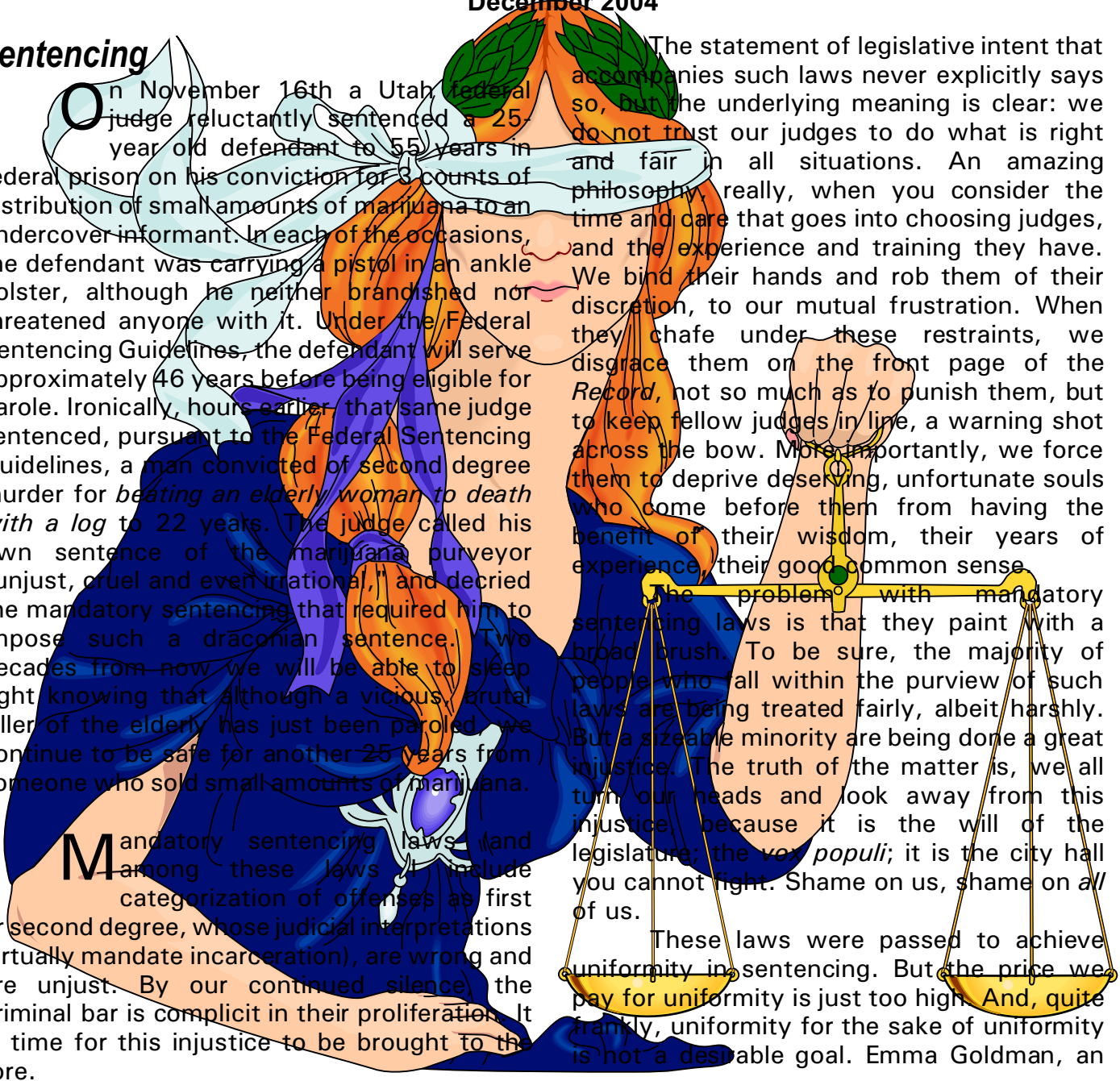

CRIMINAL LAW UPDATE

EDITED AND AUTHORED BY JOSEPH P. REM, JR.

ALL COMMENTS AND SUBMISSIONS, 201-488-1234; FAX 487-8030; E-MAIL JREM@REMZELLER.COM

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sentencing

An illustration of a woman with long, wavy hair, wearing a blue dress and a white blindfold. She is holding a golden scale of justice. The background is a mix of blue and orange colors.

On November 16th a Utah federal judge reluctantly sentenced a 25-year old defendant to 55 years in federal prison on his conviction for 3 counts of distribution of small amounts of marijuana to an undercover informant. In each of the occasions, the defendant was carrying a pistol in an ankle holster, although he neither brandished nor threatened anyone with it. Under the Federal Sentencing Guidelines, the defendant will serve approximately 46 years before being eligible for parole. Ironically, hours earlier that same judge sentenced, pursuant to the Federal Sentencing Guidelines, a man convicted of second degree murder for *beating an elderly woman to death with a log* to 22 years. The judge called his own sentence of the marijuana purveyor "unjust, cruel and even irrational," and decried the mandatory sentencing that required him to impose such a draconian sentence. Two decades from now we will be able to sleep tight knowing that although a vicious, brutal killer of the elderly has just been paroled, we continue to be safe for another 25 years from someone who sold small amounts of marijuana.

Mandatory sentencing laws (and among these laws I include categorization of offenses as first or second degree, whose judicial interpretations virtually mandate incarceration), are wrong and are unjust. By our continued silence, the criminal bar is complicit in their proliferation. It is time for this injustice to be brought to the fore.

The statement of legislative intent that accompanies such laws never explicitly says so, but the underlying meaning is clear: we do not trust our judges to do what is right and fair in all situations. An amazing philosophy, really, when you consider the time and care that goes into choosing judges, and the experience and training they have. We bind their hands and rob them of their discretion, to our mutual frustration. When they chafe under these restraints, we disgrace them on the front page of the *Record*, not so much as to punish them, but to keep fellow judges in line, a warning shot across the bow. More importantly, we force them to deprive deserving, unfortunate souls who come before them from having the benefit of their wisdom, their years of experience, their good common sense.

The problem with mandatory sentencing laws is that they paint with a broad brush. To be sure, the majority of people who fall within the purview of such laws are being treated fairly, albeit harshly. But a sizeable minority are being done a great injustice. The truth of the matter is, we all turn our heads and look away from this injustice, because it is the will of the legislature; the *vox populi*; it is the city hall you cannot fight. Shame on us, shame on all of us.

These laws were passed to achieve uniformity in sentencing. But the price we pay for uniformity is just too high. And, quite frankly, uniformity for the sake of uniformity is not a desirable goal. Emma Goldman, an

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American anarchist who was jailed for advocacy of birth control, once said "the strongest bulwark of authority is uniformity; the least divergence from it is the greatest crime." Is this the true crime for which our clients are being sentenced?

Our congressmen and legislators like to be seen as being tough on crime; it gets them re-elected. The prospect of *not* being reelected haunts and drives them. Mark Twain noted that "there is no distinctly native American criminal class except Congress." A broad indictment to be sure, but is it unfair to paint all our chosen representatives who have voted so often and so unwisely on this issue with the same broad brush, or is turnabout not fair play?

The genesis of these laws is often found in legislatures reacting, some would say over-reacting, to whatever recent heinous and sensational crime has found the headlines. But if indeed these crimes are heinous, can we not trust to the good judgment of judges to punish the truly wicked appropriately? Is an entire category of citizenry to be judged by its worst member?

Some people who violate criminal statutes with minimum mandatory punishments do so to only a minimal degree, or in a way not completely or fully envisioned by the drafters of the statute. The underlying crime must be punished, but often there is a second crime, the crime of incarcerating the truly undeserving to serve the god of uniformity.

Two wrongs have never made a right, although they may make for good re-election fodder. Let us loosen the reins on judges, giving them guidelines, not marching orders. Let us trust in them. Let's acknowledge our appellate courts as the system's safety net. Let us restore to our system the balance that has slowly been eroded.

"The quality of mercy is not strained; it droppeth as the gentle rain from heaven upon the place beneath. It is twice blessed - - it blesseth him that gives, and him that takes." William Shakespeare's words are no less true today than they were 400 years ago. And when it is justice that is sought, not merely mercy, who can stand against it?

If your client is driving a commercial vehicle and is charged with DWI, whether under *N.J.S.A. 39:4-50(a)* or *N.J.S.A. 39:3-10.13* (CDL DWI), the penalty as to the commercial driver's license is a 1-3 year suspension. But, *even for a first offense*, if the client has previously been convicted of Operating a Commercial Vehicle While on the Revoked List under *N.J.S.A. 39:3-10.18(b)(1)*, or Leaving the Scene of an Accident (*N.J.S.A. 39:4-129*) While in a Commercial Vehicle, or Refusal to Submit to a Breath Test, then the license suspension for the first time offender is slightly longer: *the balance of his life*.

From the letter of the sister of a recent client to the sentencing judge: I would hope the spirit of the law calls for the penal system to punish with purpose, and neither to avenge nor to destroy, for how, then, can justice be served?

And that was your first friggin' clue, Einstein? From a local Florida newspaper: "Port Richey-- Lewis Davis was ready to drive home from a party on November Drive at 2 a.m. Thursday when he saw a green Cherokee jeep pull up. Six men, their faces covered with red bandanas, got out of the Cherokee carrying a knife, baseball bat, billy club and a rolling pin, said Davis, 20."

"I knew when I saw the rolling pin that something bad was going to go down.'" (And the covered...faces, the knife, the bat suggested...what?) *November 15th Tonight Show's Headlines*.

Merry, merry, merry! Happy, happy, happy! Celebrate in style—give to the poor, understand the unspoken anxiety of your client, sentence the person and not just the offense, treat your depression, revel—rejoice!—in the society of your brethren, care, love, forgive, hug. In the words of *Bill and Ted*, "Be excellent to each other." Those who did not make it to these holidays would surely urge the same. Amen.

