

## TRIBUTES TO MARGARET A. BERGER FOR THE SCIENCE FOR JUDGES PROGRAMS

TRIBUTE TO PROFESSOR MARGARET A. BERGER

*Joan G. Wexler\**

I met Margaret Berger in 1974, when she had just joined the Brooklyn Law School faculty, one of the first three young women to do so. At that time, I had no affiliation with the law school, but was lucky enough to meet Margaret, because I was just starting out as a clerk for Judge Jack B. Weinstein, and Margaret was a distinguished alumnus of his chambers. Margaret understood that I was new to clerking and to Brooklyn, and she reached out to me and helped me with the transition from student to clerk. Immediately, I could tell she was special. For one thing, she was warm and friendly and supportive. For another, she was “hooked” on teaching and legal scholarship. Margaret wanted only the best *for* Brooklyn Law School and she expected the best *from* herself. She talked about her goal of producing superior scholarship and her ideas for strengthening the School.

Although I was barely out of law school, Margaret convinced me to think about becoming a professor at Brooklyn. I think the rest of the faculty were somewhat less sanguine about my candidacy at the time—after all, I hadn’t even taken the bar exam and was not quite sure what lay in my future. But, years later, Margaret, still my friend, urged me once again to consider joining the faculty. I have now had the pleasure of being Margaret’s colleague for twenty-two years. My initial assessment of her talents was correct. She is first-rate. Margaret has been a leader at the law school

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\* Joseph Crea Dean and Professor of Law, Brooklyn Law School.

and in her field. To me, it was only fitting that she was asked to join the Science for Judges Project Advisory Board and to become Director of the program. The choice was clearly a wise one; the tributes written by the other members of the Advisory Committee attest to the extraordinary job that she has done.

IN PRAISE OF MARGARET A. BERGER

*Hon. Shirley S. Abrahamson\**

I have known Margaret Berger for many years. I knew her first in print from her writings, especially *Weinstein and Berger on Evidence*. Then I got to meet and talk with her in person. The in-person version of Margaret Berger was better than the print version—same mastery of the subject matter and same well-organized presentation, but with animation, flair and humor.

My first opportunity to work with Margaret came via the Commission on the Future of DNA Evidence, which I chaired. We had to select a reporter for the Post-conviction Issues Working Group. This group was charged with producing a model statute or rule for authorizing post-conviction testing on DNA evidence. Attorney General Janet Reno thought this issue, affecting incarcerated people who were claiming innocence, should be the commission's top priority and should be addressed quickly. We combed the lists of academics and lawyers for a suitable reporter, and quickly settled on Margaret Berger. She was knowledgeable, she was able to work with people from various disciplines who held different views, and she could be counted on to produce written materials in a timely manner. Margaret lived up to all expectations.

My next opportunity to work with Margaret came with the Science for Judges seminar. I had the privilege of serving with a wonderful board of advisors. The members of the board were creative; they filled our meetings with great ideas for programs (many times only partially described). It was up to Margaret to flesh out the ideas, find speakers, and pull together an interesting program. And she always did!

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\* Chief Justice, Wisconsin Supreme Court.

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My work with the board of advisors gave me an opportunity to work with Margaret Berger in her natural habitat—Brooklyn Law School. The logo used for the law school, and used in the seminar materials, is a drawing of the Brooklyn Bridge. Observers attribute different meanings to the representation of the bridge. For me, the bridge represents Margaret Berger: She spans professions and disciplines. She connects scientists and legal professionals, federal court judges and state court judges, and academics and practitioners. As a state court judge, I am especially grateful for her efforts.

Margaret—you have done a marvelous job in these seminars and publications. Thanks!

## A WOMAN OF VALOR: MARGARET A. BERGER

*Joel E. Cohen\**

It has been my privilege to work under the leadership of Margaret Berger for decades.

From 1991 to 1995, Margaret Berger led a panel of neutral experts, of whom I was one, in advising the court of Judge Jack Weinstein on projections of future asbestos-related injuries in litigation over the Manville Personal Injury Settlement Trust. Margaret was magically skilled in keeping us wayward scientists focused on the questions of concern to the judge and lawyers contending at his bench, while permitting us to indulge in the usual free-for-all of scientific argument and discovery. She asked us probing questions, often prompting us to revise our scientific work. Her critical mind undoubtedly strengthened our procedures and product, summarized in *Forecasting Product Liability Claims: Epidemiology and Modeling in the Manville Asbestos Case*, by Eric Stallard, Kenneth G. Manton and Joel E. Cohen (New York, Springer-Verlag, 2005).

After that trial by fire, Margaret Berger engaged me in 1996 in a panel of special masters to advise Judges Weinstein and Samuel Pointer on the selection of experts for a panel on the scientific un-

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\* Abbe Rockefeller Mauzé Professor of Populations, Rockefeller University and Columbia University.

derpinnings of the multidistrict silicone gel breast implant litigation. Again, working with Margaret was a pleasure and an education as we developed standards of scientific quality and objectivity as well as procedures to avoid conflicts of interest in an area where there was little or no precedent. Margaret shepherded us advisors to a successful set of recommendations: the reports of the experts we recommended to Judge Pointer were not challenged.

From 2002 to 2007, Margaret orchestrated and conducted a sequence of invaluable tutorial sessions at Brooklyn Law School called Science for Judges. I was privileged to serve on her advisory group with distinguished judges and lawyers. Margaret had unerring taste for topics of judicial concern. She chose speakers of good judgment and expository skill. She arranged good informal opportunities for judges and scientists to talk shop and exchange views. The many recidivists among the judges who participated in more than one of these intellectually lively sessions testify to the value of the sessions.

Margaret's personal modesty and easy manner give leverage to her intellectual brilliance and managerial competence. It has been a privilege and a pleasure to work with Margaret, for which I am grateful. I wish her every success, good health, and joy.

#### A LAWYER IN THE LABORATORY

*Richard A. Merrill\**

Margaret Berger was the perfect choice to design, organize, and execute Brooklyn Law School's very successful "Science for Judges" program. She combines nationally recognized distinction as a scholar of Evidence and related law school subjects with a practical understanding of litigation mechanics and challenges they present to the central figures in the trial process—judges, federal and state. And equally relevant, and perhaps uniquely, Margaret has developed a grasp of the scientific disciplines that influence the conduct and outcome of civil law suits. This understanding, and

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\* Professor Emeritus, Dean (1980-1988), University of Virginia School of Law.

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the sympathies she has developed for the judges who must confront this material, have earned her respect and appreciation throughout the country.

I had no hand in Margaret's selection for this role, though her qualifications were surely obvious from the outset. However, I did play a small part in her selection for another, related role. Along with Donald Kennedy, I co-chair the Science, Technology, and Law Program of the National Academies, which is overseen and guided by some two-dozen prominent lawyers and scientists. The program was launched seven years ago, in response to the famous *Daubert* ruling of the Supreme Court and with an immediate focus on the legal system's reliance on the products of science in resolving legal disputes. Our varied projects have addressed the handling of science in the regulatory process as well as in the courtroom. Margaret Berger has played a central role in fashioning our agenda and overseeing its implementation.

For many of the NAS panel's activities Margaret has often, indeed almost always, seemed ideally equipped to play an active and not simply an oversight role. She knows the issues, she is familiar with the players, and she brings a balance and objectivity that are respected by more firmly aligned participants. An immediate example of such a project is an on-going study, funded by Congress, to evaluate the strength of the science that supports forensic evidence—fingerprints, handwriting, tool markings. Headed by the former Chief Judge of the D.C. Circuit, Harry Edwards, the panel charged with this assignment confronts a range of issues on which there is strong interest and intense feeling. Once more, the NAS oversight panel has turned to Professor Berger, confident that she will exhibit the practical reasoning and balanced judgment that has characterized her career.

NO *DAUBERT* HEARING NECESSARY: THE EXTRAORDINARY  
EXPERTISE OF MARGARET BERGER*Judith Resnik\**

As the series, *Science for Judges*, wends to the closure of this phase, the members of the advisory group working with Professor Margaret Berger came together to honor her. We did so by a contribution to the Brooklyn Law School's library for books in the field close to her heart and on which she has made such a mark—science and the law. As Judge Weinstein aptly put it, Margaret's work has served as a "bridge" between the two. Margaret saw the need to build that bridge long before others realized that a gap existed. The commentary that follows records some of the many comments made in her honor in the spring of 2007.

Our shared subject matter—the many contributions of Margaret Berger—provides us with the pleasure of pausing to reflect on her accomplishments. Margaret is a leader among academic scholars writing about the law of evidence. What makes her work unusual is her ability to see issues on the horizon but not yet the subject of general discussion. Hence, Margaret has pioneered inquiries into the role of DNA evidence, the relationship between rules of evidence in civil and criminal cases, the import of the decision (*Daubert*<sup>1</sup>) requiring federal trial judges to vet the quality of experts before permitting a jury to hear their views, and the role of federalism in thinking about whether courts or legislatures in the state or federal system ought to supply answers to the problems she identifies.

In the 1960s and 1970s, Margaret was a pioneer of another sort. Then, relatively few women were in law teaching. Then, litigation on behalf of women's rights was in its early stages. Reflective of Margaret's insights and thoughtfulness, the Ford Foundation asked her to do a review of the effects of that litigation—thereby offering her one of many opportunities to marry her expertise on courts, evidence, and on the law with her commitment to

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\* Arthur Liman Professor of Law, Yale Law School.

<sup>1</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

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social justice.

Margaret does all of her work with a keen sense of its import. In exploring the relationship between scientific and legal judgment, she has clearly positioned herself as concerned about the impact of the rules crafted. Margaret understands that legal obligations have effects on the industries producing innovations and on the people who, individually or in groups, complain about the harms to which they have been exposed. Thus, Margaret is both a scholar of the law of evidence and of the law of due process, for she is committed to the constitutional obligation that frames evidentiary rules—that courts be accessible so that public judgments can be made about liability and remedy.

Margaret also serves for me, personally, as a role model, and I have had the pleasure of her friendship. She teaches many wonderful lessons. Her many publications display her brilliance and her consistent lucidity. With analytical precision and thoughtfulness, Margaret offers a careful, fair, and clear interrogation of a given topic. But her work moves beyond that of many others because her inquiries are animated by a deep commitment to justice. Thus, atop the clarity of analysis and intellectual insightfulness comes unflappable gutsiness. Margaret speaks up when she sees unfairness in operation.

Furthermore, as the leader of this seminar series, held twice a year at Brooklyn Law School from 2003 to 2007, Margaret showed her skill as a collaborative and congenial colleague. She was generous in giving time to shape a serious and engaged series of lectures and colloquia at a consistently spectacular level. Regularly, she received comments from judges that her programs were the “best” that they had attended. Margaret’s expertise in setting intellectual agendas has been recognized in many other fora. She is asked regularly to assist the Carnegie Foundation, the National Academy of Sciences, the Federal Judicial Center, the American Law Institute, and other institutions as they develop programs in areas of her expertise.

Throughout her endeavors, Margaret Berger is unfailingly attentive to questions of justice and she is deeply concerned about the integrity of courts, of science, and of the legitimacy and fairness of the knowledge that is the predicate to decision making in

both fields. Through her intellectual virtuosity and because of her literacies in the languages of both science and of law, she has taught us a great deal. Some of us had the opportunity to attend the seminars she produced, and all of us can read the volumes now published in the Brooklyn Law School *Journal of Law and Policy*,<sup>2</sup> which enable broad dissemination of that work. And happily, through a series of these brief comments, readers can have a flavor of the person who brought all of this into being. In short, the topic is easy and our debt to Margaret Berger is clear.

A DEDICATED VISIONARY: MARGARET A. BERGER

*Hon. Barbara J. Rothstein\**

Now that we have experienced the last of the Science for Judges Programs, it is fitting to pay homage to the person who made these wonderful seminars happen. Over the past four years Professor Berger's Science for Judges Program has provided an unprecedented opportunity for hundreds of federal and state judges to learn about recent developments at the intersection of science and law. Some of our nation's most distinguished scientists and policy researchers have informed judges of emerging scientific issues that will shape litigation for years to come. Publication of these presentations in the Brooklyn Law School *Journal of Law and Policy* will ensure that these valuable materials are available to

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<sup>2</sup> See Symposium, *Science For Judges I: Papers on Toxicology and Epidemiology*, 12 J.L. & POL'Y 1 (2003); Symposium, *Science For Judges II: The Practice of Epidemiology and Administrative Agency Created Science*, 12 J.L. & POL'Y 485 (2004); Symposium, *Science For Judges III: Maintaining the Integrity of Scientific Research and Forensic Evidence in Criminal Proceedings*, 13 J.L. & POL'Y 1 (2005); Symposium, *Science For Judges IV: Agent Orange and Human Behavior Research*, 13 J.L. & POL'Y 499 (2005); Symposium, *Science for Judges V: Risk Assessment Data: Disclosure and Protection*, 14 J.L. & POL'Y 1 (2006); Symposium, *Science for Judges VI: Techniques for Evidence-Based Medicine*, 15 J.L. & POL'Y 525 (2006); Symposium, *Science for Judges VII: Evaluating Evidence of Causation and Forensic Laboratories: Current Issues and Standards*, 15 J.L. & POL'Y 1 (2007).

\* Director, Federal Judicial Center; United States District Judge, Western District of Washington.

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others who were not able to attend the meeting.

This series of programs represents the most recent instance of Professor Berger's many contributions to judges' understanding of science and law. For the past fifteen years she has worked to further judges' understanding of the scientific issues that would become part of their cases and to introduce federal judges to their "gatekeeping" duties under the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* Professor Berger's work with the Carnegie Task Force on Science and Technology in Judicial and Regulatory Decisionmaking, including her influential brief that was cited by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, provided the foundation for this series of educational programs sponsored by the Federal Judicial Center.

Her chapter in the Center's Reference Guide on Scientific Evidence summarizing the Supreme Court's trilogy of decisions on expert testimony has long been a primary reference source for federal and state judges, attorneys and legal scholars. The federal judiciary has recognized Professor Berger's contributions to judicial education by naming her as a recipient of the Center's John A. Brown Award.

We have all benefited from Professor Berger's vision of a judiciary that is informed by a rigorous understanding of emerging science. She brought together a collaboration of judicial, scientific and academic organizations that helped fulfill her vision of a judiciary that incorporates an understanding of science to help it achieve the goal of dispensing justice.

MARGARET A. BERGER: ARCHITECT OF BRIDGES BETWEEN LAW  
AND SCIENCE

*Hon. Jack B. Weinstein\**

Professor Margaret A. Berger has been my student, my first law clerk, my mentor, my co-author, joint instructor in many seminars, and dear friend for half a century. I should be disqualified by reason of bias from serving as her character witness—but who would object? She is extraordinarily able, energetic, and insightful, and has the ability to project her charm and leadership in class and in important professional enterprises.

The logo of Brooklyn Law School, where she teaches (in addition to her many visiting lectures and professorships) is the Brooklyn Bridge. It should be Margaret's personal monogram as well. For she is the John Roebling designer of bridges between science and the law. One of the towers is sunk into the law side and the other is rooted in science. Strong steel-like strands between the two have been spun by the law–science symposia at Brooklyn Law School, arranged by Margaret who has brought together the most knowledgeable people in both fields. While the bridge is far from complete, her contributions to it are unsurpassed.

As a veteran member of the National Academy of Science's panel on Science, Technology and Law, Professor Berger has served on, and helped guide, many commissions dealing with such matters as *Daubert*, the tracing of weapons through gunpowder and the future of DNA. Trying to understand the modern legal system, the *New York Times* turned to her. Its front page of October 1, 2007, summarized the matter: “‘Technology has made a big difference,’ said Margaret Berger, a DNA legal expert who is on a National Academy of Sciences panel that is looking into the changing needs of forensic scientists. ‘We see that there are new techniques for ascertaining the truth.’” And Margaret is telling us how to properly apply these new methods.

Professor Berger has been honored by the joint American Law

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\* United States Senior District Judge, Eastern District of New York.

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Institute and American Bar Association award for her contributions to this field, and for her work as reporter to the Advisory Committee on the Federal Rules of Evidence and consultant to the Carnegie Commission on Science, Technology, and Government. She is author of numerous books, articles, and amicus briefs on evidence, procedure, *Daubert* and related matters, as well as a key chapter of the United States Judicial Center's Manual on Scientific Evidence.

Her many admirers in both fields stand in awe of, and deep affection for, this great leader of the law and science, Margaret A. Berger.

## MARGARET A. BERGER: IN CELEBRATION

*Elizabeth M. Schneider\**

I first met Margaret Berger when I joined the Brooklyn Law School faculty as an adjunct professor in 1974, co-teaching Women and the Law. During that time, I was one of the people Margaret interviewed for her important study on women's rights litigation for the Ford Foundation. I was tremendously impressed with her intelligence and thoughtfulness. Then, when I joined the full-time faculty in 1983 and we became colleagues, both teaching Civil Procedure, I really got to know her. Over the last more than twenty years, I have seen her wisdom and insight in operation at faculty meetings, on committees, and as a speaker on many programs. We regularly discuss procedure, evidence, courts and litigation, we have been co-panelists on programs on procedure and she has been an important influence on my scholarship, teaching and thinking.

Margaret is a brilliant, wise, warm, funny, wonderful person, who I am lucky to have as a friend and colleague. She is also an impassioned fighter for justice. As one of the early women in law teaching, she has been an inspiration and provided support to me and a whole generation of younger women legal academics who followed her into law teaching. I know that many of us at Brooklyn Law School, as well as women legal academics around the country

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\* Rose L. Hoffer Professor of Law, Brooklyn Law School.

who have told me of their admiration for Margaret, see her as an important role model.

I have had the pleasure to attend many of the pathbreaking Science for Judges Programs Margaret has directed over the last several years. They have always been immensely stimulating. During this same period of time, I have also worked closely with the National Association of Women Judges (“NAWJ”). Many federal and state judges that I know through NAWJ have attended some of the Science for Judges Programs. These judges were always tremendously excited by these programs, and said that they were the best judicial education programs that they attended. They were also wowed by Margaret and the content and vision of the programs she had designed.

Margaret’s work on Science for Judges has enriched judicial education and made important contributions to the development of interconnections between science and law. Her leadership in this, as in so many areas, has brought great honor to all of us at Brooklyn Law School. I know I speak for many of us on the faculty in celebrating Margaret’s many accomplishments and these pioneering programs.