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### Tribute to Bernard Meltzer

Cass R. Sunstein

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Cass R. Sunstein†

It is 1982. About six months ago, the Professional Air Traffic Control Organization (PATCO) launched a massive strike against the federal government—the first nationwide public employee strike in the history of the United States. President Ronald Reagan fired the strikers on the very day that they struck. The world of American labor law is attempting to make some sense of these events.

Bernard Meltzer, the most distinguished labor law teacher in the United States, is interested in writing something about the strike—on its causes, its nature, and the many legal issues it raises. He enlists a young law teacher as coauthor. The young coauthor was the present writer; the product was published in the *University of Chicago Law Review*.<sup>1</sup>

Bernie was no kid at the time; when the article was complete, he was nearly seventy. But he was a real workhorse, he had endless patience, and he was insistent on getting the details right. Bernie wrote every word of the account of the underlying facts, which occupies about a third of the article. (Bernie was also responsible for the vast majority of the footnotes.) Of course Bernie was a master of the theoretical issues, including the reasons for the ban on public employee strikes and the constitutional questions raised by the government's response. But he was insistent on being precise about every claim, however small, which he documented with his endless array of long, yellow sheets filled with his indecipherable handwriting.

I had the distinct impression that Bernie did not much like PATCO and its leader, Robert Poli. But Bernie showed real emotion at only one point in our long collaboration. After reading some of the source materials, he said to me, "Poli was concerned with only one thing—*raw power*." He made a fist as he said the final words. At the time, I could make no sense of the intensity of that statement; a quarter of a century later, I can still feel its sheer force.

The article's conclusion was also written entirely by the senior author. Bernie said that while the ban on public employee strikes is justified, responsive administration is a corollary of that ban. If public employees are to be deprived of the strike weapon, officials must "expand the participation of employees and enlist their ingenuity in solving the

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<sup>1</sup> Bernard Meltzer and Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U Chi L Rev 731 (1983).

problems of the workplace.”<sup>2</sup> Bernie added that public officials must take seriously the recommendations of task forces appointed in the aftermath of public crises, in part to ensure that the views of employees, transmitted to such task forces, “were seriously evaluated and given life, day by day, unless good cause for not doing so is shown.”<sup>3</sup> Bernie emphasized that public officials who question the prohibition on public employee strikes should not use the union hall as “the forum for supporting an impending strike,” especially “when strike fever is high.”<sup>4</sup> He emphasized that politicians must not use “bureaucrats’ as scapegoats for the failures of national policy,” in part because rhetoric of that kind “tends to intensify ill will on both sides and is likely both to add to the strains on the antistrike policy and to undermine morale and loyalty.”<sup>5</sup>

There is an intimate relationship among Bernie’s intense concern for details, his objection to “raw power,” and his recommendations. Bernie was a craftsman because he was a proceduralist—one who believed, with Justice Frankfurter, that “the history of liberty has largely been the history of the observance of procedural safeguards.”<sup>6</sup> For Bernie, concern for the details *is* a kind of procedural safeguard—one that disciplines one’s own judgments and exemplifies while helping to ensure fairness to all sides. In the end, what bothered Bernie about the PATCO strike was not in any sense political (as I suspected, wrongly, at the time). What bothered him was the union’s willingness to exercise power without the slightest attention to legal requirements and legitimate procedure. (Bernie cut his legal teeth during World War II, and he was an active participant in the Nuremberg trials.)

I had one other chance to work with Bernie, this time in the very recent past. The Department of Defense had the good judgment to consult Bernie, on an informal basis, about several questions raised by the war on terror, specifically involving the detention and trial of suspected terrorists. I was privileged to work with him, again as a kind of junior associate. Now in his late eighties and early nineties, Bernie had a complete command of the historical analogies and an intense concern for the current details. But he had these above all: an unshakable opposition to raw power, even when exercised by the United States, and an unyielding commitment to fair procedure.

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<sup>2</sup> Id at 798.

<sup>3</sup> Id.

<sup>4</sup> Id at 799.

<sup>5</sup> Id at 798.

<sup>6</sup> *McNabb v United States*, 318 US 332, 347 (1943) (Frankfurter).

Let me close with a passage from an unpublished speech delivered by this modest, careful, gentle, and wise man. The date was September 12, 2001:

Yesterday's infamous assaults against the United States have evoked the deepest concern for the direct victims and those they left behind and for countless indirect victims, all those who cherish the idea of civilization and ordered liberty. . . . [W]e must, as the President and others have reminded us, identify and hold accountable those responsible for yesterday's horrors.

But there are obvious caveats: We must have reliable evidence about who the perpetrators were before we unleash our power. Our desire for retribution, revenge, or deterrence must not be allowed to outdistance our evidence about the perpetrators and their accomplices. We must, of course, also avoid a backlash against Arab-Americans and Islamic-Americans, as such. Having been victims, we should be careful not to become victimizers of those who happen to have something in common with plausible suspects. . . .

And so we have much hard work and many hard choices in front of us. In making them, we must not forget our traditions of due process and fair play. We cannot, of course, give the protections of a criminal trial to those who orchestrate terrible crimes and hide in distant and dark places. But we must, to repeat, have reliable evidence before we unleash our power. By honoring the core values behind our worthiest traditions we might, in time, even get a sliver of consolation for the grievous loss that all of us have suffered and should not and will not, I am certain, ever forget or disregard.