ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Can (Should) Law Do Without Free Will?

ALBERTO ARTOSI

Former Full Professor of Legal Theory and Logic and Legal Argumentation
University of Bologna (Italy)

✉ **alberto.artosi@unibo.it**

https://orcid.org/0000-0001-5557-910X

ABSTRACT

Recent advances in the field of neuroscience are currently casting doubts on the existence of something like free will. This has raised a controversy between those who think that the obliteration of free will is incompatible with holding people responsible for their actions and those who think the other way round. This paper seeks to overcome the problem by investigating the possibility that law could do without free will. An argument to this effect has been advanced by Hans Kelsen in the second edition of his *Pure Theory of Law*. This argument is discussed in sections 2-4 of the paper. The conclusion is that Kelsen's attempt to found law on deterministic grounds does not fit with his legal doctrine, which seems to imply that the answer to the question in the title of this paper is negative. Nevertheless, there is a point in Kelsen's rejection of free will, which can be vindicated. Section 5 introduces and discusses an argument that, although alien to Kelsen's thought, seems to better account for his claim that responsibility does not in any way presuppose free will.

Keywords: Kelsen, free will, legal determinism, imputation, neuroscience

ATHENA
Volume 5.2/2025, pp. 186-203
Articles
ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488

"Imputation presupposes neither the fact or fiction of [freedom as] causal non-determination"
H. Kelsen

1. Introduction

Free will has traditionally been considered a presupposition of law necessary for holding people responsible for their acts (should people's actions be somehow determined, then it would make no sense to hold people responsible for them). Yet, recent advances in the field of neuroscience are currently casting doubts on the existence of something like free will. This has raised a controversy among those who think that the obliteration of free will is not compatible with holding people responsible for their actions and those who think that it is. Both sides are, for opposite reasons, in obvious trouble. The second side, however, can count on a very respectable pedigree. The argument with which, in the 1960s, Hans Kelsen tried to free law from the presupposition of free will can be considered as a paradigm of the "compatibilist" position for both the difficulties it raises, first for his pure theory of law, and the solutions it proposes. In this paper, I will analyse Kelsen's argument in some detail to answer the question of the title of the paper: whether law can – or even should – do without free will.

2. Kelsen's Legal Determinism

Kelsen's rejection of free will as a necessary presupposition of law is found in section 23 of the second edition of the *Pure Theory of Law* (Kelsen, 1967; henceforth PTL):

> The assumption… that only man's freedom (that is, the fact that he is not subject to the law of causality) makes responsibility (and that means: imputation) possible is in open conflict with the facts of social life. The establishment of a normative, behavior-regulating

ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488

> order, which is the only basis of imputation, presupposes that man's will is causally determinable, therefore not free. For it is the undeniable function of such an order to induce human beings to observe the behavior commanded by the order — to turn norms that command a certain behavior into possible motives determining man's will to behave according to those norms. But this means that the idea of a norm commanding a certain behavior becomes the cause of a norm-conforming behavior. Only because the normative order (as the content of the ideas of men whose conduct the order regulates) inserts itself in the causal process, in the chain of causes and effects, does the order fulfil its social function. And only on the basis of a normative order, that presupposes such causality with respect to the will of the human beings subject to it, is imputation possible (PTL, 94).

The above passage can be said to contain the gist of Kelsen's legal determinism, i.e. the view that to hold people responsible for their actions is possible only based on a normative order which presupposes their causal determination. At this point, to understand Kelsen's view, it is advisable to make some general remarks on the causation of actions.

That actions have causes seems obvious – if they had no causes, it would mean that they happen by chance, in which case we should probably be held even less responsible for them than if they were causally determined. Still, as Nozick (1981) has argued, there is a great difference between having a cause and being causally determined. Suppose that, in a given situation S, person P does action A. If in all situations exactly like S, P had equally done A, A would be causally determined. Suppose instead that P is in a situation in which he can choose to do either action A or action B. Each of these actions has a cause, say C_A and C_B. In the case that P chooses to do A, we can say that A was caused by C_A, but not that it was causally determined by C_A since in the very situation in which he chose to do A, P could have chosen to do B, in which case B would have been caused, but not causally determined, by C_B.

ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488

The point is that before P chooses what to do, there is nothing that determines what he will choose; in fact, until the moment in which P chooses to do (say) A, his choice remains open ("free"), i.e. there was the possibility that he would choose to do B.

The distinction between being caused and being causally determined is clear enough. Kelsen, however, was unable to see it because he conceived of causality in terms of the traditional idea of causality as nomic determination, i.e. whenever an event of type A causes an event of type B, there holds a general law (a "law of nature" such as "All metallic bodies expand when heated") under which any occurrence of A is always followed by an occurrence of B. Applied to actions, nomic determination implies that there is one such law following which "the circumstances before an action determine that it will happen, and rule out any other possibility" (Nagel, 1987, 51). It is hard to think that Kelsen did not realise that embracing such a conception would have jeopardised the very distinction between causality and imputation on which his Pure Theory of Law rests. Indeed, Kelsen's legal determinism as formulated in section 23 of PTL comes as a surprise to all Kelsenians, including Kelsen himself.

3. Kelsen *vs* Kelsen

The fact is not only that, as has already been observed (Renzikowski, 2023), there is no comparable text in Kelsen's previous works,[1] but, what is worse, that we find in the same PTL passages that seem to openly contradict a form of legal determinism such that professed in the above passage. For example, in PTL, 11, we find what can be considered a decisive objection to such a kind of legal determinism:

[1] It would be interesting to investigate the reasons that may have led Kelsen to reject free will and to embrace a strong form of legal determinism. We are probably not far from the truth if we hypothetise the influence of logical positivism and its antimetaphysical stance. On the relationship between Kelsen and logical positivism, see Artosi (2006).

ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488

> "Validity" of a legal norm presupposes… that it is possible to behave in a way contrary to it: a norm that where to prescribe that something ought to be done of which everyone knows beforehand that it must happen necessarily according to the laws of nature always and everywhere would be as senseless as a norm which were to prescribe that something ought to be done of which one knows beforehand that it is impossible according to the laws of nature.[2]

The point is so important that Kelsen repeats it again in PTL, 213:

> As mentioned in another connection, the possibility of an antagonism between that which is prescribed by a norm as something that ought to be and that which actually happens must exist; a norm, prescribing that something *ought* to be, which, as one knows beforehand *must* happen anyway according to a law of nature, is meaningless – such a norm would not be regarded as valid.

But what is striking here is that the definitive refutation of Kelsen's legal determinism is found in just three sections after that devoted to the problem of free will:

> If the concept of the "ought" is rejected as senseless, then the law-creating acts can merely be perceived as the means of bringing about a certain behavior of men to whom these acts are addressed; therefore as causes of certain effect. One believes, then, to be able to understand the legal order merely as the regularity of a certain course of human behavior… In that case, however, the meaning of an act in which the legal authority commands, authorises, or positively

[2] This was already asserted by Kelsen with great clarity in the first edition of *Pure Theory of Law* (Kelsen, 1992, 59-60): "Actual behavior corresponds to the system to a certain degree. Complete correspondence, without exceptions, is not necessary. Indeed, there must exist the possibility of a discrepancy between the normative system and what actually takes place within its scope, for without such a possibility a normative system is meaningless; when one can assume that something will necessarily take place, one has no need to order that it happen."

ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488

> permits can scientifically be described only as an attempt to create in men certain ideas whose motivating power causes them to behave in a certain way… From this viewpoint "norms" do not exist and the statement that this or that "ought" to be has no meaning, not even a specific positive-legal meaning, different from a moral meaning. From this viewpoint, merely the natural, causally connected events and the legal acts merely in their actuality, but not their specific meaning, are taken into consideration. This specific meaning, the "ought", is [accordingly] an ideological fallacy and therefore has no place in a scientific description of the law (PTL, 102-3).[3]

In the light of this passage, any attempt to found the legal order on the causal order of nature is bound to enter into an irresolvable tension with the law's specific normative meaning. The conflict between Kelsen's legal determinism and his Pure Theory of Law could not be more manifest. Is it possible that Kelsen did not realise it? Indeed, he was fascinated by determinism to the point of knowingly contradicting what he had claimed in the passage of PTL, 11, quoted above:

> Earlier it has been said it would be senseless to issue a norm commanding that something ought to be done of which it is known beforehand that, under a law of nature, it must necessarily always and everywhere take place. This seems to admit that normativity and

[3] Substantially the same passage is found in Kelsen, 1992, 32-3: "Normative meaning… is denied altogether from time to time. One views the law, that is, lawmaking acts, solely as a mean of bringing about certain behavior on the part of those human beings to whom the acts are directed; one views lawmaking acts, then, as causes of certain effects. And one believes that in the regularity of a certain pattern of human behavior, one can comprehend the legal system… The assertion (of the legislator or the legal theorist) that whoever steals ought to be punished in regarded, then, as simply an attempt to induce human beings to forbear from theft because others punish thieves; it is regarded as an enterprise to engender in human beings certain notions whose motivating force induce them to behave in an appropriate way… From this point of view, it is causally interconnected natural events alone that are considered, it is legal acts only in their facticity and not the specific meaning that accompanies these acts. This specific meaning – the norm or the "ought" with which the law represents itself and is represented by jurisprudence – turns up as sheer 'ideology', and this is true even of meaning that has been refined by the Pure Theory of Law."

ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488

> causality are mutually exclusive. However this is not so. The norm that we ought to speak the truth is not senseless, for we have no reason to assume a law of nature according to which men must speak the truth always and everywhere; we know that men sometimes speak the truth and at other times lie. But when man speak the truth or when he lies, then in both case his behavior is causally determined, that means, determined by a law of nature. Not by a law of nature according to which one must always speak the truth or always lie, but by another law of nature, for example by one according to which man chooses that behavior from which he expects the greater advantage. The idea of the norm that one ought to speak the truth can be – in conformity with this law of nature – an effective motive for behavior according to the norm. A norm that would prescribe that man ought not to die would be senseless because we know beforehand that all men must die according to a law of nature. The idea of such a norm cannot be an effective motive for a behavior according to the norm but in contradiction to the law of nature. The idea of such a norm is senseless, precisely because of the lack of the possibility of causal effectiveness (PTL, 94-5).

The least that can be said regarding the above passage (leaving aside any consideration about the particular "law of nature" here involved) is that Kelsen did not take into account the fact that it is one thing to affirm that a norm cannot conflict with a law of nature and a completely different thing to say that its causal effectiveness depends on its conformity with one such law. What is worse, if we connect so closely norms and laws of nature, what would prevent imputation from collapsing on causality? It is quite evident that Kelsen was aware of the problem and that he tried to avoid it by an unexpected conceptual twist.

ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488

4. Imputation and Freedom

This conceptual twist is given by Kelsen's recovering of man's freedom at the level of imputation:

> [From what has been said so far] It follows that is not freedom, i.e., non-determination of will, but its very opposite, causal determination of will, that makes imputation possible. One does not impute a sanction to an individual's behavior because he is free, but the individual is free because one imputed a sanction to his behavior. Imputation and freedom (in this sense) are indeed essentially linked. But this freedom cannot exclude causality, and does in fact not exclude it. If the assertion that man as a moral or legal personality is free, is to have any meaning, then this moral or legal freedom must be compatible with the causal determination of his behavior. Man is free insofar and because reward, penance, or punishment are imputed as consequence to a certain human behavior; not because this conduct is causally indetermined, but although it is causally determined. Nay *because* it is causally determined. Man is free because his behavior is an end point of imputation. And this behavior can be an end point of imputation even if it is causally determined (PTL, 98).

To understand this puzzling text, remember that imputation is Kelsen's term for the relation linking a certain behaviour (e.g. stealing) as a condition with a sanction (e.g. imprisonment) as a consequence. In this respect, a legal proposition is analogous to, though essentially different from, a law of nature:

> In the rules of law (the sentences by which the science of law describes its object, the law; in contradistinction to legal norms which are prescriptions) a principle is applied which, although analogous to causality, is nevertheless characteristically different from it. It is analogous in that this principle has a function in the rules of law similar to the function of the principle of causality in the

ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488

> laws of nature… Precisely like a law of nature, the rule of law connects two elements. But the connection expressed in the rule of law has a meaning entirely different from causality, the connection expressed in a law of nature. Quite patently crime and punishment… are not connected as cause and effect. The rule of law does not say, as the law of nature does: when *A* is, "is" *B*; but when *A* is, *B* "ought" to be, even though *B* perhaps actually is not (PTL, 76-7).

Kelsen strongly insists on this last point, e.g. in PTL, 81: "Imputation, implied in the concept of responsibility, is the connection between a certain behavior, namely a delict, with a sanction. Therefore it is possible to say: the sanction is imputed to the delict, but the sanction is not 'effected by' (is not 'caused by') the delict"; and even more clearly in PTL, 88: "The possibility of the norm being ineffective – that in individual cases it may not be applied or obeyed – must always be present. Precisely in this respect does the difference between legal law and law of nature become apparent." But if human actions are subject to nomic determination, does it not follow from this that any distinction between causality and imputation, legal law[4] and law of nature, vanishes?

As we have said, Kelsen's way out of this difficulty was to recover freedom at the level of imputation: "One does not impute a sanction to an individual's behavior because he is free," he writes, "but the individual is free because one imputed a sanction to his behavior.". But here we realise that Kelsen has ventured onto treacherous ground. For, if, as he maintains, it is the "causal determination of will, that makes imputation possible," how is it possible that an "individual is free because one imputed a sanction to his behavior"? Maybe we can think that Kelsen was carried away by the desire to translate his idea that causality and freedom are compatible in a rhetorically appealing formula, and that what he meant is instead expressed by the third to last sentence of the passage quoted at the beginning of this section: "Man

[4] That is "law in the legal sense" (PTL, 79), to emphasize its distinction from the structurally analogous law of nature.

ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488

is free insofar and because reward, penance, or punishment are imputed as consequence to a certain human behavior; not because this conduct is causally indetermined, but although it is causally determined." Indeed, Kelsen's earlier essay *Causality and Imputation* (Kelsen, 1950) contains the same argument, with almost the same words, but in a more perspicuous form:

> It is usual to assume that only [man's] freedom – and that means his exemption from the principle of causality – makes imputation possible. However, it is just the other way round. Human beings are free because we impute reward, penance, or punishment, as consequence, to human behavior, as condition, not because human behavior is not determined by causal laws but in spite of the undeniable fact that it is determined by causal laws. Man is free because his behavior is the end point of imputation. And it can be the end of imputation even if his behavior is determined by causal law (ibid., 334).

In this form, it is quite clear what Kelsen had in mind: freedom exists – is realized – only at the level of the acts of creation and application of norms, acts which, let us remember, as normative acts are, according to Kelsen, "acts of will," and therefore free, even if with different degrees of freedom:

> To be sure, there is a difference between these two cases [i.e. the creation and the application of norms], but it is only one of quantity, not of quality; the difference is merely that the constraint exercised by the constitution upon the legislator, as far as the content of the statutes is concerned which he is authorized to issue, is not as strong as the constraints exercised by a statute upon the judge who has to apply this statute – that the legislator is much freer in creating law than the judge. But the judge too creates law. And he too is relatively free in this function. For the creation of an individual norm, within the frame of a general norm in the process of applying the law, is a function of the will (PTL, 353).

ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488

The very interpretation of the law by the judge is both a cognitive operation and an act of will by which the judge makes a (relatively) free choice among "the possibility shown by cognitive interpretation" (PTL, 354) – a choice that is not available to the addressee of the norm:

> If an individual wishes to obey a legal norm that regulates his behavior, that is, if he wishes to fulfill a legal obligation by behaving in a way to whose opposite the legal order attaches a sanction, then this individual, too, must make a choice between different possibilities if his behavior is not unambiguously determined by the norm. *But this is not an authentic choice*. It does not bind the organ which applies this norm and therefore always runs the risk of being regarded as erroneous by this organ, so that the individual's behavior may be judged to be a delict (PTL, 355; italics added).

The last, definitive, and more metaphysical, reason for assuming human freedom at the level of imputation – "Man is free because his behavior is the end point of imputation" – is rooted in what Kelsen considers "the fundamental difference between imputation and causality" (PTL, 91): in the case of causality the chain of events involved is "endless in both directions" (ibid.); in the case of imputation the chain of events is limited to only two events – the condition and the consequence that is imputed to it in a moral or legal law. Indeed,

> Reward, penance, punishment are not imputed to the condition under which a certain behavior is commanded as meritorious or prohibited as sinful or unlawful; they are imputed to the man who behaves in conformity or in conflict with the command, or, more precisely, his behavior in conformity with the command is rewarded, his opposite behavior penanced or punished. In this behavior ends the imputation that constitutes his moral or legal responsibility… The decisive point is: the behavior that, under a normative (i.e., a moral or legal) order, is the end point of an imputation, is, under the causal order, no end

ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488

> point (neither as cause nor as effect) but only a link in an infinite chain. This, then, is the true meaning of the idea that man, as the subjects of a moral legal order… is "free". That man, subjected to a moral or legal order, is "free" means: he is the end point of an imputation that is possible only on the basis of this normative order (PTL, 93-4).

There is therefore an end point of imputation – the behaviour conforming or non-conforming with the norm – thanks to which man escapes from the causal process that makes imputation itself possible: this is what the essence of freedom consists of.

In section 1, it was argued that Kelsen's legal determinism is untenable by his own criteria. This would seem to imply that the answer to the title's question is negative. Nevertheless, there is a point in Kelsen's rejection of free will, which can be vindicated. This is the claim that "Imputation presupposes neither the fact or fiction of [freedom as] causal nondetermination." Kelsen supports this claim with two relatively independent arguments. The first argument is simply that "when imputation is recognised as a connection of facts different from causality but by no means in conflict with it, this fiction becomes superfluous" (PTL, 95). The second argument is that "even a convinced determinist does by no means draw from his view the conclusion that a behavior forbidden by morals or law must not be disapproved or punished – that no imputation must take place" (PTL, 96). In the next section, we will discuss a more refined argument that, although alien to Kelsen's thought, seems to better account for his claim that imputation does not in any way presuppose the causal non-determination of will.

ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488

5. Retributivism

"A theory of retributive punishment does not await or depend upon a theory of free will"
R. Nozick

Nozick (1981) outlined a philosophical theory of retributive punishment which does not presuppose free will. The central assumption is that punishment (re)connects the person who deservedly suffers it with the "correct values" he has "flouted":[5]

> Punishment effects a connection with correct values for those who have flouted them... The system is not one of maximizing the good (connection with correct values) but to eradicating the bad (flouting of correct values) by replacing flouting with linkage. So the role of suffering in punishment is not merely to ensure a significant effect in people's lives, but… to negate or lessen flouting by making it impossible to remain as pleased with one's previous anti-linkage (ibid., 384).

The question is: Is this conception of retributive punishment invalidated by the hypothesis that our actions are causally determined? Of course, yes: if our actions are causally determined, then we cannot be held responsible for them and, consequently, we cannot even be punished if they flout correct values by their injustice. As Nozick observes:

> It strongly appears that determinism is incompatible with punishment, which raises the philosophical question: given determinism, how is deserved punishment possible. It is not clear that the two are incompatible, but they appear to be, there is a tension

[5] Indeed, the act of punishment involves "two connections with value… that effected between correct values and (the life of) the punished person, and that between the punisher itself and the correct values when he acts as a vehicle for their having effect" (ibid., 378).

ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488

> between them. The task is to see how they could fit together (ibid., 394).

Kelsen had posed himself the same question and the same task – to reconcile determinism with imputation – even though, whether he realised it or not, his Pure Theory of Law was not compatible with such a task. Nozick's answer to the question "given determinism, how is deserved punishment possible?" is a sort of "Columbus' egg": to get rid of the notion of responsibility with all its problematic baggage and to focus on the acts that flout correct values and deserve punishment for those who commit them, whatever their causes:

> Retributive punishment effects a link with correct values in those who have flouted them (and who are capable of being linked). By whatever way the person came to be unlinked, came to flout, still, he unlinked and flouting, and so punishment is called for to effect and establish the linkage. "But if it was causally determined that he flout, how can he justifiably be punished for floating?" He is punished for his wrongful act, and he deserves punishment only if it is an act of flouting; we can say shortly… that he is punished for flouting. The punishment establishes the link between him and the values he was anti-linked to; causes of his being anti-linked do not alter the fact of his being so – rather they produce it – nor do they reduce the need for him to be linked (ibid., 395).

What we are faced with here is a clear version of the classical theory of punishment as the restoration of the order of justice[6]. Nozick makes it explicit with the following words:

[6] Cp., e.g., Hegel, 1963, § 220: "Objectively… by the annulment of the crime, the law is restored and its authority is thereby actualised. Subjectively, it is the reconciliation of the criminal with himself, i.e. with the law known by him as his own and as valid for him and his protection; when this law is executed upon him, he himself finds in this process the satisfaction of justice and nothing save his own act."

ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488

> Wrong puts things out of joint in that acts and persons are unlinked with correct values; this is the disharmony introduced by wrongdoing. Punishment does not wipe out the wrong, the past is not changed, but the disconnection with value is repaired (though in a second best way); nonlinkage is eradicated. Also, the penalty wipes out or attenuates the wrongdoer's link with incorrect values, so that he now regrets having followed them or at least is less pleased that he did (ibid., 379).

In turn, Kelsen himself presents his doctrine of imputation as a version of classical retributivism:

> retribution is imputation of… punishment to crime. The principle of retribution connects… a behavior which is in conflict with a norm with punishment. Thus it *presupposes* a norm that… prohibits this behavior… just by attaching a punishment to it (PTL, 92).

From this it follows that

> According to its inherent meaning [an] order may prescribe sanctions *without regard to the motives* that actually, in each single case, have brought about the behavior conditioning the sanctions. The meaning of the order is expressed in the statement that in the case of a certain behavior – *brought about by whatever motives* – a sanction (in the broader sense, that is, reward or punishment) ought to be executed (PTL, 26; italics added).

The values that, to use Nozick's jargon, are flouted by the behaviour to which a punishment is attached are those established by the norm with which such behaviour is in conflict:

> An objectively valid norm according to which a certain behavior 'ought to be', constitutes a positive or negative value. The behavior that conforms to the norm has a positive value, the behavior that does not conform a negative value. The norm that is regarded as

ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488

> objectively valid, functions as a standard of value applied to actual behavior" (PTL, 17).

It is worth noting that Kelsen's retributivism is much more radical than Nozick's. For Nozick, flouting correct values is a question of degree: "Causal determination of action… may lessen the degree of flouting" even if "it does not reduce it to zero; it does not undercut deserved punishment" (Nozick, 1981, 393-4). On the contrary, for Kelsen, flouting positive values does not admit a graduation: "a graduation of an objective value is not possible because a behavior can only conform or not conform with an objectively valid norm, but cannot do so more or less" (PTL, 21). Since the standard of value constituted by an objectively valid norm is a binary standard – conforming/non-conforming – flouting positive values is equivalent to pursuing negative ones and just as entails the punishment associated with such flouting. All that is required for a person to know is what it means to behave in conformity with a norm or to behave oppositely and in this case, what the consequences are. After all, even a serial killer determined to kill by irresistible motives knows that his acts constitute a flouting of the positive values established by the norm that links murder to a justified punishment (i.e., a punishment justified by the norm itself).

6. Conclusions

My aim in this paper was (and is) not to recommend some version of retributivism as a theory of punishment preferable to other theories. Indeed, what I have done is to present two versions of retributivism that reject free will with the intent of showing that rejecting it is just as plausible a philosophical option as accepting it. Of course, this does not mean that the two options are indifferent. To be sure, many (perhaps even most) people will feel uncomfortable with a theory that admits that unjust actions should be punished even if they are causally determined. They are more comfortable

ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488

with a theory that assumes that, given free will, the fact that such actions may be causally determined can limit, and in some cases even cancel, their punishability. But the judgement that intervenes here is dictated, more than by a comparative consideration of the intrinsic merits of each option, by our legal and moral sensibility. It is our sensibility that rebels against the idea that we can be punished for our wrongdoings even if we are causally determined to commit – and thus not responsible for – them. But we must not forget that, in the course of a long history, free will has been invoked, or denied, in support of the most diverse causes, starting from its use as an answer to the problem of evil (evil as a consequence of the abuse of our freedom of choice). And throughout this history, it has been the subject of interminable and inconclusive discussions. Whether the progress in the field of neurosciences has contributed (or will contribute) in some way to drying up the "quagmire of questions" (Nozick, 1981, 396) that free will brings with it is, in turn, a question on which I leave it to the experts to pronounce. But even if it were demonstrated that there is nothing like free will, punishing or not punishing actions that flout correct (positive) values would remain a choice that, as Kelsen argued, would bring into play that little or much freedom and responsibility that we are entitled to recognise in ourselves.

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ISSN 2724-6299 (Online)
https://doi.org/10.60923/issn.2724-6299/22488