

# PROFESSOR HALL AND THE GHOSTLY MENS REA

By PHILIP MULLOCK\*

## A. Introduction.

In his discussion of *mens rea*, Professor Jerome Hall informs us that "More recently the perennial issues have been revived by Professor Gilbert Ryle who seeks to banish the 'Ghost in the Machine'<sup>1</sup> and substitute the logical implications of certain propositions, which resemble criminal pleas, for the ancient 'myths'. Such iconoclasm, however, finds little favour among philosophers who are unwilling to surrender the badge of their vocation; and this seems, also, the inevitable position of those who, dealing with legally significant action, can find criminality or one crime rather than another only by reference to different states of mind."<sup>2</sup> From all of which the (philosophically) lay man might justifiably conclude that at best Ryle's work is trivial and at worst not worthy to be called philosophizing. These are serious charges. And whether aware of these charges or not, it is unlikely that Professor Ryle will take the trouble to defend himself. Nevertheless he is entitled to his day in court. And so, in the interests of fair play I shall now try, though not without some misgivings as to my competence, to show not that the application of Ryle's thesis will presto dissolve the problems clouding *mens rea* (though this may indeed be the case) but simply that what he has to say is not trivial, is not mere "verbosophy" and is worthy of consideration on its merits as a possible tool to aid in resolving the "perennial issues". Philosophy may well be, in Ryle's epigram, "the replacement of category-habits by category-disciplines".<sup>3</sup>

## B. The General Doctrine: *actus non est reus nisi mens sit rea*.<sup>4</sup>

Criminal responsibility is generally said to rest on the twin pillars of *mens rea* and voluntary conduct. *Mens rea* in turn is said to consist

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1. Hall is referring to THE CONCEPT OF MIND (1949) by Gilbert Ryle, Waynflete Professor of Metaphysical Philosophy in the University of Oxford.
2. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 105-106 (2d ed. 1960). As authority for the second sentence. Hall refers (note 5 at p. 106) to "several papers in 48 J. of Philos. 257-301 (1951)."
3. Ryle, *op. cit. supra* note 1, at 8.
4. Hall's discussion of *mens rea* takes up four chapters, pp. 70-211. The origin of the maxim is dealt with at pp. 77-83.

of knowledge of circumstances and foresight of consequences. It is intended to connote a state of mind, variously described as "evil", "culpable", "guilty", "blameworthy" or alternatively as "criminal intent", without which a harm done, cannot amount to a true crime.<sup>5</sup> Professor Hall expresses this duality of criminal liability by stating, "In sum, *mens rea* includes the state of knowing or believing, with reference to the material facts and, also, the internal effort of intention, while criminal conduct is *mens rea* manifested by a further effort evidenced in the production of a penal harm."<sup>6</sup> In other words, there are two basic elements involved in a true crime; one is mental, internal, inner; the other is physical, external, outer. To commit a true crime is not to do one thing, *e.g.*, behave in a certain way, it is to do two things of which the one (mental element) is the (alleged) cause of the other (physical effect). Again to quote Professor Hall, "In sum, *mens rea* includes relevant cognition, *i.e.*, knowledge of the material facts, and an internal effort, 'movement of the will;' and the additionally required manifested effort ('act') must be established by relevant evidence, different from and beyond that which establishes the *mens rea*."<sup>7</sup> Clearly then, if A commits a true crime he has done two things and not one. Yet Professor Ryle has had the temerity to assert that the intelligent execution of an operation embodies one thing and not two. And if what he asserts to be the case is indeed the case then something must be amiss with legal theory. So let us without further ado examine his thesis.

### C. *The Concept of Mind According to Professor Ryle.*

Philosophy cannot, of course, be studied in paraphrase or precis. A satisfactory understanding of Ryle's work can be obtained only from his writings.<sup>8</sup> No attempt is made here to provide a second-best to this understanding but rather to state the main points of his thesis as it relates or may relate to the "perennial issues" and perhaps give to those whom Professor Hall may have deterred at least some desire to dip in the lucid pools of Ryle's prose. But first a word of history. Philosophers in England during the interwar years, dominated by

5. Generally, see J. W. C. TURNER, *KENNEY'S OUTLINES OF CRIMINAL LAW* 13-40 (17th ed. 1958); GLANVILLE WILLIAMS, *CRIMINAL LAW, THE GENERAL PART* 28-174 (1953); PERKINS, *CRIMINAL LAW* 650-728 (1957).

6. Hall, *op. cit. supra* note 2 at 179.

7. *Id.* at 183.

8. *E.g.*, PHILOSOPHICAL ARGUMENTS (1945); *THE CONCEPT OF MIND* (1949); *Systematically Misleading Expressions*, *ESSAYS ON LANGUAGE AND LOGIC* (Flew ed. 1951); *DILEMMAS* (1954); *A PUZZLING ELEMENT IN THE NOTION OF THINKING* (1958).

the Cambridge school,<sup>9</sup> were to a considerable extent exercised in reductive analysis. This reductivism was the somewhat inevitable offspring of logical atomism married to the empiricist tradition. The search was for a perfect, truth-functional language whose structure would "picture" that of those simples, the basic or atomic facts of sense-experience which alone constituted "reality". Anything at all that could be said about the world must be said in or must be a truth-function of atomic propositions corresponding to or picturing the structure of atomic facts.<sup>10</sup>

The first blow for Oxford was struck by Gilbert Ryle.<sup>11</sup> "I cannot credit," he wrote, ". . . that what makes an expression formally proper to a fact is some real and non-conventional one - one relation between the composition of the expression and that of the fact. For I do not see how a fact or state of affairs can be deemed like or even unlike in structure a sentence, gesture or diagram. For a fact is not a collection—even an arranged collection—of bits in the way in which a sentence is an arranged collection of noises or a map an arranged collection of scratches."<sup>12</sup> Logical atomism and its reductive analysis lingered on. But gradually the emphasis veered from the search for knowledge of new facts to new knowledge of facts; from the meaning or analysis of statements to their uses or jobs. Every statement has its own logic. There is no single task which all sentences perform; language has many tasks and many levels. The approach now is to attempt to solve (dissolve) each problem as it arises by what methods can be devised rather than to approach them with some preconceived program. There is no longer any such thing as reductive analysis: nothing can be reduced to anything else by philosophers. Having laid the foundation we may now ask the question: What is Professor Ryle's concept of mind? It boils down (I will not say can be reduced) to this.<sup>13</sup>

A commonly held theory formulated amongst others by Descartes and dubbed the "official doctrine" by Ryle, holds that a human being is composed of two parts, mind and body. The latter is material—visible, audible, touchable, tasteable and smellable; the former is

9. Russell, Moore, Wittgenstein, Ramsey & Wisdom.

10. See generally, URMSON, *PHILOSOPHICAL ANALYSIS* (1958); PASSMORE, *100 YEARS OF PHILOSOPHY* (1957); WARNOCK, *PHILOSOPHY SINCE 1900* (1958).

11. At the same time Ayer was forcefully expounding the Logical Positivism of the Vienna Circle. See LANGUAGE, TRUTH AND LOGIC (1936); *THE FOUNDATIONS OF EMPIRICAL KNOWLEDGE* (1940).

12. *Systematically Misleading Expressions*, *ESSAYS ON LANGUAGE AND LOGIC* (Flew ed. 1951).

13. In order to convey the force of Ryle's argument and the lucidity of his exposition, I have endeavored, insofar as precis will permit, to let the defendant tell his own story, in his own words, in his inimitable style.

spiritual—invisible, inaudible, untouchable, untasteable and unsmellable. The body belongs to the physical world—external, outer, public, in space and time and composed of matter; mind belongs to the mental world—internal, inner, private, in time but not in space and composed of consciousness. This bifurcation of the two lives and the two worlds presents a notorious theoretical difficulty and subsumes a philosophical assumption. Even though “inner” and “outer” are construed metaphorically, the transactions *between* mind and body remain a mystery since by definition they can belong to neither.<sup>14</sup> A person is directly and authentically seized of the present state and workings of his own mind; but he has no direct access to the events of the inner life of another. At most he can draw analogies from bodily movements similar to his own to mental workings similar to his own. But this can never be corroborated by observation. Hence it is often concluded by the adherent of the official doctrine that there do not exist minds other than his own. Even if he rebels against this solipsism, he can never claim to have discovered the characteristics of other minds or what they do or undergo. Only our bodies can meet; our minds remain in absolute solitude—ghosts in bodily machines; insulated fields comprising the mental world.

It follows from the official doctrine, says Ryle, that mental conduct concepts such as knowing, believing, intending, etc., when used to describe intelligent performances by others, must denote special episodes in their (to us) secret, inner histories. Only their own privileged access to this occult stream of consciousness, in direct awareness and introspection, can provide authentic testimony that these mental conduct verbs are correctly or incorrectly applied.<sup>15</sup> Yet we do know how to make such comments, make them with general correctness and correct them when they turn out to be confused or mistaken. The official doctrine, however, would entail that there could be no regular or effective use of these mental-conduct concepts in our descriptions of, and prescriptions for, other people's minds. And this is because it rests on what Ryle calls a category - mistake.<sup>16</sup> John Doe may be a

14. For an interesting historical discussion of the problem, see BURRT, *METAPHYSICAL FOUNDATIONS OF MODERN SCIENCE* (1932).

15. This corollary to the official doctrine is often described by Ryle as the “intellectualist legend”.

16. The “category-mistake” was first articulated by Ryle in his article on *Systematically Misleading Expressions*: see note 8 *supra*. A statement is systematically misleading if it is of such syntactical form that it is improper to the facts recorded and proper to facts of another logical form than the facts recorded. For instance, quasi-ontological statements such as “x exists” or “x does not exist” do not assert or deny that a given subject of attributes, x, has the attribute of existing, but do assert or deny the attribute of being x-ish or being an x of something not named in the statement. Grammatically, we may

relative, a friend, an enemy or a stranger to Richard Roe; but he cannot be any of these things to the Average Taxpayer. And as long as John Doe thinks of the Average Taxpayer as a fellow-citizen, he will tend to think of him as an elusive insubstantial man, a ghost who is everywhere yet nowhere. A student of British politics, understanding the relations between Parliament, Church, Judicature, Cabinet and Ministries, may experience difficulties if he tries to find similar connections between all or any of them and the British Constitution. For while the former are institutions, the latter is not an institution in the same sense of that noun. So the inter-institutional relations which can be asserted or denied to hold between the Home Office and the Church cannot be asserted or denied to hold between either of them and the British Constitution. The British Constitution is not a term of the same logical type as the Home Office and the Church.

Descartes, as a man of scientific genius, believed his methods of scientific discovery could provide a mechanical theory which would cover every occupant of space. Yet as a religious and moral man he could not accept the discouraging rider that human nature differs from clockwork only in degree of complexity. The mental could not be just a variety of the mechanical.<sup>17</sup> Thus, since mental-conduct concepts were not to be construed as signifying the occurrence of mechanical processes, they must be construed as signifying the occurrence of non-mechanical processes; since mechanical laws explain movements in space as the effects of other movements in space, other laws must explain some of the non-spatial workings of minds as the effects of other non-spatial workings of minds. The difference between the human behaviors which we describe as intelligent and those which we describe as unintelligent must be a difference in their causation; so, while some movements of human tongues and limbs are the effects of mechanical causes, others must be the effects of non-mechanical causes. The differences between the physical and the mental were thus represented as differences inside the common framework of the categories of "thing", "stuff", "attribute", "state", "process", "change", "cause" and "effect". Minds are things, but different sorts of things from bodies; mental processes are causes and effects, but different sorts of causes and effects from bodily movements. And since minds belong to the same category as bodies and since bodies are rigidly governed by mechanical laws, so minds must be similarly governed by rigid non-mechanical laws. Now, when two terms belong to the same cate-

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say "Carnivorous cows do not exist"; logically we should say "Nothing is both a cow and carnivorous"; the former is a systematically misleading expression.

17. Burrt, *op. cit. supra* note 14.

gory, it is proper, says Ryle, to construct conjunctive propositions embodying them. The conjoining of terms of different types, however, produces only absurdities such as "She came home in a flood of tears and a sedan-chair". Ryle does not deny that there occur mental processes. What he does say is that the phrase "there occur mental processes" does not mean the same sort of thing as "there occur physical processes", and, therefore, it makes no sense to conjoin or disjoin the two. So much, then, for the official dogma. Now, for Ryle's theory.

From an examination of the logic of mental-conduct concepts, Ryle seeks to show that when we describe people as exercising qualities of mind we are not referring to occult episodes of which their overt acts and utterances are effects; we are referring to those overt acts and utterances themselves. The exercise of intelligence in practice cannot be analyzed into a tandem operation of first considering prescriptions and then executing them. To perform intelligently is to do one thing and not two things; it is to apply criteria in the conduct of the performance itself. There are many activities which directly display qualities of mind, yet are neither themselves intellectual operations nor yet effects of intellectual operations. For example, intelligence-epithets such as shrewd or silly, prudent or imprudent do not impute the knowledge or ignorance of this or that truth (knowing *that*) but rather the ability or inability to do certain sorts of things (knowing *how*). Knowing *how* is not merely to satisfy criteria but to apply them. And they are applied in performing critically, *i.e.*, in trying to get things right. But proponents of the official doctrine tend to assimilate knowing *how* to knowing *that* by asserting that any intelligent act is preceded by and steered by a prior intellectual act of considering a regulative proposition appropriate to the problem. But in order for the intellectual act of reflecting to be intelligent there must be some prior reflection on how best to reflect how to act. The regress is infinite. What distinguishes sensible from silly operations is not their parentage but their procedure and this holds no less for intellectual than for practical performance. "Thinking what I am doing" does not connote "both thinking what to do and doing it"; I am simply doing something intelligently which is doing one thing and not two. My performance has a special procedure or manner, not special antecedents. When we ask "Why did someone act in a certain way", the question may be either an inquiry into the cause of his acting that way or be an inquiry into the character of the agent which accounts for his having acted in that way. Explanations by motives, says Ryle, are of the second type.<sup>18</sup> No one could ever know that the

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18. For a criticism of this view, see ANSCOMBE, INTENTION 20-21 (1958).

cause of someone's overt act was the occurrence of some inner impulse. People's motives are actually discovered by an inductive process based on what they do and say in certain circumstances and resulting in the establishment of law-like propositions which we then apply as "reasons" for particular actions. Acting from motive is acting more or less intelligently. But the adverbs used—*e.g.*, careful, purposefully,—do not signify the prior or concomitant occurrence of extra operations of resolving, planning or cogitating, but only that the action taken is done in a certain positive frame of mind and not absent-mindedly.

We applaud the cleverness of the clown in simulating clumsiness and we do so not because it is an effect of any hidden internal causes but for being an exercise of skill. Now skill is not an act and is therefore neither witnessable nor unwitnessable; it cannot be separately recorded by a camera. And this is not because it is a ghostly happening but because it is not a happening at all. It is a disposition,<sup>19</sup> or complex of dispositions, and a disposition is a factor of the wrong logical type to be seen or unseen, recorded or unrecorded. Yet the traditional theory of mind would misconstrue the type-distinction between disposition and exercise into its mythical bifurcation of unwitnessable mental causes and their witnessable physical effects. The purposeful tumbling of the clown is both a bodily and a mental process, but it is not two processes. Thus, Ryle concludes, to perform intelligently is simply to do one thing, *viz.*, to apply criteria in the conduct of the performance itself. And how is this recognized in those performances which we characterize as skillful, logical, prudent, etc.? It is what one does that shows whether one knows the rules (how) in the executive way of being able to apply them. Now it is true, in judging that someone's performance is or is not intelligent, we do in a certain manner look beyond the performance itself. But in doing so, we are not trying to pry into some hidden counterpart performance enacted on the supposed secret stage of the agent's inner life. We are considering his abilities and propensities of which this performance was an actualization. Our inquiry is not into causes (and *a fortiori* not into occult causes) but into capacities, skills, habits, liabilities and bents. And this is not, says Ryle, to deny the value of intellectual operations but only to deny that the execution of intelligent performances entails the additional execution of intellectual operations. In using mental-conduct concepts, therefore, we are simply describing the ways in which performances are conducted. Traditional dualism, however, because of its category-mistake, entails the false

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19. For a rejection of Ryle's theory of dispositional statements, see Hampshire, *Dispositions*, 14 ANALYSIS No. 1, 5-11 (Oct. 1953).

supposition that we are describing the performances of occult mental happenings and results in the substitution of a causal hypothesis for a functional description; in a search for a cause instead of a criterion; in a logical mistake.

D. *Ryle and the Perennial Issues.*

Criminal liability, we are told, rests on "*mens rea*" and "voluntary conduct". And when we talk of criminal liability as such, we are thinking of *mens rea* as the state of mind necessary for crime in general; of what is sometimes referred to as "the mind at fault". How do we know whether the defendant's mind was "at fault"? The official doctrine would entail the conclusion that we could never know. At best we can infer from witnessable physical effects to unwitnessable mental causes by drawing analogies from bodily movements similar to our own to mental workings similar to our own. Professor Ryle, however, would reply we need simply consider what the defendant did, the way in which he did what he did and the circumstances under which he did what he did. No need to inquire into occult causes. No need to adduce evidence of "an internal effort, 'movement of the will' " and then "by evidence different from and beyond that which established the *mens rea*" show "the additionally required manifested effort ('act')".<sup>20</sup> But granted this would be no small boon, what additional light does all this shed on *mens rea*? Ryle has merely told us how to go about finding what we are looking for. He has not told us what "it is" that we are looking for. True. But that was never his purpose. He sought only to explode a myth and to show why certain sorts of operations with the concepts of mental powers and processes are breaches of logical rules. "Abandonment of the two-worlds legend involves abandonment of the idea that there is a locked door and a still to be discovered key. Those human actions and reactions, those spoken and unspoken utterances, those tones of voice, facial expressions and gestures, which have always been the data of all the other [than psychologists] students of men, have, after all, been the right and the only manifestations to study. They and they alone have merited, but fortunately not received, the grandiose title 'mental phenomena' ".<sup>21</sup> A fortiori, they and they alone are what we should refer to when we speak of *mens rea*.

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20. See text at note 7 *supra*.

21. Ryle, *op. cit. supra* note 1 at 320-321.

E. *Hall and the "Perennial Issues."*

In constructing his theory of criminal law, Professor Hall distinguishes what he calls three types of propositions. At one extreme he places "principles", the widest generalizations, such as *mens rea*, act, causation. The narrowest sort, which he calls "rules", define particular crimes, fix penalties. In between are "doctrines" such as insanity, necessity, mistake.<sup>22</sup> *Mens rea*, then, is of the highest order, viz., a principle, and in its broadest sense ". . . is the mental state exhibited in any conduct or behaviour which violates any 'penal law' ".<sup>23</sup> The discussion of *mens rea* is long, involved, and at times difficult to follow. If Ryle has not, in Hall's opinion, succeeded in banishing the ghost, neither, would it seem, has Hall entirely purged himself of Ryle. Like the fat man within the thin man, he keeps popping out, giving an impression of vacillation between intellectualist doctrine and Ryleian iconoclasm. "We cannot", says Hall, "see these mental functions, nor can the most sensitive instruments record their operations. It seems likely that the first method of describing and explaining them was to point to and thus (illicitly!) call attention to events and experiences which obviously excluded the relevant conscious mental states."<sup>24</sup> Thus ". . . the first methods of defining *mens rea* were those of exclusion by pointing to and then elucidating situations where, in any recognized sense of the term, there was no intention by the defendant to commit the harm in issue or where his intelligence was so greatly impaired that there was no criminal intention."<sup>25</sup> However, the shades (or light) of Ryle soon disappear when we are informed that this method of exclusion gave way ". . . to the elucidation of the exclusionary doctrines and thence to the critical construction of the relevant affirmative concepts."<sup>26</sup> All of which leads Hall to conclude, in line with the official doctrine, that *mens rea* involves ". . . the state of knowing or believing, with reference to the material facts and also, the internal effort of intention. . . ."<sup>27</sup>

Hall allows there is a difficult epistemological problem involved in our knowledge of other people's minds. But ". . . if one recognizes the necessity to rely upon a degree of faith—such as underlies the acceptance of any empirical induction—the question becomes relatively simple . . . . Given certain facts, we must, on the basis of our experience in a given culture, introspection, and the instant facts,

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22. Hall, *op. cit. supra* note 2 at 17.

23. *Id.* at 70.

24. *Id.* at 106.

25. *Id.* at 107-108.

26. *Id.* at 108.

27. *Id.* at 179.

conclude that any and every rational human being in those circumstances did or did not intend the results . . . ."<sup>28</sup> While it is hard to grasp exactly what Hall is trying to convey, at least it would seem to be some sort of "intuitionism". However, he continues, ". . . the possibility of error in [our knowledge of other people's minds] [does] not support the dogmatic view that in the vast majority of findings [by triers of fact], based on rational methods of investigation, there is no reasonable accurate correspondence [between the findings regarding mental states and the actual mental states]."<sup>29</sup> Now one senses definite overtones of "iconoclasm." But Hall soon reverts to the official legend when he concludes that criminal conduct is ". . . an effort of the same genus as, but additional to, the effort already functioning in the intention of the *mens rea*. The additional effort may be viewed as the projection forward into conduct of the already existent action-thought of *mens rea*"<sup>30</sup> This seems to be precisely the sort of category-mistake that Ryle condemns. In sum, then, Hall's theory would seem to add up to an internally inconsistent brand of eclecticism of which the dominant element is what Ryle, with deliberate abuse, calls the intellectuellist legend.<sup>31</sup>

It is interesting to note that the "exclusionary method" which Hall sees merely as a primordial precursor to serious theorizing, is viewed by another legal scholar as the key to many of the puzzles presented by legal concepts. Merely to specify, as do most theories, the necessary and sufficient conditions for the application of legal concepts, is to ignore what Professor Hart has called their "defeasible" nature.<sup>32</sup> For whereas one may know all the necessary conditions, yet these may not be sufficient because of the indispensable word "unless". This applies particularly to the "mental element" of crime and makes any general theory, such as Hall seems to be striving for, logically inappropriate. What is meant by *mens rea*, says Professor Hart, is only to be understood by considering certain defenses or exceptions such as mistake, accident, coercion, duress, provocation, insanity, which either exclude liability or "reduce" it.<sup>33</sup> The fact that these are admitted as defenses or exceptions constitutes what Professor Hart calls the "cash-

28. *Id.* at 154-155.

29. *Id.* at 156.

30. *Id.* at 179-180.

31. See note 15, *supra*.

32. Hart, *The Ascription of Responsibility and Rights*, ESSAYS ON LOGIC AND LANGUAGE 145 (Flew ed. 1951). For a criticism of Prof. Hart's views see Bodenheimer, *Modern Analytical Jurisprudence and the Limits of its Usefulness*, 104 U. PA. L. REV. 1080 (1956). Hart's reply appears in 105 U. PA. L. REV. 953 (1957).

33. A similar view is reached by Prof. Perkins—see PERKINS, CRIMINAL LAW 31, 38-40, 654-655. (1957).

value" of *mens rea*. Among the blessings to be bestowed by such a solvent theory, not the least would consist in its obviating recourse to such bankrupt notions as "implied" or "presumed" "intent" when what is meant is simply that no "unless" factors are present.<sup>34</sup> But, as the Restatements would say, I am getting "beyond the scope of" this paper.<sup>35</sup> Enough has been said to suggest that Professor Hall is neither fair nor entirely consistent in his summary dismissal of Ryle. And so the choice remains: Whether to join Professor Hall in his pursuit of some will-o-the-wisp of a general theory of *mens rea*, or whether, like Ryle, to banish the ghost and be free to concentrate on the cash-value.

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34. E.g., *Hadley v. State*, 55 Ala. 31 (1876).

35. Freund, *Thomas Reed Powell*, 69 HARV. L. REV. 800, 802 (1956).