

UTTER LESSONS

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“Hello, friend.” Every time I saw Bob Utter he greeted me that way. Those two words reveal much about this wondrous man who held a seat on Washington State’s highest court. He was kind to a fault and humble in all ways, both professional and personal. In a manner only he could convey, Bob always graced a smile that welcomed you into his world. And what a world it was.

In an interview he did for *The Olympian* in February of 2014, Bob stressed that his father “was a humanitarian through and through—including with his family. . . . He certainly never gave up on us. I think he showed that in his life—he never gave up on people. He created a lot of deep friendships that way, and inspired a lot of people.”¹ That was pure Bob Utter, just like his father—he truly cared about the human lot and improving its condition; he showed it through his generosity of spirit and his dedication to the rule of law tempered by equity. And as evidenced by the University of Washington Law School Symposium held during the fall of 2015 in his honor, he continues to inspire us.

Robert Utter—the lawyer, the judge, and the teacher—had a genuine commitment to freedom, a commitment at once passionate and informed. And it was that passion that first attracted him to the importance of state constitutions as bulwarks of freedom in our constitutional system. That passion led him to explore state constitutional law first as a novice, then as a scholar and teacher, and ultimately as a jurist. In the process, he became a major figure in the movement then known as the “New Judicial Federalism.” In that regard, it was not surprising that Justice Utter joined the cast of state court luminaries attending the landmark Williamsburg Conference held in March of 1985—the likes of Justices Shirley Abrahamson, Hans Linde,

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1. Beth Kaiman, *Robert Utter, former Washington Supreme Court Justice, dies at 84*, SEATTLE TIMES (Oct. 16, 2014), <http://www.seattletimes.com/seattle-news/robert-utter-former-washington-supreme-court-justice-dies-at-84/> [perma.cc/C2YK-BYD7].

Stanley Mosk, and Stewart Pollock.²

There are others here far more learned in the law and history of state constitutional law and of Justice Utter's contribution³ to it than I. Professor Spitzer is one of them. But I have long since left that circle. Hence, it is fitting that I defer to them, and I am happy to do so. My remarks concerning my venerated friend point in a slightly different direction, in one more concerned with lawyering, social justice, and what young lawyers can learn from the life and legacy of Robert Utter.

Start here: If you would do your client and your cause justice, remember that government—be it state or federal—must do what it is legally ordained to do. Questions of the state's lawful authority are antecedent to questions of rights. Thus, for example, if a state agent is statutorily or constitutionally barred to act, those actions are lawless. And as Justice Utter knew all too well, statutes limit the government's police powers antecedent to and quite apart from whether they might also run afoul of constitutional norms. It seems obvious, which makes the lawyerly oversight all the more surprising. Too often, in the rush to vindicate some claim of constitutional right, lawyers skip over questions of the government's duty to act or not act; they skip over questions of state law. To do so is folly.

It is as strange as it is true: Lawyers frequently prefer what is easiest for them to what is best for their clients. They prefer to follow than lead; they prefer the familiar to the unfamiliar; and they prefer to cut and paste the tests of cases than spend several moments of quiet solitude thinking how best to solve some riddle of the law. This explains why so many lawyers either ignore the law of state constitutions or are helpless to do anything with it. Since most are fed on federal constitutional law as law

2. DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE (B. McGraw ed. 1985). I was fortunate to be a part of that conference.

3. See, for example, his opinion in *State v. Coe*, 101 Wash. 2d 364, 373–74, 679 P.2d 353, 359 (1984) (“First, state courts have a duty to independently interpret and apply their state constitutions that stems from the very nature of our federal system and the vast differences between the federal and state constitutions and courts. Second, the histories of the United States and Washington Constitutions clearly demonstrate that the protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with our sovereignty. By turning to our own constitution first we grant the proper respect to our own legal foundations and fulfill our sovereign duties. Third, by turning first to our own constitution we can develop a body of independent jurisprudence that will assist this court and the bar of our state in understanding how that constitution will be applied. Fourth, we will be able to assist other states that have similar constitutional provisions develop a principled, responsible body of law that will not appear to have been constructed to meet the whim of the moment. Finally, *to apply the federal constitution before the Washington Constitution would be as improper and premature as deciding a case on state constitutional grounds when statutory grounds would have sufficed, and for essentially the same reasons.*” (emphasis added)).

students, they lack both the will and the way to think outside of the box of federal law and into the treasure trove of state constitutional law.

As judge, scholar, and a teacher, Robert Utter made it his life mission to change all of this and to help usher in a new generation of lawyers committed to the rule of law—all the rules of law from mundane regulations and ordinances to majestic constitutional guarantees. In these ways and others, thinking was more important than memorizing, several arguments were better than one, researching history⁴ was more valuable than parroting hackneyed axioms, and formulating new ways of thinking about the law was nobler than remaining cabined within the confines of the law's dead letters.

It is but a memory now, but a vivid one nonetheless: Many years ago, after a conference, I joined the Judge for dinner—just the two of us. In the course of the meal he asked me a question, to which I replied rather off-handedly: “Well, thus is our life in the law.” It was a throwaway answer, simply that. And then the Judge asked, with complete seriousness: “So what do you think it means to have a life in the law?” I must say I did not see that one coming. But come it did and we discussed the subject for most of the evening that followed. Imagine that—a law professor being prompted to think about what it means to live a life in the law. Think about it, and soon enough you will sense what it was like to be in Bob's company.

If Justice Utter was a rebel, it was because he rebelled against the kind of mindsets that stifle freedom. If he was radical, it was because he railed against the conventions that sell social justice short. If he was unorthodox, it was because he truly valued diversity. If he was a dissident, it was because he dissented from the idea that wisdom was national rather than local. If he was a nonconformist, it is because he refused to conform to the notion that history is immaterial or that originality is impossible. And if there was a touch of Louis Brandeis in him, it is because he believed in freedom enough to preserve what is best in the old in order to foster what may become better in the new.

That was the measure of the man I knew; those were his ways; and those were his lessons, his Utter lessons.⁵ He wove all of that and much

4. See, e.g., Robert F. Utter & Hugh D. Spitzer, *THE WASHINGTON STATE CONSTITUTION* (2d ed., 2013).

5. For a sampling of these lessons, see Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, in *DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE*, *supra* note 2, at 239; Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 *TEX. L. REV.* 1025 (1985). For biographical information and a list of his articles, see *Justice Robert French Utter*,

more into the fabric of law. Take heed. But be mindful of the *man* behind the law, and why he did what he did.



If you would honor Justice Utter's memory, learn his lessons. Be kind, be learned, be attentive, be prepared, be creative, be comprehensive, and be all you can be as a lawyer committed to constitutional government, to humane government, and to a government of limited powers and unlimited possibilities. Let Utter's lessons become your creed. Remember, too, his words: "actions of ordinary people to show love and forgiveness and charity can truly affect people's lives."⁶ That was his gospel, both in law and in life.

And one more thing: Whenever you see fit, try to greet others with the salutation "hello friend."

1930–2014, GALLAGHER LAW LIBRARY, <https://lib.law.washington.edu/content/memorial/justiceutter> [perma.cc/M5DC-5P9S] (last visited Jan. 5, 2016).

6. Kaiman, *supra* note 1.