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MERT BERNSTEIN: PENSION PIONEER

KAREN W. FERGUSON*

When Mert Bernstein first ventured into the field of pension policy in 1959, it was uncharted terrain. Private pension plans had increased dramatically in the 1950s, fueled by a bull stock market, government wage-price policies and favorable court decisions. By the end of the decade, they were being hailed as the nation's most important source of investment capital and the solution to the nation's retirement income problems. They had legions of fans and no audible critics.

Enter Merton Bernstein with a barrage of criticism. His book, *The Future of Private Pensions*,¹ begun when he started law teaching and published in 1964, recounted Mert's diagnosis of plan shortcomings, principally that restrictive eligibility conditions were denying benefits to most workers covered by private pension plans. The book was extraordinary not only in its scope and depth but also its impact.

Michael S. Gordon, who, as Minority Counsel for Pensions for the U.S. Senate Labor and Public Welfare Committee from 1970-1975, worked with Senator Jacob K. Javits to draft the Employee Retirement Income Security Act of 1974 (ERISA), described Mert's book and the role it played in the development of ERISA in the following terms:

"The Future of Private Pensions" . . . laid out in a magisterial fashion, what Bernstein viewed as the principal deficiencies in private pension plans. Based on exhaustive case studies, he argued eloquently and persuasively that private plans did not assure equity or adequate legal protection to workers, that the plans restricted labor mobility, that the adequacy of funding for many plans was seriously in doubt, and that termination of plans owing to mergers, corporate dissolution, financial difficulties or sales constituted a substantial threat to the retirement security of indeterminate numbers of employees. . . .

[T]he book had an undeniable influence on all who thought, wrote or spoke on the issues of pension reform. Even those who did not agree with some or most of Bernstein's conclusions, recognized that he had provided the most comprehensive and intellectually rigorous critique of private pensions to date, and that, henceforth, no meaningful debate on the subject could

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1. MERTON C. BERNSTEIN, *THE FUTURE OF PRIVATE PENSIONS* (1964).

ignore his contribution.²

In 1965, *The Future of Private Pensions* won the Elizur Wright Award conferred by the American Risk and Insurance Association for the best book on insurance in the year of publication.

Not content with merely researching and writing the first definitive analysis of the problems of the private pension system, Mert was determined to solve those problems. He brought his findings to the attention of policymakers in the Administration and on Capitol Hill. He met with officials at the White House in 1961, shared his book manuscript with the U.S. Treasury, testified before congressional committees in both the House and Senate, and provided continuing input to the Senate Labor Subcommittee and individual Senators.

He also went to the media. In *Fortune* and the *New York Times*, in small circulation magazines, as well as on radio, local television and on *60 Minutes*, Mert pressed the need for pension reform. His advocacy was remarkably effective, as demonstrated by the *60 Minutes* segment.³

Mike Wallace and the segment's producer had initially planned to focus on corruption in pension funds. Mert persuaded them that this was a minor part of the problem, that plan design was the chief culprit. As a result, the program emphasized the mismatch between eligibility conditions and actual employee tenure, with only a small amount of attention given to plan looting—and the program featured Mert. The magic of *60 Minutes* worked—it transmuted a dauntingly complex subject into simplicities that incited outrage. When the show aired in 1971, pension reform got onto the national agenda.

Mert also helped shape NBC's Peabody award-winning White Paper, *Pensions: The Broken Promise*.⁴ Edwin Newman, moderator for this 1973 program, interviewed Mert for hours to learn the many ways that private pensions favor the few and dismay the many. Millions of viewers got the message, as did the U.S. Congress.

Mert's role in focusing the academic community on pension policy concerns was also critical. As Mike Gordon, recently noted, "Mert shook

2. "Overview: Why Was ERISA Enacted," in *The Employee Retirement Income Security Act of 1974: The First Decade*, an Information Paper prepared for use by the Special Committee on Aging of the United States Senate. See S. REP. NO. 221, 98th Cong. 8-9 (1984). Accord E. Robert Livernash, *Wages and Benefits*, in I A REVIEW OF INDUSTRIAL RELATIONS RESEARCH 79, 131 (Gerald G. Somers, ed., 1971) ("most outstanding pension study of the decade").

3. *60 Minutes* (CBS television broadcast, June 8, 1971).

4. *White Paper: Pensions—The Broken Promise* (NBC television broadcast, Sept. 12, 1972).

up the intellectual establishment. He really put it all together, showing horrendous losses, and the obsolescence and lack of rationality of many pension provisions.”⁵

Business groups also recognized the importance of Mert’s work. He was regularly invited to speak at pension industry meetings—where he did not hesitate to criticize his hosts for offering products that appeared to promise so much more than they were designed to deliver.

Many of the policy prescriptions contained in *The Future of Private Pensions* were reflected in ERISA, most notably elimination of exclusionary participation requirements, provisions for widows benefits, limits on breaks in service, protection against dismissal to prevent workers from receiving benefits, and requirements for more rapid funding. Other recommendations (such as portability and an end to the practice of “integrating” pensions with Social Security) are on the current reform agendas of retiree, employee and women’s groups.

After the enactment of ERISA—described by Senator Javits as “the greatest development in the life of the American worker since Social Security”⁶—Mert set out for new frontiers. His interest in the pension field has however, continued and he always can be counted on to speak out on the issues in his characteristically insightful and forthright fashion.

For example, Mert and his wife Joan began their 1988 book, *Social Security: The System That Works* with the following statement:

If people knew more about Social Security, they would be less anxious about its future; if they knew more about private retirement and state and local plans, they would be less complacent about their yield and reliability.⁷

The book documents today’s pension problems in three comprehensive and detailed chapters that could easily have been subtitled *Private Pensions: The System That Doesn’t Work*.⁸

As public concern escalates about many remaining inequities in the now \$3 trillion private pension system and the disturbing decline in coverage under traditional plans, a new generation of journalists, scholars and policymakers will be turning to Mert to be educated on the issues. They will find that he is as outspoken as ever in his conviction that further

5. Telephone Interview with Michael S. Gordon, Minority Counsel for Pensions for the U.S. Senate Labor and Public Welfare Committee, 1970-1975 (July 21, 1993).

6. *Pension Reform Passed by Senate and Sent to Ford*, N.Y. TIMES, Aug. 23, 1974, at A1.

7. MERTON C. BERNSTEIN & JOAN B. BERNSTEIN, *SOCIAL SECURITY: THE SYSTEM THAT WORKS* x (1988).

8. See *id.* chs. 4-6.

tinkering with the private pension system can never do the job of providing all Americans with an adequate supplement to Social Security; and that the only realistic solution to the nation's pension problems is an expanded Social Security system. A radical concept thirty years ago, this approach is increasingly being talked about as a realistic option. It may well be that Mert Bernstein has once again blazed the trail to retirement income reform.