What will be the most important criminal justice issues in the next three to five years? In October, this question was posed to the prosecutors, defense lawyers, judges, academics, and other professionals who chair committees of the Criminal Justice Section and serve on its Council. Here, in alphabetical order, are some of the subjects they thought were most important together with some observations about how the Section is responding.

**Alternatives to Incarceration.** Traditionally, our criminal justice system revolved around convicting and locking up criminals. But that is an increasingly outmoded and limited way to think about criminal justice. While incarceration has an important role in promoting public safety, especially when it comes to violent offenders, many in Section leadership have observed with great interest the increasing attention given to alternatives to prosecution and/or incarceration of low-level offenders promoted by elected prosecutors and experienced trial courts. One member of Council wrote: “We continue to lock up too many people for far too long, and over the next three to five years it will become increasingly apparent that we need to reverse this trend by finding alternatives to imprisonment and refining our sentencing laws to better ensure that we are incarcerating only those who need to be incarcerated.”

The Section is not deterred by the complexity of questions requiring sound answers. At the core of the discussion of alternative punishments is the question of the role of imprisonment in a fair and just criminal system. It will be important to focus on how states respond to jail and prison overcrowding and, in extreme cases, inhumane conditions of incarceration. Issues will arise concerning who might be released from prison early—for example, elderly prisoners. Issues also will arise as to whether there should be greater use of post-sentence incarceration, not only for violent sex offenders who are now being detained after they complete their sentences, but for offenders who have been convicted of other kinds of crimes and are predicted to pose a future danger.

Several discussed the need, particularly in drug use and possession cases, to make drug treatment more widely available and to recognize the success that some programs already have demonstrated. Others stressed the need to explore an expanded role for therapeutic and problem-solving courts such as drug courts, mental health courts, and veterans’ courts.

Several responses focused on the need for alternatives in the area of juvenile justice. One anticipated that charging and incarceration practices, especially with regard to status offenses, would be reevaluated in light of fiscal considerations and concerns about overly harsh, and nonrehabilitative, treatment. Another forecast that increased attention would be given to new behavioral and brain research differentiating adults from juveniles and to the implications of this research for...
decisions about whether to try juveniles as adults and how to punish juvenile offenders. Our Juvenile Justice Committee is one of our most active committees and regularly produces excellent programs and policy proposals.

Last year, District Attorney Joe Hynes, as chair of the Section, made alternatives to incarceration and reentry programs following incarceration two of our Section’s top priorities, and they remain so. These subjects were emphasized in our annual fall conference and are the subject of ongoing study by our Standards Committee, which is developing standards on diversion, as well as by our ADR and Restorative Justice, Alternatives to Incarceration and Diversion, Corrections, Reentry, and Sentencing committees. In a time of economic recession, it may be that innovative thinking about alternatives will result in measures being adopted that promote justice and safety while also saving money.

**Bail Reform.** Our leaders suggested that the economic downturn should also spur thinking about alternatives to pretrial detention in recognition of the social and economic costs of unnecessary pretrial detention of those who are neither dangerous to the community nor flight risks. According to the US Department of Justice, two-thirds of the 500,000-plus men and women in jail awaiting trial pose no significant risk to themselves or the community and also represent a low flight risk. These nonviolent inmates often sit in jail for many months—some more than a year—before standing trial. They are deprived of the opportunity to work or to seek rehabilitative treatment, while the criminal justice system incurs the unnecessary costs and prison overcrowding that could be ameliorated with pretrial release of nondangerous individuals. This year, the Section created a Task Force on Pretrial Release, chaired by Shima Baradaran and Lohra Miller to work with the ABA’s Governmental Affairs Office to encourage states to implement the ABA Standards on Pretrial Release. These standards call upon jurisdictions, among other things, (1) to use citations or summons in lieu of the arrest of low-level offenders; (2) to develop diversion and alternative adjudication options, including drug, mental health, and other treatment courts or other approaches to monitoring defendants during pretrial release; and (3) in general, to employ pretrial detention only when necessary to ensure a defendant’s attendance at court proceedings and to protect the community, victims, witnesses, or others.

**Collateral Consequences of Criminal Convictions.** Many Council responses focused on the collateral consequences of criminal convictions, a subject addressed by the Supreme Court last term in *Padilla v. Kentucky*. *Padilla* cited relevant ABA Standards to which an ABA amicus brief had called attention, and recognized that defense lawyers must advise noncitizen defendants about the immigration consequences of a guilty plea. Among the challenges ahead are (1) to identify the many collateral consequences of criminal convictions; (2) to educate defense lawyers, prosecutors, and judges about these consequences so that defense lawyers can ensure that their clients make adequately informed decisions about whether to plead guilty in light of them, so that prosecutors fairly take account of them in charging and plea bargaining decisions, and so that judges adequately address them in guilty-plea proceedings and sentencing decisions; and (3) to encourage jurisdictions to change laws that create unnecessary stigmas and excessive barriers for convicted defendants seeking to reenter society and to expand rehabilitation, employment, and housing options for ex-offenders. Our past chair, Steve Saltzburg, has been leading the Section’s efforts to help defense lawyers, prosecutors, and judges meet these challenges through a nationwide project funded by the National Institute of Justice to identify collateral consequences and through an effort to educate lawyers and judges about the implications of *Padilla*. So far, we have created a *Padilla* resource page that includes a video and written training materials for lawyers seeking to comply with *Padilla*. (See “Resources” under the Highlights heading on the Section web page at http://new.abanet.org/sections/criminaljustice/pages/defaults.aspx). Additionally, our Juvenile Justice Committee is producing a report on the collateral consequences that arrests and adjudications have for juveniles in all 50 states.

**Discovery.** Questions about criminal discovery have taken center stage in recent years and, not surprisingly, are at the fore of concerns of many Council members. Council concerns focus on the following topics among others: the adequacy of prosecutors’ compliance with their obligations...
under the *Brady v. Maryland* and procedural rules and statutes governing discovery, and the adequacy of defense lawyers’ compliance with their reciprocal discovery obligations; whether Rule 16 of the Federal Rules of Criminal Procedure, in particular, should be amended to address perceived deficiencies in federal criminal practice; whether state and federal courts should require prosecutors to comply with state ethics rules based on Rule 3.8(d) of the ABA Model Rules of Professional Conduct, which, as recently interpreted by the ABA’s Ethics Committee, is more demanding than *Brady* in some respects; whether prosecutors should voluntarily adopt “open file” discovery policies to reduce the risk of noncompliance with legal obligations, to promote procedural fairness, and to encourage speedier resolutions; and whether, as urged by participants at a recent Cardozo Law School conference cosponsored by the Criminal Justice Section, prosecutors’ offices should pay more attention to internal systems and culture as they relate to criminal discovery. At the ABA Midyear Meeting, the Section will propose that the ABA adopt a policy urging courts to distribute detailed written checklists to prosecutors and defense lawyers that delineate applicable disclosure obligations, and the Section’s Brady Task Force chaired by Sandy Weinberg is seeking to develop additional policies and writings.

**Education.** Criminal prosecution and defense become more complicated by the day, but, with financial cutbacks, opportunities have diminished for necessary training in a host of subjects, including trial skills, investigation, collateral consequences of criminal convictions, discovery, substantive and procedural law, forensic evidence, and ethics. Of particular importance, the Section leadership across the board has urged greater training in the exercise of discretion by those officials who routinely exercise it in the criminal justice system. Several of our leaders emphasized the need to expand educational opportunities especially for state and local prosecutors and public defenders, ideally by establishing a national training and resource center, as well as through collaborations with law schools and other institutions. The Criminal Justice Section seeks to help by developing affordable CLE programs of various kinds for lawyers participating in the criminal justice process, but we recognize that our programs can reach only a small segment of the professional community and that much more is needed. The hope is that necessary educational opportunities will not further diminish because of scarce public resources.

**Funding.** The need for adequate funding for criminal justice was a recurring, nearly universal, theme among Council members and committee chairs. There is widespread agreement that adequate funding is needed for judges, prosecutors, defense lawyers (both public defenders and lawyers appointed from the private bar), the police, and others in the criminal justice process, so that they can serve their various functions in promoting public safety and fair processes. The need for loan assistance for prosecutors and public defenders was identified time and again. Similar sentiment exists that adequate funding is needed for social programs that reduce the incidence of crime, such as Head Start and recreational programs for teenagers; to ensure fair trials and humane prison conditions; and for mental health and drug treatment. Many expressed concern that, in a time of fiscal austerity, all aspects of the criminal justice will suffer, to the public detriment.

**Globalization.** Particularly from the white-collar criminal perspective, the globalization of criminal investigations and prosecutions is seen as an increasingly significant phenomenon, characterized by US application of laws such as the Foreign Corrupt Practices Act to corporate conduct abroad, and the UK’s adoption of new antibribery laws with similar extraterritorial reach. In response, our Section has established a “Global Anti-Corruption Initiatives Task Force,” cochaired by Markus Funk and Andrew S. Bouros, to report on, and make recommendations regarding, transnational anticorruption developments.

**Holistic Legal Work.** The term “holistic lawyering” may be unfamiliar to some. But many public defenders’ offices (such as the Bronx Defenders, a pioneer in this area) and law school criminal-defense clinics, and even some private defense lawyers’ offices, employ this term to refer to efforts to address defendants’ interests beyond those directly impacted by the criminal charges, typically through collaborations with civil lawyers and nonlawyer professionals. Recently, the Brennan Center for Social Justice issued a report titled *Community-Oriented Defense: Stronger Public Defenders,* to capture a similar concept. Some see this as a hot topic for those concerned about high-quality criminal defense, and we have assembled a task force, under the leadership of Justine Luongo, to study the subject. For many
years, the Criminal Justice Section and others in the ABA have committed considerable resources to raising the “floor” for criminal defense lawyers, such as by promoting caseload standards and by advocating as an amicus in Padilla v. Kentucky. This is tremendously important work. But we can improve defense performance by promoting a more general vision of outstanding defense representation and encouraging defense counsel to embrace that vision. Ideally, the task force’s work will lead to the publication of a report and the organization of a conference or other event to broaden the bar’s awareness and appreciation of alternative approaches and to explore how to promote the adoption of these approaches in the face of perceived resource limitations.

Indigent Defense Systems. The perennial financial crisis in indigent defense services in many states and localities has only been exacerbated by the economic downturn, and the search for innovative solutions will almost certainly continue. In the past year, for example, the US Justice Department appointed Harvard law professor Laurence Tribe to lead efforts in the area of access to justice for low-income clients in both the criminal and civil arena; Equal Justice Works joined with the Southern Public Defender Training Center to create a new program of public defense fellowships for recent law graduates; organizations pursued litigation strategies in cases such as Hurrell-Harring v. State of New York, 15 N.Y.3d 8 (2010), seeking to achieve increased state funding for indigent defense; and law professors Stephen Schulhofer and David Friedman, in a policy analysis for the Cato Institute, proposed a system of “defense vouchers” as an alternative indigent defense system. In collaboration with the ABA’s Standing Committee on Legal Aid and Indigent Defenders, the Criminal Justice Section will seek to encourage solutions that implement the principles of our Criminal Justice Standards on “Providing Defense Services,” and other ABA policy directed at ensuring that quality legal representation is afforded to those who cannot afford criminal defense representation without substantial hardship.

Judicial Selection, Compensation, and Independence. Several responses noted the recurring concern that for federal and many state and local judgeships, judicial pay is inadequate to provide fair compensation and to encourage high-quality lawyers to take and remain on the bench. The election of judges in many states, combined with unrestricted campaign spending by organizations seeking to unseat judges who rule unfavorably to their interests, is also perceived to be discouraging high-quality candidates as well as eroding judicial independence. These are important issues for civil and criminal justice alike. The ABA and many state and local bar associations have given high priority to promoting judicial pay raises, sound methods of judicial selection, and judicial independence, and will continue to do so.

Legalization of Marijuana. Another prediction was that the movement to legalize marijuana will have profound consequences in the next few years. Although California’s proposition on legalizing marijuana failed at the polls, a respondent provocatively observed before the elections, in part: “Even if voter initiatives, such as Proposition 19 in California fail to win a majority, voter support of one-third or more demonstrates that such laws do not represent a consensus of the governed. Can criminal laws that are opposed by one-third or more of the public have moral authority or legitimacy? Does continued prosecution and imprisonment of a fraction of the population that is disproportionately African-American, Hispanic and young, for offenses that a substantial portion of the electorate rejects fundamentally undermine the sense that the law has the consent of the governed, and might [it] fairly be considered oppressive or tyrannical? . . . If marijuana is legalized, what will be the implications for probation and parole violations? Will there be a demand for amnesty for millions of marijuana offenders? How will criminal histories involving marijuana be handled? How many people will be released from prison who are serving marijuana sentences?” Given the number of offenders convicted of drug crimes, questions concerning the best way of dealing with substances that millions of Americans continue to demand are likely to call for discussion and debate.

Mental Illness. Our leadership pinpointed the treatment of the mentally ill in the criminal justice system as another topic of concern. This is not a new problem, of course. The ABA Criminal Justice Mental Health Standards, consisting of 96 standards designed for both lawyers and clinicians to use, date to the 1980s. But it is a prevalent problem. An estimated one-fifth of adults in this country suffer from mental illness. The percentage in the prison population is far higher—as much or more than half the state prison population suf-
fers from mental illness. Mental illness implicates all aspects of the criminal process, including adjudication, sentencing, and alternatives to incarceration, conditions of confinement (which typically worsen inmates’ mental health problems), and reentry. A book copublished by our Section, Criminal Mental Health and Disability Law: Evidence and Testimony, addresses mental health issues primarily in the adjudicative context. Some see the expanded use of mental health courts as a promising response; others emphasize the need for communities to provide preventive and supportive programs for the mentally ill. In coming years, the increasing involvement of war veterans in the criminal process may lead to expanded, and perhaps more sympathetic, attention to the problem of mental illness and criminal justice.

**Professional Conduct.** Issues of criminal defense and prosecution conduct are perennial subjects of both news reports and judicial opinions. In the past year, for example, the Padilla decision raised questions about the expectations for defense lawyers in advising clients about guilty pleas, while disclosure violations in several high-profile federal prosecutions raised questions about how prosecutors should best comply with disclosure obligations. We expect the spotlight to continue to shine on lawyers’ professional conduct in criminal cases, but even if it did not, promoting high standards of professional conduct would always be one of the Section’s top priorities. In February 2010, the ABA adopted two resolutions sponsored by our Section on professional conduct issues, the first urging the US Department of Justice to provide more information to the public about the results of its internal disciplinary investigations, and the other urging courts to differentiate between “error” and “prosecutorial misconduct” when reviewing the conduct of prosecutors. Currently, our Criminal Justice Standards Committee is reviewing draft revisions of the Prosecution and Defense Function Standards, which deal with the professional conduct of prosecutors and criminal defense lawyers. This past fall, the Section worked with more than a dozen law schools around the country to organize seminar-style discussions of the revised standards while they are still a work in progress. Among the questions anticipated to be most topical is how prosecutors and defense lawyers interact with witnesses, including noncitizen witnesses who are subject to deportation and other vulnerable witnesses who are susceptible to dissuasion, pressure, or intimidation.

**Racial Justice.** Public discussion and concerns over racial disparities in the criminal justice system are unlikely to end, and should not, our Section’s leaders tell us. The New Jim Crow: Mass Incarceration in the Age of Colorblindness, a recent book by Ohio State law professor Michelle Alexander, describes the problem—namely, the disproportionate racial impact of the criminal justice process and postconviction collateral consequences, typified by the disproportionate arrest among the most important substantive criminal law questions identified were those of fair notice.
and incarceration of racial minorities and other low-level crimes. This is among the problems targeted by our committee on Racial and Ethnic Justice and Diversity. Recently, our Section has created a model cultural competency curriculum and instructional materials that are available for free on our website, and has trained more than 80 individuals involved in criminal justice in the materials. Over the next two-and-a-half years, we will seek to further contribute to public discussion and understanding, with the support of a DOJ/BJA grant, by creating and supporting four Racial Justice Task Forces. The task forces will address the disparate impact of the criminal justice system on people of color in New Orleans, St. Louis County (Minnesota), Brooklyn (New York), and Delaware. Such task forces were proposed by the ABA Justice Kennedy Commission in its 2004 report and approved by the ABA House of Delegates, and the concept was then developed during our Section’s “Congress” on disparate racial impact of the criminal justice system in May 2009.

Scientific Evidence. Last year’s National Academy of Sciences report on the fallibility of forensic methods, such as hair and fingerprint analysis, precipitated much public discussion of the role of scientific evidence, including a conference presented by the Criminal Justice Section at Fordham Law School last June. Many at the head of our Section anticipate the discussion to continue and the case law to develop and move into new directions in the next few years. Among the anticipated questions are how new scientific knowledge will affect the admissibility of evidence and jury instructions; what prosecutors and defense lawyers must learn in order to do their work competently; the circumstances in which convictions procured based on forensic evidence should be set aside in light of new scientific understandings; whether, and under what conditions, jurisdictions should establish and use DNA databases; and whether new attacks will be leveled on certain kinds of traditional evidence, such as eyewitness testimony and confessions, in light of developing social science understandings. In February 2010, the ABA House of Delegates adopted six resolutions sponsored by our Section calling for expensive searches for electronic documents. Judges will have to deal with jurors who have access to the Internet and social networking sites as a way to inform themselves on these matters. The Internet and social networking sites offer new ways both to protect vulnerable populations, especially the elderly; and to ensure the availability of forensic testing and testimony for criminal defendants. In light of the ongoing importance of the subject, we have begun planning another conference on this theme and have established a Task Force on Forensic Instructions under the leadership of Paul Giannelli, Myrna Raeder, and Matthew Redle to develop further recommendations.

Technology. We were told repeatedly that technological developments will pose significant questions in the next few years. The Internet and social networking sites offer new ways both to commit crimes and to investigate crimes. Jurisdictions will have to consider whether to create new laws to target online harassment, bullying, and hate speech. Technological means of investigation, such as new tracking technologies, pose new questions, and will result in additional litigation under the Fourth Amendment. Lawyers and law enforcement personnel will need the funding and training necessary to keep current with, and take advantage of, developing technology. Criminal defense counsel will test their clients’ rights to electronic evidence in the possession of Internet service providers and other third parties, and third parties will challenge grand jury subpoenas calling for expensive searches for electronic documents. Judges will have to deal with jurors who have access to the Internet and social networking sites in both jury selection and trial management. Our inaugural “academics colloquium” on November 5, 2010, focused on the implications of technological change for criminal law and procedure, and we will continue to study the subject through several committees, including those on Criminal Procedure, Evidence and Police Practices; Cybercrimes; Science and Technology; and White Collar Crime.

Victim Protection and Compensation. Some of our leaders expect issues regarding victims to be significant. Likely issues include (1) how to protect vulnerable populations, especially the elderly; (2) how to develop violence reduction mechanisms in the community; (3) when to provide special immigration visas for crime victims; (4) how to provide and improve restitution for victims; (5) when GPS monitoring should be employed to protect victims from defendants; and (6) how best to improve efforts to implement domestic violence laws and persuade victim-witnesses to cooperate with law enforcement and courts. Issues such as these will be addressed by our committees...
on LBGT; Problems of the Elderly; Racial and Ethnic Justice and Diversity; Women in Criminal Justice; and, of course, Victims.

Wrongful Convictions. Several years ago, the Section’s publication, Achieving Justice: Freeing the Innocent, Convicting the Guilty, focused on the essential importance of policies that best ensure that individuals will not be convicted of crimes they did not commit and that promote the rectification of wrongful convictions and compensation of wrongly convicted individuals. The Section has maintained this focus by—among other activities—spearheading the ABA’s adoption of Rules 3.8(g) and (h) of the Model Rules, which address prosecutors’ postconviction obligations upon learning of significant new exculpatory evidence. Our leadership predicts that guilt-and-innocence will remain front and center. Procedural hurdles to litigating postconviction claims of innocence surely will warrant our attention. Thanks to the efforts of Steven Wisotsky, cochair of our Appellate and Habeas Committee, we soon will address an aspect of this problem: At the ABA Midyear Meeting, we will propose the adoption of ABA policy on the question addressed by the Supreme Court last term in Holland v. Florida, namely, the application of the “equitable tolling” doctrine when a convicted defendant files a habeas petition too late because of a lawyer’s negligence.

No doubt, there is plenty of room for discussion about whether these are the important issues of the day, or whether other issues are more important. Whether or not you think our Section’s leaders have it right, I am sure you will agree that there is no shortage of important criminal justice issues, many challenges ahead, and much work to be done. The ABA Criminal Justice Section has never been deterred by the number or complexity of the questions that require sound answers. We shall press forward, with your help, to address the urgent criminal justice issues of the coming days, serving as a national voice on all important criminal justice policy issues. As the topics set forth in this column demonstrate, there are many stakeholders whose interests must be considered as questions are debated. Our Section is uniquely able to consider them all because our leadership includes dedicated prosecutors, defense counsel, judges, academics, victims’ advocates, collateral consequence experts, and others who come together to seek the common good. Let us hope to find it.