Comment

Imaginary Intent: The California Supreme Court's Search for a Specific Legislative Intent That Does Not Exist

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EARLY ONE MORNING in September 1866, David Harris went to the polls in San Francisco and voted in the general election for State Senate and Assembly.[1] Several hours and a number of drinks at a local tavern later, Harris returned to the same precinct and attempted to vote again.[2] A gentleman who had been at the polling place earlier warned Harris that he had already voted and would face punishment should he vote again.[3] An inebriated Harris assured the man strongly that he had not done so and took an oath to this affect.[4] He then voted for what he believed was the first time that day.[5] He was arrested and later convicted under a statute forbidding double voting.[6]

At trial, Harris alleged that he did not know at the time that he had already voted and thus had no guilty intent.[7] The statute under which he was charged included neither an explicit knowledge requirement, nor a provision discounting the need for such knowledge.[8] The

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1. People v. Harris, 29 Cal. 678, 679 (1866).
2. *See id.*
3. *See id.*
4. *See id.* at 679–80.
5. *Id.* at 680.
6. *Id.* at 679.
7. *Id.* at 680–81.
8. *See id.* at 680–82.

trial court gave the jury instructions that in order to convict Harris they need not find that he had voted twice knowingly.[9] Harris appealed to the California Supreme Court, saying that the offense included a knowledge requirement.[10]

The California Supreme Court was thus presented with the question at the center of this Comment. Given a statute that neither expressly includes nor excludes an explicit mens rea[11] element, how should the court approach a case in which a defendant asserts that he did not possess guilty knowledge? Should the court base its determination on societal policy concerns, the purpose of the statute in question, or the intent of the Legislature? This Comment begins to address these questions. In doing so, it establishes that the California Supreme Court has adopted an approach to these cases that is out of step with sound legal theory and the nature of law in California. Instead of weighing the policy implications of reading a mens rea requirement into a silent statute, as the court has traditionally done in the past, the court's new and faulty approach entails a quest for legislative intent that simply does not exist.

Part I argues that through two recent cases, *In re Jorge M.*[12] and *In re Jennings*,[13] the California Supreme Court has adopted a framework for approaching silent statute cases that represents a significant departure from well-established case law. This new framework focuses first and foremost on finding the California Legislature's specific intent in drafting the statute.[14] The court's primary tool in this quest is legislative history.[15] The court has expressed the opinion that the legislative history of silent statutes is valuable in determining whether or not the Legislature intended to implicitly include or exclude mens rea requirements from the statute.[16]

This new approach to silent statute analysis is markedly different because in the past the court has considered legislative intent only in passing. Part I discusses how, for over a century, the court primarily based silent statute decisions on judicial policy determinations. Absent

9. *Id.* at 680.

10. *Id.* at 681.

11. Mens rea refers to "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime." BLACK'S LAW DICTIONARY 1006 (8th ed. 2004).

12. 4 P.3d 297 (Cal. 2000).

13. 95 P.3d 906 (Cal. 2004).

14. *See Jennings*, 95 P.3d at 914–17; *Jorge M.*, 4 P.3d at 300–03.

15. *See Jennings*, 95 P.3d at 915–17.

16. *Id.*; *Jorge M.*, 4 P.3d at 301–02.

from the court's recent decisions in *Jorge M.* and *Jennings* is any indication that the California Supreme Court Justices feel that the task of weighing the wisdom of including a mens rea element belongs to them. Indeed, the court appears to have relegated all such power to the Legislature.

The court's search for specific legislative intent is a type of intentionalism. The term intentionalism refers to a foundational framework for deciding cases by uncovering the will of those who passed a particular piece of legislation into law.[17] "Under this view, the Court acts as the enacting legislature's faithful servant, discovering and applying the legislature's original intent."[18] In its strictest form, intentionalism constitutes the process of deriving the actual intent of the legislative body that passed a statute.[19] Because deriving the rationale behind the decisions of each member of the legislature, or at least that of a majority of each house, would be impossible, intentionalism most commonly takes a more conventional form. This includes looking to floor statements by bill sponsors and committee reports.[20]

Competing against intentionalism are other foundational theoretical frameworks, such as textualism and purposivism, as well as theories that less strictly adhere to any one particular legal foundation. In interpreting statutes, courts may choose which theory to rest their hats on.[21]

Part I concludes that the *Jorge M.-Jennings* framework reflects a fundamental shift in California jurisprudence, completing intentionalism's metamorphosis from reasoning thrown into cases as an afterthought into the heart of silent statute interpretation in California.

Part II of this Comment argues that the first two tests of this framework, *Jorge M.* and *Jennings* themselves, resulted in two unconvincing decisions, each of which creates anomalous rules of law.

In Part III, this Comment further argues that the California Supreme Court's decisions in *Jorge M.* and *Jennings* are flawed because the new framework that the court has created to analyze silent statutes requires a search for a specific legislative intent that does not exist. Part III first contends that the court's new approach to silent statutes

17. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325 (1990).

18. *Id.*

19. *See id.* at 326.

20. *See id.* at 326–27.

21. Different legal theories are so numerous that an entire Comment could be devoted to a barebones survey of all of them. As such, a comprehensive list of alternative legal theories is far beyond the scope of this Comment.

is theoretically flawed because the nature of legislative bodies makes it unlikely that any specific legislative intent as to mens rea requirements actually exists. This section next presents several arguments that suggest that in the case of California's silent statutes, circumstances exist that make it particularly unlikely that the legislature actually possessed any specific intent as to the proper mens rea requirement. First, the history of the California Penal Code reveals a legislative deference to the courts in answering mens rea questions left by ambiguous statutes. Indeed, the California Legislature has long desired for the courts to play a traditional common law role. In addition, the structure of the California Penal Code also suggests that the Legislature intends for the courts to play a common law role in interpretation of silent statutes. Finally, the Legislature's established competence in expressly including or excluding mens rea requirements provides a strong indication that when it fails to expressly answer such questions, its intent was, in fact, to defer to the wisdom of the courts. This indicates again that the court has created an analytical framework in which it is most likely searching for a legislative intent that does not exist.

I. *Jorge M.* and *Jennings* Establish an Intentionalist Framework, Completing Intentionalism's Journey from Afterthought Reasoning to the Core of the Court's Analysis in Silent Statute Cases

This section argues that before the California Supreme Court adopted its current doctrine regarding silent statutes, any intentionalist analysis was simply afterthought reasoning, usually thrown into the end of opinions, likely as a ceremonial salute to those who wrote the laws. Recently, however, the court has shifted its course and adopted a framework that primarily relies on the derivation of the Legislature's specific intent in determining the proper mens rea requirement for a given silent statute. Indeed, beginning with *Jorge M.* and then solidified through *Jennings*, the court has made intentionalism the foundation of silent statute analysis.

A. Despite Using Intentionalist Language, the Court's Decisions in Silent Statute Cases Have Historically Rested on Other Grounds, with Legislative Intent as an Afterthought

The California Supreme Court has historically maintained the freedom to decide silent statute cases through a dynamic reasoning

process, relying more on other interpretive tools, rather than strictly adhering to legislative intent.[22] Nevertheless, the court has long used intentionalist language in silent statute cases.[23] Rather than honoring an intentionalist foundation in these cases, the court has generally made reference to legislative intent simply as a kind of ceremonial tip of its cap to the Legislature as the drafters of the laws the court was then interpreting.[24] The rationale used to decide these cases actually includes judicial policy determinations characteristic of a more dynamic approach to statutory interpretation.[25]

An important distinction exists between cases in which courts utilize an intentionalist framework and cases in which courts feign a discovery of legislative intent while actually using other legal reasoning.[26] In the former, the analysis and disposition of cases will revolve around an inquiry designed to derive the intent of the Legislature.[27] In the latter, decisions reached through other means are attributed to the Legislature.[28] Beginning prior to the codification of the California Penal Code and continuing until only recently, the California Supreme Court silent statute cases that refer to legislative intent have consistently fallen into this latter group.[29] Indeed, some silent statute cases make no reference at all to legislative intent.[30]

22. *See generally* People v. Simon, 886 P.2d 1271 (Cal. 1995); People v. Vogel, 299 P.2d 850 (Cal. 1956); People v. Ahart, 159 P. 160 (Cal. 1916).

23. *See Simon*, 886 P.2d at 1287 ("We see no reason, in logic or public policy why the Legislature would intend to apply a higher standard." (quoting People v. Calban, 65 Cal. App. 3d 578, 585 (1976))); *see also Vogel*, 299 P.3d at 854 ("The 'correct and authoritative exposition of Sec. 20' . . . compels the conclusion that guilty knowledge . . . was omitted from section 281 [statute prohibiting bigamy] to reallocate the burden of proof on that issue in a bigamy trail."); *Ahart*, 159 P. at 161 ("[W]hen a criminal statute is . . . open to construction . . . of two permissible constructions [the] one under which the law is valid will be adopted as expressing the intent of the legislative body.").

24. *See generally Simon*, 886 P.2d 1271; *Vogel*, 299 P.2d 850; *Ahart*, 159 P. 160.

25. *See generally Simon*, 886 P.2d 1271; *Vogel*, 299 P.2d 850; *Ahart*, 159 P. 160.

26. *See* Dannye Holley, *Culpability Evaluations in the State Supreme Courts from 1977 to 1999*, 34 AKRON L. REV. 401, 402 n.18 (2001).

> Courts are loath to admit they are, in fact, making culpability evaluations as opposed to the more narrow and traditional judicial function of ascertaining legislative intent with regard to the requisite culpable mental state. But since . . . state legislatures have simply not made culpability evaluations for many objective elements of new or reenacted crimes, searching for such intent is often pretense.

Id.

27. *See, e.g.*, *In re* Jennings, 95 P.3d 906 (Cal. 2004); *In re* Jorge M. 4 P.3d 297 (Cal. 2000).

28. *See* Holley, *supra* note 26, at 401 n.18.

29. *See infra* text accompanying notes 31–54.

30. *See, e.g.*, People v. Hernandez, 393 P.2d 673 (Cal. 1964); People v. McClennegen, 234 P. 91, 101 (Cal. 1925); People v. Harris, 29 Cal. 678 (1866).

For instance, in *People v. Harris*,[31] the court reversed the trial court's decision that no mens rea was required, holding instead that knowledge was indeed an element of the crime.[32] In so holding, the court looked, not to the intent of the Legislature, but rather to "the universal doctrine that to constitute what the law deems a crime there must concur both an evil act and an evil intent."[33] The court found that the prosecution must, therefore, prove knowledge of voting previously in order to secure a conviction.[34]

The court went on to say that, "if it be an act in itself unlawful, the law in the first instance presumes it to have been intended, and proof of the justification or excuse lies on the defendant to overcome this legal and natural presumption."[35] The court did not expand on its reasoning behind this burden shifting process.[36] Nevertheless, its reference to the "natural presumption" that the doing of an act that the law proscribes is done with the intent to do that act, suggests that it was making a policy judgment based on all of the considerations before it, including social mores, that this shift of the burden simply made the most sense, and was most consistent with the principles of criminal law and the interests of the public. Again, the court never mentioned legislative intent.

Some years later, the court addressed another silent statute in *In re Ahart*.[37] The court examined whether an ordinance that prohibited selling alcohol outside of designated areas included knowledge of the character of the place where the liquor was sold as an element of the crime.[38] The *Ahart* court did not make a search for the actual intent of the Legislature the central focus of its analysis.[39] Instead, it relied on precedent and rules of construction, both of which it felt leaned strongly toward the inclusion of a knowledge requirement.[40] In so do-

31. 29 Cal. 678 (1866).
32. *Id.* at 679.
33. *Id.* at 681 (citations omitted).
34. *Id.*
35. *Id.* (citations omitted).
36. *See id.*
37. 159 P. 160 (Cal. 1916).
38. *See id.* at 161. The number of the statute in question was not provided by the court, however it provided that as follows:

> Every person who . . . transports within the city of Covina, spirituous, or vinous, or malt, or mixed, liquors or intoxicating drinks, or vessels for containing the same, to any place, the establishing or keeping of which is prohibited by this ordinance . . . shall be deemed guilty of a misdemeanor.

Id.

39. *See id.*
40. *See id.*

ing, the court did use arguably intentionalist language, stating that "when a criminal statute is . . . open to construction . . . of two permissible constructions [the] one under which the law is valid will be adopted as expressing the intent of the legislative body."[41] Because it believed the law to be invalid without a knowledge requirement, the court found that the statute did include such an element and that a defendant charged under it was entitled to a reasonable mistake of fact defense.[42] The court thus held that the statute was not invalid.[43] While the rule of construction itself was crucial to the court's decision, its lone reference to "the intent of the legislative body" adds nothing to its analysis, nor does it reflect any real probe into what the Legislature intended in drafting the statute.

People v. Vogel,[44] an oft cited silent statute decision from decades after *Ahart*, which also used somewhat intentionalist language, further reinforced that the court, even when speaking as intentionalists, had acted to the contrary.[45] In *Vogel*, the court was presented with the question of whether a charge of bigamy, which had expressly required a knowledge element prior to codification but was codified as a silent statute, required knowledge by the defendant that he was still legally married.[46] The court's holding explicitly parallels *Harris*, stating that the bigamy statute implicitly requires knowledge that he was married, and that a defendant is not guilty if he has a reasonable belief that he was no longer legally married.[47]

In its decision, the court refers often to legislative intention, and even uses legislative history.[48] The court looked at the commissioners' annotation to section 20, finding that the commissioners cited *Harris*

41. *Id.*

42. *Id.* at 162.

43. *See id.* at 161–62.

44. 299 P.2d 850 (Cal. 1956).

45. *Id.* The piece of *Vogel* that has had the greatest influence on subsequent case law came as a footnote justifying its assertion that guilty intent can be excluded "by necessary implication." *Id.* at 853. The court claimed the existence of what later became well known as Public Welfare Offenses. "Under many statutes enacted for the protection of the public health and safety, e.g., traffic and food and drug regulations, criminal sanctions are relied upon even if there is no wrongful intent." *Id* at 853 n.2. The California Penal Code makes no reference to such offenses, and the court cites only to several law review articles as authority for their existence. *Id.* This footnote in *Vogel* has served to continue the silent statute dilemma into an era that has given considerably more weight to California Penal Code sections 20 and 26 than ever before. Indeed, this Comment would likely be superfluous had the statement never been made.

46. *Id.* at 852–53.

47. *See id.* at 852.

48. *See id.* at 853–55.

extensively and suggested that the case gave the proper analytical framework for analysis of the act and intent requirement.[49] Thus, the court derived from the legislative history the general intent behind the enactment of a related statute, rather than the specific intent of the Legislature in the statute before it. This led the California Supreme Court to reason that the omission of intent from the bigamy statute, enacted simultaneously, did not imply the exclusion of a knowledge element, but rather suggested a burden shift to the defendant to prove that he had reasonably believed that his wife had divorced him.[50] Had the court ended its discussion at this point, its decision could appropriately be deemed intentionalist and would have been fairly unconvincing.

The court instead went on to test the inference it had made as to legislative intent through other interpretive tools.[51] The court examined how the statute fit within the greater legal system surrounding it, the social policy consequences of holding people to one of the bigamy statute's provisions without any knowledge requirement, and how to reconcile it with precedent cases. Ultimately, the court found that each was consistent with the court's inference that a knowledge element should be included in the offense.[52]

The court states in this discussion that these factors "make it extremely unlikely that the Legislature meant to include the morally innocent to make sure the guilty did not escape."[53] This argument is prefaced, however, by the statement that "[t]he foregoing construction of sections 281 and 282 [bigamy statutes] is consistent with good sense and justice."[54] Thus, the real message the court expresses seems to be that the Legislature did not likely intend to enact an unjust statute. Thus, the court is not declaring that it has actually found the specific legislative intent of the statute. While framed in intentionalist language, the *Vogel* court takes into account numerous factors, including its own sense of reason and justice that would have little value to an intentionalist court. Until as recently as the middle of the 1900s, the only references to legislative intent were passing afterthoughts, rather than persuasive reasoning used to decide silent statute cases.

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49. *See id.* at 854.
50. *Id.* at 853–54.
51. *Id.* at 854–55.
52. *Id.*
53. *Id.* at 855.
54. *Id.*

In *People v. Simon*,[55] the most recent pre-*Jorge M.* silent statute case, the court used its strongest intentionalist language to date and even attempted to find the Legislature's intent through legislative history.[56] Yet the court made its final judgment only after examining how the statutes in question fit within the broader regulatory scheme within which they were enacted and considering, on its own, the social policy ramifications of the options before it.[57] In *Simon*, a defendant who had been convicted of selling unqualified securities and selling securities by the use of false statements or omissions appealed his conviction based on the argument that knowledge of falsity or the misleading nature of the statement was an element of the offense.[58] The statute in question provided no explicit answer to this question.[59]

Simon's analysis began—for the first time in the California Supreme Court's history of handling silent statutes—with a search for the Legislature's specific intent through use of legislative history.[60] Nevertheless, the court could not find any traditional form of the statute's legislative history.[61] Instead, it could find only the peripheral writings of some of the statute's drafters and the United States Supreme Court's analysis of the legislative history of the federal act after which the California statute was modeled.[62] The court felt the Legislature would surely be aware of this analysis.[63] Thus, the court's attempt to find actual intent of the Legislature through legislative history produced less than compelling results. The court admitted as much stating: "Neither the language and history of section 25540 nor reference to the federal law after which 25401 was patterned resolves this question . . . ."[64]

Acknowledging that the legislative history was not strong enough evidence to decide the case, the court looked to the placement of the statute within the broader legislative structure surrounding it, as well

55. 886 P.2d 1271 (Cal. 1995).

56. *See id.* at 1281–91.

57. *See id.* at 1287–91.

58. *See id.* at 1273–75.

59. *See id.* at 1280; *see also* CAL. CORP. CODE § 25540(a) (West Supp. 2005) ("Any person who willfully violates any provision of this division [including section 25401], or who willfully violates any rule or order under this division, shall upon conviction . . . .") The statute could be violated through willful conduct whether or not the perpetrator had knowledge of the facts that made the act a crime.

60. *See Simon*, 886 P.2d at 1281–85.

61. *See id.* at 1285.

62. *See id.*

63. *See id.*

64. *See id.* at 1282.

as at section 20.[65] The court determined that this structure, coupled with section 20, made it unlikely that legislative intent to create a strict liability offense even existed.[66] The reason for this was that the statutory scheme made the more severe of two tiers of civil penalties for the conduct in question dependant on knowledge, and the court found it "unreasonable . . . to conclude that when the Legislature created the third tier of enforcement, criminal prosecution with sentence to state prison . . . it intended to dispense with any element of knowledge or scienter while permitting a much greater sanction."[67]

Despite the intentionalist language, the court actually incorporated its own social policy judgments to find the solution that it believed was most just. It appeared to the court unjust for one to be punished criminally for conduct that would not be civilly culpable.[68] Language of a court of appeal, cited with approval in *Simon*, suggests as much.[69] Thus, *Simon*'s reference here to the Legislature's intent was merely paying homage to the statutory scheme's authors, similar to those in *Ahart* and *Vogel*.

Thus, the court, throughout its history, has consistently rested its opinions on non-intentionalist grounds when determining whether silent statutes include a mens rea element. This statutory approach never included any mention of the legislative history of the statute as a means of deriving the actual legislative intent until *Simon*, and even then the court found this endeavor fruitless. Any language in these cases indicating a belief that such intent even exists is limited to an intent presumed to be held based upon the best judgments of the court. Intentionalism has rarely taken on a form more significant than ceremonious language thrown into the end of a case. With the new millennium, however, came a new theoretical framework for handling silent statutes in California.

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65. *See id.* at 1287–91.

66. *See id.*

67. *See id.* at 1287.

68. *See id.*

69. *See id.* "We see no reason in logic or public policy why the Legislature would intend to apply a higher standard of criminal culpability—i.e., absolute liability for filing a false affidavit regardless of knowledge of the falsity—to private persons as contrasted with public officials and employees." (quoting People v. Calban, 65 Cal. App. 3d 578, 585 (1976)).

B. *Jorge M.* and *Jennings* Make Intentionalism the Core of Silent Statute Analysis by Relying on the Use of Legislative History to Find the Legislature's Specific Intent

While the prior case law described above reveals that the California Supreme Court had never previously relied on deriving the Legislature's specific intent to decide silent statute cases, *Jorge M.* and *Jennings* changed the judicial landscape. These two cases took a theoretical framework that had been little more than lip service until *Simon* and made it the focus of silent statute analysis.

In *Jorge M.*, a minor had been adjudicated delinquent in juvenile court for possession of an assault weapon in violation of California Penal Code section 12280(b).[70] Section 12280(b) was enacted as part of the Assault Weapon Control Act ("AWCA").[71] Among the questions before the court was whether in order to be convicted under section 12280(b), a silent statute,[72] the offender must have knowledge that he was in possession of a weapon considered to be an assault weapon under the AWCA.[73]

The court framed its ultimate question of first impression as: "Whether section 12280(b) can properly be categorized as a public welfare offense, for which the *Legislature intended* guilt without proof of any scienter."[74] This question in itself reflects an intentionalist foundation, as the court takes for granted that the Legislature indeed had an intention and makes finding that intent the focus of its inquiry. Nevertheless, without more, the court's statement could merely be the same sort of ceremony without substance seen in its earlier cases. The court's reasoning in the case, however, suggests otherwise.

In attempting to find the specific legislative intent, the court looked to a criminal law treatise by LaFave and Scott.[75] The court adopted this treatise's list of seven factors that "courts have commonly taken into account in deciding whether a statute should be construed as a public welfare offense,"[76] as a framework for approaching the si-

70. *In re* Jorge M., 4 P.3d 297, 299 (Cal. 2000); CAL. PENAL CODE § 12880(b) (West 1999).

71. CAL. PENAL CODE §§ 12275–12290 (West 2000).

72. The statute provides in relevant part that "any person who, within this state, possesses any assault weapon, except as provided in this chapter, is guilty of a public offense." *Id.* § 12280(b).

73. *Jorge M.*, 4 P.3d at 297.

74. *Id.* at 301 (emphasis added).

75. WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW 342–44 (1986).

76. *Jorge M.*, 4 P.3d at 301.

lent statute in question.[77] The first factor in this framework with which the court was to determine the Legislature's specific intent was the statute's "legislative history and context."[78] Thus, the court bolstered its intentionalist language with very real intentionalist reasoning.

The court did not delve deeply into the legislative history of section 12280(b), however, because it found that the legislative history of the statute provided "no specific evidence of an intent to include or exclude any particular scienter . . . [or] any mens rea element for a section 12280(b) violation."[79] The court did, however, make clear that such evidence could be used to infer an actual specific legislative intent. Indeed, the court expressly made a declaration that using legislative history to assist in finding this intent is appropriate.[80] The court also framed its entire analysis of the case in terms of the Legislature's actual intention as to mens rea requirements in enacting the statute.[81]

In *Jennings*, the California Supreme Court built upon its decision in *Jorge M.* that it could look at legislative history to determine whether the specific intention of the Legislature was to create a public welfare offense or one requiring a union of act and intent by making this query the centerpiece of its framework.[82] *Jennings* relied on legislative history in a way that no silent statute case in California history had previously done.[83] The case confronted the court with a man convicted, under section 25658(c) of the California Business and Professional Code,[84] of purchasing alcohol for a person under twenty-one who then drove and caused serious injury or death to himself or others.[85] The question in the case was whether the statute required knowledge that the person for whom the man had bought alcohol was

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77. *Id.* Paraphrasing LaFave & Scott, the court listed the seven factors as:

> (1) the legislative history and context; (2) any general provision on mens rea or strict liability crimes; (3) the severity of the punishment provided for the crime; (4) the seriousness of the harm to the public that may be expected to follow from the forbidden conduct; (5) the defendant's opportunity to ascertain the true facts; (6) the difficulty prosecutors would have in proving a mental state for the crime; (7) the number of prosecutions to be expected under the statute.

Id.

78. *Id.*

79. *Id.* at 302–03.

80. *Id.* at 301.

81. *Id.* at 302.

82. *In re* Jennings, 95 P.3d 906, 915–17 (Cal. 2004).

83. *See id.* at 919 (stating that legislative history provided the strongest justification for the court's holding).

84. CAL. BUS. & PROF. CODE § 25658(c) (West Supp. 2005).

85. *See id.* 908–09.

under twenty-one.[86] The court agreed with lower courts that knowledge of age was not an element of a section 25658(c) violation but also held that mistake of fact was in fact an affirmative defense to the crime.[87]

The court's analysis focused heavily on legislative history.[88] Rather than go through each of the seven *Jorge M.* factors, the *Jennings* court disposed of four of the seven, believing that only "three factors . . . the legislative history and context of the statute, the severity of the punishment, and the seriousness of the harm to the public," were relevant.[89] Thus, the court instantly made legislative history one of three, rather than one of seven, categories with which courts should derive legislative intent. In applying these factors, the court began by stating, "First and foremost, the legislative history of section 25658(c) strongly suggests the Legislature intended to impose guilt without a showing the offender knew the age of the person for whom alcohol was purchased."[90] The court examined in depth the legislative history of section 25658(c) and suggested that the history provided a heavy implication that the Legislature intended not to include any mens rea.[91]

These two cases clearly reveal that the court has adopted an intentionalist approach to silent statutes. *Jorge M.* makes the principle focus of inquiry in silent statute cases whether the Legislature in-

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86. *Id.* at 910–11. Section 25658(c) of the California Business and Professional Code provides:

> Any person who violates subdivision (a) by purchasing any alcoholic beverage for . . . a person under the age of 21 years and the person under the age of 21 years thereafter consumes the alcohol and thereby proximately causes great bodily injury or death to himself, herself, or any other person, is guilty of a misdemeanor.

Id. § 25658(c). Subdivision (a) provides: "Except as otherwise provided in subdivision (c), every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor." *Id.* § 25658(c).

87. *Jennings*, 95 P.3d at 919, 922. While the court addressed both the act requirements of section 25658(c) and the parallel issue of the knowledge required to prove a violation of section 25658(a), a lesser included offense, discussion of these elements has been omitted for brevity. It is worth noting, however, that the court refers to the legislative history of section 25658(c) to show that its focus was on more than just "'shoulder tapping,' or asking an adult, often in front of a liquor store, to purchase alcohol for a minor." *Id.* at 912. Also, the court's conclusion that all evidence before it "suggest[s] the Legislature has dispensed with any requirement of knowledge or some criminal intent" for section 25658(a) is phrased in strongly intentionalist language. *Id.* at 915.

88. *See id.* at 915–17.

89. *Id.* at 915.

90. *Id.*

91. *Id.* at 915–17.

tended to make an offense a public welfare offense or one including at least some criminal intent.[92] It also opened the door for the use of legislative history to derive the Legislature's precise intent.

Jennings burst this door wide open by continuing on an intentionalist path and relying primarily on legislative history to reach its conclusion as to what the Legislature's intentions were.[93] The gravity of this decision should not be underestimated. The court used the available legislative history behind section 25658(c) to infer the Legislature's intent and answer a question that the court acknowledged the statute itself did not answer. Further, *Jennings* solidifies intentionalism as the court's preferred approach to silent statutes. Thus, if the use of legislative history to derive the actual intent of the Legislature and intentionalism itself do not rest on solid footing, then both the court's decision in this case and the state of silent statutes in California's substantive criminal law exist in great peril. As the remainder of this Comment shows, this is precisely the case.

Prior to these cases, the California Supreme Court often used intentionalist language, but just as often did not. Of its recorded cases interpreting silent statutes, the court has used intentionalist language in three of them[94] and omitted any reference to a search for legislative intent in three cases.[95] What makes these cases different is that together they establish intentionalism not simply as an approach that the court can shift in and out of at the whim of the justice chosen to write the decision—as seems to have historically been the case[96]—but rather a framework for approaching silent statutes centered around

92. *See In re* Jorge M., 4 P.3d 297, 301 (Cal. 2000).

93. *See Jennings*, 95 P.3d at 915–17.

94. *See* People v. Simon, 886 P.2d 1271, 1287 (Cal. 1995) ("We see no reason in logic or public policy why the Legislature would intend to apply a higher standard." (quoting People v. Calban, 65 Cal. App. 3d 578, 585 (1976))); *see also* People v. Vogel, 299 P.3d 850, 854 (Cal. 1956) ("The 'correct and authoritative exposition of Sec. 20' . . . compels the conclusion that guilty knowledge . . . was omitted from section 281 [statute prohibiting bigamy] to reallocate the burden of proof on that issue in a bigamy trial."); People v. Ahart, 159 P. 160, 161 (Cal. 1916) ("[W]hen a criminal statute is . . . open to construction . . . of two permissible constructions that [the] one under which the law is valid will be adopted as expressing the intent of the legislative body.").

95. *See* People v. Harris, 29 Cal. 678 (1866); *see also* People v. Hernandez, 393 P.2d 673 (Cal. 1964); People v. McClennegen, 234 P. 91, 101 (Cal. 1925) ("Whether a criminal intent or guilty knowledge is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute, in view of its manifest purpose and design.").

96. *See* discussion *infra* Part III for the premise that intentionalism had not previously been the backbone of silent statute cases.

deriving legislative intent. Thus, courts following these decisions in the future as precedent will be forced into an intentionalist box.

II. The Intentionalist Framework Used in *Jorge M.* and *Jennings* Resulted in Unconvincing Decisions That Created Anomalous Law

The initial test of the intentionalist foundation that the California Supreme Court has established through *Jorge M.* and *Jennings* is the two cases themselves. As such, these decisions fail to produce convincing results and bring about legal rules that are anomalous and inconsistent with California substantive criminal law.

The *Jorge M.* court found that there was no compelling evidence in the statute's text or its history to tip the scales in favor or against the implicit inclusion of a mens rea requirement. The court believed that the presumption created by section 20, the difficulty in determining whether a particular weapon falls under the statute's proscriptions, and the severity of punishment for the crime all leaned toward the inclusion of some mens rea requirement. The court reasoned, however, that the grave public concerns at stake, the numerous prosecutions expected, and the difficulty that requiring actual knowledge on the part of defendants would present to prosecutors suggested that "section 12280(b) was not intended to contain such an actual knowledge element."[97] With all the factors being equally balanced, the court held that the prosecution must prove that defendants charged with violations of the statute either knew or negligently failed to know that the weapon had characteristics that subjected it to the regulation by the AWCA.[98]

The decision appears to essentially boil down to the court's finding that, since it could glean nothing from the legislative history of the statute, and since three of the other six factors favoring inclusion of a knowledge requirement and three favored exclusion, the court split the difference and decided that the Legislature must have intended something in between. The court essentially admits as much, stating that "the AWCA has some key characteristics of a public welfare offense, justifying the inference that the Legislature intended guilt to be established by proof of a mental state slightly lower than ordinarily required for criminal liability."[99] In effect, the court concluded that

97. *In re* Jorge M., 4 P.3d 297, 311 (Cal. 2000).

98. *Id.*

99. *Id.* at 311 n.11.

the Legislature intended for the courts to apply a simple negligence standard.

Strikingly, a simple negligence standard had never before been seen in California criminal law.[100] Section 20 has required that crimes are punishable only on the finding of criminal intent or criminal negligence since the codification of the Penal Code in 1872.[101] Public welfare offenses have never required any mens rea.[102] Prior to *Jorge M.*, no middle ground existed. The court held that the Legislature, in its wisdom, saw fit to establish an entirely new standard of criminal liability, out of step with centuries of statutory and jurisprudential precedent, without telling anyone what it was doing. Logically, however, this seems quite unlikely.

The *Jennings* court appeared to appreciate the thin ice upon which *Jorge M.* rested such a monumental holding. By eliminating four of the seven *Jorge M.* factors, the court greatly reduced the likelihood of needing another tie-breaking compromise.[103] This put more pressure on the court, however, to come to a conclusion as to whether the legislative intent favored the inclusion or exclusion of a mens rea requirement. The court's reasoning crumbled under this pressure.

In examining the legislative history, the court noted that Assembly Bill No. 1204,[104] which became section 25658(c), had been amended before the full Assembly to expressly include as a requisite element for imprisonment in state prison under subsection (c) that the offender knew or should reasonably have known that the person the alcohol was purchased for was under twenty-one.[105] The court also noted that, on leaving the Assembly, the bill's Legislative Counsel's Digest stated that such mens rea was required for felony convictions under the statute.[106] Thus, the California Assembly was certainly con-

100. Ronald L. Moore, *The California Supreme Court Adopts a New Test and a Civil Negligence Standard Where a Criminal Statute Lacks an Express Mental Element: The* In re Jorge M. *Case*, 28 W. St. U. L. Rev. 207, 207–08 (2001).

101. Cal. Penal. Code § 20 (West 1999).

102. *See In re* Jorge M., 4 P.3d 297, 301 (Cal. 2000); *see also* People v. Vogel, 299 P.2d 850, 853 (Cal. 1956).

103. While the court stated that only the three factors that it discussed had "substantial application," it seems more likely that these were the only factors the court wanted to include in its discussion. *See In re* Jennings, 95 P.3d 906, 915 (Cal. 2004). Section 20's general provisions seem no less relevant to section 25658(c) than to section 12280(b). Nor do the defendant's ability to uncover the key facts, the prosecutor's challenge in proving that the defendant knew these facts, nor the number of prosecutions expected appear to be any less applicable.

104. S. Amend. to Assem. B. No. 1204, Reg. Sess. (Cal. 1998).

105. *Jennings*, 95 P.3d at 916.

106. *Id.*

cerned that the statute may be overly harsh if applied in certain ways to those without mens rea.

The court then traced the bill as it entered the Senate and pointed out that "Assembly Bill No. 1204 was thereafter amended to delete the felony option together with its intent requirement, leaving section 25658(c) as a misdemeanor provision only, with no explicit intent requirement."[107] It was this version that passed through the Senate and into law after the governor signed it. The *Jennings* court stated that "the obvious inference [was] that in deleting the felony option, with its attached intent requirement, the Legislature intended to leave the new crime a misdemeanor only, with no intent requirement."[108]

The court's reasoning, however, contains a false positive. Simply because the Legislature opted against expressly including a mental state element does not mean that it intended to exclude one. Rather, as is discussed in greater detail in Part III, it is just as likely, if not more likely, to be indicative of legislative deference to the wisdom of the courts in handling questions of appropriate mens rea requirements.

The court compounded its faulty reasoning in attempting to bolster its shaky conclusion through discussion of the context in which the legislation was enacted. The court cited to examples in related statutes that expressly included the requirement that a defendant must "knowingly" do certain acts in order to be convicted and asserts that the Legislature would have done the same with 25658(c) had it intended to include knowledge of age as a requirement.[109] None of these examples the court offered, however, pertained to knowledge of another person's age.[110] In addition, the court failed to examine section 25658(d), part of the *very same statute* as 25658(c), which contains language making it punishable to "knowingly" allow those under twenty-one to drink on the premises whether or not the defendant knew how old they were.[111] This strongly undermines the conclusion reached in *Jennings* and suggests that the Legislature can include mens rea provisions when it wants to. This point too is discussed in Part III.

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107. *Id.* (citing S. Amend. to Assem. B. No. 1204, Reg. Sess. (Cal. 1998)).
108. *Id.* at 917.
109. *See id.*
110. *See id.*
111. CAL. PENAL CODE § 25658(c) (West Supp. 2005) ("Any on-sale licensee who knowingly permits a person under the age of 21 years to consume any alcoholic beverage in the on sale premises, whether or not the licensee has knowledge that the person is under the age of 21 years, is guilty of a misdemeanor.").

While *Jennings*'s reasoning in determining whether or not to include a mens rea element in 25658(c) leaves much to be desired, the court did return to an "either or" standard, approaching 25658(c) as if it either had a mens rea element, or it did not. This at least made the *Jennings*'s conclusion plausible, and had the court stopped there, the decision would not have greatly offended any well-established principles of California criminal law. Nevertheless, it did not.

The court went on to discuss the availability of a mistake of fact defense.[112] It acknowledged that, according to statutory law, and "[a]s a general matter, . . . a mistake of fact defense is not available unless the mistake disproves an element of the offense."[113] Nonetheless, despite the fact that it had just held section 25658(c) to be a public welfare offense that included no mental state element, it held that violators of section 25658(c) must be allowed to raise the mistake of fact as a defense.[114] Again, the court created a rule of law completely anomalous to preexisting California law. The court essentially endorsed a nonsensical scenario in which a defendant may escape criminal punishment by raising an affirmative defense of mistake of fact in order to disprove a mental state element that does not exist.

In each of the first two cases applying a strict intentionalist framework, the court has failed to reach convincing decisions and has torn at the existing fabric of California criminal law with unprecedented substantive holdings.

III. The Use of an Intentionalist Framework in Silent Statute Interpretation Leads the Court in a Search for a Specific Legislative Intent that Does Not Exist

The California Supreme Court's failure to reach compelling decisions in *Jorge M.* and *Jennings* results not from happenstance, but rather from its use of strict intentionalist framework. Indeed, the failures of *Jorge M.* and *Jennings* stem from inherent flaws in applying such a framework to silent statutes, especially in California. This is because the *Jorge M.-Jennings* framework searches for a specific legislative intent that does not exist in silent statutes.

112. In re *Jennings*, 95 P.3d 906, 919–23 (Cal. 2004).

113. *Id.* at 920; *see* CAL. PENAL CODE § 26 (West 1999) (excusing from criminal culpability "[p]ersons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent").

114. *Jennings*, 95 P.3d at 919–23.

A. The Nature of the Legislative Process Makes It Unlikely That the Legislature Has Any Specific Intent as to Mens Rea When It Drafts a Silent Statute

The legislative process is long and complicated. In California, a bill must leap numerous hurdles before it is eventually enacted as a law.[115] California has a bicameral Legislature with an Assembly and a Senate.[116] After it is drafted, a new bill must pass through the Assembly or Senate Rules Committee where it is passed on to one of many policy committees in its house of origin.[117] Once the bill has passed through committee, it is put to the full house for a vote.[118] Both in the policy committee and before the entire house, the bill is subject to amendments brought by various legislators.[119] Once the bill passes through its house of origin, it must go through the identical process in the other house.[120] After the second house has passed the bill, the house of origin must concur on any changes made to it before it is passed into law.[121]

This intricate legislative process makes ascertaining a legitimate, trustworthy intention of the Legislature difficult, if not, impossible. As such, the *Jorge M.-Jennings* framework is vulnerable to attack.

Moreover, the nature of the political process makes it highly unlikely that much of the legislative history available to the court reflects the will of a majority of both houses of the Legislature.[122] *Jennings,*

115. *See generally* SENATE SELECT COMMITTEE ON CITIZEN PARTICIPATION IN GOV'T, THE LEGISLATIVE PROCESS: A CITIZEN'S GUIDE TO PARTICIPATION 11 (1996).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* If the house of origin does not concur with the changes made by the second house, the bill is sent to a bicameral, six-person committee to reach a compromise. *Id.* The bill then goes back to each house for passage. *Id.*

122. *See* Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring) ("An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed. Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."); RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 1–21, 43–45, 69 (1973) (noting that different ambitions and interests direct legislators toward different committees); JOHN D. LEES, THE COMMITTEE SYSTEM OF THE UNITED STATES CONGRESS 98–99 (1967) (describing the fact that congressional committees often do not represent the larger legislative body in either composition or decisions as among the defects of the committee system); Eskridge & Fickey, *supra* note 17, at 327 ("Committee members and bill sponsors are not necessarily representative of the entire Congress, and so it is not necessarily accurate to attribute their statements to the whole body.").

however, makes the use of legislative history paramount in silent statute interpretation. The court's preoccupation with legislative history in attempting to get a definite answer to a highly specific question about a statute is ill-advised. Indeed, Justice Antonin Scalia has expressed this concern, stating that "[i]t is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions."[123]

The court has a highly limited amount of information detailing a statute's legislative history at its disposal.[124] This dearth of material to work from makes it impossible to uncover the intentions of each individual member of the Legislature in voting for or against a bill.[125] At best, the court can simply infer that a majority of the Legislature has the intent that the court derives from the comments of sponsors, committee reports, transcriptions of any hearings held on the matter, and votes on various versions of proposed legislation.[126]

Because of the intricate list of legislative subgroups, it is highly unlikely that there exists any actual specific intention of a majority of both houses of the California Legislature as to any matter that the Legislature has not spoken on expressly.[127] The argument at hand, however, does not depend on this concept. Rather, the argument here stands for the broader premise that intentionalism, as the California Supreme Court has applied it, is always a theoretically flawed foundation.

Reports and comments by legislative committees are some of the most prominent forms of legislative history.[128] Legislators are not assigned to committees in random fashion; they seek out the commit-

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123. Thompson, 484 U.S. at 192 (Scalia, J., concurring).

124. *See* Eskridge & Fickey, *supra* note 17, at 326–27.

125. *See id.*

126. *See id. Jorge M.* and *Jennings* are indicative of this dependence on secondary materials to derive an inferred intent of the Legislature. In *Jennings*, the court looked only to the section 25658(c) as it was originally proposed, comments to the bill that accompanied it into an Assembly committee, and several different successful votes to amend the bill. *In re* Jennings, 95 P.3d 906, 913 (Cal. 2004). In *Jorge M.*, the court examined statements by witnesses called before the Assembly in preparation for the passage of section 12280(b) and changes to the law that came about after them, as well as the legislative statement of purpose to the overarching legislation of which the section was a part. *In re* Jorge M., 98 P.3d 297, 301–02 (Cal. 2000).

127. *See infra* Part III.B addressing several factors making it unlikely that the California Legislature would ever intend to silently include or exclude a mens rea requirement. This particular section of the Comment, however, does not depend on this argument, but rather accepts arguendo that California legislators may at times have this intention.

128. *See* Eskridge & Fickey, *supra* note 17, at 326–27.

tees that will best serve their political interests.[129] Therefore, committees such as the Assembly and Senate Committees on Public Safety are likely to be stacked with members of the Legislature whose legislative districts are concerned heavily with crime.[130] This will likely have an effect on the general disposition of these committees—one that will make the committees' leanings on crime-prevention legislation different from the larger houses of the Legislature.[131] Therefore, any legislative history that comes out of these committees is suspect if being used to infer the actual intent of the Legislature.

In addition, the need for a bill to pass through both houses makes it dangerous to assume the existence of a specific intent held by the whole Legislature based upon the words or actions of members of one house. At best, this information can arguably provide an answer as to what *that* house intended.

The same problems present themselves in the use of comments drafted by the sponsor of a particular bill. Considering all of the shuffling that takes place after a bill's introduction, with multiple committees and multiple houses of the Legislature having worked with it, it defies all reason and logic to suggest that the sponsor's words could be of any value in answering the question of whether the final statute included a knowledge requirement. There is no reason that the assumptions of one member at a bill's inception, no matter how connected to it she may be, should be attributed to the majority of both houses of the Legislature.

A hypothetical example may prove useful in putting these ideas together. Suppose that the California Supreme Court was presented with another silent statute case. Legislative materials gathered by the court revealed the following history:

The sponsor's comments indicate strongly that while she knew clearly what act she wanted to prohibit, she had not envisioned the situation with which the court was presented and had not considered mens rea issues at all, as criminal intent would normally be clear. The bill then goes to the Senate Committee on Public Safety, which, as noted in transcripts of their proceedings, does consider the issue. The Committee members believe that an intent requirement should be required; yet they could not politically afford to do so expressly and sub-

129. *See* FENNO, *supra* note 122, at 1–21, 43–45, 69; LEES, *supra* note 122, at 98–99; Eskridge & Fickey, *supra* note 17, at 326–27.

130. *See* MICHAEL BARONE & GRANT UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 1336 (1988).

131. *See* FENNO, *supra* note 122, at 43–45; LEES, *supra* note 122, at 98–99.

ject themselves to being portrayed as soft on crime. Nonetheless, the Committee believed that the California Supreme Court will construe the statute as requiring mens rea, and it passed the bill to the full Senate completely in tact. The Senate discussed the mens rea issue at length, and a floor vote indicates that there was not sufficient support for an amendment expressly including a knowledge requirement. The bill passes the full Senate as written.

In the Assembly Committee on Public Safety, whose members are all from fairly conservative, "hard on crime" districts, the bill was amended to include a phrase that a defendant could be punished "whether or not he or she had knowledge of facts making the act criminal." The majority of the full Assembly, however, believe that such knowledge is required and vote to amend the statute to omit this phrase and passes the bill as originally offered by the sponsor.

In this example, the sum of the individual actions by the Legislature's subgroups could not reasonably be said to imply any unified specific intent as to whether a mens rea element should be required. The bill's sponsor, the two committees that handled the bill, and the two full houses each had different intentions in acting as they did. The history indicates, for example, that the two full houses had diametrically opposed views. Any court that finds a specific legislative intent to exist in such a situation is clearly engaging in wishful thinking.

Concerns about imperfect and incomplete information, as well as veiled conflicts of particular legislators, lead to the conclusion that legislative power is far too divested to reasonably believe that a single specific legislative intent would ever exist as to an issue not expressly passed upon by the Legislature. The implausibility of such an intent makes intentionalism particularly inappropriate for application in silent statute analysis.

B. The Legislature Intends to Defer to the Courts When It Fails to Include or Exclude Any Mens Rea Requirement

In addition to the general theoretical flaws in the California Supreme Court's intentionalism and use of legislative history to derive the actual intent of the Legislature, there are a number of reasons that the approach is especially inappropriate for use in California. As the history and structure of the California Penal Code reveal, the California Legislature is particularly unlikely to have any genuine specific intent in regards to mens rea when it drafts a silent statute.

1. The History of the California Penal Code Suggests That the California Legislature Did Not Intend to Wrest the Power to Make Mens Rea Determinations from the Courts Through Codification

A probe of the history of the California Penal Code also provides some indication as to why the court has failed to convincingly apply an intentionalist foundation in its handling of silent statutes. Such a query reveals that an intentionalist approach is fundamentally at odds with the nature of the relationship between the Legislature and the courts, a relationship that makes the existence of any specific legislative intent improbable.

At common law, courts commonly acted to fill in gaps in statutes without ever looking to find the Legislature's specific intent as to the gaps.[132] *Harris* presents one such example.[133] If the Legislature drafted a silent statute at common law, it should reasonably have expected that the courts would independently trudge through the legal penumbras. The Legislature's available remedy was to statutorily overrule court decisions with which it disagreed.[134] In such a legislative-judicial relationship, the existence of a specific legislative intent in an area in which a statute is silent is unlikely.

The California Penal Code was first enacted in 1872. It was the result of an effort to codify the existing criminal common law into a single body of law.[135] The codification of the common law was a prominent idea at the close of the 19th century, popularized by Jeremy Bentham.[136] Further, according to one scholar:

> The movement away from the common law and toward a codified system of law was generally motivated by a desire to limit power of judges; California's code was motivated by a more modest goal—it set out simply to organize and memorialize existing common law. Given the code's limited goal, it did little to alter the relationship between the Legislature and the court.[137]

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132. Suzanne Mounts, *Malice Aforethought in California: A History of Legislative Abdication and Judicial Vacillation*, 33 U.S.F. L. Rev. 313, 359 (1999) ("In a common law context, in the face of legislative inaction, the court might act to resolve a particular legal issue.").

133. *See generally* People v. Harris, 29 Cal. 678 (1866).

134. *See* Mounts, *supra* note 132, at 359.

135. *See id.* at 317.

136. *See id.* at 320.

137. *Id.* at 317; *see also* Ralph N. Kleps, *The Revision and Codification of California Statutes 1849–1953*, 42 Cal. L. Rev. 766, 772–73 (1954) (citing statutes empowering the committee that drafted what became the California Code to do so under the premise that the effort was one of compilation, not of codification as it was thought of at the time).

Indeed, just more than a decade after the codification, the California Supreme Court itself acknowledged ambiguity in the newly codified Penal Code and began to interpret it as incomplete without reference to the common law.[138] While origins of the codification movement were more ambitious, New York's Field Penal Code, upon which the California Penal Code was based, "aimed only at producing a comprehensive compilation of existing criminal law, with no attempt to reform or even to simplify the existing law."[139] In other words, the codification itself did not change the role of the court or its relationship with the Legislature.[140] "The Code was not seen as a means of curtailing judicial activity or of radically shifting power to the legislature."[141] Thus, if no subsequent events shifted the roles that the legislature and the courts in relation to one another, the court's role in state government remains the same as it did in 1866 when *Harris* was decided, a role that includes judicial gap-filling of mens rea questions.

History suggests that no such alteration of the legislative-judicial relationship ever occurred. In the 1980s, the Legislature confronted several California Supreme Court decisions that concerned the defenses available to criminal defendants to disprove certain specific mental states of voluntary intoxication.[142] It did so simply by legislatively reversing the Supreme Court's decisions.[143] It answered no larger questions that could have closed gaps in the existing law. Nor did it define terms whose ambiguity left much room for judicial interpretation.[144] Instead, the Legislature again left the courts to toil with these issues. Thus, the relationship between the Legislature and the courts in the handling of mens rea questions remains one of a common law nature to the present day. This nature includes legislative deference to the courts in mens rea questions, not unexpressed legislative intent.

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138. Sharon v. Sharon, 16 P. 345, 350–58 (Cal. 1888).

139. Mounts, *supra* note 132, at 321; *see also* Kleps, *supra* note 137, at 772–73.

140. While such a limited purpose may seem suspect given the great amount of work involved in the codification effort, the effort may well have been part of a larger effort by California to shed its image as an unsophisticated, unorderly, unintellectual state. California was among the first states to codify its code, a move that many felt displayed the capacity for order and intellect lacking in the state's image after the Gold Rush. *See* Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617, 621–25 (1994).

141. Mounts, *supra* note 132, at 322.

142. *See id.* at 353–59.

143. *Id.*

144. *Id.*

2. The California Legislature's Displayed Ability to Include or Exclude Mens Rea Elements Indicates Deference to the Judiciary in Mens Rea Issues

The structure of the California Penal Code confirms an intention for courts to play a role reminiscent of common law times in mens rea decisions. Discussion of mens rea is not absent from the code, and never has been. What is included, however, is incredibly sparse.

In describing the way that courts under the new statutory regime should approach mens rea questions, the Penal Code provides only a general requirement of a "joint operation of act and intent" in section 20[145] and a list of situations under which an act may not be considered criminal in section 26,[146] in part a codification of the *Harris* burden shifting analysis.[147] While section 20 offers strong language requiring criminal intent or criminal negligence for every crime or public offense, the remainder of the Penal Code does not define what either form of mens rea looks like in practice. Neither does the Code define crimes or public offenses. As a purely practical matter, in the absence of any further guidance from the Legislature, the courts are the only branch of government that can resolve these issues in order to decide cases presented to them.

Likewise, while section 26 provides certain situations under which a person cannot be capable of committing a crime, it again provides

145. CAL. PENAL CODE § 20 (West 1999). ("TO CONSTITUTE CRIME THERE MUST BE UNITY OF ACT AND INTENT. In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.").

146. *Id.* § 26 (West 1999):

> All persons are capable of committing crimes except those belonging to the following classes:
>
> One–Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.
>
> Two–Idiots.
>
> Three–Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.
>
> Four–Persons who committed the act charged without being conscious thereof.
>
> Five–Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.
>
> Six–Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.

Id.

147. *See* People v. Vogel, 229 P.2d 850, 853–54 (Cal. 1956).

no indication as to what constitutes a crime.[148] Moreover, section 26 includes no answers to the question of how the burden of proof should be allocated when such defenses are at issue.[149] Again, the courts logically will have to resolve these penumbra issues.

Certainly, the Legislature is not ignorant of the fact that courts will be asked to apply these vague statutory laws regarding mens rea. It follows that the Legislature would not leave to the courts questions that it had an affirmative answer to. The same conclusion is warranted when considering the legislative drafting of silent statutes. One thing that the legislative history detailed in *Jennings* does reveal is that the Legislature is acutely aware of the questions that arise from a decision not to expressly include a mental state provision.[150] When such questions are left unanswered it suggests that the Legislature has made a conscious decision to leave them that way. Therefore, it is counterintuitive to ask whether the Legislature intended to include or exclude a mental state element.

In addition, the Legislature, when it is so inclined, has displayed great proficiency in the art of both including and excluding such elements. The Legislature has exhibited the ability to expressly include mens rea elements in requiring that criminals have knowledge of the criminal nature of gangs they join in order to be punished for gang membership,[151] knowledge that a document is about to be used as evidence to be convicted of destroying evidence,[152] and knowledge that their victim is an elder in order to be found guilty of battery against an elder,[153] among many others. As discussed in Part II, the

148. *See* CAL. PENAL CODE § 26 (West 1999).

149. *See id.*

150. *See In re* Jennings, 95 P.3d 906, 915–17 (Cal. 2004).

151. CAL. PENAL CODE § 186.22(a) (West 1999):

> Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

Id.

152. CAL. PENAL CODE § 135 (West 1999):

> Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor.

Id.

153. CAL. PENAL CODE § 243.25 (West Supp. 2005):

very statutory scheme in question in *Jennings* provides not only another example of the Legislature's ability to expressly include mens rea elements, but also a clear example of its aptitude at expressly excluding such provisions.[154]

This again indicates that there is no specific legislative intent in this area. Far more rational is the belief that the legislative intent in silent statutes is not to include or to exclude mens rea, but simply to throw its hands into the air and ask for the court's assistance. It is thus imprudent to suggest that the failure to expressly include as an element a provision that the defendant knowingly committed an act reflects any intention to exclude such an element. Rather, the fact that the Legislature has displayed in the very same statutory scheme the ability to include or exclude mens rea requirements strongly suggests that while it knew the conduct that it desired to punish, the Legislature could not make a determination as to what the appropriate mental state should be.[155] Instead, it left this decision to be resolved by the courts in their role as gap fillers.

Given this situation, it appears nonsensical to use an approach to statutory interpretation that depends upon the presumption of an affirmative legislative intent. Thus, under yet another litmus test, intentionalism fails to pass muster.

Conclusion

The California Supreme Court's intentionalist approach to silent statute cases is a break from centuries of precedent. It also establishes a foundation that requires California's courts to look for a legislative intent that does not exist, as evidenced by sound legal theory, the court's traditional role, and the displayed capability of the Legislature to express what it means. Continued use of this approach will be devastating for California criminal law.

The court must approach mens rea issues left unanswered by the Legislature with an understanding that they are most likely the first

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> When a battery is committed against the person of an elder or a dependent adult as defined in Section 368, with knowledge that he or she is an elder or a dependent adult, the offense shall be punishable by a fine not to exceed two thousand dollars ($2,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

Id.

154. *See supra* Part II.

155. Again, it bears repeating here that the exclusion of such an element could also indicate that the Legislature relied on section 20's requirement of a union of act and intent.

branch of government to do so. Given the fact of legislative deference, social policy concerns regarding the wisdom of including or excluding mens rea from a silent statute will never be fully considered by any branch of government should the courts pass on the opportunity to interpret outside the context of a search for legislative intent. Yet this is precisely what the intentionalist framework established by *Jorge M.* and *Jennings* forces California courts to do. The California Supreme Court must reverse course and release itself, as well as these lower courts, from the hopeless quest for legislative guidance in an area where none has been provided.

When thus unshackled, the court can develop a framework that draws on its own wisdom in order to tackle silent statute issues. Indeed, many of the factors the court considers may well be those used in *Jorge M.* Under its new framework, however, the court would consider these factors in light of what it determines is the wisest conclusion, as opposed to using them in attempt to figure out what the Legislature was actually thinking.

While this may indeed reek of judicial usurpation of the law-making process, the alternative now utilized by the court is to imagine that intent actually exists and purport to find it. Certainly it is far more productive to acknowledge times in which the Legislature has failed to resolve an issue and charge our brightest jurists with the responsibility to do so to the best of their abilities. Doing so will allow for the court to reach far more convincing and consistent decisions. Further, it will honor society's interest in a criminal system that makes policy decisions only after fully considering the way those decisions affect both public safety and the level of culpability required to punish its citizens. When the court deliberates fully on mens rea issues as they arise, as it has done in the past, the social policy interests in punishment proportional to culpability and a safe community will be in good hands.