Holder plays catch-up

By Douglas A. Berman

ERIC RISBERG Associated Press

In his speech to the American Bar Assn. on Monday, Atty. Gen. Eric H. Holder Jr. sounded more like a fierce critic of the federal criminal justice system than its formal leader. He described some federal mandatory minimum prison terms as "excessive" and "draconian" and said "they oftentimes generate unfairly long sentences." He asserted that "people of color often face harsher punishments than their peers," and he more broadly lamented that "too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason."

But as startling, and welcome, as his statements were, the issues he raised weren't new. Holder's themes, and even his rhetoric, echo what many criminal justice advocates have been saying for years. Indeed, in a major policy speech in 2007, then-presidential candidate Barack Obama talked passionately about the need for federal sentencing reform to help usher in "a new dawn of justice."

Yet, until now, aside from relatively tepid prodding of Congress to address extreme and disparate federal sentences on crack cocaine, the Obama administration's criminal justice policies have largely followed the "get-tough" script that a generation of Democrats embraced hoping to thwart political attacks that they are "soft on crime." On nearly every major criminal justice issue, including marijuana policy, federal prosecutorial powers, the war on drugs and the clemency process, the administration has shown little interest in seizing opportunities to pioneer long-needed reforms.

So why the apparent change in course now? In a way, the Obama administration is coming late to the party. President Obama's traditional adversaries had already begun talking about the need for reform.

In recent years, with criminal justice expenditures accounting for an ever-larger portion of shrinking government budgets, Republican leaders at both the state and federal levels had begun championing reforms designed to reduce prison populations and their associated costs. A prominent new group, Right on Crime — which includes such GOP stalwarts as Jeb Bush, Newt Gingrich, Grover Norquist and Edwin Meese III — says in its statement of principles that a true conservative needs to be tough not only on crime but also on criminal justice spending. And the group stresses that over-reliance on incarceration is not a cost-effective approach to public safety.

> He should do more to seize the sentencing reform moment.

Another prominent conservative, Sen. Rand Paul (R-Ky.), emerged this year as a prominent advocate for federal sentencing reform. Paul has sponsored legislation that would soften federal mandatory sentencing statutes, publicly complaining that "one-size-fits-all federal mandatory sentences ... are heavy-handed and arbitrary" and "disproportionately affect those without the means to fight them."

Holder's bar association speech suggests the Obama administration senses that the time could be right for a bipartisan consensus in support of major federal sentencing reform. But his speech also hinted that the administration might be content with a gradual approach to achieving needed reforms.

The new charging policy that Holder unveiled — in which federal prosecutors won't routinely include in indictments the amount of drugs seized, so as not to trigger mandatory minimum sentences in some cases — is not especially bold or sweeping. And other important reforms haven't even been discussed.

If the administration is serious about reforming the system, it should immediately stop aggressively prosecuting medical marijuana providers that are in compliance with local laws. It should be proactively identifying and supporting clemency requests from federal inmates who received inappropriately lengthy sentences under mandatory guidelines.

Though Holder should be credited for giving attention to these issues in a forceful speech, he and the president need to recognize that a remarkable alignment of public-policy concerns and broader political realities make the next few months a critical period for achieving the "sweeping, systematic changes" that Holder correctly said are needed. The combination of relatively low crime rates, lean budgets, sequester cuts and overcrowded federal prisons presents a unique moment for the enactment of landmark criminal justice legislation, and the need for fundamental sentencing reform is one of the very few topics on which leading Democratic and Republican voices might be able to agree.

Rather than just calling for federal prosecutors to ease off on charges that could bring low-level drug offenders lengthy mandatory sentences, Holder should be advocating the repeal of most, if not all, federal mandatory minimum sentencing statutes. In addition to increasing the number of compassionate prison releases for medical reasons, Holder should set up procedures through which his department would make clemency recommendations to the president. And both the president and the attorney general should embrace the reality that most Americans have come to recognize that many aspects of our 40-year war on drugs have been marked by criminal justice failures. Congress should be encouraged to work toward a true public health approach to marijuana reform and regulation.

Before a new course can be set, the criminal justice ship has to navigate away from the old "get-tough" course, and that won't be easy. So it's perhaps understandable that Holder is, for now, talking only about the need for bold steps rather than taking them. But because the political and economic winds (not to mention the moral ones) are all starting to blow in the same direction on federal sentencing reform, the administration shouldn't wait too long before sailing full speed ahead.

DOUGLAS A. BERMAN is a professor of law at the Ohio State University Moritz College of Law and creator of the blog Sentencing Law and Policy.

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A route around a BART strike

By William B. Gould IV

Gov. Jerry Brown, his investigative panel and a San Francisco Superior Court judge appear to be of one mind: A renewed strike against the Bay Area Rapid Transit District would jeopardize and harm the public's health, safety and welfare. Thus, the court ordered a 60-day injunction against a strike, as provided for by California labor law, until midnight Oct. 10.

In most public transit labor disputes, unless binding arbitration is substituted for the injunction, state intervention is unlikely to solve the deeper problems and may only put off an eventual work stoppage. The BART dispute offers a good example why.

Though negotiated settlements have followed temporary transit injunctions involving BART, the current talks, so filled with rancor and gaping differences between the parties, may mirror the one in 1997, when a six-day stoppage occurred after a 60-day injunction expired. The prospects for peace in these circumstances are not good.

In the first place, the parties appear to remain far apart on all issues, particularly the critical ones involving wages, pensions and healthcare. The rhetoric, frequently engaged in publicly in defiance of a mediator's gag order, has been acrimonious. And beyond the cooling-off objective inherent in the 60-day injunction, there is no incentive in this process to settle differences. Indeed, in these circumstances, the dispute often heats up rather than cools off. And, equally important, the injunction places all the burdens on labor and none on management.

If the BART dispute lingers on, it is possible that public opinion, already hostile to the unions, could push for an irrational solution through the state's frequently irrational initiative process. This avenue could take the form of a call for strike prohibitions, for example. Such a response would be seen by many as appropriate given the unacceptability of transit strikes, which can affect public safety because the ensuing traffic congestion could disrupt response times of ambulances, firetrucks and police cars, as well as people's ability to get to work. But such a course of action is incomplete and wrongheaded.

Just prohibiting strikes could simply foster union defiance. This approach also would be one-sided and undemocratic. The sine qua non for a legal remedy in such strikes must be *final* and *binding* arbitration along with the strike prohibition. The Legislature should enact both principles in a new law and displace the injunction as a stand-alone remedy.

This kind of resolution should not be of the Solomonic variety in which the arbitrator can split the difference, thus encouraging each side to adopt uncompromising and rigid stands, as we've seen in the current situation. The new law should, instead, provide for what is known as "final offer" arbitration, in which the arbitrator is obliged to select one or the other side's final position. This is a process first adopted by Major League Baseball — a sport in which there is a winner and a loser and no tie games — in its 1973 salary disputes. This process generally induces each side to be more reasonable in the hope that its final position will be the one selected. As parties come closer together, the prospects for voluntary settlements increase and the arbitrator may be able to don a mediator's hat in assisting the parties in reaching an agreement.

Sometimes, though, the parties simply cannot get together and a binding final offer decision becomes necessary. While the 60 days provided by the court in this case may not get the parties to an agreement, they should give the political process time to work. But the governor and the Legislature must act immediately to devise this kind of legislative approach so that the BART dispute, as well as future ones, has a better chance of effective resolution. Both will be reluctant to act, but they should realize that the alternative is the possibility of an initiative that could displace their legitimate role in governing and disrupt labor-management relations. Final offer arbitration is a better incentive for dispute resolution than a one-sided injunction.

WILLIAM B. GOULD IV, chairman of the National Labor Relations Board in the Clinton administration and professor emeritus at Stanford Law School, is the author of the just-published "A Primer on American Labor Law."

The truth about football

By Daniel J. Flynn

Football periodically faces extinction, but never has the game been enveloped in a crisis as odd as the current one. Just when the game plays safer than at any time in its 144-year history, its critics threaten to make the game history. Sportswriter Frank Deford calls football "barbarous." Author Malcolm Gladwell labels it a "dumb ... 19th century game." But it's that characterization that appears backward to anyone paying attention.

In 1905, when President Theodore Roosevelt intervened to help make the game he loved safer, more athletes died from on-field collisions on a single Saturday afternoon (three) than died from hits during all of the 2012 season (two). In 1968, a year of assassinations and bombings at home and peak casualties in the Vietnam War, football meshed with the violent times: An all-time high of 36 players were lost to collision deaths at all levels of competition. The rough sport, which could boast just two seasons of single-digit contact deaths between 1931 and 1977, has since 1977 experienced just one season of double-digit collision deaths — in 1986, the birth year of today's average NFL player.

The dramatic reduction in fatalities should have caused football's boo-birds to cheer, or at least chirp. Relative to its past and the present of other pastimes, football looks quite good. For instance, California suffered seven times as many collision deaths from skateboarding last year as the entire United States did from football.

Instead of putting football safety into perspective, the sport's critics have shifted the conversation to chronic traumatic encephalopathy, or CTE, a degenerative brain disease found in a number of deceased football players, including Hall of Famers John Mackey and Mike Webster.

Unlike fatality numbers, generalizations regarding CTE are just that. The absence of a randomized study on CTE leaves football's critics making sweeping assertions about the sport, though science can't yet pinpoint the prevalence or even the cause of the condition. It's irresponsible enough that pundits extrapolate autopsy findings from a few former pros to the entire NFL, but projecting the damage endured by a tiny fraction of athletes who toiled for years at elite levels onto youngsters who will never play beyond Pop Warner or high school competition goes beyond reckless.

> Critics ignore the fact that the game has never been safer.

In April, five scientists writing in the British Journal of Sports Medicine cautioned against such "causal assumptions" regarding contact sports and CTE because a "cause-and-effect relationship remains to be shown scientifically."

All the while, in measurable areas, football progresses. In the National Football League, concussions dropped from 270 in 2010 to 266 in 2011 to 170 in 2012. A study published last year by federal researchers of pension-vested NFL retirees who played between 1959 and 1988 showed that just 10% of the group had died, compared with the expected rate of 18%. In other words, Hall of Famer Art Donovan, that burly bard of football folk tales who passed away at 88 this month, wasn't much of an outlier, at least when it came to his life span. The National Institute for Occupational Safety and Health concluded that NFL retirees experience "significantly decreased" mortality relative to their peers in the U.S. population.

The same study, which the NFL Players Assn. petitioned the institute to conduct, also looked at suicide. Given the speculation linking CTE with the suicides of several high-profile players, the scientists' findings were stunning. The study found a suicide rate for the retired athletes significantly below the expected rate.

So the facts about football dangers improve even if the perception doesn't. In the end, longer lives and fewer deaths should offer a valuable lesson to football's crusading abolitionists, and to its rigid purists. The former should grasp that football no longer poses the risks it once did. The latter should concede that reform is the reason.

Football is a sport of roughness and change. When the game gets too rough, as it had when Roosevelt got involved more than a century ago, change inevitably follows. The elimination of pre-snap forward motion (toward the scrimmage line) for running backs, the establishment of a neutral zone between offense and defense, and the introduction of the forward pass resulted from that deadly 1905 season. In the era following the grim 1968 season, spearing penalties forbidding head-first hits, and the introduction of industry standards that ushered in more-protective helmets, saved lives and made a fun sport safer.

Purists who protest change really don't understand the sport they love. While baseball and soccer have essentially stayed the same since the 19th century, football has morphed from a collegiate kicking sport to a grinding ground game to a spectacle of aerial acrobatics. Those changes didn't destroy the game, and surely the new rules allowing the NCAA to eject players for hits on defenseless receivers and allowing the NFL to penalize running backs who lower their heads into tacklers won't destroy it either.

Football is anything but backward. It evolves. The game's most zealous friends and foes might take a page out of football's playbook and evolve too.

DANIEL J. FLYNN is the author of the about-to-be-published book, "The War on Football: Saving America's Game."