ALBANY LAW SCHOOL
GOVERNMENT LAW CENTER

Insights from the 2018 Anderson Legislative Breakfast Seminar Series

By Richard Rifkin, Andy Ayers, and Kendra Sena

Each year during the legislative session, the Government Law Center at Albany Law School sponsors a series of programs that offer serious discussions of important issues that are expected to confront legislators during the session. What follows is a summary of this year's four Anderson programs.

The Government Law Center is grateful to the co-chairs of its Anderson Committee, **Bruce Gyory** of Manatt, Phelps & Phillips, LLP, and **Mary Berry**, Government-Lawyer-in-Residence at the GLC.

February 13, 2018

Bail: Are There Better Alternatives?

*This summary of 2018's first Anderson Breakfast program was written by **Richard Rifkin**, Consultant to the New York State Bar Association and a member of the Government Law Center's Advisory Board, who organized and moderated the program.*

The Government Law Center held the first of its 2018 Anderson Breakfast programs on February 13. This first 2018 program focused on the imposition of monetary bail in our criminal justice system, a concept that is generally recognized as badly in need of reform. As was evident from the discussion, the hard questions surround developing mechanisms to replace monetary bail as it is currently imposed.

The audience heard views of five panelists, each of whom come from a different perspective. **Alphonso David**, Counsel to Governor Cuomo, described the reform bill

that has been proposed by the Governor and how it fits within a series of criminal justice reforms that the Governor is advocating, including discovery reform and speedy trial requirements. David explained how pre-trial proceedings would be handled if the Governor's bill were to be enacted.

Scott McNamara, President of the District Attorneys Association, discussed the subject from the perspective of the prosecutorial community. As the Oneida County District Attorney, he focused his attention on some of the significant problems that arise upstate, especially in the courts of the smaller towns and villages. **Tina Luongo**, who is in charge of criminal practice in New York City's Legal Aid Society, presented the views of the defense community and focused her attention on the deficiencies in the current practice in New York City.

Two other speakers presented views that go beyond the courtroom. **Donna Young**, a professor at Albany Law School, discussed some of the historic notions behind the bail system and how the current system developed. She also considered its impact on those who are incarcerated pending further court appearances as well as the racial impact, with those incarcerated being overwhelmingly minorities. Finally, **Martin Horn**, former Corrections Commissioner of both the State and New York City, discussed the impact of monetary bail on the local jail systems and the cost of maintaining those systems due to the enhanced number of individuals who are incarcerated prior to trial.

While each of the speakers offered a different view, they all recognized that changes were likely. The critical question was what changes would result and would they work as anticipated. While the Governor has presented a specific bill, there was an understanding that this bill will need to work its way through the legislative process, with changes likely.

The audience was left with many factors to consider. As one speaker said, if we don't get it right, we will be back in ten years having the same discussion and searching for the same solutions. Those in attendance were left to consider the complexities of taking a system that needs reform and finding a new mechanism or mechanisms to achieve the objectives of bail but which reflect our notions of fairness and justice in the twenty-first century.

April 3, 2018

State and Local Power Over Immigration

*This summary of the second Anderson program was written by **Andy Ayers**, the director of the Government Law Center, who organized and moderated the panel.*

The purpose of the second Anderson program was to give an overview of some of the ways in which states and local governments have an impact on immigration law and policy.

Ayers opened the program by explaining that there are at least four kinds of policy decisions that affect whether a jurisdiction might be deemed a "sanctuary": whether to contribute their own law-enforcement resources to cooperate with federal investigations; whether to detain noncitizens at federal request; to what extent they will share information about noncitizens with the federal government; and to what extent

they will grant physical access to state-controlled facilities, including courthouses.

The law governing each of these decisions is complicated. Ayers distinguished between policies that attempt to obstruct or resist immigration enforcement and policies under which localities simply attempt to stay neutral.

Zainab Chaudhry, Assistant Solicitor General in the office of New York State Solicitor General Barbara Underwood, described the role of the New York Attorney General's office in immigration issues.

Since children are constitutionally entitled to an education regardless of their immigration status, the office has worked to ensure access of immigrant children to education, including making sure that schools do not ask questions about immigration status.

Chaudhry also described the current Supreme Court litigation in *Hawaii v. Trump*, in which New York and other states challenged the Trump Administration's travel ban, focusing on the harms states suffered as a result of the ban. The case thus presents the question of states' standing to bring a lawsuit challenging federal immigration policies, an important issue that will have far-reaching implications for federal/state disputes in the future.

New York has also led a multi-state coalition challenging the federal government's attempts to defund localities it identifies as "sanctuaries," and Chaudhry announced that the office would also be challenging census questions that ask about immigration status.

Barbara Weiner, Attorney Emeritus at the Empire Justice Center, described a federal proposal that has recently leaked to the press—one under which noncitizens' interactions with the states' public-benefits systems will have major implications for their ability to remain in the country. Certain noncitizens who wish to enter the U.S. or to become permanent residents must show that they will not become a "public charge."

The newly leaked proposal would dramatically expand the kinds of public benefits that make someone a "public charge" for immigration purposes to include food assistance, housing subsidies, and even tax credits. It would thus dramatically affect the ways in which a state agency's provision of public benefits could have repercussions for the recipient's immigration status.

Gerard Wallace, the Director of New York State Kinship Navigator, brought to the panel his expertise on kinship care (children being raised by people other than their parents), and discussed what happens to children who are citizens but whose noncitizen parents are facing deportation.

Planning for kinship care involves choosing what arrangement the parents would want; options include legal custody, legal guardianship, "informal custody" (in which the caregiver does not go to court), and parental powers of attorney. Each has different implications for healthcare decision-making and other powers and responsibilities.

By creating these ways in which noncitizens can plan for the care of their children in the event of deportation, New York State law has a profound impact on the lives of noncitizens and their family members. As the panel discussion showed, this is just one of many ways in which states and localities

play a profoundly important role in immigration law and policy.

April 24, 2018

Self-Driving Cars: Preparing for the Autonomous Vehicle

*This summary of the third Anderson program, on April 24, 2018, was written by **Andy Ayers**, the director of the Government Law Center.*

Wade Beltramo, General Counsel at the New York State Conference of Mayors and Municipal Officials and a member of the Government Law Center's Advisory Board, organized and moderated this discussion of a topic that has received heightened attention after a deadly self-driving vehicle crash in Tempe, Arizona, in March 2018.

Beltramo observed that people watching the debate seem to expect either a "carmageddon" or a transportation utopia—with fewer exploring the possibilities in between. He said he urges the municipalities with whom he works to begin planning now for autonomous vehicles.

Hilary Cain, Director of Technology and Innovation Policy at Toyota, saw two main potential benefits from self-driving cars: safety and access. The first was safety—currently one million people around the world every year die in vehicular accidents, with 250 a year in New York alone, with 94% of car accidents the result of human error. The second reason is access to mobility. A lot of people cannot drive; the technology can provide independence and reduce isolation.

Cain said that when she is asked, "When is this technology coming?", she answers, "Now, soon, and not for a long time." We already see on the road some lower-level systems, and higher-level systems are coming soon but only in limited geographic areas, e.g., a particular city during the day in nice weather. But the holy grail of a vehicle that can go anywhere, at any time, in any weather—"those systems are probably decades away."

A Google driverless car. Image courtesy Wikimedia Commons.

Cain distinguished "chauffeur" vehicles, where no one is in the driver seat, from "guardian" vehicles, where an advanced artificial intelligence system is in place to take over for the driver when needed. Chauffeur vehicles are much further in the future.

Professor **Edward De Barbieri** of Albany Law School raised three important questions. First, how will this technology improve the lives of people with limited access to transportation: how do people get to jobs, healthcare, education, and services. Second, he also talked about the role of citizens in shaping how the technology is rolled out—the importance of involving the public in discussions. And, third, liability questions: whether regulation of the technology will come from states or the federal government, the extent to which manufacturers will be liable. Traditionally states play an active role in regulating

liability, while safety is regulated at the federal level.

Cain observed that traditionally, the federal government has regulated the vehicle, while the states have regulated the driver; but when the driver becomes the vehicle, the laws will have to adapt.

Presently, Cain noted, it is illegal to deploy self-driving vehicles in New York because of a law that requires a driver to have one hand on the steering wheel at all times.

Michael Replogle, Deputy Commissioner for Policy at the New York City Department of Transportation, described the City's "Vision Zero": setting a goal of zero road-traffic deaths. He talked about investing in safer streets through major engineering, enforcement and education initiatives. Automated vehicles could also play a role, but only if properly regulated and managed.

Replogle described some concerns: as partially autonomous vehicles come into use, drivers may be unable to take control quickly when needed. He described the importance of thorough testing. He also talked about managing the impacts of autonomous vehicles, like "ghost vehicles" driving around empty, clogging the roads while driving out to the suburbs for free parking. He also talked about the risk of increased sprawl if autonomous vehicles reduce the cost of travel. To manage this transition, he said, it will be necessary to price and manage road space.

Finally, he discussed potential labor impacts: displacement as robotic cars displace drivers for both passenger and freight movements. With 175,000 people in New York City in the taxi and limousine industry, we must prepare those workers for opportunities in the new emerging economy.

May 15, 2018

The *Janus* Case and Public Sector Unions: Where Jurisprudence Meets Politics

This summary of the fourth and final Anderson program was written by Kendra Sena, the Government Law Center's Senior Staff Attorney.

Bruce Gyory, senior advisor at Manatt, Phelps, & Phillips and a member of the Government Law Center's Advisory Board, organized and moderated a discussion of *Janus v. AFSCME*, a case awaiting a decision from the Supreme Court of the United States that has the potential to dramatically change the public labor sector. Gyory described the case as the "perfect" Anderson topic: meaty in its jurisprudence and significant in both politics and governance. The discussion that followed proved that statement true.

Associate Dean and Professor of Law at Albany Law School **Rosemary Queenan** explained the issue in the case: whether public-sector unions may collect "agency fees" from nonmembers who benefit from the collective bargaining efforts of the union. Queenan explained that the Court upheld the system in *Abood v. Detroit Board of Education* (1977), and considered it again in *Friedrichs v. California Teachers Association* (2016) after going around the issue in *Harris v. Quinn* (2014). In *Friedrichs*, the Court seemed poised to overturn *Abood*, but the death of Justice Antonin Scalia left the Court deadlocked and the lower court ruling in place. *Janus* represents the fourth time the Court will consider the issue of public-sector union agency fees, and the decision may turn on

any number of legal arguments: (1) whether the collection of such fees is compelled speech, violating the First Amendment; (2) whether *Abood* should be overturned; (3) at what level of scrutiny should the Court evaluate the claim; and (4) whether the Court lacks subject matter jurisdiction to hear the case at all.

Having laid the foundation for *Janus*, the panel turned to debate. **Ken Girardin**, Policy Analyst at the Empire Center, presented two central arguments in favor of overturning *Abood*. First, he explained, the Court in *Abood* drew a distinction between the collective bargaining activities of a union and the union's political or ideological activities, only the former of which were held to be a permissible use of agency fees. Girardin argued that the distinction is unworkable because *all* public-sector union activities are by their nature political activities; because public-sector unions influence how public money is spent, all union activity has a direct impact on public policy. He noted that in oral argument Justice Kennedy asked the union's lawyer if ruling against the union would lower the union's political influence. When counsel replied that it would, the Justice asked, "Isn't that the end of this case?"

Second, said Girardin, *Abood* was decided in the context of massive labor protests and work stoppages that supported a legitimate state interest in preserving labor peace at the expense of First Amendment protections. The climate, he said, has changed, and the agency fee structure at issue in the case is no longer necessary to preserve labor peace, nor is it compelling enough to justify limits on the First Amendment. Girardin pointed to a number of right-to-work states that have done away with agency fees and have not seen an uptick in public sector work stoppages. Rather than threatening labor peace, he argued, overturning *Abood* will force unions to earn the money they seek from their members, resulting in more responsive unions—a win for workers.

Richard Casagrande, formerly the General Counsel to NYSUT, disagreed with the way Girardin framed the issues. The case, said Casagrande, is a political one—part of a conservative agenda to impose right-to-work provisions nationwide. Invoking the Rev. Dr. Martin Luther King, Casagrande warned that so-called "right-to-work" laws destroy labor unions, resulting in depressed wages, limited job opportunities, and no civil rights.

Turning to the law, Casagrande argued that when the government is acting as an employer, it is well-established that it has much more latitude to restrict the First Amendment rights of its employees than it does its citizens. He noted, for example, the right of the government-employer to limit employees' speech out of a reasonable concern for the disruption it may cause—as in the case of NYC police officers fired for off-duty racist behavior (*Locurto v. Giuliani* (2006)). The *Janus* case, Casagrande argued, will "constitutionalize" every employee grievance—an untenable consequence.

Believing that the Court will decide against the union, Casagrande predicted that unions will become more aggressive, and that we will see more work stoppages like the recent teacher strikes in West Virginia, Kentucky, and Oklahoma. He noted that while walkouts are not good for governments or taxpayers, "sometimes we have to re-learn the lesson that if you take rights from working people, they will fight back."

Girardin was skeptical. He doubted that massive work stoppages would result because, he said, other states that have eliminated agency fees have not seen that happen. Moreover, Girardin took issue with the First Amendment frame that Casagrande presented; this case, said Girardin, is about *compelled* speech, not limiting speech. It curbs a person's dignity, argued Girardin (echoing Justice Alito), to compel speech and so it deserves greater protection.

The case will have a huge impact in New York and across the country. Queenan noted that 23 states have agency fee statutes and thousands of collective bargaining agreements include agency fee clauses. She raised the question of severability in light of the dramatic number of statutes and contracts that stand to be invalidated by the ruling. In New York, Queenan said, the state legislature has amended the Taylor Law, the state statute governing public-sector collective bargaining. Anticipating a ruling against the union in *Janus*, the amendments most notably relieve the responsibility of public-sector unions to represent nonmembers in grievances beyond those negotiated in the collective bargaining agreement.

Gyory and members of the audience challenged the panelists to predict unintended consequences of the anticipated ruling, including whether the change would result in industry-wide shutdowns as seen in France, or multi-tiered systems of bargaining to address free riders, and even the implications for corporate speech and its effect on shareholders. We won't have long to wait for answers; the Court heard arguments in February of this year and a decision is expected next month.

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