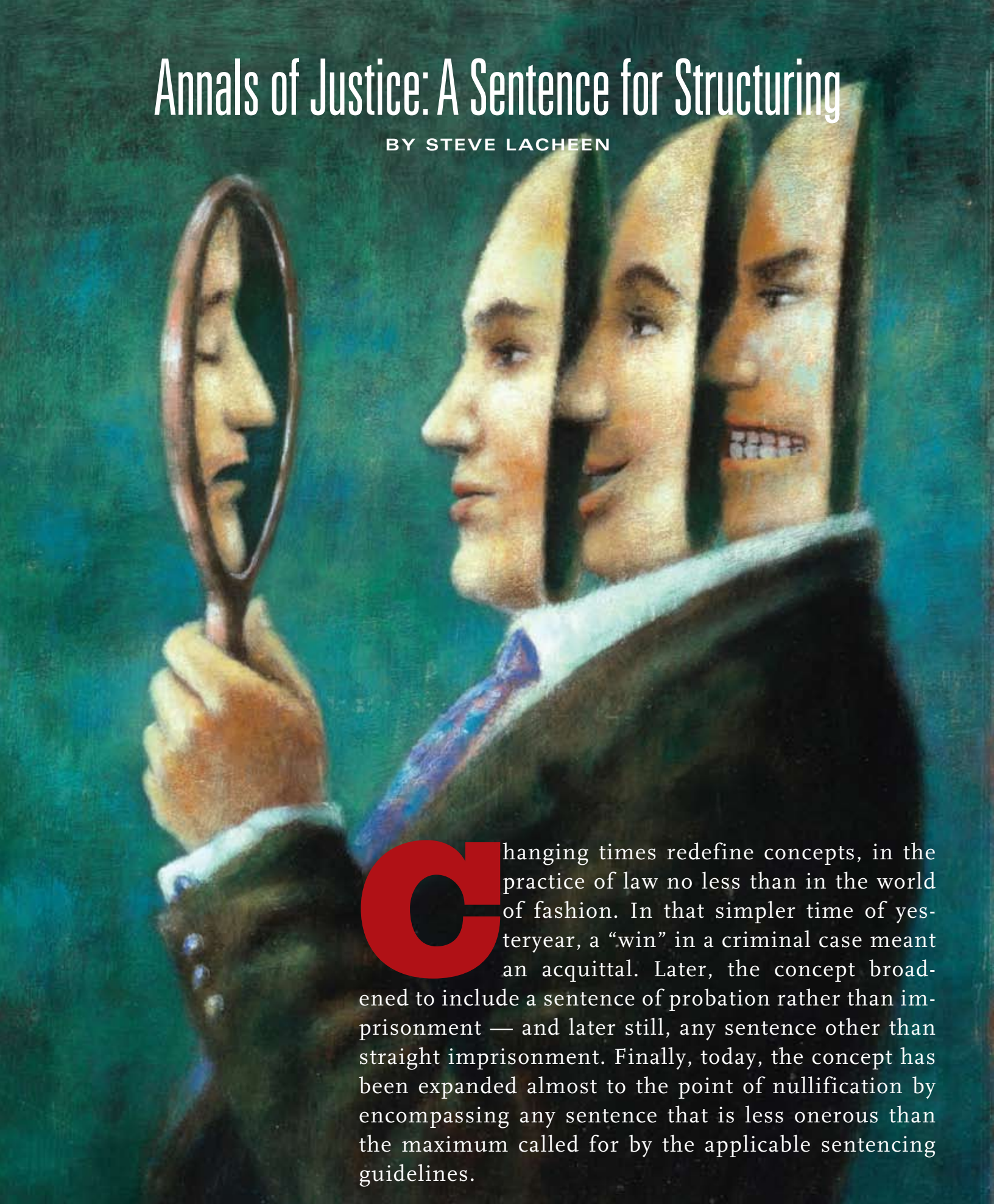
# Annals of Justice: A Sentence for Structuring

BY STEVE LACHEEN



Changing times redefine concepts, in the practice of law no less than in the world of fashion. In that simpler time of yesteryear, a "win" in a criminal case meant an acquittal. Later, the concept broadened to include a sentence of probation rather than imprisonment — and later still, any sentence other than straight imprisonment. Finally, today, the concept has been expanded almost to the point of nullification by encompassing any sentence that is less onerous than the maximum called for by the applicable sentencing guidelines.

Somerset Maugham wrote that the line between love and hate is as thin as the razor's edge. Thinner yet may be the line between winning and losing; so thin in fact that what appears at first to be either may turn out to be the other. An apparent loss may, when re-examined through the prism of time, be revealed to have been a victory of sorts; and, no less true that, what first appears to be a winning result may in due (or undue) course, turn out to be the opposite. "Winning" is not only protean but relative.

A case in point: Early in my practice, I succeeded in obtaining a reversal of the most serious of several counts of conviction for a defendant, 313 A.2d 770 (Pa. Super. 1973), and then convinced the judge to re-sentence him to probation even though his prior record merited incarceration. Within a fortnight of my client's release from custody, his wife had, in the vernacular of the day, "cleaned his ear with a shotgun." In retrospect, a loss in the courtroom would certainly have extended and perhaps even saved his life.

But the clearest example of the blurring of the line between winning and losing I ever encountered occurred much more recently, and involved not only a redefinition of the final result, but a re-assessment of numerous intermediate decisions along the way.

The saga of Mark Simon began for me when he was brought to my office by a Brooklyn rabbi, who had read a news report that I had obtained a reversal on appeal of a conviction in a "currency structuring" case (See, "I Meet the Supremes (For Real)"). The legal problem that prompted the visit was neither unusual nor difficult; the client was both.

At first glance, Mark was an imposing physical presence. Standing six feet two inches, he looked like an athlete gone soft. He was in fact extremely soft-spoken and polite to the point of being obsequious. Not exactly handsome, he had regular features, with high cheekbones, an eastern European slant to his eyes, and a sly smile. Coupled with a paranoiac view of the world, his cunning facade gave Mark an aura of inscrutability that belied his basic lack of experience and dearth of knowledge.

Dressed in black according to the precepts of his orthodoxy, with matching broad-brimmed black hat perched squarely atop his head, Mark projected a meek and mild affect, and spoke to me in terms so deferential as to be annoying, especially when I came to realize that his diffidence, although not exactly feigned, was simply one arrow in a large quiver of manipulative devices.

I became even more annoyed at his habit of ending every conversation with the sincerely expressed wish that I have a "very, very good day," or weekend, or holiday, as the calendar dictated. Most annoying of all, however, was his habit of asking me questions, the answers to which he already knew, as a mechanism for testing whether I knew what I was talking about. Representing him, I thought, was going to be a real challenge. And I was right.

At that first meeting, the rabbi did most of the talking. He advised that Mark had pled guilty to one count of illegally "structuring" currency deposits to evade IRS reporting and had been sentenced to serve fifteen months in prison. He was awaiting designation to an institution; his self-surrender date was about a month away. What they wanted was to improve Mark's situation by reducing the sentence in any way possible. Toward that end, I agreed to review the plea agreement, presentence report and sentencing transcript in his case.

In so doing, I discovered an error in the sentencing proceedings that I felt certain would enable Mark to have his sentence vacated and reconsidered. His attorney, the prosecutor, the presentence investigator, and the judge had all been unaware that the sentencing guideline for the offense of structuring had been amended a month earlier to provide for the possibility of a lower offense level — and resulting lower guidelines — in a situation in which the cash deposits were not the proceeds of illegal activity and the ownership of the funds had not been concealed.

Mark's offense had involved his depositing a total of $140,000 in cash deposits of less than $10,000 each into his own bank account in his own name over a seven-day period, and the funds had been legal income in the first place. I thought we would have an excellent chance to convince the judge to reduce his sentence, especially since there were other mitigating circumstances that prior counsel had not presented to the court at sentencing.

We decided we did not want to petition to withdraw Mark's guilty plea, because the government would then be free to charge him with the tax offenses that they had agreed not to prosecute as part of the plea agreement. The motion I filed sought only a re-sentencing based on the ground that the sentence had been imposed without consideration of the recent amendment to the guidelines.

To bolster our argument for relief, I included an allegation that, after the date of Mark's sentencing, the U.S. Supreme Court had decided (in the case which I had argued) that the "willfulness" element of the offense of structuring required knowledge on the part of a defendant that he was engaging in unlawful conduct. Since Mark had, during his plea colloquy, specifically denied that he had known structuring was illegal, his plea would, if Mark chose to do so, be subject to attack on that basis. I was, of course, hoping the court would consider that factor as an additional reason to reduce Mark's sentence to one of probation and thereby avoid further proceedings in which Mark would file a motion to withdraw his guilty plea.

But that was a serious error in judgment on my part. At the hearing on my motion to vacate and reconsider Mark's sentence, the judge accused me of trying to bargain with the court by saying in effect that if the court didn't grant Mark probation, he would then move to vacate his guilty plea as well as his sentence. Therefore, said the judge, Mark would have to affirm his plea before the court would consider the motion to resentence him.

We argued, and argued, and argued; and eventually the court called upon me to make a decision one way or the other. I said we would stand firm on the motion as filed, expecting that the judge would deny the motion, thereby creating an appropriate record for what I was sure would be a successful appeal. But I was wrong again, and completely surprised, when the judge immediately issued an order from the bench, vacating the sentence, marking the guilty

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plea withdrawn, and dismissing the indictment without prejudice. And then she said Mark was free to go.

Mark and his ever-attendant rabbi were ecstatic. Not only had the sentence been vacated, the charges were dismissed altogether! Their celebratory mood was quickly unleavened, however, when I explained that the judge's order was only a temporary reprieve, that Mark could and certainly would be re-indicted, and that the new charges might very well encompass not only the structuring offense but the tax offenses which the government had agreed not to charge pursuant to the plea agreement. So, our "win" was anything but.

But I still believed that Mark had been entitled to be resentenced without having to waive his right to later move the court to withdraw his guilty plea. And so, I filed an appeal to the Court of Appeals that would at least prevent the prosecutor from proceeding to obtain a new indictment for six months or more, pending disposition of the appeal.

Briefs were filed and the matter listed for argument. The three-judge panel insisted on treating the matter as an appeal from the dismissal of the indictment, disregarding the fact that it was the judge's order denying the motion for resentencing which we had appealed. Brushing off the argument that my client was prejudiced by the court's action because he now faced the prospect of being indicted on additional charges, the panel avoided the core issue by ruling from the bench that, until such time, if ever, that the government proceeded with a new indictment, my appeal was premature. I told myself we would at least avoid a later allegation of waiver; but in my heart it just felt like one more loss.

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The prosecutor, with enough experience under his belt to know the difference between crimes and Serious Crimes, and enough self-confidence not to take the matter personally, knew that bringing additional tax charges might be vulnerable to an allegation of vindictive prosecution, and decided to re-indict Mark only on the same structuring charge. So, the new indictment when it came, although perceived by my client as a loss, was regarded by me as something of a win, since our losing appellate effort had not resulted in exposing him to greater punishment. But, in that regard, later events proved me wrong again.

In due course, pretrial motions were filed, heard and denied; and the case was listed for trial. Jury selection took less than an hour, and the "twelve in the box" looked like one of those World War II cinematic army platoons from Central Casting — one each of every ethnic stripe — without a doubt a melting pot of reasonable doubt.

"I never saw a jury like this before," I said to the prosecutor. "A miniature United Nations. I can't imagine a more representative group." "It won't make any difference once they hear the evidence," he said, with a knowing smile.

Opening remarks and presentation of the government's case took all of an afternoon. The jury was excused for the night, and the court heard argument on my motion for acquittal, which was denied. The court made a finding that the required element of knowledge by the defendant — that it was unlawful to break bank deposits into amounts of less than $10,000 — was supplied by mere proof that Mark had listed his occupation, on the application to open his bank account several years earlier, as stock broker.

I was certain that the government's proof on that point was insufficient to establish the crucial element of knowledge; and so, when court convened the next morning, the defense rested without putting on any evidence.

Final arguments took less than an hour. My closing remarks consisted mainly of arguing to the jury the truism that one and one do not make three; in other words, that the government's evidence established only two of the three elements necessary to support a conviction, and that the court

would so instruct them. And the court did in fact give that exact instruction.

The jury deliberated exactly ten minutes before returning with a verdict. Guilty! Wrong again.

The probation officer who conducted the presentence investigation made it clear that by going to trial and losing, Mark had forfeited the three-level reduction of his offense level that had been granted for his acceptance of responsibility at the time of his initial guilty plea. The resulting recalculation of the guidelines called for a more severe sentence than the fifteen-month term previously imposed.

But all was not lost, not yet. At sentencing, I argued for a downward departure based upon other factors — that it had been the court itself, and not Mark, who had withdrawn his guilty plea; and that Mark had never denied the facts of his case, only the application of the law to those facts. Further, in the time that had elapsed since Mark's initial sentence, his wife had given birth to their first child, and was not well; and since they had no other help, his extraordinary personal responsibilities were further justification for a downward departure.

After considerable hesitation, the judge imposed the same fifteen-month sentence as before. To have taken back Mark's guilty plea, and gone to trial and lost, and to have obtained the same sentence, seemed to me a virtual win. From my client's standpoint, however, after almost two years of constant lawyering, he was right back where he started, on his way to serve a fifteen-month prison sentence.

Not just yet, however. We still had the right to appeal the conviction based upon the insufficiency of the evidence to establish the mens rea required to support the conviction. So, it was off to the Court of Appeals once again.

Six months later, I made exactly the same argument to the Court of Appeals that had won a reversal from the U.S. Supreme Court for the client whose victory reported in the press was what had attracted Mark's rabbi to me in the first place. But this time, four of the six ears hearing the argument were not only unpersuaded, they were determined not to follow the Supreme Court's lead; and so, when the opinion was handed down several weeks later, it read "Judgment Affirmed," with one dissent. 85 F.3d 906 (CA2, 1996). Yet another loss. I couldn't believe how many times I had been found wrong in the same case — at least once at every turn.

Unlike my client in the prior case, Mark did not get to go to the Supreme Court. We were awaiting notice from the U.S. Marshal, as to which federal institution he was to report, when I decided, in a last ditch effort, to write the judge a letter, requesting that she recommend to the Bureau of Prisons that Mark be designated to Boot Camp. Completion of the mandatory six-month commitment there would result in Mark's immediate release to a halfway house, thereby cutting the prison component of his sentence from fifteen months to six months. To my surprise, the prosecutor agreed not to object, and the judge signed the proposed recommendation that I had enclosed with my letter.

And the Bureau of Prisons complied with the judge's recommendation. Someone must have thought it would be funny to send this ultra-Orthodox, overweight Brooklyn boy to Boot Camp in the heart of Pennsylvania Klan country, run by a cadre of prison guards not known for their tolerance of anyone or anything, especially the cultural differences of individual inmates.

To everyone's surprise, including his own, Mark stuck it out. He endured the entire grueling program, lost twenty-five pounds, and "graduated" to home detention six months later. So, when all was said and done, although every one of our efforts in court had been a failure, we had somehow managed to "win" a sentence reduction anyway.

Following his release from custody, Mark's time under supervision of the Probation Office was a stormy one. His probation officer simply could not grasp that Mark spent all day, every day, engaged in prayer at his local synagogue, and he hounded Mark to get a job on pain of facing probation violation charges. So Mark got himself hired as the Shamus, or caretaker, at the synagogue, where he continued to spend his day, every day.

Mark called periodically to let me know he was alright and had not forgotten his obligation to pay the balance of the fee due me from before he went into custody. Once in a while Mark's wife called to complain about the restraints imposed by Mark's probation. At other times, she called to vent her anger at Mark over his refusal to seek "normal" employment. During one such call, I recalled Maugham's analogy.

In less than two years following his release from prison, Mark and his wife had two more children. Somewhere along the way, I heard that he had gotten a job in telemarketing, and I had the unhappy thought that he would somehow find himself in trouble again.

I did not, however, expect the call that came from Mark's wife one Friday morning early in the third year of his supervised release, to tell me that Mark had not come home the night before. The police had found her father's car, which Mark had been driving, stopped with the motor running on a street near Coney Island. A witness had told the police that the driver of the car had been taken away in handcuffs. Obviously, neither robbery nor ransom had been the motive.

I spent that entire Friday calling every police precinct and hospital in the area, with no results. Mark's wife had no clue as to where he might be, or why she hadn't heard from him. As the end of the day and the start of the Sabbath approached, she agreed to call me the following night, or sooner if she heard anything.

When the phone rang later that same night, I expected to hear that Mark had been located, but was shocked to learn that he had been found, in the Borough of Queens, still handcuffed, shot dead. Dead at 34, leaving a wife and three young children.

What offense, I wondered, could he have committed to have motivated someone to invoke the ultimate sanction — the loss of his life? The question remains unanswered because the mystery of Mark Simon's death remains unsolved. ■

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