

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

*TRIBUTES TO MARGARET A. BERGER*

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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).

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