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A TRIBUTE TO PROFESSOR MERTON C. BERNSTEIN

DEDICATION

On the eve of his retirement, the Law Quarterly is pleased to dedicate this issue to Professor Merton C. Bernstein. From the outset, however, the Law Quarterly wishes to make one thing clear: Professor Bernstein's retirement represents a mere change in status. The faculty and students at Washington University School of Law will continue to receive the benefit of Professor Bernstein's considerable talents as a teacher, scholar, public servant, colleague, friend and resident optimist. The Law Quarterly is confident that Professor Bernstein will continue to use his position as a leading legal scholar to challenge established views and work for a better society. A quick glance at A Tribute to Professor Merton C. Bernstein confirms that the Law Quarterly's confidence is shared by many.

MERTON BERNSTEIN & SOCIAL POLICY

ROBERT M. BALL*

My personal knowledge of Merton Bernstein's contribution to American social history has little to do with Washington University, his role as a legal scholar or his role as a teacher. I will have to leave that part of the story to others. But I have worked closely with Professor Bernstein for

* Mr. Ball was Commissioner of Social Security from 1962-73 and is currently Chair of the Board of the National Academy of Social Insurance.

thirty years. Our overlapping interests have been primarily in Social Security and private pensions where our policy views have almost always taken the same direction.

I have profited much over the years from Mert's ability to look at old questions from a new perspective and from his inventiveness in offering new solutions while holding steadfastly to basic goals and values.

As lawyers will, he does not hesitate to pick up a subject others have studied for years, and, lo and behold, he makes an important and original contribution. As far as I know, for example, he was the first to propose a national health insurance plan that molds into a single scheme all personal health care services.¹ At first blush you may not think this so original, but it is and probably very, very difficult to accomplish. It is quite clearly the right thing to do but has been overlooked by others because it runs head on into a variety of separately developed institutional arrangements, each with its own vested interests. But it is typical of Mert to propose the right course in spite of difficulty, and based on his great faith in our democratic system, expect it to prevail—if not now, soon; if not soon, eventually.

While others have said "cover the uninsured and control costs," he has added a call for the consolidation of all services in one plan, using the economies generated by the elimination of several separate arrangements as a contribution to financing the expansion of coverage to those now uninsured.²

Think what a simple idea this is, but one with such important consequences. He would fold into the national health insurance plan the medical services part of workers' compensation, the medical services part of automobile insurance, the medical services part of product liability suits and other liability insurance, the medical services part of tort claims, and if you can think of anything else where medical services are now treated as part of a separate program—that too.³ A major part of the savings would be in reduced income to members of his own profession, something that would not concern Professor Bernstein at all.

I first became acquainted with Mert through his monumental 1964 work

1. Mert and I had discussions on his proposals as early as 1970. For a comprehensive description of Professor Bernstein's national health insurance proposal, see Merton C. Bernstein, *Rationalizing Health Care Programs or "Why Not National Health Insurance?"*, Paper Presented at the Renaissance in Health Planning Conference, Detroit, Michigan (July 11, 1983) (on file with the *Washington University Law Quarterly*).

2. *Id.* at 3.

3. *Id.* at 2-3.

on private pensions.⁴ It was the most complete work on the subject since Murray Latimer's study, completed before the passage of the Social Security Act in 1935. I had done a short combined study of private pensions and Social Security for the Congressional Joint Economic Committee in 1952 and so was primed for Professor Bernstein's study. I was not disappointed and so began thirty years of work in the same vineyards.

For some time after Mert's 1964 book we would find ourselves on the same platform at conferences or on the same study group. Complete disclosure requires me to report, however, that there was a short period during which his unerring judgement was briefly off the track. For a time he espoused the view that Social Security had gone about as far as it could on the level of benefits and contribution rates, and that we would have to look to private plans for the further expansion of retirement protection. I mention this only to show that Professor Bernstein is human. He soon abandoned this position and has been a leading member of a small group of experts emphasizing the inability of private plans to achieve meaningful protection for the average earner and those earning less than the average and to point up the inherent problems the private system has in achieving inflation protection or adequate protection for those who move from one job to another. For many, many years he has been closely associated with those who emphasize the superiority of the public social insurance approach and to press for its improvement, thus showing his ability to change his mind when confronted with new evidence and new argument.

Perhaps I should not bring up what he, himself, has later considered error in a publication celebrating his contributions to the public weal, but I think the episode has its positive side. I wish a lot of other people had the intellectual confidence to abandon old and mistaken positions, and I can hear some saying they wish I did!

By the mid-to-late seventies, after I left the position of U.S. Commissioner of Social Security, Mert and I were working hand in glove on many matters. He helped form the Save Our Security (SOS) coalition of organizations which Wilbur Cohen, Nelson Cruikshank and I, together with some others, put together to oppose cuts in Social Security benefits. Perhaps, most importantly, Merton Bernstein was the principal consultant on the staff of the National Commission on Social Security Reform in 1982-83. This was the Commission chaired by Alan Greenspan that

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

negotiated a series of benefit cuts, tax increases and other Social Security changes that won the support of President Reagan and Speaker O'Neill and resulted in the 1983 Amendments to the Social Security Act. These changes restored financial health to the system and averted a widely perceived Social Security crisis undermining public confidence in the program.

Being "principal consultant" meant that Mert was the top staff officer of the Commission chosen by the five members (out of fifteen) appointed by the Democratic Speaker of the House and the Democratic Minority Leader of the Senate. He was part of the staff under the direction of the Republican-appointed staff director, Robert J. Myers, retired chief actuary of the Social Services Administration, but he had special responsibility, along with two other staff members, to meet the needs of the five of us in the minority.

After a long struggle, the Commission came up with a highly successful product negotiated during an extension of its life for the first two weeks of 1983. Mert was a big help during the year-long Commission activities, exhibiting his usual patience, imagination and ability to work with those of contrary views.

The Commission on Social Security Reform is frequently referred to as a model for solving extremely difficult and controversial government problems. Several have been set up in the hope of producing similar success but none has quite made it. It turns out, in all probability, that the success or failure of such groups is as much a matter of the people involved—both staff and principals—as of the form of the arrangement.

In 1987-88, Mert and his partner in so many of his intellectual ventures, his wife, Joan Brodshaug Bernstein, exhibited over a long period of time another Bernstein characteristic—a willingness to research a subject thoroughly and to write and rewrite to get a subject down just as they think it should be. *Social Security: The System That Works*, published in 1988 was not so much written as rewritten.⁵ Mert and Joan wouldn't let go until they were fully satisfied that they had the issues down right and said what they had to say in the best way they could. The book made a difference and still does. It is a policy book making a strong defense of our Social Security system and coming after a long line of books that mainly told the public that the Social Security sky was falling. Except for

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

revised text-book type books, the Bernstein book was the first in a long while that provided the reader with the positive rationale for the program and its accomplishments. There have been others since.

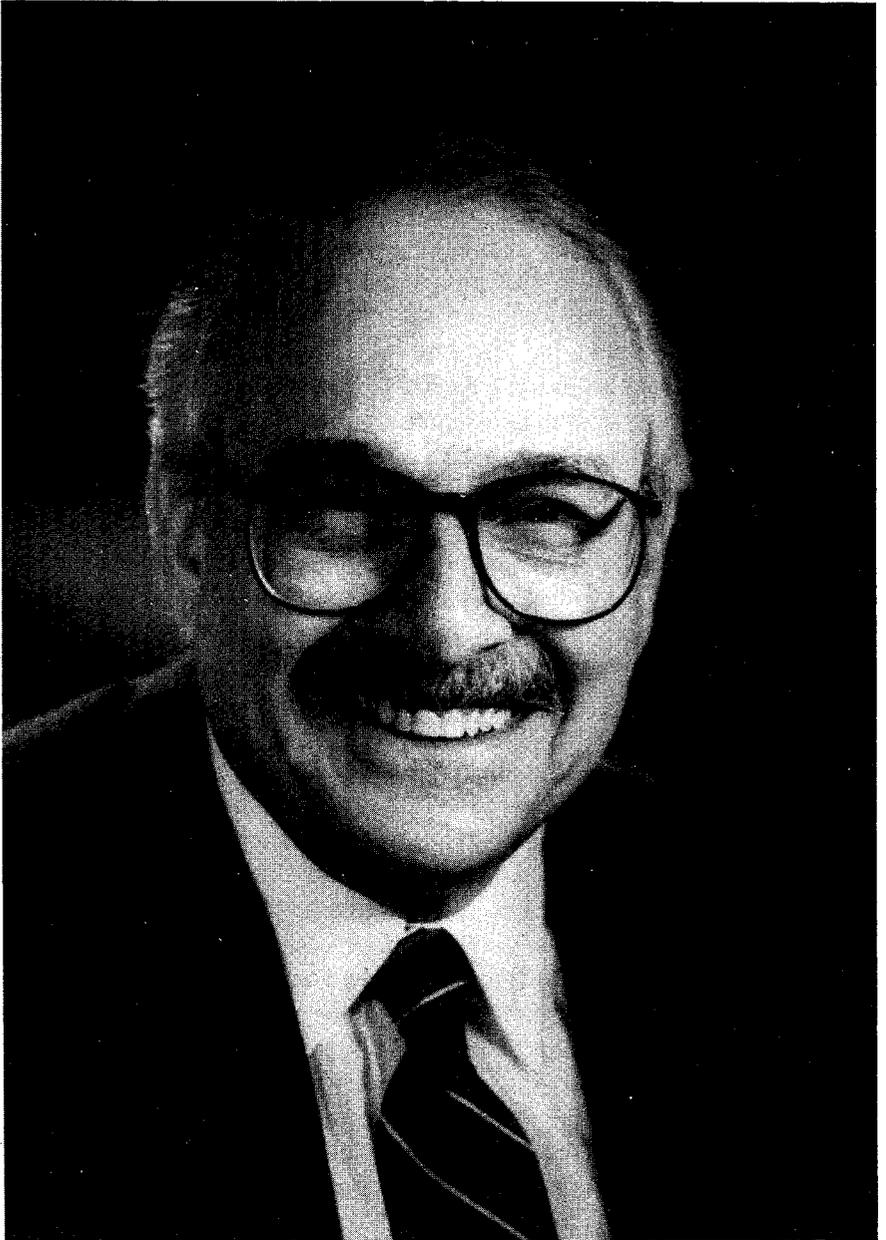
Around this time, shortly after the Tax Reform Act of 1986, Mert started to promote another original idea that has yet to take root. He was and is struck by the large windfall that private pensioners received when income tax rates were greatly reduced. Private pensioners suddenly had greatly increased after tax incomes that had not been planned for when the pensions were set up and which the pensioners had not counted on. His idea was and is that it would be quite painless to capture some of this windfall for deficit reduction or health insurance or any other much needed government expenditure.⁶ Another simple and highly useful idea, but evidently hard to sell.

During this same period Professor Bernstein joined Henry Aaron, Alicia Munnell, me and a few others on an organizing committee to establish an institution of Social Security experts, researchers and administrators. The idea was to educate the public about social insurance, promote research, train the scholars and administrators of the future and provide useful service to the leaders of today.

The organizing committee established the National Academy of Social Insurance and Mert was a member of the original Board of Directors. He served with distinction from 1988 when the Academy was established until, according to Academy by-laws, he had to resign from the Board when he ran for the United States Senate. Unfortunately he did not become a Senator, but he remains an active member of the Academy, a young organization which has already proved to be hugely successful.

Mert will always be found at work, alone or with groups, when he believes he can make a contribution to the success of American Democracy. He is a doer and an optimist, with a very special devotion to the idea of social insurance with its concept of an earned right to benefits growing out of past earnings and contributions. A concept which spells freedom and responsibility for the beneficiary and stability for the institution.

6. *Id.* at 203-04. See also Testimony of Merton C. Bernstein before the House Select Committee on Aging (Sept. 23, 1987) (on file with the *Washington University Law Quarterly*).



Merton C. Bernstein in a 1992 campaign photograph. (Photo: Martin Schweig Studio, St. Louis, MO)