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# Judges, Friends, and Facebook: The Ethics of Prohibition

SAMUEL VINCENT JONES\*

*The concept of friendship has enjoyed a renewed prominence in the vocabulary of the new digital social networks that have emerged in the last few years. The concept is one of the noblest achievements of human culture. It is in and through our friendships that we grow and develop as humans. For this reason, true friendship has always been seen as one of the greatest goods any human person can experience. We should be careful, therefore, never to trivialize the concept or the experience of friendship. It would be sad if our desire to sustain and develop on-line friendships were to be at the cost of our availability to engage with our families, our neighbours and those we meet in the daily reality of our places of work, education and recreation. If the desire for virtual connectedness becomes obsessive, it may in fact function to isolate individuals from real social interaction while also disrupting the patterns of rest, silence and reflection that are necessary for healthy human development. —Pope Benedict XVI<sup>1</sup>*

## INTRODUCTION

Since 2004, electronic social networking (“ESN”) websites such as Facebook and MySpace have become a significant component of American culture, reportedly acquiring more than 500 million members.<sup>2</sup> Any person with an e-mail account can join and use an ESN site. The Federal Bureau of Investigation estimates that there are approximately 200 different ESN sites.<sup>3</sup> Among attorneys

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1. Benedict XVI, Pope, Message of the Holy Father Benedict XVI for the 43<sup>rd</sup> World Communications Day: New Technologies, New Relationships. Promoting a Culture of Respect, Dialogue and Friendship (May 24, 2009), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/messages/communications/documents/hf\\_ben-xvi\\_mes\\_20090124\\_43rd-world-communications-day\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/messages/communications/documents/hf_ben-xvi_mes_20090124_43rd-world-communications-day_en.html).

2. Quentin Hardy, *In Zuckerberg We Trust*, FORBES MAG., Oct. 11, 2010, at 80, available at <http://www.forbes.com/forbes/2010/1011/rich-list-10-technology-facebook-google-laws-zuckerberg-we-trust.html> (stating that Facebook is a network of 500 million customers); see also Patricia Sanchez Abril, *A (My)Space of One's Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73, 74 (2007), available at <http://www.law.northwestern.edu/journals/njtip/v6/n1/4/Abril.pdf> (“If MySpace alone were a country and each of its profiles a person, it would be the 12th most populous nation in the world.”).

3. Press Release, Fed. Bureau of Investigation, Social Networking Sites: Online Friendships Can Mean Offline Peril (Apr. 3, 2006), available at <http://www.fbi.gov/news/stories/2006/april>.

surveyed by the American Bar Association (“ABA”), forty-three percent used at least one ESN site in 2009, an increase of approximately 300% from 2008.<sup>4</sup>

Because ESN websites enable members to use a computer or personal digital assistant (“PDA”) to instantly disseminate information to millions of people, ESN websites have become increasingly popular. ESN easily allows users to: cultivate social connections,<sup>5</sup> enhance political campaign marketing,<sup>6</sup> locate people,<sup>7</sup> facilitate romantic interaction/dating,<sup>8</sup> share personal information,<sup>9</sup> and supplement litigation methodologies.<sup>10</sup> The consequences of ESN usage, however, are not all favorable, as widespread concern has arisen regarding jury misconduct,<sup>11</sup> privacy invasion,<sup>12</sup>

4. Reginald F. Davis, *Getting Personal: Social Networks Appeal, But Not to the Firm*, 95 A.B.A. J. 30, 30 (2009), available at [http://www.abajournal.com/magazine/article/getting\\_personal/](http://www.abajournal.com/magazine/article/getting_personal/) (reporting fifteen percent use in 2008 and forty-three percent use in 2009); see also John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES, Sept. 13, 2009, at A1, available at <http://www.nytimes.com/2009/09/13/us/13lawyers.html> (reporting that a recent LexisNexis survey indicated “86 percent of lawyers ages 25 to 35 are members of social networks like Facebook, LinkedIn and MySpace, as opposed to 66 percent of those over 46”).

5. See James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1154 (2009) (“[A] social network site lets you make new friends and deepen your connection to your current ones.”). A recent study that “sampled the habits of 1,605 adults using social media between May and June” of 2010 revealed that women between the ages of 18 to 34 primarily use Facebook. Over “half of young women (57%)” admit that “they talk to people online more than face-to-face” and “39% of them proclaim themselves Facebook addicts, while 34% of [them] make Facebook the first thing they do when they wake up, even before brushing their teeth or going to the bathroom and 21% of women age 18-34 check Facebook in the middle of the night.” See Ben Parr, *The First Thing Women Do in the Morning: Check Facebook [Study]*, MASHABLE (July 7, 2010), <http://mashable.com/2010/07/07/oxygen-facebook-study>. Commentators note that use of social media such as Facebook differs among genders, with women making up approximately 57% of the social media population and using it primarily for connecting with people, while men use it primarily as a means to obtain information and improve social status. See Jenna Goudreau, *What Men and Women Are Doing on Facebook*, FORBES.COM (Apr. 26, 2010, 6:00 PM), <http://www.forbes.com/2010/04/26/popular-social-networking-sites-forbes-woman-time-facebook-twitter.html>.

6. See Miriam Rozen, *Social Networks Help Judges Do Their Duties*, TEX. LAW., Aug. 24, 2009, at 1, available at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202433293771>.

7. *Id.*

8. Grimmelmann, *supra* note 5, at 1154. A 2010 study revealed that “50% of women believe that it’s just fine to date people they’ve met on Facebook, compared to 65% of men.” See Parr, *supra* note 5.

9. Grimmelman, *supra* note 5, at 1152-53. Studies indicate that 42% of women between the ages of 18-34 consider it appropriate to “post photos of themselves intoxicated, while 79% consider it appropriate to display themselves “kissing in photos” and 49% of women between ages 18-34 believe it’s appropriate to “keep tabs on a boyfriend by having access to his accounts,” with “42% of men” feeling the “same way.” See Parr, *supra* note 5.

10. Rozen, *supra* note 6, at 4.

11. Martha Neil, *Oops. Juror Calls Defendant Guilty on Facebook, Before Verdict*, A.B.A. J. (Sept. 2, 2010, 1:28 PM), [http://www.abajournal.com/news/article/oops.\\_juror\\_calls\\_defendant\\_guilty\\_on\\_facebook\\_though\\_verdict\\_isnt\\_in](http://www.abajournal.com/news/article/oops._juror_calls_defendant_guilty_on_facebook_though_verdict_isnt_in); see also Candice Williams, *Facebook Juror Fined, Apologizes for Posting*, DETROIT NEWS, Sept. 3, 2010, at A12 (stating that juror was fined \$250 for announcing a guilty verdict on Facebook before the conclusion of a trial).

12. Grimmelmann, *supra* note 5, at 1140; see also Abril, *supra* note 2, at 74 (describing the danger social networking sites present to privacy because “privacy harms are no longer short-lived and innocuous. . . . [I]nformation’s digital permanence, searchability, replicability, transformability, and multitude of often unintended audiences make its effects more damaging than ever.”); Alejandro Martinez-Cabrera, *Now*

deception,<sup>13</sup> and misrepresentation.<sup>14</sup> The perils associated with ESN website usage are not limited to the actual ESN users but often permeate throughout their families, communities, and social networks. For example, ESN activity has been cited as a catalyst behind at least twenty percent of the divorces filed in the United States<sup>15</sup> and is also linked to a wide range of sexual and physical violence against children.<sup>16</sup>

Facebook, arguably the most popular ESN website, permits users to identify, contact, and befriend other members.<sup>17</sup> The solicited member must approve the

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*Facebook Wants Locator App Like Twitter*, S.F. CHRON., July 17, 2010, at D2 (reporting that Facebook seeks to include an application that lets other users know where a person is sending updates from and that a poll revealed that “half of all social networking users in the United States are either ‘concerned’ or ‘very concerned’ about their privacy”); *Twitter Settles FTC Privacy Charge*, INVESTORS.COM, (June 24, 2010, 6:40 PM), <http://www.investors.com/NewsAndAnalysis/Article/538399/201006242340/Twitter-settles-FTC-privacy-charge.aspx>; James Temple, *Local Class Action Complaint Filed Over Google Buzz*, TECH CHRONICLES (Feb. 17, 2010, 4:14 PM), <http://blog.seattlepi.com/techchron/archives/194949.asp> (reporting that a class action suit against Google Buzz alleged violations of “various electronic communications laws, including the Consumer Fraud and Abuse Act” for sharing user information without consent).

13. Tiffany M. Williams, *Social Networking Sites Carry Ethics Traps and Reminders*, LITIG. NEWS (Aug. 27, 2009), [http://www.abanet.org/litigation/litigationnews/top\\_stories/social-networking-ethics.html](http://www.abanet.org/litigation/litigationnews/top_stories/social-networking-ethics.html). In one instance, a deposition inquirer thought that one of a witness’s ESN webpages contained information that would later be useful in impeaching the opposing witness. See Phila. Bar Prof’l Guidance Comm., Op. 2009-02, at 1, 3 (2009), available at [http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion\\_2009-2.pdf](http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf). Frustrated that he could not view the information in the witness’ profile himself, the inquirer proposed that a third person request the witness’ friendship so that the third person could then view the witness’ profile, and pass along the information to the inquirer. See *id.* The Committee found that such conduct would violate the ethical rules, because the planned communication between the third party and the witness was deceptive. *Id.*

14. Nathan M. Crystal, *Ethical Issues in Using Social Networking Sites*, S.C. LAW., Nov. 2009, at 8; Ken Strutin, *Pretexting, Legal Ethics and Social Networking Sites*, LLRX.COM (Oct. 5, 2009), <http://www.llrx.com/node/2205/print>.

15. *Is Facebook a New Tool for Cheating?* (CNN television broadcast July 15, 2010), available at <http://www.cnn.com/video/#/video/bestof/2010/07/15/pn.facebook.affairs.discussion.cnn?ref=allsearch> (stating that social media such as Facebook has been linked to “one in five divorce cases”); Linda Lewis Griffith, *Let’s Face It: Facebook is Becoming a Factor in Divorce*, TRIBUNE (San Luis Obispo, Cal.), July 2, 2010, available at <http://www.sanluisobispo.com/2010/07/01/1201608/lets-face-it-facebook-is-becoming.html#storylink=mirelated> (“Recent research found that 20 percent of divorcing couples now mention Facebook as the cause of their breakups.”); see also Juju Chang, *Facebook Infidelity: Cheating Spouses Go Online*, ABC NEWS, Nov. 30, 2010, available at <http://abcnews.go.com/Technology/facebook-infidelity-cheating-spouses-online/story?id=12272421>; Greg Groogan, *Facebook a Factor in Infidelity*, MY FOX HOUSTON (Dec. 6, 2010, 7:11 PM), <http://www.myfoxboston.com/dpp/news/local/101206-facebook-a-factor-in-infidelity>; Carolyn Davis, *Divorce, Facebook Style*, PHILA. INQUIRER, July 12, 2010, [http://articles.philly.com/2010-07-12/news/24967905\\_1\\_facebook-popular-social-networking-website-divorce-case](http://articles.philly.com/2010-07-12/news/24967905_1_facebook-popular-social-networking-website-divorce-case) (discussing man who discovered wife using Facebook to engage in an extra-marital affair).

16. Susan Hanley Duncan, *MySpace is Also Their Space: Ideas for Keeping Children Safe From Sexual Predators on Social Networking Sites*, 96 KY. L.J. 527, 527-28 (2007-2008).

17. *Facebook’s Privacy Policy*, FACEBOOK, <http://www.facebook.com/policy.php?ref=pf> (last visited Jan. 11, 2011). But see Fla. Judicial Ethics Advisory Comm., Op. 2009-20 (2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html> (holding that a judge may not request or accept the “friendship” of any lawyer who may appear before him on an ESN site). ESNs can be useful professionally as well. See Kelly Phillips Erb, *Put Your Best Face Forward—Online*, PA. LAW., Dec. 2009, at 32 (“Law firms now use social networking sites to build brands, manage their online reputations, engage clients and attract new talent.”).

“friend” request in order for the relationship to be so identified.<sup>18</sup> By virtue of this “friendship,” members acquire the capacity to exchange electronic communications and observe one another’s postings, statements, profile behavior, photos, and/or friends, fans, or contacts.<sup>19</sup> Facebook also provides its members with a “wall,” on which other members are allowed to post messages,<sup>20</sup> a messaging system that permits members to email one another,<sup>21</sup> a “poking” function by which members can draw the attention of other members,<sup>22</sup> and the means to post photos and “tag” other users in those photos.<sup>23</sup>

Legal constructions have long struggled to keep pace with such technology.<sup>24</sup> ABA President Carolyn B. Lamm questions whether the ethics rules have kept pace with ESN activity.<sup>25</sup> Some commentators even maintain that ESN technology has “outpaced” legal ethics rules.<sup>26</sup> Within the growing examination of the ESN phenomenon, research has focused on ESN capacities to facilitate robust pedagogical, entertainment, social, and commercial opportunities for attorneys. Use of ESN websites by judges or judicial candidates, whose conduct is governed

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18. *Help Center*, FACEBOOK, <http://www.facebook.com/help> (follow “Friends” hyperlink; then follow “Adding friends,” and “Friend requests” hyperlinks) (last visited Jan. 11, 2011); *see also* Fla. Judicial Ethics Advisory Comm., *supra* note 17 (“The member of the social network must approve a person who requests to be identified as the member’s ‘friend.’”).

19. Fla. Judicial Ethics Advisory Comm., *supra* note 17; *see also* Robert Sprague & Corey Ciocchetti, *Preserving Identities: Protecting Personal Identifying Information Through Enhanced Privacy Policies and Laws*, 19 ALB. L.J. SCI. & TECH. 91, 114 (2009) (“The key element of a social networking site (such as Facebook) is that individuals can share information with their friends (who are also members of the site).”).

20. *Help Center*, *supra* note 18 (follow “Wall” hyperlink; then follow “How to use the Wall feature” hyperlink); *see also* Grimmelmann, *supra* note 5, at 1145 (“Each user’s profile page has a ‘Wall’ where other users can post messages.”).

21. *Help Center*, *supra* note 18 (follow “Messages” hyperlink; then follow “Sending a message” hyperlink); *see also* Grimmelmann, *supra* note 5, at 1145 (“There’s also a private, email-like ‘Message’ system . . .”).

22. *Help Center*, *supra* note 18 (follow “Home and News Feed” hyperlink; then follow “Pokes” hyperlink); *see also* Grimmelmann, *supra* note 5, at 1145 (“[T]he ‘Poke’ system, whose only message is ‘You were poked by \_\_\_\_.’”).

23. *Help Center*, *supra* note 18 (follow “Photos” hyperlink; then follow “Viewing and editing,” “Tagging,” and “Privacy and abuse” hyperlinks); *see also* Grimmelmann, *supra* note 5, at 1145-46 (“There’s a photo-sharing feature, imaginatively named ‘Photos,’ with a clever tagging system: click on a face in a photo—even one posted by someone else—and you can enter the person’s name.”).

24. RAYMOND WACKS, LAW, MORALITY, AND THE PRIVATE DOMAIN 274 (Hong Kong Univ. Press 2000); *see also* Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in E-Discovery*, 60 MERCER L. REV. 983, 986 (2009) (attributing the failure of law to keep up with technology to both lawyers’ “archetypal personalit[ies]” and “the failure of most law schools to adapt to the modern technological revolution”); Dahlia Lithwick & Graham Vyse, *Tweet Justice: Should Judges Be Using Social Media?*, SLATE (Apr. 30, 2010, 6:22 PM), <http://www.slate.com/id/2252544/> (“It will take years for the courts to sort out questions about new technology and privacy. And by the time they do, Tweeting and Facebook will be passé.”).

25. Press Release, Am. Bar Ass’n, ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers (Aug. 4, 2009), [http://www.abanet.org/abanet/media/release/news\\_release.cfm?releaseid=730](http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=730) (detailing the creation of the ABA Commission on Ethics 20/20 formed from judges and attorneys from all areas and sizes of practice).

26. *See, e.g.*, Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 114 (2009). This article, however, did not address the ethical issues as they pertained to judges. *See id.* at 114 n.9.

by well-established ethical standards, has received scant attention despite the enormous potential for ESN activity to negatively affect a judge's reputation and duties to the public. The ABA Code of Judicial Conduct ("Judicial Code"),<sup>27</sup> like most legal ethics paradigms, does not explicitly address ESN usage.<sup>28</sup> Despite the precarious ethical implications regarding ESN "friendships," there is a lack of clarity and agreement among the various state judicial ethics commissions regarding the permissibility of ESN "friending" under the Judicial Code.

This essay represents a first step in exploring the ethical risks judges encounter when using ESN websites. It examines the practical and jurisprudential arguments for and against ESN "friending" and weighs ESN behavioral capacities against the constraints enumerated under the Judicial Code. It posits that an interpretation of the Judicial Code that restricts judges from ESN "friending" is warranted given the enormous potential for ESN "friending" to compromise the prestige of the judicial office and threaten public confidence in the judiciary. In so doing, this essay demonstrates that the current Judicial Code, albeit silent regarding ESN usage, contains adequate prohibitions to control the effects of ESN on the judiciary.

## I. THE JUDICIAL CODE AND THE PUBLIC

The purpose of the Judicial Code is fueled by the imperative to maintain public confidence in the judiciary.<sup>29</sup> Justice Frankfurter once noted, "The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."<sup>30</sup> Similarly, the Supreme Court of North Dakota recognized that judges "symbolize the law and justice and, consequently, their action and behavior will reflect favorably or unfavorably on the integrity of the judiciary and the high respect required in the administration of justice."<sup>31</sup> It continued,

It is not merely sufficient to do justice but the public and society must have good cause and reason to believe that justice, in fact, is being done. . . . We are also convinced that the . . . Code of Judicial Conduct [was] designed and adopted to accomplish this, as well as to require that the judge not only act

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27. ABA MODEL CODE OF JUDICIAL CONDUCT (2004), *reprinted in* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 512-604 (John S. Dzienkowski ed., 2009-2010 ed.) [hereinafter MODEL CODE OF JUDICIAL CONDUCT].

28. *See* MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 3 ("Because it is not practical to list all . . . conduct, the Rule is necessarily cast in general terms."); Bennett, *supra* note 26, at 114.

29. MODEL CODE OF JUDICIAL CONDUCT pmbl.; *see* Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 951 (1996) ("The objective of the Code is to maintain both the reality of judicial integrity and the appearance of that reality. The public has confidence in judges who show character, impartiality, and diligence.").

30. *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

31. *In re Cieminski*, 270 N.W.2d 321, 327 (N.D. 1978).

impartially but also that the litigants and society believe that the judge did, in fact, act impartially.<sup>32</sup>

Put succinctly, one fundamental purpose of the Judicial Code is to guide the conduct of judges in order to increase public confidence in the judiciary. Hence, the Judicial Code exists for the benefit of the public.

An independent bench is critical to maintaining public confidence in the judiciary and is central to American jurisprudence.<sup>33</sup> Because the judiciary possesses enormous power to provide justice to citizens, and is removed from the influence of the executive or legislative branches, any sort of judicial misconduct has the potential to threaten the prestige and the authority of the judiciary.<sup>34</sup> The Judicial Code attempts to uphold the prestige of the judiciary<sup>35</sup> by shaping conduct that is consistent with the independence of the judiciary.<sup>36</sup> The constraints the Judicial Code places on a judge's behavior and expressions are designed to buttress the importance of judicial independence.<sup>37</sup> Hence, interference with a judge's freedom regarding ESN usage is not only for the benefit of the public, but is also for the benefit of the judge.<sup>38</sup>

## II. ESN USAGE AND JUDICIAL CODE VIOLATIONS: TWO APPROACHES

To date, research has not revealed a court decision or ethics opinion that found that a judge violated the Judicial Code by simply joining an ESN site, such as Facebook or Twitter.<sup>39</sup> Naturally, the manner in which a judge engages in ESN,

32. *Id.* (quoting an anonymous former judge).

33. MODEL CODE OF JUDICIAL CONDUCT pmbl. ("An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law.").

34. *See* MODEL CODE OF JUDICIAL CONDUCT pmbl.; Raymond J. McKoski, *Ethical Considerations in the Use of Judicial Stationery for Private Purposes*, 112 PENN ST. L. REV. 471, 475 (2007) (citing *United States v. United Mine Workers*, 330 U.S. 258, 308 (1947) (Frankfurter, J., concurring); MODEL CODE OF JUDICIAL CONDUCT Canon 2B cmt. (1990)).

35. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT pmbl., Canon 1; *see also* McKoski, *supra* note 34, at 475 ("Because of the serious threat to the integrity and independence of the judiciary caused by the misuse of the judicial office, a central purpose of all canons of judicial ethics is to eliminate abuse of a judge's power and prestige.").

36. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT R. 1.2; Judge Irving R. Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics*, 35 LAW & CONTEMP. PROBS. 3, 3 (1970).

37. *See* MODEL CODE OF JUDICIAL CONDUCT R. 1.2 & cmt. 3 ("Conduct that . . . appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary.").

38. *See* MODEL CODE OF JUDICIAL CONDUCT R. 1.2 & cmt. 2 ("A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code."). *But see* Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees is What the Judge Gets*, 94 MINN. L. REV. 1914, 1950-84 (2010) (arguing that the First Amendment costs of the "appearance of impropriety" standard outweigh any purported benefits).

39. *See* Fla. Judicial Ethics Advisory Comm., *supra* note 17 (approving of a judge or his or her campaign committee posting on an ESN site comments that do not violate the Code and of a judge's campaign committee

however, may conflict with the standards enunciated under the Judicial Code.<sup>40</sup> Among the most potentially problematic ESN activities involves judges engaging in Facebook “friending.” Because friendships can be “every bit as intimate as love, marriage, or business,” they present unique legal ethics challenges because judges, as human beings, may be predisposed to favor their friends, which may include social networking friends.<sup>41</sup> Friendships between judges and possible litigants or attorneys of records that “exceed[] ordinary and reasonable social intercourse between acquaintances and business associates” often necessitate judicial recusal or disqualification.<sup>42</sup> This would include ESN “friending.” Ethics opinions regarding a judge’s ESN “friending” center on two dominant but competing approaches, which I term *integrative* and *restrictive*. Proponents of the integrative approach to ESN “friendships” are inclined to characterize ESN “friending” as a permissible activity that promotes public confidence in the

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using an ESN site to list supporters of his or her candidacy); N.Y. State Advisory Comm. on Judicial Ethics, Op. 08-176 (2009), available at <http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm> (stating that there is nothing “inherently inappropriate” with a judge using a social networking site); S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (2009), available at <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009> (“A judge may be a member of Facebook and be friends with law enforcement officers and employees of the Magistrate as long as they do not discuss anything related to the judge’s position as magistrate.”).

40. See N.Y. State Advisory Comm. on Judicial Ethics, *supra* note 39.

The Committee cannot discern anything inherently inappropriate about a judge joining and making use of a social network. A judge generally may socialize in person with attorneys who appear in the judge’s court, subject to the Rules Governing Judicial Conduct . . . Thus, the question is not whether a judge *can* use a social network but rather, *how* he/she does so.

*Id.* (emphasis added). With regard to ESNs and attorneys:

The rules of legal ethics still apply. Keep in mind that the duties of confidentiality, limits on lawyer advertising and restrictions relating to communications are just as important online as offline. Be professional as you build your network: Popularity should never be confused with integrity.

Erb, *supra* note 17, at 35.

41. Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575, 586, 608-09 (2006).

42. *Id.* at 578-79 (“Friendship is loyalty, and loyalty to one side of a case (be it a named party or lawyer) is the perfect antonym to impartiality.”). In light of the significant potential for friendships to engender partiality, some commentators have even argued for the establishment of a “friendship recusal rule.” See, e.g., *id.* at 608-09. One commentator argues that judges should consider recusal when their social relations create or appear to create partiality upon consideration of many factors:

(1) the duration of the relationship or [social] contact; (2) the content of any conversation during the relationship or [social] contact; (3) the nature and circumstances of the relationship or [social] contact; (4) the frequency of meetings or conversations; (5) the personal dependence of either [party] on the relationship; (6) whether the relationship was connected with the subject matter of the proceeding; (7) in a business relationship, whether the judge receives preferential treatment not granted to others; (8) whether the relationship has been the subject of media publicity; and (9) statements attributable to the judge or any other person about the relationship.

Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55, 98 (2000).



judiciary, while adherents of the restrictive approach are disposed to view ESN “friending,” quite justifiably, as an impermissible activity that compromises public confidence in the judiciary.

#### A. THE INTEGRATIVE APPROACH

When considering whether ESN “friending” violates judicial ethics standards, a New York Ethics Commission reasoned that a violation occurs whenever a judge’s conduct could negatively influence or destroy the public’s confidence in the judge’s decision-making or the prestige of the judicial office.<sup>43</sup> When addressing specific usage, the Commission did not specifically permit or restrict any particular ESN “friending” conduct.<sup>44</sup> Instead, it left the determination to the discretion of individual judges.<sup>45</sup> Similarly, when considering whether a judge runs afoul of ethics rules by ESN “friending,” the South Carolina Advisory Committee on Standards of Judicial Conduct (“South Carolina Commission”) reasoned that a judge’s ESN “friending” not only does not violate legal ethics requirements to act in a manner that promotes public confidence, it implied that ESN “friending,” in fact, enhances the public’s confidence in the judiciary.<sup>46</sup> The South Carolina Commission opined that a judge’s ESN “friending” may promote public confidence in the judiciary by preventing the judge from isolating him or herself from the community,<sup>47</sup> which is consistent with the duty to participate in community activities that promote “public understanding of and confidence in the administration of justice.”<sup>48</sup> According to the South Carolina Commission, the transparency and judicial integration that a judge’s ESN “friending” allows the public to observe how the judge communicates and behaves, thus providing the public with greater understanding and confidence in its judiciary.<sup>49</sup> The South Carolina Commission concluded that a judge may even choose to “befriend” law enforcement officers and employees on ESN websites, provided the judge does not discuss matters related to the judge’s official duties.<sup>50</sup>

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43. See N.Y. State Advisory Comm. on Judicial Ethics, *supra* note 39 (stating that judges share a duty to consider how the public will view content on the judge’s ESN page and how they will adjust their behavior accordingly).

44. *Id.*

45. *Id.* (“The Committee urges all judges using social networks to, as a baseline, employ an appropriate level of prudence, discretion and decorum in how they make use of this technology . . .”).

46. S.C. Advisory Comm. on Standards of Judicial Conduct, *supra* note 39.

47. *Id.*

48. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 6; see also MODEL CODE OF JUDICIAL CONDUCT R. 3.1 cmt. 2 (“Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.”).

49. S.C. Advisory Comm. on Standards of Judicial Conduct, *supra* note 39.

50. *Id.* The integrative approach adopted by the South Carolina Commission was also accepted by the judicial ethics commissions in Ohio and Kentucky. See Supreme Court of Ohio Bd. of Comm’rs on Grievances and Discipline, Op. 2010-7 (2010) (concluding that a “A judge may be a ‘friend’ on a social networking site with a lawyer who appears as counsel in a case before the judge”); Ky. Jud. Ethics Comm’n, Op. JE-110 (2010) (The

## B. THE RESTRICTIVE APPROACH

Like the South Carolina Commission, the Florida Judicial Ethics Advisory Commission (“Florida Commission”) acknowledged that “judges cannot isolate themselves entirely” from the community nor be expected to avoid friendships outside their judicial responsibilities.<sup>51</sup> It also noted, however, that behavioral restrictions are inherent in the judicial office and, thus, require some degree of isolation from the public.<sup>52</sup> The Florida Commission reasoned that certain forms of conduct may harm the public’s confidence in the judiciary.<sup>53</sup>

In ascertaining the proper balance between avoiding isolation from the community and maintaining judicial independence and public confidence, the Florida Commission differed markedly from its South Carolina counterpart regarding ESN “friending.” It held that a judge’s ESN “friending” violates the Judicial Code when a judge’s ESN webpage affords the judge the option to accept or reject “friends,” to denominate himself or herself as a “friend” on another ESN user’s webpage, and to convey the existence of the “friendship” to the public.<sup>54</sup> The Florida Commission found these features ethically unsound because a judge, by selecting and publicizing ESN “friendships,” conveys, or allows others to convey, the impression that the “friend” is “in a special position to influence the judge.”<sup>55</sup> The dispositive question for the Florida Commission was not whether an ESN “friend” is *actually* in a position to influence the judge, but whether the identification of the person as a “friend” conveys the *impression* that the person is in such a position.

Logic follows that if an ESN website provides judges the discretion to accept or deny specific attorneys as “friends,” this activity indicates the possibility of

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commission stated that it is permissible for judges to “friend” parties that may appear before them because Kentucky judges are elected and should not be isolated from the community in which they serve. The Kentucky commission warned that a judge or justice should be “extremely cautious that such participation does not otherwise result in violations of the Code of Judicial Conduct.”)

51. Fla. Judicial Ethics Advisory Comm., *supra* note 17.

52. *Id.* (citing CODE OF JUDICIAL CONDUCT FOR THE STATE OF FLA. Canon 2A cmt. (2008), available at [http://www.floridasupremecourt.org/decisions/ethics/09-15-2008\\_Code\\_Judicial\\_Conduct.pdf](http://www.floridasupremecourt.org/decisions/ethics/09-15-2008_Code_Judicial_Conduct.pdf)).

53. *Id.*

54. *Id.*

55. *Id.* The New York Ethics Commission also noted that the public nature of the relationship between judges and their ESN contacts or “friends” and the increased access that the friend would have, including access to any personal information the judge chose to post on his/her own ESN profile, establishes, “at the [very] least, the appearance of a stronger bond” between the judge and the friend. N.Y. State Advisory Comm. on Judicial Ethics, *supra* note 39. It should be noted that in addition to judges, the concern that ESNs are viewable by the public should be a matter of concern for attorneys as well. Kelly Phillips Erb advises, “Think about what you post, from photos and videos to links, and how your colleagues and clients might react. Be mindful of the impression that clients (and, more important, potential clients) may take away from the site.” Erb, *supra* note 17, at 35. Nathan M. Crystal observes that “[t]hese technologies are a form of communication, but they radically increase the number of people with whom such communications are made, and they transform what are often ephemeral, private experiences into documented public expressions.” Crystal, *supra* note 14, at 8.

partiality toward those attorneys granted “friendship” status<sup>56</sup> and potentially inspires the public to examine a judge’s ESN “friends” list and only hire attorneys identified on the judge’s “friends” list.<sup>57</sup> Such activity not only provides, at least implicitly, an improper benefit to the judge’s Facebook “friends,” it induces the public into engaging in a harmful selection process regarding its legal representation and denotes the judge’s potential for favoritism and partiality, which threatens the public confidence in the judiciary.

### C. OBJECTIONS TO THE RESTRICTIONIST APPROACH

#### 1. NEW HUMAN ASSOCIATION

Despite the harmful potentialities associated with ESN “friending,” some integrationists claim the restrictionist approach represents a “hypersensitive” response to judicial ESN “friending”<sup>58</sup> on grounds that there already exist effective methods for dealing with a judge’s “friends,” such as motions to disqualify whenever a judge is, or appears, biased.<sup>59</sup> This contention, however, seems blind to the reality that ESN technology shapes and controls the scale, pace, and form of human association and action.<sup>60</sup> ESN websites, such as Facebook, are more than just communication exchange vehicles. They represent a category of space through which people find, meet, and, arguably, form very authentic relationships via the Internet.<sup>61</sup> As such, ESN websites are not merely physical space substitutions but are unregulated virtual meeting and communication hubs that have expanded the scope of previous human interaction without the accountability of physical presence.<sup>62</sup> Hence, like the railroad and telephone, ESN websites have created completely new kinds of human associations.<sup>63</sup> Legal tools that may have been sufficient during the pre-ESN era cannot and should not prevent the advance of new legal methodologies and approaches to governing judicial conduct.

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56. Fla. Judicial Ethics Advisory Comm., *supra* note 17; Anita Ramasastry, *Why Florida’s Ban on Judges’ “Friending” Lawyers on Facebook is the Right Call*, FINDLAW.COM (Dec. 15, 2009), <http://writ.lp.findlaw.com/ramasastry/20091215.html>. Becoming a “fan” of a judge, on the other hand, is permissible, as it requires no interaction on the part of the judge. *Id.*

57. Ramasastry, *supra* note 56.

58. John Schwartz, *For Judges on Facebook, Friendship Has Limits*, N.Y. TIMES, Dec. 11, 2009, at A25 (quoting Professor Stephen Gillers, N.Y. Univ.).

59. *Id.* (citing Professor Stephen Gillers, N.Y. Univ.).

60. See MARSHALL McLuhan, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 8 (MIT Press 1994) (1964).

61. Grimmelmann, *supra* note 5, at 1154.

62. Duncan, *supra* note 16, at 543.

63. See McLuhan, *supra* note 60, at 8.

## 2. ESN AND MILL'S HARM PRINCIPLE

Integrationists also object to the restrictionist approach on grounds that it offends the judge's autonomy, arguing that judges are in the best position to determine whether they should engage in ESN "friendships."<sup>64</sup> The premise of this objection bears the imprint of allegiance to the literature of John Stuart Mill, whose classic work, *On Liberty*, represents the most influential treatment of the social consequences of interference with individual liberty.<sup>65</sup> Mill perceived "autonomy as a special kind of value."<sup>66</sup> He reasoned that every person is entitled to autonomy with respect to his personal affairs.<sup>67</sup> According to Mill, a person is the one most interested in his or her own well-being.<sup>68</sup> Any interest that another can have in one's own affairs, "except in cases of strong personal attachment," is negligible in comparison to one's interests in his or her own affairs.<sup>69</sup> Any overruling of an individual's judgment with respect to his or her personal life can only be "grounded on general presumptions; which may be altogether wrong, and even if right, are as likely as not to be misapplied" by someone unacquainted with the individual's personal circumstances.<sup>70</sup> Therefore, according to Mill, any error that a person is likely to commit regarding his or her personal life is outweighed by the harm of allowing others to overrule his or her discretion based on what they believe is good.<sup>71</sup>

At first glance, this particular integrationist objection appears consistent with Mill's reasoning regarding the importance of autonomy. But even Mill, one of the staunchest opponents of government interference with individual autonomy, recognized the rectitude of restricting an individual's choices when the conduct at issue harms others.<sup>72</sup> Mill also acknowledged that where a person has received the "protection of society," that person "owes a return for the benefit" and protection he received and must bear his share of "sacrifices incurred for

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64. See, e.g., John P. Hutchins, *Legal Ethics in the Age of Internet Mobility*, in INFORMATION TECHNOLOGY LAW INSTITUTE 2010: OPPORTUNITIES IN CLOUD COMPUTING, BLOGS, BRAND PROTECTION AND TARGETED MARKETING, at 527, 540 (PLI Patents, Copyrights, Trademarks, & Literary Prop., Course Handbook Ser. No. 23460, 2010) ("Stories such as [judges having left the bench because of transgressions on ESN websites] are becoming more prevalent in the legal world, and it is up to attorneys [and judges] to balance their need and desire to network on the internet with their duty to uphold . . . the legal profession, and their reputations."); see also MODEL CODE OF JUDICIAL CONDUCT R. 2.11 cmt. 2 ("A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.").

65. John Stuart Mill, *On Liberty*, reprinted in PHILOSOPHY OF LAW 219 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991).

66. Daniel Markovitz, *Contract and Collaboration*, 113 YALE L.J. 1417, 1512 n.228 (2004).

67. See Mill, *supra* note 65, at 220-21.

68. *Id.* at 221.

69. *Id.*

70. *Id.* at 221-22.

71. *Id.* at 222.

72. See *id.* at 224.

defending the society or its members from injury and molestation.”<sup>73</sup> Mill argued that if any part of a person’s conduct prejudicially affects the interests of others, society has jurisdiction over it, and the conduct becomes subject to restriction for the benefit of the general welfare.<sup>74</sup> If a person’s conduct prevents him or her from performing “some definite duty incumbent on him to the public, he is guilty of a social offence.”<sup>75</sup> Hence, it logically follows that Mill would contend that, although no person ought to be prevented from using ESN websites, a judge’s ESN usage should be restricted given that such behavior harms the public.

The premise of the autonomy objection also appears factually misplaced to the extent that it relies on the assertion that judges are always better situated to govern their own social relationships. An examination of 187 opinions from forty-one state judicial ethics committees involving judges and their social relationships<sup>76</sup> indicated that fifty-nine, or 31.5%, of the questions presented to the committees involved conduct that arguably violated the Judicial Code.<sup>77</sup> Most of these instances involved questionable uses of the judge’s office for the benefit of the judge’s friends, e.g., writing letters of recommendation on judicial letterhead,<sup>78</sup> attending political social functions,<sup>79</sup> or having close relations with

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73. *Id.* at 221.

74. *Id.* at 221, 224.

75. *Id.* at 224.

76. States whose judicial ethics committees do not issue opinions or who published no opinions regarding judges’ social relationships were excluded from the examination results, which are on file with the author and available upon request.

77. Some statements by the committees were not definitive. *E.g.*, Mass. Comm. on Judicial Ethics, Op. 2002-17 (2002), available at <http://www.mass.gov/courts/sjc/cje/2002-17n.html> (stating that a judge is only disqualified from those proceedings in which her fiancé was personally involved); Wis. Judicial Conduct Advisory Comm., Op. 97-7 (1997), available at <http://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=899> (stating that a judge could not solicit campaign funds from close friends, but that a campaign committee acting for the judge could).

78. *See, e.g.*, Ark. Judicial Ethics Advisory Comm., Op. 2005-01 (2005), available at [http://www.accessarkansas.org/jec/committees/advisory\\_2005\\_01.pdf](http://www.accessarkansas.org/jec/committees/advisory_2005_01.pdf) (stating that a judge cannot write a letter of recommendation to a sentencing judge on behalf of a lifelong friend); Ark. Judicial Ethics Advisory Comm., Op. 95-01 (1995), available at [http://www.accessarkansas.org/jec/committees/advisory\\_95\\_01.html](http://www.accessarkansas.org/jec/committees/advisory_95_01.html) (stating that a judge may write a letter of recommendation for a friend, so long as it is not on judicial letterhead); S.C. Comm’n on Judicial Conduct, Op. 6-1994 (1994), available at <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=06-1994> (stating that a judge may not write a letter on behalf of a college classmate who was convicted of a crime in 1978 and sought a pardon in 1994); State of Wash. Ethics Advisory Comm., Op. 92-17 (1992), available at [http://www.courts.wa.gov/programs/orgs/pos\\_ethics/index.cfm?fa=pos\\_ethics.dispopin&mode=9217](http://www.courts.wa.gov/programs/orgs/pos_ethics/index.cfm?fa=pos_ethics.dispopin&mode=9217) (prohibiting a judge from writing a letter for the adult child of a family friend in conjunction with federal sentencing proceedings); *Digests of Informal Opinions*, JUDICIAL ETHICS COMM. OF THE PA. CONFERENCE OF STATE TRIAL JUDGES, <http://ethics.pacourts.us/digests.htm> (last visited Jan. 11, 2011) (reporting on a March 12, 2008 opinion prohibiting a judge from writing a letter to a district attorney on behalf of the judge’s friend who was arrested for driving under the influence).

79. *See, e.g.*, Conn. Comm. on Judicial Ethics, Op. No. 2009-07, in *INFORMAL OPINION SUMMARIES 14* (2009), available at [http://www.jud.ct.gov/committees/ethics/informal\\_summaryLog.pdf](http://www.jud.ct.gov/committees/ethics/informal_summaryLog.pdf) [hereinafter *INFORMAL OPINION SUMMARIES*] (emergency staff opinion stating that a judge may not attend a public event where a friend of the judge plans to announce his candidacy for public office); *see also* Fla. Judicial Ethics Advisory Comm., Op. 2004-30 (2004), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/>

attorneys appearing before the judge.<sup>80</sup> These findings raise serious questions as to whether judges are in the best position to decide whether social relationships compromise the prestige of their office or are harmful to the public.

### 3. ESN AND DWORKIN'S FUTURE-ORIENTED CONSENT

There is also considerable jurisprudential evidence indicating that the restrictionist approach does not interfere with a judge's autonomy, but, rather, is consistent with it. Consider Gerald Dworkin's "future-oriented consent" theory, which involves situations under which a person will come to welcome certain coercive measures in the future rather than the time at which the coercion occurs.<sup>81</sup> Theorists have incorporated the principle into various types of legal doctrines, e.g., restitution and incapacity.<sup>82</sup> For instance, in the case of cognitive delusions, Dworkin reminds us that the law acts against the expressed will of the person involved, but respects the person's true will.<sup>83</sup> Dworkin explains that if a man believes that he will fly when he jumps out of a window, the law permits another to forcibly detain him against his expressed will.<sup>84</sup> The reasoning is that the man does not truly wish to be injured or to injure someone else.<sup>85</sup> If he were

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jeacopinions/2004/2004-30.html (stating that a judicial candidate may not attend church and be introduced to the congregation by an incumbent judge as a candidate and the judge's "guest and friend"); Ga. Judicial Qualifications Comm., Op. 209 (1996), available at <http://www.gajqc.com/opinions.cfm> (accessed by searching for Opinion Number 209) (stating that a judge may not put a bumper sticker on his personal vehicle displaying his support for another judicial candidate who is a friend of the judge).

80. See, e.g., Ala. Judicial Inquiry Comm'n, Op. 81-99 (1981), available at <http://www.alalinc.net/jic/opinions/ao81-99.htm> (requiring that judges disqualify themselves from a capital murder case where the victim was the son of the judges' personal friend); State of Nev. Comm'n on Judicial Discipline, Standing Comm. on Judicial Ethics & Election Practices, Op. JE04-002 (2004), available at <http://judicial.state.nv.us/je040023new.htm> (requiring disqualification from civil eviction cases brought by the owner of an apartment complex who discusses evictions with the judge and has a close personal relationship with the judge); N.Y. Advisory Comm. on Judicial Ethics, Op. 08-166 (2008), available at <http://www.nycourts.gov/ip/judiciaethics/opinions/08-166.htm> (requiring a judge to disclose the fact that an attorney appearing before the judge was a personal friend and former business associate of the judge); S.C. Comm'n on Judicial Conduct, Op. 17-2002 (2002), available at <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2002> (stating that a judge must disqualify himself from those cases where his girlfriend, a law enforcement agent, appears before him); Conn. Comm. on Judicial Ethics, Op. No. 2009-30, in INFORMAL OPINION SUMMARIES, *supra* note 79, at 29-30 (emergency staff opinion requiring a judge's disqualification when an attorney in the case has a close relationship with the judge's family).

81. Gerald Dworkin, *Paternalism*, in PHILOSOPHY OF LAW 258, 263-64 (Joel Feinberg & Hyman Gross eds., Wadsworth Publ'g Co. 3d ed. 1986) (1975).

82. See, e.g., *Credit Bureau Enters., Inc. v. Pelo*, 608 N.W.2d 20, 25 (Iowa 2000) ("In certain circumstances, however, restitution for services performed will be required even though the recipient did not request or voluntarily consent to receive such services."); *Rivers v. Katz*, 495 N.E.2d 337, 343 (N.Y. 1986) ("For the State to invoke [the *parens patriae*] interest [to justify overriding appellants' protests to the administration of mind-altering drugs], 'the individual himself must be incapable of making a competent decision concerning treatment on his own.'") (quoting *Rogers v. Okin*, 634 F.2d 650, 657 (1st Cir. 1989)).

83. Dworkin, *supra* note 81, at 265.

84. *Id.*

85. *Id.*

aware that he is mistaken as to the harmful consequences of his jump, he would not wish to jump, and thus, would want another to stop him.<sup>86</sup> Hence, the man's autonomy or will is satisfied by another's interference with his expressed desire, although, at the time of interference, it appears unwelcome. For another to refrain from interfering in such circumstances is to act against the person's autonomy or true will.

A judge, being human, is not immune to deficiencies in knowledge, irrational thinking, or social impulses or disorders.<sup>87</sup> A judge, like any other person, may engage in conduct that is harmful to himself, the public, or both. More specifically, a judge, like any other person, may either attach incorrect weight to some of his or her values, e.g., value for the taste of wine or tobacco over the value of good health;<sup>88</sup> inaccurately evaluate the risk associated with a specific act when weighing it against the inconvenience of risk reducing measures, e.g., neglect to fasten a seatbelt or wear a helmet when riding a motorcycle because of the inconvenience;<sup>89</sup> suffer from an inability to resist certain forms of immediate pleasure<sup>90</sup> or evaluate the consequences of certain interactions;<sup>91</sup> or stand unable to determine which course of action best reduces his or her risk.<sup>92</sup>

In the case of ESN, judges may incorrectly assess the effectiveness or functionality of privacy settings, exercise poor judgment in the amount of time they spend on ESN websites, or improperly weigh the negative consequences of their ESN conduct. For example, Chief Judge Ernest H. Woods III recently resigned from his seventeen-year position after it was revealed that he exchanged improper emails with a defendant in his court, in violation of the Georgia Code of Judicial Conduct.<sup>93</sup> Judge Matthew A. Sciarrino, Jr. was involuntarily transferred because of his Facebook activity.<sup>94</sup> Judge Sciarrino maintained a Facebook page, viewable by the public,<sup>95</sup> through which he "friended" several lawyers, updated his Facebook status from the bench, and "once took a photograph of his crowded courtroom and posted it" on his Facebook page.<sup>96</sup> Similarly, Judge Jonathan

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86. *Id.*

87. *See id.* at 236.

88. *See id.* at 236-37.

89. Dworkin, *supra* note 81, at 258, 265.

90. *See id.*

91. *See id.*

92. *See id.*

93. Kathryn Hayes Tucker, *Ga. Judge Steps Down Following Questions About Facebook Relationship With Defendant*, LAW.COM (Jan. 7, 2010), <http://www.law.com/jsp/article.jsp?id=1202437652986>.

94. John M. Annese, *Staten Island Criminal Court Judge to be Transferred to Manhattan After Facebook Postings, Sources Say*, SILIVE.COM (Oct. 15, 2009, 7:02 AM), [http://www.silive.com/news/index.ssf/2009/10/criminal\\_court\\_judge\\_to\\_be\\_tra.html](http://www.silive.com/news/index.ssf/2009/10/criminal_court_judge_to_be_tra.html).

95. *Id.* Some ESN sites maintain that they have filters that will protect member profiles from public view. *See, e.g., Help Center, supra* note 18 (follow "Privacy" hyperlink; then follow "Privacy settings and fundamentals" hyperlink).

96. Daniel Leddy, *MySpace, the Judge and Judicial Propriety*, SILIVE.COM (Oct. 20, 2009, 7:19 AM), [http://www.silive.com/opinion/danielleddy/index.ssf/2009/10/myspace\\_the\\_judge\\_and\\_judicial.html](http://www.silive.com/opinion/danielleddy/index.ssf/2009/10/myspace_the_judge_and_judicial.html).

MacArthur was removed from office after he posted inflammatory language on his MySpace page.<sup>97</sup>

In light of the awareness of irrationality, temporal deficiencies in cognitive and emotional capacities, and the avoidable and unavoidable ignorance that is inimical to the execution of proper judicial duties, prudence suggests that judges would desire the formation of a specific arrangement that restricts them from making judicial decisions or behaving in certain ways that might produce irreparable harm to the public. While judges may be willing to accept the risk of harm to their person, they, presumably like most individuals, are less willing to accept placing others at risk. Therefore, it is rational for judges to desire that others prevent them from acting in a manner that harms the public or compromises the prestige of the judicial office, though at the time of the judge's conduct, the judge may not appreciate the value of the interference because of a lapse in judgment, knowledge, or will power.<sup>98</sup>

For instance, few would deny that if a judge knows that he or she is susceptible to defective judgment or behavior whenever certain temptation is present, it would be reasonable for the judge to ask a friend to restrict his or her freedom when such conditions are obvious to the friend but remain less obvious to the judge, i.e., driving while intoxicated.<sup>99</sup> The judge consents to the friend's infringement upon the judge's freedom even though at the time of consent, the specific conditions or type of interference the friend may exercise may be unknown to both at the time the consent is given, i.e., subsequently taking the judge's car keys.

The rationality that supports the reasoning in the case of the judge's friend is analogous, in many respects, to the reasoning employed by restrictionists. As with the friend, with respect to the Judicial Code and the ethics commission that interprets its applications, the judge does not consent to specific interference or restriction. Rather, the judge consents to a code of conduct that includes supervision by his or her peers, with an understanding that they may interfere with the judge's freedom in order to safeguard the public and protect the judge's interest. The various ethics commissions and Judicial Code, in restricting the judge's conduct, are, in effect, aligning the judge's conduct with the conduct the judge would choose if free from cognitive or behavioral imperfection.<sup>100</sup> In short, the ethics restrictions are consistent with judges' autonomy or will and accurately reflect judges' desire to avoid harming the highly vulnerable public.<sup>101</sup>

Put succinctly, the restrictionist approach respects a judge's autonomy, upholds

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97. Martha Neil, *Temp Judge Fired Over MySpace Post*, A.B.A. J. (Aug. 14, 2007), [http://www.abajournal.com/news/article/temp\\_judge\\_fired\\_over\\_myspace\\_post/](http://www.abajournal.com/news/article/temp_judge_fired_over_myspace_post/).

98. See Dworkin, *supra* note 81, at 264.

99. See *id.*

100. See *id.* at 237.

101. See *id.* at 232, 237.



the prestige and reputation of the judicial office, and protects the public from harm in a manner in which the integrationist approach falls short.<sup>102</sup> It is not that integrationists do not value the public welfare. Rather, integrationists appear to recognize the risk of ESN “friending,” but either discount the degree to which restricting a judge’s use of ESN websites is consistent with the judge’s desire to avoid harmful consequences relative to ESN usage<sup>103</sup> or underestimate the likelihood of ESN “friending” leading to violations of the Judicial Code. But as the discussion below reveals, ESN “friending” has the potential to create numerous ethical problems for judges when one considers the specific text of all four canons of the Judicial Code.

### III. ESN AND THE JUDICIAL CODE CANONS

#### A. CANON ONE: JUDGES AND ESN FRIENDSHIPS

Canon One of the Judicial Code (“Canon One”) requires a judge or judicial candidate to “uphold and promote the independence, integrity, and impartiality of the judiciary, and . . . [to] avoid impropriety and the appearance of impropriety.”<sup>104</sup> By its terms, it could be accurately described as the “public perception” canon<sup>105</sup> because it was designed to promote public confidence and protect the prestige of the judicial office.<sup>106</sup> A judge violates Canon One by failing to comply with the law, court rules, or provisions of the Judicial Code,<sup>107</sup> or by engaging in conduct that creates in “reasonable minds” the perception that the judge acted in a way that reflects poorly on her “honesty, impartiality, temperament, or fitness to serve as a judge.”<sup>108</sup> It prohibits, among other things, judges from using or attempting to use their office for personal gain.<sup>109</sup> It renders improper a judge’s use of: (1) “judicial status to gain favorable treatment in encounters with traffic officials” or (2) official “judicial letterhead for [personal] gain” or “to exert pressure by reason of the judicial office.”<sup>110</sup>

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102. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2256-57 (2009) (holding that, despite the lack of actual bias, the Fourteenth Amendment compels a judge to recuse himself when one of the parties appearing before him contributed large amounts of money to the judge’s electoral campaign).

103. See Dworkin, *supra* note 81, at 259, 265.

104. MODEL CODE OF JUDICIAL CONDUCT Canon 1.

105. See MODEL CODE OF JUDICIAL CONDUCT R. 1.2 & cmt. 1 (“Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.”).

106. See MODEL CODE OF JUDICIAL CONDUCT R. 1.2.

107. MODEL CODE OF JUDICIAL CONDUCT R. 1.1.

108. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 & cmt. 5.

109. MODEL CODE OF JUDICIAL CONDUCT R. 1.3 & cmt. 1.

110. MODEL CODE OF JUDICIAL CONDUCT R. 1.3 cmts. 1-2; e.g., *Spruance v. Comm’n on Judicial Qualifications*, 532 P.2d 1209, 1216-19, 1220, 1225-26 (Cal. 1975) (removing the judge from office because, among other things, he heard cases involving the son of a friend and political supporter, the nephew of a friend and political supporter, and an attorney who was dating the judge’s daughter); *In re Former Judge Wasilenko*, 49

Canon One does not require the judge to be found impartial or biased.<sup>111</sup> Rather, a judge violates Canon One when the judge engages in conduct that gives the impression that the judge is partial to one party or the other or subject to the influence of another person.<sup>112</sup> A violation of Canon One certainly occurs if a judge permits others to use the judge's office to advance their personal or financial interest.<sup>113</sup> Hence, whenever a judge permits an ESN user to be a "friend," the judge risks violating this ethical standard because a potential consequence of ESN "friending" is that the ESN user could use the ESN "friendship" with the judge to advance his or her personal or financial interest.<sup>114</sup>

## B. CANON TWO: JUDICIAL FUNCTIONS AND ESN FRIENDSHIPS

The standards enunciated under Canon One are closely aligned with those stated in Canon Two, which requires judges to perform their judicial duties not only impartially, but competently and diligently.<sup>115</sup> Judicial Canon Two has

Cal. 4th CJP Supp. 26, 32, 34, 36-37, 39, 49, 52 (Cal. Comm'n on Judicial Performance 2005) (concluding that the judge should have recused himself from hearing numerous traffic violations of friends and family members).

111. MODEL CODE OF JUDICIAL CONDUCT Canon 1, R. 1.2 cmt. 3 ("Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary.") (emphasis added).

112. MODEL CODE OF JUDICIAL CONDUCT R. 1.2; see *In re Corboy*, 528 N.E.2d 694, 700-01 (Ill. 1988) (per curiam) (noting that where an attorney gave a judge \$1,000, this gives the impression of influence over the judge); *People v. Bradshaw*, 525 N.E.2d 1098, 1101-02 (Ill. App. Ct. 1988) (holding that a judge erred in not recusing himself after a meeting in which a sheriff deputy, who worked in the judges' courtroom, informed the judge that she was the mother of one of the victims in a case before the judge; and opining that the judge was required to avoid giving the public the impression that he was improperly influenced); see also *In re Cresap*, 940 So.2d 624, 635, 638-39 (La. 2006) (holding that the judge violated a Louisiana ethics rule that forbid judges from "convey[ing] the impression that others are in a position to influence the judge"); *In re Eskridge*, 559 S.E.2d 575, 575-76 (S.C. 2002) (per curiam) (noting the appearance that a public official had influence over a judge, when the public official would give the judge a list of the defendants set to appear before the judge, with "NG" for "Not guilty" appearing beside some of the defendants' names, and the judge would subsequently find these defendants not guilty).

113. MODEL CODE OF JUDICIAL CONDUCT R. 1.3.

114. See, e.g., Fla. Judicial Ethics Advisory Comm., *supra* note 17 (stating that, by simply listing an attorney who may appear before a judge as a "friend," the judge advances the personal interest of that attorney by conveying "a special position to influence the judge"); N.Y. State Advisory Comm. on Judicial Ethics, *supra* note 39 (stating that befriending lawyers could lead to "increased access . . . to any personal information the judge chooses to post on his/her own profile page," which could create "at least, the appearance of a stronger bond").

115. MODEL CODE OF JUDICIAL CONDUCT Canon 2. Among the factors to be considered in determining whether a judge's impartiality has been compromised are: the duration of the relationship, frequency of communications between the party and the judge, the time and date of communications, and the nature of the relationship. See MODEL CODE OF JUDICIAL CONDUCT R. 2.11; *McCullough v. Comm'n on Judicial Performance*, 776 P.2d 259, 262-64 (Cal. 1989) (holding that where there was a long-term friendship and the judge had extra-judicial discussions with the friend about the case, the judge should have disqualified himself); *Spruance*, 532 P.2d at 1216-19, 1220, 1225-26 (holding that the judge should not have heard cases involving the son of a friend and political supporter, the nephew of a friend and political supporter, and an attorney who was dating the judge's daughter); *In re Wasilenko*, 49 Cal. 4th CJP Supp. at 32, 34, 36-37, 39, 49, 52 (holding that where the judge heard numerous traffic violations of friends and family members, he should have recused himself); see

multiple broad components that present serious questions regarding the permissibility of ESN “friending.” For instance, judges are required to be “dignified” when interacting with “litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity,” (collectively referred to as “court participants.”)<sup>116</sup> Undue influence or even the appearance of undue influence on the part of the judge compromises the dignity of the judge’s office.<sup>117</sup> Nonetheless, a judge may, albeit unintentionally, unduly influence a court participant simply by requesting an ESN friendship. Circumstances may arise in which a court participant may have personal reasons for desiring not to “befriend” a judge on an ESN website.<sup>118</sup> Because of the power and influence intrinsic to the judicial office, however, the court participant may not feel free to deny the judge’s ESN “friend” request and, subsequently, may accept it despite his or her true desire to do otherwise.<sup>119</sup> The resulting ESN “friendship” with the court participant heightens the risk of recusal or disqualification of the judge from hearing cases involving or relating to the court participant. This outcome not only offends the “dignity” requirement under Canon Two but also stands in stark contrast to judges’ duty to avoid “personal and extrajudicial activities” that increase the risk of disqualification.<sup>120</sup>

Canon Two also requires judges, and their agents, to refrain from initiating, permitting, or considering *ex parte* communications with one of the attorneys or a party to the case before them.<sup>121</sup> This prohibition includes ESN communications.

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*also* Schupper v. Colorado, 157 P.3d 516, 521 (Colo. 2007) (holding that recusal was not necessary where the judge was a former district attorney, who was friends with a member of the prosecution team, because the relationship was from the past and not recent); *In re* Disqualification of Bressler, 688 N.E.2d 517, 518 (Ohio 1997) (holding recusal not necessary where the judge was friends with a detective who was a witness in the case); *People v. Booker*, 585 N.E.2d 1274, 1284-85 (Ill. App. Ct. 1992) (holding that the judge did not have to recuse himself from the present case where he had represented the victim’s father in a previous matter).

116. MODEL CODE OF JUDICIAL CONDUCT R. 2.8(B).

117. MODEL CODE OF JUDICIAL CONDUCT R. 2.4(C) & cmt. 1.

118. See Arthur Bright, *The Judge Would Like to Be Your “Friend”*, CITIZEN MEDIA L. PROJECT BLOG (Sept. 4, 2009), <http://www.citmedialaw.org/blog/2009/judge-would-be-your-friend> (“[I]t’s not hard to imagine situations where lawyers might mouth off on Facebook about something wholly unrelated to their cases, but nevertheless get into hot water when the judge takes a dim view of their thoughts or opinions.”).

119. See *id.* (“[W]hen it comes to judges friending lawyers, the judges have an awful lot of power. Would a lawyer really be comfortable rejecting a judge’s request, given that the lawyer always wants to stay on the judge’s good side, both for his own good and that of his client?”).

120. MODEL CODE OF JUDICIAL CONDUCT R. 2.1 & cmt. 1. Judges must also avoid making hostile remarks or exhibiting apparent bias towards someone on an ESN site that will appear before them. See Neil, *supra* note 97 (reporting that a temporary judge in Las Vegas was removed from the judicial office after he posted comments on his personal MySpace page that were “reportedly hostile to prosecutors and used graphic language”).

121. MODEL CODE OF JUDICIAL CONDUCT R. 2.9; see also *Tyson v. State*, 622 N.E.2d 457, 460 (Ind. 1993) (holding that a judge’s recusal was warranted where the judge’s wife had *ex parte* communications with an attorney appearing before the judge). For example, in *Vaska v. Alaska*, defendant challenged a judge’s impartiality on the ground that there were improper *ex parte* communications between the judge’s law clerk and a state’s attorney and that the judge’s law clerk and the state’s attorneys were friends. *Vaska v. Alaska*, 955 P.2d 943, 944-45 (Alaska Ct. App. 1998). The law clerk sent a communication to the state’s attorney that clearly

Perhaps the most widely known offender of the rule is Judge B. Carlton Terry, Jr., who was reprimanded for his Facebook activity.<sup>122</sup> Judge Terry befriended one of the attorneys appearing before him in a child custody case.<sup>123</sup> Throughout the case, Judge Terry updated his Facebook page with news of the trial, posted statements regarding material witnesses, and responded to the attorney's Facebook post, "I hope I'm in my last day of trial," with "[Y]ou are in your last day of trial."<sup>124</sup> Judge Terry's ESN activity amounted to prohibited "ex parte communications with counsel for a party in a matter being tried before him."<sup>125</sup> Judge Terry's actions also contravened Canon Two's prohibition against making judicial statements on pending and impending cases.<sup>126</sup>

### C. CANON THREE: JUDICIAL CONFLICT AND ESN "FRIENDSHIPS"

While Canon Two requires a judge to perform his or her duties "impartially, competently, and diligently,"<sup>127</sup> Canon Three governs how judges conduct themselves outside their judicial activities.<sup>128</sup> Together, Canons Two and Three require that a judge's official duties take precedence over any and all other activities in which the judge may become involved.<sup>129</sup> To that end, judges may never divest themselves of their judicial responsibilities. Once installed into office, the status of judge is indelibly imprinted on that person and the responsibilities associated with the judicial office apply both during the judge's professional activities and personal affairs, including personal ESN activities.<sup>130</sup> Therefore, judges are required to conduct their "personal and extrajudicial activities [so as] to minimize the risk of conflict with the obligations of judicial office."<sup>131</sup> Canon Three prohibits ESN "friendship" because the activities constrained by Canon Three include, but are not limited to: (1) using nonpublic information for personal gain;<sup>132</sup> (2) affiliating with an organization that practices

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avored the state's attorney, and signed it "P.S. FOR YOUR EYES ONLY!!!" *Id.* at 944. The court ruled that the law clerk's behavior was suspected to give rise to a reasonable appearance of judicial bias. *Id.* at 946.

122. State of N.C. Judicial Standards Comm'n, Inquiry No. 08-234 (2009), available at <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf>.

123. *Id.* at 2.

124. *Id.*

125. *Id.* at 3.

126. See *id.* at 2-3 (reporting that the judge had ex parte communications with one of the attorneys in a case he was presiding over, writing on the attorney's wall that he had "two good parents to choose from" and that the attorney was in his "last day of trial"); see also MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A) (prohibiting judges from communicating about pending and impending cases with limited exceptions).

127. MODEL CODE OF JUDICIAL CONDUCT Canon 2.

128. MODEL CODE OF JUDICIAL CONDUCT Canon 3.

129. MODEL CODE OF JUDICIAL CONDUCT R. 3.1(C) (prohibiting a judge from "participat[ing] in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality").

130. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 & cmt. 1.

131. MODEL CODE OF JUDICIAL CONDUCT Canon 3.

132. MODEL CODE OF JUDICIAL CONDUCT R. 3.5 cmt. 1; see also Fla. Judicial Ethics Advisory Comm., Op. 2005-12 (2005), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2005/>

invidious discrimination;<sup>133</sup> (3) soliciting contributions for a not-for-profit organization;<sup>134</sup> and (4) practicing law<sup>135</sup> via the ESN website. Hence, simply by befriending certain organizations via their officers or central figures, or exchanging certain types of information with an ESN “friend,” a judge may violate Canon Three.

#### D. CANON FOUR: JUDICIAL CAMPAIGNING AND ESN “FRIENDS”

Some judges join ESN sites, such as Facebook, not only for social networking, but also for judicial campaigning purposes.<sup>136</sup> Similar to Canon Three, Canon Four prohibits a judge or judicial candidate from engaging “in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.”<sup>137</sup> It bars judges and judicial candidates from engaging in certain activities or certain types of postings on ESN sites, as well as sending certain types of communications to their ESN “friends.”<sup>138</sup> Prohibited ESN communications include, but would not be limited to: (1) soliciting campaign contributions;<sup>139</sup> (2) publicly endorsing or opposing a candidate for

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2005-12.html (holding that a judge could “not produce or narrate a video in which the judge requests ‘help,’ ‘support’” for a project to restore a courtroom even if the video was seeking more than just financial support, namely moral or vocal support, because of the requested financial contribution); Ga. Judicial Qualification Comm’n, Op. 133 (1989), *available at* <http://gajqc.com/opinions.cfm> (accessed by searching for Opinion Number 133) (ruling that a judge, who was a Chairman on the Tara District of Atlanta Area Council for the Boy Scouts of America, could not participate in fundraising activities; and when a letter was sent out by the Council for fundraising purposes with the judge’s name included in the text, the conduct was considered an ethical violation despite the judge having been unaware that his name would be contained therein).

133. MODEL CODE OF JUDICIAL CONDUCT R. 3.6.

134. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(2).

135. MODEL CODE OF JUDICIAL CONDUCT R. 3.10; Ill. Judicial Ethics Comm., Op. 94-2 (1994), *available at* <http://www.ija.org/ethicsop/opinions/94-2.htm> (holding that a judge should not practice law, and noting that the rule which prohibits the practice of law is not limited to those legal activities that result in compensation, but also extends to the provision of legal services on a pro bono basis and providing legal advice to members of a fraternal organization); *see also* N.Y. State Advisory Comm. on Judicial Ethics, *supra* note 39 (“[U]sers of the social network, upon learning of the judge’s identity, may informally ask the judge questions about or seek to discuss their cases, or seek legal advice. As is true in face-to-face meetings, a judge may not engage in these communications.”).

136. *E.g.*, Fla. Judicial Ethics Advisory Comm., *supra* note 17 (permitting a judge’s campaign committee to post information on the committee’s site); Allison Petty, *Social Networking Web Sites Raise Ethical Issues for Judges, Lawyers*, CHI. DAILY L. BULL., Feb. 3, 2010, § 1, at 1 (reporting that Illinois judges frequently use Facebook as an inexpensive means of campaigning); Rozen, *supra* note 6 (reporting that Judge Susan Criss uses Facebook for both “personal and professional networking purposes,” including “‘friending’ lawyers on Facebook to network and possibly to campaign”).

137. MODEL CODE OF JUDICIAL CONDUCT Canon 4.

138. MODEL CODE OF JUDICIAL CONDUCT R. 4.1; *see also* N.Y. State Advisory Comm. on Judicial Ethics, *supra* note 39 (“The Committee has, for example, advised that a court should not provide a link on its web page to an advocacy group for Megan’s Law which listed the names and counties of residence for registered sex offenders. A judge should thus recognize the public nature of anything he/she places on a social network page and tailor any postings accordingly.”).

139. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 4, R. 4.1(A)(8); *see also* Simes v. Ark. Judicial Discipline & Disability Comm’n, 247 S.W.3d 876, 877, 884 (Ark. 2007) (holding that the Judicial

public office;<sup>140</sup> (3) making statements that commit, or appear to commit, a judge to rule a given way on legal issues within cases that will likely come before the court;<sup>141</sup> (4) “knowingly, or with reckless disregard for the truth,” misrepresenting information about themselves, an opponent, or an issue in a campaign;<sup>142</sup> (5) making representations about a candidate or judge’s sexual activities;<sup>143</sup> (6) speaking on behalf of a political organization;<sup>144</sup> and (7) seeking, accepting, or using endorsements from political organizations.<sup>145</sup> For the above reasons, the restrictionist approach is consistent with the four canons because it incorporates the protections enunciated under the relevant rules supporting each canon.

### CONCLUSION

This essay has explained the various legal risks associated with ESN “friending” under the Judicial Code. The rapid expansion of ESN websites and

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Commission’s determination that the judge violated the ethical rules by asking attorneys for campaign contributions before they were due to appear in court was not clearly erroneous).

140. MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(3); *see also* Ill. Judicial Ethics Comm., Op. 94-11 (1994), available at <http://ija.org/ethicsop/opinions/94-11.htm> (advising that Illinois judges are prohibited from “publicly stating their opinions regarding candidates for office,” and noting that the ethical rules “clearly prohibit[] a judge who is not a candidate from publicly endorsing or opposing any candidate for judicial or other public office”); *In re* Code of Judicial Conduct, 603 So.2d 494, 495-98 (Fla. 1992) (ruling that the challenged canons of the *Florida Code of Judicial Conduct* were constitutional and finding that the rules did not deprive a judge of his right to free speech when he wrote an open letter, which was published by several newspapers, to electors encouraging them to vote for the retention of another judge). In discussing the special place judges hold in society, the Supreme Court of Florida stated:

The great mass of the people think that judges are different, that their special relationship to the law is what makes them different, that they are not merely political authorities, weighing and balancing interests, but legal authorities, guided and restrained by the law. It is this conviction, more than anything else, which compels the people to obey orders of the court. It is this conviction, more than anything else, which gives judges a power and authority that so resembles political power that they mistakenly think they are political people.

*In re* Code of Judicial Conduct, 603 So.2d at 497-98 (quoting Robert A. Goldwin, *Comments to Chapter 1*, in *THE JUDICIARY IN A DEMOCRATIC SOCIETY* 19 (Leonard J. Theberge ed., D.C. Heath & Co. 1979)).

141. MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(12).

142. *See* MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(11); *see also In re* Tully, 2 Ill. Cts. Comm. 150, 154, 157 (1991) (holding that a judicial candidate’s authorization and approval of “improper advertisements” that implied he was already a judge by including terminology like “VOTE FOR JOHN P. TULLY APPELLATE COURT JUDGE” constituted an intentional misrepresentation because candidate was a circuit court judge running for a seat on the appellate court, and not an appellate judge running for reelection).

143. At least one ethics commission has reasoned that it is impermissible for a judicial candidate to disclose information about an opponent’s private sexual conduct, even if that information is factually accurate, unless the conduct would result in a criminal or judicial disciplinary violation. *See* Ill. Judicial Ethics Comm., Op. 03-01 (2003), available at <http://ija.org/ethicsop/opinions/03-01.htm>. Canon Four, however, does not appear to prohibit judicial candidates from truthfully contrasting their background and experience with that of an opponent. *See* MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(11) & cmt. 7. Nor does it appear improper to discuss issues such as an opponent’s health, work habits, philosophy, or sources of campaign funding, so long as the judicial candidate tells the truth. *See id.*

144. *See* MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(2).

145. *See id.*

their growing technological capacities are likely to present additional risks of judicially infirm conduct and public harm as ESN usage nurtures and creates new patterns of human association. To avoid the perils that emanate from current and future ESN capacities—including, but not limited to, “friending”—the Judicial Code should be viewed as a restrictive juridical construct. The *restrictive* approach not only safeguards the public better than the *integrative* approach, it also decreases the risks of judicial disqualification and recusal. Whether one is jurisprudentially inclined to agree with Mill’s well-established *harm principle*, or persuaded by Dworkin’s influential *future-oriented consent* theory, it remains clear that each principle aligns itself with the restrictive approach and recognizes the primacy of harm-avoiding approaches to self-regarding and other-regarding conduct, which is consistent with the purpose of the Judicial Code.