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## OTTO AND THE COURT

*Stephen R. Barnett\**

The first time I met Otto Kaus, the topic was bizarre, and perhaps not suitable for the staid and proper pages of a law review's memorial tribute. But Otto was never one to keep things serious and proper, and I don't think he'd have wanted us to bowdlerize him. So here goes.

It was at a meeting of the American Law Institute in Washington, D.C., sometime in the mid-1970s. I was not then a California court junkie and had never heard of Otto Kaus. But somehow, during a break in (or during) the learned debates on new Restatements and the like, I fell into conversation with this name-tagged fellow Californian, who turned out to be a court of appeal justice.

I have no memory of how the topic came up—maybe there was something relevant in a pending Restatement—but we talked about recovery for loss of consortium. And Otto was telling me, from his experience as a trial judge, what the testimony was usually like when the plaintiff spouse was put on the stand and asked the delicate but unavoidable question: “How often did the two of you have sex?”

The answer, said Otto, was always “three times a week.” As he explained it, with that clipped Viennese accent and that mischievous light in his eye: “If she said less than three times a week, it wouldn't sound like so much. If she said more than three times a week, no jury would believe her. So it's always three times a week.”

That was vintage Otto—irreverent, savvy, slightly risqué, unfooled but charitable toward human foibles, grounded in earthy truth. Several years later, when I came to know both Otto and his judicial work, I recalled that I had caught this glimpse of one facet of a matchless man and judge.

I came to know Otto partly as a neighbor. When he was on the supreme court and commuting weekends back home to Los

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Angeles, he took as a weeknight *pied à terre* a room over the garage—a sort of coachman's quarters—in a Spanish-style estate near the Claremont Hotel in Berkeley, not far from where I lived. So we occasionally ran into each other, and once or twice had a drink, dinner, or a game of tennis (fierce on Otto's part). My total immersion in Otto, though, came through his supreme court opinions.

Although Otto joined the court on July 21, 1981, the wheels there grind so creakily that the first majority opinion by Kaus, J., didn't appear until December 17, 1981.<sup>1</sup> More surprising, Otto's first dissenting or concurring opinion didn't see light until a month after that.<sup>2</sup> But once Otto got started, like some souped-up BMW, he went instantly to full speed. Nineteen eighty-two thus proved to be a fully productive year for the new Justice Kaus, and in retrospect perhaps the most significant of his four years on the court.<sup>3</sup> I happened to do a law review article on the work of the California Supreme Court for 1982,<sup>4</sup> so I had the luck of taking a close look at the opinions produced by Otto during that path-breaking year.

Reading now what I wrote about Otto then, I find it less embarrassing than many such confrontations with one's former authorial self, but I do wish I hadn't been so stiff, constrained, and cautious. I commended Justice Kaus for "the generally high quality of his opinions," which were "pragmatic, fact conscious, and dispassionate."<sup>5</sup> I deemed Otto's majority opinions "at once knowledgeable and readable, even when dealing with rather technical subjects," but found his "most distinctive" voice in his dissents.<sup>6</sup> These were "remarkably concise, often no more than a

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1. See *People v. Lock*, 30 Cal. 3d 454, 637 P.2d 292, 179 Cal. Rptr. 56 (1981).

2. See *Assembly v. Deukmejian*, 30 Cal. 3d 638, 694, 639 P.2d 939, 973, 180 Cal. Rptr. 297, 331 (1982) (Kaus, J., dissenting).

3. As noted, Otto's first opinion appeared in December 1981. Although Otto retired on October 16, 1985, he sat as a "holdover" *pro tem* justice in cases decided through December 31, 1985. See, e.g., *White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 900, 710 P.2d 309, 327, 221 Cal. Rptr. 509, 527 (1985) (Kaus, J., sitting under assignment by chairperson of Judicial Council, concurring and dissenting). Otto's participation in decisions of the court thus covered almost exactly the four years of 1982 through 1985.

4. See Stephen R. Barnett, *The Supreme Court of California, 1981-1982: Foreword: The Emerging Court*, 71 CAL. L. REV. 1134 (1983). (The subsequent abandonment of this annual "California Supreme Court issue" by the *California Law Review*, and the apparent lack of interest on the part of any other California law journal in picking it up, strike me as emblems of the court's declining reputation—and its need for someone like Otto.)

5. *Id.* at 1182

6. *Id.* at 1183, 1185.

page long[,] . . . lucid and . . . low key, down-to-earth, often witty and wry, . . . a contrast to the high-pitched rhetoric that sometimes emanates from other chambers."<sup>7</sup>

The other regret I have on rereading that piece springs from its optimistic tone about Otto's role in the court's future. I described the court in 1983 as "emerging from a period of transition,"<sup>8</sup> with Otto and three other justices (Allen Broussard, Cruz Reynoso, and Joseph Grodin) having recently come on board, and I assumed that the court was in for a period of greater stability. That assumption has been repeatedly foiled, first by Otto's own premature departure in 1985, then by the upheaval of the 1986 judicial election, and since then (it seems) by the siren call of private judging. While I had little praise in that piece for the 1982 court's majority ("One of the main strengths of the present court lies in its dissents," as I delicately put it),<sup>9</sup> I implicitly looked forward to an extended period in which Otto would play a major role on the court. It's sad to read that now, with the knowledge that he served only four years. Volumes Thirty through Forty-One of the *California Reports* ought to have a golden "O" on their spines, denoting that they contain opinions by Otto.

### I. OTTO FOR THE COURT

Otto's lasting legacy is in those volumes, and that's what I want to focus on in this remembrance. There are eighty-three majority (or lead) opinions by Otto and forty-two dissents, plus another forty-two concurring opinions.<sup>10</sup> These opinions are so readable that it seems almost perverse to write *about* them, instead of just quoting Otto (as in fact I'll often be doing). Like the proud proprietor of a great wine cellar, you're endlessly tempted to show off and savor your favorites. At the same time, though, reading Otto's opinions can almost make you cry, especially if you compare them with many of the opinions produced by the California Supreme Court today.

One obvious contrast is length. Otto's majority opinions for the court (death penalty cases excluded) averaged about 4,300 words. This was twelve percent shorter than the majority opinions produced by the other justices serving with Otto, and *forty-five*

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7. *Id.* at 1183.

8. *Id.* at 1134.

9. *Id.* at 1188.

10. Opinions "concurring and dissenting" are counted as dissents.

percent shorter than the majority opinions turned out by the court today (death cases again excluded). One wonders how the present court would defend this differential. Would anyone claim that the opinions of today's court are better, in any way, than Otto's? If Otto could decide a case in fewer than 5,000 words, why can't today's justices (or their research attorneys)?<sup>11</sup>

Brevity is only one of the ways that Otto's opinions stand out; another is that, while Otto surely used law clerks and research attorneys, you rarely have any doubt that the opinion was written, or rewritten, by Otto himself. The laser-like analysis, the deep learning and scholarship lightly wielded, the style, the wit, the panache are trademarked Otto. True, his majority opinions could be all-business and impersonal, especially in criminal cases or in tasks he did not relish, such as (one assumes) his role as the court's designated tort-killer in upholding the MICRA medical malpractice "reform" legislation.<sup>12</sup> But almost always there is some of Otto's lightness, grace, and punch.<sup>13</sup> Otto would make even the most difficult opinions look easy, dealing on terms of relaxed familiarity with subjects such as common carrier liability insurance coverage<sup>14</sup> and zeroing in effortlessly (or so it seemed) on the heart of the case.<sup>15</sup> One audience that appeared to appreciate Otto's opinions consisted of his fellow justices; in 1982, his first year, Otto led the court by far in the percentage of his majority opinions that were unanimous.<sup>16</sup>

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11. In a recent reply to my criticisms of the present court along this and other lines, Chief Justice Ronald M. George has conspicuously avoided the subject of opinion length. See Stephen R. Barnett, *The Bureau Court*, CAL. LAW., Sept. 1996, at 27, 28; Ronald M. George, Letter to the Editor, *The Justices Are In*, CAL. LAW., Dec. 1996, at 13, 13-14.

12. See *Fein v. Permanente Med. Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985); *Roa v. Lodi Med. Group*, 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985); *Barme v. Wood*, 37 Cal. 3d 174, 689 P.2d 446, 207 Cal. Rptr. 816 (1984); *American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc.*, 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984).

13. See, e.g., *People v. Castro*, 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985) (holding that the "Victims' Bill of Rights" initiative did not put all prior convictions into evidence): "The People attempt to escape from this plainest of meanings, by claiming—to put it bluntly—poor draftsmanship." *Id.* at 310, 696 P.2d at 116, 211 Cal. Rptr. at 723.

14. See *Home Indem. Co. v. King*, 34 Cal. 3d 803, 670 P.2d 340, 195 Cal. Rptr. 686 (1983) (Kaus, J., for unanimous court).

15. See, e.g., *Ramos v. Superior Court*, 32 Cal. 3d 26, 648 P.2d 589, 184 Cal. Rptr. 622 (1982) (prosecution of special circumstance allegation barred after dismissal by magistrate) (Kaus, J., for unanimous court).

16. Sixty-three percent of Otto's opinions for the court in 1982 were joined by all

In reviewing Otto's record recently, one thing I found surprising was his performance in death penalty cases. Moderate as Otto was in other areas, in death cases his liberal streak came through loud and clear. He wrote for the court in eleven death penalty cases, reversing the penalty in all eleven.<sup>17</sup> He voted in forty-six death penalty cases, voting to reverse the penalty in forty-five of them.<sup>18</sup> This is a record nuzzling the sixty-one-out-of-sixty-one death penalty reversals that brought down Chief Justice Bird, and Justices Reynoso and Grodin with her, in the 1986 election.<sup>19</sup>

What to make of Otto's record in death penalty cases? That batting average isn't easy to square with Otto's usual willingness to set aside his policy preferences and apply the law, however distasteful. It indicates, though, how complex Otto was as a judge. He had a deep passion for fairness and a sympathy for society's underdogs that tended to prevail in criminal cases, along with a moderation, common sense, and sure feeling for the limits of judi-

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the other sitting justices, compared with 45% for the runner-up, Chief Justice Bird. See Barnett, *supra* note 5, at 1183 n.346.

17. See *People v. Leach*, 41 Cal. 3d 92, 710 P.2d 893, 221 Cal. Rptr. 826 (1985); *People v. Silbertson*, 41 Cal. 3d 296, 709 P.2d 1321, 221 Cal. Rptr. 152 (1985); *People v. Hamilton*, 41 Cal. 3d 408, 710 P.2d 981, 221 Cal. Rptr. 902 (1985); *People v. Masie*, 40 Cal. 3d 620, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985); *People v. Frierson*, 39 Cal. 3d 803, 705 P.2d 396, 218 Cal. Rptr. 73 (1985); *People v. Holt*, 37 Cal. 3d 436, 690 P.2d 1207, 208 Cal. Rptr. 547 (1984); *People v. Turner*, 37 Cal. 3d 302, 690 P.2d 669, 208 Cal. Rptr. 196 (1984); *People v. Ramos*, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984); *People v. Mroczko*, 35 Cal. 3d 86, 672 P.2d 835, 197 Cal. Rptr. 52 (1983); *People v. Easley*, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983); *People v. Robertson*, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982).

18. In addition to the cases cited *supra* note 17, see, for example, *People v. Croy*, 41 Cal. 3d 1, 710 P.2d 392, 221 Cal. Rptr. 592 (1985); *People v. Carlos*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983); *People v. Haskett*, 30 Cal. 3d 841, 640 P.2d 776, 180 Cal. Rptr. 640 (1982). The only case in which Otto voted (with the court) to affirm a death sentence was *People v. Fields*, 35 Cal. 3d 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983).

19. Could it be, then, that Otto's premature departure from the court in 1985 was due, in part, to a disinclination to heap the plate for his famous "crocodile in the bathtub?" See JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 177 (1989) (quoting Otto as likening the effect of judicial elections to "brushing your teeth in the bathroom and trying not to notice the crocodile in the bathtub"). I do recall one evening, not long after the 1982 judicial election, when Otto and I were having a drink in his Spanish hideaway and he groused about the election results, in which Frank Richardson got a retention vote of 76.2% and Otto only 57.0%, followed by Allen Broussard with 56.2% and Cruz Reynoso with 52.4%. *Id.* at 168. I tried to reassure Otto by arguing that the voters hadn't had time to digest the differences among the new justices and that next time they would do better. Otto was not reassured. But Otto would not have been on the ballot in 1986—his term ran to 1990—so he could have stayed for at least another four years without worrying about reptilian diets.

cial power that marked his civil-case judging.

## II. OTTO ON LAWYERS

Among Otto's opinions for the court in civil cases, a bunch of my favorites could be collected under the title "Otto on Lawyers." While Otto was savvy about countless things, from the earthy to the academic, he seemed especially knowing about the ways of lawyers. One sparkling result was *Hartman v. Santamarina*.<sup>20</sup> Otto's opinion for a unanimous court in this case upheld the hoary practice of avoiding mandatory dismissal under the "five-year rule"<sup>21</sup> by impanelling a jury and then sending it home until the lawyers and judge could get to the case.

Originally, Otto observed, the practice may have been "a mere professional courtesy to comatose counsel," but today's overcrowded dockets "often make it touch and go whether even the most aggressive plaintiff can get to trial within five years."<sup>22</sup> To the defendant's claim that impanelling a jury only to send it home was "a 'charade' which does little credit to the public image of the courts,"<sup>23</sup> Otto replied with a keen-edged thumbnail history of legal fictions. Quoting Marshall and Blackstone, he recalled the "symphony of fictions" by which the King's Bench transformed the action of ejectment into a way of trying title, and then the "machinations" by which the King's Bench usurped civil jurisdiction from the Common Pleas by pretending to jail the defendant.<sup>24</sup> "The obvious parallel between a 'pretend' jailing to acquire jurisdiction and the 'pretend' picking of a jury to keep it effective," Otto concluded, "suggests that the jurors participated not in a charade but, rather, in a tableau in a centuries old pageant."<sup>25</sup>

Here you had the classic ingredients of a Kaus opinion: a practiced feel for the needs and habits of today's trial courts, a deft lesson in legal history, unanswerable argument, wry and witty writing, and all compressed into just over five pages.

Otto's sympathy for human foibles did not extend to hapless lawyering, as several counsel of that ilk had occasion to learn. In

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20. 30 Cal. 3d 762, 639 P.2d 979, 180 Cal. Rptr. 337 (1982).

21. See CAL. CIV. PROC. CODE § 583(b) (West 1996).

22. *Hartman*, 30 Cal. 3d at 766, 639 P.2d at 981, 180 Cal. Rptr. at 339.

23. *Id.*

24. *Id.* at 766 & n.4, 767 n.5, 639 P.2d at 981 & nn.4-5, 180 Cal. Rptr. 339 & nn.4-5.

25. *Id.* at 767, 639 P.2d at 981-82, 180 Cal. Rptr. at 339-40.

*Carroll v. Abbott Laboratories*,<sup>26</sup> for example, one of Otto's "comatose counsel" sought relief from a dismissal order with a claim of "excusable neglect," citing a line of cases that seemed to establish, in Bernie Witkin's words as quoted by Otto, that "the more gross and inexcusable the neglect of the attorney, the more certain is the party of getting relief."<sup>27</sup> Nothing doing, said Otto for the court (Bird, C.J., dissenting). The exception noted by Witkin should be limited to cases where the attorney had deserted the client ("de facto substituted himself out of the case").<sup>28</sup> "Excusable neglect" should be narrowly applied, "lest negligent attorneys find that the simplest way to gain the twin goals of rescuing clients from defaults and themselves from malpractice liability, is to rise to ever greater heights of incompetence and professional irresponsibility while, nonetheless, maintaining a beatific attorney-client relationship."<sup>29</sup> This one took six pages.

Another errant counsel wandered into Otto's ken in *Aloy v. Mash*,<sup>30</sup> the "serendipity" case. This was a legal malpractice suit in which the defendant attorney, in representing the wife in her divorce action in 1971, had failed to assert a community property interest in her husband's vested military pension. Although the law admittedly was unsettled at the time, the defendant had done little research ("an incomplete reading of a single case")<sup>31</sup> and hadn't considered the issues raised by the vesting of the pension or by possible federal preemption. Ten years later, in *McCarty v. McCarty*,<sup>32</sup> the United States Supreme Court held that federal law did preempt the application of community property principles to federal military pensions. The defendant thus argued, as Otto put it, that "the claim which defendant negligently failed to assert in 1971 luckily turned out to be worthless in 1981—the serendipity defense."<sup>33</sup>

The dissenters bought it. Justice Reynoso (joined by Chief

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26. 32 Cal. 3d 892, 654 P.2d 775, 187 Cal. Rptr. 592 (1982).

27. *Id.* at 895, 654 P.2d at 775, 187 Cal. Rptr. at 592 (citation omitted).

28. *Id.* at 900, 654 P.2d at 779, 187 Cal. Rptr. at 596.

29. *Id.* When Chief Justice Bird complained that the malpractice remedy was slow and inadequate, Otto responded with a bit of real-world savvy: "Realistically, . . . the mere threat of malpractice liability brings another purse into the settlement negotiations and may thus actually further a speedy disposition." *Id.* at 898 n.7, 654 P.2d at 778 n.7, 187 Cal. Rptr. at 595 n.7.

30. 38 Cal. 3d 413, 696 P.2d 656, 212 Cal. Rptr. 162 (1985).

31. *Id.* at 419, 696 P.2d at 660, 212 Cal. Rptr. at 165.

32. 453 U.S. 210 (1981).

33. *Aloy*, 38 Cal. 3d at 421, 696 P.2d at 661, 212 Cal. Rptr. at 167.



Justice Bird and a *pro tem* justice) knew of "no case which suggests that an attorney whose advice is correct may be held liable for malpractice."<sup>34</sup> Such formalism was not for Otto. Asserting the community property claim in 1971 could in fact have benefitted the client, he noted,<sup>35</sup> while *McCarty* had not been retroactively applied and had been largely overruled by an act of Congress.<sup>36</sup> "It would be ironic," Otto concluded, "if the chief legacy of *McCarty* were the immunization of legal malpractice by an attorney who never even pondered the issues which fathered *McCarty's* brief life."<sup>37</sup>

Nothing was more characteristic of Otto's judging than this rejection of abstract formalism in favor of the fact-based human realities involved in the actual practice of law.<sup>38</sup>

### III. OTTO DISSENTING

On the whole, though—criminal cases aside—Otto was primarily a dissenter on the Bird court. He was too good a lawyer, too moderate, skeptical, trial court-smart and fact-conscious, to go along with the salient civil decisions of that court's majority. At the same time Otto did not share the conservative views of the court's other dissenting conscience, the relentless Frank Richardson.<sup>39</sup> So Otto's was a distinct voice in the ideological middle—but not the voting middle—of the court.

No one could mistake a Kaus dissent for that of another judge. They all have his conversational tone and down-to-earth, prag-

34. *Id.* at 422, 696 P.2d at 662, 212 Cal. Rptr. at 168 (Reynoso, J., dissenting).

35. *See id.* at 419-21, 696 P.2d at 660-61, 212 Cal. Rptr. at 166-67.

36. *See id.* at 422 n.7, 696 P.2d at 661 n.7, 212 Cal. Rptr. at 167 n.7.

37. *Id.* at 422, 696 P.2d at 662, 212 Cal. Rptr. at 168; *see also* *Wilson v. Sunshine Meat & Liquor Co.*, 34 Cal. 3d 554, 562, 669 P.2d 9, 14, 194 Cal. Rptr. 773, 778 (1983) (Otto, for majority, denying relief to party whose lawyers had shown "appalling absence of diligence" in failing to bring case to trial).

38. For another rejection of formalism, see Otto's concurrence in *Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa*, 39 Cal. 3d 501, 520, 703 P.2d 1119, 1130, 217 Cal. Rptr. 225, 236 (1985) (Kaus, J., concurring). While the majority struck down an anti-fortunetelling ordinance as contrary to California's free speech guarantee, Otto agreed that the ordinance was overbroad but was "more optimistic than the majority" that an acceptable one could be drafted. Noting that the plaintiff "cites no case which elevates fortunetelling to the same free speech pedestal as does the majority," Otto could not help feeling "that the core values of the First Amendment have somehow become obliterated in the court's somewhat formalistic application of precedent based on entirely different facts." *Id.* (Kaus, J., concurring).

39. Of 129 cases decided with opinion by the court in calendar year 1982, Richardson dissented in 36 (and concurred in 2), while Otto was next with 16 dissents (and 10 concurrences). *See* Barnett, *supra* note 4, at 1138.

matic approach. The Kaus dissents are amazingly concise—most one or two pages, none more than eight.<sup>40</sup> Therein lies a notable point about the court's procedures. Many dissents in the California Supreme Court, in Otto's day as now, began life as draft majority opinions, or "calendar memos," and got outvoted; they commonly bear the stigmata of this history not only in their excessive length, but also in the structural apparatus of a majority opinion ("Introduction," "Statement of Facts," "Background," "Legal Analysis," "Conclusion," etc.) that the author has not bothered to dismantle.<sup>41</sup> Otto's dissents are always free of such detritus; they directly confront the majority opinion, as a dissent should. Given his differences with the Bird court majority, Otto must have written plenty of calendar memos that got outvoted; in fact he told me about one.<sup>42</sup> When that happened, however, Otto evidently recast the memo completely as a dissent. One wonders why today's justices can't do that, though admittedly the "90-day rule"—which wasn't enforced in Otto's day—probably makes it harder.<sup>43</sup>

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40. The longest appears to be *Fullerton Joint Union High School Dist. v. State Bd. of Educ.*, 32 Cal. 3d 779, 808, 654 P.2d 168, 188, 187 Cal. Rptr. 398, 418 (1982) (Kaus, J., concurring and dissenting) (seven and one-half pages).

41. See, e.g., *Cowan v. Superior Court*, 14 Cal. 4th 367, 383, 926 P.2d 438, 448, 58 Cal. Rptr. 2d 458, 468 (1996) (Brown, J., concurring and dissenting); *Brosnahan v. Brown*, 32 Cal. 3d 236, 262, 651 P.2d 274, 290, 186 Cal. Rptr. 30, 46 (1982) (Bird, C.J., dissenting).

42. Otto told me that this was true of *City of Long Beach v. Bozek*, 31 Cal. 3d 527, 530, 645 P.2d 137, 138, 183 Cal. Rptr. 86, 87 (1982) (holding that "constitutional principles and tort principles combine" to prohibit a city from suing for malicious prosecution). I had mentioned something I had written about *Bozek*, and Otto exclaimed: "That was my case." Otto's dissent in *Bozek* is a bit longer than usual for him—five pages—but framed entirely as a response to the majority, with no traces of the calendar memo it apparently once was. See *id.* at 539, 645 P.2d at 143, 183 Cal. Rptr. at 93. (Kaus, J., dissenting).

43. Under the California Constitution's 90-day rule, obeyed strictly by the California Supreme Court since 1989, see 2 JUDICIAL COUNCIL OF CAL., 1989 ANNUAL REPORT 19 (1989), a case must be decided within 90 days after it is "submitted" (i.e., argued). See CAL. CONST. art. VI, § 19. This would reduce the time for converting an outvoted calendar memo into an authentic dissent. But since the court has reacted to the 90-day rule by changing its procedures so as to vote on a case *before* the argument, and not to set the case for argument until "the 'majority' calendar memorandum has been approved by at least four justices" and "all concurring or dissenting calendar memoranda have circulated," SUPREME COURT OF CAL., PRACTICES AND PROCEDURES 23 (1990), it is not clear why the outvoted calendar memo cannot be converted into a dissent *before* the argument. The reality may be—as the strange term "dissenting calendar memoranda" suggests—that this does not happen because the memo's author clings to the hope of regaining the majority as a result of the argument. One wonders, though, why an alternative, dissent-like version of the outvoted memo cannot be prepared and circulated before the argument, for the (substantial) chance that the votes will not change. Indeed, a true dissent might well

It was Otto's dissents, in which he spoke for himself, that best assembled and showcased the strands in his judicial philosophy (at least for civil cases). At the same time those dissents reflect, by mirror image, an historical portrait of the Bird court's positions, even as those positions are skewered by Otto's mind and pen.

### A. Law and Policy

One strand in Otto's dissents was a dispassionate commitment to apply the law, letting the policy chips fall where they might. Thus in *Isbister v. Boys' Club of Santa Cruz, Inc.*,<sup>44</sup> where the majority applied the Unruh Civil Rights Act to bar a boys' club from excluding girls, Otto was with the "conservatives." He did not see why the club, in pursuit of its purpose of deterring juvenile delinquency, could not focus on boys.<sup>45</sup> The "basic mistake" of the majority, wrote Otto in his wryly critical vein, was that

it views the Club's policies as being pointed toward the exclusion of girls. With that chip on the majority's shoulder, pejoratives come easily. If the court looked at the Club's activities more benignly as providing a service for boys—a service tailored to their needs—it would not find it necessary to reach such a wondrous result.<sup>46</sup>

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be more likely than a "dissenting calendar memorand[um]" to shake votes from the existing majority.

44. 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985).

45. See *id.* at 99-100, 707 P.2d at 230-31, 219 Cal. Rptr. at 168-69 (Kaus, J., dissenting).

46. *Id.* at 101, 707 P.2d at 232, 219 Cal. Rptr. at 170 (Kaus, J., dissenting). *Isbister*, though a statutory case involving private entities, presents interesting parallels with the recent decision of the United States Supreme Court in the *Virginia Military Institute* case, based on the Equal Protection Clause and involving state-supported institutions. See *United States v. Virginia*, 116 S. Ct. 2264 (1996). In both cases the majority emphasized the "uniqueness" of the institution and the lack of any comparable facility for women. Compare *id.* at 2287 ("an educational opportunity no other Virginia institution provides," plus "unequaled" prestige) and *id.* at 2285 (absence of "any 'comparable single-gender women's institution'") and *id.* at 2276 n.7 ("[w]e address specifically and only an educational opportunity recognized . . . as 'unique'") with *Isbister*, 40 Cal. 3d at 77, 707 P.2d at 215, 219 Cal. Rptr. at 153 ("The Club is unique in northern Santa Cruz County . . . . No single program or facility open to girls offers a similar range of activities at similar cost.").

The legal issues presented by the two cases, however, seem basically different. As long as state-supported single-sex schools are not per se prohibited, the "uniqueness" of the institution may be essential to a denial of equal protection. But if the Boys' Club of Santa Cruz is a "business establishment" under the Unruh Act and is thus prohibited from excluding girls, no logical basis appears for retracting that conclusion when there are one or more girls' clubs in town with comparable or better facilities. Otto made just this point at the start of his *Isbister* dissent:

But in *Murphy v. E.R. Squibb & Sons, Inc.*,<sup>47</sup> Otto was with the "liberals." While the majority (with the 1986 election in view) went through contortions to hold that a pharmacist in filling a prescription was performing a service rather than making a sale, and so was not strictly liable for a product defect, Otto saw no reason why strict liability for retailers did not cover a retail pharmacist.<sup>48</sup>

Otto was equally uninterested in massaging the legislative ego. In *Strang v. Cabrol*<sup>49</sup> the court's majority, in an access of self-abnegation, gave an expansive reading to 1978 amendments abrogating some decisions by the court that had imposed civil liability for injuries resulting from the illegal sale of alcoholic beverages.<sup>50</sup> Although the legislature had failed to enact anything abrogating liability for illegal sale to a nonintoxicated minor, the court held that this must have been intended as well. Otto declined to join in this politic bow:

Defendants' problem in this case is that there is no law on the books which condones their conduct . . . . I find it puzzling that notwithstanding this void the court feels compelled to grant absolution by an unnecessarily generous interpretation of the Legislature's effort to turn the clock back to a time when it was not running properly.<sup>51</sup>

Notable here, in the final phrase, was Otto's candid willingness to invoke policy considerations—in his case, mainly liberal ones—when they figured legitimately in judicial decision-making. He thought they did here, because the legislature had not acted. In the MICRA cases, where the legislature had acted, Otto saw no alternative but to uphold the statute.<sup>52</sup>

Nor would Otto rewrite contract terms to obtain a preferred

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I feel compelled to express puzzlement at the majority's repeated mention of the fact that there is no comparable facility for girls in the Santa Cruz area. If there were a Girls' Club in Santa Cruz, would the majority be satisfied with "separate but equal" facilities? . . . . Unless the majority is prepared to suggest that the existence of additional facilities might affect its conclusions, I respectfully submit that the references to the Club's monopoly are of no legal significance.

*Isbister*, 40 Cal. 3d at 98-99, 707 P.2d at 230, 219 Cal. Rptr. at 168 (Kaus, J., dissenting).

47. 40 Cal. 3d 672, 710 P.2d 247, 221 Cal. Rptr. 447 (1985).

48. *Id.* at 700, 710 P.2d at 267, 221 Cal. Rptr. at 467 (Kaus, J., dissenting).

49. 37 Cal. 3d 720, 691 P.2d 1013, 209 Cal. Rptr. 347 (1984).

50. *See, e.g., Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

51. *Strang*, 37 Cal. 3d at 729, 691 P.2d at 1019, 209 Cal. Rptr. at 353 (Kaus, J., dissenting).

52. *See cases cited supra* note 12.

result or avoid a seemingly harsh one. In *Fahey v. Gledhill*,<sup>53</sup> the contract between the plaintiff yacht owner and the defendant dry-dock relieved the dock of liability for damage "from any cause whatsoever, excepting only willful misconduct."<sup>54</sup> The dock's conduct, while very negligent (dropping the boat while relaunching it), was not claimed to be "willful misconduct." The court allowed liability nonetheless, by reading the clause as not disclaiming liability for negligence. "[A]ny cause whatsoever" covered only "the scope of the loss," the court reasoned, and not clearly enough "the physical or legal responsibility" for the loss.<sup>55</sup>

For Otto, the clause was plain enough. With his killer instinct for the perfect quote, he invoked Holmes on "the inability of the 17th century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to an intelligence fired with a desire to pervert."<sup>56</sup> The majority, said Otto, was dissecting the clause "with the mind-set of a 17th century pleader."<sup>57</sup>

Policy predilections clashed with law again in *City of Los Angeles v. Venice Peninsula Properties*.<sup>58</sup> The majority imposed a "public trust" on southern California tidelands originally ceded to private parties by Mexico and then patented to their owners by the U.S. government, notwithstanding the failure of the grants to reserve any public rights. Otherwise, said Justice Mosk for the majority, California would have a "Mason-Dixon coastline," with the public trust doctrine applying in the north but not in the south.<sup>59</sup> Otto found this concern "probably overstated," but in any event thought such policy considerations could not override the "governing United States Supreme Court decisions" on the scope of the federal grants.<sup>60</sup> The United States Supreme Court unanimously agreed.<sup>61</sup>

Otto's independence from the Bird court's majority—and from the interests of Governor Jerry Brown, who had just

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53. 33 Cal. 3d 884, 663 P.2d 197, 191 Cal. Rptr. 639 (1983).

54. *Id.* at 886, 663 P.2d at 198, 191 Cal. Rptr. at 640.

55. *Id.* at 894, 663 P.2d at 204, 191 Cal. Rptr. at 646.

56. *Id.* at 895, 663 P.2d at 204-05, 191 Cal. Rptr. at 647 (Kaus, J., dissenting) (citation omitted).

57. *Id.*, 663 P.2d at 205, 191 Cal. Rptr. at 647 (Kaus, J., dissenting).

58. 31 Cal. 3d 288, 644 P.2d 792, 182 Cal. Rptr. 599 (1982).

59. *Id.* at 303, 644 P.2d at 800, 182 Cal. Rptr. at 607.

60. *Id.* at 317, 644 P.2d at 809, 182 Cal. Rptr. at 616.

61. *See Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198 (1984).

(belatedly) appointed him—was established in Otto's very first dissent, in what proved to be the crucial redistricting case of the 1980s, *Assembly v. Deukmejian*.<sup>62</sup> The court held that a state legislative redistricting plan passed by the Democratic legislature and signed by Governor Brown, but stayed by a Republican-sponsored referendum, should be used in the 1982 elections in place of the pre-existing districts—with the result, ultimately, of preserving Democratic control of the legislature for the decade.<sup>63</sup> In a 4-3 vote (the swing vote provided by a *pro tem* justice appointed by Chief Justice Bird), Otto joined Justices Richardson and Mosk in dissent. Otto's own dissent captured in one calm paragraph the two considerations that should have controlled the case: "simple adherence to precedent"—the previous decade's decision in *Legislature v. Reinecke* ("*Reinecke I*")<sup>64</sup>—and avoidance of the "greater judicial intrusion" into the process of legislation and referendum that the majority's approach entailed.<sup>65</sup> Even in this first and momentous outing, Otto could not resist a wry footnote: "I pity the 1992 Supreme Court which will have to break the tie between *Reinecke I* and *Assembly v. Deukmejian*."<sup>66</sup>

### B. Facts and Skepticism

Another strand in Otto's dissents was his pragmatic skepticism, his focus on facts in preference to the abstract principles, policy notions, and per se rules favored by the majority.<sup>67</sup> A text-

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62. 30 Cal. 3d 638, 639 P.2d 939, 180 Cal. Rptr. 297 (1982).

63. The new plan was defeated in the referendum, but a majority of the legislators elected under it were, predictably, Democrats. They proceeded to enact, and Governor Brown on his last day in office proceeded to sign, a new districting plan. This one protected enough seats of Republican incumbents to obtain the two-thirds vote needed to bar a referendum. For a fuller account, see Stephen R. Barnett, *California Justice*, 78 CAL. L. REV. 247, 255 n.34 (1990) (book review).

64. 6 Cal. 3d 595, 492 P.2d 385, 99 Cal. Rptr. 481 (1972).

65. *Assembly*, 30 Cal. 3d at 694, 639 P.2d at 973, 180 Cal. Rptr. at 331 (Kaus, J., concurring and dissenting).

66. *Id.* at 694 n.1, 639 P.2d at 973 n.1, 180 Cal. Rptr. at 331 n.1. Happily, that didn't happen. The combination of a Democratic legislature and Republican governor produced a political stalemate, and hence legislative districts for the 1990s drawn by special masters appointed by the supreme court. See *Wilson v. Eu*, 1 Cal. 4th 707, 823 P.2d 545, 4 Cal. Rptr. 2d 379 (1992).

67. Justice John Paul Stevens of the United States Supreme Court has raised the same flag, in criticizing the majority of that Court. In a 1984 address at Northwestern University Law School, Justice Stevens said he was taught in law school

to be skeptical of black letter rules that are found in hornbooks as well as in appellate court opinions. The inevitable gaps in the law are not filled by simple, logical extrapolations from an accepted proposition, but rather from concentration on the novel as well as familiar aspects of specific cases and

book example was *People v. Shirley*.<sup>68</sup> The majority there held flatly and grandly, in a fifty-page opinion by Justice Mosk, that "the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward."<sup>69</sup> Otto's dissent clogged this pristine abstraction with some pesky facts. He noted the varied contexts in which hypnosis may take place (such as aiding a police artist to sketch the suspect right after the crime);<sup>70</sup> the unfaced question of the decision's apparent retroactive effect ("rendering incompetent virtually all witnesses who have been hypnotized at any time in the past without regard to the circumstances of the hypnosis");<sup>71</sup> and the further unconsidered question of what happens when a *defendant* who has been hypnotized wants to testify.<sup>72</sup>

Three months later the majority opinion was modified to leave the retroactivity question open,<sup>73</sup> and also to recognize a "necessary exception to avoid impairing the fundamental right of an accused to testify in his own behalf."<sup>74</sup> Otto proceeded to skewer the latter abstraction. Even if the right to testify in one's own defense was "fundamental," he said, there could be "no right to offer testimony which suffers from all of the potential vices which have triggered the majority's total ban on the testimony of hypnotized witnesses."<sup>75</sup> Meanwhile the legislature passed a statute that modified *Shirley*, by authorizing certain testimony by previously-hypnotized witnesses under specified safeguards,<sup>76</sup> and vindicated Otto's fact-conscious approach.

Another big idea of the Bird court was tort recovery for

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controversies . . . .

*Annual Meeting of the American Bar Assoc.*, 53 U.S.L.W. 2082, 2082 (Aug. 14, 1984).

68. 31 Cal. 3d 18, 723 P.2d 1354, 181 Cal. Rptr. 243 (1982), *modifying* 641 P.2d 775 (1982), *cert. denied*, 459 U.S. 860 (1983).

69. *Id.* at 66-67, 723 P.2d at 1384, 181 Cal. Rptr. at 273.

70. *Id.* at 75, 723 P.2d at 1389, 181 Cal. Rptr. at 278 (Kaus, J., concurring and dissenting).

71. *Shirley*, 641 P.2d at 811 (Kaus, J., concurring and dissenting), *modified by* 31 Cal. 3d 18, 723 P.2d 1354, 181 Cal. Rptr. 243 (1982).

72. *See id.* at 811-12 (Kaus, J., concurring and dissenting).

73. *See Shirley*, 31 Cal. 3d at 67 n.53, 723 P.2d at 1384 n.53, 181 Cal. Rptr. at 273 n.53. The question subsequently was decided in favor of retroactivity in *People v. Guerra*, 37 Cal. 3d 385, 690 P.2d 635, 208 Cal. Rptr. 162 (1984).

74. *Shirley*, 31 Cal. 3d at 67, 723 P.2d at 1384, 181 Cal. Rptr. at 273.

75. *Id.* at 77, 723 P.2d at 1390, 181 Cal. Rptr. at 279 (Kaus, J., concurring and dissenting).

76. *See CAL. EVID. CODE* § 795 (West 1995); *see also Guerra*, 37 Cal. 3d at 430 n.1, 690 P.2d at 665 n.1, 280 Cal. Rptr. at 192 n.1 (1984) (Kaus, J., concurring).

breach of contract. Otto in a weak moment went along with this in the misbegotten (and now overruled) *Seaman's* case.<sup>77</sup> A year later he was having second thoughts. Reflecting that "our experience in *Seaman's* surely tells us that there are real problems in applying the substitute remedy of a tort recovery—with or without punitive damages—outside the insurance area," he lauded an article critical of *Seaman's* and all but begged the legislature to step in.<sup>78</sup> The problem, he lamented, was that "there is tremendous pressure on the courts, particularly this court, to extend bad faith liability to other contractual relationships."<sup>79</sup> Otto continued:

So far we have not succumbed, although a satisfactory rationale for continued resistance is hard to come by. We have learned how to spell "banana" but not how to stop. Nevertheless, in my view it would be disastrous if every contract were to be subjected to the same set of rules which we have applied in the context of the insurer-insured relationship. Without wishing to strike a blow for bad faith or unfair dealing, I just cannot see every person who wilfully breaks a contract subjected to almost unlimited liability for punitive damages.<sup>80</sup>

Here again, Otto had no compunctions about expressing his policy preferences when they legitimately applied in a judicial context—or in admitting that he had gotten them wrong the first time.

Another grand effort of the majority, cut down to size by Otto's wry skepticism, came in a prison newspaper case, *Bailey v. Loggins*.<sup>81</sup> While the lead opinion trumpeted that a prison news-

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77. *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984), *overruled by* *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 900 P.2d 669, 44 Cal. Rptr. 2d 420 (1995).

78. *White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 901, 710 P.2d 309, 328, 221 Cal. Rptr. 509, 528 (1985) (Kaus, J., concurring and dissenting) (citing Michael Traynor, *Bad Faith Breach of a Commercial Contract: A Comment on the Seaman's Case*, 8 BUS. L. NEWS 1 (1984)).

79. *Id.* at 900, 710 P.2d at 327, 221 Cal. Rptr. at 527 (Kaus, J., concurring and dissenting).

80. *Id.* at 900-01, 710 P.2d at 327-28, 221 Cal. Rptr. at 527-28 (Kaus, J., concurring and dissenting) (footnote omitted). Otto added one of his field notes on the food-gathering habits of lawyers: "It seems to me that attorneys who handle policy claims against insurance companies are no longer interested in collecting on those claims, but spend their wits and energies trying to maneuver the insurers into committing acts which the insureds can later trot out as evidence of bad faith." *Id.* at 900 n.2, 710 P.2d at 328 n.2, 221 Cal. Rptr. at 528 n.2. (Kaus, J., concurring and dissenting).

81. 32 Cal. 3d 907, 654 P.2d 758, 187 Cal. Rptr. 575 (1982).



paper could enjoy First Amendment protection,<sup>82</sup> Otto's three-page dissent bristled with earth-bound facts. "The majority's concept of the type of paper which defendants are to allow presumably conforms to some platonic ideal of a newspaper the very contemplation of which evokes First Amendment magic," Otto needed, but the newspaper in question was something else: "a house organ, [permitted] as part of the inmates' educational and vocational training program, run under the supervision of a civilian instructor with full authority to select, edit and reject submissions."<sup>83</sup> In "straining to find" that the newspaper was a "market-place for ideas," Otto wrote, the majority

is not likely to further First Amendment values. It is recognized that the department is under no compulsion to permit the publication of newspapers within our prisons. It has, however, made a stab in that direction but, for its pains, has been subjected to a rolling barrage of First Amendment artillery. If the department can live with the guidelines promulgated in this opinion . . . no harm will be done. On the other hand, if it finds the guidelines intolerable, it will simply have to discontinue a worthwhile educational and vocational training program.<sup>84</sup>

### C. A Rare Passion

One concurring opinion showed a different face of Otto, the passion for social justice that he usually kept contained. This was a judicial discipline case, *In re Stevens*,<sup>85</sup> in which the court imposed public censure on Judge Stevens for repeated use of racial and ethnic epithets, mostly to counsel and court personnel while in chambers. Justice Mosk filed a remarkable dissent, arguing that the judge's speech was protected by the First Amendment. That was too much for Otto. "In view of the dissent," he felt "compelled to detail some of the facts," and proceeded to spell out some of the judge's remarks<sup>86</sup> (a demonstration Justice Mosk labeled "gratuitously lurid").<sup>87</sup> "It is beyond me," Otto declared, how it can be argued that such behavior is not "conduct

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82. *See id.* at 917, 922-23, 654 P.2d at 764, 768-69, 187 Cal. Rptr. at 581, 585-86.

83. *Id.* at 929-30, 654 P.2d at 774, 187 Cal. Rptr. at 591 (Kaus, J., dissenting).

84. *Id.* at 930-31, 654 P.2d at 774, 187 Cal. Rptr. at 591 (Kaus, J., dissenting).

85. 31 Cal. 3d 403, 645 P.2d 99, 183 Cal. Rptr. 48 (1982).

86. *Id.* at 404-05, 645 P.2d at 99-100, 183 Cal. Rptr. at 48-49 (Kaus, J., concurring).

87. *Id.* at 405, 645 P.2d at 101, 183 Cal. Rptr. at 50 (Mosk, J., dissenting).

prejudicial to the administration of justice” simply because Judge Stevens otherwise performed his judicial duties “fairly and equitably.” . . . The administration of justice is prejudiced by the public perception of racial bias, whether or not it is translated into the court’s judgments and orders.<sup>88</sup>

All the other justices, except Justice Mosk, joined in Otto’s opinion.<sup>89</sup>

#### IV. CONCLUSION

Although Otto Kaus was only one justice on a court of seven, and was often outvoted to boot, in his four years on the California Supreme Court he gave that court a professional stature it has not had since. However the votes might fall, it was Otto’s view of a case that carried the most weight, I think, for the state’s lawyers and judges. Otto brought to the court a unique combination of qualities—high intellectual capacity (so obvious it goes without saying), learning and scholarship, common sense, skepticism, fidelity to law, a passion for social justice tempered by a sense of judicial limits, courtroom savvy and human sympathy, wit and literary talent, lightness and grace, earthiness and sophistication—that placed his opinions in a class of their own. California has never had a better judge, nor a more estimable man on its bench. We were fortunate to have him on the court for a brief shining moment, and can serve his memory best by studying and emulating his judicial example.<sup>90</sup>

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88. *Id.* at 405, 645 P.2d at 100, 183 Cal. Rptr. at 49 (Kaus, J., concurring).

89. *See id.* (Kaus, J., concurring).

90. In these days of Mandatory Continuing Legal Education, one might wish that supreme court justices and their judicial research attorneys were not exempt. An M.C.L.E. program devoted to the opinions of Otto Kaus, with justices and research attorneys required to attend, could do wonders for the opinions turned out by the court today. Since Otto loved to ski, one could hold the program at Mammoth or Squaw, with morning sessions devoted to Otto’s opinions, skiing in the afternoon, and after-ski drinks and stories about Otto in an atmosphere he would have loved.

