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WORKING MAN

*Mickey Kaus**

I've always thought Otto—that is what my brother and I called him—was close to an ideal father, in part because he wasn't all that "fatherly." He went off to work; he came home to dinner. He retired to his room to work some more. Nothing authoritarian, no stern lessons or heavy man-to-man chats. The "parenting," as it is now called, was left to my mother. Otto was almost an equal, from my perspective, a nice man who lived with us and earned the money. Later, when I became a lawyer myself and visited him in his chambers, I could see that not only did he spend most of his time working, but he thrived on it, coming alive at the office in a way he often didn't when he came home exhausted.

I leave to others any analysis of Otto's legal opinions. I don't know all that much about them, except that when we did talk law we usually disagreed. (He would refer to me as "My son, the fascist.") I do think, however, that he brought to his judging some of the modesty and natural egalitarianism we saw at home. In my brief legal career, I clerked for the California Supreme Court (before Otto's arrival) and was surprised, and somewhat perplexed, by the righteous, hyperbolic tone of some of the opinions and dissents. You couldn't just disagree with a legal interpretation, it seemed; you had to predict it would lead to calamity for the republic.

Otto seems to have been different. He was a Democrat and, by today's standards, a liberal, but he was not motivated by any conventional sort of ideology—"I just have nothing I want to sell," he said.¹ He had a nongrandiose conception of his function, both in the sense that he felt tightly bound by precedent, and in the more important sense that he respected the right of the people, through initiatives or the legislature, to enact laws he no doubt felt were stupid or unfair. He was aware (as, perhaps, freshly-minted

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1. *Oral History: Justice Otto Kaus*, 15 HASTINGS CONST. L.Q. 193, 267 (1988).

law clerks such as myself were not) that his decisions had real impact on real people and had to work in practice, not just in theory. And he acknowledged that he himself might be mistaken, and that many of the issues the courts were called on to decide were, in fact, close questions about which reasonable judges could differ. "Obviously much is to be said on each side of the [issue]," he wrote in *Assembly v. Deukmejian*.² "The two considerations which, in my view, tip the scale in favor of the dissent are these"³

Otto was uncomfortable with politics. The atmosphere during the "No on Bird" campaign clearly troubled him, though whether he was more troubled by the attacks on the court or the fear that his fellow justices would trim their opinions to appease the "crocodile in the bathtub,"⁴ I don't know. His decision to retire, however, was (as he asserted) dictated by personal considerations.⁵ I walked around the block with him shortly before he quit. I was sticking in my two cents, questioning his decision to leave the bench. Surely, I thought, he had an agenda he'd brought to the court, things he wanted to accomplish—what sentient lawyer wouldn't? He said he did have a small "hidden agenda," but that he'd accomplished two of the three things on it. It was not an agenda of bold new rights or reforms. All three items were relatively technical, though not insignificant, issues where Otto just thought the law was all bollixed up.⁶ My own profession, the press, tends to lionize judges (William Brennan, for example) who see their role as striking dramatic blows for social justice. But the tendency of judges, liberal and conservative, to want to keep on striking dramatic blows has, in our democracy, gotten the courts (especially the California Supreme Court)⁷ into trouble.

2. 30 Cal. 3d 638, 694, 639 P.2d 939, 973, 180 Cal. Rptr. 297, 331 (1982) (Kaus, J., concurring and dissenting).

3. *Id.* at 696; see also *Oral History*, *supra* note 1, at 260.

4. See JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 177 (1989).

5. See *Oral History*, *supra* note 1, at 266.

6. The three issues on Otto's private agenda, apparently, were (1) the admissibility of evidence of prior acts in a criminal trial, see *People v. Tassell*, 36 Cal. 3d 77, 679 P.2d 1, 201 Cal. Rptr. 567 (1984); (2) whether defendants jointly charged with a felony are entitled to independent attorneys, see *People v. Mroczko*, 35 Cal. 3d 86, 672 P.2d 835, 197 Cal. Rptr. 52 (1983); and (3) whether California state courts of appeal have to follow each other under the rule of stare decisis. See *Oral History*, *supra* note 1, at 245.

7. In 1985, while working as West Coast correspondent for *The New Republic* magazine, I wrote an article criticizing Chief Justice Rose Bird. See Mickey Kaus,

Otto was not materialistic. A new Volvo every 10 years and he was satisfied. He loved his job, and he loved athletics; neither took much cash. He did make a lot of money in private practice after he retired from the court, and he was proud of making it, but he never learned how to spend it. Outside the office he walked around in an old athletic jacket or windbreaker.

During his last few months, when he must have realized he was dying, Otto—a bit of a hypochondriac—was, against our expectations, quite courageous. He fought the disease, but never cracked. He didn't complain about his course of treatment. He didn't bemoan his fate. I don't know why. It all seemed quite unfair to me. Then again, Otto knew more than I did. His family had made it out of Europe just ahead of the Nazis, and he could have died as a young soldier in the Pacific during the war that followed. Yet he lived to raise his own family in freedom, during one of the great, unexpected prosperities of human times.

And how many of us are lucky enough to spend our working lives doing what we love to do and do best?

Flipping the Bird, 192 NEW REPUBLIC 21 (1985). Soon thereafter, the story began circulating that I'd written it out of some sort of Oedipal anger. Otto, who strongly supported Bird's retention, went to one of the chief's aides and explained that, while he didn't know where these rumors were coming from, they weren't true. After that, Bird didn't speak to him for many weeks, even (according to my mother) denying him the blueberry muffins she brought to the court's Wednesday conferences. I should add that I never heard Otto privately criticize Bird's judicial performance. (There is some mild public criticism of one of Bird's opinions in *Oral History*, *supra* note 1, at 261.) When, in 1995, Otto was diagnosed with malignant cancer, Bird sent him a warm note, which drew on her experience fighting the disease, and which gave him great comfort.

