

University of New South Wales Law Research Series

**DROWNING, RESCUING, AND THE LAW IN
BETWEEN**

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[2020] *UNSWLRS* 51

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DROWNING, RESCUING, AND THE LAW IN BETWEEN

Julie E. COHEN, *Between Truth and Power: The Legal Constructions of Informational Capitalism*
(New York Oxford University Press, 2019, Verso, 2018, 366 pp)

Julie E. Cohen has written a tremendous book: revelatory in its tracing of the vascular role of law in making and sustaining that pervasive power matrix for which she borrows Manuel Castells' term "informational capitalism", and law's reconfiguration in the process. As a corrective to perceptions that the prevailing power of digital platforms is a consequence of the lawlessness of the domain in which they operate, it is both timely and incisive. Legal norms, ideas and institutions are not, Cohen shows, late to the platform party; they've been servicing its hosts and revelers for some time. Accessible yet exacting, this book will be indispensable for anyone seeking to understand how we came to a point, in the U.S. and many parts of the globe, at which more or less everything is being routed, in varying degrees and in a range of ways, through digital infrastructure, much of it held in shockingly few hands.

Yet for all its strengths—more on those in a moment—*Between Truth and Power* is also telling in its subtexts, particularly how it approaches the predominant of its titular concerns: power. Although the term is indexed only once, the book has rather a lot to say about power, albeit mostly obliquely. One way into this intriguing dimension of the book is epigraphically. Consider, for instance, the epigraph to the book's rather fatalistic conclusion. It is taken from Octavia Butler's 1993 dystopian novel *The Parable of the Sower*, which is set in Los Angeles in 2024—a city of walled neighborhoods, water scarcity, designer drugs, mass migration, and rampant privatization. Cohen has selected the following quote: "Drowning people/Sometimes die/fighting their rescuers". But who exactly, one wonders, are the rescuers in Cohen's account? Does Cohen envisage herself among them? And how would these rescuers propose to save the drowning belligerents? Answering these questions requires paying close attention to Cohen's rendering of power in *Between Truth and Power*. Before exploring this subtextual dimension, however, let us examine a little more of the body of the text.

Between Truth and Power is divided into two parts, both concerned with patterns. The first part—'Patterns of Entitlement and Disentitlement'—explores how "struggles to shape the patterns of information flow are seeking out [and finding] new modes of recognition and accommodation within the legal system" [2]. The second part—'Patterns of Institutional Change'—examines how this process is "restructuring the legal system itself" [2] on both national (i.e., U.S.) and global planes.

As to recurrent features of these patterns, Chapter 1 details three legal "appropriation strategies" [25] that have been wielded or exploited by "large rightholders" [19] in platform economies. These are: the amassing and enclosure of intangible resources through "de facto property arrangements" [45] comprised of contracts, computational protocols, and trade secrecy entitlements; the expansion of legislatively- and judicially-developed protection for brand owners' capital; and the embedding of an expanding range of forms of exchange in platforms such that "[p]latforms... replace (and rematerialize) [markets]" [42]. Chapter 2 builds upon this idea of the platform as "the core organizational logic of the political economy of informational capitalism" [47] by focusing on what this has made of the public domain. And the news is not good. The "platformization" of the economy and the construction of a

ubiquitous “sensing net” in its service has, Cohen argues, “sublimated” consent to data extraction and normalized its “free” appropriation for profit-making purposes through “near-automatic” enrolment [58-9]. This supports a trade in “data doubles” in the market for predictive profiling—these corresponding to “flesh-and-blood human beings”, but typically configured in the aggregate and sold in “tranches” [67]. Meanwhile, according to Cohen’s account of media law and policy in Chapter 3, they have “almost nothing to say about the activities of online intermediaries and platform firms” [100]. Finally, countering any sense that untrammelled data flow has become the norm, Chapter 4 recalls how both national governments and digital content providers have secured and deployed a range of ways of interrupting and blocking information flows. The “surveillance economy and the surveillance state” are, Cohen contends, “inextricably intertwined” [131].

So far so dismal, or galvanizing, readerly dispositions depending. Part II contends, further, that legal institutions have not just been instrumentalized but also fundamentally transformed and de-barbed in the course of their (re)distributive work in the platform economy. Chapter 5 examines how the U.S. judicial system has been “re-engineered” around the idea that “different kinds of disputes should be managed differently” [145]. More specifically, judicial creativity has regularly been summoned in disputes concerned with proprietary interests’ protection and enforcement. On the other hand, those disputes in which remediation of informational harms is sought (claims arising from unfair credit reporting, or discriminatory employment screening, for instance) have routinely elicited judicial scepticism, Cohen shows. On the whole, Cohen contends, courts have been disinclined to impugn or even to engage “the background condition of widespread ‘ordinary’ data harvesting and processing” [151]. Chapter 5 similarly shows the maladaptation of the “industrial-era regulatory toolkit” [174] to deal with abuses of power in informational capitalism: a toolkit largely comprised, in the U.S., of antitrust law and the law on unfair and deceptive trade practices. The thresholds, threats and targets around which these are organized, Cohen explains, “sit in growing tension with accumulated learning about the behaviors of complex, networked systems” [185]. Chapter 7 moves to the transnational domain to analyze the dependence of contemporary informational capitalism on legal frameworks facilitating cross-border flows of people, materials and data and the extension of proprietary rights across borders. Among the most relevant are frameworks of trade liberalization, intellectual property protection, technical standardization and investment protection—frameworks typically forged with minimal if any public participation and under conditions of stark geopolitical and economic inequality. In Cohen’s assessment, this has yielded “policy hegemony relatively unchecked by political or structural constraints” [219] sustaining policy coordinates closely aligned with the interests of the powerful.

Law is cast throughout as constitutive of, and distributive within, social and economic order. It so functions by effecting a background pre-allocation of privileges and responsibilities, backed by the coercive power of the state, conditioning the exercise of “free” choice and the resolution of particular disputes. Cohen is right to trace this framing back to the early twentieth century work of American Legal Realists such as Robert Hale (although curiously her reference is to Wesley Hohfeld rather than Hale) [Hale, 1923¹]. Cohen’s rendering of the economy likewise recalls early twentieth century heterodoxy, being heavily indebted to the Austro-Hungarian economic sociologist Karl Polanyi, particularly to his 1944 book *The Great Transformation*. Like Polanyi, Cohen regards economic phenomena as embedded in social relations and mentalities, specific configurations of which are historically contingent. This is

¹ R.L. Hale, 1923, “Coercion and Distribution in a Supposedly Non-Coercive State”, *Political Science Quarterly* 38(3): 470-494.

why she presents “new patterns of intermediation and disintermediation” [174] and the prevalence of certain “conception[s] of innovation” [91] as vital to understanding contemporary manifestations, distributions and abuses of economic power. Also, like Polanyi, Cohen understands particular configurations of capitalism as outcomes of antagonism between commodification and marketization, on one hand, and protective counter-movements, on the other, with the latter encapsulating a range of reactions and initiatives from societal actors seeking to redress negative social and environmental consequences of market society. It is legal counter-movements—existing and prospective—in which Cohen places explicit faith in the concluding chapter of the book.

Cohen’s concluding remarks bring us back to the conception of power in which *Between Truth and Power* trades and the puzzle posed by her epigraphic embrace of Octavia Butler’s dystopia. The book’s title, Cohen reveals early on, is taken from a 1955 Quaker pamphlet on pacifism titled ‘Speak Truth to Power’ [3]. This pamphlet spoke of three different forms of power: the power of office and authority: of “those who hold high places in our national life and bear the terrible responsibility of making decisions” at that level; the power of voice and value: “the American people” whose “values and expectations set the limits for those who exercise authority”; and finally, “the idea of Power itself, and its impact on Twentieth Century life” [Cary et al. 1955²].

This pamphlet hints at the kinds and vectors of power that Cohen seeks to rally to the cause of launching a counter-movement, or a series of counter-movements, against the current settings of informational capitalism, albeit any one of those “inevitably temporary” and prone to reversal or cooption [270]. She does, however, extend these to include material power. Cohen’s call is for both bread and dreams: “concrete improvements in the living conditions in ordinary people” as well as a renewal of such people’s expectations of the law [270].

Rallying these various forms of power, Cohen suggests, requires “continuing experimentation with the institutions and practices of governance” with a view to generating “new legitimating constructs”, “new institutional forms”, new “[a]rticulations of fundamental rights” and revised “rule-of-law constructs” [270-271]. Power, in this account, is at once gravitational (or ever-present) and mysterious. It is all around us, yet remains “protean, defying efforts to describe its workings” [270]. Power is indistinguishable from the idea of power.

Cohen does passingly invoke another, distinct analytic of power by referencing Michel Foucault’s notions of biopolitics and governmentality. Of those, however, she makes only the slightest of uses. For instance, Cohen characterizes the public domain configured for ubiquitous data harvesting as “biopolitical” because of its orientation towards the management of populations [49]. She does not, however, show how the measures that she describes target the biological features of the human species, nor how they marshal the “power to make live and let die” in Foucault’s terms—both features of biopower that distinguish it from sovereign power [Foucault, 2003: 241³]. Similarly, Cohen adopts the term “governmentality” to describe “the ideological framework that serves to legitimate and facilitate economic activity and... underwrite processes of governmental and social reorganization” as well as

² S.G. Cary et al., 1955, ‘Speak Truth to Power: A Quaker Search for an Alternative to Violence’ <https://quaker.org/legacy/sttp.html> (last accessed 19 August 2020).

³ M. Foucault, 2003, *Society Must Be Defended: Lectures at the College de France 1975-1976* (New York, Picador).

“its organizational and practical entailments” [7]. This, however, gives short shrift to Foucault’s conception of governmentality as that which distinguishes a regime “ruled by techniques” from one “dominated by structures of sovereignty” [Foucault, 1991:101⁴]. Governmentality, as Foucault characterized it, cannot be mapped on to an ideological framework. Rather, Foucault employs governmentality as an “analytical grid for [those] relations of power” and “procedures” that operate to produce subjects that are concerned with tending continually to the self or being entrepreneurs of the self. It does not denote any one diagram of social organization, but rather a mode of rule articulated through “a continuum of apparatuses”—educational, medical, administrative and so on—and combining a range of “ways of conducting the conduct” of people [Foucault, 1979: 144⁵; Foucault 2008: 186⁶].

Her terminology notwithstanding, Cohen’s understanding of power is, in these and other respects, not Foucauldian. Indeed, her understanding of power remains quite elusive. Unlike Polanyi, Cohen does not seem to regard power as directed and differentiated by motive. For Polanyi, “transformation implies a change in the motive of action on the part of the members of society” [Polanyi 1944:41⁷]. For Cohen, power cannot be so channeled. Rather, power is everywhere, ubiquitous and multi-directional, always “seeking and finding paths of least resistance” [5]. Moreover, law is not uniformly opposable to power. Laws and legal institutions, like pretty much everything in Cohen’s rendering, are power-saturated: both generative and accommodating of power, as well as being potentially disruptive of it.

The 1955 pamphlet from which Cohen takes her book’s title also hints at her conception of the second, lesser of the book’s titular concerns: truth. The pamphlet’s stated purpose was “not to preach religious truth, but to show how it is possible and why it is reasonable to give practical expression to it” through the presentation of alternatives and to appeal to those of “an open mind” to “join in a serious effort to explore farther the lines of thought” that it suggested [Cary et al. 1955⁸]. Truth is thus a form of power to be pursued experimentally: an agenda not an endpoint. Cohen’s vision lies between truth and power because it comes without assurance of effectiveness or rightfulness (truth) and is contingent on the operation of forces (power) that are unknowable.

The rescuers of the Butlerian epigraph (noted above) are law-bearing in Cohen’s account—since it is to *legal* counter-movements that she appeals—but they also may be among the drowning. The people and the rescuers fight, because antagonism is pervasive amid capitalism. Yet they are also interchangeable: the people may yet become rescuers; the rescuers may drown or require rescue. Cohen’s book occupies a “between” of interminable struggle, rather than a “beyond”, although her final gestures are in the latter direction. Insofar as she writes of the future, Cohen envisions ceaseless struggle, and unending transformation through struggle. For those committed to that struggle, or thrust into it by circumstance, *Between Truth and Power* identifies many possible points of pressure and intervention within the infrastructure of informational capitalism. As a guide to the legal fastenings and fundamentals of that infrastructure, in the United States especially, it is invaluable. As a work of thoughtfully hewn,

⁴ M. Foucault, 1991, “Governmentality”, in G. Burchell, C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality* (Chicago, University of Chicago Press: 87-104).

⁵ M. Foucault, 1979. *The History of Sexuality, Volume I: An Introduction*, trans. R. Hurley (London, Allen Lane).

⁶ M. Foucault, 2008, *The Birth of Biopolitics: Lectures at the College de France 1978-1979* (New York, Palgrave).

⁷ K. Polanyi, 1944, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston, Beacon Press).

⁸ Cary, *supra* note 2.

Forthcoming in the *European Journal of Sociology*, 2020.
Please cite to the final, published version.

politically engaged legal scholarship, it is exemplary. Rescue it does not promise. Insight and opportunity, it does.

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