

In Piam Memoriam Francis Heller

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How does one take the measure of a man's life? Is it the number of years lived? Or is it the amount of wealth he accumulates? Or is it the good works he has done? Whatever the criteria one might apply, when one looks at Professor Francis Heller's life one thing becomes clear: it was a good life. Indeed, it was extraordinary.

Early Life & War Years

Professor Heller was a member of the "Greatest Generation" but he certainly was not a typical member. He was born in Vienna in 1917.¹ Vienna, at that time, was at the center of the Austro-Hungarian Empire. During the decades in which he grew up, his home city was the cultural center of Europe, home to many of the philosophers, artists, and scientists who were to shape the twentieth century. Professor Heller attended the *Schottengymnasium* there. This school, run by Benedictines, was one of the most prominent schools in Europe, and, as a result, he obtained a superb education. After the gymnasium, he enrolled in the University of Vienna as a law student (law was—and is—an undergraduate subject in Austria). In 1937 he volunteered to join the Austrian army (military service was then mandatory for all Austrian men when they turned twenty-one). He was assigned to the light artillery as a trainee officer. From his own account, the future Professor Heller took naturally to the military life. But his life in Vienna was soon to come to an end in the days and months leading up to the German invasion and annexation of Austria. During this period, many Austrians, including some in the military, began to openly support the Nazis. The Nazis took to the streets and began to prepare for the German invasion. Although Professor Heller might have either joined with the Nazis or, at least,

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1. Biographical details are taken from FRANCIS H. HELLER, *STEEL HELMET AND MORTARBOARD: AN ACADEMIC IN UNCLE SAM'S ARMY* (2009) [hereinafter *STEEL HELMET*].

accepted their seizure of power, he did not. When he was asked to take an oath of loyalty to the Nazi occupiers, he refused. By so doing, he left himself no choice but to leave his homeland. He met his family in Warsaw, and from there he and his two brothers left for safer locations. One brother went to boarding school in England. A second brother enrolled in the University of Grenoble. And Francis went to the United States and enrolled in law school at the University of Virginia.

In September 1942, Francis was drafted into the U.S. Army. He was offered a slot as a translator, one that might well have kept him out of combat, but he chose to fight instead and was sent to Fort Bragg to train as an artilleryman. Although he had been an officer in the Austrian army just a few years before, he was simply an enlisted man when he went to Fort Bragg. Within a few months, he was on his way to Hawaii and the Pacific Theater.

The British, when speaking of those who served during World War II, often say that an individual had a “good war.” By this they usually mean that the person saw action in combat or the equivalent and served not only honorably but exceptionally. Francis Heller had a “good war.” From Hawaii (where, incidentally, he was sworn in as a citizen of the United States) he travelled to Australia with the artillery. At this time, he was a private and lived a private’s existence:

Every Sunday for four months Privates Flack and Heller peeled potatoes and scrubbed pots and pans together.²

Soon, however, Private Heller’s tranquil life ended. Instead, he and his unit were shipped out first to Goodenough Island and then on to a succession of Pacific Islands and some of the fiercest fighting of World War II. Very quickly, Private Heller became Sergeant Heller. He fought in Leyte and distinguished himself at the Battle of Kilay Bridge.³ With his unit, he continued on to Mindoro and Mindanao. It was not easy. Like his brothers in arms throughout the Pacific Theater he suffered privations and illness. But he never faltered. He was scheduled to be part of the invasion of the Japanese homeland and knew what this meant:

2. *Id.* at 43.

3. *Id.* at 75.

What was scary was that MacArthur's master plan assumed that these four attack divisions [including his own] would be wiped out within the first seventy-two hours of the invasion!⁴

He later commented:

I could not help but feel that, but for the atomic bomb, this [the area of Japan that he would have fought in] is where I would have died.⁵

One might well think that his lasting affection for President Harry Truman had its roots in his decision to use the atomic bomb rather than risk the millions of deaths an invasion would have involved.

By the time of Japan's surrender, Sergeant Heller had been promoted and become an officer. When given the opportunity to return to the United States, he volunteered to remain in Japan as part of the occupying forces and, in fact, did not get back to the United States until 1947.

The War in the Pacific was brutal and unrelenting. In his thirty-three months of service, Professor Heller had only twelve days when he was not on duty. He spent much of his duty time in combat with his artillery unit. He fell ill several times and was even hospitalized. When not in combat, he served in various adjutant posts, including as a General's aide. Even when the war was over, he decided to continue to serve his adopted country and stay on as part of the occupying force. His was certainly a "good war," a war in which he demonstrated his heroism and his love of the United States. In spite of all he endured from 1942 until 1947, he took no time off when he returned home. Instead, he immediately enrolled in the Ph.D. program at the University of Virginia. He received the Ph.D. in June 1948. Just a few weeks later he accepted a visiting assistant professorship at the University of Kansas, which was to become his professional home for the next sixty years, with the exception of the time he spent serving in the army when his unit was called up as part of the Korean War mobilization.⁶

If one remembers that Professor Heller celebrated his thirtieth birthday in the year he returned to the United States, one realizes what a remarkable life he had already had. Born in Vienna, trained as a lawyer and soldier there, emigration to the United States and another law degree followed by five years of war and occupation in the Pacific. One can

4. *Id.* at 87.

5. *Id.* at 88 n.6.

6. *Id.* at 146-49.

only ask how many men, even of the “Greatest Generation” had lived such lives by the time they turned thirty! I suspect that the answer is “very few.”

Teaching & Administration

We live in an era of public skepticism about higher education and in which the students often feel that their professors put little priority on teaching. No student ever said that about Francis Heller. Francis was passionate about his subject and passionate about his teaching. He also had a great gift: the ability not only to convey facts to his students but, also, to convey his enthusiasm and love of his subject. His primary field was American constitutional law, but his interests in both teaching and research were far broader, extending to comparative law and legal history. His training as a lawyer both in Austria and the United States gave him a perspective few American law teachers had then or have now. His fluency in both German and English (as well as other subjects) meant that he could teach his students not only about what American scholars had written but also what German and Austrian scholars had written as well. In the 1930s and 1940s American universities were enormously enriched by the influx of European scholars who had fled the Nazis.⁷ These scholars trained a generation of Americans to be less parochial in their views and more global in their worldview. Professor Heller was one of these refugees. But most of the émigré scholars who came to this country in this period did not retrain in the United States as he did. Professor Heller brought together the broad humanistic education he gained at the Benedictine-affiliated *Schottengymnasium*, the “scientific” approach to jurisprudence he learned at the University of Vienna, the traditional legal education he obtained at the University of Virginia School of Law, and the rigorous graduate education he gained from his Ph.D. program in Political Science at the University of Virginia. This highly unusual combination, fueled by his passion, made him an exceptional teacher. I had the privilege to sit in on some of the American legal history classes he taught at KU during his retirement. His unique perspective made those classes memorable. And his students appreciated his efforts both in the classroom and out. In my academic career I have rarely seen the intense devotion Professor Heller’s students felt for him. This is the true mark of a great teacher. His broad humanistic

7. See generally DER EINFLUSS DEUTSCHER EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN DEN USA UND IN DEUTSCHLAND (Marcus Lutter, Ernst Stiefel & Michael H. Hoefflich, eds., 1993).

perspective, rare in a lawyer, also led him to his involvement in subjects outside his traditional areas of expertise. From 1956 until 1962, he served as Director of the Honors Program at KU.

Few university professors have a high opinion of academic administration and even fewer decide to interrupt their teaching and scholarly careers for a stint in administration. Professor Heller was one of these rare professors. His directorship of the Honors Program was followed by a year as Associate Dean of Faculties at KU, then five years as the Chief Academic Officer (1967–1972), and three years as Acting Provost (1967–1970).⁸

Being an academic administrator is a thankless task. One is reminded of the cliché that attempting to manage faculty is like attempting to herd cats. Professor Heller had the unfortunate (or, perhaps, fortunate) experience of being the academic chief executive of KU during one of the most difficult periods in American academic history, the period of student unrest in the late 1960s and early 1970s. But he never shirked his duties even when they were quite difficult. Administration came easily to him. In my opinion, his service in the army, especially his duties serving high ranking officers, taught him more about management than any MBA or educational administration course might have done. Professor Heller understood hierarchy and the importance of accountability, above all. The story is told of the time when the then university librarian, who reported to then-Dean Heller, decided to go on a book buying trip to Europe during the summer.⁹ He neither informed Dean Heller of his trip nor sought his permission, even though the university librarian, unlike regular faculty, is on a twelve-month contract. Some days after the librarian set out on his European trip, his absence came to the attention of Dean Heller. To his mind this was a violation of the university librarian's contract. To Dean Heller, there was a simple solution: he ordered that the university librarian's salary be stopped immediately. And it was, to the librarian's consternation. Of course, once the librarian contacted Dean Heller and obtained permission for his trip, his salary was restarted. Dean Heller respected rules and hierarchy and made sure that those who reported to him did so as well.¹⁰

8. *Obituary: Francis Heller*, LAWRENCE J.-WORLD, Jan. 20, 2013, <http://obituaries.ljworld.com/obituaries/ljworld/obituary.aspx?pid=162460856#fbLoggedOut>.

9. This incident was told to the author by William Crowe, a former Dean of Libraries at KU (but not the librarian who went to Europe).

10. Professor Heller was proud that he had the reputation of being a “no-nonsense officer”

Long after Professor Heller's administrative career came to an end he continued to serve KU with his organizational and administrative skills. One of the great dangers that American public universities have always faced, particularly those that are not on either coast, is parochialism. The American public—and public universities must please the public, who pays their bills, at least to some extent—has rarely had a global perspective. Refugee scholars like Francis Heller, did much in the post-World War II years to broaden their students' perspectives on the world. In another important respect, Professor Heller also helped to broaden his law school colleagues' perspectives. Professor Heller never lost his love of his birth country, Austria. After the war he and Donna, his wife, travelled to Austria. It was through these travels, and his personal contacts there, that Professor Heller was instrumental in establishing a faculty exchange program between the University of Vienna and KU Law School. For several decades (the program is now, alas, extinct) these exchanges allowed KU faculty to spend a time teaching at Vienna and Vienna faculty to teach at KU.¹¹

Scholarship

Francis Heller was a prolific scholar until the very end of his life. For sixty years, he produced a constant stream of books and articles on a number of subjects. That he was able to publish so much of such high quality over such a long period during which he also accomplished so many other things is truly remarkable and little seen in legal academia.

Constitutional Law

Professor Heller's primary subject in both his teaching and research was American constitutional law. Among his earliest and most important books were *The Sixth Amendment to the United States Constitution: A Study in Constitutional Development* (1951), and *Introduction to American Constitutional Law: A Selection of Cases and Materials* (1952). His periodical publications on constitutional law began in 1943 with his *A Turning Point for Religious Liberty* in the *Virginia Law Review*.¹² Over the next half century he published

during his military career. STEEL HELMET, *supra* note 1, at 157.

11. See generally Francis H. Heller & John C. Peck, *American Law Teachers in an Austrian University: Some Observations Gleaned from a Decade of the Kansas-Vienna Exchange Program*, 42 U. KAN. L. REV. 507 (1994).

12. 29 VA. L. REV. 440 (1943).

numerous additional articles on constitutional law. Among these are his *The End of the “Commercial Speech” Exception—Good Riddance or More Headaches for the Courts?* in the *Kentucky Law Journal*,¹³ *Article V: Changing Dimensions in Constitutional Change*, in the *University of Michigan Journal of Law Reform*,¹⁴ *The Supreme Court: Its Role in the Balance of the Federal System* in the *Journal of Public Law*,¹⁵ and many more.

Professor Heller was also a pioneer in the study of state constitutional law from the very beginning of his scholarly career. In 1949 he published *Virginia’s State Government During the Second World War: Its Constitutional, Legislative, and Administrative Adaptations, 1942-1945*. In 1962 he co-authored (with Don Bowen) *Uniform State Laws in Kansas*.¹⁶ In 1992 he produced his magisterial *The Kansas State Constitution: A Reference Guide*.

The American Presidency

In addition to Professor Heller’s abiding interest in American constitutional law, he was also fascinated by the history, structure, and functioning of the American Presidency. It was in his writings on the presidency that his dual training in law and political science found its fruition. Among his major works on this subject are his books, *The Presidency: A Modern Perspective* (1960), *Economics and the Truman Administration* (1981), and *The Truman White House* (1980). But, in my opinion, his greatest contribution to the history of the American presidency was a book that never carried his name as author, *President Harry Truman’s Memoirs*.¹⁷

Professor Heller relates the history of his involvement with President Truman and his *Memoirs* in his own autobiography, *Steel Helmet and Mortarboard*.¹⁸ Soon after President Truman retired and just a few short years after Professor Heller arrived at the University of Kansas, he received a call from then-Chancellor Franklin Murphy asking whether he

13. 67 KY. L.J. 927 (1978–1979).

14. 7 U. MICH. J.L. REFORM 71 (1973–1974).

15. 6 J.PUB. L. 319 (1957).

16. It is interesting to note that Professor Stephen McAllister at the University of Kansas School of Law has carried on Professor Heller’s interest in state constitutional history. See, e.g., STEPHEN MCALLISTER, ET AL., *STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE* (2010).

17. HARRY S. TRUMAN, *MEMOIRS* (1955).

18. STEEL HELMET, *supra* note 1, at 177–81.

would be interested in assisting President Truman in preparing his memoirs. Within a few weeks he was visiting with the retired President in his modest Kansas City offices. In that first interview the professor and the President learned that they shared a common experience: the artillery. Professor Heller later commented that it was “good fortune” that brought him and the retired President together.¹⁹ Their partnership was also good fortune for the history of the Truman presidency. Professor Heller remained loyal to President Truman until his death. This loyalty manifested itself not only in his work on the presidential memoirs, but, also, in his decades of service to the Truman Presidential Library.

Legal History

Professor Heller had a lifelong interest in history and the history of the law. This is hardly surprising. His legal education in Austria would have stressed the history of Austrian law. The law he learned there was based upon the *Allgemeines bürgerliches Gesetzbuch* enacted in 1811 and based, in large part, on the Roman legal heritage. Legal education in Austria and in the other civil law countries in the interwar period was very much historical. His study of constitutional law at the University of Virginia would also have focused, in part, on constitutional history. Thus, throughout his life Professor Heller taught and wrote about legal history. Among his most important writings on the subject were those on Kansas legal history, including his *Lawyers and Judges in Early Kansas: A Prospectus for Research*²⁰ and *The Justices of the Kansas Supreme Court 1861-1975: A Collective Portrait*.²¹ Professor Heller also wrote about military legal history in his 1977 article *Military Law in the Continental Army*.²²

Other Writing

Had he limited his research and writing to the subjects discussed above, Professor Heller would have been a polymath, but he did not. He

19. *Id.* at 181.

20. 22 U. KAN. L. REV. 217 (1974).

21. 24 U. KAN. L. REV. 521 (1976). It is noteworthy that Professor Heller's interest in Kansas legal history was shared by another colleague, Paul Wilson, who also wrote seminal articles on the subject. See PAUL E. WILSON, MUSINGS OF A SMILING BULL (2000).

22. 25 U. KAN. L. REV. 353 (1977).

also wrote on comparative law and European law.²³ And he wrote about humanistic subjects, beginning with his M.A. Dissertation at the University of Virginia.²⁴ There were truly no limits to his interests. There were also no limits to his willingness to share his scholarship and his scholarly network with his colleagues. Many of his colleagues, as I have mentioned, benefitted through his German and Austrian connections. I was a beneficiary of his scholarship in a different way. When I first arrived in Kansas in 1994, I decided that I wanted to explore the history of the legal profession in Kansas. This was a formidable task because many of the sources for Kansas legal history were not easily available.²⁵ Among the most pressing needs that I saw was the need to compile a list of Kansas lawyers from 1855 to the present. I mentioned this to Professor Heller. A few hours later he appeared at my office door with an armful of filing boxes filled with thousands of index cards listing every lawyer who had ever been admitted in Kansas. He and a student had compiled these. He gave them to me and said that he hoped that I would put them to good use. I still use them more than a decade later. Such a gift is immensely rare among scholars, who all too often jealously guard their research findings. Professor Heller was one of the most generous men I have ever known.

In Piam Memoriam

How does one adequately sum up a life so rich, so complex, so long as Professor Francis Heller's? I cannot do so and this brief memorial cannot pretend to do so. By whatever standards one applies, Francis Heller was a great man who led an amazing life. He enriched the lives of thousands of people: those he served with in two wars, those he taught, those who were his colleagues, those who served with him in all the activities he engaged in. His memory will live on long past his life in the minds of all those whose lives he touched.

23. See, e.g., FRANCIS HOWARD HELLER & JOHN GILLINGHAM, *NATO: THE FOUNDING OF THE ATLANTIC ALLIANCE AND THE INTEGRATION OF EUROPE* (1992); FRANCIS HOWARD HELLER, *USA, VERFASSUNG UND POLITIK* (1987).

24. FRANCIS HOWARD HELLER, *NATIONAL SOCIALISM IN THE GERMAN NOVEL* (1941).

25. See M.H. Hoeflich, *Why the History of Kansas Law Has Not Been Written*, 26 KAN. HIST. 264 (2004), available at http://www.kshs.org/publicat/history/2003winter_hoeflich.pdf.