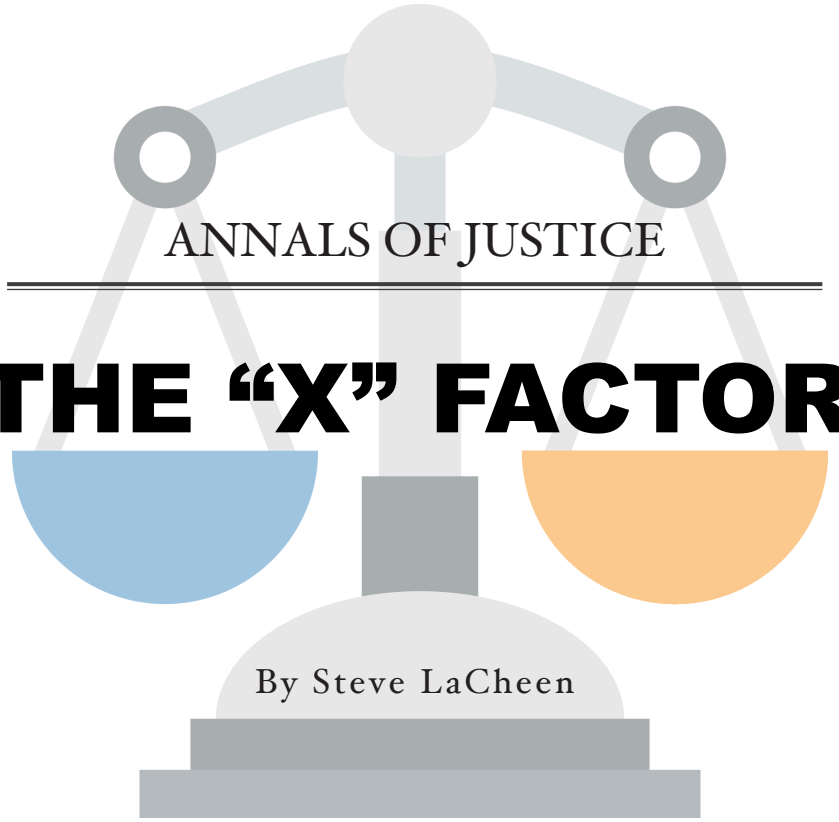

ANNALS OF JUSTICE

THE "X" FACTOR

By Steve LaCheen

It's been a "long haul," as they say. Sixty years at the bar, mostly in the trial court trenches, sometimes in the appellate second stories, and twice in the ionosphere of the Supreme Court. Ins and outs; ups and downs; wins and losses; one case at a time; and as I wrote retrospectively in 1999, I had long maintained the firmly held belief, that, "considering all the circumstances, and myriad variables, despite all countervailing forces, and against all odds, when all was said and done, a rough approximation of justice seems always to have been produced."

But there did come a time, about a decade later, when the "rough equivalent of justice" collided head-on with the implacability of "random selection" and was reduced to smithereens. I came to feel I had been kidding myself all along, and that "serving Justice one client at a time" was a self- deceptive mantra on a banner that would have better read "Randomness Rules." The proverbial moving digit was indeed the fickle finger of fate, and, to remix the already mixed metaphor, the joke was that the system was not only hanging by a thread, it was twisting in the wind.

The crucible of such a depressing state of affairs was my representation of two defendants in separate criminal cases that came to me, were handled by me, and disposed of by me during the same general period of time, before different judges on the same court.

The cause of my angst was, to put it mildly, that each client received an undeserved sentence. In slightly hyperbolic terms, one might have said that the client who deserved incarceration was given probation, while the client who deserved probation was given a prison sentence. At some point, I prepared an itemized comparison between the two cases, like the "tale of the tape" for a prize fight, comparing the fighters' statistics, but it will better serve the purpose of this memoir to put a little flesh on those bones.

Paul was a forty-something first offender, who had been the mentee and co-conspirator of Kevin, a master fraudster and life-long swindler. Kevin had been caught out by the authorities and, having decided to cooperate, had turned in Paul and everyone else with whom he had conducted a massive fraud involving false class action claims, which the government claimed had caused a $44 million loss. As Kevin's right-hand man, Paul had netted $750,000 for his role in the offense. Prior to retaining counsel, Paul had been tape-recorded by Kevin and admitted everything; so he would be pleading guilty.

On the other side of the arena was Richard, a 60-year-old, with no prior record, who had been the CFO of a startup biomedical company, trying to raise capital to complete the next phase of clinical testing for the company's incipient product. Richard had been introduced to the same Kevin, who was by then cooperating with the government setting up various "stings" to catch unwary persons predisposed to join him in the commission of what they were led to believe were securities offenses. In Richard's case, the offense involved nothing more complicated than Kevin making a $5,000 investment in the stock of Richard's

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company in return for a kickback of $1,000, a clear violation of the securities laws, which Richard cheerfully admitted ("It's what everyone does to prime the pump."), when interviewed by federal agents. Clearly, a guilty plea was indicated in Richard's case as well.

So, the stage was set for these two defendants to await their respective sentencings. As an attorney with long years of practice in these precincts, I expected that the older first offender who had been trapped (but not entrapped) into committing a $5,000 offense would be treated more leniently than the younger first offender, who had been in pari delicto with Kevin in the commission of a $44 million offense, which netted him a personal profit of $750,000. Enter the "X" factor.

The filing of whatever document initiates formal legal proceedings generates the random judicial assignment of the matter; that assignment is designated by several initials stamped on the upper left- hand corner of the document—the initials of the judge to whom the case has been randomly assigned. And those initials in our cases were, for all intents and purposes, seals on the fate of each defendant. As to how the "X" factor of each of those equations was translated into practical terms, consider the following: both judges were middle-aged males, married with families, of the same religious persuasion, and with approximately the same tenure of judicial experience. There, however, the similarity ended.

The "X" in Paul's case was a local-born former solo practitioner who had won his appointment to a federal judgeship by way of being a solo practitioner. A local political leader of his party out-of- power, when his party regained the presidency, he received the appointment by way of appropriate reward for years of service to the people in his particular bailiwick. Ultimately, Paul's "X" would prove to be a lucky draw.

Richard, on the other hand, was not so fortunate. The "X" to whom the initials on his charging papers indicated his case had been assigned was, in fact, of about the same age as Paul's judge but a tiger of a totally different stripe. Foreign-born, he had immigrated to the United States as a teenager, enjoyed a superlative academic career, became a citizen, then an attorney, and then a government prosecutor, before being appointed to the federal bench during the government's campaign to improve the diversity of the federal bench.

So, the stage was set for the final act.

I was devastated over what I felt was a total failure of the system, as well as my own failure to overcome the obvious inequities in the sentences given to my clients.

The tortuous maze through which each client and I, as their counsel, wended our respective ways over the next two years—and the legal pyrotechnics involved—are well beyond the scope of this essay. A critical factor was that neither client was able to offer cooperation as a way of reducing his guidelines. At the end of the courtroom day, Paul, who had put $750,000 in his pocket as Kevin's criminal amanuensis, whose sentencing guidelines were 78–97 months, was given a sentence of nine months' home detention followed by 51 months' probation, plus restitution; and Richard, who had put nothing in his pocket and had, in fact, spent $1,000 of his own money to get $5,000 into his firm's coffers solely for the purpose of attracting new investors, was sentenced on the basis of a postulated loss of between $2.5 - $7 million, which called for guidelines of 63–78 months, to serve 51 months' incarceration.

The oversimplified but reasonably accurate "explanation" for the obvious disparity would be that Paul's judge focused on the nature and circumstances of the offender as well as his offense, while Richard's judge focused upon his offense and, since there had been no actual loss, simply accepted the government's exaggerated projection of a speculative intended loss.

But that was nowhere near the end of the day. That would be two full years away. The government appealed Paul's sentence on the ground that so drastic a downward variance from the guidelines was not supportable; I appealed Richard's sentence on the ground that it was based upon a judicial miscalculation of the applicable guidelines. The government's appeal of Paul's sentence was successful; the Court of Appeals reversed his sentence and remanded the case for resentencing. Our appeal of Richard's sentence was unsuccessful; his sentence was affirmed, and he surrendered into custody to serve his 51-month sentence. Upon remand, Paul's judge simply placed more specific findings on the record and imposed the same sentence. And that was the end of the day.

I was devastated over what I felt was a total failure of the system, as well as my own failure to overcome the obvious inequities in the sentences given to my clients. Frankly, although I certainly did not want Paul to receive a prison sentence, I did feel that the system would have been more fair if each client had been given the other's sentence.

Life, personally and professionally, went on, pretty much as before, except I noticed that somewhere during that period, I had lost faith in the system as well as my role in it. I had always felt that if I did the best I could, my clients would get the best possible results; I no longer felt that way. More than anything else, it was the luck of the draw which determined the eventual outcome, and I had no control over the draw.

Over time, I continued to hear from both Paul and Richard; and little by little, I began to focus less on the random unfairness of past events and more on trying to limit the risk of random waywardness in my life in general, and my law practice in particular, which remains an ongoing struggle even today.

In the meantime, Paul completed his probation without incident. Richard was granted supervised release after service of 40 months and arranged to visit me as soon as he was granted permission to travel. What a surprise that turned out to be. Richard had lost 20 pounds, looked younger and better fit than he had three years earlier. He told me that he had spent most of the time in custody re-learning to play the bass in a prison jazz band and was pursuing a mid-life change of career to do what he loved instead of trying to resuscitate a business career which he had never enjoyed.

It was Richard's story—and the way Richard had dealt with what he might well have considered a death blow to the life he had built but instead let it open the door to something that he had always wanted—that placed a healthy balance-weight on the other side of the Scale of Randomness. The art of reframing our negative experiences by seeing them not as "the end of the day" but as another turn of the clock hands in the knowledge that whether they bode good or evil is an operational definition that begins with how we perceive them and respond to them is that "X" factor over which we can exercise control.

Everything considered, the belief I expressed in 1999, with which I started this essay, has for me morphed into something closer to what John Galsworthy wrote about a hundred years ago:

> "Justice is a force which, when given a starting push in one direction, rolls on, and often finds its own way."
> - Justice, Act Two

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Steve LaCheen *(slacheen@concentric.net), a partner with LaCheen, Wittels & Greenberg, is a member of the Editorial Board of The Philadelphia Lawyer.*