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**“TRANSPARENCY-WASHING” IN  
THE DIGITAL AGE: A  
CORPORATE AGENDA OF  
PROCEDURAL FETISHISM**

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## **“Transparency-Washing” in the Digital Age: A Corporate Agenda of Procedural Fetishism**

Monika Zalnieriute\*

### **Abstract**

*Contemporary discourse on the regulation and governance of the digital environment has often focused on the procedural value of transparency. This article traces the prominence of the concept of transparency in contemporary regulatory debates to the corporate agenda of technology companies. Looking at the latest transparency initiatives of IBM, Google and Facebook, I introduce the concept of “transparency-washing,” whereby a focus on transparency acts as an obfuscation and redirection from more substantive and fundamental questions about the concentration of power, substantial policies and actions of technology behemoths. While the “ethics-washing” of the tech giants has become widely acknowledged, “transparency washing” presents a wider critique of corporate discourse and neoliberal governmentality based on procedural fetishism, which detracts from the questions of substantial accountability and obligations by diverting the attention to procedural micro-issues that have little chance of changing the political or legal status quo.*

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## I. Introduction

“Visibility is a trap.”

Foucault, *Discipline and Punish*, 1977: 200

Transparency is the modern panacea for tempering power and attaining justice vis-à-vis state, public institutions and powerful corporate actors. Yet, along many other hyped buzzwords with pseudo-religious qualities, “transparency is more often preached than practiced” and, ironically, entails mystical qualities.<sup>2</sup> While contemporary discourse and legal research on the regulation and governance of the digital environment has often focused on procedural values of transparency and due process,<sup>3</sup> the qualities of procedural values such as transparency are rarely challenged. Critical scholars have started investigating the historical roots and anatomy of transparency<sup>4</sup> and this article furthers that investigation by tracing the prominence of the concept of transparency in contemporary regulatory debates to the corporate agenda of technology companies. Looking at the latest transparency initiatives of three major tech companies—IBM, Google and Facebook—I introduce the concept of “transparency-washing,” whereby a focus on transparency acts as an obfuscation and

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<sup>2</sup> Christopher Hood, Transparency in Historical Perspective, in *Transparency: The Key to Better Governance?* 3 (David Heald & Christopher Hood eds., 2006).

<sup>3</sup> Danielle Keats Citron, Technological Due Process, 85 *Washington U. L. Rev.* 1249 (2008); John Elia, Transparency Rights, Technology, and Trust, 11 *Ethics Inf. Tech.* 145 (2009); Nicolas Suzor, *Lawless: The Secret Rules that Govern Our Digital Lives* (2019).

<sup>4</sup> Mikkel Flyverbom, *The Digital Prism: Transparency and Managed Visibilities in a Datafied World* (1st ed. 2019); *Transparency, Society and Subjectivity: Critical Perspectives*, (Emmanuel Alloa & Dieter Thomä eds., 2018); Cynthia Stohl et al., Managing Opacity: Information Visibility and the Paradox of Transparency in the Digital Age, 10 *Int. J. Commun.* 123 (2016).

redirection from more substantive and fundamental questions about the concentration of power and whether a particular issue should be left to the discretion of digital behemoths in the first place. Some scholars have noted how tech giants have been engaging in “ethics-washing” lately. “Transparency washing” works similarly, yet it presents a wider critique of the contemporary governmentality based on procedural fetishism which detracts from questions of substantial accountability and obligations by diverting the attention away from *substantive* issues and towards *procedural* micro-issues that have little chance of changing the political or legal status quo.

## II. From Ethics Washing to Transparency Washing

“In a move of genius, the corporations interested have started to finance multiple initiatives to work on ethics of AI, thus, while pretending best intentions, effectively delaying the debate and work on law for AI.” Paul Nemitz 2018<sup>5</sup>

The language of “ethics” has recently become very popular within technology circles. A quick look at the websites of IBM, Google and Facebook, points to an “ethics”-oriented framing: IBM claims that “[e]thics must be embedded in the design and development process” of its facial recognition technologies;<sup>6</sup> Google has an “ethics charter” and recently introduced a short-lived ethics board; and Facebook co-founded an AI ethics research center in

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<sup>5</sup> Paul Nemitz, Constitutional Democracy and Technology in the Age of Artificial Intelligence, 376 *Philos. Trans. R. Soc. Math. Phys. Eng. Sci.* 20180089 (2018).

<sup>6</sup> IBM, Everyday Ethics for Artificial Intelligence, IBM Watson (<https://www.ibm.com/watson/assets/duo/pdf/everydayethics.pdf>).

Germany.<sup>7</sup> It seems that technology companies have become very much concerned about “ethics.”

Yet the emergence of the concept of ethics should not be mistaken as a push for stricter standards or regulation—we already have an established discourse and language of human rights and regulation with legal obligations attached to them. Instead, such an emergence represents a strategic attempt to establish a normative alternative—a substitute for law, that lacks legal obligations for the private companies. A scholarly critique has emerged arguing that the language of ethics creates an “acceptable façade”; a much-needed cover for tech companies to appear as though they are following ethical principles when it comes to doing business and to justify the industry’s voluntary self-regulation as an alternative to governmental intervention. For example, Ben Wagner terms this repurposing of the concept of “ethics” by technology companies as “ethics washing,”<sup>8</sup>—a cynical strategy for companies to avoid regulation by governments while continuing to promote their own ethical self-regulation.<sup>9</sup> Similarly, Elettra Bietti observes how the language of ethics is being instrumentalized and how it weaponizes self-regulatory efforts to promote “shallow appearances of ethical behaviour.”<sup>10</sup>

The lack of enforcement mechanisms for ethical principles coupled with the non-binding, self-regulatory nature of internal ethics “policies,” “principles” and “values” further adds to ethics washing.<sup>11</sup> Such discourse aims to gloss over the inevitable conflict of interest between technology corporations, who have a financial interest in profiting off the development and deployment of data collection technologies on the one hand; and individuals, who use

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<sup>7</sup> James Vincent, *The Problem with AI Ethics*, *The Verge*, Apr. 3, 2019 (<https://www.theverge.com/2019/4/3/18293410/ai-artificial-intelligence-ethics-boards-charters-problem-big-tech>).

<sup>8</sup> Ben Wagner, *Ethics as an Escape from Regulation: From “Ethics-Washing” to Ethics-Shopping?*, in *Being Profiled: Cogitas Ergo Sum: 10 Years of Profiling the European Citizen 84* (Emre Bayamlioglu et al. eds., 2018).

<sup>9</sup> *Id.* at 84-90.

<sup>10</sup> Elettra Bietti, *From Ethics Washing to Ethics Bashing: A View on Tech Ethics from Within Moral Philosophy*, in *Proceedings of ACM FAT\* Conference (FAT\* 2020)* (2019).

<sup>11</sup> Vincent, *supra* note 7.

them, and whose rights to, inter alia, privacy, self-determination, non-discrimination are at stake, on the other hand.<sup>12</sup>

Similar to ethics washing, yet rooted somewhat more heavily in legal lexicon, the language of “transparency” is gaining traction within the tech industry. For example, using “transparency” rhetoric, IBM announced its “IBM Policy Lab,” dedicated to policy development on transparency in AI, in January 2020.<sup>13</sup> Since 2019, Google has been developing its “Privacy Sandbox” supposedly to improve transparency in targeted online advertising; and Facebook, seeking to appear transparent to its 2.6 billion active users, launched a political advertising database<sup>14</sup> and an (in)famous oversight board.<sup>15</sup> Transparency rhetoric is both related to ethics, but is also an alternative, additional discourse because of its connotations to legal normativity—for example, transparency is both one of the foundational values of administrative law as well as of the fuzzy legal concept, known as the “rule of law.”<sup>16</sup> The use of the language of transparency—in addition to ethics—thus, can deceptively imply the existence of legal obligations and regulations, where there are none.

The following sections discuss recent corporate transparency initiatives where, in response to growing pressure for regulation, tech companies have instead come up with private solutions to seemingly increase their transparency to the public. Yet

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<sup>12</sup> A similar argument is advanced by Tom Slee, *The Incompatible Incentives of Private-Sector AI*, in *The Oxford Handbook of Ethics of AI* 106 (Markus D. Dubber et al. eds., 2020) (<https://oxfordhandbooks.com/view/10.1093/oxfordhb/9780190067397.001.0001/oxfordhb-9780190067397-e-6>).

<sup>13</sup> IBM, *Davos Panel Hosted by IBM CEO Ginni Rometty Explores Precision Regulation Of AI & Emerging Technology*, IBM News Room (2020) (<https://newsroom.ibm.com/2020-01-22-Davos-Panel-Hosted-By-IBM-CEO-Ginni-Rometty-Explores-Precision-Regulation-Of-AI-Emerging-Technology>).

<sup>14</sup> Satwik Shukla, *A Better Way to Learn About Ads on Facebook*, About Facebook, Mar. 28, 2019 (<https://about.fb.com/news/2019/03/a-better-way-to-learn-about-ads/>).

<sup>15</sup> Facebook, *Establishing Structure and Governance for an Independent Oversight Board*, About Facebook, Sept. 17, 2019 (<https://about.fb.com/news/2019/09/oversight-board-structure/>).

<sup>16</sup> Monika Zalnieriute et al., *The Rule of Law and Automation of Government Decision-Making*, 82 *Mod. L. Rev.* 425 (2019); Monika Zalnieriute et al., *Rule of Law by Design?*, *Tulane L. Rev.* (forthcoming 2021).

a closer look shows that a lot of the transparency initiatives were aimed to obfuscate and misdirect policymakers, researchers and the public, suggesting that corporations are engaging in what I term a “transparency washing” in the bid to strengthen their brand and avoid regulation and binding laws. At the same time, the excessive emphasis on transparency is not unique to technology companies; as I will suggest in the following section, it is part of a larger trend of contemporary governmentality, based on procedural fetishism, which is intrinsically linked to the origins of the modern state and administration.

### III. IBM’s Vocal Stance on Transparency

The International Business Machines Corporation (IBM) is one of the world’s oldest (and largest) technology companies.<sup>17</sup> Best known for its famous personal computers, in recent years the company’s focus has shifted to AI, facial recognition technologies (FRT), business IT infrastructure, cloud computing, consulting services and data analytics.<sup>18</sup> In response to growing pressure for regulation of tech companies, IBM has recently positioned itself as a pioneer at the forefront of policy discussions on greater transparency and regulation of AI technologies. For example, “IBM’s Principles on Data Trust and Transparency,” released in 2017, proclaimed that “[n]ew technology, including AI systems, must be transparent and explainable.”<sup>19</sup> Similarly, the “IBM Policy Lab,” announced in January 2020 at the World Economic Forum, has the mandate of “guid[ing] regulation of AI based on

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<sup>17</sup> Encyclopaedia Britannica, IBM | Founding, History, & Products, Encyclopaedia Britannica (<https://www.britannica.com/topic/International-Business-Machines-Corporation>).

<sup>18</sup> Eric Reed, History of IBM: Timeline and Facts, TheStreet, Feb. 24, 2020 (<https://www.thestreet.com/personal-finance/history-of-ibm>).

<sup>19</sup> IBM, IBM’S Principles for Data Trust and Transparency, THINKPolicy Blog (2018) (<https://www.ibm.com/blogs/policy/trust-principles/>).

accountability, transparency, fairness and security."<sup>20</sup> Yet several of IBM's transparency initiatives raise questions about the authenticity of the company's vocal position, and the ability of transparency ideas to tamper the corporate power in the digital environment.

*A. IBM's Transparency About Supplying FRT Technologies to Police*

Following the mass uprising in response to the killing of George Floyd on May 25, 2020, IBM's CEO Arvind Krishna announced that the company would no longer sell facial recognition software to police, stating:

IBM firmly opposes and will not condone uses of any [facial recognition] technology, including facial recognition technology offered by other vendors, for mass surveillance, racial profiling, violations of basic human rights and freedoms, or any purpose which is not consistent with our values and Principles of Trust and Transparency.<sup>21</sup>

While IBM has been vocal about the need for greater transparency for FRT as well as the potential of FRT to contribute to racial injustice in the USA, IBM's actions question whether mere declarations of transparency—even if they are not used cynically—are capable of solving substantial policy problems, such as the use of FRT to suppress dissidents and protesters, or its inherent biases against racialized and discriminated groups. For example, a detailed report by *The Intercept* published in March 2019 revealed that in 2012 IBM had provided police forces in Philippines with video surveillance technology which was subsequently used to perpetuate

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<sup>20</sup> IBM, *supra* note 13.

<sup>21</sup> IBM CEO's Letter to Congress on Racial Justice Reform, THINKPolicy Blog, June 8, 2020 (<https://www.ibm.com/blogs/policy/facial-recognition-susset-racial-justice-reforms/>).

President Duterte’s war on drugs through extrajudicial killings.<sup>22</sup> At the time, the brutal and excessive crime suppression tactics of the Davao police were well known to local and international human rights organizations.<sup>23</sup>

At the time, IBM defended the deal with Philippines, saying it “was intended for legitimate public safety activities”<sup>24</sup> but claimed that it had ceased provision of its technology to Philippines in 2012. However, it took at least several years for IBM to stop providing general purpose facial recognition or analysis software to law enforcement (e.g., IBM mentioned its “Face Capture” technology in a public disclosure in 2013 and 2014 presentation on its Davao City project.<sup>25</sup> The company’s practice of providing authoritarian regimes with technological infrastructure is not new and dates back to the 1930s when IBM supplied the Nazi Party with unique punch-card technology that was used to run the regime’s censuses and surveys to identify and target Jewish people.<sup>26</sup>

#### *B. IBM Transparency Initiative for Fighting Racial Bias*

In January 2019, in search of a solution to rectify the widely known racial bias of FRT software, IBM aimed to position itself as a transparency pioneer by releasing two datasets which can be used for training facial recognition systems—one of which was curated specifically to help remove bias.<sup>27</sup> This was meant to be a step towards a self-regulatory conscious action following criticisms that IBM’s FRT had been yielding high false positive rates, with its AI powered gender classification software shown to have 34.4 percent

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<sup>22</sup> George Joseph, Inside the Video Surveillance Program IBM Built for Philippine Strongman Rodrigo Duterte, *The Intercept*, Mar. 20, 2019 (<https://theintercept.com/2019/03/20/rodrigo-duterte-ibm-surveillance/>).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Edwin Black, *IBM and the Holocaust: The Strategic Alliance Between Nazi Germany and America’s Most Powerful Corporation* (2001).

<sup>27</sup> Ryan Browne, IBM Releases Diverse Dataset to Fight Facial Recognition Bias, Jan. 29, 2019 (<https://www.cnbc.com/2019/01/29/ibm-releases-diverse-dataset-to-fight-facial-recognition-bias.html>).

error rates between lighter males and darker females.<sup>28</sup> In response, IBM released its dataset collection to researchers and the public as a progressive commitment to reducing bias in FRT.

However, this move towards increased transparency and self-directed efforts to solve bias is again somewhat at odds with their supposed commitment to “trust” and “transparency.” IBM’s dataset for FRT training contained nearly a million photos taken from photo hosting site Flickr and was coded to describe the subjects’ appearance. These photographs were collected and released without the consent of the users who had uploaded them to Flickr (under a Creative Commons license, which IBM exploited for its own end, yet, training FRT algorithms is not a “use” anticipated by even Creative Commons’ most permissive licenses).<sup>29</sup> It is rather ironic that between 2009 and 2012, IBM had also used CCTV footage provided by the NYPD to develop surveillance and identification technology with skin tone searching capabilities.<sup>30</sup> IBM’s vocal commitment to “transparency” apparently does *not* extend to disclosure of its technology deployment in ways which contributed to the development of racialized technological infrastructure in the first place.

In short, while IBM’s latest vocal position on increased transparency might appear positive, behind this seemingly progressive policy lies company efforts to navigate the growing public disapproval of private companies providing infrastructure to police and immigration, and to avoid external governmental regulation on these issues by promoting the idea that self-regulatory “transparency” initiatives will keep the company

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<sup>28</sup> Joy Buolamwini & Timnit Gebru, Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification, 81 Proc. Machine Learning Res. 1 (2018) (<http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf>).

<sup>29</sup> Shannon Liao, IBM Didn’t Inform People When It Used Their Flickr Photos for Facial Recognition Training, *The Verge*, Mar. 12, 2019 (<https://www.theverge.com/2019/3/12/18262646/ibm-didnt-inform-people-when-it-used-their-flickr-photos-for-facial-recognition-training>).

<sup>30</sup> George Joseph & Kenneth Lipp, IBM Used NYPD Surveillance Footage to Develop Technology That Lets Police Search by Skin Color, *The Intercept*, Sept. 6, 2018 (<https://theintercept.com/2018/09/06/nypd-surveillance-camera-skin-tone-search/>).

accountable, and the destructive potential of its technology harnessed.

#### IV. Google’s Transparency Initiatives

Google (now parented by Alphabet) is a technology company founded in 1998 which dominates the global online products and services market, ranking as the world’s second most valuable brand in 2019.<sup>31</sup> Among its best-known services are its search engine, which captures over ninety two percent of the worldwide search engine market share as of September 2020,<sup>32</sup> and YouTube, an online video hosting site with over two billion users or one-third of the internet.<sup>33</sup>

Google is one of the pioneers of the so-called “Transparency Reports,” which became prominent in the tech space in the 2010s. These Reports document the number of law enforcement and intelligence requests that tech companies receive and respond to within a year. Google’s release of the Transparency Reports has prompted many other companies to follow suit.<sup>34</sup> These, however, have been criticized for shedding limited light on the actual trustworthiness of companies,<sup>35</sup> as they shift the emphasis from the incompatibility of the business models of tech companies with digital rights, to the actions of governments.<sup>36</sup> Google, now facing an unprecedented anti-trust action initiated by

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<sup>31</sup> Marty Swant, The 2020 World’s Most Valuable Brands, *Forbes* (<https://www.forbes.com/the-worlds-most-valuable-brands/>).

<sup>32</sup> StatCounter, Search Engine Market Share Worldwide, StatCounter Global Stats (<https://gs.statcounter.com/search-engine-market-share>).

<sup>33</sup> YouTube for Press (<https://www.youtube.com/about/press/>).

<sup>34</sup> Ryan Budish, What Transparency Reports Don’t Tell Us, *Atlantic*, Dec. 19, 2013 (<https://www.theatlantic.com/technology/archive/2013/12/what-transparency-reports-dont-tell-us/282529/>).

<sup>35</sup> Christopher Parsons, The (In)effectiveness of Voluntarily Produced Transparency Reports, 58 *Bus. Soc.* 103 (2019).

<sup>36</sup> Rikke Frank Jørgensen, What Platforms Mean When They Talk About Human Rights: Platforms and Human Rights, 9 *Pol’y Internet* 280 (2017).

the US Justice Department in October 2020,<sup>37</sup> launched many other transparency initiatives in recent years.

*A. Advanced Technology External Advisory Council*

One of such initiatives was on March 26, 2019, when Google said it would establish an Advanced Technology External Advisory Council (Council) to bring together a group of experts from various fields to complement the internal governance structures and processes that would help Google to implement *Google’s AI Principles* published in June 2018.<sup>38</sup> Among those principles was a commitment to “provid[ing] appropriate transparency and control over the use of data.”<sup>39</sup>

However, in its bid to supposedly increase transparency to the public, Google failed to apply the same principles internally and in forming the external governance bodies for transparency, such as the Council itself. For example, the Council was dissolved on 4 April, 2019 because of the protests and petitions from Google’s employees to remove one of the Council’s board members, anti-LGBT advocate and climate change denial sponsor Kay Coles James.<sup>40</sup> In response to pressure, Google replied that it was trying to capture “diverse perspectives” on some of the pressing ethical questions but announced that that it was going back to the “drawing board.”<sup>41</sup> While employees’ activism forced Google to

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<sup>37</sup> Dominic Rusche & Kari Paul, US Justice Department Sues Google Over Accusation of Illegal Monopoly, *Guardian*, Oct. 20, 2020 (<https://www.theguardian.com/technology/2020/oct/20/us-justice-department-antitrust-lawsuit-against-google>).

<sup>38</sup> Kent Walker, An External Advisory Council to Help Advance the Responsible Development of AI, *Google*, Mar. 26, 2019 (<https://blog.google/technology/ai/external-advisory-council-help-advance-responsible-development-ai/>).

<sup>39</sup> *Google*, AI at Google: Our Principles, *Google*, June 7, 2018 (<https://blog.google/technology/ai/ai-principles/>).

<sup>40</sup> Scott Shane & Daisuke Wakabayashi, The Business of War: Google Employees Protest Work for the Pentagon, *N.Y. Times*, July 30, 2018 (<https://www.nytimes.com/2018/04/04/technology/google-letter-ceo-pentagon-project.html>).

<sup>41</sup> Walker, *supra* note 38.

rescind the Council, ironically, this showed Google’s unwillingness to publicly share the selection criteria of their transparency boards.

*B. Google’s Ad Transparency Measures: the “Privacy Sandbox”*

In another transparency initiative, in May 2019, Google announced a “Privacy Sandbox” to “enhance user transparency, choice and control”<sup>42</sup>—by adding a so-called “fingerprinting” practice: third-party tracking employed when users have opted-out of ordinary tracking.<sup>43</sup> The initiative consists of “a set of open standards,”<sup>44</sup> stronger restrictions on fingerprinting for ad personalization,<sup>45</sup> and an open-source browser extension that shows the user information about the advertiser, publisher and the criteria which led the ad to be shown to the user.<sup>46</sup>

In addition to the transparency, which Google’s Sandbox initiative will increase, it will also use Google’s federated learning technology (Federated Learning of Cohorts, FLoC) to analyze Google Chrome users’ browsing habits to group them into “flocks,” which identify them as a particular kind of web user. This, as some critics have pointed out, would essentially function as a “behavioral credit score” that may reveal sensitive information to third parties. Trackers can then use this information as they please, including for nefarious purposes such as discriminatory advertising targeted towards vulnerable groups.<sup>47</sup> Google’s Sandbox initiative also takes away individual websites’ freedom to choose how they treat their users; for example, a decision *not* to allow third-party trackers on their site is effectively useless if these “flock” identifiers

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<sup>42</sup> Prabhakar Raghavan, Raising the Bar on Transparency, Choice and Control in Digital Advertising, Google, May 7, 2019 (<https://blog.google/products/ads/transparency-choice-and-control-digital-advertising/>).

<sup>43</sup> Justin Schuh, Building a more private web, Google, Aug. 22, 2019 (<https://blog.google/products/chrome/building-a-more-private-web/>).

<sup>44</sup> *Id.*

<sup>45</sup> Raghavan, *supra* note 42.

<sup>46</sup> *Id.*

<sup>47</sup> Bennett Cyphers, Don’t Play in Google’s Privacy Sandbox, Electronic Frontier Foundation, Aug. 30, 2019 (<https://www.eff.org/deeplinks/2019/08/dont-play-googles-privacy-sandbox-1>).

(and their viewing by third parties) are a built-in feature of the web browser that the user accesses the site on.<sup>48</sup>

It is rather ironic that Google, a company which tracks user behavior on two thirds of the web and owns all of the top five "third-party" domains,<sup>49</sup> is suddenly so vocally opposed to tracking. Google has not yet confirmed whether its Chrome browser, which controls sixty-five percent of the global browser share,<sup>50</sup> will restrict Google's own marketing activities with user data (e.g., AdWords) or just those of other companies. Under the Privacy Sandbox, all user data is stored and processed in the browser, owned by Google.<sup>51</sup>

While Google's Sandbox initiative, in the company's own words, is "a new level of ads transparency and user control,"<sup>52</sup> it is also a convenient cover for further monopolization of the advertising market by restricting competitors' access to user information.<sup>53</sup> It cannot be a coincidence that web browsers whose business model is *not* based on generating ad revenue, like Apple's Safari<sup>54</sup> or Mozilla's Firefox,<sup>55</sup> have taken the harder-line approach of a comprehensive blanket-ban on cookie tracking, while Google, whose business model is based on generating ad revenue, has taken a more calculated response.

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<sup>48</sup> Id.

<sup>49</sup> Steven Englehardt & Arvind Narayanan, *Online Tracking: A 1-Million-Site Measurement and Analysis* (2016) (<https://webtransparency.cs.princeton.edu/webcensus/>).

<sup>50</sup> Lucinda Southern, *As Apple Stakes Out an Aggressive Pro-Privacy stance, Google Occupies Middle Ground*, Digiday, Nov. 13, 2019 (<https://digiday.com/media/googles-privacy-updates-loom-in-the-industry-but-questions-remain/>).

<sup>51</sup> Seb Joseph, *WTF is Google's Privacy Sandbox?*, Digiday, Jan. 17, 2020 (<https://digiday.com/marketing/wtf-googles-privacy-sandbox/>).

<sup>52</sup> Chetna Bindra, *Next Steps to Ensure Transparency, Choice and Control in Digital Advertising, Google*, Aug. 22, 2019 (<https://blog.google/products/ads/next-steps-transparency-choice-control/>).

<sup>53</sup> Joseph, *supra* note 51.

<sup>54</sup> Jessica Davies, *How Google's Privacy Moves Will Spur Changes to Ad Tech*, Digiday, May 9, 2019 (<https://digiday.com/marketing/what-to-know-about-googles-latest-anti-tracking-privacy-tools/>).

<sup>55</sup> Arvind Narayanan, *Deconstructing Google's Excuses on Tracking Protection*, Aug. 23, 2019 (<https://freedom-to-tinker.com/2019/08/23/deconstructing-googles-excuses-on-tracking-protection/>).

In sum, both of Google's transparency initiatives indicate that its "transparency" aspirations do not apply to Google's own internal procedures, suggesting that the Advisory Council, transparency reports, and the Privacy Sandbox are more of a self-serving attempt at promoting a public image of trustworthiness to increase the company's already huge market share.

## V. Facebook's Transparency Initiatives

Facebook is one of the biggest online social media companies in the world with around two and a half billion monthly active users.<sup>56</sup> Facebook's recent involvement in the "Cambridge Analytica" data harvesting scandal that influenced the 2016 US Presidential election,<sup>57</sup> along with accusations that Facebook is profiting by allowing the proliferation of "fake news", has sparked an international outcry among policymakers who are pushing for stricter regulation on the platform.<sup>58</sup> Facebook has responded with several initiatives to increase its transparency. A closer look, however, shows that some of these initiatives are intended to obfuscate and misdirect policy-makers, researchers and the public.

### *A. Transparency Washing in Political Advertising*

The first example of Facebook's efforts to increase transparency to avoid regulation was the launch of a searchable ad archive API in

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<sup>56</sup> Facebook, Facebook Reports Fourth Quarter and Full Year 2019 Results (2020) ([https://s21.q4cdn.com/399680738/files/doc\\_financials/2019/q4/FB-12.31.2019-Exhibit-99.1-r61\\_final.pdf](https://s21.q4cdn.com/399680738/files/doc_financials/2019/q4/FB-12.31.2019-Exhibit-99.1-r61_final.pdf)).

<sup>57</sup> Carole Cadwalladr & Emma Graham-Harrison, Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach, *Guardian*, Mar. 17, 2018 (<https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>).

<sup>58</sup> Abby Ohlheiser, This Is How Facebook's Fake-News Writers Make Money, *Washington Post*, Nov. 19, 2016 (<https://www.washingtonpost.com/news/the-intersect/wp/2016/11/18/this-is-how-the-internets-fake-news-writers-make-money/>).

2019. Facebook's aim was to create "a new standard of transparency and authenticity for advertising."<sup>59</sup> Facebook has faced repeated criticism for its role in elections, specifically its lack of transparency about political advertising. In response, the company has promised to change the platform to promote transparency.<sup>60</sup> Facebook's CEO, Mark Zuckerberg, remarked that "[E]ven without legislation, we're already moving forward on our own to bring advertising on Facebook to an even higher standard of transparency than ads on TV or other media."<sup>61</sup>

This move attracted much publicity, yet the actual degree of transparency stemming from the initiative has been rather limited; access to Facebook's ad data is selective and researchers can only access the site once they pass an identity check and agree to the platform's terms of service.<sup>62</sup> Even after they have access, researchers cannot see targeting criteria or engagement levels of the advertisements; researchers can only locate advertisements through keyword searching, meaning that there is no way to ascertain whether the database is comprehensive.<sup>63</sup> Facebook has retained control over *what* researchers are able to scrutinize, reflecting a shallow commitment to "transparency" in an effort to delay or avoid external regulation. Facebook is promoting the narrative that self-regulation through their version of "transparency" is sufficient to compensate for a lack of enforceable legislative regulation.

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<sup>59</sup> Shukla, *supra* note 14.

<sup>60</sup> Alexis C. Madrigal, Will Facebook's New Ad-Transparency Tools Protect Democracy?, *Atlantic*, May 10, 2018 (<https://www.theatlantic.com/technology/archive/2018/05/facebook-ad-transparency-democracy/559853/>).

<sup>61</sup> *Id.*

<sup>62</sup> Natasha Lomas, Facebook Accused of Blocking Wider Efforts to Study Its Ad Platform, *TechCrunch*, Apr. 29, 2019 (<https://social.techcrunch.com/2019/04/29/facebook-accused-of-blocking-wider-efforts-to-study-its-ad-platform/>).

<sup>63</sup> Mozilla, Facebook's Ad Archive API Is Inadequate, *The Mozilla Blog*, Apr. 29, 2019 (<https://blog.mozilla.org/blog/2019/04/29/facebooks-ad-archive-api-is-inadequate>).

*B. Facebook Oversight Board*

“The content policies we write and the decisions we make every day matter to people. That’s why we always have to strive to keep getting better. The Oversight Board will make Facebook more accountable and improve our decision-making. This charter is a critical step towards what we hope will become a model for our industry.”

Nick Clegg, VP Global Affairs and Communications, Facebook<sup>64</sup>

The last frontier of Facebook’s efforts to postpone and avoid regulation is the launch of its oversight board, which was established in May 2020 and has forty members from “a variety of cultural and professional backgrounds.”<sup>65</sup> The role of the board is what Marc Zuckerberg has described as a quasi-“Supreme Court”; it is empowered to apply Facebook’s policies and assess public interest considerations to overrule content moderation decisions.<sup>66</sup> According to the oversight board’s website, “The purpose of the board is to promote free expression by making principled, independent decisions regarding content on Facebook and Instagram and by issuing recommendations on the relevant Facebook company content policy.”<sup>67</sup> The board can also serve a mediator function, as Facebook users can report posts to it for review and dispute resolution,<sup>68</sup> whereby its members will be able to review content cases and either uphold or reverse the content decisions made by Facebook. As the board has only been recently launched, its impact on procedural justice in the digital environment remains unclear.

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<sup>64</sup> Facebook, *supra* note 15.

<sup>65</sup> Facebook, Meet the Board | Oversight Board (<https://www.oversightboard.com/meet-the-board/>).

<sup>66</sup> Evelyn Douek, Facebook’s Oversight Board Bylaws: For Once, Moving Slowly, *Lawfare*, Jan. 28, 2020 (<https://www.lawfareblog.com/facebook-oversight-board-bylaws-once-moving-slowly>).

<sup>67</sup> Facebook, Oversight Board | Independent Judgment. Transparency. Legitimacy. (<https://www.oversightboard.com/>).

<sup>68</sup> Facebook, *supra* note 15.

Unlike the current content moderation system which operates behind closed doors, the rationale behind the oversight board is that it will be open and increase transparency. Similar to public courts, the board will consider precedent from its prior decisions and will “publicly shar[e] written statements about its decisions and rationale.”<sup>69</sup> Supposedly, the board will infuse transparency in the way content review appeals are conducted; as the board is “independent,” its decisions are “binding,” and its decisions are public.<sup>70</sup> In Facebook’s own words: “As part of our overall transparency efforts, trust documents will be publicly released, and these will establish the formal relationship between the board, the trust and Facebook.”<sup>71</sup>

However, the move towards such increased transparency with an oversight board does not *per se* result in any more substantial policy changes. The oversight of content moderation policies for over two billion users cannot be provided effectively by forty part-time board members, who are likely to be “overwhelmed” by the challenge.<sup>72</sup> Some scholars have suggested that “the new Facebook review board will have no influence over anything that really matters in the world.”<sup>73</sup> Similarly, Nicolas Suzor, a member of the board, has noted that since the board is independent from Facebook, it will have little impact on Facebook’s overarching policy.<sup>74</sup> Therefore, since the oversight board only reviews individual *decisions*, and not overarching policies, attention is diverted away from critiquing the legitimacy or

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<sup>69</sup> Facebook, *supra* note 67.

<sup>70</sup> Dunstan Allison-Hope, A Human Rights Review of the Facebook Oversight Board | Blog | BSR (<https://www.bsr.org/en/our-insights/blog-view/a-human-rights-review-of-the-facebook-oversight-board>).

<sup>71</sup> Facebook, *supra* note 15.

<sup>72</sup> Casey Newton, Facebook’s Independent Oversight Board Could Be Overwhelmed by the Challenge, *The Verge*, May 27, 2020 (<https://www.theverge.com/interface/2020/5/7/21249154/facebook-oversight-board-membership-announcement-history-challenges>).

<sup>73</sup> Sam Whitney, Facebook and the Folly of Self-Regulation, *Wired*, May 9, 2020 (<https://www.wired.com/story/facebook-and-the-folly-of-self-regulation/>).

<sup>74</sup> Nicolas Suzor, Facebook’s Oversight Board and the Challenges of Making Policy We Can Trust, *Medium*, May 27, 2019 (<https://digitalsocialcontract.net/facebook-oversight-board-and-the-challenges-of-making-policy-we-can-trust-9088482601b8>).

appropriateness of Facebook's business practices themselves and is instead focused on Facebook's "transparency" about them. The appropriateness of the substantial policies themselves are obfuscated, or even legitimated, through the micro procedural initiatives, with little power to change *status quo*.

## **VI. Transparency-Washing and Procedural Fetishism: Macro-Legitimation Through Micro-Critique**

All three case studies demonstrate how tech companies use "private" transparency to respond to public scandals around their policies and calls for stricter regulation. Yet they also reflect a larger trend of contemporary governmentality, in which a focus on procedure is used strategically to distract from, and even legitimize, the substantial policies and actions by promoting the idea that "something that is seen, can be trusted."<sup>75</sup> This trend is not limited to particular policy areas, but covers both internal policies in modern states, as well as international relations and law. For example, the assumption that openness and transparency can legitimize the killing of people has become prevalent in international law: targeted killings—once a "covert" and "illegitimate"<sup>76</sup> secret—have become increasingly accepted as a legitimate method of counter-terrorism and "surgical warfare" since the 9/11 attacks among many NATO members and other nations.<sup>77</sup> So the mere declaration and transparency in this case distract from questions of substantive fairness and legitimacy of such practice. Similarly, liberal governmentality assumes that sexual exploitation is legitimate if it is done openly and regulated

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<sup>75</sup> Subhanya Sivajothe, With and Against Transparency: Taking a Critical Look at How "Transparency" Is Taken Up in Data Justice Discourses, 5 *Journal Grad. Stud. J. Fac. Inf.* 57, 58 (2020).

<sup>76</sup> Rommel J. Casis, Predator Principles: Laws of Armed Conflict and Targeted Killings, 85 *Phil. L. J.* 329 (2010).

<sup>77</sup> Nils Melzer, *Targeted Killing in International Law* (2008).

transparently,<sup>78</sup> with some prominent philosophers proposing to extend the principle to organ trafficking (camouflaged as "organ exchange," but this is not as widely accepted).<sup>79</sup>

This idea of trust, and even fairness, following automatically from transparency led governments and corporations alike to embrace transparency not only as an organizational principle, but a political ideal and value in itself. In such governmentality, transparency thus is no longer a tool, but rather an end in itself, a "direct path to accountability, trust and legitimacy"<sup>80</sup> and a solution to many, if not all, societal problems.<sup>81</sup> Such fetishization of transparency<sup>82</sup> is part of a wider phenomenon of procedural fetishism, which is prevalent in both public and private organizations. For example, a universal embrace of the concept of the rule of law among liberal democracies and authoritarian regimes alike—which, first of all, emphasizes procedure rather than substance—suggest that emphasis on procedure is not unique to a particular form of political organization (e.g., only democracy), but is closely intertwined with the origins of the modern state and administration.

Going beyond vague concepts, such as the rule of law, administrative law displays similar excessive focus on the form of constraints of government power, as compared to the substance of government policy and action. For example, Nicolas Bagley has described the phenomenon in administrative law as a "procedure fetish," which has resulted in a shift in the understanding of legitimacy, from its *substance*, i.e., "how well it advances [society's] collective goals," to instead its *form*, i.e., "the stringency of the constraints under which it labors."<sup>83</sup>

The procedural fetishism of public law and institutions is also mirrored in the private sector, where the idea that something

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<sup>78</sup> Erin Albright & Kate D'Adamo, Decreasing Human Trafficking Through Sex Work Decriminalization, 19 *AMA J. Ethics* 122 (2017).

<sup>79</sup> Francesca Minerva, Julian Savulescu & Peter Singer, The Ethics of the Global Kidney Exchange Programme, 394 *The Lancet* 1775 (2019).

<sup>80</sup> Flyverbom, *supra* note 4.

<sup>81</sup> David E. Pozen, Seeing Transparency More Clearly, 80 *Pub. Adm. Rev.* 326, 326 (2020).

<sup>82</sup> *Id.* at 328.

<sup>83</sup> Nicholas Bagley, The Procedure Fetish, 118 *Mich. L. Rev.* 345, 350 (2019).

that is seen, can be trusted, is also prevalent. However, as the latest transparency initiatives of IBM, Facebook and Google suggest, this idea is wrong for it enables the legitimation of a policy on a *macro* level through "transparency-washing"—a sort of *micro* critique. It is wrong for at least three reasons.

First, the idea is especially wrong in the tech sector, because corporations are, as Garsten and De Montoya succinctly put it, "[d]esigned to reveal, but just as much to conceal."<sup>84</sup> Technology companies, as the case studies demonstrate, often apply the "transparency" ideal selectively by disclosing only what is commercially desirable for them to disclose and concealing anything that is not, regardless of how transparent they promise the public and regulators they will be.<sup>85</sup> For example, Google, when creating an Advisory Council (supposedly to improve transparency), simultaneously refused to reveal the internal processes that led to the selection of a controversial member. Yet, more importantly, fresh and new transparency initiatives enable corporations to divert attention from and conceal the substantial shortcomings of their policies, shielding them under the always changing "transparency" labels.<sup>86</sup> IBM, for example, through its vocal transparency washing after George Floyd's death, hoped to conceal and divert attention from its problematic past of providing FRT to law enforcement.

Second, corporate transparency initiatives are often mere box-ticking exercises to exploit "transparency" for marketing and branding purposes.<sup>87</sup> A key example is IBM's strategic choice to postpone announcing that it had ceased providing FRT to law enforcement until it could use the announcement to take advantage of the publicity attracted by controversial public events, rather than

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<sup>84</sup> The Naked Corporation: Visualization, Veiling and the Ethico-Politics of Organizational Transparency, in *Transparency in a New Global Order: Unveiling Organizational Visions* 79 (Christina Garsten & Monica Lindh De Montoya eds., 2008).

<sup>85</sup> Flyverbom, *supra* note 4, at 15.

<sup>86</sup> *Id.* at 3.

<sup>87</sup> The Naked Corporation: Visualization, Veiling and the Ethico-Politics of Organizational Transparency, *supra* note 84, at 87.

at the actual time the decision occurred; evincing a mere "box-ticking" rather than a genuine attempt to improve its policies.

Third, ticking this "transparency box" also allows tech companies to proactively prevent any regulation of their activities. Some argue that this weak or almost non-existent regulation has further solidified the move away from "territorial to functional sovereigns," where companies position themselves as decision-making authorities that exercise juridical power, which results in a shift of the identity of digital companies from participants *in* the market to makers *of* the market, creating a new political economy and concentrating power in the hands of corporations rather than governments.<sup>88</sup> Companies can then depict themselves as their own regulators, as Facebook has done through its quasi-judicial oversight board, or, more insidious still, as an *industry-level* regulator, as Google's Privacy Sandbox attempts to do by changing the digital advertising market.

With all these corporate motives, transparency washing diverts attention from fundamental questions about the legitimacy and legality of concentrated corporate power by focusing on form and procedure. As I already pointed out, an excessive emphasis on a procedure and form (whether a company is "transparent") over substance (the legality of that company's actions) is not unique to the corporate sector. For example, the very concept of the rule of law in public and particularly administrative law, displays a similar excessive focus on the form of government power, conflating procedure with legitimacy and legality of the substance of government policy and action. As the case studies analyzed in this paper suggest, corporate transparency washing is exploiting procedural fetishism, so deeply prevalent in our public institutions and contemporary governmentality, for commercial gain.

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<sup>88</sup> Frank Pasquale, From Territorial to Functional Sovereignty: The Case of Amazon, Law and Political Economy, June 12, 2017 (<https://lpeblog.org/2017/12/06/from-territorial-to-functional-sovereignty-the-case-of-amazon/>).

## VII. Conclusion

Transparency has become a palatable buzzword alluring us to believe that it tempers power. In the digital environment, dominated by tech companies, it is an intentional strategy to obfuscate the implications of concentrated corporate power—a far less palatable consequence. Tech behemoths legitimize their practices through transparency washing to divert the focus onto the procedures they follow, both for commercial gain and to avoid their operations being tempered by regulation.

Countering corporate transparency washing, requires, first of all, returning the focus back to the substantive problems in the digital environment. In other words, it requires paying attention to the substance of technology companies' policies and practices, not only the procedure. As the examples of IBM, Facebook and Google demonstrate, tech companies cannot be blindly trusted to regulate their policies and practices. This requires the policymakers and regulators to act. Rather than buying into transparency washing as companies intend for them to do, these public actors instead need to create binding, legally enforceable mechanisms to hold the tech companies to account. Extending the binding obligations under international human rights law and administrative law principles to the private actors is one option, enforcing anti-trust and competition rules is another. An anti-trust lawsuit against Google, launched by the US Justice Department on October 20, 2020, is a move in that direction. One thing is clear: corporate transparency washing will not protect the users and citizens in the digital environment.<sup>89</sup> The repeated failures of non-binding transparency initiatives by the technology industry should not be ignored. Countering transparency washing requires working on laws regulating technology companies rather than creating more private "transparency" principles and initiatives.

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<sup>89</sup> Slee, *supra* note 12.