

Responsibility and Good Reasons

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I have argued elsewhere that respect for human rights requires a robust notion of responsibility, and that this in turn depends on folk-psychological ideas including free will, and also that such ideas need to be articulated in such a way that they can be used in combination with contemporary science in the development of the criminal law. Stephen J. Morse contends that responsibility is explained by our capacity to grasp and be guided by good reasons, and that this is so despite the truth of determinism. In this article, I consider whether Morse's criterion is sufficiently robust to support human rights in an era when science is suggesting that behavior is just the causal product of genes and environment, and whether the criterion is such that it can satisfactorily be used together with science in the development of the criminal law. I contend that Morse's criterion presupposes the ability to reason consciously and informally, using emotional feelings as well as logic, and to bridge a gap that exists between reasons on the one hand and conclusions and actions on the other. I suggest that, on this criterion, we can be responsible because the reasons do not compel conclusions, so that, in the exercise of the capacity Morse refers to, we can either heed and obey the requirements of the law, or not do so, as we choose. So interpreted, I contend, the criterion can be sufficiently robust to support human rights notwithstanding the claims of science that I have mentioned, and to contribute to the development of the criminal law, but I also contend that the criterion itself suggests a possible qualification to those claims and implies that the question of determinism should at least be left open.

I. INTRODUCTION

One important aspect of human rights is the principle that the state should generally not coerce, imprison or otherwise forcibly interfere with the liberty of an adult, responsible citizen, except where the citizen has voluntarily broken a public law that is part of a system of laws of adequate fairness, and that where a citizen has voluntarily broken such a law, the state may do no more than impose a punishment that is in some sense proportionate to the citizen's wrongdoing. With a few exceptions, it is a violation of human rights for the state to interfere with a citizen's liberty in any other circumstances or to any extent not justified by the breach of the law in question.

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This principle makes sense because it is assumed that most adult persons are truly responsible for their voluntary conduct in such a way as to make it *fair* that voluntary conduct in breach of such a law may justify taking away their liberty. In contrast, it is not fair that their liberty be taken away for any other reason such as that, without their having engaged in any voluntary conduct in breach of the law, they are considered by those in power to be a danger to their policies or to “society.” This in turn presupposes that persons do have the capacity to control their voluntary actions, and in particular to choose whether or not to act in breach of the law: that is, it presupposes folk-psychological ideas about the causation of human behavior including the idea that persons have free will.

Such folk-psychological ideas have long been challenged by philosophers, at least to the extent of saying that they must be understood in a sense that makes them compatible with determinism, and the advance of science over the last four hundred years has made it increasingly difficult to maintain a view of human conduct as being anything other than the outcome of the inexorable unfolding of events in accordance with universal laws of nature. Our bodily movements are caused by the contracting of muscles, which are caused by nerve impulses, which in turn are caused by a vast succession of firings of neurons in our brains, and every step in this process conforms to physical laws of nature. Thus there may seem to be no room for the operation of any choice between genuinely open alternatives, as supposed in folk-psychological notions of free will.

Furthermore, the whole idea that we are in a substantial way responsible for our own actions is strongly challenged by an argument put most forcefully by Galen Strawson,¹ building on two premises:

- (1) We act as we do because of the way we are.
- (2) We cannot be responsible (in the sense of *ultimately* responsible, the buck stopping with us) for the way we act unless we are responsible for the way we are.

Strawson argues that we cannot be responsible for the way we are when we first make decisions in life, so we cannot be responsible for actions based on those decisions, and so on. Thus, we can never become responsible for the way we are later in life, or responsible for the way we act later in life.

In those circumstances, I have thought it important to argue that the scientific and philosophical case against free will is far from being made good, and that in fact it is more reasonable to believe in free will than to reject it.² I have also

¹ Galen Strawson, *The Bounds of Freedom*, in THE OXFORD HANDBOOK OF FREE WILL 441 (Robert Kane ed., 2002).

² See, e.g., David Hodgson, *Hume's Mistake*, in THE VOLITIONAL BRAIN 201 (Benjamin Libet et al. eds., 1999) [hereinafter Hodgson, *Hume's Mistake*]; David Hodgson, *Three Tricks of Consciousness*, 9 J. CONSCIOUSNESS STUD. 65 (2002) [hereinafter Hodgson, *Three Tricks*].

contended that compatibilism, the view that free will and responsibility are compatible with determinism, may not be an adequate response to scientific and philosophical attacks on free will and responsibility.³

In this paper I consider a recent exposition of a compatibilist view, namely the view of Stephen J. Morse⁴ that responsibility is explained by our capacity to grasp and be guided by good reasons, and that this is so despite the truth of determinism. I ask whether Morse's criterion is sufficiently robust to support human rights in an era when science is suggesting that behavior is just the causal product of genes and environment, and whether it is such that it can contribute along with science to the development of the criminal law.

II. MORSE'S THESIS

In his article *Waiting for Determinism to Happen*, Stephen J. Morse, believing "that determinism or something just like it is true,"⁵ offers an account of responsibility "that is not inconsistent with the truth of determinism or principles of fairness that we endorse."⁶ For this account, he makes two assumptions:

(1) that human beings have "general capacities," a general capacity being "an underlying ability to engage in certain behavior" (Morse gives the example that "English speakers . . . have the general capacity to speak English, even when they are silent or speaking a different language");⁷ and

(2) that most people, when they reach "the age of reason," "have the full, general capacity to grasp and to be guided by good reasons."⁸

He asserts that neither assumption is inconsistent with determinism,⁹ and contends that the particular capacity in (2) is the primary criterion that explains our responsibility concepts and practices.¹⁰ He notes that this approach means that the concept of rationality "must do a great deal of work," but that it would be unreasonable to expect a precise, uncontroversial definition of rationality.¹¹ He refers to "the implicit, common sense notion—the ability to perceive accurately, to

³ See, e.g., David Hodgson, *Guilty Mind or Guilty Brain? Criminal Responsibility in the Age of Neuroscience*, 74 AUSTRALIAN L.J. 661 (2000).

⁴ Stephen J. Morse, *Waiting for Determinism to Happen* (1999) (unpublished manuscript, on file with the Ohio State Journal of Criminal Law and author) [hereinafter Morse, *Waiting*]. Morse has since expressed similar views in Stephen J. Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251 (2000) [hereinafter Morse, *Rationality*].

⁵ Morse, *Waiting*, *supra* note 4, at 5; Morse, *Rationality*, *supra* note 4, at 258–59.

⁶ Morse, *Waiting*, *supra* note 4, at 5; see Morse, *Rationality*, *supra* note 4, at 261.

⁷ Morse, *Waiting*, *supra* note 4, at 6; see Morse, *Rationality*, *supra* note 4, at 253.

⁸ Morse, *Waiting*, *supra* note 4, at 6; see Morse, *Rationality*, *supra* note 4, at 255.

⁹ Morse, *Waiting*, *supra* note 4, at 6; see Morse, *Rationality*, *supra* note 4, at 261.

¹⁰ Morse, *Waiting*, *supra* note 4, at 6; see Morse, *Rationality*, *supra* note 4, at 253.

¹¹ Morse, *Waiting*, *supra* note 4, at 7–8; see Morse, *Rationality*, *supra* note 4, at 256.

reason instrumentally, including according to a minimally coherent preference-ordering, and the like,” and he suggests that this is sufficient for his purposes.¹²

Thus Morse does not elaborate on the concept of rationality that is central to his account of responsibility, but is content to utilize what he calls the commonsense notion. I will commence by looking in more detail at this commonsense notion of rationality and what it involves.

III. THE COMMONSENSE NOTION OF RATIONALITY

While it is true that the commonsense notion of rationality does involve such things as the ability to perceive accurately and reason instrumentally, it also (and crucially) involves *consciousness*, and in particular the ability to make conscious decisions and exercise conscious control over one’s actions. A view that our decisions are made by non-conscious processes, for example by computation-like processes, perhaps of a kind generally similar to those used by chess-playing computers, is not, I suggest, in accordance with the commonsense notion of rationality. I am not here saying that such a view would necessarily be wrong: many respected scientists and philosophers argue to the general effect that our decisions and actions are in fact produced by computation-like processes in which our consciousness has no efficacious role, and they may be right. But my contention is that this is not the commonsense notion of rationality that Morse refers to, and I will suggest that it is a notion of rationality that could not plausibly support our ideas and practices concerning criminal responsibility.

The commonsense notion of rationality, beyond involving the ability to make conscious decisions and exercise conscious control over our actions, also involves the associated ability to make decisions and to act on the basis of *inconclusive* reasons, in some cases by consciously weighing these reasons and reaching decisions in ways that appear to go beyond the derivation of conclusions by explicit logical or (more generally) algorithmic processes. It is, of course, part of human rationality to be able to apply rules of logic, mathematics and probability, and to reach conclusions required by these rules—although in this respect humans are slow, clumsy and very fallible in comparison with computing machines. However, this is only a small part of human rationality—most of our decisions and actions are the result of *plausible reasoning* and are based on inconclusive reasons, and these decisions and actions are not required or even justified by the application of rules of logic, mathematics or probability to accepted premises or data. It is true that for much of the time we act without deliberation, and also that we often find reasons compelling, but this does not contradict my assertion that reasons are (generally) inconclusive unless and until given effect to by a decision or action.

Certainly, when we use plausible reasoning to decide what to believe on the basis of conflicting evidence, there appears to be an element of *judgment* involved

¹² Morse, *Waiting*, *supra* note 4, at 8; see Morse, *Rationality*, *supra* note 4, at 255–56.

that cannot be reduced to conformity with rules of any kind, and this, I suggest, is what is needed to explain why, despite the arguments of Hume, Popper, Hempel, Goodman and others, some conclusions of inductive arguments are reasonable and others are not reasonable.

It seems that the inconclusive reasons on which we base our decisions often include emotional feelings of various kinds, whether they be explicit motivators like hunger or pain, or more elusive "gut feelings" of rightness or wrongness in our deliberations as to what to believe and what to do. And on the commonsense notion of rationality, these conscious feelings motivate just because of their impact on our conscious decisions and actions, through the way they actually *feel* to us. Hume lumped these motivational feelings together as passions or desires, and he contended that we always act in accordance with the preponderance of our desires. But that makes the unjustified, and I would contend untrue, assumption that desires are commensurable quantities, like forces in Newtonian physics. There is no basis for saying that a feeling of hunger admits of a quantitative measure of strength that could render it commensurable with a feeling of obligation to fulfill a commitment to a friend, so that where these reasons conflict the outcome is just a matter of one quantity exceeding another quantity: plainly, I suggest, this is not the case.

Thus, the reasons on the basis of which we decide and act do not appear to include a *clincher* that predetermines the decision or action: the only clincher seems to be the decision or action itself.¹³ The same idea is expressed by philosopher John Searle¹⁴ when he writes about a *gap* between reasons and decision or action: indeed Searle identifies three such gaps, one between reasons and a decision what to do, another between a decision what to do and actually commencing to do it, and a third between commencing to do something and carrying it through to conclusion. At each stage, according to Searle, a decision or act of will is required which is not, on its face at least, a mere automatic result predetermined by the reasons.

Now it is clear that our decisions and actions depend, at least to a substantial extent, on physical processes in our brains, including pre-conscious processes and also processes that are either identical with or else correlate with and/or support our conscious processes; and as suggested before, it is possible that (consistently with determinism) our decisions and actions are *fully* caused by and *fully* explicable in terms of these physical processes, with no distinctive efficacious contribution from our conscious processes.

On this view, the incommensurability and inconclusiveness of our reasons, the associated gap between reasons and decisions, and the clinching efficacy of our conscious processes, can only be apparent. The incommensurability of reasons disappears, in that the physical processes that somehow support the apparently incommensurable reasons proceed entirely in accordance with physical laws

¹³ See Hodgson, *Hume's Mistake*, *supra* note 2.

¹⁴ JOHN R. SEARLE, RATIONALITY IN ACTION 61–73 (2001).

applying to commensurable physical quantities. Similarly, there is no inconclusiveness of reasons, and any clincher for decisions and actions must be provided by these same processes. Our feeling of efficacious conscious resolution of incommensurable and inconclusive reasons must then be seen as an illusion, or at best as no more than an incomplete and misleading projection from these inexorable processes. The rationality and effectiveness of these physical processes must be explained, not in terms either of conscious rationality (on this view, that could be no explanation) or of compliance with known rules of logic or mathematics (because this cannot explain plausible reasoning), but on the basis that the processes have been developed through millions of years of evolution as effective computation-like processes—being processes of which we have little understanding, but which are well adapted to dealing with the problems of survival and reproduction.

This is a possible view, and something like it is popular among philosophers and neuroscientists; but it is a long way from the commonsense notion of rationality. As noted above, it is essential to the commonsense notion that our decisions and actions are for the most part truly under our conscious control, and that it is generally our conscious decision-making and acting that resolve the questions that face us. And it is inconsistent with the commonsense notion that the apparent gap between reasons and decisions or actions should be bridged, not by our conscious decision-making or conscious control of our actions, but by computation-like processes of which we have no real awareness or understanding and over which we have no control.

Furthermore, this view would not accommodate Morse's notion of grasping and being guided by good reasons, which again presupposes conscious control. The notion of "grasping" good reasons suggests that one must appreciate and understand the reasons and be able consciously to take them into account in making decisions as to what to do. This is reinforced by the reference to being guided by the reasons: the notion of "being guided" suggests conscious adaptation of conduct to some indication of what is to be done, not the determination of conduct without efficacious input from conscious processes.

IV. RATIONALITY AND RESPONSIBILITY

I will not here be disputing that the ability to grasp and be guided by good reasons, when equated with the commonsense notion of rationality outlined above, can be accepted as the primary criterion supporting our responsibility concepts and practices. What I do suggest is that this is just because it involves the idea of ability to make and carry out conscious decisions and actions, and in doing so to provide the clincher that bridges the gap between the inconclusive reasons on the one hand and the decision or action on the other hand. We can readily accept that a person is responsible for conduct where the person has the capacity to grasp and be guided by good reasons; but I say this is because that capacity involves the

ability to take account of those reasons consciously in deciding whether or not to engage in the conduct and in acting or not acting in accordance with that decision.

I will expand on this by considering in turn some of the features of the commonsense notion of rationality that are relevant to and tend to support our responsibility ideas and practices.

First and foremost, as I have said, there is consciousness. We take it for granted that consciousness is a necessary condition for both rationality and responsibility in human beings. The presence of consciousness during conduct is *prima facie* evidence of responsibility for that conduct, while its absence is indicative of lack of responsibility. For example, if someone causes injury by crashing a car after falling asleep at the wheel, that person's responsibility must be found in making the conscious decision to drive in circumstances where the person should have been aware of a risk that this might happen, or in failing to respond to indications sufficient to make the person aware that sleep was imminent. Strict criminal liability might be imposed because of the grave consequences that this can cause and the difficulty of proving responsibility; but if so, this would be as an exception to the general rule that responsibility is a necessary condition for criminal liability. Similarly, the knowledge required for criminal liability for assisting someone else in the commission of a crime is knowledge, concerning the commission or intended commission of the crime, which has actually come to the conscious awareness of the person. It is insufficient that a person has the means to such knowledge and the capacity to acquire that knowledge given those means, for example, from a letter or email message which has not been read, or even which has been read but not consciously understood.

Second, there is the grasping of reasons, including emotional feelings. Normal adults have the ability to grasp all kinds of reasons relevant to their decisions and actions, including reasons relevant to their own, and other persons', short-term and long-term interests. These reasons include feelings like pain or hunger, and "somatic markers"¹⁵ associated with various alternative possibilities. The grasping of these reasons requires consciousness of them (although of course I do not suggest that we are conscious of *all* our reasons and motivations) and in some cases also a measure of *understanding* of them. Understanding of reasons involves not merely knowledge of the reasons themselves, but also extensive knowledge *about* them, and the ability to generate further knowledge about them as required in various contexts and for various purposes.¹⁶ This seems relevant to responsibility because it seems to be part of what is required for the *flexibility* of response that we associate with responsibility. Reasons don't appear to operate automatically, but appear to be taken into account in different ways in varieties of circumstances. Less understanding of reasons and less flexibility in response is

¹⁵ This phrase is from ANTONIO R. DAMASIO, *DESCARTES' ERROR* 173–75 (1994).

¹⁶ I need not enter here on the question of what count as good reasons, in particular of whether there is some requirement of objective validity. This does not affect my argument.

taken as suggesting less responsibility for conduct. Thus, lack of understanding of reasons for conduct is seen as negating responsibility for conduct for persons of tender years (under ten in Australian law), and as putting responsibility in question for those who are just a little older (between ten and fourteen in Australian law).

Third, there is the gap between reasons and decisions or actions. Except possibly where all reasons point one way, or where what is being considered is capable of being resolved by application to accepted data of laws of logic or mathematics or probability, reasons are fundamentally inconclusive: no matter how fully they are expressed or elaborated, they do not unequivocally require one decision or action. And this is so even when we act without deliberation, and even when reasons seem compelling. Commonsense rationality involves identifying and grasping reasons, but crucially it also involves *weighing* reasons, reasons that do not come with predetermined weights, and arriving at a conclusion that the reasons have not and could not have dictated. We consider that we are responsible for our decisions and actions precisely because they are seen as being *not* predetermined by the reasons, but as being the result of *our* determining which reasons should prevail. We consider that it is we, not the reasons as such, that provide the clincher, and thus that it is we who are responsible.

Finally, it is to be noted that all three previous aspects are implicit in Morse's formulation that we are *guided* by good reasons. As mentioned earlier, to be guided is to adapt one's conduct to some indication of what is to be done, thereby suggesting consciousness. In order to be guided by reasons, one has to be aware of them and to understand just what they are indicating in a wide variety of contexts, and one has to determine for oneself precisely what one's conduct is to be in the light of those reasons.

It is these factors, namely consciousness, understanding of reasons and determining for oneself what to do, that are at the heart of our responsibility concepts, and they are what makes it possible to say fairly and accurately that we can either heed and obey the requirements of the law, or not do so, as we choose. A person who does something and is conscious, understands relevant reasons, and has determined for himself or herself what to do, is readily accepted as being responsible for that conduct. It is true, as Morse suggests, that we might accept this without being concerned as to whether determinism is true or false. What I will be suggesting, however, is that wholehearted acceptance of determinism would tend to bring into question the relevance and efficacy of these crucial elements of commonsense rationality and in that way tend to undermine our responsibility ideas and practices.

V. RATIONALITY AND DETERMINISM

I previously outlined a notion of rationality consistent with determinism. What I will do now is to consider further how acceptance of determinism relates to the elements of commonsense rationality just discussed, and thus to our responsibility ideas and practices. I take determinism to imply that, given any state

of the world, the physical laws of nature will constrain a single line of development from it, and that the physical world is closed to any non-physical influence. This means that there is great difficulty in giving a deterministic account of consciousness, in particular in that any causal efficacy of consciousness has somehow to operate within this framework.

If the physical world is closed to any non-physical influence, then any causal efficacy of conscious processes must be entirely through their associated physical processes. One approach then is to say conscious processes as such have no causal efficacy.¹⁷ Otherwise, the causal efficacy of consciousness has to *be* the causal efficacy of the associated physical processes, with consciousness being treated either as no more than a level of description of those same processes,¹⁸ or as a “user-friendly” account of brain processes produced by our brains so as to assist in monitoring them and communicating them to others.¹⁹ The former approach offers no explanation of what it is about conscious processes that distinguishes them from the vast amount of non-conscious information-processing that our brains perform (or indeed that computers perform); while the latter equates conscious experiences to convenient fictions, that would equally be “felt” by computers programmed to work with similar “user-friendly” accounts yet would not be felt by any non-human animals that do not monitor or communicate their mental processes.

One or other of these approaches may be correct; but they are very much at odds with the commonsense view of rationality and responsibility as depending on consciousness. And experiments that assume a deterministic framework tend further to undermine this commonsense view, by suggesting that all effectual information-processing and decision-making are in fact performed by unconscious processes, and that conscious will is no more than an illusion.²⁰

The difficulty deterministic views have in accounting for consciousness means that they have the same difficulty in relation to our grasping of reasons, particularly in so far as reasons depend upon conscious feelings like pain or hunger. Additionally, determinism seems inconsistent with any satisfying account of what it is to *understand* reasons. Penrose has argued convincingly that computers as presently conceived, no matter how powerful, do not understand anything but just blindly carry out algorithms.²¹ Of course, the view that understanding is something more than the processing of information in accordance with computational algorithms may itself be no more than an appearance or illusion produced by evolution-selected algorithmic processes that underlie our conscious processes, but again, if this is so, it is contrary to our commonsense notion of rationality.

¹⁷ DAVID CHALMERS, *THE CONSCIOUS MIND* 150–60 (1996).

¹⁸ JAEGWON KIM, *SUPERVENIENCE AND MIND* (1993).

¹⁹ DANIEL C. DENNETT, *FREEDOM EVOLVES* 242–55 (2003).

²⁰ DANIEL M. WEGNER, *THE ILLUSION OF CONSCIOUS WILL* (2002).

²¹ ROGER PENROSE, *SHADOWS OF THE MIND* 127–212 (1994).

Next, as suggested earlier, determinism seems inconsistent with the gap between reasons and decisions or actions. Algorithmic processes simply proceed to their conclusion: they involve no inconclusive reasons and no gap between reasons and conclusion. Determinists can say that consciousness gives only partial access to the processes that determine decisions and actions, and discloses only part of the reasons or other causes of our actions, and thereby gives the misleading impression that reasons are inconclusive; and determinists may be right about this. However, one wonders what could be the evolutionary advantage that selected in favor of such partial and misleading access, and in any event, this further illustrates the gulf between deterministic and commonsense notions of rationality.

So, I say that deterministic accounts of rationality are very different from the commonsense notion of being guided by good reasons. According to deterministic accounts, consciousness has no distinctive efficacious contribution to make, or perhaps is efficacious merely as a user-friendly summary for monitoring and communication. Reasons are not grasped; at best they function as elements in automatic algorithms. There are no such things as operative yet inconclusive reasons, or gaps between reasons and decision or action. And the feeling we have, that we are consciously adapting our conduct to indications given by reasons that are grasped and understood and consciously resolved, is mere illusion.

This is not to say that determinism cannot stand with any account of responsibility. Indeed, many supporters of determinism, following Hume, argue that determinism is *necessary* for responsibility, in order that actions can be considered as arising out of a person's character, rather than as originating capriciously out of nowhere.²² It has also been said that belief in determinism cannot in fact affect our responsibility ideas and practices: we just cannot help accepting them and giving effect to them.²³ And it has been pointed out that in any event, the law's concern with responsibility and voluntary conduct is fully supported by a combination of determinism and utilitarianism: since it is voluntary conduct that is most affected by threatening and applying punishment, it is reasonable that punishment should for the most part be limited to voluntary conduct, and this in turn explains our responsibility ideas and practices.²⁴

What all this leaves out is any kind of explanation or justification either of our commonsense notion of rationality, or of why it can be *fair* (as opposed to merely *expedient*) that we hold persons responsible and punish them for voluntary conduct in breach of the law, whereas it is unfair and unacceptable that, in the absence of such conduct, they be punished or otherwise interfered with because those in power believe them to constitute a threat to their policies. The commonsense

²² R.E. Hobart, *Free Will as Involving Determinism and Inconceivable Without It*, 43 MIND 1 (1934).

²³ P.F. Strawson, *Freedom and Resentment*, in ANALYTIC PHILOSOPHY: AN ANTHOLOGY 301-14 (A.P. Martinich & David Sosa eds., 2001).

²⁴ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 76-80 (1968).

approach to responsibility depends heavily upon the conscious grasping and understanding of reasons, the existence of a real gap between reasons and decisions or actions, and the ability to bridge that gap by conscious decision-making and conscious control of our actions—features that play no part in deterministic accounts of rationality.

Furthermore, if it be the case that all our conduct is the unique pre-determined outcome of evolution-selected algorithmic computational processes, there is no reasonable answer to Galen Strawson's dilemma—suggesting that we cannot be truly responsible for the way we are or the way we act, and thus suggesting that singling out persons for punishment by reference to how they have acted cannot be justified on the basis that it is fair to do so. On the other hand, the commonsense notion of rationality as capacity to be guided by good reasons, if unaffected by any assumption of determinism, can provide an answer to Strawson's dilemma. It can accept that there is a sense in which it is true to say that we act as we do because of the way we are, but can still leave it open that we may have some ultimate responsibility for the way we act even if we are not responsible for the way we are. One aspect of the way we are is that we have the capacity to be guided by good reasons, that is, to decide which reasons should prevail and to adapt our conduct to whatever those reasons indicate; and while "the way we are" may determine, indeed predetermine, what those reasons are and how they appeal to us, it is by no means clear that it predetermines how we exercise this capacity. Accordingly, unless we assume determinism, we may to some extent be responsible for the way we act even if we are not responsible for the way we are.²⁵ And this in turn opens the way to some responsibility for the way we are, as this comes to be affected by the way we act.

VI. RESPONSIBILITY AND SELECTION OF PUNISHMENT

The commonsense notion of rationality as the capacity to be guided by good reasons can provide a basis for assessing *degrees* of responsibility, because it makes sense to regard the exercise of this capacity as being something partially independent of, but liable to be affected by, genetic and environmental factors. Thus, persons with intellectual difficulties, and persons who have been damaged by abuse when they were children, may be regarded as having a lessened capacity to be guided by good reasons and may therefore be regarded as deserving less punishment. Similarly, persons whose circumstances, such as poverty or pressure from associates, make it harder for them to conform to the requirements of the law, may be considered as disadvantaged in the exercise of their capacity to be guided by good reasons, and again may for that reason be regarded as deserving less punishment.

²⁵ See Hodgson, *Hume's Mistake*, *supra* note 2; Hodgson, *Three Tricks*, *supra* note 2.

However, wholehearted acceptance of determinism would tend to undermine the basis for assessing degrees of responsibility for conduct. The exercise of the capacity to be guided by good reasons would itself have no independence from genetic and environmental factors, apparently removing the ground for distinguishing, as cases involving lesser responsibility and as deserving lesser punishment, those cases in which genetic and environmental factors have lessened or prejudiced the capacity to be guided by good reasons.

Furthermore, unless the exercise of the capacity to be guided by good reasons is considered as at least potentially having some independence from genetic and environmental factors, advances in neuroscience and the cognitive sciences can be expected to put increasing pressure on our responsibility ideas and practices. We are already seeing claims that all decisions are effectually made by unconscious processes, that is, processes of which we are not aware and over which we have no control,²⁶ and it can be expected that these claims will continue and become more insistent.

The law should be informed by advances in science, and certainly it is to be hoped that science will assist in the identification and amelioration of factors that contribute to anti-social and criminal behavior. It is also to be hoped that science will assist in the improvement of strategies to promote the reform and rehabilitation of offenders. However, I contend that it would be unfortunate if crime came to be seen generally as a disease (or genetic and/or environmental artifact) to be treated²⁷ rather than as wrongdoing that fairly justifies the imposition of coercive measures in some sense proportionate to the guilt of the wrongdoer. My reason for saying this is as indicated at the start of this paper, namely, that to regard crime as a disease (or artifact) would be damaging to the principle of human rights that says that the state must not, other in exceptional circumstances, coerce any of its citizens except to the extent that such coercion is fairly justified by voluntary conduct in breach of a public law that is part of a system of adequate fairness.

Some suggest that this problem be dealt with by maintaining free will as a convenient fiction,²⁸ while Michael Moore maintains that retribution can be seen as a positive good notwithstanding the truth of determinism.²⁹ My suggestion here is that we can adopt Morse's formulation as one that might command wide acceptance, while not requiring commitment to a final view on whether or not determinism is true. Then, so long as the capacity to be guided by good reasons is understood in the commonsense way I have discussed, and thus is regarded as something over which we have conscious control, our responsibility ideas and

²⁶ WEGNER, *supra* note 20.

²⁷ It is so suggested in COLIN BLAKEMORE, *THE MIND MACHINE* 257-72 (1988).

²⁸ See STEVEN PINKER, *HOW THE MIND WORKS* 55 (1997).

²⁹ MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997).

practices can be maintained, and advances in science can be used to aid the law's approach to crime without endangering human rights.

VII. CONCLUSION

I suggest that persons concerned to maintain the principle of human rights mentioned at the beginning of this paper should, along with Morse, accept at least provisionally that human beings do have the capacity to grasp and be guided by good reasons, interpreting this consistently with the commonsense notion of rationality I have discussed. I also suggest that they should not jeopardize this commonsense notion, and the support it gives to our responsibility ideas and practices, by wholeheartedly embracing determinism—because while I do not claim that my arguments show beyond question that the commonsense notion is inconsistent with determinism, I do claim that they do show at least that this may well be so.

My own personal view is that determinism is probably false, and that something like an indeterministic incompatibilist view of free will is probably true; and I have supported that view in various writings. However, my purpose in this paper is not to argue for that view, but rather to suggest that we should not prematurely assume that determinism is true. The difficulty of giving a satisfactory deterministic account of consciousness and plausible reasoning is, I suggest, sufficient reason to be at least agnostic about the truth of determinism; and if one does not assume the truth of determinism, one then has, in Morse's criterion, a satisfactory basis for our responsibility ideas and practices. However, that basis is jeopardized if one does, prematurely, assume the truth of determinism.

