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The Alabama Criminal Code - 25 Years and Counting

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"Do you want to prevent crimes? See to it that the laws are clear and simple . . . ."

Cesare Beccaria[1]

I. INTRODUCTION

First effective January 1, 1980, the Alabama Criminal Code[2] recently passed its 25-year mark.[3] Adoption of the Code substantially and extensively changed the criminal law landscape in Alabama. It establishes general principles and provisions applicable to the entire range of crimes, uses common definitions,[4] simplifies crimes and defenses, organizes related crimes into groups, and provides consistency and proportionality. The Code makes the law simpler, clearer, more rational, more uniform, and more accessible.

The Code was intended to be—and is—the primary, definitive source for crimes and their definitions in this state,[5] but because the Code itself

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1. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 94 (Henry Paolucci trans., Bobbs-Merrill Co., Inc. 1963) (1764).

2. *See* ALA. CODE § 13A-1-1 (1994) [hereinafter "the Code"] ("This title shall be known and may be cited as the 'Alabama Criminal Code.'"). As the commentary to this section suggests, one might easily confuse the Alabama Code and the Alabama Criminal Code. Because this Article discusses the Alabama Criminal Code, I will refer to it throughout the Article simply as "the Code." In those instances in which sections of the Alabama Code are addressed, the more general term—the Alabama Code—is used. The Alabama Code became effective in 1975. When earlier codes are mentioned in this Article, the text or notes clearly state which code is addressed.

3. Offenses committed prior to January 1, 1980 were governed by previous law. § 13A-1-7(c).

4. Definitions appear throughout the Code. Definitions generally applicable throughout the Code are stated in section 13A-1-2. Definitions applicable only to a particular chapter or article appear in that chapter or article. *See, e.g.*, § 13A-3-20 (stating definitions applicable to justification and excuse); § 13A-6-1 (containing definitions specifically applicable to homicide offenses). Other definitions appear within the statute establishing a particular crime or defense. *See, e.g.*, § 13A-9-51(c) (defining the term "misapply" within the provision establishing the crime of misapplication of property).

5. *See* § 13A-1-4 ("No act or omission is a crime unless made so by [title 13A] or by other appli-

recognizes that other statutes or ordinances may establish or define crimes,[6] it is not the exclusive source for crimes. Moreover, although the Code addresses and defines most criminal defenses, it does not preclude the possibility of a lingering common-law defense.[7]

This Article surveys the first 25 years of the Alabama Criminal Code. It discusses the evolution of the Code over the years, and attempts to identify some areas which may merit reconsideration. The aim of this Article is not to criticize legislative or judicial choices, or mire the reader down in lengthy policy debates pronouncing where the law should go. Rather, this Article identifies and discusses several areas of the Code which, through the clarity of hindsight and experience, may be ineffective, inefficient, or at odds with the original aims of the Code. The Article also compares the development of Alabama's Criminal Code in certain areas with that of other states.

Part I is a brief introduction to the Code itself, discussing its history and the context in which the Code was enacted. The aims of the Code, along with some of the effects of its enactment, are mentioned.

Part II fleshes out how the Code has evolved over the past 25 years. Legislation, judicial interpretation, and inflation have all influenced the Code. They have expanded some areas of the Code, while contracting others. The modifications made by these factors have changed the direction of parts of the Criminal Code, and this Article examines several issues brought about by these changes.

Part III examines several problems with the existing Code. A lack of clarity has mired some sections of the Code in uncertainty, confusion, and inefficiency. This Article points out several examples of these problems and also brings up the issue of constitutionality with respect to parts of the Code.

Part IV ends the Article by advancing offenses and defenses which should possibly be added to the Code in the future. Whether the result of choices made 25 years ago by the legislature, decisions made by the judiciary over the short life of the Code, or merely the passage of time, gaps in the Alabama Criminal Code have become apparent. The new possibilities advanced in this section are an attempt to make the Code more cohesive, comprehensive, and effective for people of the State of Alabama.

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cable statute or lawful ordinance.").

6. *Id.*

7. For example, in the original draft, the new criminal code included the defense of necessity. *See* ALA. LAW INST., PROPOSED REVISION WITH COMMENTARY—ALABAMA CRIMINAL CODE § 640 (1974) [hereinafter PROPOSED CODE]. But this provision did not survive the legislative process. The Alabama Criminal Code thus contains no general defense of necessity. Does this mean that Alabama has no general necessity defense or does Alabama law retain a common-law defense of necessity? The effect of this legislative rejection is discussed below in Part IV.A.3.

A. Development and Enactment

By the late 1970s, a majority of states and the federal government had enacted or were planning new criminal codes.[8] Alabama, in an effort to make penal law easier to use, both comprehensively and systematically, joined this trend. With financial support from the Alabama Law Enforcement Planning Agency (LEPA), the Alabama Law Institute formed an Advisory Committee to achieve this goal.[9] The Advisory Committee included circuit court judges, state government officials, local law enforcement officials, assistant attorneys general, private attorneys, and district attorneys.[10] Many others, such as appellate and federal judges, law professors, circuit court judges, and law students assisted the Committee by attending study sessions or providing advice or research to the committee reporters.[11] The Department of Court Management[12] and the City of Tuscaloosa also supported the project by assisting in obtaining financial grants.[13]

Over a period of about three years, the Advisory Committee analyzed existing Alabama statutes and caselaw and considered concepts not yet embodied in Alabama law.[14] As Alabama criminal law existed at the time, it was drawn from "hundreds of statutory provisions and thousands of Alabama cases."[15] The goal of the Committee was to revise the entire field of criminal law into an understandable, comprehensive, codified scheme.[16] Where existing law was responsive to the needs of the criminal justice system, the Advisory Committee retained the concepts, though the form and terminology sometimes differed.[17] Radically departing from Title 14, the Committee employed a system of classifying and grading crimes and their penalties in order to make the penal law more accessible and systematic. The Committee's result was the Proposed Code, which, although not perfect, represented a vast improvement over then existing criminal law.

The Proposed Code was submitted to the legislature for its adoption, which passed the Code virtually intact during its 1977 legislative session. The Code's effective date was set for January 1, 1980 to permit the bench and bar of Alabama to become acquainted with its provisions before it became law.[18]

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8. PROPOSED CODE, *supra* note 7, at iv.
9. *Id.* at iv-v.
10. *Id.* at v.
11. *Id.*
12. The Department's name was later changed to the Administrative Office of Courts.
13. PROPOSED CODE, *supra* note 7, at iv.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at v.
18. In furtherance of that goal, the author served as Chair of the Seminar Faculty on the Alabama Criminal Code that conducted educational conferences on the Code in a number of cities across the state.

B. The Effect of the Code's Adoption

As mentioned earlier, the Code dramatically changed Alabama's criminal law. Obviously, the Code is a comprehensive treatment of criminal law. Before its enactment, Alabama had no comprehensive criminal code. Although the Alabama Code contained Title 14, entitled "Crimes and Offenses," that title contained nothing like a comprehensive treatment of the criminal law. Rather, it consisted of a collection of statutory crimes—some of common-law origin—and punishments for crimes.

Murder, as it was defined in Title 14, is a good example of a statutory crime of common-law origin. Title 14 established two degrees of murder.[19] First-degree murder included the usual common law possibilities: wilful, deliberate, malicious, and premeditated killing, including "transferred intent" murders;[20] felony murders during certain enumerated felonies;[21] "malicious heart" murders;[22] and homicides perpetrated by poison or lying in wait. All other homicides that would have been murders at common law were relegated to second-degree murder.[23] In other words, any malicious killing not listed as a first-degree murder was a second-degree murder. Such killings might include, for example, intentional and malicious killings without premeditation or deliberation.[24] Second-degree murder also included killings during felonies not listed as first-degree murder but potentially just as dangerous to human life,[25] such as kidnapping for ransom[26] or forcible sodomy.[27]

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19. *See* ALA. CODE § 14-314 (1940, recomp. 1958) (repealed 1980) [hereinafter CODE § 14-314]. Every homicide, perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery, or burglary, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree; and every other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree.

Id.

20. In a transferred intent murder, the perpetrator intends to and attempts to kill a specific individual but kills a person other than the intended victim by mistake or accident. *Id.*

21. The enumerated felonies, as reflected in section 14-314 were arson, rape, robbery, and burglary. *Id*.

22. A "malicious heart" murder is one in which the actor commits an act which is greatly dangerous to human life without any particular intent to take human life but with obvious disregard for the lives of others. *Id*.

23. *Id*.

24. *See, e.g.*, Smith v. State, 257 So. 2d 372, 372 (Ala. Crim. App. 1972) (noting that second-degree murder did not require the actual intent to kill the victim); Miller v. State, 90 So. 2d 166, 168 (Ala. Ct. App. 1956) (observing that "murder in the second degree is the unlawful killing of a human being with malice, but without deliberation or premeditation").

25. There is a dearth of cases in Alabama involving convictions for murder in the second degree arising out of a nonenumerated felony, but the courts have noted that "every killing, which would be murder at the common law, is murder, either in the first or second degree, under our statute. The enumerated common-law murders fall within the first degree. The non-enumerated [murders] fall within the second degree." Mitchell v. State, 60 Ala. 26, 31 (Ala. 1877). Other states have addressed the possibility in a few cases. *See, e.g*., State v. Lindsey, 62 S.W.2d 420, 424 (Mo. 1933), observing that in an escape

Some Title 14 crimes (such as murder) were well defined; others, however, were not. For example, sodomy was defined as a "crime against nature, either with mankind or with any beast."[28] To determine the parameters of "the crime against nature," one had to consult the common law. Sometimes the answer was not that helpful. For example, in *Horn v. State*,[29] a case involving a prosecution for sodomy,[30] the Alabama Court of Criminal Appeals answered a charge that the statute was unconstitutionally vague by noting that the statute only established the punishment for a "carnal copulation contrary to nature by the common law and anciently."[31] The court elaborated: "Public and legal history is replete with knowledge of this criminal offense. It is characterized as abominable, detestable, unmentionable, and too disgusting and well known to require other definition or further details or description."[32]

Other Title 14 crimes also had no statutory definition. For example, rape and robbery statutes provided only punishments[33] and one had to look to the common law for a definition.[34]

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case

> the offense was a felony but not one of the felonies mentioned in the statute defining murder in the first degree. If therefore the degree of murder for which appellant was liable for trial should have been determined by the fact that he was engaged or was about to engage, at the time of the assault upon [the victim], in the commission of the felony of jailbreaking, then the jury should have been instructed only on murder in the second degree.

Id. (citations omitted); *see also* State v. Robinett, 279 S.W. 696, 700 (Mo. 1926) (noting that a killing during a nonenumerated felony would be murder in the second degree). Similarly, the Michigan Supreme Court concluded that a killing during a daytime breaking-and-entering could support a second-degree murder conviction even though the same killing at night would have met the statutory requirement of burglary for first-degree murder. *See* People v. Young, 340 N.W.2d 805 (Mich. 1983); People v. Young, 391 N.W.2d 270, 286 (Mich. 1986) (reversing and remanding for retrial on a charge of second-degree murder). Like the Alabama statute, second-degree murder in Michigan was defined as "[a]ll other kinds of murder." *See* MICH. LAWS ANN. § 750.317 (2004).

26. *See* ALA. CODE § 14-7 (1940, recomp. 1958) (kidnapping) (repealed 1975). The potential danger to human life is reflected in the punishment provided by this section, namely "death or imprisonment in the penitentiary for not less than five years." *Id.*

27. *See* ALA. CODE § 14-106 (1940, recomp. 1958) (sodomy) (repealed 1975). Although this crime carried a punishment range of only two to ten years, it arguably served as the functional equivalent of rape, which was defined as sexual intercourse by a man with a woman by force and without her consent. *See, e.g.*, Lewis v. State, 35 Ala. 380, 389 (Ala. 1860). Rape was punishable "by death or imprisonment in the penitentiary for not less than ten years." ALA. CODE § 14-395 (1940, recomp. 1958). Just as rape addressed forcible sex offenses, the cited sodomy statute encompassed forcible sexual encounters against the will of a victim, such as forcible buggery or fellatio. *See* Horn v. State, 273 So. 2d 249, 250 (Ala. Crim. App. 1973).

28. ALA. CODE § 14-106 (1940, recomp. 1958) (repealed 1975).

29. 273 So. 2d 249 (Ala. Crim. App. 1973).

30. Although the court chose not to state exactly which variant or variants of sodomy formed the basis of the charge, a careful reading of the case indicates both buggery and fellatio. *See id.* at 250 (noting that the child's mother observed rectal bleeding and, after talking with a doctor, instructed the child to gargle).

31. *Id.*

32. *Id.*

33. *See* ALA. CODE § 14-395 (1940, recomp. 1958) (repealed 1975) ("Any person who is guilty of the crime of rape shall, on conviction, be punished, at the discretion of the jury, by death or imprisonment in the penitentiary for not less than ten years."); ALA. CODE § 14-415 (1940, recomp. 1958) (repealed 1975) ("Any person who is convicted of robbery shall be punished, at the discretion of the jury, by death, or by imprisonment in the penitentiary for not less than ten years.").

II. EVOLUTION OF THE CODE

The Code has not remained static. Over the past 25 years, legislation, judicial interpretation, and economic forces have significantly both expanded and narrowed the Code. I will address each of these modifiers.

A. Legislative Modification

Since the Code became effective, the Alabama Legislature has added, deleted or amended numerous provisions. Sometimes these changes were necessary. Other times, they were advisable. In some instances, though, the changes were unnecessary, ill-advised, or perhaps even disastrous. Examples of both advisable and disastrous legislative modifications can be found in the Code's theft provisions.

First, an advisable change: Monetary values determine the classification of many crimes in the Code. Consider, for example, theft in the second and third degrees. Third-degree theft of property originally involved property which did not exceed $250 in value;[35] and second-degree theft involved property valued between $250 and $1000.[36] Suppose a thief took an item of property—a widget[37]—valued at $200. This act constituted theft in the third degree, a Class A misdemeanor,[38] subjecting the thief upon conviction to a jail term of not more than one year.[39] As inflation increased the value of the widget to more than $250, the same act became theft in the second degree, a Class C felony,[40] with punishment ranging from one year and a day to ten years imprisonment.[41] Moreover, the range of fine authorized rose from the maximum of $2,000 authorized for a Class A misdemeanor[42] to not more than $5,000 for a Class C felony.[43] The item had not changed; the act had not changed; the law had not changed. Only the fair market value of the widget and, therefore, the attendant punishment for the theft, had risen due

34. *See, e.g.*, Harris v. State, 56 So. 55, 55 (Ala. Ct. App. 1911) (using common law to define a rapist as "[o]ne who by force, and against the consent of a female, has sexual intercourse with her"). Similarly, using common law, robbery was defined as "the felonious and forcible taking of the property of another from his person, or in his presence, against his will, by violence or by putting him in fear." Lambert v. State, 266 So. 2d 812, 814 (Ala. Crim. App. 1972); *see also* Thomas v. State, 9 So. 81, 81-83 (Ala. 1891) (analyzing the elements of common-law robbery).

35. *See* ALA. CODE § 13A-8-5(a) (2003). Although the current version of this provision sets $500 as the maximum value of the property, the historical note following the section states that the 2003 amendment to the statute increased the amount from $250 to $500. *Id.*

36. *See* § 13A-8-4(a). Again, although the current version of this section establishes a range of $500 to $2500, the historical note following the section states that the 2003 amendment to the provision increased the range from its previous limits of $250 to $1000. *Id.*

37. A widget was a fictitious product manufactured by equally fictitious manufacturing companies operated by students in an advanced business laboratory course some years ago. As a student I did not recognize the real utility of widgets. They serve quite well as examples.

38. *See* § 13A-8-5(b).

39. *See* § 13A-5-7(a)(1) (1994).

40. *See* § 13A-8-4(b).

41. *See* § 13A-5-6(a)(3).

42. *See* § 13A-5-12(a)(1).

43. *See* § 13A-5-11(a)(3).

to inflation.[44] In this example, an act originally punishable by a maximum one-year term of imprisonment in a county jail became punishable by a maximum of ten years imprisonment in the penitentiary. Thus, one can readily understand why from time to time legislative bodies amend the monetary elements within the definition of crimes in order to adjust for inflation.[45]

On the other side of the inflation problem, inflation decreases the sting of fines over time. In 1980, the fine schedule was based, of course, on 1980 dollars. By 2005, those 1980 dollars are worth much less. Ergo, the cost of punishment has decreased.[46]

In 2003, the Alabama Sentencing Commission advised the Alabama Legislature that inflation between 1980 and 2003 had caused many misdemeanor offenses to rise to felony offenses, and both misdemeanor and felony crimes to rise from lower levels to higher levels (for example, Class C offenses rose to Class B, Class B to Class A). The Commission suggested that monetary amounts throughout the Code should be adjusted for inflation, returning amounts to a level relatively comparable to the 1980 values and thereby returning a number of property crimes to their previous levels. The legislature accepted the suggestion and enacted a bill originally drafted by the Sentencing Commission.[47] This bill adjusted for inflation and returned the actual-dollar values in value-defined crimes back to levels equivalent to 1980 levels. Thus, the values stated in all offenses ranked by the value of property taken, held, or damaged were raised to restore monetary ranges to their preinflation values.[48] Consequently, what had been misdemeanors in 1980 but had become felonies in intervening years were returned to misdemeanors in 2003. Moreover, offenses—whether felonies or misdemeanors—were returned to their original classifications (that is, Class A, B, or C felony or misdemeanor).[49]

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44. It should be noted that the actual sentence imposed could range a great amount. For example, a judge might sentence up to 12 months imprisonment in the county jail for the misdemeanor theft and a year and a day in the penitentiary for the felony theft, with a fine of an equal amount—such as $100—for the two offenses. But one must also recognize that the difference could be considerable. Another judge might sentence ten days imprisonment suspended and no fine for the misdemeanor theft and ten years imprisonment in the penitentiary and $5,000 fine for the felony theft. The obvious potential for disparity in sentencing is a subject for another day.

45. *See, e.g.*, H.R. CONF. REP. No. 97-760, at 579 (1982) (noting the need to adjust the amount of fines).

46. *Cf.* United States v. Soderna, 82 F.3d 1370, 1378-79 (7th Cir. 1996) (discussing the effects of inflation on the size of a fine in determining whether the offense was a serious crime entitling the defendants to a trial by jury or a petty offense and thus triable by a judge without a jury).

47. *See* 2003 Ala. Acts 355.

48. These crimes include theft, receiving stolen property, mischief and vandalism type offenses. *Id.*

49. Devising a self-adjusting scheme to remedy problems caused by inflation would likely be impractical. For example, it would be difficult to tie the values of stolen property or the amounts of potential fines to a Consumer Price Index for the purpose of defining crimes or establishing permissible punishments. "The Consumer Price Index (CPI) is used to measure the rate of inflation and compare prices over a period of time." Andrew James McFarland, Note, *Lewis v. United States: A Requiem for Aggregation*, 46 CATH. L. REV. 1057, 1102 (1997) (citing ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS § 1.5, at 13-14 (2d ed. 1992)). In discussing the value of fines vis-á-vis the right to a jury trial, McFarland suggests the possibility of using alternative measures such as the "Gross Domestic

Legislative modifications, however, have not always been helpful. Sometimes, in fact, they are disastrous. Consider this example: As mentioned earlier, the monetary ranges for theft-type crimes were amended by the Alabama Legislature during its 2003 session. During the 2004 session, though, the legislature attempted to amend the livestock provisions of section 13A-8-4. In so doing, the legislature—seemingly inadvertently—returned the monetary range to its pre-2003 level, a change which resulted in a "lack of coverage for the criminal offense for a certain monetary range."[50] The piece of legislation and its effect demonstrates how ad hoc tweaking of individual Code provisions may cause considerable problems. As originally proposed, second-degree theft would have alternatively addressed theft of (a) property valued between $250 and $1,000 in value, or—regardless of value—(b) credit cards, (c) firearms, and (d) controlled substances (drugs).[51] As enacted, the controlled-substances provision disappeared and a provision that the theft of property taken from a building where the property was stored or sold appeared.[52] Later, the theft of controlled substances provision was reinserted,[53] and the list continued to expand. Theft of livestock was added to second-degree theft.[54] Livestock included "cattle, swine, horses, mules, asses or sheep, regardless of their value."[55] Then, in 2003, the range of the value of the property taken was raised from not less than $500 to not more than $2,500.[56]

Product (GDP) implicit price deflator." *Id.* at 1106. He also proposes his own creation, a "Criminal Consumer Price Index." *Id.* at 1097 n.226. Whether an index could be used to adjust criminal definitions or establish punishment limits is beyond the scope of this Article, but noting the need for periodic reassessment of these items is not. It is necessary that periodically the Code's provisions addressing monetary amounts or ranges be revisited and possibly amended to rectify the impact of inflation or possibly deflation. *See, e.g.*, Jim Chen, *The Price of Macroeconomic Imprecision: How Should the Law Measure Inflation?*, 54 HAST. L.J. 1375, 1375 (2003) ("Of late the principal macroeconomic concern in the United States has not been inflation, but its opposite, deflation."). The courts are virtually powerless to change the monetary amounts in the statutes. The issue is better addressed by the legislature. *See, e.g.*, *id.* at 1378 ("Any legislatively fixed number, so it seems, commands unconditional judicial acquiescence: . . . judges are mostly impotent to adjust numbers . . . engraved directly into a statute."). Of course, judges can adjust the fine to be imposed (within the range authorized), but they cannot change the definition of a crime by looking to the Consumer Price Index. Although it might be difficult to tie crime classifications to the Consumer Price Index, perhaps other alternatives for adjusting the Code for inflation might be developed by a review committee.

50. Synopsis, Pre-file Copy of Bill to Amend section 13A-8-4 (approved by the Alabama Sentencing Comm'n on Dec. 3, 2004) (on file with author).

51. *See* PROPOSED CODE, *supra* note 7, § 3203.

52. *See* 1977 Ala. Acts 3203. The provision encompassing the theft of property valued at $25 or more from a building in which it was stored or sold likely came from the earlier larceny statute. It was a provision which the drafting committee intentionally had omitted. *See* ALA. CODE § 14-331 (1940, recomp. 1958) (repealed 1975) (stating theft of property valued at twenty-five dollars or more constituted grand larceny, but "any person who steals any personal property of the value of five dollars or more . . . from or in any storehouse, warehouse, shop, office, church, school house, or any public building . . . shall be guilty of grand larceny").

53. *See* 1979 Ala. Acts 471.

54. *See id.*

55. *See* ALA. CODE § 13A-8-4(g) (1982).

56. *See* 2003 Ala. Acts 355. Additionally, theft of property not taken from the person of another and valued between $100 and $1000 constitutes second-degree theft if the thief has previously been convicted of either first- or second-degree theft. *Id*.

The 2004 amendment substituted "equine or equidae" for "horses, mules, [or] asses,"[57] but it also reverted to the pre-2003 monetary range. Because the range for second-degree theft reaches only $1000 and the bottom threshold for first-degree theft is $2500, property valued between $1000 and $2500 does not come within any of the theft of property statutes. Moreover, after the 2004 amendment, property valued between $250 and $500 falls within the range for both second- and third-degree theft of property.

The complexity of the value matrix is reflected in the following table:

Value or Nature of Property or Services	TOP-1[58]	TOP-2[59]	TOLP-1[60] TOS-1[61] RSP-1[62] CM-1[63]	TOLP-2[64] TOS-2[65] RSP-2[66] CM-2[67]	TOP-3[68] TOLP-3[69] TOS-3[70] RSP-3[71] CM-3[72]
> $2500	X		X		
> $500 to = $2500				X	
> $250 to = $1000		X			
</= $500					X

57. *See* 2004 Ala. Acts 627.
58. ALA. CODE § 13A-8-3 (2004).
59. § 13A-8-4.
60. § 13A-8-7.
61. § 13A-8-10.1.
62. § 13A-8-17.
63. § 13A-7-21. A person also commits this offense if the damage is inflicted by "means of an explosion." *See* § 13A-7-21(a)(2).
64. § 13A-8-8.
65. § 13A-8-10.2.
66. § 13A-8-18. A person also commits the offense if he or she "[r]egularly buys, sells, uses or handles" property and acquires the stolen property of any value "without making reasonable inquiry" about the seller's legal right to sell the property. *See* § 13A-8-16(b)(3); § 13A-8-18(a)(2).
67. § 13A-7-22.
68. § 13A-8-5.
69. § 13A-8-9.
70. § 13A-8-10.3.
71. § 13A-8-19.
72. § 13A-7-23.

> $250 to = $2500 by Previously Convicted Thief or Receiver to Stolen Goods				RSP-2 only	
> $100 to = $1000 by Previously Convicted Thief		X			
Property Taken From the Person*	X				
Motor Vehicle*	X				
Credit Card*		X			
Firearm*		X			
Livestock*		X			
Controlled Substance*		X			

LEGEND:	
TOP-Theft of Property	RSP-Receiving Stolen Property
TOLP-Theft of Lost Property	CM-Criminal Mischief
TOS-Theft of Services	*-Regardless of Value

Prior to the 2004 amendment, no overlap of values existed, yet all property and services of value were included in the matrix. As of the time of this writing, an effort is underway to remedy both the gap and the overlap created by the 2004 legislation during the next legislative session by returning the value range of second-degree theft of property to its pre-2004 amendment level. This, of course, would again cover thefts of property valued between $1000 and $2500 as well as eliminate the overlap.

To remain responsive to changing needs, the Alabama Legislature has added, deleted and amended Code provisions. One significant portion of the Code that was not part of the original enactment is capital murder. Although

capital murder and the procedures governing its use were not part of the original criminal code proposal, the crime and capital procedures have been incorporated into the Code by separate legislation. Almost expectantly, there have been a number of legislative changes to the capital murder provisions. Because they are now folded into the Code, any study of the Code must focus on some aspects of this crime and its processes.

In 1992, the legislature added four aggravated forms of murder[73] to the existing 14 variants of capital murder. Although three of the four new capital murders may have been intended to address drive-by shootings,[74] they cover more than shootings, and drive-by killings are not required. Weapons, however, are required.

The three "drive-by" provisions encompass the intentional killing of a person by shooting into a dwelling,[75] shooting the victim while the victim is in an automobile,[76] or shooting within or from an automobile whether the victim is in or outside of the automobile.[77] But by the language of all three provisions, the homicide can be committed "through the use of a deadly weapon."[78] The Code defines a deadly weapon to include firearms, dangerous knives, and other weapons or instruments "designed, made, or adapted" to kill or inflict serious bodily injury.[79] Thus, the "drive-by" provisions would cover the stabbing of a person in an automobile by another individual who is in[80] or outside the vehicle,[81] or shooting a person with a crossbow from an automobile. As worded, the provisions cover victims who are in either a dwelling or an automobile as well as victims who are shot from an automobile, but because all three provisions require the use of a deadly weapon, strangling or smothering a person to death in an automobile—without some aggravating component[82]—would not constitute capital murder.

Although the pros and cons of any of these policy choices are debatable, the two sections addressing intentional murders involving automobiles raise pragmatic issues due to their inexact wording. Any murder in which either

73. *See* 1992 Ala. Acts 601, *codified as* ALA. CODE §§ 13A-5-40(a)(15)-(18) (1994).

74. The fourth, murder of a child, also may have been intended to address drive-by shootings, but its potential reach is much broader. Any intentional killing of a child under the requisite age creates the potential for capital punishment.

75. *See* ALA. CODE § 13A-5-40(a)(16) (1994).

76. *See* § 13A-5-40(a)(17).

77. *See* § 13A-5-40(a)(18).

78. §§ 13A-5-40(a)(16)-(18).

79. *See* ALA. CODE § 13A-1-2(7) (2004) (defining "deadly weapon").

80. *See* ALA. CODE § 13A-5-40(a)(18) (1994) (requiring both the victim and the perpetrator to be in the vehicle).

81. *See* § 13A-5-40(a)(17) (requiring the victim to be in the vehicle).

82. Aggravating components of capital offenses generally fall within three categories: (1) they protect certain types of victims such as police officers, § 13A-5-40(a)(5), public officials, § 13A-5-40(a)(11), or children under 14 years of age, § 13A-5-40(a)(15); (2) they address certain characteristics of the defendant such as individuals under sentences of life imprisonment, § 13A-5-40(a)(6), or who have been previously convicted of murder, § 13A-5-40(a)(13); or (3) they involve murders of a specific aggravated nature such as murder during a robbery, § 13A-5-40(a)(2), or rape, § 13A-5-40(a)(3), or murder during multiple killings, § 13A-5-40(a)(10). *See generally* § 13-5-40(a).

or both the defendant and the victim are inside or outside an automobile may be capital murder because the victim may have protected status,[83] the defendant may have particular characteristics,[84] or the crime may have aggravating attributes.[85] Suppose, however, that no other statutory aggravator exists other than either the defendant or the victim is inside an automobile. If a defendant in an automobile intentionally murders a victim with a deadly weapon, whether the victim is in that vehicle, another vehicle, or on a sidewalk or in a yard, it is potentially a capital murder.[86] Similarly, if a defendant who is not in an automobile intentionally murders a victim with a deadly weapon inside an automobile the killing may be capital murder.[87] But if neither the victim nor the defendant is inside an automobile, the killing is not capital murder, even if the defendant is attempting to murder someone in an automobile.[88] Moreover, if the killing is perpetrated without the use of a deadly weapon, such as by strangulation or suffocation, it is not per se a capital murder.

Confusing? Perhaps, but applying the statutory language to the scenarios leads to such results whether they make sense or not. What is the aggravating aspect of the murder? It includes shooting either into or from a vehicle. Thus, the two sections belong to those aggravators which address the nature of the crime, such as murder during a robbery, and not to those which protect a class of victims such as police officers, witnesses, or children. So, a homicide may be capital murder if the defendant uses a deadly weapon and is in an automobile at the time of the killing, but not if the defendant is on foot or on a bicycle unless the victim is in an automobile. And if the intended victim is in an automobile, but the defendant misses the intended victim and kills an unintended victim, whether it is capital murder depends on whether or not the unintended victim is in a vehicle and whether a pistol or a pillow was used to kill the victim. Perhaps these provisions should be revisited.

B. Judicial Interpretation

The Code has been tweaked by forces other than the legislature. During the Code's existence, the courts have been required not only to apply but also to construe the Code's provisions. The drafters and the legislature anticipated the need for judicial interpretation of Code provisions. To aid in interpretation, the Code includes some direction for the judiciary. Section

83. *See* §§ 13A-5-40(a)(5), (11), (15) (providing as aggravating factors the victim's status as a member of law enforcement, a public official, or a minor under 14 years of age, respectively).

84. *See* §§ 13A-5-40(a)(6), (13) (providing as aggravating factors that the defendant was alrready under a life sentence or a previously convicted murderer, respectively).

85. *See* §§ 13A-5-40(a)(1), (2), (10) (providing as aggravated factors that the murder was committed during a kidnapping, robbery, or as a multiple murder, respectively).

86. *See* §§ 13A-5-40(a)(17)-(18).

87. *See* § 13A-5-40(a)(17).

88. *See Ex parte* Jackson, 614 So. 2d 405, 405 (Ala. 1993).

13A-1-6 instructs that Code provisions "shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law, including the purposes stated in Section 13A-1-3."[89] The latter section is intended to serve as an interpretative aid by clearly stating the philosophy underlying the Code.

In the intervening years, courts have interpreted, defined, applied and, in the view of some, modified the Code. Two examples of judicial interpretation that impact the Code involve the year-and-a-day rule in homicides and extreme indifference murder.

1. The Year-and-a-Day Rule

The Code establishes three levels of homicides, namely murder, manslaughter, and criminally negligent homicide. None of the provisions mention the year-and-a-day rule, an infrequently used relic of the common law. At common law, a person could not be guilty of a homicide unless the victim died within a year and a day of the allegedly fatal injury.

Alabama's homicide statutes, though, clearly establish a rule of causation without any mention of a time limitation.[90] In fact, no provision in the Code retains the common-law year-and-a-day rule for homicides.

Ralph Lynn Key was charged with manslaughter for the death of a pedestrian struck by his vehicle. The victim suffered a severe brain-stem injury which caused a "persistent vegetative state" and resulted in the victim's death about 18 months after the injury.[91] At trial, Key sought dismissal of the indictment.[92] The trial judge denied the motion to dismiss the indictment. Although the intermediate appellate court noted that the year-and-a-day rule was a part of the common law of Alabama,[93] it upheld the trial court's ruling by striking down the common-law rule as "an outdated relic of the common law."[94] The Supreme Court of Alabama reversed and held that the rule survived the adoption of the Code.[95]

Although the Alabama drafters found it "unnecessary" and "impolitic" to recommend a specific provision that would have abolished the common law, other states have included such provisions in their codes.[96] If the rule is

89. Section 13A-1-3 states the purposes of the Code, which include proscribing antisocial conduct, providing fair notice of proscribed conduct and punishment, defining crimes, differentiating between minor and serious crimes, establishing proportionality of punishment, ensuring public safety, and preventing arbitrary or oppressive treatment of persons accused or convicted of crimes. *Id.*

90. All three homicide statutes require that the accused "cause" the death of the victim. *See* §§ 13A-6-2(a)(1)-(3), 3(a)(1)-(2), 4(a) (criminalizing murder, manslaughter, and criminally negligent homicide, respectively).

91. *See* Key v. State, 890 So. 2d 1043, 1043 (Ala. Crim. App. 2002), *rev'd sub nom. Ex parte* Key, 890 So. 2d 1056 (Ala. 2003).

92. *Id.*

93. *Id.* at 1045-46.

94. *Id.* at 1050.

95. *Ex parte Key*, 890 So. 2d at 1060-62.

96. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-103 (West 2001) ("All common law offenses and affirmative defenses are abolished.").

as antiquated and ill-advised as most writers and more than a few appellate judges now believe, perhaps it is time for the legislature to explicitly repeal at least the year-and-a-day rule if not the common law generally.[97]

2. Extreme Indifference Murder

The Code establishes three forms of murder, namely intentional, extreme indifference, and felony murder.[98] Each of the three is treated as an equivalent of the other two, carrying the same range of punishment.

The crime of murder today generally retains its 1980 attributes. Through interpretation, however, Alabama courts have tweaked extreme indifference murder.[99]

Lana Northington was indicted and convicted of extreme indifference murder for the death of her five-month-old daughter.[100] Despite "the revolting and heartsickening details of this case,"[101] the court of criminal appeals, despite its expressed extreme reluctance, reversed the conviction.[102] The court based the reversal on the idea that extreme indifference murder requires "conduct which manifests an extreme indifference to human life and not to a particular person only."[103] Believing that it had no choice but to read the Alabama statute to require a disregard towards life in general, the court held that extreme indifference murder did not include "acts and omissions . . . specifically directed at a particular victim and no other."[104] Therefore, the court reluctantly concluded Northington's conduct "create[d] a

97. *See, e.g.*, FLA. STAT. ANN. § 782.035 (West 2000) (abrogating the year-and-a-day rule). Seemingly, a case can be made that the Code in fact does repeal the common law. The argument would go something like this: The commentary to the Code states that "[t]he original draft of this section included an explicit provision to abolish common law crimes, which is a feature of most modern criminal codes; but the Advisory Committee considered such provision impolitic and also, unnecessary under a comprehensive Criminal Code, so it was deleted." ALA. CODE § 13A-1-4 cmt. (2004). Unnecessary? Yes, *unnecessary*, because the Code explicitly states that no act or omission is a crime unless made so by the Code or other applicable statute or ordinance. It may have been impolitic to say so—the argument continues—but the Code Reporters thought the Code essentially did repeal the common law. Nothing was to be gained from saying so, and saying so might have caused opposition to the adoption of the Code. Alabama Code section 1-3-1 may remain in effect, but by its provisions the common law can be altered or repealed by the legislature, and if the Code did not repeal the common law explicitly, it did so implicitly.

This Article neither argues that *Ex parte Key* was decided incorrectly nor asserts that *Key* is correct. Rather, the Article raises the issue that the year-and-a-day rule exists in Alabama, and if that is not acceptable, the Code needs revision. As stated by the Alabama Supreme Court, "Although the year-and-a-day rule may appear archaic, the decision how best to replace the rule is a policy question best left in the capable hands of the Legislature, which has the tools and the special competency to make such prospective general rules." *Ex parte Key*, 890 So. 2d at 1063.

98. *See* ALA. CODE § 13A-6-2 (1994).

99. In some states, extreme indifference murder is known as "depraved heart" murder.

100. *See* Northington v. State, 413 So. 2d 1169, 1169 (Ala. Crim. App. 1981). The author served as the trial judge in the *Northington* case. The discussion in the text is intended to be an objective discussion of the legal issues involved and not as a late-date defense of the trial court's actions.

101. *Id.* at 1172.

102. *Id.*

103. *Id.* at 1170 (emphasis omitted).

104. *Id.* at 1169.

grave risk of death to only her daughter and no other,"[105] and could not support a conviction for extreme indifference murder.

The court reached—or, in its view, was forced to reach—this conclusion based upon several sources of law. It placed great weight on the commentary to section 13A-6-2, which characterized the new statute as a restatement of existing law.[106] The existing law to which the commentary referred "defined murder in the first degree to include every homicide 'perpetrated by any act greatly dangerous to the lives of others and evincing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life.'"[107] The court seemed to interpret, as a threshold matter, this bare commentary reference to existing law as a command to exclude acts towards individual persons from the definition of extreme indifference murder under section 13A-6-2(a)(2). Looking at caselaw to support this idea, the court observed that extreme indifference murder "is intended to embrace those cases where a person has no deliberate intent to kill or injure any particular individual,"[108] and that "[t]he element of 'extreme indifference to human life,' by definition, does not address itself to the life of the victim, but to human life generally."[109] The court also quoted extensively from a State of Washington case,[110] which itself heavily relied on ideas from one of three opinions in a New York case.[111] A closer look at the statute and other sources, however, shows not that the Alabama Court of Criminal Appeals was incorrect in its reasoning, but that it did have another choice, equally supported by precedent, other than to reverse Northington's conviction. It is apparent, albeit in hindsight and with the benefit of more recent legal developments, that the case of Lana Northington did not necessarily force the court's hand to reverse the conviction of a derelict mother, but rather presented an opportunity to recognize that the language of section 13A-6-2(a)(2) signaled a change in the definition of extreme indifference murder in Alabama.

The statute itself states that "[a] person commits the crime of murder if . . . [u]nder circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a *person* other than himself, and thereby causes the death of another person."[112] The statute specifically contemplates conduct that endangers a singular, particular person. Alabama's statute is substantially similar to that of New York's, the only difference being the substitution of "depraved indifference" for "extreme indifference."[113] New York courts have held that

105. *Id.* at 1172.
106. *Id*. at 1170.
107. *Id.* (quoting ALA. CODE § 13-1-70 (1975) (repealed 1980)).
108. *Id*. at 1171 (emphasis omitted) (citing Napier v. State, 357 So. 2d 1001, 1007 (Ala. Crim. App. 1977), *rev'd on other grounds*, 357 So. 2d 1011 (Ala. 1978) (emphasis omitted)).
109. *Id.* (quoting People v. Dist. Court, 521 P.2d 1254, 1256 (Colo. 1974)).
110. State v. Berge, 607 P.2d 1247 (Wash. Ct. App. 1980).
111. Darry v. People, 10 N.Y. 120 (1854).
112. ALA. CODE § 13A-6-2(a)(2) (1994) (emphasis added).
113. N.Y. PENAL LAW § 125.25 (2) (McKinney 2004).

where a defendant is indifferent to whether a single victim will die from his or her conduct, "depraved indifference may be manifest."[114] In fact, New York courts have found defendants guilty of extreme indifference (or depraved heart) murder in several cases which bear extremely close factual resemblance to the *Northington* case. In *People v. Word*,[115] a New York appellate court, finding sufficient evidence to sustain a second-degree murder conviction, held that the "[d]efendant's actions toward her apparently otherwise healthy infant . . . in depriving him of adequate sustenance in spite of his obvious emaciation were plainly sufficient to create a substantial risk of death by starvation."[116] Also, "continued brutality toward a child . . . fits within the accepted understanding of the kind of recklessness involving 'a depraved indifference to human life.'"[117] These cases show that New York, with a virtually identical statute, has gone in a different direction than Alabama. This does not indicate that the Alabama Court of Criminal Appeals necessarily was incorrect, but it does show that the court had a choice about the direction of the new law in the *Northington* case.

This choice is echoed elsewhere. In *Robinson v. State*,[118] the Maryland Court of Appeals encountered the same choice that the Alabama Court of Criminal Appeals faced in *Northington*. The Maryland court held that "'depraved heart' murder does not require that more than one life be placed in imminent danger by an assailant's life-threatening act."[119] Looking at the Model Penal Code, the court further stated that "[t]he critical factor . . . is not the number of persons whose lives are threatened but whether the assailant acted with extreme indifference to the value of *any* human life."[120]

The Model Penal Code also supports the idea that conduct towards a single victim is sufficient to convict for extreme indifference murder. The Model Penal Code's language is substantially different that the Alabama statute, finding murder where homicide "is committed recklessly under circumstances manifesting extreme indifference to the value of human life."[121] The reference here to the value of human life certainly supports the idea expressed in the *Northington* case, namely that extreme indifference murder countenances only conduct indifferent to human life generally. The Model Penal Code comments, however, state that prior law may serve "as a means of differentiating [extreme indifference] murder and manslaughter."[122] In illustrating this difference, the comment discusses several examples, includ-

114. People v. Gonzalez, 775 N.Y.S.2d 224, 227 (2004); *see also* People v. Payne, 786 N.Y.S.2d 116, 118-19 (2004) (recognizing a "species of depraved indifference murder in which the acts of the defendant are directed against a particular victim but are marked by uncommon brutality").
115. 689 N.Y.S.2d 36 (1999).
116. *Id.* at 37.
117. People v. Poplis, 330 N.Y.S.2d 365, 366-67 (1972).
118. 517 A.2d 94 (Md. 1986).
119. *Id*. at 94.
120. *Id*. (emphasis added).
121. MODEL PENAL CODE § 210.2 (1980).
122. *Id*. at 22.

ing some involving single victims.[123] The inclusion of such examples shows that a conviction for extreme indifference murder is possible under the Model Penal Code formulation when only one potential victim is involved. It follows that if the Model Penal Code—with its much more general reference to the value of human life—includes acts against single persons, then Alabama's statute—with its much more specific reference—should include them as well. In fact, the inclusion of the condition "creates a grave risk of death to *a person* other than himself"[124] may evidence the different direction the Alabama Legislature intended in enacting this statute.

In sum, the Alabama Court of Criminal Appeals' *Northington* decision was not necessarily right or wrong. The case, however, provided a unique opportunity to define and shape the new (at the time) Code. The court, seemingly looking past the statute passed by the legislature, relied, instead, on a bare reference contained in the commentary for its interpretation of the law. This reference, not approved by the legislature, may have had more to do with the direction of Alabama law than the statute itself. Instead of spotlighting Lana Northington's extreme indifference to the life of her child, the court focused on the number of people at risk from her conduct. The better question is not whether there was only one—or more than one—potential victim, but whether the reckless conduct of the defendant evidenced an extreme indifference to the life of an individual, regardless of whether that individual was in a group or alone. A killer's conduct should be measured by the nature and quality of the conduct, not by the number of individuals at risk.[125] By not recognizing the choice it actually had, and placing the emphasis of analysis on the number of possible victims, the court of criminal appeals tweaked the Code in a significant way when one considers the difference in penalty between manslaughter and murder, and an argument can be made that the interpretation may not coincide with the legislature's intent.

III. PROBLEMS WITH THE CODE AS IT EXISTS

A. The Mens Rea Requirement

During the Code-drafting effort, the Advisory Committee apparently decided to omit one provision found in some comprehensive criminal codes, namely a minimum mens rea requirement. In at least some other states, two principles are established in their criminal codes. First, unless the statute clearly establishes a strict liability offense, crimes generally are not strict liability offenses.[126] Instead, they usually require a mental component. Sec-

123. *Id.* at 22-23.

124. ALA. CODE § 13A-6-2(a)(2) (1994) (emphasis added).

125. Of course, the number of people put at risk may give measure to the nature and quality of the conduct, but it does not provide the only measure.

126. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/4-9 (West 1993) (authorizing "absolute liability" only for minor misdemeanors and offenses with clear legislative purpose to impose absolute liability); 18 PA.

ond, if the criminal statute defining the charged offense does not state a mens rea element, the mens rea component will be implied and proof that the offender acted intentionally, knowingly, or recklessly will suffice.[127] These statutes thus eliminate the possibility of criminal negligence[128] serving as the mens rea component unless the statute defining the offense establishes criminal negligence as the requisite mens rea.

Although the Alabama Criminal Code fails to address the first principle directly, strict liability offenses are few. A cursory reading of the Code might lead one to surmise that the absence of a mens rea establishes a strict liability offense. Section 13A-2-3, for example, might serve as the basis for such a conclusion. That section provides that "[i]f that conduct is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, the offense is one of 'strict liability.'"[129] But the commentary to that section[130] and section 13A-2-4(b) refute this idea. The latter section clearly states that "[a] statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, states a crime of mental culpability."[131] Thus, the Code's approach mirrors the Model Penal Code scheme in many respects, but fails to provide to Alabama courts some of the guidance found in the Model Penal Code. Why this particular, potentially useful interpretative tool was omitted is simply unknown. The commentary does not mention whether the drafting committee considered the provision, but because the commentary cites subsection (5) of the same Model Penal Code provision,[132] it would seem that they did consider it, and for some unknown reason decided to reject it.[133]

CONS. STAT. ANN. §§ 302(a), 305 (West 1998) (establishing "absolute liability" as an exception to the general requirement of a mens rea component for each crime; limiting absolute liability to summary offenses and crimes which the legislature has plainly defined as one of absolute liability); TEX. PENAL CODE ANN. § 6.02(b) (Vernon 2003) (requiring "a culpable mental state . . . unless the definition [of the crime] plainly dispenses with any mental element").

127. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 302(c) (West 1998) ("When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto."); TEX. PENAL CODE ANN. § 6.02(c) (Vernon 2003) ("If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b), intent, knowledge, or recklessness suffices to establish criminal responsibility."). The Model Penal Code also establishes recklessness as the minimum mens rea for those offenses for which no mens rea is provided. *See* MODEL PENAL CODE § 2.02(3) (1980) ("When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto."). Not all states, though, have provisions which establish the minimum level of mental culpability absent a statutory mental element. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-202 n.1 (West 2001) (stating that Arizona criminal law originally contained such a provision, but in 1978 the provision was repealed).

128. Criminal negligence is an available mens rea element in the Illinois, Pennsylvania, and Texas codes. *See* 720 ILL. COMP. STAT. ANN. 5/4-7 (West 1993) (negligence); 18 PA. CONS. STAT. ANN. § 302(b)(4) (West 1998) (negligence); TEX. PENAL CODE ANN. § 6.02(a) (Vernon 2003) (criminal negligence).

129. ALA. CODE § 13A-2-3 (1994).

130. § 13A-2-3 cmt. (stating that "[t]here are few, if any, strict liability offenses" in the Code).

131. § 13A-2-4(b).

132. § 13A-2-4 cmt.

133. I do not recall any discussion of the point among either the reporters or drafting committee

Of course, sometimes offenses are, in fact, strict liability offenses. In those instances, the offense is usually regulatory and the punishment generally light. Such offenses frequently are classified as violations,[134] and include loitering (while masked),[135] public intoxication,[136] carrying concealed weapons,[137] and selling cigarettes to minors.[138]

Sometimes, though, the Code contains provisions that do not have stated mens rea requirements,[139] and the Code does not contain a provision similar to those of other states which establishes a minimum mens rea requirement. In those instances in which material elements are presented without a mens rea element,[140] Alabama courts are left to their own devices. The absence of a statutory minimum mens rea may lead to ill-advised prosecutions, inappropriate convictions, excessive punishments, or unnecessary appeals.

The lack of a clear mens rea requirement has also plagued the Code's provision classifying the murder of a police officer as a capital offense.[141] As originally enacted by the legislature, this section contained no requirement that the killer actually know that the victim was a police officer.[142] In fact, the section did not mention a mens rea component. This lack of clarity created a tension between legislative intent and judicial interpretation which surfaced in *Ex parte Murry*.[143]

In 1982, Paul Murry was convicted of the murder of a Montgomery police officer and sentenced to death pursuant to section 13A-5-40(a)(5).[144] The court of criminal appeals affirmed the conviction,[145] but the Alabama Supreme Court reversed, assuming that the legislature intended a knowledge requirement, and holding that the trial judge erred in not delivering a

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members, but I am confident that the concept was discussed in light of the fact that the Model Penal Code was studied throughout the drafting process.

134. A violation is punished by incarceration for not more than thirty days and/or a fine of not more than $200 in most instances. *See* §§ 13A-5-7(b), 5-12(b).

135. *See* § 13A-11-9(a)(4).

136. *See* § 13A-11-10.

137. *See* § 13A-11-53 (providing an ad hoc punishment scheme of a fifty dollar to a five hundred dollar fine and/or up to six months imprisonment or hard labor).

138. *See* § 13A-12-3 (providing an ad hoc punishment range of ten dollars to fifty dollars and/or imprisonment or hard labor for not more than thirty days).

139. *See, e.g.*, §§ 13A-10-31 (escape in the first degree), 13A-10-32 (escape in the second degree), 13A-10-33 (escape in the third degree), 13A-11-2 (treason), 13A-11-4 (inciting to riot). No mens rea is stated in any of the foregoing statutes. *But see* GA. CODE ANN. §§ 16-10-52(a) (West 2003) (establishing "intent" as mens rea for escape), 16-11-1 (establishing "knowledge" as mens rea for treason), 16-11-31 (establishing "intent" as mens rea for inciting to riot).

140. *See, e.g.*, ALA. CODE § 13A-11-50 (1994) (carrying a concealed weapon; no mens rea stated).

141. § 13A-5-40(a)(5).

142. *See* 1981 Ala. Acts 178. The section included in the list of capital crimes the

> [m]urder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty or because of some official or job-related act or performance of such officer or guard.

Id.

143. 455 So. 2d 72 (Ala. 1984).

144. *Id.* at 73.

145. Murry v State, 455 So. 2d 53 (Ala. Crim. App. 1983).

jury instruction to that effect.[146] Quoting the statute, the court held that "[c]learly, a murder 'because of some official or job-related act' requires that the perpetrator know the victim is a peace officer and is or was performing an official act."[147] The court likened a knowledge requirement for subsection (a)(5) to two similar offenses in section 13A-5-40, namely "murder of a public official which 'stems from or is caused by or is related to [the victim's] official position, act, or capacity,' § 13A-5-40(a)(11); and murder of a witness 'when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness,' § 13A-5-40(a)(14)."[148] It pointed out that "[t]he causal elements of these provisions require that the defendant have knowledge of the specified status or act and intend to murder the victim because of the status or act."[149]

The court also placed great emphasis on the Code's self-stated rules of construction,[150] believing they "militat[ed] against the creation of strict liability offenses by implication."[151] Viewing the absence of an explicit legislative statement as evincing its intent not to create a strict liability offense, the court refused to recognize the absence of a knowledge requirement. Additionally, the court thought it "a preposterous result to increase punishment, from a term of years or life with possibility of parole, to life without parole or the death penalty, with the sole difference being an element making no reference to the mental culpability of the defendant."[152]

Justice Maddox dissented, suggesting that the legislature "deliberately did not put a knowledge requirement in the statute."[153] He believed that the "strict construction rule[154] should not be substituted for 'common sense,

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146. *See Ex Parte Murry*, 455 So. 2d at 78.

147. *Id.* at 73.

148. *Id*.

149. *Id*. at 73-74. The court apparently disregards the difference between subsection (a)(5) and these subsections. Subections (a)(11) and (a)(14) both include the word "caused." This word does not appear in subsection (a)(5), likely signaling the legislature's intent to make that subsection considerably more expansive than either (a)(11) or (a)(14). In its care not to recognize a strict liability offense, the court apparently disregarded this distinction.

150. *See* ALA. CODE § 13A-2-4(b) (1994). This section states:

> Although no culpable mental state is expressly designated in a statute defining an offense, an appropriate culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state. A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, states a crime of mental culpability.

Id.

151. *Ex Parte Murry*, 455 So. 2d at 76.

152. *Id*. at 77.

153. *Id.* at 81.

154. Although the court mentioned the strict-construction rule, the Code adopts a fair-import test. *See* ALA. CODE § 13A-1-6 (1994). The commentary to this section states that "[t]he original draft expressly abolished the common law rule that penal laws are to be strictly construed." *Id*. However, the printed draft of the Proposed Code contains no provision seeking to abolish the strict-construction rule. *See* PROPOSED CODE, *supra* note 7, § 105 (utilizing the same language as § 13A-1-6). The commentary continues by explaining that the committee was reluctant to abolish the rule and "[r]epeal, therefore, of the strict construction rule has been omitted from the proposal." *Id*. Ergo, it appears that the provision expressly repealing the rule died early in the drafting process and never made it to the legislature. Never-

precedent, and legislative history,'"[155] and that the "clear and obvious legislative intent behind § 13A-5-40(a)(5) is to protect all law enforcement officers . . . [which could] only be effectuated insofar as plain-clothes officers are concerned by not reading a status scienter requirement into the statute."[156]

In 1987, the legislature specifically and emphatically rejected the Alabama Supreme Court's holding in *Ex parte Murry*.[157] The revised statute stated that the murder of a police officer is a capital offense "regardless of whether the defendant knew or should have known the victim was an officer or guard on duty."[158] Even though this pronouncement did not expressly term this offense as one of strict liability, the legislature has effectively made that choice by swinging the pendulum back to the other extreme.

The haggling over the knowledge requirement may have been avoided by adhering to the Model Penal Code approach. The Model Penal Code establishes recklessness as the minimum culpability by default when the required culpability "is not prescribed by law."[159] This stems from the belief that "[w]hen purpose or knowledge is required, it is conventional to be explicit."[160] Had this method of dealing with an unclear provision been in place in the Code, the problems of *Ex parte Murry* could have been lessened or even avoided.

The perceived lack of clarity in this instance caused an incredible tension between the legislature and the judiciary which injected inconsistency and uncertainty into Alabama's criminal justice system. Although the legislature may have thought it was clearly signaling a significant shift in the law, this example and the foregoing discussion of the year-and-a-day rule in homicide[161] show that courts are reluctant to endorse such changes absent a clear and unmistakable pronouncement. This fact should be remembered as revisions and new provisions are drafted.

B. Sexual Offenses

The Code's sex-crime provisions may also need review and revision. As originally drafted and enacted, the forcible rape, sodomy—whether forcible

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theless, according to the commentary, "the old rule of strict construction is practically meaningless as it is seldom cited and then only to support a conclusion already reached by reference to the fair meaning of the words and phrases used in the statute and a consideration of the legislature's intent." *Id*.

155. *Ex parte Murry*, 455 So. 2d at 81 (quoting United States v. Standard Oil Co., 384 U.S. 224, 225 (1966)).

156. *Id*.

157. 1987 Ala. Acts 709.

158. ALA. CODE § 13A-5-40(a)(5) (1994).

159. MODEL PENAL CODE § 2.02(3) (1985).

160. *Id*. at § 202(3) cmt. 5. This statement from the Model Penal Code is particularly interesting in this case, where the legislature, in its original pronouncement, did not explicitly require knowledge.

161. *See supra* Part II.B.1.

or not—and sexual abuse provisions[162] included a marital exemption which derived from the common law.[163]

The Code incorporated the marital exemption in either of three ways:

(1) By defining "female" as "any female person who is *not married to the actor*."[164] Thus, a male[165] could not be prosecuted for nonconsensual sexual acts with his spouse, even if force were used to overcome the wife's resistance because the nonconsenting, resisting wife was not a "female" within the meaning of the rape and forcible sodomy statutes. In 1986, the court of criminal appeals struck down the marital exemption as contained in the definition of "female."[166] The court stated: "The marital exemption for the offense of rape found in § 13A-6-60(4) is hereby severed from the statutes defining rape, and the proscription of the statutes is now enlarged to include married as well as unmarried persons."[167]

(2) By defining "deviate sexual intercourse" as "[a]ny act of sexual gratification between persons *not married to each other* involving the sex organs of one person and the mouth or anus of another."[168] Although this definition remains intact in the Code, it too has been struck down by court

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162. *See* ALA. CODE §§ 13A-6-61 (1994) (rape), 6-63 (forcible sodomy), 6-65(a)(3) (nonforcible sodomy), 6-66 (sexual abuse).

163. *See, e.g.*, State v. Getward, 365 S.E.2d 209, 212 (N.C. Ct. App. 1988) ("Under the common law, a husband could not be prosecuted for raping his wife unless he abetted another in committing the act."); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 33.06[A][1] (3d ed. 2001) ("[T]he so-called marital immunity rule became a part of the common law, and was adopted by most American legislatures as part of the original definition of rape.").

164. PROPOSED CODE, *supra* note 7, § 2301(d) (emphasis added). The section further provided that for the purposes of this definition, "persons living together as man and wife" were married, but "spouses living apart under a decree of judicial separation" were not married. *Id*. The provision was codified as Alabama Code section 13A-6-60(4), but the definition was amended in 1988 to define "female" simply as "any female person." *See* 1988 Ala. Acts 339 ("[An Act] to remove the exemption from criminal responsibility of the spouse for rape and redefine the term 'female' which excludes married victims.").

165. The masculine gender is used intentionally. As originally promulgated, the Code did not define nonconsensual sexual acts by a female with a male—whether married or unmarried—as rape; rather, the female committed sexual misconduct. *Compare* ALA. CODE § 13A-6-61 (1994) ("A *male* commits . . . rape . . . .") (emphasis added), *with* § 13A-6-65(a)(2) (1994) ("Being a *female*, she engages in sexual intercourse with a male without his consent . . . .") (emphasis added). But in keeping with the Code's general condemnation of acts of sodomy, whether consensual or nonconsensual, a female could be convicted for sodomy. *See, e.g.*, § 13A-6-63 ("A *person* commits . . . sodomy . . . .") (emphasis added).

166. *See* Merton v. State, 500 So. 2d 1301, 1305 (Ala. Crim. App. 1986). In *Merton*, the defendant was convicted of first-degree rape and sodomy of an eight-year-old child. *Id.* He argued that Alabama's forcible rape and sodomy provisions were unconstitutional because the statutes criminalized conduct by unmarried person which was not criminal for married persons, and thus violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id*. The court agreed.

167. *Id.* at 1305. An interested issue, of course, is the court's "expansion" of the Code provision which seemingly would criminalize conduct by a husband despite a statutory provision that clearly states: "No act or omission is a crime unless made so by this title or by other applicable statute or lawful ordinance." ALA. CODE § 13A-1-4 (1994). Thus, after *Merton*, charges presumably could be brought against a husband for forcible sexual intercourse with his wife under the rubric of a court decision even though the statute under which he was charged provided an exemption as enacted by the legislature. This potential issue was rectified by subsequent legislation. *See* 1988 Ala. Acts 339 (redefining "female" as "[a]ny female person" and thereby removing the marital exemption for forcible rape). I am unaware of any husband charged with forcible rape between the release of the *Merton* ruling and the passage of the remedial legislation.

168. *See* ALA. CODE § 13A-6-60(2) (1994) (emphasis added).

decision. In *Williams v. State*[169] the court of criminal appeals declared this provision violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The statute, though, has not been amended.

(3) By defining "sexual contact" as "[a]ny touching of the sexual or other intimate parts of a person *not married to the actor*, done for the purpose of gratifying the sexual desire of either party."[170] This marital exemption has not been attacked as violative of equal protection. In view of the rulings in *Merton* and *Williams*, though, it might be prudent to review and possibly revise the provision. Within a marriage, a touching by one spouse of the other with or without that spouse's consent is "exempt" behavior unless the *Merton-Williams* reasoning reaches "sexual contact." A forcible contact by a non-spouse, though, might constitute sexual abuse in the first degree.[171]

At the time the Code was drafted, marital exemptions for sexual behavior existed in many states either by common law or statute,[172] although the exemptions were being challenged in court and scholarly writings.[173] Despite the fact that remnants of the marital exemption remain in the Code, to a great extent they are no longer applicable and therefore the sex-offense statutes should be revisited and, in some instances, revised.

The Code contains several other statutes which may or may not be enforceable. For example, the Code criminalizes various forms of consensual sexual relations[174] which the Code designates as "deviate sexual inter-

169. 494 So. 2d 819, 831 (Ala. Crim. App. 1986). In *Williams*, the defendant, a male not married to the female victim, argued that the forcible-sodomy statute violated the Equal Protection Clause of the Fourteenth Amendment because it criminalized forcible sodomy by persons not married to the victim but not forcible sodomy by actors against their spouse. *Id*. The court agreed. The court ruled that

> the "marital exemption" for the offense of forcible sodomy is hereby severed and removed from this statute. The statute at issue is now enlarged to include married, as well as unmarried, persons. Therefore, *any* person who engages in deviate sexual intercourse with any other person, by forcible compulsion, is guilty of the offense of sodomy in the first degree.

Id. at 831 (emphasis added). Thus, the "expansion" issue discussed above, *see supra* note 167, resurfaces, except in this instance there has been no remedial legislation. Forcible sodomy, post-*Williams*, is—by way of court decision—a prosecutable offense even though the statutory definition of deviate sexual intercourse still contains the exception language. Again, a provision of the Code needs review and revision.

170. ALA. CODE § 13A-6-60(3) (1994) (emphasis added).

171. *See* § 13A-6-66(a)(1). Whether it is or is not sexual abuse depends upon the nature of the force. *See* § 13A-6-60(8) (defining forcible compulsion).

172. Drafters and legislators continued to adhere to the common-law approach despite concerns about the impact of the exemption. *Cf.* Celia Wells, *The Impact of Feminist Thinking on Criminal Law and Justice: Contradiction, Complexity, Conviction and Connection*, 2004 CRIM. L. REV. 88, 88 ("Thirty years ago many commentators thought that the marital rape immunity could be justified.").

173. *See, e.g.*, Jaye Sitton, Comment, *Old Wine in New Bottles: The "Marital" Rape Allowance*, 72 N.C. L. REV. 261, 277 (1993) ("The marital rape exemption went largely unchallenged from the time of Matthew Hale until the late 1970s.").

174. *See* § 13A-6-65(a)(3) ("A person commits the crime of sexual misconduct if: (3) He or she engages in deviate sexual intercourse with another person under circumstances other than those covered by sections 13A-6-63 and 13A-6-64.") The latter-cited sections are the Code's forcible or nonconsensual sodomy statutes. Sexual misconduct is a Class A misdemeanor with a maximum potential penalty of one-year imprisonment and a fine of up to $2,000. *See* §§ 13A-5-7(a)(1), 5-12(a)(1).

course."[175] The potential reach of this section is constitutionally suspect in light of *Lawrence v. Texas*.[176]

In *Lawrence*, the United States Supreme Court struck down the Texas sodomy statute insofar as it criminalized private, consensual homosexual relations between adults on the ground that the statute as applied violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[177] The Texas statute declared that "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."[178] Thus, the Texas statute applied only to same-sex intercourse.

The *Lawrence* Court discussed at length criticisms of their earlier case—*Bowers v. Hardwick*[179]—which upheld a Georgia statute outlawing consensual sodomy. The Court then overruled *Bowers*, declaring that "[t]he State cannot demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime."[180] Justice Kennedy, writing for the majority, based the decision on the Fourteenth Amendment's Due Process Clause rather than the Equal Protection Clause, which Justice O'Connor relied upon in her concurring opinion.[181] The Court's reliance on Due Process, which requires recognition that the "liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons,"[182] rather than the Equal Protection Clause, certainly brings into question the constitutionality of section 13A-6-65(a)(3).

Although the Alabama statute is substantially broader (in that it is not limited to same-sex intercourse), it may be subject to the same concerns. Nearly identical to the Texas definition of "deviate sexual intercourse," the Alabama definition differs only in that it has a marital exemption. This exception means that Alabama's statute does not reach private, consensual sodomy between married persons.

C. Accomplice Liability

Another interesting interpretation of the Code is found in *Ex parte G.G.*[183] The case involved criminal mischief in which the Grand Hotel at Point Clear, Alabama, was damaged by several juveniles. The State did not

175. "Deviate sexual intercourse," § 13A-6-60(2), is defined as "[a]ny act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another." *Id.*
176. 539 U.S. 558 (2003).
177. *Id.* at 578-79.
178. TEX. PENAL CODE § 21.06(a) (1994).
179. 478 U.S. 186 (1986).
180. *Lawrence*, 539 U.S. at 578.
181. *See id.* at 574-75, 579.
182. *Id.* at 558.
183. 601 So. 2d 890 (Ala. 1992).

seek to prove that the defendant, G.G., actively participated in the vandalizing of the hotel lounge. Instead, the State argued that G.G. was culpable as an accessory. The evidence did show that G.G. knew of the vandalism, that G.G.'s room key was found under a sofa in the damaged lounge and that he had dropped some candy wrappers on the floor of the lounge. No one—including two juveniles who accused each other of the mischief—accused G.G. of direct participation in the crime. Nevertheless, the trial court adjudged G.G. to be a juvenile delinquent, placed him on probation, and ordered that he pay restitution and court costs. G.G. appealed and the court of criminal appeals affirmed.[184] The Supreme Court of Alabama granted certiorari and reversed.[185]

The issue on appeal was whether the State had presented a prima facie case of criminal mischief against G.G.[186] The court decided that the State had failed to prove its case.[187] In deciding whether G.G. was culpable as an accessory, the court noted that the Code provides for criminal liability based on the conduct of another person in section 13A-2-21.[188] That section provides that a person may be made culpable for another's behavior either by the statute defining the crime or by "specific provision of this title."[189] The court, construing the Code section, then noted that "[t]his section provides for liability for the behavior of another only if the statute violated imposes such liability. Section 13A-7-21 contains no provision for liability for the acts of another."[190] Section 13A-7-21 is the criminal mischief statute.[191] Thus, the court in essence discarded the provision of the Code that accessorial culpability could be established by another "specific provision of this title."[192] That provision, not discussed by the court, is section 13A-2-23.

Section 13A-2-23 is the general statute addressing accessorial culpability. G.G. could have been found culpable if his conduct met the test of *either* section 13A-2-23 or 13A-7-21.[193] The court only considered the latter possibility.[194] Section 13A-2-23 establishes a multi-pronged test for determining the culpability of one person for the conduct of another person. It provides that a person may be criminally liable for the behavior of another person if the accused, acting with an intent to promote or assist the commission of the offense, either procures, induces, or causes the other person to commit the crime, aids or abets the actor in the commission of the offense,

184. *See* G.G. v. State, 587 So. 2d 1111, 1111 (Ala. Crim. App. 1991), *rev'd sub nom. Ex parte* G.G., 601 So. 2d 890 (Ala. 1992).
185. *Ex parte G.G.*, 601 So. 2d at 891.
186. *Id.*
187. *Id.*
188. *Id.* at 893; *See* ALA. CODE § 13A-2-21 (1994).
189. *Ex parte G.G.*, 601 So. 2d at 893 (citing § 13A-2-21).
190. *Id.*
191. *See* § 13A-7-21.
192. *Ex parte G.G.*, 601 So. 2d at 893 (citing § 13A-2-21).
193. *See* § 13A-2-21.
194. *See Ex parte G.G.*, 601 So. 2d at 893.

or breaches a legal duty to prevent the crime by failing to take such action as the accused is required by law to take.[195]

The result in *Ex parte G.G.* appears to be appropriate. The evidence not only failed to show that G.G. engaged directly in criminal conduct but also failed to show that, with the requisite intent, he instigated the crime or assisted the perpetrators.[196] Moreover, he had no legal duty to attempt to thwart the criminal actions of the other individuals.

For the purposes of this Article, though, we should note that the court failed to note three possible bases for culpability on G.G.'s part. This omission is as apparent as the lack of evidence to prove the charge under any of the possibilities. *Ex parte G.G.* is a reported case. It may mislead litigants in future cases, although on any future appeal, the court hopefully would note the existence of section 13A-2-23. In any future revision of the Code, it may be helpful to clarify the commentary to the accessorial culpability sections.

D. Habitual Offender Statutes

The Code includes the Alabama Habitual Offender Act.[197] A rather basic habitual offender provision was included in the proposed code,[198] but even before the Code became effective that provision was amended and greatly expanded.[199] The resulting habitual offender sections have been controversial; proponents have strongly supported them and detractors have widely criticized them.

As originally enacted, section 13A-5-9(c)(3) provided that an individual with three previous felony convictions who subsequently was convicted of a Class A felony must be sentenced to life imprisonment without parole,[200] rather than incur a sentence within the normal range for Class A felonies of not less than 10 years nor more than 99 years or life.[201] Similarly, section 13A-5-9(c)(2) required the imposition of a sentence of life imprisonment for any person with three prior felony convictions who was subsequently convicted of a Class B felony,[202] which normally carries a range of punishment of not less than two nor more than twenty years.[203]

In 2000, the Alabama Legislature passed a remedial measure which changed two of the more fiercely criticized provisions from mandatory to discretionary.[204] The 2000 amendment gives trial judges discretion to im-

195. § 13A-2-23.
196. *See Ex parte G.G.*, 601 So. 2d at 891.
197. *See* ALA. CODE § 13A-5-9 (2004).
198. *See* PROPOSED CODE, *supra* note 7, §§ 1235-37 (establishing a much-simplified version of the current habitual offender provision, but also including enhanced sentencing for habitual misdemeanants, which is not a part of the current statute).
199. 1979 Ala. Acts 1164, *codified as* ALA. CODE § 13A-5-9(c)(3) (2004).
200. *Id.*
201. *See* ALA. CODE § 13A-5-6(a)(1) (2004).
202. 1979 Ala. Acts 1164, *codified as* ALA. CODE § 13A-5-9(c)(2) (2004).
203. *See* ALA. CODE § 13A-5-6(a)(2).
204. 2000 Ala. Acts 1736, *codified as* ALA. CODE § 13A-5-9(c)(3)-(4) (2004).

pose either a life or a life-without-parole sentence upon conviction for a Class A felony of a defendant with three or more prior felony convictions,[205] unless one of the prior convictions was for a Class A felony, in which case the mandatory punishment remains at life imprisonment without parole. The amendment also authorizes judges to impose either life imprisonment or any term-of-years sentence not less than twenty years upon conviction of a Class B felony of a defendant with three prior felony convictions.[206]

Then, in 2001, the legislature made these changes retroactive and sought to empower trial judges to resentence defendants who had been sentenced under the mandatory scheme that existed prior to the 2000 amendment.[207] This act, however, was somewhat vague. A number of officials and agencies expressed concern, sought clarification or opposed implementation of the act. Ultimately, the Supreme Court of Alabama upheld it against arguments that the act violated the separation of powers doctrine or was unconstitutionally vague.[208]

Criminal sentencing in Alabama presently is under microscopic examination by the Alabama Sentencing Commission.[209] Habitual offender sentencing is just one knotty part of the entire issue-rich Alabama sentencing paradigm.

E. Multiplicity

Although the Code is both systematic and cohesive, and attempts to group and classify similar offenses, some sections of the Code nevertheless continue to overlap. An earlier discussion pointed out the overlap in theft crimes. Another example of overlap surfaces in robbery. Does Alabama actually need a separate crime addressing robberies of pharmacies?[210] These and other statutes demonstrate an opportunity to further refine Alabama law by consolidating some crimes and eliminating overlaps in others.

F. Capital Sentencing Procedure

Although more procedural than substantive, the Code establishes the sentencing process for capital crimes.[211] Recent events demonstrate a need to revisit that process. The United States Supreme Court in *Ring v. Arizona*[212] struck down the Arizona capital punishment scheme because Arizona judges were empowered to determine the existence of aggravating

205. *Id*.
206. 2000 Ala. Acts 1736, *codified as* ALA. CODE § 13A-5-9(c)(2) (2004).
207. 2001 Ala. Acts 941.
208. *See Ex parte* State, No. 1030128, 2004 WL 1909345, at *4-*7 (Ala. Aug. 27, 2004).
209. The author serves as Chair of the Sentencing Commission.
210. *See* ALA. CODE §§ 13A-8-50 to 8-52 (1994).
211. *See* §§ 13A-5-42 to 5-52.
212. 536 U.S. 584 (2002).

circumstances during the sentencing process without jury determination of disputed facts.[213] Although the Alabama Supreme Court has determined that *Ring* does not invalidate the Alabama capital punishment scheme, it has recognized that it can impact those cases in which an aggravating component[214] is not included in the list of statutory aggravating circumstances. After *Ring*, the Alabama Supreme Court has had to address the issue,[215] but the statutes have not been revised. Only the legislature can amend the statutes, but the Alabama Supreme Court has ample powers to remedy procedural defects.[216]

G. Other Offenses

Other crimes and defenses not yet mentioned may also be worthy of review. For example, Alabama does not have a statewide prohibition against either looting during emergencies[217] (such as Hurricane Ivan, which devastated the Gulf Coast in 2004) or the manufacture or possession of—or other crimes involving—weapons of mass destruction.[218] Additionally, some states have created a crime of facilitation[219] which covers accessorial culpability but requires less mens rea than either attempt or conspiracy. Both attempt and conspiracy require intent.[220] Facilitation only requires knowledge.[221]

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213. *Id*. at 609.

214. *See* § 13A-5-40(a) (listing 18 potential capital offenses, each of which includes a component that aggravates the intentional murder aspect of the capital charge). On previous occasions, I have suggested calling such aggravating elements of the intentional murder "aggravating components." *See, e.g.*, Joseph A. Colquitt, *The Death Penalty Laws of Alabama*, 33 ALA. L. REV. 213, 222 (1982) ("Throughout this discussion, the aggravating factor constituting a part of the offense is referred to as the 'aggravating component,' and the aggravating elements listed for consideration during determination of a sentence are called 'aggravating circumstances.'"). By using the term "aggravating component" for section 13A-5-40 aggravators, we readily distinguish them from the list of statutory aggravating circumstances established by the Code as sentencing factors. *See* ALA. CODE § 13A-5-49 (2004) (listing statutory aggravating circumstances).

215. *See Ex parte* McGriff, No. 1010469, 2004 WL 2914851, at *11 (Ala. Dec. 17, 2004) (discussing the impact of *Ring v. Arizona*).

216. Insofar as the statutes are procedural, the Alabama Supreme Court has rulemaking power and thus could promulgate new procedures in capital cases. ALA. CONST. amend. 328, § 6.11. To date, the court has provided direction through case dictum. *See, e.g.*, *Ex parte McGriff*, 2004 WL 2914951, at *11

> The decision of *Ring v. Arizona* . . . prompts us to supply some direction to be followed if, upon a retrial of McGriff's case, the jury again finds him guilty of capital murder. We will identify the pertinent provisions of the Alabama death penalty statutory scheme . . . and we will explain the effect of *Ring* upon this scheme.

Id. (citations omitted).

217. *See, e.g.*, N.C. GEN. STAT. ANN. § 14-288.6 (West 2003) (establishing a crime for trespassing during emergencies).

218. *See, e.g.*, N.C. GEN. STAT. ANN. §§ 14-228.21 to 288.24.

219. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1004 (West 2001) ("A person commits facilitation if, acting with knowledge that another person is committing or intends to commit an offense, the person knowingly provides the other person with means or opportunity for the commission of the offense.").

220. *See* ALA. CODE §§ 13A-4-2(a) (1994) (requiring intent for attempt), 4-3(a) (requiring intent for conspiracy).

221. ARIZ. REV. STAT. ANN. § 13-1004.

IV. MEETING PRESENT AND FUTURE NEEDS

In addition to the issues of whether some provisions of the Code as enacted should be amended or provisions omitted should be added, there looms the additional question of whether in the intervening years events have shown the need for new or modified offenses or defenses. In an Article of this length, it would be difficult to mention every possibility, but a few possibilities will be advanced simply to show the breadth of potential issues presently unaddressed or inadequately addressed.

Other crimes and defenses may not be worthy of consideration. For example, North Carolina has a state statute criminalizing the theft of pine straw, a Class H felony.[222] That offense seemingly would fall within one of the current theft-of-property definitions of the Alabama Code.[223]

A. Alternatives to Existing Law

The Code is the result of deliberate legislative choices. At the time of the drafting, alternatives were available for every offense and defense, and even more alternatives possibly are available now. The drafters (and the legislature) elected courses of action which resulted in the present Code. Now that 25 years have passed, it may be prudent to revisit those elections to determine whether chosen approaches remain optimal or whether alternatives, rejected or unrecognized at the time, are worth reconsideration.[224] Though reconsideration may be prudent in several areas of the Code, this Article will address only three prominent possibilities, namely felony murder, extreme emotional distress, and the necessity defense.

1. Felony Murder

The Code both expanded and constricted felony murder as it existed under prior law. The 1940 Alabama Code defined felony murder as a homi-

222. N.C. GEN. STAT. ANN. § 14-79.1 (2003) (establishing a crime for larceny of pine needles or pine straw).

223. *See* ALA. CODE § 13A-8-5 (2004) (stating that theft in the third degree, consisting of the theft of property not exceeding $500 in value and not taken from the person of another, is a Class A misdemeanor). This assumes theft of, say, less than 100 bales of pine straw. If a tractor-trailer load was stolen, it could be a very serious theft indeed. Although the North Carolina offense is classified as a Class H felony, punishment without some aggravating factor would likely be within the same range as Alabama's misdemeanor. *See* N.C. GEN. STAT. ANN. § 15A-1340.17 (West 2003) (providing structured sentencing tables with a range between four and eight months imprisonment for a first offender). Moreover, probation is a distinct possibility for a first offender. *See* N.C. GEN. STAT. ANN. § 15A-1341 (providing for probation or deferred prosecution). Similarly, the Alabama offense which carries a range of punishment of up to one year in jail is subject to probation in the discretion of the judge. *See* ALA. CODE § 13A-5-7(a)(1) (1994) (punishing a Class A misdemeanor by up to one year imprisonment in the county jail or hard labor for the county); ALA. CODE § 15-22-50 (1995) (vesting in the judge the authority to place a person on probation).

224. I address these alternatives even though in most instances I believe the drafters and the Alabama Legislature made the correct decisions. Nevertheless, the passage of time and changes in circumstances may warrant revisiting some of the issues.

cide "committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery, or burglary."[225] The punishment for first-degree murder was either life imprisonment or death.[226]

The Code expanded felony murder by adding aggravated forms of escape, kidnapping, and sodomy to the list of enumerated felonies.[227] It also tacked onto the enumerated crimes a catch-all provision covering "any other felony clearly dangerous to human life."[228]

More obscurely, the Code may have narrowed the reach of the crime as previously defined. Although preexisting law listed only four felonies which would serve as enumerated crimes for first-degree murder purposes, and the Code lists seven plus the catch-all provision, the pre-Code formulation may have been broader. Title 14 defined second-degree murder as "every other homicide" not defined as first-degree murder "committed under such circumstances as would have constituted murder at common law."[229] Thus, under Title 14, if a killing occurred during a nonenumerated felony but would have constituted murder at common law, it constituted murder in the second degree. Conceivably, a killer could have committed a felony not listed in either of the two felony murder definitions which did not involve clear danger to human life, and thus be guilty of a second-degree murder under prior law, but not guilty of felony murder under the Code.[230] Ergo, the Code potentially constricts prior felony murder law.

Controversial throughout its existence, the felony murder doctrine has numerous critics.[231] A few states have rejected the crime of felony murder[232]

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225. CODE § 14-314, *supra* note 19.

226. *See* ALA. CODE § 14-318 (1958) (repealed 1975).

227. ALA. CODE § 13A-6-2(a)(3) (1975).

228. *Id*.

229. CODE § 14-314, *supra* note 19.

230. In such circumstances, the homicide might be either manslaughter or criminally negligent homicide. *See* ALA. CODE §§ 13A-6-3, 6-4 (1975).

231. *See, e.g.*, People v. Aaron, 299 N.W.2d 304, 307 (Mich. 1980).

> Felony murder has never been a static, well-defined rule at common law, but throughout its history has been characterized by judicial reinterpretation to limit the harshness of the application of the rule. Historians and commentators have concluded that the rule is of questionable origin and that the reasons for the rule no longer exist, making it an anachronistic remnant [of the common law].

Id.; GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 192 (1998) ("The doctrine of felony murder distorts the criteria of liability almost beyond all recognition."); 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 14.5(h), at 472 (2d ed. 2003) (observing that "it is arguable that there should be no such separate category of murder"); Recent Developments, *Criminal Law: Felony-Murder Rule—Felon's Responsibility for Death of Accomplice*, 65 COLUM. L. REV. 1496, 1496 (1965) ("[T]he felony-murder rule has an extensive history of thoughtful condemnation.").

232. *See, e.g.*, HAW. REV. STAT. § 707-701 cmt. (2004) ("In recognition of the trend toward, and the substantial body of criticism supporting, the abolition of the felony-murder rule, and because of the extremely questionable results which the rule has worked in other jurisdictions, the Code has eliminated from our law the felony-murder rule."); KY. REV. STAT. ANN. § 507.020 (West 1999) (listing only intentional and extreme indifference homicides as murder); Bennett v. Commonwealth, 978 S.W.2d 322, 327 (Ky. 1998) ("With the adoption of the penal code, the felony murder doctrine was abandoned as an independent basis for establishing an offense of homicide in Kentucky."); *Aaron*, 299 N.W.2d at 307, 328-29 (abrogating the felony-murder rule). England, too, abandoned felony murder in 1957. *See* FLETCHER, *supra* note 231, at 192-93.

and others use alternative approaches. The Model Penal Code abandons the felony-murder doctrine. It defines murder as homicides which are "committed purposely or knowingly; or . . . recklessly under circumstances manifesting extreme indifference to the value of human life."[233] Under the Model Penal Code approach, a person who commits certain enumerated felonies is presumed to have acted recklessly in a manner that evidences extreme indifference to the value of human life.[234] This approach permits rebuttal of the presumption; moreover, the jury may simply choose not to apply it. If so, in either case, the defendant may be convicted of manslaughter or criminally negligent homicide rather than murder. The concept may be too innovative for adoption, and in fact few states have adopted this approach. Nevertheless, it remains a viable approach worth considering.

2. Extreme Emotional Distress

Another interesting legislative decision involved the choice to include the traditional, common-law concept of provocation[235] in the definition of manslaughter, as opposed to the extreme mental or emotional disturbance requirement of the Model Penal Code.[236] Weighing these two forms of man-

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233. MODEL PENAL CODE § 210.2 (1980).

234. *See* MODEL PENAL CODE § 210.2(1)(b).

> Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

Id.; *see also Bennett*, 978 S.W.2d at 327 (noting that "participation in a dangerous felony may constitute wantonly engaging in conduct creating a grave risk of death to another under circumstances manifesting an extreme indifference to human life"). Kentucky's approach was modeled after Model Penal Code § 2.06(4). *See* Meredith v. Commonwealth, 2003 WL 22975380, at *4 n.1 (Ky. 2003).

235. Common-law manslaughter was a "killing committed in the 'heat of passion' due to a legal provocation." ALA. CODE § 13A-6-3 cmt. (1975). This definition illustrates the two distinct requirements of common-law provocation. Objectively, a legal provocation is one which is reasonable, that is, a "provocation which causes a reasonable man to lose his normal self-control," and makes the killing "understandable." LAFAVE, *supra* note 231, § 15.2(b), at 495. Traditionally, only a few particularized categories of events could be reasonable, the most common being violent physical attack, mutual combat, unlawful arrest, and adultery. *Id*. Even if the provocation is objectively reasonable, adequate provocation is still not established "unless the defendant in fact acted in a sudden heat of passion." MODEL PENAL CODE § 210.3 cmt. 5(a) (1980). Therefore, even if a killer was reasonably provoked, "the individual whose passions are not aroused by provocation merits the same condemnation and punishment as one who kills without provocation of any sort." *Id*. Finally, even if the provocation was objectively reasonable and subjectively adequate, "a provoked defendant [could not] have his homicide reduced to voluntary manslaughter where the time elapsing between the provocation and the death blow is such that a reasonable man thus provoked would have cooled." LAFAVE, *supra* note 231, § 15.2(d), at 507.

236. The Model Penal Code finds manslaughter, not murder, when the killing "is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." MODEL PENAL CODE § 210.3 cmt. 5(a) (1980). In contrast to the common law, the MPC standard "avoids arbitrary exclusion of some circumstances that may justify reducing murder to manslaughter [by] not requir[ing] that the actor's emotional distress arise from some injury, affront, or other provocative act perpetrated upon him by the deceased." *Id.* Also, the Model Penal Code does away with the common-law requirement that the provocation be limited to a few defined instances. The biggest difference between the two standards, however, is the Model Penal Code requirement that "reasonableness be assessed 'from the viewpoint of a person in the actor's situation.'" *Id.* This provision is "designedly ambiguous." *Id*. It gives the trier of fact "sufficient flexibility to differentiate in particular cases between

slaughter, the Advisory Committee ultimately decided that the Model Penal Code approach was "unsound, unclear and susceptible of abuse" [237] and sent the Proposed Code to the legislature with the common-law provocation standard. This standard has remained unchanged in the 25 years since the Code took effect. However, a recent case may signal that Alabama law has drifted slightly away from this choice made 25 years ago.

In *Ex parte McGriff*,[238] the Alabama Supreme Court reversed the defendant's capital murder conviction, holding that a jury instruction on provocation was required. In this case, the victim and two other individuals threw a fire bomb at the defendant, and pursued him in a high-speed car chase to a neighboring town eight-and-a-half miles away.[239] Some time later,[240] the defendant drove that same distance back to an abandoned parking lot where, among thirty or forty other individuals, the victim was "mingling."[241] The defendant fired a warning shot, then two more shots in the direction of the car used by the victim and his companions in the earlier car chase. One of these shots struck and killed the victim.

The court held that the defendant's right to a particular instruction must be based on facts most favorable to that defendant. The court believed those facts to show a "'continuum of events, each consuming only a few minutes,' that adequately injected heat of passion into the case so that the provocation that caused McGriff to act was sufficient as a matter of law."[242] The dissent, however, recognizes that the "evidence established that his reaction to the assault by the victim was not sudden; he not only had time to acquire a weapon, but also to find his victim."[243] Put another way, the continuum recognized by the majority was "a series of events that provided time for [the defendant] to develop a plan for revenge and a reasonable time for [the defendant's] passion to cool and for reason to reassert itself."[244]

For purposes of this Article, it matters not whether there was or was not adequate provocation in this case; rather, the important consideration is the considerable difference between provocation at common law and the provocation held adequate here by a majority of the Alabama Supreme Court. The court's recognition of the "continuum of events"[245] in this case seems more similar to the Model Penal Code's approach emphasizing the particular situation that the killer faced, rather than the strict, rigid requirements of the

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those special aspects of the actor's situation that should be deemed material for purpose of grading and those that should be ignored." *Id*.

237. ALA. CODE § 13A-6-3 cmt. (1975).

238. 2004 WL 2914951 (Ala. 2004).

239. *Id.* at *1.

240. The State and the defense varied widely on how much time passed between the provocation and the killing. The State maintained that the shooting occurred almost five hours after the car chase, while the defense offered testimony that the shooting occurred within an hour of the chase. *Id.*

241. *Ex Parte McGriff*, 2004 WL 2914951, at *1.

242. *Id*. at *15 (Stuart, J., dissenting) (quoting the majority opinion).

243. *Id.* at *16.

244. *Id.* at *15.

245. *Id*. at *10.

common-law approach. As the dissent points out, Alabama law prior to *Ex parte McGriff* actually seemed more restrictive than the common law, "acknowledg[ing] such legal provocation in only two circumstances: (1) when the accused catches his/her spouse in the act of adultery; and (2) when the accused has been assaulted or was faced with what appeared to be an imminent assault."[246] To entitle the defendant in this case to a manslaughter instruction, the dissent argues, he must have "shot the victim as a consequence of *sudden* passion kindled by what was apparently about to happen to him at the victim's hands."[247] Here, the majority's more permissive stance towards cooling time seems to greatly enlarge the definition of manslaughter past its common-law bounds.

Ex parte McGriff seems to place Alabama law in a middle ground between the common law and the Model Penal Code. Whether or not this case signals a significant departure from the common law in Alabama remains to be seen. What is apparent is that the legislative choice made 25 years ago is ripe for reconsideration so that its effectiveness and viability may be evaluated.

3. Necessity

Another interesting legislative choice involves the necessity defense. As stated earlier in this Article,[248] this defense was included with the original draft of the Proposed Code.[249] However, before the effective date of the Proposed Code, this section was repealed.[250] It is unclear whether this deliberate omission by the legislature signals an abolition of the necessity defense in Alabama, or merely a deference to the common-law contours of that defense.

Although the Code is silent as to the necessity defense, "the commentary to § 13A-3-21 explicitly states that '[w]hile much law is covered in this article, no codification can be complete, and these formulations are not intended to preclude further judicial, or statutory, development of these, or other, justifications.'"[251] Additionally, the Alabama Code states:

> The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the Legislature.[252]

246. *Id.* at *14.
247. *Id.* at *15.
248. *See supra* note 7.
249. *See* PROPOSED CODE, *supra* note 7, § 640.
250. 1979 Ala. Acts 664.
251. Allison v. City of Birmingham, 580 So. 2d 1377, 1379-80 (Ala. Crim. App. 1991).
252. ALA. CODE § 1-3-1 (1975).

Indeed, Alabama courts "are compelled to follow the common law on any subject when the same has not been changed by the legislative branch of our government."[253] These cases show that the Alabama judiciary has recognized, at least, that the defense may be available in some circumstances.

The choice by the legislature not to retain the codification of the necessity defense, in light of these cases, likely does not operate to eliminate the defense in Alabama. Courts have, however, refused to allow the defense in cases of medical necessity[254] and criminal trespass involving abortion clinics.[255] It appears that the effect of this rejection was to avoid a specific pronouncement that may have the unintended effect of limiting or expanding the availability of the defense. Instead, the legislature's choice in this instance likely shows its intent to rely on the common law and the courts to provide for the defense in proper cases.

These three examples, while by no means exhaustive, give a sampling of some instances where alternatives were rejected or not considered. Perhaps some or all of these should be reexamined by the legislature with the benefit of hindsight. Time affords the opportunity for evaluation of not only affirmative choices made during drafting, but also of legal concepts absent from the Code that, due to the natural evolution of existing law or the genesis of new issues, might be very valuable and helpful additions.

B. Possible Additions to the Code

Although the Code is comprehensive, particularly when compared to preexisting criminal law in Alabama, it is not exhaustive. Principles of law or provisions in other codes are unaddressed by—and sometimes intentionally omitted from—the Code. An excellent example of such an omission is the lack of any provision for corporate criminality.

1. Corporate Criminal Liability

Corporations have not always been subject to criminal prosecution.[256] In modern times though—in most states, at least—a state may prosecute a corporation for criminal acts performed by its agents on its behalf,[257] particu-

253. Kauffman v. State, 620 So. 2d 90, 91 (Ala. Crim. App. 1992) (quoting Smith v. United Const. Workers, Dist. 50, 122 So. 2d 153, 154 (Ala. 1960)).

254. *Kauffman*, 620 So. 2d at 92.

255. *Allison*, 580 So. 2d at 1382.

256. *See, e.g.,* MODEL PENAL CODE § 2.07 cmt. (Proposed Official Draft 1962). ("The law of corporate criminal responsibility is of comparatively recent origin, the modern development having occurred almost entirely within the last century and a quarter . . . . In recent years most of these limitations have been swept aside.").

257. *See, e.g.*, State v. Christy Pontiac-GMC, Inc., 354 N.W.2d 17, 19 (Minn. 1984) ("Most courts today recognize that corporations may be guilty of specific intent crimes."); Commonwealth v. McIlwain School Bus Lines, 423 A.2d 413, 417 (Pa. Super. Ct. 1980) ("Today . . . it is generally recognized that a corporation may be held criminally liable for criminal acts performed by its agents on its behalf."); *see also* MODEL PENAL CODE § 2.07 (Proposed Official Draft 1962) (establishing liability of corporations and other business entities for crimes).

larly if those acts were solicited, authorized, performed, or supervised by—or perhaps even known to—top management personnel within the corporation. Alabama was poised to join this movement and recognize corporate criminal liability with the Proposed Criminal Code of 1974.

The Proposed Criminal Code contained a corporate criminality provision[258] patterned after similar provisions in the Michigan and New York Codes as well as the Model Penal Code.[259] At the time the Proposed Code was drafted, Alabama had little law governing corporate criminal behavior.[260] Thus, the proposal greatly expanded and clarified Alabama's stance on corporate criminality. Commentary to the provision specifically noted that the section "should facilitate enforcement in the area of economic crimes, including pollution, securities and tax, fraud, and antitrust violations."[261] In application, the section also would have sanctioned prosecutions for much more than "business" crimes.

The proposal sent to the Alabama Legislature provided that a corporation could be culpable for the acts of its agents made "within the scope of [their] employment if either a) those acts were 'in behalf of the corporation, and . . . the offense [was] a misdemeanor, or' b) the governing statute expressly indicated a "legislative intent to impose such criminal liability on a corporation."[262] Alternatively, a corporation could be criminally liable if it failed to meet a statutory duty or its board of directors (or a "high managerial agent acting within the scope of his [or her] employment"[263]) engaged in, encouraged, supervised, or even tolerated criminal conduct on behalf of the corporation.[264] Thus, a corporation could be criminally liable for either misdemeanors or felonies committed on its behalf. However, corporations would have been liable only for misdemeanors except for those cases in which high-level actors (for example, directors or executive officers) were engaged in the criminal behavior or the corporation failed to meet a statutory duty to act and the law provided that the failure to act constituted a felony. Additionally, the criminal liability of the corporation would not have depended upon a conviction of the agent.[265]

The corporate criminality proposal, however, failed to gain legislative approval and thus does not appear in the Code.[266] Consequently, even though criminal actors may be held responsible for their illegal conduct on

258. *See* PROPOSED CODE, *supra* note 7, § 430 (liability of corporations).
259. *Id.* § 430 cmt.
260. *Id.* ("Current Alabama Law dealing with corporate criminal liability is fragmentary and inconclusive; there are no general statutory standards nor workable guidelines.").
261. *Id.*
262. *Id.* § 430(1)(a).
263. *See id.* § 430(1)(b).
264. *See id.* § 430(1)(c).
265. *See id.* § 430(3).
266. The Code does contain some corporate criminality provisions, such as the inclusion of business entities in the general definition of "person." ALA. CODE § 13A-1-2(6) (1994); *see also* § 13A-5-2(e) (retaining the power of a court to dissolve a corporation as a legally permissible penalty); § 13A-5-10(b) (exempting corporations from habitual offender sentencing).

behalf of a corporation,[267] the Code does not generally fabricate corporate criminality from acts of corporate agents committed on the corporation's behalf. The absence of these proposed corporate criminality provisions formed the basis of the *State v. St. Paul Fire & Marine Insurance Co.*[268] opinion, in which the Alabama Court of Criminal Appeals concluded that corporations are not subject to prosecution for perjury.[269] The court noted that "where appropriate," the Code does include corporations in the definition of "person."[270] But based on its review of the Code, the court was "convinced" that corporate criminal liability exists only for "those crimes in which the Legislature has specifically provided for corporate liability."[271]

In recent years, many examples of criminal conduct at the highest levels of corporate management have come to light. Some of the high profile cases of high level corporate malfeasance such as Enron,[272] Arthur Andersen,[273] WorldCom,[274] and HealthSouth[275] come to mind.

The Code addresses some crimes that seem particularly fit for corporate criminal action. Such offenses include various types of "deceptive business practices,"[276] "false advertising,"[277] "falsifying business records,"[278] "defrauding secured creditors,"[279] "issuing false financial statement[s],"[280] and "commercial bribery,"[281] but this list is not exhaustive. Although these crimes have not been specifically singled out by the legislature for corporate criminality, it seems appropriate to hold corporate entities criminally liable for violations of these laws. Recent high-profile cases of high-level corpo-

267. *See* § 13A-2-26 ("A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation to the same extent as if such conduct were performed in his own name or behalf.").

268. 835 So. 2d 230 (Ala. Crim. App. 2000), *aff'd sub nom. Ex parte* State of Alabama, 835 So. 2d 234 (Ala. 2002) (mem.).

269. *Id*. at 234.

270. *See also* ALA. CODE § 13A-1-2(6) (1994).

271. *St. Paul Fire & Marine Ins. Co.*, 835 So. 2d at 233.

272. Bethany McLean and Peter Elkind, *Enron: Partners in Crime*, FORTUNE, *available at* http://www.fortune.com/fortune/investing/articles/0,15114,517415,00.html (last visited on Nov. 4, 2004) (discussing the "Enron scam").

273. Arthur Andersen was convicted of one count of obstruction of justice as a result of the Enron debacle. *See* Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 357 n.1 (2003). The conviction was overturned due to flawed jury instructions. *See* Authur Anderson LLP v. United States, 125 S. Ct. 2129, 2136 (2005).

274. As a result of the WorldCom accounting fraud, the corporation was joined in a multi-count felony indictment in Oklahoma charging violations of state securities laws. *See* Brickey, *supra* note 273, at 357 n.5.

275. HealthSouth involves yet another accounting fraud of monumental proportions. One account stated the amount at $1.4 billion or more. *See* HealthSouth Execs Charged with Massive Accounting Fraud: Criminal, Civil Indictments Expected in Earnings Scandal, *at* http://www.ioma.com/pub/GCR/2003_04/533335-1.html. Others set the figure higher; one stated the fraud reached $2.7 billion. *See* Russell Hubbard & Val Walton, *HealthSouth Fraud Grew Big Quickly, Expert Says*, BIRMINGHAM NEWS, Jan. 29, 2005, *at* http://www.al.com/news/birminghamnews/index.ssf?/base/news/110699385847280.xml.

276. *See* ALA. CODE § 13A-9-41 (1994).

277. *See* §§ 13A-9-42 to 9-44.

278. *See* § 13A-9-45.

279. *See* §§ 13A-9-46 to 9-47.

280. *See* § 13A-9-49.

281. *See* § 13A-11-120.

rate malfeasance and misfeasance, such as those mentioned earlier, sharply illustrate the appropriateness of imposing such criminal liability on corporations.

As noted in the *St. Paul* case, Alabama has a number of statutes criminalizing corporate behavior. The Code, however, does not subject corporations to prosecution for many other crimes, although, in some instances, perhaps it should. Consider, for example, two relatively well-known corporate criminality cases: *State v. Christy Pontiac-GMC, Inc*.[282] and *Commonwealth v. McIlwain School Bus Lines*.[283]

In *Christy Pontiac-GMC*, the Minnesota Supreme Court upheld the conviction of the corporation for two thefts and two forgeries, for which the punishment imposed consisted of fines.[284] The corporation argued that it could not be prosecuted for or convicted of specific intent offenses, but the Minnesota courts were unpersuaded. The state supreme court, relying on the statutory "fair-import" standard of interpretation—the same standard contained in the Alabama Code[285]—construed the terms "person" and "whoever" to include corporations, absent clear legislative intent to the contrary.[286] The court found theft and forgery in business settings to be "[p]articularly apt candidates for corporate criminality."[287] In fact, the Minnesota court even opined in dicta that "there may be instances where the corporation is criminally liable even though the criminal activity has been expressly forbidden."[288]

In *McIlwain School Bus Lines*, a Pennsylvania trial court quashed an information charging the corporate defendant with vehicular homicide.[289] The charge was based on the failure of the corporate defendant to comply with a statutory mandate to install mirrors on the front of school buses so the drivers could see pedestrians in front of the vehicles. The *McIlwain* bus, which struck and killed a six-year-old student who had just exited the bus and was walking across the street in front of the bus when it departed, had no mirror. On appeal by the Commonwealth, the court reversed the order.[290] The court rejected the view that the homicide statute addressed only conduct by natu-

282. 354 N.W.2d 17, 19 (Minn. 1984) (holding that a corporation can be convicted of theft and forgery against an argument that a corporation cannot be convicted of a crime involving specific intent).

283. 423 A.2d 413, 413 (Pa. Super. Ct. 1980) (reversing the trial court's dismissal of an information charging a corporation with homicide by vehicle and rejecting the argument that a corporation cannot commit a homicide).

284. *Christy Pontiac-GMC*, 354 N.W. 2d at 19.

285. *See* ALA. CODE § 13A-1-6 (1994) ("All provisions of this title shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law, including the purposes stated in Section 13A-1-3.")

286. *Christy Pontiac-GMC*, 354 N.W.2d at 19.

287. *Id*.

288. *Id*. at 20. *Cf.* United States v. Hilton Hotels Corp., 467 F.2d 1000, 1007 (9th Cir. 1972) ("[W]e conclude that as a general rule a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent.").

289. 354 N.W.2d 17, 19 (Minn. 1984).

290. *Id*.

ral persons, such as vehicle drivers, and held that the corporation could be prosecuted.[291]

As a result of our legislature's rejection of proposed corporate criminality provisions, corporations cannot be prosecuted under the Code, yet may be criminally liable under other Alabama Code provisions. Recognizing corporate criminality in the criminal code, instead of relying on specific, and sporadic, legislative pronouncements, would allow the state to punish the whole course of criminal conduct by corporations. Such recognition would also provide a sure way to address corporate criminal activity in Alabama, since some corporate officers whose criminal acts affect Alabama may not be within the reach of Alabama courts. In fact, it is conceivable that criminal acts affecting Alabama citizens may go unpunished because the only actor that can be brought to court—the corporation—is protected from prosecution under current law. It seems entirely fair and equitable to make the corporate body available for criminal sanction when the corporate brain—the directors and other higher managers—acts in contravention of the laws of this state.

The issue of corporate criminality and its absence from the Code provides an interesting look at choices made in the enactment of the Code and the wisdom of those choices in retrospect. Whatever direction the idea of corporate criminality takes in Alabama, the issue deserves more critical and thorough consideration to determine whether or not the choices made 25 years ago are still consistent with the purposes and goals of the Criminal Code.

2. Entrapment

Entrapment fared better than corporate criminality in the legislative process. The Proposed Criminal Code addressed both topics.[292] Corporate criminality, as mentioned above, did not survive the legislative process; entrapment did, albeit only temporarily.

Prior to the adoption of the Code, Alabama's law of entrapment was court-made and subjective.[293] Code drafters replaced the subjective test for entrapment with an objective test.[294] The legislature accepted the proposal,

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291. *See id.*

292. *See* PROPOSED CODE, *supra* note 7, §§ 430 (liability of corporations), 650 (entrapment).

293. *See, e.g.*, Miller v. State, 298 So. 2d 633, 633 (Ala. Crim. App. 1974) (applying subjective test).

294. *See* ALA. CODE § 13A-3-31 cmt. (1994).

> [T]he [proposed] section was deemed to differ from Alabama's case law on entrapment because it focused on whether the method of inducement created a substantial risk that the offense would be committed, and the actor's prior criminal record and predisposition to crime were not relevant and not admissible when considering entrapment.

Id. It should be noted that the Commentary confuses the two tests—subjective and objective—when it observes that the proposed section "corresponded to the basic theory applied in the federal courts." *Id.* The test utilized in federal courts was, and is, the subjective test. *See* Sorrells v. United States, 287 U.S. 435, 435 (1932); 2 WAYNE R. LAFAVE, *supra* note 231, § 9.8(b), at 94.

> The majority view is usually referred to as the "subjective approach" although it is also called the federal approach or the *Sherman-Sorrells* doctrine . . . This subjective approach to en-

but the acceptance was short-lived.[295] Even before the provision was to become effective on January 1, 1980, the legislature repealed the provision, thereby retaining the subjective test, which remains the test used in Alabama today.[296]

3. Hate Crimes

The Code barely (and weakly) addresses crimes motivated by hate. First, it declares the right of everyone to be free from threats, intimidation, harassment, and physical harm.[297] It then provides for enhanced punishment of criminal actors who are motivated by the "actual or perceived race, color, religion, national origin, ethnicity, or physical or mental disability."[298] If the crime constitutes a felony and is motivated by hate, the minimum sentence is raised, but not significantly.[299] Despite the increase in the minimum sentence to be imposed, nothing in the statute bars the use of probation, split sentences, or parole. Therefore, the actual difference in sentencing may be nil.

Texas, for the purpose of comparison, raises the range of punishment by one level except for first-degree felonies and Class A misdemeanors.[300] New York has a similar approach.[301] If Alabama had a provision similar to Texas or New York, instead of merely raising the range of punishment for Class C felonies to two-to-ten years rather than one-to-ten years,[302] the statute would raise the range at both ends and the range would be two-to-twenty

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> trapment has been consistently affirmed by a majority of the Supreme Court, and is adhered to by the federal courts as well as a majority of the state courts.

Id. (citations omitted). For a discussion and critique of entrapment in each of its forms, see generally Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389 (2004).

295. *See* ALA. CODE § 13A-3-31 (repealed); 1977 Ala. Acts No. 607, § 650.

> Entrapment is a defense to proscribed conduct that otherwise would be criminal.
>
> (1) Entrapment occurs when a law enforcement agent induces the commission of an offense, in order to obtain evidence for the purpose of criminal prosecution, by methods creating a substantial risk that the offense would be committed by one not otherwise disposed to commit it. Conduct merely affording the actor an opportunity to commit the offense does not constitute entrapment.
>
> (2) In this section "law enforcement agent" includes personnel of federal, state and local law enforcement agencies and any person cooperating with such agency.
>
> (3) The defense provides [sic] by this section is available even though the actor denies commission of the conduct to constitute the offense.

Id.

296. *See* ALA. CODE § 13A-3-31 (1994) ("The Alabama Criminal Code adopts the present case law on entrapment.").

297. § 13A-5-13.

298. § 13A-5-13(b).

299. In the case of Class A felonies, the normal sentencing range of ten years to 99 years or life rises to 15 years to 99 years or life. Class B felonies are punishable by ten years to twenty years instead of two years to twenty years, and Class C felonies are punishable by two years to ten years rather than one year and a day to ten years. *Compare* ALA. CODE § 13A-5-6 (normal felony ranges), *with* § 13A-5-13 (hate crime ranges). Misdemeanors motivated by hate are punished as Class A misdemeanors with a minimum sentence of three months. § 13A-5-13(c)(2).

300. TEX. PENAL CODE ANN. § 12.47 (Vernon 2003).

301. *See* N.Y. PENAL LAW §§ 485.05-485.10 (2005).

302. § 13A-5-13.

years. Similarly, Class B felonies motivated by hate would be punishable by not less than ten years nor more than 99 years or life instead of the present range of ten-to-twenty years.[303] A review committee initially, and the Alabama Legislature ultimately, should decide whether to strengthen the Code's hate-crime section—and, if so, in what way.[304]

4. Assault

Other Code provisions perhaps ripe for review include the family of assault crimes. The Code contains three levels of assaults. Second-degree assault is an aggravated form of assault that, in one variety, protects a particular class of victims, namely police officers, emergency medical personnel, firefighters, and employees of educational institutions.[305] It does not, however, cover security guards or armored car personnel.[306] Whether such coverage has been considered or not is unknown to the author, but other states do extend enhanced protection to such individuals.[307] Additionally, although Alabama law provides some protection to beneficiaries of court-issued protective orders,[308] the Code's assault provisions do not address victims under court protection. Perhaps that too should be considered. Other states have specific provisions for assaults in violation of court-issued protective orders.[309]

V. CONCLUSION

This Article unveils a number of issues in abbreviated form without any attempt to provide answers to issues or solutions to problems. It marks the issues for others to examine. Compared to the common law, which continues to exist and evolve in some jurisdictions, the 25 years of the Code is rather brief. Nevertheless, the passage of time has provided us with ample opportunity to identify shortcomings and needs. The Code has weathered well, but perhaps it is time for reflection and repair.

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303. § 13A-5-13.

304. Without becoming mired in a discussion of sentencing law, it should be noted that the approach used may require jury determination of the motivation of the actor. *See, e.g.,* Blakely v. Washington, 542 U.S. 296 (2004) (holding that the trial court's imposition of a sentence beyond the guideline range based on facts not submitted to the jury or admitted by the defendant violated the the defendant's right to a jury trial); Apprendi v. New Jersey, 530 U.S. 466 (2000) (hate crimes case) (requiring a jury determination of any fact other than a prior conviction used by the judge to impose a sentence beyond the normal statutory maximum).

305. *See* §§ 13A-6-21(a)(4)-(5).

306. *See* § 13A-6-21.

307. *See, e.g.*, TEX. PENAL CODE §§ 22.01-.02 (enhancing penalties for two degrees of assault by one level if the victim is a security officer).

308. *See* ALA. CODE § 30-5-9 (1998) (providing that the violation of a protective order by abusive behavior is punishable as a Class A misdemeanor); § 30-5A-3 (making the violation of family violence protection orders a Class A misdemeanor).

309. *See, e.g.*, TEX. PENAL CODE ANN. § 25.07 (2003).

As stated earlier, this Article generally does not encourage or oppose specific actions on issues raised; rather, it promotes review of the Code. I do not argue that corporate criminal liability should be expanded in the Code, that the year-and-a-day rule in homicide should be abrogated,[310] or that extreme indifference murder should be modified to cover indifference to the life of a single individual as opposed to persons generally.[311] Instead, this Article asserts that after 25 years, it may be time to revisit these and many other issues to ensure that the Code is current and responsive to the needs of Alabama.

In order to address the issues, it is probably preferable to empanel a committee or task force for that purpose. About 25 years ago, the Alabama Law Institute identified the need for a new criminal code, found funding, and appointed Reporters and a drafting committee. After three years of concentrated study of criminal law principles, existing Alabama law, the Model Penal Code and the codes of several other states, the Advisory Committee and Reporters completed the original draft of the Code.[312] The Institute then sent the proposed code to the Alabama Legislature for consideration and adoption. This model could serve as a guide for any review and possible revision process.

The Alabama Law Institute should consider forming a review-and-revision panel to study the Code, to identify either (1) provisions which need either amendment or repeal, or (2) omissions in the existing Code, and draft proposed legislation addressing those needs. That group may decide that only a few housekeeping[313] measures are necessary or it may find compelling needs with regard to some provisions—or lack of provisions—in the Code.

The Alabama Criminal Code is a prodigious product, but it was written in the late 1970s. Times, circumstances, and needs change. I cannot hope to address all of those circumstances and needs in such a short presentation. Suffice it to say that the time is right to review the Code to ensure that it is current and responsive to the needs of Alabama. Otherwise, we are relegated to piecemeal amendment of the Code, which generally does not serve our state well.

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310. This issue is being addressed in a separate article now being written.

311. This issue, too, is being addressed in a separate article already underway.

312. This brief account of the Code project is drawn from the Preface to the Proposed Code, *see supra* note 7, at iv-vi, and the memory of the author, who served as one of the five Reporters.

313. For example, a number of Code revisions include surplus language which could be removed during a revision process. *See, e.g.*, ALA. CODE § 13A-7-23.1(b) (1994) ("[A]nd upon conviction . . . shall be punished as provided by law"); 13A-8-102(d)(1) (1994) ("[P]unishable as provided by law."); § 13A-9-82 (2004) ("[A]nd shall be punished as provided by law."); § 13A-11-60(d) (1994) ("[A]s defined by Section 13A-5-3."); § 13A-12-5(b) (2004) ("[A]nd is punishable as provided by law."); § 13A-12-131 (1994) ("[A]nd shall be punished . . . ."). This sampling of amendments to the Code illustrate some of the shortcomings of ad hoc legislation, namely unnecessary and incongruous provisions.