

Hofstra School of Law Presents Ethics Conference On "Judging Judges' Ethics"

BY LAZAR EMANUEL

Beginning Sunday September 14 and continuing through Tuesday, September 16, the Hofstra University School of Law will present its annual conference on Ethics for lawyers and judges. This year's conference will concentrate on issues of judicial ethics.

The Sunday presentation, "The Future of Judicial Speech," deals with one of the most important and provocative issues in Judicial Ethics - to what extent are judges' political and other public activities protected by the First Amendment?

The issue was raised by a 2002 decision of the Supreme Court in *Republican Party of Minnesota v. White*. In a number of states in which judges are elected, the rules of judicial ethics have forbidden candidates for judicial office to "announce" a position on a disputed legal or political issue. In a 5-4 opinion by Justice Scalia, the Supreme Court held this to be an unconstitutional restriction on the freedom of speech of judicial candidates. One issue that will be considered at the conference is how far this First Amendment right of judges reaches.

First, University of Pennsylvania Professor Geoffrey C. Hazard, Jr., will discuss the *White* case itself and some of its implications. Prof. Hazard is widely regarded as the leading authority nationally on lawyers' and judges' ethics.

Following Prof. Hazard will be Gerald Stern, Esq., Senior Counsel to the NY State Commission on Judicial Conduct (in effect, the chief prosecutor of judges accused of misconduct). Mr. Stern has brought a variety of charges against judges that would have been routine prior to the *White* decision, but which have been challenged under the authority of *White*.

One of those cases is against New York's Judge Spargo, one of three judges who will speak following Mr. Stern. One of the charges against Judge Spargo is that during the last presidential election, when the "chad" count was going on in Dade County FL, he was a member of the crowd of Republican activists who were demonstrating loudly outside the count room. A federal district judge has thrown out that charge against Judge Spargo on First Amendment grounds.

Another judge who will speak is Judge Thomas Penfield Jackson. Judge Jackson was the trial judge in the antitrust case against Microsoft. During the trial, he spoke daily to a reporter, with the understanding that nothing he said was to be published until the case was over. In his conversations, the Judge expressed opinions on such matters as the credibility, or lack of credibility, of Bill Gates. The conversations were reported only after the Judge had ruled. However, the U.S. Court of Appeals for the D.C. Circuit reversed Judge Jackson and ordered a new trial, in part because of what they considered to be his improper conduct in talking with the reporter during the trial.

Judge Nancy Gertner will also speak on the issue of judicial speech. Judge Gertner was trial judge in a high-profile case in Boston. During the proceedings, the lawyer for one side told a Boston newspaper that the Judge had denied a motion that he had filed without even giving him a hearing. Judge Gertner then wrote to the paper explaining that (a) the motion had not yet been filed when the lawyer made the statement; (b) she hadn't yet ruled on it one way or another; and (c) a hearing could not be held at that point because another hearing had to precede it. Judge Gertner also observed that the current case was "more complex" than another she had decided. The U.S. Court of Appeals for the First Circuit ordered Judge Gertner to recuse herself from hearing the case.

Other Issues Created by White

On Monday, Harvard Law Professor Andrew Kaufman will discuss another ramification of the *White* decision. His paper is titled, "Judicial Correctness Meets Constitutional Correctness." The Code of Judicial Conduct forbids a judge to be a member of an organization that discriminates on racial, religious, or gender grounds. Professor Kaufman analyzes this provision in the light of the First Amendment right of freedom of association, considering whether the *White* decision invalidates that rule of judicial conduct.

Harvard Law Professor Charles Fried will present his paper titled, *The Office of Judge: Why It Is Special and the Concomitant Ethics.* The paper, which analyzes the moral foundations of judging, promises to be another classic in the field. Professor Fried has written one of the most widely cited and reprinted articles in Legal Ethics - "The Lawyer as Friend" (Yale Law Journal).

On Tuesday another particularly important and provocative paper will be presented by Federal District Judge Shira A. Scheindlin. She was the federal trial judge in *U.S. v. Awadallah*. Awadallah had been arrested and held as a material witness for a grand jury hearing on the 9/11 terrorist attacks. After testifying before the grand jury, he was charged with knowingly making false statements before the grand jury. Judge Scheindlin held that Awadallah had been illegally detained in the first place, that his grand jury testimony therefore had to be suppressed, and that the indictment against him therefore had to be dismissed.

At the beginning of her opinion, Judge Scheindlin quotes from three Supreme Court decisions, including *Ex Parte Milligan* (1866):

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

At the Hofstra Conference, Judge Scheindlin will talk about "Judicial Responsibility in a Time of Crisis."

Professor Paul Butler of George Washington University Law Center will discuss the extension to judges of principles similar to "jury nullification" by African-American jurors of laws that discriminate invidiously against African-American criminal defendants. Professor Butler's paper for the Conference is

titled, "Judicial Nullification: Judicial Ethics and Judges' Morality."

Jury nullification has been part of our law for centuries. In brief, a jury, which serves as the conscience of the community, has the power to find a criminal defendant not guilty if the jurors believe that the law, or its application in the particular case, is unjust. Even though the jury will be disobeying the instructions of the judge, no judge has the power to punish the jurors in any way. Oddly, however, even though the jurors unquestionably have this power, virtually all judges will impose sanctions on a lawyer who informs the jurors of their power of nullification.

Professor Butler will consider whether judges should also nullify laws that they deem to be unjust. For example, should a judge who believed slavery to be immoral nevertheless have enforced the Fugitive Slave Laws?