One View of a Digital Cathedral: Toward a Definition of Dignity in Cyberspace

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World War II catalyzed an international effort to ground human rights in “dignity.” The Universal Declaration of Human Rights opens with a “recognition of the inherent dignity” of all “members of the human family.” Both Protocol 13 of the European Convention on Human Rights and Article 3 of the Geneva Conventions feature similar provisions. More than 160 countries highlight “dignity” in their constitutions, while the U.S. Supreme Court has invoked the term over four-hundred times since 1946. Yet these relentless appeals to dignity, as Ruth Macklin maintained nearly two decades ago, offer little more than “vague restatements” and “mere slogans.” One generation after Arendt’s famous call for dignity to be enshrined as “a new law on earth,” dignity’s oversaturation diminishes its utility.

Compounding this problem is the indeterminate relationship between human rights and cyberspace. Advances in the digital landscape pose new challenges to liberty and welfare in the form of hacks, fake news, and restricted internet freedom. Evolving threats of this nature, as the 2016 Amnesty International report made vivid, expose human dignity to “vigorous and relentless assault from powerful narratives of blame, fear, and scapegoating.” In the face of such assault, this essay offers a framework for defining and conceptualizing one strand of “cyberdignity.” Recent legal developments, the essay argues, associate cyberdignity with three values integral to freedom of expression: participation, assent, and privacy. After surveying these three models, the essay concludes by contemplating cyberdignity’s fragility and dependence on formal rights.

Model 1: Packingham and the Right to Online Participation

Our first model concerns what might be termed the right to participation. This value emerges from Packingham v. North Carolina (2017), a case in which the Supreme Court held unconstitutional a state statute restricting registered sex offenders from accessing social media or creating personal websites. In striking down the statute, Packingham underscored the extent to which online speech has, in the words of Justice Kennedy, earned recognition as “the modern public square.” Whether exceptions exist and whether Kennedy’s metaphor warrants slight revision fail to undermine the broader point: reliance on virtual communication renders the internet a “new digital and democratic culture.” Limiting one’s cyber presence cannot, in this model, be viewed merely as limiting some convenient luxury. Instead, such restrictions more properly approximate deprivations of an essential element of free expression.

In Procunier v. Martinez (1974), Justice Marshall recognized the link between communicative participation and human dignity. Constraining prisoners’ access to mail, Marshall reasoned, rejected “the basic human desire for recognition and affront[ed] the individual’s worth and dignity,” given the extent to which
intellectual growth and personal identity rely upon human connection. This first model transposes into the digital arena the concerns expressed in Procunier: even those for whom civil liberties prove limited deserve at least some ability to participate in society’s dominant form of self-expression. Viewing participation as one prong of the dignity of self-expression provides a clear-cut method for establishing legal boundaries in cyberspace that prioritize self-representation and the free exchange of ideas.

Model 2: “Clickwrap” and the Right to Assent

Our second model centers on another element integral to digital freedom of expression: the requirement that users assent to the terms of conditions featured on websites. Such agreements achieve enforceability to the extent that they provide sufficient notice, typically through one of two methods: “browsewrap” or “clickwrap.” While the former conflates usage with consent, the latter requires proactive—that is, clickable—consent. Two recent cases demonstrate courts’ preference for “clickwrap.” In Alan Ross Machinery Corp v. Machinio (2018), the Northern District of Illinois dismissed allegations of the misappropriation of some two thousand sales listings on the basis of deficient underlying “browsewrap.” More recently, in HealthplanCRM v. Avmed (2020), the Western District of Pennsylvania registered similar preference for clickwrap. Through creative reasoning, the court claimed that what appeared as “browsewrap” actually functioned as “clickwrap,” given that a warning hovering beneath a log-in button triggered “a similar psychological effect.”

What animates these two cases transcends procedural preference. Fixations with “clickwrap” pay testament to the link connecting dignity with notice and assent. In Planned Parenthood v. Casey (1992), Justice Stevens viewed the capacity to make decisions as “an element of basic human dignity.” These “clickwrap” cases pale in comparison to the “traumatic and yet empowering decisions” at issue in Casey, but nonetheless provide useful examples for considering dignitary concerns involved in cyberspeech. Under this model, individual choice deserves careful protection. Manufacturing consent thus violates dignity by disregarding the human capacity to make independent choices.

Model 3: Carpenter and the Right to Privacy

A final model, attuned to privacy, emerges from Carpenter v. United States (2018). There, federal investigators accumulated cell-site location information, stored in tower databases, to tie a suspect to a crime scene. Acquired without a warrant, such data provided intimate access into the suspect’s life, exposing personal habits ranging from Church attendance to sleeping locations. Until Carpenter, intrusions of this nature occurred regularly, approximately two-hundred thousand times each year. In Carpenter, however, the Court emphasized a “reasonable expectation of privacy” regarding cellphone location data, access to which now requires probable cause.
Two principles underpinned the Court’s decision: cellphones currently function as indispensable tools, and these tools inform our personal lives. This vision of privacy intersects with the notion that, in a world in which we exist online, the “digital selves” we cultivate demand dignity befitting our four-dimensional forms. As Justice Brennan insisted in Schmerber v. California (1966), the “overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.” By tethering cyberdignity and privacy, this third model views such intrusion as harmful to self-autonomy and capable of compelling expression, especially as school, business, and socialization occur online.

Conclusion

Against criticism attacking the legal utility of human dignity, this essay has aimed to offer a functional approach to dignity in cyberspace. The three strands presented—participation, assent, and privacy—showcase the interrelationship between cyberdignity and freedom of expression. By giving rise to concrete rights, these models provide methods for adjudicating dignity not as abstract generalities invoked for rhetorical purposes, but as legal claims defined in recent judicial developments. Still, this framework presupposes the frailty of cyberdignity. Unlike the non-digital realm, in which some degree of human dignity remains in the absence of rights, cyberspace operates as a territory in which rights necessarily precede dignity. Within this framework, discussions of “inviolability” must therefore resist confusing whether cyberdignity should be violated and whether it can withstand violation. Without the protection afforded by participation, assent, or privacy, the artifice of cyberdignity vanishes.