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## Tributes to Margaret Berger

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# FESTSCHRIFT IN HONOR OF MARGARET A. BERGER

## Introduction

*Edward K. Cheng*<sup>†</sup>

It is my privilege to introduce this special issue of the *Brooklyn Law Review* in honor of my colleague and mentor, Margaret A. Berger. When Margaret announced her retirement from almost forty years of teaching at Brooklyn Law School, many of us were at a loss as to what to do. Naturally, as local tradition dictates, there would be a retirement dinner, complete with toasts from colleagues and family, speeches by former students, and the unveiling of a portrait. But for Margaret, the occasion seemed to demand something extra, something to acknowledge her remarkable contributions to the law of evidence and her eminent place in the field.

Out of that vaguely unsettled feeling, Larry Solan and I, in consultation with our dean, Joan Wexler, arrived at a “festschrift.” Using foreign phrases of course has its dangers, and throughout this process the Berger “Festschrift” has not infrequently been greeted with puzzled looks and tentative pronunciations. In concept though, everyone has perfectly understood not only what it is, but also why it is a perfect fit for Margaret’s retirement. A new collection of works on the law of evidence looking not only at the past, but also to the future—what better way to celebrate Margaret’s career?

Margaret’s career in the law of evidence has spanned the full breadth of the discipline. As a scholar, she has co-authored (with Judge Jack Weinstein) arguably the preeminent

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treatise on the Federal Rules of Evidence, as well as written a number of influential law review articles. As a teacher, she has co-authored a leading evidence casebook, enlightened generations of students, and educated judges about the complexities of science with her now-famous Science for Judges conferences. As a lawyer, she has written amicus briefs to the Supreme Court and served on pathbreaking committees of the National Academy of Sciences. And as a member of the academic community, Margaret has embraced her role as part of the vanguard for women in the legal academy, and she has served as an important role model for young scholars female and male alike.

Befitting a career of such incredible scope, sixteen evidence scholars make their contributions in this festschrift issue. The word “festschrift” comes from the German, which can be literally translated as “party writing” or “festival writing” and this festschrift lives up to that name. As with most parties (good ones, at least), the sounds emanating from this festschrift are celebratory, boisterous, and more importantly, *polyphonous*. The articles run the gamut of modern evidence law.

The festschrift begins with three tributes. Judge Jack Weinstein is a natural tribute writer for any evidence scholar, but his tribute is a particularly fitting one in this case. After all, Margaret was not only Judge Weinstein’s first law clerk, but she has collaborated with him for years on both their treatise and casebook. Eleanor Swift writes a moving tribute to Margaret’s impact on women teaching in the field of evidence, and Larry Solan writes one as her long time colleague at Brooklyn Law School.

As might be expected given Margaret’s scholarly focus over the last two decades, scientific evidence articles comprise the lion’s share of this issue. Jennifer Mnookin, who delivered the Ira M. Belfer Lecture that preceded Margaret’s retirement dinner, considers the problems facing the forensic identification sciences. She devotes considerable effort addressing a key question left largely unexplored by the recent National Academy of Sciences report—how should courts respond to the problems found in forensic science?

The forensic themes of the Mnookin lecture surface in other contributions. Paul Giannelli, for example, chronicles Margaret’s involvement in the three biggest events in the recent history of forensic science—the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals*, the

acceptance of DNA evidence in the courtroom, and the recent National Academy of Sciences report. Ed Imwinkelried continues this vein by exploring Margaret's role as amicus curiae in both *Daubert* and *Kumho Tire v. Carmichael*.

A different variation on the forensic theme appears in David Kaye's contribution, which responds to a recent article by Jay Koehler and Michael Saks on the "individualization fallacy" in the forensic sciences. Kaye contends that they overstate their claim. Koehler and Saks in turn write a contribution in response.

In other scientific evidence pieces, an interesting thread emerges among several articles that highlights the tension between the general nature of science and the particularized nature of legal inquiry. As David Faigman notes in his contribution, this "evidentiary incommensurability" lies at the root of the tension between science and law, and he provides a useful taxonomy for navigating the terrain. Joe Sanders takes this dichotomy in a different direction, using it to explain the longstanding conundrum of why courts seemingly apply *Daubert* more strictly in civil cases than in criminal ones. I also rely heavily on the distinction in my contribution, which argues that scientific facts should be treated not like ordinary adjudicative facts but rather like foreign law.

Beyond scientific evidence, other evidentiary concerns and doctrines make appearances as well. Michael Risinger goes back to basics, arguing that reform of the evidentiary rules should strive to improve accuracy, as determined through a combination of empirical evidence and common sense. In contrast, Aviva Orenstein tackles a specific evidentiary *bête noire*, advocating that the rule governing past convictions for crimes of deceit under Rule 609(b) should be subject to a judicial balancing test like Rule 403.

Three contributions comment on the Confrontation Clause, motivated in part by Margaret's pre-*Crawford* work on confrontation issues: her 1992 article discussing the Confrontation Clause implications of statements solicited by government actors, and her amicus briefs in *Idaho v. Wright* and *Lilly v. Virginia*. Bob Mosteller argues that informant testimony should be recorded in "draft form" to reveal the potential influence of government agents. Norman Abrams writes about the implications of *Davis v. Washington*'s "ongoing emergency" qualification to the Confrontation Clause for terrorism prosecutions and government attempts to gain information for intelligence purposes. Myrna Raeder discusses

the future of forfeiture doctrine in domestic violence cases in the wake of *Giles v. California*.

Finally, no festschrift in honor of Margaret could be complete without some words about teaching, and Roger Park kindly obliges with his reflections on “clickers.” With its often technical yet deterministic rules as well as its link to real-time courtroom objections, Evidence may be the most amenable among law school survey courses to the “clicker” revolution. Park offers one example of how to inject “clicker” technology into the classroom successfully.

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So this festschrift is polyphonous indeed. And although detractors sometimes characterize the field of evidence as a narrow set of arcane rules—perhaps even a narrow set of *irrelevant* rules given the death of the trial—this celebration shows the field to be vibrant and wide-ranging. This result should come as no surprise. After all, the process of proof and the rules that govern it are not only fundamental to legal inquiry, but also necessarily reflect our deepest values.

A final word of thanks. Although the footnote at the beginning of this introduction acknowledges all of the people who made this festschrift possible, I purposely made one glaring omission, saving the best for last. I think it safe to say that all of the participants, as well as everyone else in the field of evidence, would gladly join me in thanking Margaret for dedicating her career to our field and helping make it what it is today. It is our great fortune to have her as a colleague and friend, and we look forward to her new contributions for many years to come.

# TRIBUTES TO PROFESSOR MARGARET A. BERGER

## Tribute

*The Honorable Jack B. Weinstein*<sup>†</sup>

How fortunate are those of us whose lives have been enriched by Margaret Berger.

A superb classroom teacher of civil procedure, evidence, mass torts, and science and the law, she has provided the basis for professional success, a life of the intellect, and the ethical practice of law for thousands of her students.

For hundreds of state and federal judges, scientists, and government administrators of science-based programs, she has presented an extraordinary series of seminars and working sessions that have measurably improved the capacity of lawyers, scientists, and government officials to administer the law.

Colleagues in teaching and practicing lawyers and judges have been grateful for her influential casebooks, treatises, and articles.

To her many friends, she epitomizes the supportive, enchanting, engaged personal relationships that add sweetness to life even in its most trying hours.

And there is yet another dimension that is at the core of this uncommon woman. It is glimpsed from time to time by those who have had the pleasure of visiting her home. There she presides with warm elegance in her beautifully old-world furnished apartment in midtown Manhattan and her suburban house by the sea. Margaret, along with Mark, her late husband, a well known general practitioner, and their sons, Josh, a T.V. stage manager, and David, a boutique firm litigator, have often

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<sup>†</sup> Senior District Judge, United States District Court for the Eastern District of New York.

invited students, colleagues, and friends to share their beautiful and bountiful table and cultured conversation.

It has been my privilege and honor to know Margaret Berger. She was my student (and thus my teacher) and my first law clerk. We have been coauthors and joint instructors. She has been a dear friend for over half a century. My bias in her favor is no disqualification from participating in this well deserved Berger Festschrift and dinner in her honor. As demonstrated by this outpouring of affection and by the many tributes to her and her Science for Judges programs in the sixteenth volume of the *Journal of Law and Policy*, legions will confirm that here partiality is mandated by truth.

# Tribute

*Lawrence M. Solan*<sup>†</sup>

Margaret Berger and I have been colleagues at Brooklyn Law School since I joined the faculty in 1996. In the beginning, I really didn't know what to make of her. Some people are best described as "no-nonsense," others as "warm and friendly," still others as "brutally honest." Margaret is all of those things among others, and sees no conflict among them. She is a complex and brilliant woman. I learned this about her fairly quickly, and we soon became close friends.

I know Margaret's work well, and have even been fortunate enough to have written with her, which I hope to do again. Her work reveals a tightly argued, yet compassionate vision of the law. To take one example: Legal scholars have been concerned about the fact that there is not enough science in what passes as scientific evidence. Margaret has been part of this movement. But at the same time, Margaret has forged another, contrarian movement, whose theme is that the fetish of unattainable scientific certainty is being used by the courts to ensure that those injured by chemical and pharmaceutical products cannot recover for their injuries. That is because the courts require scientific proof of causation that is stricter than the scientific community can generally provide.

Margaret proposes changes in the substantive law, as well as the law of evidence and procedure, the latter two of which she regards as parts of the same package. She not only sees the big picture, but she is willing to paint a new one if that is what is needed.

For those who know how deeply Margaret has devoted herself to music, opera, and theater (for most of her life with her late husband, Mark), it should not be surprising that her work is as humanistic as it is intellectually crisp. I can't say with scientific certainty that Margaret Berger is one of a kind,

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but I've been attempting to falsify that hypothesis for some time, and have come up empty so far.

# Tribute

*Eleanor Swift*<sup>†</sup>

For women teaching in the field of evidence law, Professor Margaret Berger's career shines as a beacon—a stellar teacher, a highly-respected scholar of scientific evidentiary issues, co-author of the most venerated of evidence casebooks, co-author of the foundational treatise on the Federal Rules of Evidence, consultant to courts, private and government commissions too numerous to mention, and Reporter to (among other august institutions) the Advisory Committee on the Federal Rules of Evidence. She has broken every glass ceiling in academia.

It could not have always been easy. Margaret entered the legal profession at a time when women were not hired by major New York law firms. She entered law teaching just as women were becoming a significant presence in law school student bodies, but not yet in law school faculties. And in the field of evidence law, male professors were iconic figures. Yet I wonder whether Margaret would ever admit how hard it was. She would probably give her characteristic “shrug” to underplay her own remarkable achievements.

These achievements paved the way for women who followed her into the academic profession and into the field of evidence law. It is easier not to be the first, even though Margaret always set such a high standard. Even her introductions are masterpieces, as those who heard her remarks about Judge Weinstein at the AALS Evidence Section Luncheon in 2008 well remember. And she paved the way with her own brand of fellowship as well as her own achievements. At every major Evidence conference, at which she was always an invited speaker, Margaret welcomed us. She shared her inquiring mind with us, immediately treating us as colleagues instead of newcomers.

It is her combination of fellowship and accomplishment that I have admired from near and afar for more than twenty

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years. I know this admiration is shared by countless other women (and men too) who have been similarly inspired by Professor Margaret Berger.