Between Truth and Power (New York: Oxford Univ. Press, 2019)

Conclusion: Countermovements, Now and Then

"Drowning people
Sometimes die
Fighting their rescuers."
-- Octavia Butler, *Parable of the Sower*

This has been a book about both institutional transformation and institutional failure. It has mapped the evolution of legal entitlements and institutions in response to the demands of information capital, and it has also traced the failure of institutional strategies developed over the course of two centuries to constrain unbridled economic power. Two decades into the twenty-first century, the Polanyian countermovements and the others that came after them are increasingly outpaced, outflanked, and co-opted. It would be easy to conclude that the outlook for law as an instrument of reform is bleak. To reach that conclusion, however, would be to misunderstand the most important lesson that the rise and fall of countermovements has to teach.

Legal countermovements have a rich and varied history. The original Polanyian countermovements were crude but effective circuit-breakers that interrupted market-driven logics of commodification by imposing basic worker-protection requirements. Beginning in the late nineteenth century and culminating with the administrative innovations of the New Deal and the constitutional and legislative innovations of the civil rights era, the U.S. legal system developed a host of other protective measures that ranged from simple prohibitions to complex institutional arrangements. Transnational human rights institutions represent yet another kind of legal countermovement, in which moral and normative components played especially prominent roles. Each countermovement was flawed and imperfect, but each changed the conversation about the kinds of institutional action that were possible. Eventually, all have invited new strategies for evasion, capture, co-optation, and arbitrage.

Next, consider the strong property and contract rights at which the Polanyian and U.S. countermovements took aim. Familiar narratives now connect the pernicious effects of unbridled economic power to expansive notions of property and contract. But strong property and contract rights were initially countermovements devised to limit monarchical authority, and legal innovations that expanded opportunities for property ownership and freedom of contract have played important democratizing roles in the U.S. as well. To similar effect, the first modern copyright statute—the British Statute of Anne—was conceived as an author-centric reform to regimes of publisher licensing that kept the interests of both authors and the reading public subordinated to those of publishers and the Crown. The first modern patent statutes replaced royal charters

granted to favorite businesses and revocable at whim with more durable legal protections for the fruits of human ingenuity. Natural-rights-based arguments for strong and undiluted property, contract, and intellectual property rights have an antediluvian whiff today, but they were progressive once.

Here it is useful to recall the functional description of power sketched briefly at the outset of this investigation: Power is both pragmatic and protean, defying efforts to describe its workings and cabin its reach. Given rules of engagement, it seeks out gaps; confronted with prohibitions, it finds workarounds. Durable countermovements disrupt the rhetorical and institutional logics that power has constructed, but if countermovements prove durable, they also become sources of opportunity and targets for co-optation.

In short, the most important lesson that the rise and fall of countermovements has to teach is that countermovements are inevitably temporary. But that does not make them futile nor their gains illusory. While they have force, countermovements produce both concrete improvements in the living conditions of ordinary people and less tangible but equally important benefits to human societies generally. Countermovements also engender expectations—for enjoyment of civil, political, and social rights, for equal and meaningful access to economic opportunities, and for the protection of the rule of law—and those expectations have a power of their own. Expectations that the law will find a way to do justice create pressure for continuing experimentation with the institutions and practices of governance. As law mediates between truth and power, the possibility for real, incremental improvement—and occasionally even for transformative improvement—exists in the windows of opportunity between institutional innovation and institutional capture.

Whether the effects of the transformations explored in this book will elicit meaningful countermovements is yet to be seen. What seems certain is that reforms that simply adopt yesterday's methods are unlikely to succeed. Just as the most effective institutional changes of a previous era engaged directly with the logics of commodification and marketization, so institutional changes for the current era will need to engage directly with the logics of dematerialization, datafication, and platformization, and will need to develop new toolkits capable of interrogating and disrupting those logics. In particular, data protection, algorithmic accountability, platform power, and network-and-standard-based governance have begun to emerge as essential modalities of oversight for the information age. Each oversight modality requires both new legitimating constructs and new institutional forms. Articulations of fundamental rights designed to defend and extend liberal individualism must be paired with others that engage directly with the logics of neoliberal governmentality and platform-based, data-driven, algorithmic power. And overarching rule-of-law constructs designed for a slower, more atomistic, and more court-centered era require rethinking and revision. Together, these goals define an essential agenda for institutional innovation within a new window of opportunity that now stands open.