

The Transformation in Kelsen's Last Works

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Stanley L. Paulson, *Metamorphosis in Hans Kelsen's Legal Philosophy*, 80 **Modern L. Rev.** 860 (2017), available at [SSRN](#).

Though Hans Kelsen is arguably the best-known and most influential legal philosopher of the 20th century world-wide, he is not especially well known among American scholars, and when his work is discussed in this country, it is often misunderstood. See D. A. Jeremy Telman, *Hans Kelsen in America – Selected Affinities and the Mysteries of Academic Influence* (2016). One scholar who has worked tirelessly for decades to make Kelsen better known and better understood on these shores is Stanley L. Paulson. He has (with the help of Bonnie Litschewski Paulson) translated Kelsen's works, See, e.g., Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson & Stanley L. Paulson, trans., 1992). written numerous articles summarizing and evaluating Kelsen's work, and translated and compiled other significant commentaries on Kelsen. See, e.g., Stanley L. Paulson & Bonnie Litschewski Paulson, *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (1998). Paulson's most recent article, "Metamorphosis in Hans Kelsen's Legal Philosophy," (a) explains the neo-Kantian approach of most of Kelsen's works (Pp. 876-880), (b) discerns certain weaknesses in the argument (Pp. 880-881, 893), and (c) investigates when and why Kelsen ultimately abandoned a neo-Kantian approach, and also changed his views about the application of logic to (legal) norms (Pp. 861-865, 882-892).

Anglo-American legal scholars are accustomed to a more empirical and pragmatic approach to philosophy in general, and to the study of law in particular, which is why H. L. A. Hart's approach has been well received. See, e.g., H. L. A. Hart, *The Concept of Law* (Oxford, 2012). What has made Kelsen's works so difficult for us is that his best-known writings are grounded in a very different approach, one based on Kant's transcendental argument. As Paulson explains, Kelsen's neo-Kantian argument goes along the following lines: We need to ask what follows from the fact that we (or "legal science") view the acts of officials as valid legal norms. The mystery is grounded in the fact that the actions of officials are in the empirical realm (facts about what legislators, judges, administrators, and other officials have done or said), while legal rules are in the normative (non-empirical) realm. A standard philosophical view is that normative conclusions cannot be derived from strictly empirical premises.

Kelsen died in 1973; a lengthy manuscript that he left unfinished was published posthumously in 1979, with an English translation appearing in 1991. Hans Kelsen, *General Theory of Norms* (Michael Hartney, trans., 1991). That work caused a sensation among legal theorists, because it involved a sharp departure from Kelsen's longstanding neo-Kantian approach to understanding law. In that final work, Kelsen presented his "Basic Norm" now as a fiction (in the spirit of Hans Vaihinger's work See Hans Vaihinger, *Philosophy of "As If"* (C. K. Ogden, trans., 1965). "The acts of will of legal organs are to be treated as if they could be understood normatively, not empirically." (P. 884, footnote omitted)., and offered an approach based on skeptical empiricism, in the spirit of David Hume.

In the present article, Paulson shows that Kelsen's break in fact occurred in 1960, many years before his death, and, more surprisingly, that this break in fact had a precursor, in some of Kelsen's writings in 1939-1940 (Pp. 885-892). Paulson argues that Kelsen's switch from Kant to Hume may have been tied to a different dispute, regarding whether it makes sense to apply logic to norms.

Paulson's article ultimately makes a great deal about the transformations in Kelsen's views clearer, but, in the process, creates new mysteries. For example, the switch away from neo-Kantian views in 1939 and 1960 is left clearer than the return to that approach in 1941, and its continued use until 1960. Paulson speculates (P. 891) that Kelsen's return to his neo-Kantian approach in 1941 may have been due to his practical circumstances (in exile from Europe, looking for a permanent position), but more may be needed to explain his persistence with that approach for two more decades.

For those who wish to study Kelsen (with or without the post-1960 works), Paulson's publications, including the present article, are the best places to start.

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