Critical Dialogue


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— Tanisha M. Fazal, University of Minnesota

In this trenchant analysis of how the United States has navigated its international legal obligations during the War on Terror, Rebecca Sanders brings a critical lens to such practices as torture, extrajudicial killing, and extensive surveillance of U.S. citizens that have been “made” legal in the twenty-first century. In so doing, she points out that even though the United States has been an ostensible leader in the making of international law (in the twentieth century in particular), it has also always employed strategies of legal evasion.

Sanders classifies these strategies into three legal cultures: a culture of legal exception; a culture of legal secrecy; and a culture of legal rationalization. Each maps onto a different period of U.S. history. A culture of legal exception describes much of pre–World War II America, where large portions of the population—including and especially indigenous peoples and African Americans—did not enjoy the legal protections afforded white U.S. citizens. A culture of legal secrecy shrouded the Cold War period, when the United States hid its human rights violations while presenting itself internationally as a proponent of human rights, in distinction to the Soviet bloc. Most recently, Sanders argues, the United States has brought questionable tactics out of the shadows of the Cold War, instead deploying new legal arguments to justify practices such as “enhanced interrogation,” targeted killings, and warrantless surveillance. It is this latest legal culture that lends the book its title. These practices, previously characterized as exceptional and applied only to certain classes of people or conducted in secret, are today presented as “plausibly legal.”

Sanders takes a sophisticated view of international law. Similar to scholars such as Ian Hurd and Helen Kinsella (see, respectively, How to Do Things with International Law, 2017, and The Image Before the Weapon, 2011), she views law as manipulable, and as a tool for states as much as a constraint upon them. Indeed, in Chapter 2, she presents a theory of law as a “permissive constraint.” The book thus forces the reader to revisit questions about the relationship between law and morality, and the specific issue of whether and when the fact that a particular practice is deemed legal can lead to moral satisficing. These are big questions whose importance cannot be overstated. Plausible Legality is clearly motivated by a desire to mitigate the human costs of war, and is as useful for its critical analysis as it is for its clear and remarkably jargon-free overview of the ways in which the laws of war have been used and abused in the “War on Terror.”

To provide evidence for her argument, Sanders deftly takes the reader through three main issue areas in human rights law: torture; deprivations of life and liberty (detention, trial, and targeted killing); and, surveillance. For each issue area, she provides a narrative account of the evolution of these three legal cultures. In making an argument about changing legal cultures, however, the book also raises fascinating questions about continuity in both culture and practice.

For example, while the role of race is most explored in the context of the culture of legal exception, it continues to be critical to the cultures of legal secrecy and, especially, of legal rationalization of highly questionable policies. Sanders is of course correct that a culture of legal exception supported the claim that slave torture could be justified in eighteenth- and nineteenth-century America (pp. 40–41). As she notes, however, racism was also an important enabler, if not motivator, of torture by U.S. forces during the Vietnam War, which falls under her culture of legal secrecy (p. 46). And it is not much of a reach to suggest that racism, particularly anti-Muslim sentiment, is a factor in torture perpetrated by U.S. forces against detainees in the War on Terror, as seems abundantly clear from acts committed by American soldiers at Abu Ghraib and elsewhere. In other words, while the legal strategy of justification may change, the subjects of legal violations share important racialized characteristics. This point raises a broader set of questions around the consequences of changing legal cultures, and specifically whether these changes translate into real differences for the victims of human rights abuses.

In order to make the claim that there have been three legal cultures that have allowed the United States to navigate its own perpetration of human rights abuses, Sanders must draw clean theoretical and historical boundaries around these cultures. But it is worth noting...
that, in fact, these boundaries are likely quite permeable. An important question that she raises is whether these legal cultures build upon each other. Put another way, elements of all three legal cultures identified by the author are visible in the United States today, and were so even prior to the 2016 presidential election. Human rights violations certainly continue in secret (see the discussion of extraordinary renditions around p. 65), as well as under the auspices of legal rationalizations. And one has only to glance at the state of race relations in America today to understand that cultures of exception persist. Is it the case, then, that all three legal cultures have always been present in U.S. politics? Or, is the move from a culture of legal exception to legal secrecy to legal rationalization cumulative? Or is the analysis simply meant to emphasize the relative weight of certain types of legal justification in a given historical time period?

Consideration of the consequences of these shifts also raises questions about their causes. Plausible Legality is more effective at making the case that these three legal cultures exist than in explaining how we get from one to the other. To be fair, this would have been a very different book had Sanders taken on both tasks fully; readers might have easily glossed over the important case she makes for the very existence of these three different legal cultures. But because all good books raise as many questions as they answer, having this one in hand affords the opportunity for discussion on this point.

One possible explanation for the shift in legal cultures refers to existing literature on legalization and international law. Could it be, as Martti Koskenniemi’s argument in The Gentle Civilizer of Nations (2009) might suggest, that the proliferation of lawyers specializing in national security, human rights, and international law more generally over the course of the twentieth- and twenty-first centuries has made this particular reshaping of legal culture especially likely? Testing this hypothesis would require bringing more agency into Sanders’s account. In particular, we would have to learn who the shapers of legal culture were, and are. Has the educational profile of key players at agencies such as the Defense Department and Department of Justice changed over time? The author’s discussion of the Judge Advocate General’s Corps and how JAGs pushed back against the Bush administration’s enhanced interrogation practices (p. 60) is especially intriguing and to this point.

Other possible explanations for change in legal cultures refer to a changing media landscape and the importance of public opinion. Throughout the book, Sanders mentions both phenomena, but does not fully explore either. The notion that the media today are much better able to uncover such abuses is not new; most recently, this point has been made by Kathryn Sikkink (Evidence for Hope, 2018). But the role of the public in Sanders’s analysis remains a bit of an enigma. Presumably, the U.S. public is a key audience for the legal rationalizations of the War on Terror. But do such rationalizations swing public opinion in any way? While, again it would have been too much for Sanders to both elaborate the argument about cultures of legality and explain the shifts between and among them in one book, she strikes me as exceptionally well positioned to take on this latter question in future work.

One reason it is so important to understand the drivers of change in legal cultures is because, as the author notes, the United States may be at another legal inflection point. She wonders, at several points in the book (but especially in Chapter 6) whether Trump administration policies that, for example, restrict immigration from Muslim-majority countries are harbingers of a return to a culture of legal exception. The inherent nostalgia of the “Make America Great Again” campaign notwithstanding, though, it seems just as likely that if there is a move to be made, it will be a move to an extralegal culture in which violations of the law are not painted as exceptions or hidden away or rationalized, but rather normalized.

In distinguishing legal cultures around national security, Plausible Legality raises a number of enduring questions. Sanders should be applauded for offering a framework that sheds light on current and pressing debates in national security and human rights law.

Response to Tanisha M. Fazal’s review of Plausible Legality: Legal Culture and Political Imperative in the Global War on Terror
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— Rebecca Sanders

I greatly appreciate Tanisha Fazal’s thoughtful comments on my book. Over the years I have wrestled with many of the questions that she raises.

Plausible Legality seeks to explain the role of law in constraining state violence. Focusing on the United States, I argue that even after societies institutionalize human rights and humanitarian law, national security legal cultures produce varying justifications for abusive practices, thus shaping law’s impact on policy. As the book emphasizes, racial animus has frequently underlined repertoires of violence—overtly in cultures of exception and more implicitly in the culture of legal rationalization that has predominated in post-9/11 America. Do these shifting justifications really matter for victims, asks Fazal? I think that they do, not because plausibly legal enhanced interrogation techniques and targeted killing are an ethical or humanitarian improvement on openly racist or blatantly extrajudicial mutilation and murder, but because identifying how authorities violate, evade, and reinterpret law in differing contexts better positions human rights advocates to effectively push back against state violence.
Fazal is right to note that the drivers of cultural change are not the primary focus of the book, nor can the type of broad patterns I identify be explained by a single variable. Rather, I suggest that a conjunction of critical historical events, broader shifts in social norms, and the preferences of political actors accounts for changing legal cultures. For instance, the intelligence scandals of the 1970s and 1980s and resultant media, nongovernmental organization, and political scrutiny made a culture of secrecy and plausible deniability unsustainable. As a result, the national security establishment became increasingly risk averse, learning to seek legal cover. In contrast, the Trump administration’s crude extralegalism signals a failure to appreciate the efficacy of plausible legality as an excusable tactic, but also builds on impunity for abuses in the global War on Terror. If waterboarding is legal, why not “a hell of a lot worse”? In this sense, there is a cumulative, though not necessarily progressive aspect, to cultural change.

I agree with Fazal that there is more to be learned about the primary protagonists in my story. Legal cultures form through the patterned actions of individual agents, each with his or her own educational, ideological, and organizational backgrounds. Who collaborates with and who resists authorizing human rights abuses is a crucial question that requires ongoing attention. I also appreciate Fazal’s challenge to further specify the role of audiences. While invocations of exception often appeal directly to the mob, both mobilizing and horrifying the public, plausible legality seeks first and foremost the acquiescence of judicial and political elites who have the institutional power to trigger the type of investigations and recriminations besieging the current administration.

In many ways, my argument is aligned with Fazal’s finding that states attempt to evade the proliferation of legal constraints, although the mechanisms for doing so vary in our accounts. Like her, I hold out hope that law can account for changing patterns in the prevalence of “war formalities,” including a decrease in declarations of war and peace by states, as well as declarations of independence by secessionist movements, and the simultaneous increase in the conclusion of secessionist conflicts via peace agreements. These trends are puzzling because they have coincided with the expansion of international humanitarian law (IHL), such as the Geneva Conventions of 1949 and their Additional Protocols of 1977, which aim to regulate state conduct in war while only minimally addressing nonstate actors. However, rather than constrain behavior as intended, Fazal argues, the proliferation of IHL has had unanticipated effects, such as incentivizing states to evade burdensome legal requirements by avoiding formal acknowledgment that they are at war. At the same time, secessionist movements have sought to secure support from the international community by refraining from making destabilizing unilateral declarations of independence and acceding to formal peace agreements.

Together, these findings suggest that more law does not necessarily result in more legalized or humanitarian forms of warfare. In advancing these insights, the book contributes to a growing body of scholarship that investigates how actors instrumentally engage legal norms and how law shapes behavior beyond compliance or non-compliance.

War of Laws proceeds in three parts, beginning with an overview of the development of IHL from the mid-nineteenth century on. This is far from a rote account. Fazal plumbs the archival record to offer an original analytical history with broader significance for her argument. She notes how “law-takers,” such as state militaries, once played a lead role in the formation of IHL, but were increasingly displaced in the mid to latter twentieth century by “lawmakers,” such as legal professionals and nongovernmental advocates who have come to dominate treaty negotiations (p. 24). This has been consequential, increasing legal constraints on belligerents in comparison to the enabling nature of earlier IHL, thus deepening the bureaucratic, financial, and strategic costs of compliance for states. Yet IHL has done far less to regulate the conduct of nonstate actors, instead marginalizing their legal status.

The remainder of the book examines how and why the expansion and deepening of IHL has impacted belligerent decisions to engage in war formalities. While Fazal is explicit that compliance with IHL is not her dependent variable, she conceptualizes use of war formalities as a means through which actors signal intent to comply because doing so reduces ambiguity about their obligations (p. 45). Grounded firmly in the rationalist tradition, the resultant inquiry focuses on the shifting costs and benefits of this signaling.

To determine the extent to which IHL proliferation impacts state declarations of war (Chapter 3), jus in bello behavior (Chapter 4), and participation in peace treaties (Chapter 5), Fazal runs regressions using an original data set (p. 76). The quantitative analysis is accompanied by qualitative historical case studies of the Spanish-American War, the Boxer Rebellion, the Bangladesh War, and the Falklands/Malvinas War. The trends are striking. States declared war in 65% of interstate conflicts in the nineteenth century, but only 17% in the twentieth century,
including just three times after 1945 and never after 1972 (p. 80). Meanwhile, 75% of interstate wars concluded with peace treaties pre-1945, but only 7% post-1945 (p. 151). Fazal attributes this to growing state concern that war formalities could increase their legal exposure to even more restrictive IHL rules. The argument is illustrated most convincingly in instances such as the Falklands/Malvinas War, where there is explicit contemporaneous documentation of state rationales—in that case, statements by British legal advisors and decision makers trying avoidance of formalities with concerns about IHL requirements.

While the study of interstate formalities could stand on its own, the third section of the book shifts focus to secessionist conflicts. Fazal’s broad scope of inquiry proves analytically fruitful, highlighting how IHL proliferation has affected nonstate actors differently from states. Here, Fazal once again employs an original data set (p. 164), along with case studies of the secession of Texas from Mexico, the attempted secession of South Moluccas from Indonesia, and the secession of South Sudan. The analysis reveals that secessionists, including groups with highly viable claims, have increasingly avoided unilateral declarations of independence (Chapter 6), engaged in less countercivilian violence than nonsecessionist rebels (Chapter 7), and increasingly participated in peace agreements (chapter 8). This is explained by secessionists’ desire to win recognition from an international community that promotes sovereign stability, supports IHL compliance in theory, and encourages multilateral mediation, which in turn helps generate formal peace treaties (p. 234). Secessionists thus try to act the part of nascent responsible states by conforming, relative to other armed nonstate actors, to these preferences.

Yet Fazal shows that this performative signaling does not necessarily correlate with recognition (p. 216). As illustrated by the case of South Sudan, countercivilian atrocities did little to slow their successful bid for statehood. Nor do formal peace agreements always last (p. 242). While Fazal’s overall argument about legitimacy-seeking incentives is convincing, there are some anomalies in the data, such as the finding that rebels were 40% more likely to target civilians after the 1977 Additional Protocols regulated noninternational armed conflicts than before (pp. 207–9), which make the analysis of secessionism somewhat difficult.

The book concludes with policy implications. First, it matters who is in the room during treaty negotiations. Therefore, emergent efforts to regulate lethal autonomous weapons systems or “killer robots” and cyber threats may be more likely to effectively shape state behavior if militaries participate in rule generation and perceive constraints as reasonable and practical (pp. 245–46). However, it is sometimes hard to pin down what this means in practice. While it may be true that excessively detailed IHL is hard to comply with, Fazal also notes that the broad parameters of Common Article 3 of the Geneva Conventions of 1949 are so vague as to be easily shirked (p. 19). How exactly to craft laws that are permissive enough to be workable but constraining enough to place meaningful limits on state violence requires further probing. The book also concludes that the international community could do more to reward well-behaved secessionists (p. 251), and should more actively commit to supporting peace agreements long term (p. 253). While IHL was not primarily created to regulate nonstate actors, their sensitivity to constraints should be encouraged.

As with all such scholarly endeavors, what is gained in breadth is occasionally lost in depth. In looking for wider trends, the book is less able to systematically differentiate between divergent forms of strategic legal evasion or engagement in which actors may take part. States have almost universally eschewed war formalities for the past half century, but there is undoubtedly significant variation in the nature of this avoidance across cases and time. For instance, while the United States, one of the world’s most prolific war makers, has rejected war formalities and decried the onslaught of “lawfare,” it has also invoked the laws of war to justify controversial policies in the “War on Terror.” Because IHL allows combatants to kill other combatants as well as civilians directly participating in hostilities, the United States has claimed that targeted killing with remotely piloted aircraft around the world is lawful. In this sense, at least some law-takers may have adapted to IHL proliferation through deployment of their own more permissive legal interpretations. Even where states acknowledge the applicability of IHL, there is still ample room for maneuver. Moreover, legally sophisticated states are aware that avoiding formalities and employing euphemisms does not in fact obviate their IHL obligations, which, as Fazal notes, are triggered by the existence of armed conflict, not declarations of war (p. 82).

A related point arises insofar as the book does not say much about the legal rules, at least in theory, that bind states in the absence of IHL, namely, the plethora of treaties and other legal sources that comprise international human rights law (IHRL). In defining contemporary IHL, the book follows the International Committee of the Red Cross, which includes certain IHRL treaties, such as the Convention against Torture and the Convention on the Rights of the Child in its IHL treaty database (p. 23). However, even when states effectively avoid the clear application of IHL, they cannot legally opt out of their basic nonderogable IHRL obligations. The space beyond IHL is not a lawless one. In fact, IHRL arguably places even more stringent constraints on the exercise of state violence than does IHL. This raises a number of perplexing questions about how states that find IHL compliance too onerous understand their legal
liabilities when engaging in “counterterrorism” or “police actions” outside of this framework (p. 82).

Wars of Law is an impressive undertaking that makes a significant contribution to the international law and international security literatures. Fazal generates original data, expertly employs mixed methods to explore a wide array of cases, and innovatively tackles both interstate and civil wars simultaneously. In identifying the unanticipated effects of IHL proliferation, the book should inspire critical reflection, and will benefit from being read in conjunction with further efforts to tease out the particular dynamics of strategic legal evasion and engagement that emerge in different contexts.

Response to Rebecca Sanders’s review of Wars of Law: Unintended Consequences in the Regulation of Armed Conflict
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— Tanisha M. Fazal

I thank Rebecca Sanders for her generous and thoughtful review of Wars of Law. Because her review focuses primarily on the sections of the book dedicated to interstate war, my response also will focus on interstate war. I respond to questions she raises regarding policy implications, the role of international human rights law, and the complicated set of strategies—beyond war formalities—that states may adopt to navigate their legal obligations in wartime.

First, Sanders asks for elaboration regarding how future laws could be designed to close the distance between the legal professionals who craft the law and the military professionals meant to follow it. She does not appear to disagree that one consequence of this distance is that states are incentivized to try to sidestep the law by, for example, avoiding war formalities such as declarations of war and peace treaties. This problem is an extremely complicated one, and certainly cannot be solved in this brief response. My broader point is that only by having key players—including military personnel—in the room can lawmakers see what is possible, what is likely, and what might be problematic. Note that I am by no means suggesting that state military personnel ought to run this process. Indeed, given the prevalence of civil wars today, there is also a strong argument to invite greater participation from nonstate armed groups. Both sets of perspectives ought to be critical to the design of international humanitarian law, especially given that military personnel may consider elements like reciprocity as especially germane to IHL.

Second, the issue of reciprocity brings me to another question Sanders raises: What is the role of international human rights law (IHRL) in my analysis? Sanders is of course correct that “the space beyond IHL is not a lawless one.” While I do not focus on IHRL in Wars of Law, its development fits the arc of my argument, especially when we consider that codified IHRL is relatively new when compared to international humanitarian law. IHRL thus adds to the historical proliferation of laws meant to govern state conduct. And perhaps especially because it lacks a logic of reciprocity, states may be even more inclined to try to evade their obligations under IHRL in times of armed conflict.

Third, Sanders correctly points out that even if states are avoiding war formalities, they continue to engage IHL via strategies she outlines in her own book, Plausible Legality. While I agree with Sanders in principle, caution is warranted in generalizing her findings, which are based on the United States almost exclusively. Nonetheless, I view the basic contours of our arguments as being in harmony here. States—and their lawyers—find creative ways to evade and manipulate legal obligations in war. The task, then, is to try to reassess the law at as many levels as possible to mitigate the human costs of war.