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Smell test: sphere transgressions and counter-transgressions in legal dispute resolution

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ABSTRACT

The article applies the critical lens of sphere transgression to the field of law, with a particular focus on legal dispute resolution. The engagement of technology corporations with dispute resolution is described in terms of either facilitation or disruption, depending on whether the corporations aim at modernizing the existing justice system, or substituting it with their own adjudicative institutions. The article argues that, while facilitation can be understood as a transgression of technology into the sphere of law, disruption ultimately amounts to a counter-transgression of law into the sphere of digital goods. These observations help illustrate the usefulness of sphere transgression as a critical lens.

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1. Introduction: 10% spilled coffee

In September 2009, I started working as a trainee at a law firm in Pisa, Italy. The mornings were simple, albeit brutally boring: I queued at the offices of different court clerks, in a variety of courthouses in central Italy, waiting for my turn to file documents (the Italian justice system, at the time, was almost entirely analog). All those offices had something in common – their smell. It was a peculiar blend: 50% dust, 40% paper, 10% spilled coffee. At the time, I did not think much of it. I just waited for my turn to hand in my documents.

Six years later, in 2015, I was standing in a different queue – this time in Luxembourg, where I had relocated. I went to the Italian embassy to renew my passport, and it all suddenly came back to me. As soon as I opened the door, the smell was right there, unmistakable, and unchanged – dust, old paper, and a hint of coffee. Even within those minuscule diplomatic confines of Italian territory, the bouquet had been reproduced meticulously, in all its complexity, and I recognized it for what it was. It was the aroma of a sphere.

In January 2023, it all comes back to me once again, this time in the form of a semi-serious doubt: can sphere transgressions (Sharon, 2021a) be *smelled*? Building upon the theoretical framework of this special issue on sphere transgressions, this

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contribution presents some olfactory findings with regard to the transgressions and counter-transgressions currently taking place between the sphere of law (and legal dispute resolution), on the one hand, and the one of technology, on the other hand. More specifically, the article will argue that the current relationship between law and technology cannot be entirely understood as a transgression of the latter into the former. Rather, the two spheres mutually transgress into each other: whilst the values and expertise of the sphere of digital goods (as defined by Sharon and Gellert in this special issue) progressively penetrate the sphere of law, legal values and expertise also percolate into the sphere of digital goods, in a process of mutual influence, boundary-blurring, and scent-morphing.

Before delving deeper into the interaction between these two spheres, it is useful to provide a brief summary of the sphere transgression theory (which is discussed in further detail by Sharon and Gellert in their contribution to this special issue). Sharon's sphere transgression theory builds upon Michael Walzer's theory of justice (Walzer, 1983). According to Walzer, societies have different 'spheres' (e.g., healthcare; education; family; politics). A sphere transgression occurs when actors that have accrued power in a sphere leverage their position, to gain advantages in other spheres. In doing so, these actors unsettle the distributional principles that are typical of the sphere they transgress into. With specific respect to Big Tech companies transgressing into spheres such as healthcare or education, Sharon identifies a number of harms, including not only privacy violations, but also non-equitable returns, the marginalization of non-technological forms of expertise, and the dependency of public actors on private companies wielding power over increasingly irreplaceable digital infrastructures. A transgression by the sphere of digital goods, thus, is illegitimate inasmuch as it causes these harmful effects, undermining the criteria that a different sphere traditionally uses to distribute its distinctive good(s) (Sharon, 2021b).

Looking at legal dispute resolution through the sphere transgression critical lens, we can learn something about the lens itself, from at least two points of view. Firstly, this exercise helps us test the explanatory purchase of the sphere transgression lens beyond the pattern of 'tech expansionism' (i.e., the intrusion of Big Tech companies in different social spheres and, in particular, in the provision of the goods inherent to those spheres). The question, in other words, is to what extent this critical lens can help us make sense of reality in the case of a counter-transgression, i.e., in circumstances where the sphere of digital goods is the one that is being transgressed upon (rather than extending its own influence into the purview of a different sphere). Does the sphere transgression lens still work, in this context? This article will argue that it does, providing some practical examples.

Secondly, and relatedly, focusing on legal dispute resolution can help expand the evaluative possibilities of sphere transgression as a lens. If we focus on tech expansionism, we will typically use sphere transgression as a lens to detect possible harms. To be sure, none of this is short-sighted or undesirable; in fact, many of the contributions in this special issue illustrate how concrete and serious those risks are, with respect to different spheres. However, when shifting the focus to counter-transgressions, a different evaluative dimension emerges: can a sphere transgression also produce positive outcomes? For instance, does the transgression of law into technology result in new forms of accountability for Big Tech companies? This article will argue that the (counter-)transgression lens can help us see the potential positive effects of an interaction between spheres, which would not necessarily be visible through other lenses. Namely, a counter-transgression of law into

the sphere of digital goods may produce positive effects, since it prevents tech companies from unsettling the distributional values of the legal sphere.

The remainder of this article proceeds as follows. Section 2 will provide a descriptive overview of the current engagement of technology companies in the field of legal dispute resolution, modeling their roles as either 'facilitators' or 'disruptors'. Against that background, Section 3 will argue that the sphere of digital goods is transgressing into the sphere of law, importing into legal dispute resolution forms of expertise and values that are often at odds with those traditionally espoused by lawyers. Section 4 will complement this narrative by showing that the sphere of law is in turn counter-transgressing into the sphere of digital goods, injecting legal expertise and legal values into the functioning of Big Tech companies. Section 5, finally, will draw some conclusions from the observations, reflecting on the functions of the sphere transgression critical lens.

2. Technology companies active in the field of legal dispute resolution: facilitators and disruptors

With an unavoidable degree of simplification, the engagement of technology corporations with legal dispute resolution can be described in terms of either facilitation or disruption. This section will elaborate in this distinction, providing examples from practice.

2.1. The facilitators

Over the past decade, technology corporations have increasingly engaged with the field of legal dispute resolution, contributing to shaping the organization and functioning of courts. Governments in different regions of the world have strived to digitalize their justice systems, often relying on private actors for the creation and maintenance of digital infrastructures (Schmitz, 2019).

Different factors have played a role in the progressive (and still very uneven) digitalization of national justice systems. Indices such as the *EU Justice Scoreboard*, for instance, identify the level of digitalization of court procedures as a predictor of quality of justice in different EU Member States (Jakab & Kirchmair, 2021). Especially in the wake of the 2009 sovereign debt crisis, these empirical studies have sometimes been used as a governance tool, nudging national governments into modernizing and digitalizing their justice systems (Dori, 2015). In addition, regulatory competition has acted as a catalyst of modernization, inducing national governments to digitalize their courts, in an attempt to attract (especially high-value commercial) disputes (Bell, 2018; Hwang, 2015; Ortolani, 2022). More recently, the COVID-19 pandemic has forced governments all over the world to embrace court digitalization to a certain extent, so as to overcome the limitations imposed by social distancing (Ahmed, 2021; Baldwin et al., 2020; Björkdahl & Kronblad, 2021; Fabri, 2021; Koh, 2021; Puddister & Small, 2020). In the wake of these developments, it has been argued that national governments should abandon the model of the physical courtroom altogether and embrace fully digital justice, as a means to resolve the access to justice problem and make courts more accessible for prospective litigants (Briggs, 2020; Susskind, 2019).

When digitalizing their justice system, States often rely on private service providers. Court digitalization frequently hinges on the support of technology corporations,

which provide the necessary infrastructures and solutions. For instance, Matterhorn is a US-based software developer whose products are mainly aimed at public courts and governmental agencies. By using Matterhorn products, States can offer online dispute resolution services without the need to develop any software in-house (Bulinski & Prescott, 2021; Cartwright & Greiling, 2018; Roberge & Veronique, 2019). Matterhorn products cover a wide range of disputes, including subject-matters such as small civil claims, tax, traffic offences, parenting time allocation, separation and divorce, child support, and even some criminal law matters (concerning certain lesser misdemeanors). The underlying promise is that, by partnering with a private actor such as Matterhorn, public authorities (such as ministries of justice) will save resources (e.g., by diminishing the court clerks' and judges' workload), enhance the speed of procedures, and improve access to justice for society at large.

Companies such as Matterhorn portray themselves as facilitators, couching their activities in a narrative of efficiency and optimization. Going back to the olfactory introduction to this article, these companies aim at making the justice system 'smell better': less old paper, and no coffee spilled by trainees that wait for their turn in front of a court clerk's closed door. Interestingly, most of these actors are not 'Big Tech' companies, but small- or medium-sized service providers, sometimes (such as in the case of Matterhorn) resulting from an academic spin-off (Bulinski & Prescott, 2021). While some of these facilitators offer their services exclusively to justice-related public authorities, others target the general public as well. The US company TurboCourt, for instance, offers products that help *pro se* or in-person litigants (i.e., parties without legal representation) to prepare and submit their court filings in areas such as family and child support litigation (Aresty & Daniel Cormie, 2013). These companies, thus, acts as a sort of bridge and point of access between the litigants and the justice system, especially in sectors where the parties often lack legal representation (Kroeper et al., 2020).

2.2. The disruptors

Unlike Matterhorn or TurboCourt, other companies present themselves as disruptors, and portray their work as an attempt to substitute an irredeemably outdated and inadequate justice system with something completely different. While the facilitators grease up the gears of the justice system with new (digital) oil, the disruptors move fast, and break those old gears. Their goal is not to optimize the work of legal professionals (e.g., judges, court clerks, bailiffs, or counsel), but to make those professionals redundant altogether. These disruptors are often Big Tech firms that develop their own dispute resolution procedures and institutions, entirely alternative to the traditional channels of national justice systems. A widely discussed example of this trend is e-commerce: the maintenance of a trustworthy transnational marketplace requires, among other things, swift and reliable dispute resolution, so as to foster the trust of consumers and traders (Cortés, 2010). Consumers would likely be deterred from purchasing products or services online from traders they are not familiar with, in the absence of any mechanism protecting them against non-performance and seller fraud. From this point of view, dispute resolution can be understood as a tool of trust-enhancement, enabling global consumer marketplaces (Brennan et al., 2003; Ortolani, 2016). It is thus unsurprising that, since the 1990s, platforms such as Amazon or eBay operate as

de facto transnational consumer courts, adjudicating a high volume of cases between traders and customers (Schmitz, 2018; Schultz, 2005). Similarly, payment intermediaries such as PayPal offer dispute resolution services (van Gelder, 2019), which are instrumental to fostering the trust on which the core businesses of these companies hinge.

More recently, social media platforms have been emerging as digital adjudicators in the field of content moderation. Companies such as Meta or Twitter make hundreds of thousands of decisions every day as to whether users' posts should be deleted, accounts should be deactivated, or other types of moderation measures should be adopted (Gillespie, 2020; Klonick, 2019). In doing so, these companies emerge as *de facto* adjudicators of a wide range of disputes, which often require balancing freedom of expression against other fundamental rights. Thus, similarly to e-commerce, social media also requires dispute resolution, if it is to function on a global scale: some form of moderation is necessary, lest online communications devolve into a cesspool of hate speech, which would deter a high number of users from joining on remaining on the platforms (Busch, 2022; Douek, 2022).

In sum, since both e-commerce and social media cannot function at scale without dispute resolution, Big Tech corporations engage in this field, to foster the user trust on which their business models depend. This engagement, however, is different from the ones of facilitators such as Matterhorn or TurboCourt: companies such as Amazon, PayPal, Meta, or Twitter aim not at improving the public justice system, but at building their own private justice system, instrumental to the functioning of a global platform economy. Thus, the role of Big Tech firms in the field of legal dispute resolution is best understood in terms of disruption, rather than facilitation.

A fascinating example of disruption is one of the Oversight Board. Originally conceived as 'a Supreme Court for Facebook' (Cowls et al., 2022; Feldman, 2018; Kadri, 2022), the Board has been created with the purpose of offering an external avenue for the review of certain content moderation decisions taken by Meta (Gradoni, 2021b). In doing so, the Board is expected to develop a body of precedent as to how the Meta's terms of service for Facebook and Instagram should be applied (Douek, 2019, 2020; Klonick, 2020; Wong & Floridi, 2022). Interestingly, the Board has no legal personality and does not exist as such under US law – yet, despite its impalpability under national law, it works in practice, and delivers decisions which Meta abides by (Gradoni, 2021a). The structure and functioning of the Board are regulated in a document titled 'Oversight Board Charter', which was published in September 2019 together with a letter by Mark Zuckerberg (Zuckerberg, 2021). In the letter, Mr. Zuckerberg describes the decision to institute the Oversight Board as the consequence of a need for new rules, which national lawmakers currently fail to provide. Mr. Zuckerberg, in particular, explains how he has 'called for governments to set clearer standards around harmful content' and announces that, while national law is busy developing those standards, Facebook (as Meta was called at the time) has taken matters in its own hands, giving users the possibility to appeal the company's decisions to an external adjudicative body (Zuckerberg, 2021). The logic of disruption (rather than facilitation) is visible in the narrative that these documents create: the Oversight Board is presented as a court-like institution that is entirely separate from (and alternative to) State courts, and that applies (and contributes to the development of) Meta's own rules, rather than national law (Klonick, 2020). Interestingly, since the beginning of its operations, the Board has not limited itself

to the interpretation of Facebook's and Instagram's terms of service; in addition, it has frequently tested the legality of these rules against human rights law, in a bold judicial maneuver that has been aptly described in terms of constitutional review (Gradoni, 2021c), and that will be described in further detail below in Section 4.

3. Technology's transgression into the sphere of law

The work of facilitators (such as Matterhorn & Turbocourt) can be understood as a transgression of technology into the sphere of law. More specifically, the facilitators transgress into the sphere of legal dispute resolution by importing new values and expertise. This section will illustrate the consequences of this transgression through some practical examples.

3.1. Due process vs. speed

Legal dispute resolution adheres to a set of fundamental rights and principles that revolve around the notion of due process. Court litigation brings about important legal consequences: the judgment is a binding determination of the dispute that cannot be re-litigated (*res judicata*), and it is coercively enforceable. Given these far-reaching effects, sufficient guarantees must be in place throughout the procedure. For instance, the parties have the right to an independent and impartial adjudicator, and they must be given a fair and equal opportunity to present their case (ECtHR, 2022; Lillo Lobos, 2022). These guarantees come at a price: one of the reasons why court proceedings take significant time is that, at different stages during the litigation, the respect of the parties' fundamental procedural rights must be ensured. While human rights law does require that the length of court proceedings be reasonable (ECtHR, 2022), it is impossible to afford the disputants due process while prioritizing speed at all cost. By embracing due process as a value, thus, the legal sphere implicitly assumes that there are limitations to how fast courts can work; to put it simply, it is not possible to resolve disputes in a matter of hours, while at the same time ensuring the same level of due process that a well-functioning court procedure offers over the course of months.

By entering the legal sphere, facilitators (such as the one described in the previous section) import new values. They emphasize speed and efficiency, focusing on quantitative indicators concerning the duration of technology-aided procedures, rather than on a qualitative evaluation of the trade-offs between speed and due process. Many of the innovations that the facilitators introduce are based on the implicit assumption that, for relatively simple cases (e.g., traffic violation disputes) a faster decision is desirable, even if it comes at the expense of certain due process guarantees. For instance, a document-based online procedure may not offer the parties the same opportunity to present their case as an oral hearing, but it does ensure significant savings in terms of money and time. From the perspective of the legal sphere, this approach raises a host of delicate questions: which cases are 'simple', and who sets the criteria? Matterhorn, for example, offers products geared toward family and child custody disputes, which often require an extremely delicate analysis of rights and interests (even if those rights and interests are typically not numerically quantifiable).

3.2. Law enforcement vs. dispute resolution

While dispute resolution can assume different shapes, court litigation holds a central position in the legal sphere. The task of courts is to adjudicate, i.e., to impose a binding resolution of the dispute, achieved by applying the law to the facts. In doing so, courts ensure that the law is translated into practice: adjudication, in other words, is not only the cornerstone of legal dispute resolution, but also a means for the enforcement of the law (Cohen, 2009; Fiss, 1983). In certain areas (e.g., competition law), lawmakers expressly incentivize private litigation as a means to ensure that the law be applied (Van den Bergh, 2013). Therefore, from the viewpoint of the legal sphere, it is important not only that disputes be resolved, but also that public courts resolve them by applying democratically enacted laws, and that all comparable cases be resolved in a comparable way, by applying the same rules. This, too, gives the legal sphere its distinctive smell: the paper of casefiles becomes old over the years, and aromatizes the corridors of the courtroom where, every morning, new cases are filed by young trainees.

The facilitators shift the focus from adjudication and law enforcement to dispute resolution: the emphasis is not on the translation of substantive law into practical reality, but on the achievement of subjectively acceptable dispute resolution outcomes. From the viewpoint of the facilitators, scrupulously applying the law is not as important as ensuring that the disputants promptly receive a solution for their case. In fact, facilitators often aim at avoiding adjudication altogether, enhancing consent-based forms of dispute resolution (e.g., mediation) that do not require the strict application on any law. Hence, the facilitators' emphasis on case-management tools and court-annexed online dispute resolution (Ebner & Elayne, 2020) triggers a shift in values within the legal sphere, and places a strong focus on the rationality of customer satisfaction and outcome personalization. From a dispute resolution perspective, it is not particularly relevant whether the parties receive precisely what the law entitles them to, or whether dispute resolution leads to a consistent allocation of resources across comparable scenarios. To the contrary, the priority is the achievement of subjectively acceptable outcomes on a case-by-case basis: technology is meant to help disputants reach a solution they are happy with, and measures its success in terms of acceptance rates (e.g., by evaluating the percentage of disputes resolved through settlement on agreed terms (Balzer & Schneider, 2021)). Facilitators pragmatically cast the spotlight on the expectations and needs of each disputing party; after all (so the argument goes), as long as the disputants receive a solution that they perceive as reasonable, what difference does it make, whether that solution is based on a particular provision of law, or whether that provision has been interpreted and applied in a similar way in past cases? What matters is the achievement of a subjectively acceptable dispute resolution outcome, even if it partially comes at the expense of legal certainty, consistency, and law enforcement.

3.3. Expert intermediation vs. disintermediated access to justice

According to Pierre Bourdieu (1986), jurists construe the law as a self-standing science characterized by its own interpretive techniques, concealing the power relations and social struggles that underlie legal rules (Roussel, 2007). In doing so, lawyers also consolidate their role as professional intermediaries and gatekeepers, granting access to the

legal sphere to those that lack the necessary expertise. A manifestation of this intermediation and gatekeeping is legal representation during court proceedings: in litigation, counsel translate the position and claims of their clients into legal qualifications and reasonings, thus mediating laypeople's interaction with the legal sphere. In some national systems, this type of intermediation is considered so important that litigants are not allowed to appear in person or *pro se*, i.e., without counsel (Flaga-Gieruszyńska, 2019). Facilitators, by contrast, embrace a logic of disintermediation: technology is expected to help parties without any legal representation navigate the justice system, and reach a satisfactory resolution of their dispute. To this end, disintermediation is often coupled with legal simplification: the facilitators' emphasis on consent-based procedures such as mediation, for instance, can be partially understood as an attempt to eschew the application of rules that require legal expertise. The disintermediation brought about by the facilitators is expected to enhance access to justice for individuals that cannot afford legal representation (Schmitz, 2019). This, in turn, raises delicate questions, especially in cases where technology is used to facilitate the commencement of court proceedings, rather than to avoid them. Litigants in person, for example, can use Turbocourt (where allowed) for their court filings, but how often will they prevail against counterparties with deeper pockets, represented by legal counsel? Technology may help start a court case, but it may also fall short of leveling the playing field between those conversant with the technicalities of the 'legal science' critically described by Bourdieu, and those lacking such expertise.

3.4. Human interpretation vs. peer-to-peer dispute resolution

The process of legal interpretation, already mentioned in the previous sub-section, is at the core of legal expertise. From the start of their education, jurists are trained to apply a particular set of interpretive rules, which are meant to help them draw practical consequences from the text of the law (be it a statutory provision, or a body of precedent). Theorists have long debated whether legal interpretation is best understood as a positivistic problem with one correct solution (Gardner, 2001), a smoke-screen concealing outright judicial lawmaking (Kennedy, 1997), or anything in between. For the modest purposes of this article, it is not necessary to take a position on this centuries-long debate; rather, suffice it to point out that, irrespective of the theoretical position one adopts in respect of legal interpretation, the latter remains an intrinsically human activity. Even those who adhere to the theory of originalism (i.e., the idea that legal texts should be given the meaning they had at the time of their promulgation, without any form of subsequent judicial alteration) conceive artificial intelligence (AI) at most as an ancillary tool, aimed at enhancing rigor rather than at making human jurists obsolete (Strang, 2016).

Facilitators, by contrast, often embrace peer-to-peer forms of dispute resolution, which obviate the need for humans engaging in legal interpretation. To be sure, this does not necessarily entail the deployment of machine learning or other sophisticated AI techniques, artificially replicating human legal interpretation; in fact, most of the facilitators currently active in the legal sphere do not make extensive use of this type of technology. To the contrary, facilitators mostly promote peer-to-peer dispute resolution, where the parties reach an outcome while eschewing the need legal interpretation altogether. For instance, consent-based online dispute resolution schemes aim at helping

disputants reach an agreement without the need to interpret any law (Barendrecht, 2017). Furthermore, it is telling that, in its nascent phase, online dispute resolution often relied on blind-bidding, i.e., a procedure whereby the disputants would submit settlement offers without knowing the counterparty's offer, and a computer would calculate an average of the two offers between a certain range (Katsh, 2001). Thus, the facilitators frequently attempt to steer dispute resolution away from a process requiring human legal interpretation, toward model where the disputants themselves can cooperate and work toward the achievement of their own solution.

3.5. Justice as a physical space vs. justice as a service

Traditionally, the legal sphere conceives of justice not only as a sovereign power, but also (and relatedly) as a physical space. The courtroom is seen as a physical embodiment of central values of the legal sphere, such as transparency, fairness, participation, and authority (Duncanson & Henderson, 2022; Mulcahy & Rowden, 2019). The architecture and ritual of the courthouse thus becomes a physical manifestation of the sphere, and help convey its values to the general public (Mulcahy, 2007, 2010). The facilitators, instead, typically conceive of justice as a service, unrelated from any physical space or architectural context. By emphasizing ease of access and simplification, the facilitators marginalize the physical dimension of justice and describe the future of courts in terms of fully remote provision of dispute resolution services (Rule, 2020).

4. Disruptors enabling a counter-transgression of law into the sphere of digital goods

As already mentioned, disruptors are often 'Big Tech' companies wielding power over a technological infrastructure that enables (among other things) the enforcement of dispute resolution outcomes (Ortolani, 2016; Schultz, 2007). Large e-commerce platforms (such as Amazon and eBay) control not only the procedures that resolve disputes between consumers and traders, but also (and most importantly) the marketplace on which consumers and traders interact. Similarly, social media companies (such as Meta, Twitter or TikTok) have the power not only to moderate online speech, but also to control the platforms where that speech occurs. Thus, having resolved a certain dispute, these companies can self-enforce their own decision by means of infrastructural power. In the case of e-commerce, self-enforcement could take the shape of the exclusion from the platform of a trader violating their contractual obligations toward a consumer, and the transfer of a disputed sum of money back to the consumer (van Gelder, 2019). In the case of a social media platform, instead, self-enforcement could amount to the removal or restriction of certain posts, the suspension or termination of accounts, or other measures aimed at moderating platform behavior (Keller & Leerssen, 2020).

A platform's impetus to 'build its own court' is a consequence of such extensive private enforcement power, which enables the platform to exert *de facto* coercion without relying on the intermediation of the State (which traditionally retains a monopoly over the use of force). Adjudicative bodies arise out of the platforms' pursuit of ways to maintain their power while accruing legitimacy. Taking the example of the Oversight Board, Mr. Zuckerberg's letter (Zuckerberg, 2021) is an explicit acknowledgement of this state of affairs:

Meta, according to its CEO, makes (and enforces) such important decisions on fundamental rights, that users must be given the possibility to seek redress before an external adjudicative authority. The creation of the Board, thus, stems from a sort of 'gift of the prince' (Gradoni, 2021a), i.e., a gracious concession made by the person wielding power over the platform, in favor of a global community of platform users.

As noted by Kadri (2022), Mr. Zuckerberg's concession is likely prompted by multiple incentives. First, the Oversight Board offers Meta a brand of legitimacy that no internal complaint department could ensure in speaking the language of human rights law, the Board offers an unprecedented depth to the justification of content moderation decisions, and makes legal sense of the balancing of rights that unavoidably underlies difficult cases. Second, the Board can function as a scapegoat for Meta, shifting responsibility away from the company when delicate decisions must be made. A case in point, here, is the Board's decision concerning former US President Trump's suspension from Facebook ("Former President Trump's suspension," 2021). Third, because the Board is perceived as an effective form of self-regulation, it may help Meta keep public regulators at bay.

It is tempting to dismiss the Oversight Board, and more generally the judicialization of platforms, as an attempt at deception (Kadri, 2022) and an 'accountability theatre' (Douek, 2022). To be sure, this narrative is not wrong, and it would be naïve to assume that the creation of adjudicative bodies (such as the Board) is exclusively prompted by a sincere belief in checks and balances, and judicial review. However, when observing the phenomenon through the lens of sphere transgression, a complementary narrative takes shape: the work of disruptors (such as Meta with the creation of the Oversight Board) gives rise to a fascinating counter-transgression of the law into the sphere of digital goods. In building their own courts, Big Tech companies import into the sphere of digital goods the values, expertise, and even rituals (Chase, 2005; Gradoni & Pasquet, 2019) of the law.

The Oversight Board speaks a distinctively legal language, and all of its decisions refer to international human rights law as a normative standard against which the company's terms of service are tested. In fact, since the beginning of its operations, the Board has used human rights law to consolidate its mandate and enlarge its scope, compared to what originally envisaged in the Charter. In one of its first cases ("Breast cancer symptoms and nudity", 2020), the Board heard a complaint against the decision to remove an Instagram picture of naked female breasts. According to the complainant, the purpose of the picture was to inform users about breast cancer symptoms; as such, the post did not infringe Instagram's terms of service, which do prohibit pictures of naked female breasts, but make an exception for medical awareness purposes. While the case was pending before the Board, Meta acknowledged its mistake and reinstated the post. At that point, the company invited the Board to discontinue the proceedings. After all (so Meta's reasoning went), under Article 2(2) of the Charter, the Board has the task of assessing whether 'content enforcement decisions' are compatible with the company's 'content policies and values'; since the company had acknowledged its mistake, the Board's work seemed to have done itself, and the case seemed to have become moot. Yet, the Board refused to drop the case, as doing so would have deprived the complainant of their right to be heard and receive a fully reasoned decision, under Article 2 of the International Covenant on Civil and Political Rights. Therefore, not only did the Board eschew the limitations that Article 1(4) of the Charter seemed to have imposed on it

(by stating that '(t)he board will have no authority or powers beyond those expressly defined by this charter'); in addition, the Board also recast the meaning of its own task, adopting as a normative standard (against which content moderation decisions must be tested) not Meta's terms of services, but human rights law. This, in turn, enabled the Board to conduct a far-reaching review of the company's moderation decisions, and to disapply the company's own terms of service whenever they conflict with the hierarchically superior human rights law.

This type of judicial maneuver is far from new, and it has been aptly compared with the US Supreme Court's decision in *Marbury v. Madison* (Gradoni, 2021c). Reliance on the idea of hierarchy among sources of law, in fact, is a symptom of the legal sphere's counter-transgression into the sphere of digital goods: a traditional legal doctrine (which enables the forms of legal interpretation described above in Section 3) enters a field (content moderation) that was once dominated by the maxim 'Move fast and break things'.

Through this counter-transgression, legal experts may gain limited but significant forms of power in the sphere of digital goods. The members of the Oversight Board may be tempted to use their legal expertise (and the leeway that comes with legal interpretation) as a counter-power against Meta, rather than as the originally envisaged 'sleight of hand' (Kadri, 2022) conjuring an empty shell of legitimacy. In 2021, for instance, the Oversight Board overturned Meta's decisions in 14 of the 20 cases it decided; inasmuch as such a limited case-load allows to draw any conclusion at all, one may wonder whether the Board could rebel against its creators, much like some international courts and tribunals ruling against the States that brought them into existence (Bartels, 2004).

In sum, by setting up their own quasi-judicial bodies, Big Tech companies end up (at least partially) adopting the expertise and the values of the legal sphere. As a result, the decision-making which takes place within the sphere of digital goods starts to be articulated in legal terms, and justified on the basis of legal reasoning and legal values. This confers upon selected elites of jurists (e.g., the Oversight Board members) forms of power that, up until now, have been held by large platforms without external scrutiny, and may help prevent those platforms from distributing goods inherent to the legal sphere (i.e., the protection of rights) pursuant to inadequate, technology-specific distributional values. Given how recent this counter-transgression is, it is too early to tell whether it will lead to any actual increase in platform accountability. However, the critical lens of sphere transgression may prove to be a precious tool, to 'smell' a real (however small) counter-power, and tell it apart from mere 'theatre' (Douek, 2022). If the lawyers have their own way, soon enough, the sleek office spaces of Silicon Valley companies may start smelling like old paper, dust, and maybe even spilled coffee.

5. Conclusions: digitalization of dispute resolution and the importance of sphere transgression as a critical lens

This article has shown how technology corporations are increasingly engaging with legal dispute resolution. However, it would be simplistic to label this phenomenon in its entirety as a transgression of technology into the sphere of law. When observed closely, the current reality is best understood as the concurrence of two different, and in certain

respects opposite trends. Certain technology corporations act as facilitators, transgressing into the sphere of law and importing values such as ease of access, disintermediation, and speed, which may sometimes clash with the traditional values and expertise of the legal sphere. At the same time, however, other technology corporations act as disruptors, building their own dispute resolution institutions, rather than attempting to improve the ones that already exist. This second trend amounts to a counter-transgression of the law into the sphere of digital goods: the expertise of lawyers (e.g., in interpreting the law, and balancing rights against each other) enters the sphere of digital goods, lends legitimacy to the decision-making of large platforms, and can potentially position jurists as a counter-power to those platforms.

Understanding the work of the facilitators as a sphere transgression allow us to observe effects that would not necessarily be visible, when observing the intrusion of technology corporations in different societal fields through other critical lenses. For instance, the lens of data protection emphasizes the risks of datafication and privacy harms but fails to capture other potential harms associated with the digitalization of legal dispute resolution. Similarly, the digitalization of justice cannot be understood in its entirety through a 'hostile worlds' lens, which focuses mainly on the market vs. non-market dichotomy (Sharon, 2021b). The sphere transgression lens allows us to more thoroughly understand the specific values of the sphere of digital goods, and the effects that those values (e.g., speed, disintermediation, outcome personalization) produce when injected into the legal sphere.

Along parallel lines, the sphere transgression lens can also help us gain a deeper understanding of the work of disruptors, as exemplified by the creation of the Oversight Board. In this context, once again, the market vs. non-market dichotomy has limited value. On the one hand, if we focus on the market logic that underlies the judicialization of large platforms and the creation of new quasi-judicial body, we can productively unmask the real reasons-for-action of Big Tech companies, beyond the superficial rhetoric of checks and balances and the 'accountability theatre' (Douek, 2022). On the other hand, however, an exclusive focus on the market/non-market dichotomy prevents us from understanding what happens *afterwards*, i.e., after all the jacks are in the boxes, the accountability theatre has played itself out, and jurists are left with the distinctively *legal* task of adjudicating cases. Here, conceptualizing the judicialization of platforms in terms of a counter-transgression of law into the sphere of digital goods, we can make sense of the legal maneuvers through which jurists smuggle their values into the sphere of digital goods, and potentially erode certain (however small) regions of platform power.

Ultimately, phenomena such as the digitalization of law and legal dispute resolution are too complex to be understood in terms of simple dichotomy. When our eyes fail, and we acknowledge our inability to draw bright-line boundaries, our noses might come to the rescue: by training them to smell the characteristic fragrances of a sphere (dust, old paper, and a hint of coffee), we might make sense of the complex interactions that occur between technology and legal dispute resolution.

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