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The Elements of a Crime: a Brief Study on *Actus Reus* and *Mens Rea*

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Resumen: En este artículo, y con el objetivo de entender mejor los elementos fundamentales sobre los que se articula el derecho penal de los Estados Unidos de América, me propongo: 1) definir el *actus reus* y la *mens rea*; 2) trazar su genealogía histórica y su transformación, especialmente por lo que a la *mens rea* se refiere; 3) lo anterior se completa con un breve comentario de los principales casos legales que han ido conformando la *mens rea* tal y como se conoce actualmente.
Palabras Clave: derecho penal; *actus reus*; *mens rea*; case law; common law; Model Penal Code.

Abstract: In this essay, and with the purpose of better understanding the fundamental elements on which the U.S. criminal law is based, I propose, mainly: 1) to define *actus reus* and *mens rea*; 2) to trace their genealogy and historical evolution, especially as far as *men rea is* concerned; 3) the above will be completed with a brief comment on legal cases that were once very important in relation to *mens rea*.
Keywords: Criminal law; *actus reus*; *mens rea*; case law; common law; Model Penal Code.

1. Introduction

The two essential elements of any crime, in addition to the necessary concurrence between them, as will be discussed below, are the so-called *actus reus* and *mens rea*. In this regard, a notable scholar like Eugene J. Chessney wrote in 1939 through "The Concept of *Mens Rea* in Criminal Law," that:

> The essence of criminal law has been said to lie in the maxim 'actus non facit reum nisi mens sit rea.' " Bishop writes: 'There can be no crime large or small, without an evil mind. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist.'" (627)

Therefore, and with the purpose of better understanding these fundamental elements on which the criminal law is based, in this essay I propose, mainly: 1) to define *actus reus* and *mens rea*; 2) to trace their genealogy and historical evolution, especially as far as *men rea is* concerned; 3) the above will be completed with a brief comment on legal cases that were once very important in relation to *mens rea*.

2. Definitions

Given that it is the basis of the criminal system of the law of the United States of America, the articles that open the first part of the "General Provisions" of the Model Penal Code, published in 1962 by the American Law Institute and –approximately adapted by the 70% of jurisdictions, despite the fact that none of them do so in their entirety–, deal with the above-mentioned *actus reus* (that is, the objective elements of a crime) and *mens rea* (the elements of guilt); we will here study then with greater detail.

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2.1. *Actus reus*

The importance of *actus reus* is paramount, since, for a person to be found guilty of a crime – understood as explained in *Gilbert Law Summaries*. *Criminal Law*, "an act or omission prohibited by law for the protection of the public, the violation of which is prosecuted by the state and punishable by fine, incarceration, and / or other restriction of liberty" (V)–, it must be proven beyond reasonable doubt that an incriminating act existed, given that the person judged deliberately participated in an act prohibited by law; participation levels may vary, such as, for example, the role of co-conspirator.

The name *actus reus* comes from Latin etymology that combines actus ("act") and reus ("guilty"), which eventually formed the compound concept composed of *actus reus*, in English "guilty act." It is a concept that encompasses only a century of history and as such, since until the beginning of the XX century it had only been used within American jurisprudence, but not within its doctrinal system, so, as Joshua Dressler points out in *Understanding Criminal Law*, there is still no single widely accepted definition of the concept (85). In fact, this has led some authors, such as Douglas N. Husak in "Rethinking the Act Requirement," to claim that, beyond the name *per se*, "the single matter on which [penal theorists] are virtually unanimous is that there is an act requirement in the criminal law." *Actus reus* is thus understood as documented in *Gilbert Law Summaries*. *Criminal Law* as: "[a] n affirmative [voluntary] act, or occasionally an omission or failure to act, is necessary for the constitution of a crime. Mere thoughts are not enough" (VIII) (for example, writing in a personal journal, "I want to kill my co-worker, " does not constitute, *per se*, any type of crime). These elements are composed of attendant circumstances, of a social harm and of a causation, which, in turn, can be a cause in fact (or actual cause), that is, "[t]hat particular cause which produces an event and without which the event would not have occurred" (*Black's Law Dictionary* 201), or a proximate cause (or cause in law), but, which, in general terms, can be defined as: "[t]hat which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred" (*Black's Law Dictionary* 1103). An example would be: James walked into a bank, pulled out a gun and shot the cashier, killing him. Here James would be charged with murder because he performed a voluntary act, "pull out a gun," whose shot led to the death of the cashier ("proximate cause").

With regard to the act, Douglas Husak has referred to the need to reach a consensus about what an act is and what constitutes an act, as well as the realms of application. With this, and despite the disparity of opinions and legal interpretations in this regard, it has been generally established that in order for an act to be typified, a voluntary bodily or muscular movement is needed –that is, some degree of strength–.

The above takes us to the point of the voluntary act, as it has been established in the Model Penal Code § 2.01 (1) and 2.01 (2); in spite of, again, the different interpretations in this regard and of the fact that, once again, jurisdictions vary, about what there is a certain unanimity is in the fact that the sense of "voluntary" indicates that, in effect, this voluntariness has resulted in a bodily or muscular movement that has been derived from the voluntary force that has been applied to it. In other words, a person who, for example, unfortunately suffers from Parkinson's, his muscle spasms, reflect a problem at the level of the nervous system motivated, among other reasons, by the death and neuronal degeneration of the people who suffer from it, and thus, this movement cannot be considered under any circumstances or precept as a voluntary act. Consequently, they lack any criminal responsibility that may derive directly from such bodily movements.

What is also important to point out here is that both the *actus reus* and the *mens rea* must concur –that is, occur at the same time– at the time of the act –or their omission–; yet this is still not enough, since the mental state must also coincide with the conduct of the actor or author of the crime. The idea behind what we call concurrence is that nobody should be convicted of a different or greater damage than that reflected in the mental state of the actor or author of the crime. However, jurisdictions vary in this regard as Wayne LaFabe explains in *Principles of Criminal Law* (8). The rule generally states that there are two types of concurrence required that have to do with the *mens rea*: 1) the one that exists between the mental state and the act; 2) the one between the mental state and the harmful result; the issue of failure or omission to act deserves separate consideration, but, in any case, an element of concurrence is still required in these cases. For example: a wife and her husband are sailing in the sea; the wife involuntarily pushes her husband, who falls into the water; the wife knows that he doesn't know anything, and even though she is an expert swimmer – a previous 400m freestyle Olympic champion— and it would be no risk to throw herself into the water to save her husband, she decides not to do so or call anyone for help, since, for a moment, she considers that she would be better off without him; as a consequence, her husband drowns, dying at that moment. As a consequence, she is guilty of murder, since, for even a brief moment, she had that dark desire to see her husband dead, thinking that she would be better off without him, since, and simultaneously, she did not offer her help to him, breaching the duty to act after she created the danger that ended-up causing his very death. This duty is understood here in the sense to which John H. Scheid in "Affirmative Duty to Act in Emergency Situations-The Return of the Good Samaritan" refers to when he states that:

> The duty [to aid] must be owing from the defendant to the plaintiff, otherwise there can be no negligence … and the duty must be owing the plaintiff in an individual capacity, and not merely as one of the general public.
> This excludes from actionable negligence all failures to observe the obligations imposed by charity, gratitude, generosity, and the kindred virtues. (2)

In fact, in *Jones v. United States*, it is established that a person can be found guilty of murder if the duty of care to act existed:

> There are at least four situations in which the failure to act may constitute a breach of legal duty. One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another, and so secluded the helpless person as to prevent others for rendering aid. [2]

The truth is that the treatment of the subject does not differ substantially from what was established by common law.

In conclusion, in the hypothetical example mentioned above, what does not fit the slightest doubt is that she, the wife, is guilty of murder, understood as a "[t]the

[2] *Jones v. United States*, 529 U.S. 848, 120 S. Ct. 1904, 146 L. Ed. 2d 902, 2000 U.S. LEXIS 3426. Qtd. Luis Guillermo Fernández Budajir, "Aproximación al concepto de *Willfull blindness* y su tratamiento en *Criminal Law*," Diss. Universitat de Barcelona, 2018. p. 73.

unlawful killing of a human being by another with malice aforethought, either express or implied" (*Black's Law Dictionary* 918). This last element ("Malice Aforethought") is the necessary *mens rea* so that the elements that typify this crime are satisfied. There exists, therefore, when the defendant has a "guilty mind; a guilty or wrongful purpose; a criminal intent" (*Black's Law Dictionary* 889).

This leads us to the last element to consider for the *actus reus*, which is none other than that of social harm, derived from harmful conduct. In spite of, as was previously discussed, there are discrepancies in this regard, what cannot be ignored is that, in general terms, the social harm done has been considered as an essential element of every crime. However, there is authority and juridical opinions in this regard that disagree; in such cases, they consider and penalize behaviors that do not have to lead to social harm. And, as if this were not enough, a whole series of crimes that are characterized as being *malum in se* are also separated from this norm. *Malum in se* is the Latin expression for the English equivalent of "wrong in itself" which also deviate from this norm. In other words, something considered morally wrong, whether or not there is a legal principle that prohibits a particular behavior, and therefore the written law characterized it as a crime; basically, what happens is that this "wrong in itself" violates some aprioristic ethical and moral principles in which we live by as a society and culture (e.g. monkfish, murder, etc.).

2.2. *Mens rea*

In a general sense, and as noted earlier, the concept of *mens sea*–or "guilty state of mind," is the other necessary requirement, along with the *actus reus* and the concurrence between the two, so that a criminal liability can be spoken of –Or responsability; I will not enter here, for obvious limitations of space and for escaping the objectives of this work, on issues that cover the scope of criminal liability, such as, for example, complicity in the crime, vicarious liability.

An example of *mens rea* would be the following:

> John thought about the fastest way to commit a robbery of a bank and what gun he should use. Some days after giving some thought, he walked into this particular bank he had in mind and had studied, pulled out a very precise 9 mm Parabellum gun, shot the cashier, and, as a result, he dies.

Certainly, in the previous example a "guilty state of the mind" is noticed when, for example, it is stated that "after giving some thought," thus *mens rea* is present. However, there is a possibility that for certain crimes there is no need for the existence of *mens rea*; I mean, of course, the strict liability crimes, understood as those that confer an inherent responsibility for the damages caused by the manufacture or use of equipment or materials that are dangerous per se (e.g. certain chemicals used for irrigation), together with the possession of dangerous animals, which excludes, for example, and as a rule, dogs and cats, although this does not include the general rule of "every dog gets one free bite." In these cases it is not necessary that the owner of such non-domestic animals has performed any negligent conduct, since it is not a requirement to be charged with a crime related to strict liability crimes.

The strict liability crimes lead us to the issue of intent, where one must distinguish between general intent vs. specific intent; while for strict liability crimes, as we have seen, the "intent" element is not necessary, it is necessary for crimes classified as "general intent" –when a person seeks to commit an act prohibited by law, being the performance of this act sufficient to charge the agent of the action–, "specific intent" –when a person intends to cause precise consequences with his

actions–, and those who simply require negligence or recklessness –or willful blindness–. It is true that, in this regard, and although under common law "ignorance of the law is no excuse" can be used as a general rule, it cannot be ignored that "ignorance is not a state of mind in the sense in which sanity and insanity are. When the mind is ignorant of a fact, its condition still remains sound; the power of thinking, or judging, or willing, is just as complete before communication of the fact that after … Culpable ignorance is that which results from a failure to exercise ordinary care to acquire knowledge, and knowledge which could be acquired by the exercise of ordinary care is by law imputed to the person and he is held to have constructive knowledge..." (*Black's Law Dictionary* 672). Let's look at it from a specific example:

> Jesse, a businessman parked his car and went into an office building to work. Around midday, a woman was seen forcing a door to get into the car, she removed items from the glove compartment and then left. The receptionist of the office building who saw the whole thing reported the incident to the police. When the woman was found, they realized she was a visiting relative of Jesse and had come to the car to get medicine she had forgotten.

The "Defense of Mistake of Law," can be considered when one refers to *mens rea*, especially when considering guilt; in the Model Penal Code, guilt that is determined by *mens rea* distinguishes between different degrees of reprehensibility when assessing a crime: purpose (same as intent), knowledge, recklessness and negligence and that came to simplify the long list of concepts that, for these four categories, existed within the common law and that, with the formulation of the Model Penal Code were simplified in the following ways as included in the *Legal Information Institute*:

1) Acting purposely (this is the same as the intent) refers to the fact that "[t]he defendant had an underlying conscious object to act;" it is without a doubt the most important and in it is the foundation of *mens rea*, so that most crimes, given the breadth of the semantic field of intent, perhaps it is most appropriate to typify it as the criminal intent in order to reduce its complex semantics and link it directly to the mental state required to carry out a crime. In a more general sense, the intent includes other elements of guilt, such as the act of "acting knowingly."

2) acting knowingly indicates that "[t]he defendant is practically certain that the conduct will cause a particular result;" for example, when a shooter, such as the one from 2017 in Las Vegas, in which 58 people died and another 422 were wounded, the shooter, Stephen Paddock, even if he had not intended to kill all these people – an intent which he did have, given his behavior and actions—the truth is that at the very moment in which he took the weapon and aimed at the multitude, he knew (he had the knowledge) that his shots would fall upon different human beings.

3) acting recklessly is when "[t]he defendant consciously disregarded a substantial and unjustified risk;" such as, for example, when the actions of one person harm another, such as when someone drives recklessly and at a very high speed, which can end up causing a fatal accident; and

4) unlike, from reckless disregard, acting negligently alludes to the fact that "[t] he defendant was not aware of the risk, but should have been aware of the risk."

The other possible defenses should be explained separately, such as the lack of mental capacity or acquittal in spite of proven *mens rea*, such as self-defense, but this escapes the objectives of this work, leaving it simply noted here without further discussion.

2.2.1. Historical Background of the *Mens Rea*: from Common Law to Modal Penal Code

Although as Eugene J. Chesney very well explained in the "Concept of *Mens Rea* in the Criminal Law," "the origins of a concept such as that of *mens rea* must be sought both in Roman law (the main reference would be the speech of the great challenger and Roman speaker Marco Tulio Cicero, in his celebrated *Pro Tulio –On behalf of Tullius–*, 22,51) as, and mainly, in the canon law, especially with the changing notion of sin, given that one should take into account that its cultural construction has been changing over the centuries and with social development. Separate consideration should also be given to the influence of the Laws of Henry I as explained by John Henry Merryman in "La tradición jurídica romano-canónica" and Marta Morineau in "Una introducción al Common Law."

Within common law, understood as "[t]he body of law that developed over many years in England based on court decisions and custom, as comparted to written statutes (codifications of the law)" (*Nolo's Plain English Law Dictionary* 78) –that is, judge-made law, mostly from before 1900– in which existed a clear division between *actus reus* and *mens rea*, especially as far as its denomination is concerned, the most remarkable thing is that of the twelve mental states that satisfied the elements to prove the *mens rea*, in the Model Penal Code they are reduced to four as explained by Herbert Wechsler in "On Culpability and Crime: The Treatment of Mens Rea in the Model Penal Code": purpose, knowledge, recklessness, and negligence (24-41). In addition to this, another of the greatest achievements was that in the Model Penal Code the need to prove an evil mental state was eliminated, so it is now only necessary to prove the author's conscience at the time of committing the crime through the concurrence between *actus reus* and *mens rea*. Except for this, there are few other differences between the treatment of both elements of the crime between the common law and the Model Criminal Code. However, it is worth doing a brief historical review of the conceptualization of *mens rea*, as it has undergone the most changes.

In this way we arrive at the end of the 19th century and early last century. Without going into more detail, and after almost a century of "American complacency in matters of *mens rea*," as explained by Gerhard O. W. Mueller himself in "On Common Law *Mens Rea*" only altered by the facts described above, there were two cases that marked a change in this regard; I mean *Morissette v. United States*[3] and *Lambert v. California*[4] *(*Mueller 1043).

In *Morissette v. United States* "Morissette (D) discovered a number of spent military shell casings while deer hunting in an area marked 'Danger-Keep Out-Boming Range.' Seeing them merely dumped in heaps, he thought they had been abandoned. He thereupon loaded three tons of them on a truck, took them to a farm

[3] Morissette v. United States - 342 U.S. 246, 72 S. Ct. 240 (1952).
[4] *Lambert v. California* , 355 U.S. 225, 78 S. Ct. 240 (1957).

where he flattened them with a tractor, and then finally took them to a nearby town where he sold them for scrap for $84. He was charged under a federal statute that makes knowing conversion of government property a crime. Previous decisions had pointed out the right of the government to regulate its property on a strict liability basis. As a result, when Morrissette (D) attempted to prove that he had no intent to convert the scrap unlawfully because he felt it had been abandoned, his offer was refused by the trial court stating, ´The question in intent is whether or not he intended to take the property.' In other words, no *mens rea* scienter need be shown to establish felonious intent. His conviction was affirmed subsequently. He appealed to the United States Supreme Court.

As a result, it was established that *malum in se* crimes must include the element of *mens rea*. Additionally, it is not possible to have a statutory strict liability version of such crimes. In other words, the Supreme Court established that there two elements must be present at the same time: an evil-meaning mind and its outward expression or action. This concurrence, set a precedent, in addition, for future decisions in different jurisdictions, which, from that moment on, the *mens rea* became an indispensable requirement for the perpetuation of a crime.

In *Lambert v. California*, a convicted felon in California was defined by a city ordinance as a person who had committed a felonious act either in California or in any other state; if committed outside of California, the crime would have to be considered a felony in California.

Another ordinance required any convicted person who stayed more than five days in Los Angeles or who had visited Los Angeles more than five times within a 30-day period, to register with the Chief of Police; failure to register was a continuing offense, with each day's failure to register treated as a separate offense. Lambert (D) was arrested on suspicion of another crime and was charged with violating the registration statute. The rule of law derived from the holding and decision was that only a defendant who was cognizant of a duty established by a statue and the consequences of failing to comply with it, could then be punished for the decision made. In other words, if a defendant was unaware of the law then the person could not be held accountable for its application.

3. Conclusion

To summarize, in the preceding pages I have addressed two fundamental elements of the criminal system of the United States of America: the *actus reus* and the *mens rea*; after offering its definitions, elements and genealogy within the legal system in which it is inserted, thus differentiating between the common law and the Model Penal Code. I have also referred to several cases that are considered absolutely indispensable when it comes to understanding how these concepts have changed over the years; yet, as noted, these changes have been more about their own denominations than about the contents of each element itself. Similarly, throughout the preceding pages, I have referred to the relationship between *actus reus* and *mens rea* with other legal aspects of the American system. The first and last purpose of these pages, however, was none other than to establish and deepen the knowledge of these two pillars of the criminal system of American law. It is for the future to make a comparative study of these elements with that of other countries that follow other legal traditions, which I think would be very interesting, and more at a time when the profile of the legal professional is changing rapidly, thus adapting to the global world in which we live.

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