
REACTIONS TO AMY COHEN

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In this fascinating analysis of our book, Amy Cohen raises a series of interesting and challenging questions. In focusing solely on means, has the concept of institutional bypasses obscured normative disputes about the ends? In rejecting any form of illegality, isn't the concept of bypass implicitly assuming a concept of legitimacy that needs to be unpacked? Also, in trying to separate public and private initiatives, has the bypass potentially ignored complex interactions between market initiatives and governmental regulations? Cohen provides concrete examples to illustrate the real-world policy implications of these questions.

We are grateful to Cohen for pointing to these hard cases, as they seem to touch on some of the limitations of the concept of an institutional bypass. They do not seem to offer, however, a challenge to the concept *per se*. In these hard cases, the distinctions between means and ends, legal and illegal, public and private are not as simple as the book seems to suggest. The existence of concrete examples in which the complexity of these distinctions materializes illustrates their relevance. In this sense, Cohen's piece shows that for the bypass concept to have an application, some conditions need to be present. For instance, there must be substantial overlap in the ostensible ends pursued by the pre-existing institution and a bypass of it, at least in the judgement of citizens wishing to utilize the class of services in question. For example, as Cohen herself acknowledge, there are cases in which focusing on the means does not mask a challenge regarding the ends: Poupatempo is one example, UPAs may be another one (Prado and Trebilcock 2019, chapter 4). In these cases, the concept seems uncontentious.

This does not mean that it is not important to confront these hard cases and unpack their implications. Cohen persuasively shows that the bypass is most useful when the ends are well defined and undisputed, and the challenge lies in figuring out the means. For cases in which the ends are in dispute, something other than a bypass may be preferable. As Cohen points out, Sabel does address this question by designing a form of experimentation – democratic experimentalism – that deals at the same time with ends and means (Sabel 2012). While bypasses are not equipped to resolve these disputes about ends, there is the risk that some interest groups may intentionally promote a bypass (i.e. a strategy to deal with the means) to actually mask a deeper dispute about ends. If this is the case, this would probably be classified as an undesirable bypass, a concept that we have not developed further in our book, but that certainly deserves greater scrutiny.

Another hard case that Cohen presents is related to our requirement that an institutional bypass be legal. We do indeed impose such requirement, except that

we accept the possibility that some alternatives may be a *de jure* violation of the law, but not a *de facto* one. For instance, low-cost private schools in India are technically illegal but are largely tolerated by the state. If the state tolerates the existence of this “illegal” alternative, it becomes *de facto* legal for our purposes. But what if the groups spearheading these alternatives are actively trying to conceal them from the state, so as to prevent the state from cracking down on them? Concretely, Cohen points to cases in the United States, where some community leaders have created mediation mechanisms to deal with intimate and family violence outside of the criminal justice system because of reservations about the latter. To determine if these initiatives are legal or illegal, according to our criteria, we would ask how the state would react to this kind of arrangement. If there is no information about this – because the state is not aware of what is happening – it is hard to provide an unambiguous answer here. Therefore, this would classify as another hard case.

But Cohen goes further and asks if we would consider the possibility of broadening our concept. Specifically, she asks if, despite potential state resistance, we would consider defining as *bypasses* certain kinds of illegal activities, as long as they have the right “purpose”. As the quote from our book cited by Cohen suggests, we are not oblivious to the fact that illegal arrangements may promote meaningful institutional change (2019, 98). Indeed, we provide a number of other examples that seem in line with the one provided by Cohen, such as the evasions of prohibition laws in the United States that led to their repeal, and illegal construction in China that led to property rights reforms (2019, 99). However, in the end, we stick to the state-centered definition of legality. Why? Because determining what is the “right purpose” is a complex and controversial exercise.

In Cohen’s example, there is no consensus about the end to be pursued and, as she points out, the parties involved would have competing claims as to who has the “right purpose”. Who could be legitimized to resolve these competing claims about the “right purpose”? An alternative would be to use some other metric, such as “good intentions”, but this also involves risks. For instance, there are cases where unexpected alliances of well and not so well-intentioned actors may be formed to support a particular initiative. Baptists and Bootleggers, for example, jointly opposed the sale of alcohol on Sundays in the United States but did so for entirely different reasons (Yandle 1983). While the Baptists offered a religiously based resistance to the sale, the bootleggers were driven by commercial interests. The strength of this arrangement lay in the fact that the Baptist narrative provided politicians with a principled justification for legislative action they were receiving bribes to take (Yandle and Buck 2002).

We decided not to insert an external and (supposedly) objective criteria to define institutional dysfunctionality in our book. Similarly, we resisted the idea of trying to determine types of illegality that may be acceptable. As Cohen suggests, in adopting a state-centered definition of legality/illegality, we may be producing

an under-inclusive list of transformative institutional innovations. We acknowledge this, but we believe that this allows us to build a concept on more solid grounds rather than having as one of its foundational elements something as murky and potentially controversial as the concepts of “right purpose” or “good intentions”.

In summary, Cohen calls attention to the fact that the distinctions in which our book and the concept of institutional bypass rely on (means/ends, legal/illegal, public/private) may not be well defined in some cases. We fully acknowledge this but at the same time we classify these as hard cases. In contrast, there are cases in which the challenges presented by Cohen may not be present. Distinguishing clearly between these two is essential for those who want to further investigate institutional bypasses: while there are cases for which institutional bypasses may not be an adequate or desirable strategy for reform, there are others in which the concept can prove very useful. Further research can certainly investigate further these boundaries, identifying the dangers and limitations of institutional bypasses. These studies, in turn, may translate into useful guidance for policymakers.

REFERENCES

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