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OTTO KAUS AND THE CROCODILE

*Gerald F. Uelman**

Otto Kaus loved lawyers. Not every judge does. Every judge should, though. Once judges stop loving lawyers, they become very sure of themselves. When judges become very sure of themselves they stop being good judges. Judges who are sure of themselves have little use for lawyers.

Piero Calamandrei, in *Eulogy of Judges*,¹ speaks with great eloquence of the relationship between judges and lawyers:

There are times in the career of every lawyer when, forgetting the niceties of the codes, the arts of oratory, the technique of debating, unconscious of . . . robes . . . of the judges, he turns to the judges, looking into their eyes as into the eyes of an equal, and speaks to them in the simple words a man uses to convince his fellow man of the truth. In these moments justice is reborn and he who pronounces the word feels a suppliant tremor in his voice like that in the prayers of the faithful.

I shared a moment like that with Otto Kaus once. Just recalling it restores the suppliant tremor. To describe the moment, though, requires a prelude. The prelude was in April of 1984. I was then a professor at Loyola Law School, where I had gotten to know Otto Kaus while he served as an adjunct professor who taught Evidence. His presence on our faculty was truly a jewel in our crown, and I vividly remember our rejoicing when his appointment to the California Supreme Court was announced. For me, it was the ultimate vindication of my faith that one truly could rise to the top by simply being the best. Otto Kaus was the most thoughtful, humble, and genuinely likable judge I had ever met, and observing those qualities serve as qualifiers for judicial ascendance made up for all the disappointment of hearing presidents and senators extoll the virtues of mediocrity on the bench.

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1. PIERO CALAMANDREI, *EULOGY OF JUDGES* 6 (John Clarke Adams & C. Abbott Phillips, Jr. trans., Princeton Univ. Press 1942).

In April of 1984, Otto had been a justice of the California Supreme Court four years. I was thrilled and honored to receive an invitation to speak at the 37th Annual Supreme Court Luncheon sponsored by the Lawyer's Club of San Francisco.² Having the entire supreme court as captive audience for a luncheon speech was a moment to be relished. The moment came, however, at a very troubled time for the court. The court had just been through one bruising election confirmation campaign, and there were already rumblings of another to come.³

I began that speech, as I began this tribute, by quoting Piero Calamandrei. I asked a question Calamandrei once asked:

Why is it that when a judge meets a lawyer in a train or in a café and converses with him . . . the judge is more disposed to believe what the lawyer says than if he said the same thing in court during the trial? Why is there greater confidence and spiritual unity between [two human beings] than between judge and lawyer?⁴

After illustrating that public distrust of lawyers and judges was a recurring theme throughout California history, I noted that the controversy over the recently enacted Proposition 8⁵ had eerie parallels to the controversy over the San Francisco Vigilantes of 1856.⁶ Noting that a justice of the California Supreme Court had been taken hostage by the Vigilantes, I reminded the audience that

2. The entire speech was published as Gerald F. Uelmen, *Traveling in Circles: Some Historical Perspectives*, CAL. ATT'YS FOR CRIM. JUST. F., June-July-Aug. 1984, at 11.

3. In the gubernatorial election of 1982, four justices were on the ballot for confirmation. All were confirmed but by the narrowest margins in the history of the court. See Philip Carrizosa, *Justices Put Blame for Close Race on 'Organized' Drive: Element of Confusion*, L.A. DAILY J., Nov. 4, 1982, at 1. Justice Cruz Reynoso was confirmed with 52.6%; Justice Allen E. Broussard was confirmed with 56.4%; Justice Otto Kaus was confirmed with 55.6%; and Justice Frank Richardson was confirmed with 76.1%. See *id.* Justice Richardson was appointed by Governor Ronald Reagan, while Reynoso, Broussard, and Kaus were all appointed by Governor Jerry Brown. See *id.* In 1982 Governor George Deukmejian was elected in a close contest with Mayor Tom Bradley of Los Angeles. See Wallace Turner, *Deukmejian Faces Tough Challenges in California*, N.Y. TIMES, Nov. 7, 1982, at 30.

4. CALAMANDREI, *supra* note 1, at 39.

5. Proposition 8, an anti-crime initiative approved by California voters in 1982, precludes the exclusion of evidence based on independent state grounds, requires criminals to compensate their victims, restricts plea bargaining, mandates longer sentences for youthful and repeat offenders, and sets up a legal right to safe schools. See *A Weekly Checklist of Major Issues—Legal Affairs*, NAT'L J., Sept. 11, 1982, at 1573.

6. In 1856 citizens of San Francisco, dissatisfied with the criminal justice system, formed a vigilance committee and took a justice of the California Supreme Court captive to bring about changes in the system. See Uelmen, *supra* note 2, at 13-14.

while the constitutionality of Proposition 8 was awaiting decision by the California Supreme Court, several justices of the court were “publicly reminded that their reelection to the Supreme Court the following November would be strongly affected by their decision on the constitutionality of the initiative, and the Chief Justice was publicly threatened with a special recall effort if the Court did not uphold the measure.”⁷ I then compared the passion of both the majority and dissenting opinions in the 4-3 decision upholding Proposition 8⁸ to the passion of the Vigilantes and the passion of their captive, Justice David Terry, in a letter to his wife announcing his readiness to die for the Constitution of the State of California.⁹ The whole point of the exercise was a reminder that the controversy the court faced was one that recurs with some regularity and that critics of the court frequently lacked a historical perspective.

If we put their swirling voices in perspective, however, we will recognize we’ve been here before. And just as before, we can turn to one place of quiet calm to reconcile our differences. Today, more than ever, we must commit ourselves to maintaining the independence of that place of quiet calm: the Court which we honor today.¹⁰

After the luncheon, Otto offered me a ride to the airport so we could fly back to Los Angeles together. He seemed even more quiet and reflective than usual, and we spent the trip in light banter about teaching. He politely complimented me on the speech, but we didn’t discuss any of its themes.

A year later, when the rumblings about an electoral challenge to the justices had turned to thunder, Otto Kaus announced his resignation from the supreme court. He took advantage of his new freedom to speak candidly on the impact of electoral challenges upon the independence of the court. On one such occasion, I was among a large audience at a forum sponsored by the Los Angeles County Bar Association. I remember how stunned I was when I heard Otto recount to the audience how a “friend” had suggested in a speech in San Francisco that his vote on the decision to uphold Proposition 8 had been affected by the threats made to his reelection.

7. *Id.* at 14.

8. *See Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

9. *See Uelmen, supra* note 2, at 14-15.

10. *Id.* at 15.

tion and how in retrospect he himself wasn't sure it hadn't. He spoke his infamous line about how hard it is not to think about the crocodile in the bathtub while you're shaving in the morning.¹¹

As I left that speech, I felt sick to my stomach. The "friend" he referred to must have been me! I rushed back to my office, found a copy of my San Francisco speech, and poured over it searching for the offending accusation. I certainly never intended to say any such thing because I never believed any such thing. I never doubted that Otto's vote in the case was an honest reflection of his view of the law. But I was overcome with anguish that my words could have been misunderstood to be some sort of accusatory criticism that he had caved in to campaign rhetoric.

I immediately wrote an abject letter of apology, enclosing a copy of the speech. I suggested we get together for lunch. The letter sparked an immediate response and a date for lunch. At lunch we spoke "in the simple words a man uses to convince his fellow man of the truth."¹² I think I convinced Otto that my speech had not actually contained the offending accusation. He certainly convinced me that he was not offended. I realized the depth of the struggle that must have consumed him in the course of deciding the constitutionality of Proposition 8. He was still tormented by self-doubts about whether he truly succeeded in putting the political threats aside when he decided the merits of the case. I left with some remarkable insights about the nature of the judicial process and even deeper respect for the judicial conscience of Justice Otto Kaus. That day, I think I realized for the first time what Learned Hand was talking about when he said the spirit of liberty is the spirit that is not too sure that it is right.¹³ And I remember thinking, if a judge like Otto Kaus has to struggle like Prometheus to avoid being influenced by political threats, what about all the judges who don't measure up to Otto Kaus?

After Otto left the court, he happily joined the ranks of practicing lawyers again, and felt no embarrassment to even appear be-

11. Otto Kaus often stated that ignoring the political consequences of visible decisions is like ignoring a crocodile in your bathtub. See Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994); W. F. Rylaarsdam, *Judicial Independence—A Value Worth Protecting*, 66 S. CAL. L. REV. 1653, 1655-56 (1993).

12. CALAMANDREI, *supra* note 1, at 6.

13. See Learned Hand, *The Spirit of Liberty*, Address at the "I Am an American Day" ceremony held in New York City's Central Park (May 21, 1944), in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 190 (3d ed. 1960).

fore his former judicial colleagues in the role of an advocate. That was certainly the ultimate proof that, in all his years on the bench, he never lost his love for lawyers! Piero Calamandrei confessed to a "subtle uneasiness" when a retired judge took up the practice of law again: "It is painful to see him now among us, panting and bitter in the midst of our struggles, and to hear his voice, tremulous with age, assume tones of rhetorical anger in behalf of his client."¹⁴ Calamandrei explained his uneasiness by the expectation that, in exercising impartiality all his life, a judge should have reached "that serene peace of mind which permits older men to evaluate and commiserate from above all the passions and desires of turbulent youth, as troubles which can no longer reach them."¹⁵ But it seems to me he's describing a judge who has become very sure of himself: a judge who doesn't have much use for lawyers anymore. Thank God, Justice Otto Kaus never became that kind of judge.

14. CALAMANDREI, *supra* note 1, at 99.

15. *Id.*