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**Game of Norms: Law,
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Game of Thrones**

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Game of Norms: Law, Interpretation, and the Realms in Game of Thrones

Legality does not play a decisive role in Game of Thrones,¹ important questions do not turn around written rules, among others, the protection of property and life depend on rightly chosen alliances more than anything. If it has some legal order, unrestrained decisions of individual actors play a more important role, see, for one, how adult established persons are waiting for the word of the child ruler Robin [Robert] Arryn over Lord Yohn Royce's fate, making the question of a noble man's life or death the result of a child's fleeting mood.² If it has some rule of law, it is in most cases taken over by exception. The realms are, however, not completely devoid of elements of a legal system. The major rule of succession seems to be a monarchical norm, with surviving elder family members or children succeeding the deceased king (with the indicated uncertainty causing quite of bit of conflict). Law seems to play an eminent role also in a most unlikely community: the 'bunch of thieves and runaways',³ which is the Night's Watch, tasked with protecting the Wall and the realm of men. The Night's Watch is governed not only by the – elected – Lord Commander, but also by the oath that all joining members of the Night's Watch, the black brothers, take and need to observe until they die.

In this paper I will use Game of Thrones (the TV series⁴) and its oath of the Night's Watch to discuss some basic questions related to the nature and functioning of law. This will serve a dual goal: assessing the concept of law used in the series (making the paper part of a long-thriving academic field, law and literature, or law and film), but, more importantly, also to present theoretical questions in a friendly way – something I also tested in introduction to law classes. It is not easy to draw students into discussing questions of the right interpretation or functionalist understandings, but by driving them to a friendly (if deadly) territory, one can engage with them and show how the discussion is intimately related to fundamental dilemmas of legal theory. This is done in a context (debates on borders, walls, guards, migration, refugees, dangers) that is extremely topical, but still removed enough from current political debates to make political biases less weighty.⁵ An assessment of the oath of the Night's Watch will allow us to present to students the debates around legal

¹ I am here discussing the series, for the sake of simplicity, as depicted in the TV version, with occasional references to the book version. This decision is at least partly based on substance: the interpretation of the oath that I am mostly interested in here seems to play a weaker role in the books. I would like to thank here the insightful guidance from a friend and colleague who is way more familiar with the story (both the book and the TV versions) than me, János Fiala-Butora.

² Note, however, that the event only takes place in the TV version, and the relationship between the two persons is more complex in the books.

³ Lord Commander Jeor Mormont, 1x3 (for the sake of brevity, I refer to episodes by the 'Season x Episode' formula).

⁴ Note, again, that *not* A Song of Ice and Fire, the series of novels (being) written by George R. R. Martin.

⁵ This is not to claim that discussing the oath of the Night's Watch is in any way politically neutral, considering not only the political preferences of the writer, but also the obvious connotations of the function of a wall built to keep out some who wish to enter, with at least some of them fleeing from danger. In this sense, this article might be guilty of the 'leftist bias' that critiques point out in many law and literature pieces, while it is not praising creativity at the expense of 'strict interpretation'. RICHARD A. POSNER, LAW AND LITERATURE 11 (2009).

interpretation, originalism and the notion of the living constitution, textualist and moralist readings, functionalism, levels of abstraction, the ‘constitutional moment’, the changing meaning without changing text, Schmitt and decisionism, Kelsen and normativism. I hope this paper does some service to spread the word, to students and others, about the deeply engaging and messy workings of law and legal interpretation.⁶

I will try to discuss the series, as I have done in class, in a way that does not presuppose the knowledge of the story: those with zero knowledge of Game of Thrones should also be able to follow, just by reading the oath and contemplating its ambiguities. The nature of the discussion also means that there are spoilers in this paper. For those who do follow the series, the paper tracks events until the end of Season 7.⁷

For those who do not follow the series: Westeros is the Seven Kingdom where competing houses strive for leadership, the Iron Throne. Jon Snow, who comes to be one of the main protagonists, joins the Night’s Watch, an army tasked with protecting the Wall, a gigantic construct that separates a territory inhabited by ‘wildlings’, humans living beyond the Wall who have been, for centuries, at war with those to the south of the Wall. A new species also appears beyond the Wall: long thought of as legend only, the undead (the wights) march to the Wall, apparently, to abolish all humans and transfer them to one of their own, under the command of White Walkers and their leader, the Night King. The army of the dead grows like cancer: people killed by them raise as undead and strengthen the army. Jon becomes the leader of the Night’s Watch and faces a dilemma: whether to ally with the ‘wildlings’ – and whether this is permitted (legal) under the oath.

Game of Thrones has been widely used in academia to discuss and illustrate theories of international relations⁸ as well as law.⁹ (Not to talk about an array of other disciplines including history¹⁰ and

⁶ This is in line even with Judge Posner’s caution on the role of literature in law: ‘What literary texts that have law for a theme can do for legal teaching and scholarship is to illuminate issues of jurisprudence or legal process’ *Id.* at 546. Picking the oath, a short text also fulfils Posner’s other condition: ‘Other aspects of law and literature, such as interpretation, the use of literary techniques in legal writing, the claimed humanizing effect of literature on law, and the regulation of literature by law, are worth teaching, of course. But they are best taught by giving students brief excerpts from literary works and from such legal texts as statutes, judicial opinions, legal essays (including oppositional narratives), and constitutions, to read and discuss.’ *Id.* at 546.

⁷ And relies, in addition to the series, on YouTube fan videos and the Game of Thrones wiki at gameofthrones.wikia.com. The arguments, however, try to stick to whatever we learn from the series, excluding comparisons with the books and speculations.

⁸ Just from two leading journals: Daniel W. Drezner, *What can Game of Thrones tell us about our world’s politics?*, FOREIGN POL’Y, June 23, 2011, <https://foreignpolicy.com/2011/06/23/what-can-game-of-thrones-tell-us-about-our-worlds-politics/>; Alyssa Rosenberg, *Realpolitik in a Fantasy World: How George R.R. Martin’s A Song of Ice and Fire novels explain our foreign policy*, FOREIGN POL’Y, July 18, 2011, <https://foreignpolicy.com/2011/07/18/realpolitik-in-a-fantasy-world/>; Charli Carpenter, *Game of Thrones as Theory: It’s Not as Realist as It Seems—And That’s Good*, FOREIGN AFF., March 29, 2012, <https://www.foreignaffairs.com/articles/2012-03-29/game-thrones-theory>; Kelly DeVries, *Game of Thrones as History: It’s Not as Realistic as It Seems—and That’s Good*, FOREIGN AFF., March 29, 2012, <https://www.foreignaffairs.com/articles/2012-03-29/game-thrones-history>.

⁹ See, e.g., the special issue edited by Melissa de Zwart and Jason Bosland: *Law and Law Breaking in Game of Thrones*, MEDIA & ARTS L. REV. (2015). A nice illustration of the legally relevant aspects can be found at <https://abovethelaw.com/tag/game-of-thrones/>. For a quick overview of the laws of Westeros, see *Rules of the Game of Thrones – What are the laws of Westeros?*, UNLOCK THE LAW (June 18, 2015), <https://www.unlockthelaw.co.uk/News/rules-of-the-game-of-thrones-what-are-the-laws-of-westeros/22862938.html>. For a description of the justice system: Jennifer Vineyard, *How Does the Justice System Work in Game of Thrones?*, VULTURE, May 11, 2014, <http://www.vulture.com/2014/05/explainer-the-game-of-thrones-justice-system-tyrion-trial.html>.

gender studies.¹¹) I know of one legal mention of the interpretation problem of the Night's Watch oath, from Perry S. Bechky, that I quote here in full: 'Samwell [Tarly] argues that the Night's Watch must guard the "realms of men"—realms plural—meaning that they must protect "wildlings" as well as Westerosi. Samwell persuades Jon Snow, then the Lord Commander, to accept that the Watch has misconstrued the oath for millennia, thereby setting the legal basis for Jon to ally with the wildlings. The fact that the alliance rests on Samwell's construction of the oath, gives Samwell's Rule— "[w]ildlings are people"—a claim to legal status.'¹² This is the problem that I will tackle more in depth.

The Oath

Night gathers and now my watch begins. It shall not end until my death. I shall take no wife, hold no lands, father no children. I shall wear no crowns and win no glory. I shall live and die at my post. I am the sword in the darkness. I am the watcher on the Walls. I am the shield that guards the realms of men. I pledge my life and honor to The Night's Watch, for this night and all the nights to come.

The Oath of the Night's Watch

The oath has a personal and a constitutive dimension to it: one becomes one of the Night's Watch by taking the oath,¹³ taking up obligations until death; and the statement of mission and the rules for the brothers define, or constitute, the community. With some additional rules – including the election of the head, the Lord Commander, and that convicted criminals can avoid punishment if they join the Watch – the oath can be taken as the constitution of the Night's Watch. The oath contains what one could call 'individual' and 'collective' elements.

First, the oath creates obligations where a plurality of interpretations can survive, are not mutually exclusive, logically (if not practically). One such example is the question that brothers 'shall take no wife'. Some take it as a general obligation not to sleep with women, while many take occasional visits to the striving brothel at Mole's Town. One interpretation does not disturb the other, in fact the two can be reconciled under an interpretation with a grey margin: marriage is ruled out,¹⁴ and sleeping with women is tolerated in practice – a flexible, if hypocritical approach to celibacy, not without historical parallels.¹⁵ Of course, 'father no children' is a further hardship.

A further obligation is that watchers renounce their nobility and striving for wealth ('no lands' and 'no crowns'). This also raises questions of interpretation that might be answered differently by various watchers – but as this is not raised in the series, I will not discuss this aspect.

¹⁰ The most obvious target is medieval studies: Michaela Baca, *Bad Kids: Incestuous Fantasy and Phenomenon in A Song of Ice and Fire*, 32 *ESSAYS IN MEDIEVAL STUD.* 83 (2016).

¹¹ See, e.g., William Clapton & Laura J. Shepherd, *Lessons from Westeros: Gender and power in Game of Thrones*, 37 *POLITICS* 5 (2017); Debra Ferreday, *Game of Thrones, Rape Culture and Feminist Fandom*, 30 *AUSTL. FEMINIST STUD.*, no. 83, 2015, at 21.

¹² Perry S. Bechky, *The International Law of Game of Thrones*, 67 *ALA. L. REV. ONLINE* 1, 10 (2015); footnotes omitted.

¹³ The exact ceremony depends on one's faith: from their cohort, only Jon Snow and Samwell Tarly take the oath before the 'old gods', visiting a 'weirwood' tree beyond the Wall.

¹⁴ I omit here the question whether gay marriages would be banned under the 'no wife' paradigm.

¹⁵ 'If we beheaded every ranger who lay with a girl, the Wall would be manned by headless men.' Maester Aemon, 4x1.

An unlikely dilemma appears for Jon Snow when he is not only killed, but resurrected, with magic. The first event does not pose a problem of interpretation: his watch ends, dying at his post. Resurrected, he orders the execution of those plotting against him, and leaves the Night's Watch – apparently for good, engaging in the fight (but apparently not aspiring) for the Iron Throne, sleeping with Daenerys Targaryen.¹⁶ His interpretation is that his death means he is relieved from the duties under the oath: 'My watch is ended', he declares after he is resurrected and the perpetrators are executed.¹⁷ But did it, is he right? A quick glance at the oath shows that it is a tenable if not particularly convincing interpretation: if 'death' refers to 'any death', a 'not-final' death also ends one's watch. Yet, if one shall 'live and die' at the post ('once a watcher, always a watcher'), pledging his life to the Night's Watch for 'all the nights to come', it hard to see how nights of the post-resurrection life can be exempted. (A further question, that I will not discuss here, is whether the Jon Snow who died is indeed the same person as the one who raises afterwards.) In any case, nobody would challenge his decision in the Night's Watch. However, we learn early in the series that deserters of the Night's Watch are summarily executed if caught. In fact, Ramsay Bolton when negotiating with Jon Snow, offers, among others, to pardon him for deserting the Night's Watch. King Stannis does the same when he tries to persuade him to join his cause.

All of the above are 'individual' elements in the sense that one member can hold to different interpretations without completely (logically) undermining competing interpretations held and observed by other members. Crucially, the Oath has 'collective' elements, above all, the question of how to understand the mission of the Night's Watch: one interpretation will decide the actions of the watch, one right interpretation has to rule. This aspect is also strictly constitutive for the Night's Watch, in a fashionable term in public law circles, its 'constitutional identity' is intimately linked to how we see its central mission.

Three sentences capture the essence of what is the Night's Watch for: 'I am the sword in the darkness. I am the watcher on the Walls. I am the shield that guards the realms of men.' The somewhat obscure and poetic phrasing leaves much to interpretation – and only one interpretation can be 'right' (official), competing interpretations cripple the Night's Watch. But which is this interpretation? This is what the rest of this paper will try to unpack.

The Dilemma

Samwell Tarly and Jon Snow are in a minority thinking that 'the realms of men' to be guarded includes 'wildlings'¹⁸ or, what would be the politically correct name used by those living north to the Wall, the 'Free Folk'¹⁹ (the 'black brothers' are in turn called 'crows' for their black attire). Most of the watchers are deeply convinced that the protection prescribed by the oath does not only not extend to them: 'the realms of men' should exactly be protected *from* them. I will call the two

¹⁶ They don't know at that point that they are aunt and niece.

¹⁷ He adds, arguing with his appointed successor Eddison Tollett that 'I pledged my life to the Night's Watch, I gave my life...'; to which Ed quotes the oath: 'for all nights to come.' 6x4.

¹⁸ A question which does not arise is whether peoples living in Essos are covered or not, some of them leading traditional lifestyles which, under the common culturalist-exclusivist and, ultimately, racist reading is often enough to deny inclusion, protection and rights. The term 'realms of men' would probably extend to them, given the lack of a long history of fighting with the Night's Watch, the 'tradition' that makes the inclusivist turn so hard in the case of the wildlings. As slavery is banned in Westeros, the question whether slaves are included also does not arise.

¹⁹ To better capture the debate, I will continue to use the name commonly used in the debating community: 'wildlings'.

competing interpretations the 'inclusive' and the 'exclusive' interpretation of the oath, respectively. In a crucial moment, the White Walkers and the army of the dead marching south, one decision needs to be made: either letting through the wildlings or letting them die.

The exclusive is the traditional understanding and seems to be the winning argument: for centuries the Night's Watch has been fighting with wildlings: humans living on the northern side of the Wall, and protecting, from them and their occasional missions of killing and sacking, people living south to the Wall, in a constant war between the two sides. This might not mean that this interpretation is the right one, i.e. that it should be official (lawful), simply that it has not been challenged earlier.

Traditional legal methods exist to decide between competing interpretations of a legally valid text. As no one seems to question the validity (legality) of the oath itself – it would be hard to do after one took the oath – let's see what legal methods tell us about the dilemma of the Night's Watch. I will illustrate, with the oath, the use of the following approaches: textual, precedent-based, originalist (vs. 'living constitution'), utilitarian (law & economics), moral, and (contextualized) functionalist. Finally I will see if there is room for a fluctuating interpretation and to what extent that marks the end of 'law' (of the oath).

A textual-grammatical (but somewhat decontextualized) reading can point out that 'the realms of men' is double plural, seemingly expanding to all humans, a biological category that applies to wildlings²⁰ (see the contextualized-historical Westerosi understanding in a minute). But 'realm' can also work as a qualifier; after all, wildlings are known for a lack of organizing ability.²¹ If only men living in 'realms' are to be protected, wildlings are out.²² It is not only that there is a tension between the two parts of the expression 'realms of men', but also that the question is exactly whether a biology or political organization should matter, not mentioning other possibilities? Just in the H.L.A. Hart's famous hypothetical from 1958,²³ no vehicles in the park – would that outlaw bikes, skaters or toy cars? The text does not interpret itself, we need context – external references that help us decide which interpretation should guide the community.²⁴

Remaining with the textual approach, there is a direct textual context. It is somewhat poetic, but seems to play on the antagonistic relationship between light and darkness: 'Night gathers and now my watch begins. [...] I am the sword in the darkness. [...] I pledge my life and honor to The Night's Watch, for this night and all the nights to come.' We know that the leader of the army of the dead, the first White Walker is called the Night King. It may not be too far-fetched to say that the oath suggests that the mission of the oath-takers is linked to this fundamental antagonism, and their true goal is to fight against this ultimate darkness: death and the army that brings it, risking the end of humanity. But, remember, our question is not simply whether the drive behind the oath was originally the threat by the White Walkers, but whether wildlings can or should be allowed to enter, whether the duty of protection extends to them as well. This, the text does not make clear.

²⁰ Although the fact that a giant also arrives makes the racial – or specie-based? – delineation harder, if not the cognitive/sentientist decision.

²¹ The 'king' that can unite them comes from the south – in fact, from the Night's Watch.

²² The inclusion of women could also be questioned, on a textual reading, but the gender aspect is never raised. Unlike in the case of the prophecy about the 'prince that was promised'. When the question arises whether this can be interpreted as applying to Daenerys Targaryen, a queen, her interpreter explains that the word in question in Old Valyrian is gender neutral and could mean both prince and princess. Another quote underlines the use of gendered expressions, starting with a translation of Valyrian saying 'valar morghulis': 'All men must die. But we are not men.' Daenerys to her handmaiden-advisor Missandei, 3x3.

²³ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

²⁴ For an introduction to the dilemma, see STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* (1980).

The text does rule out certain interpretations and is constraining in certain respects. It is hard to argue that it would be okay to let wildlings through because Jon Snow wants to marry one. But it is not clear whether the general goal to protect wildlings is allowed for or even required by the best interpretation of the text of the oath. Broadening the contextual inquiry can lead us to other norms and practices, the 'legal context' that can ground a 'dogmatic' of the oath. In the series, there is really not many other legal-type rules that could be decisive for our interpretational dilemma.

A readily available context is history, e.g., 'realms', for Westerosi, means the Seven Kingdoms. The oath has been interpreted in a certain way for ages; also, the oath had to be adopted some time before, and we can make educated guesses which interpretation those people, back then, had in mind. The first, tradition-based interpretation is akin to precedent-based interpretation: we accept a certain understanding because this is what we inherited, people before us were following that same reading. The latter version of the historical context would belong to the various versions of 'originalist' readings, depending on whether we are interested in what those who wrote or those who adopted the rule understood by it or else a wider community living at the time of adoption.

Deciding between the two – precedent-based and originalist – methods is not an easy task. The late Justice Scalia of the US Supreme Court, easily the most well-known originalist, publicly stated his willingness to 'give in' to non-originalist ('evolutionary content') considerations over originalist readings in certain cases.²⁵ For the originalist reading, a particular difficulty in this case is to unearth an interpretation from thousands of years before our question of interpretation arose. Or, if wildlings (the concept or the people) did not exist back then or were unknown to the builders of the Wall, and the dilemma itself did not occur to the 'lawgiver'?²⁶ Or, on a less plausible, but possible interpretation: they built the Wall up north to the extent they included all men known to them.²⁷ Trying to guess what people back then would have thought about protecting or attacking wildlings seems shaky ground. And, asking with Posner, why should we pick any of the two if these readings do not seem right, e.g., the historical interpretation gives us bad results?²⁸ Furthermore: does the original understanding matter at all, if we can create virtual consensus today around one interpretation?²⁹

'Living constitutionalism' is usually contrasted to originalism in that it accepts that meaning can change over time, with society (the context) itself changing.³⁰ But should the reference group for the social context be only the Westerosi, showing an imperialist-civilizationist bias, under which the most compelling interpretation might easily be to exclude the wildlings; or we can also include social

²⁵ Hence his self-description as 'faint-hearted originalist': Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1988-1989).

²⁶ Just like Jon Snow's resurrection most likely presents a case that was not foreseen by whoever framed and adopted the oath.

²⁷ The book version seems to give more food for an originalist reading – e.g., hinting on the fact that different parts of the oath were written at different times – but does not eliminate this ambiguity. Of course, the last volume might change this.

²⁸ See Posner's criticism of originalism: RICHARD A. POSNER, *OVERCOMING LAW* 229–236 (1996), Chapter 8: What Am I? A Potted Plant?

²⁹ To be fair, the originalist answer to this is that in that case, it is possible to change the law (even a constitution). We don't know how, and if, the oath can be changed.

³⁰ Certainly not always 'evolve' – as Scalia put it: 'societies do not always evolve sometimes they rot', criticizing the notion of the 'evolving standards of decency'. *A conversation between U.S. Supreme Court justices. The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 525 (2005). See the same argument in ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 40–41 (1997).

standards of the Free Folk, which would make it impossible to exclude their perspectives? Can the various perspectives be really united under one common reading that can be identified as a new but dominant view? – Consider not only the differences between the two groups, but also the immense variation within them; see the hardship of uniting those living north of the Wall even as the marching of the dead started to take its toll. Even if it is such a synthesis is possible, circularity sinks our attempts to resolve the central dilemma because the boundaries of the reference group are in question. This line of argument opens ways to take in more from the current context, but does not decide what we should rely on.

Maybe we can make the ‘whom to include’ question part of the equation: we can probably agree that maximizing welfare is an appealing goal if compelling alternative interpretations seem to be open. Leaving people die, in great numbers, north to the Wall is a wrong weighty enough to be decisive, provided that their protection does not undermine the realm and the mission to protect it. Yet, the argument is exactly that to let them in will undermine the mission of the Night’s Watch who has been fighting wildlings for centuries. Every member of the Night’s Watch knows fellow members killed by wildlings. In fact, a particularly young brother who plots against Jon and participates in the murder (and gets hanged, as a consequence) had seen his whole family killed by wildlings.

The utilitarian calculus, weighing the pros and cons becomes an empirical question, then, or a question of wit: how to tell in advance what benefits and costs to expect from letting wildlings in. Maybe we can use statistics: if there is a 10% chance that letting in wildlings results in them turning against the Night’s Watch and others, with a 90% chance that they join the fight (ruling out, for the sake of argument, other possibilities), we can weigh the costs and benefits and see if it’s still worth it.³¹ We can consider the goal of maximizing the potential to save lives in the fight with the White Walkers. In our specific case, the utilitarian calculation becomes quite speculative. In fact, both sides engage in this kind of speculation: Jon Snow, himself not sure what happens if he lets in the arch-enemy, argues strategically that if they are let to be run over by the army of the dead – which eventually happens to a great extent despite his intervention – that will only make that army stronger: all those killed will rise as undead under the command of the Night King. Proponents of the exclusive reading are quick to point out that this is a risky endeavor, and the risks involved outweigh the potential benefits, e.g. because the Wall would anyway hold back the army of the dead. It is true that, in hindsight, Jon is right: it proves to be good strategy to let in the wildlings, or what remained of them, to help the fight against the old-new enemy. But does this also make the inclusive interpretation ‘right’, retroactively?

There is a further problem with the utilitarian approach. The above reading presupposes a decision on that the lives of wildlings: they matter to the same degree as non-wildlings. If their lives do not matter, the utilitarian argument looks very different, and the question is exactly that: are wildlings human, for the purposes of the oath, humans of equal worth?³² The utilitarian reading requires a

³¹ A thoroughly economic account, one step more removed from our interpretational dilemma, is also possible: is there enough food for the wildlings and to what extent the costs in that sense outweigh the benefits of having them on the southern side?

³² It is also possible that wildlings’ lives matter, but to a less extent – like slaves & Indians in the original US Const. – but this would also require a preliminary decision on their lives’ worth, and we are lacking a standard for that decision. It is also possible to argue that the oath does not mandate the protection of the wildlings (they are outside ‘the realms of men’), but protection is nevertheless warranted for humanitarian reasons and mandated by utilitarianism. However, this would cease to be a legal debate on the right interpretation of the oath, and would become a purely moral argument – just the type of argument that we are coming shortly to address.

preliminary decision about who counts for the maximalization of happiness; we cannot avoid the underlying moral dilemma.³³ We see that all interpretations require a background moral reading or arrives at a juncture where morality-based decision is necessary.

Where to look for solid ground for our moral decision? We can argue that the text of the oath shows that was born out of a humanitarian vision, the Night's Watch, whose mission to protect men cannot dehumanize people even if their protection is not specifically mandated by the oath. This would mean that a more humane reading can consolidate, but might do little to convince those whose starting point is exactly that wildlings are not human – in fact, some of them are willing to kill their own leader to make sure that the inclusive reading wins.³⁴

With a Rawlsian move, we can appeal to the fact that it is based on pure chance which side of the Wall one happens to be born to,³⁵ and it is arbitrary to make survival depend on this. (Tyrion Lannister, known for his wit, observes that the Free Folk are only different from others in that they found themselves north to the Wall when it was constructed.) Under the veil of ignorance,³⁶ all of us would ask for minimum guarantees of survival, at the very least, regardless of where one ends up. I am positively sure that not all members of the Night's Watch are Rawlsian, and maybe don't even have the willingness to engage with the hypothetical that they are born wildling.³⁷ Applying the 'Golden Rule' – in its form from the New Testament: 'Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets.'³⁸ – would give us the same conclusions; who would want it upon oneself to be faced with the choice to be killed by an army of the dead or by the Night's Watch protecting the Wall?³⁹

The Rawlsian game with perspectives appears more forcefully with the debates between Jon and Ygritte, the wildling girl he falls for. The debate starts with Ygritte questioning how sane an oath is that allows (prescribes?) invading the lands of the wildlings while does not allow touching a girl: 'So instead of getting naked with a girl, you prefer to invade our lands.'⁴⁰ Moral arguments can not only guide interpretation, but also question the legitimacy of the endeavor in the first place.⁴¹ Jon Snow retaliates by questioning the 'invasion' label and a debate ensues, citing historical grievances akin to transitional justice arguments:

³³ See, e.g., the relationship of morality-based and utilitarian arguments in: Ronald Dworkin, *Why Efficiency? – A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1980).

³⁴ This is not to deny that other motives played into the plot: Jon's main adversary for leadership, Alliser Thorne badly wanted power, but he might have not organized a plot had Jon not let in the wildlings, and it would have been harder to convince others to join the cause.

³⁵ See also: AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY* (2009).

³⁶ JOHN RAWLS, *A THEORY OF JUSTICE* 11 (1999).

³⁷ They could also say that in that case, they would fight on the other side, equally determined – and would certainly take advantage of the fact that they are let through the Wall freely.

³⁸ *Matthew* 7:12. Note also the parallel with the central interpretational statement of the New Testament: 'Think not that I am come to destroy the law, or the prophets: I am not come to destroy, but to fulfil.' *Matthew* 5:17. The inclusive interpretation can be argued to 'fulfill' the mission of the oath, rather than abolishing it, as the exclusivist side would make us think.

³⁹ The skeptic could also challenge, based on refugee law experience, the black-and-white picture behind the moral dilemma: while the choice is presented as such, and indeed many wildlings are killed by the White Walkers and their army, as they march east, it is possible that some parts of the 'real north' (territory beyond the Wall) are not threatened, and the generalized assumption does not hold.

⁴⁰ 2x7.

⁴¹ But see Maester Aemon's defense of the 'no wife', 'no children' rule, quote at footnote 96 below.

- *Invade your lands? Wildlings raid our lands all the time. Some of them tried to kill my brother, a crippled boy.*

- *They are not your lands. We've been here the whole time. Your lot came along, and just put up a big wall and said it was yours.*

- *[...] I have the blood of the First Men. My ancestors lived here, same as yours.*

- *So why are you fighting us?*⁴²

Still, it is a question whether, in interpreting the oath, we should consider the perspective of the Free Folk. If we allow moral considerations, it can play a role, but there is little support in the text for the Rawlsian or other moral readings. Jonathan Haidt argues that human morality includes basic notions such as fairness as reciprocity,⁴³ exactly the view that underlines that the wildlings 'that killed' so many of 'us' cannot be let through willingly. This would do great injustice also to those who died fighting them. While I do not find these arguments persuasive (it is impossible, in the first place, to agree with all causes over which blood has been spilled), such considerations do form part of human moral sentiments. It does not mean that they are necessarily justified,⁴⁴ but they play a role in moral(ly tainted) arguments – just as arguments based on equality and care do. Getting convinced from firsthand experience that wildlings are also human is the best way to influence interpretation. The problem is that most brothers are convinced of the opposite, nurturing an image of wildlings as 'others', who kill them whenever they can, and even those who do not are not to be considered as their own in any sense of the word. They stick to this otherness even against the very real 'Others' (the name for White Walkers used in the novel). Arguments based on equal moral worth do not seem to hold for most.

As we have seen, diverse arguments can be collected for interpreting the mission of the Night's Watch one way or the other. Proof of law's conservative nature, the traditional and dominant argument is hard to be shaken: wildlings have been fought against, and should be fought against, and should not be taken as allies – this certainly cannot be dictated by the oath under which centuries of anti-wildling have been taking place. While we can have good arguments for why alliance is good strategy⁴⁵ or is morally the right decision, the idea that the oath compels letting wildlings through the Wall that can give them protection seems far-fetched.

There is an argument without which I would not do justice to the inclusive reading, parts of which fall under some of the previous interpretative approaches, which I will summarize as a functionalist reading or, to be more precise, a contextualized functionalist reading.⁴⁶ There is a living instrument that is linked to original, moral, strategic view of who are to be protected: the Wall. In fact, the mission of the Night's Watch and the interpretation of the oath seems inherently linked to the function of the Wall. The Wall is a mountain-high structure of stone and ice that has certainly served well the goal of keeping wildlings away from the fields and villages on the southern side. Legend has it nevertheless that the Wall was built to protect the 'realms of men' from White Walkers, but who

⁴² 2x7.

⁴³ JONATHAN HAIDT, *THE RIGHTEOUS MIND* 155 (2012).

⁴⁴ An aspect Jonathan Haidt's book misses.

⁴⁵ The novel knows about at least one such alliance, when the Free Folk and the Stark fought together to bring down the rule of a former Lord Commander, the 'Night's King' (not to be confused with the 'Night King', the leader of White Walkers).

⁴⁶ Vicki C. Jackson argues for a 'contextualized functionalist' approach in the comparative constitutional context: Vicki C. Jackson, *Methods of Comparative Constitutional Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 54 (Michel Rosenfeld & András Sajó eds., 2012).

gives credit to remote, long forgotten and often contradicting tales, buried in books? We hear a bedtime story telling the building of the Wall and the fight of the 'First Men' against White Walkers.⁴⁷

The question emerges with new force, however, when White Walkers turn out to be true, and not only that: they are marching on the Wall, again, after thousands of years. This is corroborated by evidence from the signs of the Night's Watch: one blast of the horn means returning rangers (black brothers on a mission beyond the Wall, usually to fight wildlings), two means wildlings, and three means White Walkers. Lord Commander Jeor Mormont also doubted that the size of the Wall can be reconciled with the view that it was simply meant to keep away some barbarians, a statement repeated by Samwell Tarly.

A further argument supports the interpretation that the Wall is really meant to provide protection against the White Walkers. At some point we learn that the Wall is also reinforced with magic 'filter' that does not let the dead through. Jon Snow's uncle Benjen Stark who is killed by the White Walker but treated by the Children of the Forest helps Bran Stark reach the Wall and protect them from the attacks of White Walkers. Before reaching the Wall, Benjen leaves them explaining that he cannot cross the Wall: the built-in magic prevents the dead from passing through. It is only when the Wall is destroyed by the wight dragon that the Army of the Dead can march over.⁴⁸

To recapitulate: if the Wall was built to protect men from White Walkers, and further if the oath is directly linked to the function of the Wall, the danger apparent from the oath and the very existence of the Wall and the Night's Watch is indeed the attack of the White Walkers. This seems to undermine the exclusive interpretation. Even if it seems radical, it is just that: going back to the roots, if we accept that White Walkers were the true enemy when the Wall, the Watch and the oath was established. A problem with this interpretation (that I find the most convincing), or any conclusive interpretation settling the inclusive vs. exclusive debate, is that neither the White Walkers (or their army of the dead) nor the wildlings (or the Free Folk) are mentioned in the oath. One might also interject that proving that the primary threat is the White Walkers does not mean that protecting 'the realms of men' should necessarily include wildlings. The same way as the Children of the Forest do not seem to be included in either of the two categories, wildlings (with giants among them) might also exist in the grey zone: neither a threat nor a population to be protected under the mandate of the Night's Watch.

It is also possible to argue that both the inclusive and the exclusive interpretations are right, and the correct reading fluctuates with the nature of the threat: in times of normalcy, the duty of the Night's Watch is to provide protection from the wildlings, supporting the exclusivist understanding, while in times where White Walkers appear, the bigger danger rules and mandates the inclusive interpretation. In the beginning, the primary target was the White Walkers, and when they disappeared, for millennia, the institutional rationale of the Night's Watch, their need for asserting their *raison d'être* brought about the exclusive interpretation: they moved to provide protection against what became to be seen as the gravest threat coming from the north, possibly also under social pressure not to sit idly when White Walkers are long gone and there is an entity and a structure in place to provide just that protection. The fact that the horn can also signal the arrival of wildlings mean that, at least when these codes were established, both the wildlings and the White

⁴⁷ In fact, in a scene late in season 7, we see Wall paintings that depict the war of the First Men with White Walkers and their alliance with the Children of the Forest.

⁴⁸ When wights appear on the other side of the Wall and attack Lord Commander Jeor Mormont, it is by corpses carried over by members of the Guard, living persons; so this does not undermine or question the Wall's 'filter mechanism'.

Walkers were understood as a threat. But for thousands of years, the anti-wildling reading became mainstream for practical reasons. A crucial contextual change happens when the White Walkers appear, the antagonistic relationship with them makes all concessions and compromises unrealistic. And even if wildlings do not come to be part of the 'realms of men' the Night's Watch is bound to protect, letting in the remaining bands of wildlings is no more antithetical to this duty. The change might trigger what is known in law as the principle of *clausula rebus sic stantibus*: if things change substantially, so do the legal obligations.

The transition from one established interpretation to another is akin to Bruce Ackerman's 'constitutional moment'.⁴⁹ An interpretation that does not seem plausible, or is plausible but is clearly a minority position, comes to emerge as a dominant interpretation. Many argue that few before the 1990s would have thought that Amendment II of the US Constitution guarantees an individual right and is not a collective protective measure. Yet, with *Lopez*,⁵⁰ and a textual shift (taking the first part of the sentence as standing alone), this is what happened. In the case of the oath, Sam argues that they should save Gilly, and that she is a human being like them. The impossibility of the move and its relationship to the oath seems clear even to his friend Jon Snow, and the viewers most likely see the starting event for what it is: love trumping allegiance and blinding the man of knowledge, Samwell Tarly. A time might come when the opposite is true: it will be hard to imagine that one could seriously question that the Free Folk are humans. If 'the realms of men' embodies a 'civilizational' reading, uniting the Free Folk under one king (Mance Rayder) might mark this decisive moment: politically organized, they come to be included under the protection of the oath.

Ronald Dworkin tried to argue for consistency against the apparent fluctuation. He describes the process of adjudication and developing case law based on earlier case law as novel where the chapters are written after one another, and those writing the chapters have some freedom, but also have to make sure that it fits with what is already written.⁵¹ It is hard to make the inclusivist reading appear as fitting centuries of exclusivist practice. The turn is too radical, and the only possibility is to distinguish – a common legal technique in precedent-based legal systems – this practice. The challenge is that this 'precedent' lasted so long that nobody seems to remember the earlier interpretation.

If legal obligations can fluctuate that much, does it mean anything that we have written rules (law)? Is it any worth, arguing about the oath when we should, instead argue about what is in fact the 'right' decision? Critical Legal Studies would advise us to look behind the legal veil and face the genuine, material dilemma and conflict of interests instead of the superficial formalities.⁵² I would argue that, in the case of the oath, the two in fact coincide: it is a genuine question whether wildlings should be let in, and this ambiguity is very much present in the text of the oath – those accepting the legal frame for debate and those who do not can in fact participate in the same debate, relying on moral, historical, strategic etc. arguments.

⁴⁹ BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991). For a critique, see Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 *STAN. L. REV.* 759 (1992).

⁵⁰ *United States v. Lopez*, 115 S. Ct. 1624 (1995). For a discussion in the context that I raise here, see, e.g., Mark Tushnet, *Living in a Constitutional Moment: Lopez and Constitutional Theory*, 46 *CASE W. RES. L. REV.* 845 (1996).

⁵¹ For the chain novel metaphor, see RONALD DWORKIN, *LAW'S EMPIRE* 228–32 (1986).

⁵² See, e.g., the summary by a prominent CLS scholar: Roberto M. Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561 (1983).

One can also question whether governing rules, adopted generations earlier, should really be taken as binding upon us. Louis Michael Seidman argues that even the framers of the US Constitution thought that such an expectation would be tyrannical.⁵³ The oath is, however, different from a constitution in that it is individually accepted by all those whose lives are governed by it. One can debate the free will element, especially in those cases where the alternative would be execution, but this is way more than the presumed implicit consent by those born under a constitution. Civil disobedience is still possible, defying the rules of the oath for deep moral disagreement,⁵⁴ but that is not a debate about legal validity and interpretation any more.⁵⁵

In the foregoing discussion, I presented the debate as between the exclusive and the inclusive reading: the Free Folk are either to be protected or to be fought against. One nuance might be missed in such a binary view: the exclusive reading can in fact include a permissive view that does not say that wildlings are to be protected (hence excluded from ‘the realms of men’), but also does not prescribe enmity. The oath of this interpretation is indifferent to the fate of the wildlings: they can become enemies or friends, based on ‘non-legal’ (‘out-of-the-oath’) considerations, both are perfectly in line with the oath.

Exclusive reading	Permissive reading	Inclusive reading
‘The realms of men’ are to be protected against the wildlings: it is betrayal to let them through the Wall, illegal under the oath.	The oath is ignorant on this point, it does not consider the wildlings. Both fighting them and allowing them through is allowed under the oath.	The Free Folk are humans, under ‘the realms of men’, hence to be protected, as dictated by the oath.

Table 1. Possible interpretations on what the oath says about the wildlings / Free Folk.

There is in fact an ambiguity whether those arguing for or against the strict exclusive reading are also arguing against or for the inclusive understanding, respectively, or simply making the point that it is allowed under the oath (and is good strategy and morally right). Note that both are arguments under the oath and about the oath: the oath either bans alliance with the Free Folk or allows such a move; or, in the strongest reading under the latter interpretation, actually prescribes their protection.

While there is more hint that Samwell Tarly adopts a stronger, genuinely inclusive reading, while Jon Snow might be more strategic, and is certainly more cautious when publicly arguing for allowing the wildlings through, both make the case that they are humans and appeal to morality – the fact that they are strategic and make the permissive case might show caution rather than conviction. Considering that in practice, this permissive, non-exclusive view overlaps (considering the arguments and the people making them) with the inclusive, I, inclusively, include it under the inclusive interpretation: when letting through the Free Folk becomes seen as acceptable under the oath, the inclusive side wins.

⁵³ MICHAEL LOUIS SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE (2012).
⁵⁴ It is Jaime Lannister who brings this up with the archetype of loyalty, Lady Brienne of Tarth: ‘Tell me, if your precious Renly commanded you to kill your own father and stand by while thousands of men, women and children burned alive, would you have done it, would you have kept your oath then?’ 3x5.
⁵⁵ This plays out differently in the case of the US Constitution, where some raise the possibility that it was not meant to be a judicially enforced document: SEIDMAN, *supra* note 53.

In the foregoing discussion I tried to do my best to decide on the right interpretation of what I called the biggest dilemma in reading the oath. While the inclusive (or non-exclusive) interpretation seems to be the most compelling reading, as presented in the story, the Night's Watch remains heavily divided over the issue, and some level of uncertainty remains. It matters a great deal who comes to decide which interpretation is adopted by the Night's Watch, ending the ambiguity in practice. In the following section I will address this question.

The Decision

Many of law's dilemmas and debates center around institutional questions. This is also the case with our oath: a crucial legal dilemma is how to decide which interpretation rules, which is the law of the land, the official, and only in this sense 'right', interpretation. Is this a political or a strictly legal question? Phrasing it in an institutionally more conscious way: who decides on the interpretation to follow and following what procedure, if any? What I termed a 'collective' element of the oath requires one guiding interpretation that is then followed by all.

As we saw in the preceding section, it seems important to reconstruct and understand the original danger and will to counter it, but it is unclear how much certainty we can get. Does it matter if we can achieve a crucial level of certainty, what if we cannot, and who says what is the level of certainty that establishes an official interpretation?

For 'individual' elements the stakes are lower: when Jon and Sam discuss girls, they conclude that the Lord Commander would not care about brothers visiting brothels in Mole's Town. Sam explains: 'The interesting thing is, our vows never specifically forbid intimate relations with women. [...] "I shall take no wife", yes, that's in there, no denying, "I shall father no children", very specific. What our vows have to say about other activities is open to interpretation.' To which Jon adds: 'I don't think Ser Alliser cares much for interpretation.'⁵⁶ This implies that if no institutional backing, no sanction is attached to this part of the oath, it is practically not enforced,⁵⁷ interpretational debates aside, the obligation does not matter that much.

It is important to note that Samwell Tarly is not arguing to disobey the oath. He is very much keeping to the oath or, rather, seriously struggles to stick to what he in fact vowed to keep, even when his love (and sexual urge) would dictate otherwise.⁵⁸ Although it does not seem to be questioned that he is serious in his determination, and it is him (with fellow Night's Watch friends) who remind Jon of his oath, Samwell's fidelity is tainted with his sense that he does not belong to the Night's Watch and should have been sent to become 'maester', devoting his time to scripts and books in the largest library in the Citadel, Old Town.⁵⁹

Jon also makes it clear that he takes oaths seriously. When he ruins the hard chance for truce with Cersei Lannister (that included many deaths, risking many more, and losing a dragon to the Night's King) for not willing to swear something he won't be able to keep: 'I'm not gonna swear an oath I

⁵⁶ 4x9.

⁵⁷ Remember, again: 'If we beheaded every ranger who lay with a girl, the Wall would be manned by headless men.' Maester Aemon, 4x1.

⁵⁸ We eventually see a kiss and get to know that more happened between them.

⁵⁹ The two (ideal and factual) roads merge when Jon accepts the wish of Sam to go to the citadel and become the new maester of the Night's Watch, after the elderly Targaryen passes away. Sam presents this as a way to both protect Gilly and baby Sam and gain knowledge useful for the war to come.

cannot uphold [...] when enough people make false promises, words stop meaning anything, and there are no more answers, only better and better lies, and lies won't help us in this fight.'⁶⁰

Earlier, when he is offered his dream position, he refuses with a reference to his vow. King Stannis offers Jon Snow, a bastard and brother of the Night's Watch the prospect of becoming Jon Stark, King in the North, Lord of Winterfell (were he to kneel before him⁶¹). This suggests that a king can exonerate someone from the oath, or at least forgive him in advance and exempt him from the practical consequences (beheading).⁶² Jon Snow, while saying that this – legitimization – has been his dream since he was a child, explains to Sam why he will refuse: 'I swore a vow to the Night's Watch. If I don't take my own words seriously, what sort of Lord of Winterfell would that be?'⁶³

The 'extraordinary', 'special order', 'extralegal' argument – that is also strongly present, with Lady Brienne of Tarth, embodying loyalty in the series, summarily declares 'fuck loyalty', 'this goes beyond houses, and honor, and oaths'⁶⁴ – does not work for the likes of Jon and Sam.

This seriousness definitely applies to what appears to be central to the interpretational dilemma – are wildlings covered? – so there is no easy way out by saying that the inclusive reading is just a pretext, or choosing the argument that keeping the oath would be fatal, and the arrival of White Walkers call for extraordinary measures. These two men seem to become persuaded, somewhere along the way, that they also swore to protect wildlings – or at least that this does not conflict with their oath, and that this is a reading of the oath that they have to use to persuade fellow brothers. But most brothers are strongly convinced that the opposite is true, and letting wildlings through and an alliance that includes them is the betrayal of the oath.

Stanley Fish, in debate with Ronald Dworkin, argues that the real functioning of legal interpretation is not captured by the latter's chain novel parallel where subsequent decisions work like chapters in one novel, further constraining workable interpretational paths as the novel gets written. We should instead understand the process as performance before an intellectual community, and it is after all the opinion of this community that matters.⁶⁵ This is defining for the winning interpretation. Let's see who this 'intellectual community' can be in our case.

Although Jon Snow also needs to persuade the Free Folk that they should join forces with the Watch against the Army of the Dead, like people did thousands of years ago when they defeated the White Walkers,⁶⁶ the real debate takes place within the Night's Watch. (Mance Rayder, leader of the Free Folk, later offers a bargain and himself asks for wildlings to be let through the gates, to be safe from the Army of the Dead. After Rayder's death, Jon again needs to convince the Free Folk that they should unite with the Watch in their fight with the army of the dead.)

If the interpretation of the oath, and of the function of the Wall, turns around the question of who the real enemy is, this brings us to a rather Schmittean conclusion: whoever gets to define whether

⁶⁰ 7x7.

⁶¹ It is this obsession that leads the Free Folk to refer to those living south to the Wall as 'kneelers'.

⁶² 5x2.

⁶³ 5x2.

⁶⁴ 7x7.

⁶⁵ Ronald Dworkin, *Law as Interpretation*, 9 *CRITICAL INQUIRY* 179 (1982), and Stanley Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism*, 9 *CRITICAL INQUIRY* 201 (1982).

⁶⁶ Jon Snow argues to the leader that unites the Free Folk, Mance Rayder, that all of those who fight together for the living should come together for this war.

wildlings are friends or enemies is the sovereign, and the 'right' interpretation simply flows from this fact. The legal question then becomes who can be this sovereign.

While the 'legal system' of the Night's Watch, if one call it that, is certainly not a Kelsenian pyramid, there is one person more knowledgeable, or who is so trusted, about things past, than any of the other black brothers: Maester Aemon, an old Targaryen who became maester and has been serving the Night's Watch for decades. From the TV series at least, It is not clear how one becomes maester with the Night's Watch and if this brings with it certain power over settling interpretational debates – Maester Aemon seems more like a gentle advisor who is nevertheless listened to in important questions.

Jon Snow in fact asks for advice from Maester Aemon about the decision to let the wildlings through. Without allowing Jon to tell this, the Maester urges Jon to 'do it [...] do what needs to be done'.⁶⁷ This can be read as approval, but also a rejection of competence: the Lord Commander needs to decide, all by himself, he is the true sovereign. Albeit, invoking Machiavelli, as a good prince, he also needs to make sure those under his command do not revolt against him. But other than this, our interpretational question is certainly not justiciable. The interpretation of the oath seems to be a privilege of those who are anyway in power.

If the Lord Commander can truly decide over the fate of the wildlings, and whether the Night's Watch goes against an interpretation held for centuries, risking the lives of his own, it is easy to see the importance of who becomes Lord Commander. There is in fact a 'legally ordered process', rules in place for who gets to become Lord Commander. These are traditional procedures regulating internal affairs that one might call constituting (or constitutional) norms. And it comes down to a majoritarian decision, with all brothers holding equal votes.⁶⁸

Public law can be seen as defining the rules of the game through which one can arrive to a place (power) where he can rule, including, possibly, the power to define or influence the rules of the game.⁶⁹ In this case, whoever wins leadership will get to decide whether wildlings are let in or not.⁷⁰ This can link back to 'living constitutionalism' and the moral reading if we accept a reading according to which the changing social context should directly matter in case of uncertainty – just like, in the case of constitutional lacunae, democratic decision-making should rule. While polling the peoples of Westeros would be hard, not only practically, but also given the non-democratic political regimes, maybe polling the Night's Watch is enough.⁷¹

⁶⁷ Jon Snow explains that he wants to do something he has to do, 'but it'll divide the Night's Watch bitterly. Half the men will hate me the moment I give the order.' To which the maester replies: 'Half the men hadn't you already, Lord Commander? Do it.' 5x5.

⁶⁸ While it is first-past-the-post vote by secret ballot, interestingly, Maester Aemon votes publicly, when it emerges that there is tie between Jon Snow and Alliser Thorne.

⁶⁹ See the 'relationist' reading in: Martin Loughlin, *The Concept of Constituent Power*, 13 EUR. J. POL. THEORY 218 (2014).

⁷⁰ This question can also be linked to the question of who can amend the oath, a problem I will largely avoid here.

⁷¹ The immediate social context is the changing background of the brothers. Apparently, serving in the Night's Watch used to be an elevated, socially respected profession, now it is more a refuge for criminals. ('Raper. Horse thief. Ninth-born son. Raper. Thief. Thief and raper.' – listing the crimes committed by those brought to the Night's Watch, Season 4.) Yet, it would be far-fetched to claim that this changing social context should be directly relevant for the interpretation of the oath.

The interpretational question in fact becomes a central element in the political campaign: the exchange of arguments for who is fit to serve as Lord Commander. The main challenger, Alliser Thorne retorts to a powerful speech by Samwell Tarly nominating and supporting Jon Snow for leadership: 'Who does Jon Snow want to command? Night's Watch or the wildlings? Everyone knows he loved a wildling girl and spoke with Mance Rayder many times. What would have happened in that tent between two old friends, if Stannis's army hadn't come along? We all saw him put the "King-Beyond-the-Wall" out of his misery. Do you want to choose a man who has fought the wildlings all his life or a man who makes love to them?'⁷²

Putting aside the strong parallels with contemporary elections presented by some candidates as an existential decision about migration,⁷³ this argument links the vote, the Choosing, to the interpretational question, the inclusive vs. the exclusive reading. Ultimately, Maester Aemon casts his decisive vote to make Jon Snow Lord Commander. This could end the debate: if it was raised before elections, and members voted knowingly, the majority gets to decide. While this might not be the most appealing reading (the content of the oath is not up for vote), there seems to be no established mechanism to correct the Lord Commander's choice, if not rebellion.

A debate erupts when Jon, now as Lord Commander, announces his decision to let wildlings in, arguing that 'men, women and children will die by the thousands if we do nothing'. The debate plays on few of the registers that we have seen under the alternative interpretational approaches. First, Jon appeals to humanity: granting them asylum will save human lives. Sam tries and fails to argue that there is abandoned land south of the Wall where they could settle. A brother is quick to point out that those areas have been abandoned as a result of wildling attacks.

Most of the arguments against letting wildlings in center around the fact that they have been the enemies, and killed many people, family and friends, dear to individual brothers: 'Let them die, we've got our own to worry about. less enemy for us.'; 'The wildlings raided [the villages] for years. Cut them down just like they did to this boy's people.'; 'We've been fighting for thousands of years. They've slaughtered villages. They've slaughtered our brothers.' To which Jon says: 'And we slaughtered theirs.' However, this does little to convince others that it is time to break the circle.

In his final statement, Jon combines humanity with strategy: 'If we abandon them, you know what they become. We can learn to live with the wildlings or we can add them to the Army of the Dead. Whatever they are now, they are better than that.' These are not exactly lawyerly arguments, but are decisive for the interpretation of the oath.

With a maester in the castle (he is absent for he does not feel well, but makes clear, as we have seen, that he wants Jon to 'do it'), and a king present, it falls on the Lord Commander to make the decision – a decision he can make for he was elected, with a decisive vote from the maester.

The decision on the fate of the wildlings is influenced by at least these three sources of power: King, Night's Watch, maesters. Two of these, the king and the Order of Maesters can remind us to the complex and changing relationship of the church⁷⁴ and the state that we know from history. In fact, this 'church' is uninterested in power and seems to stand outside: the Citadel where the Lord Maester and the Conclave resides stands unshaken by wars and rebellions and is largely uninterested

⁷² 5x2.

⁷³ The scene on the debate over the decision whether to let wildlings through is also not devoid of some elitist criticism: King Stannis who is watching the debate at some points silently corrects one of the brothers arguing that it is better to leave wildlings die, for 'less enemies for us'. 'Fewer,' injects King Stannis. 5x5.

⁷⁴ Albeit of not faith-based, more like the secular knowledge-worship-like cult of the French Revolution.

in the political struggles. This does not mean that the individual maesters follow this attitude. Grand Maester Pycelle, serving various rulers, is very much part of the power games around the Iron Throne as member of the Council. Annulment and marriage that defines who can be king or queen – and who is a bastard – is also a power of the Order of Maesters.

A central and decisive secret in Game of Thrones is that Jon Snow,⁷⁵ raised as a bastard to protect his life, is in fact Aegon Targaryen, an heir to the iron throne.⁷⁶ To be sure, we learn earlier that he is not a child of Eddard Stark, as previously thought, but of his sister, Lyanna Stark and Rhaegar Targaryen. (This latter is the brother of the dragon queen, Daenerys Targaryen, who goes on to fall for Jon Snow, which proves to be mutual, and the two eventually make love, not being aware that they are aunt and nephew.) So the status of Jon Snow depends on an annulment and a marriage under the power of maesters. This part that tells us about the importance of various sources of knowledge is the way we come to learn this secret. Magic plays an important part: Jon Snow's apparent half-brother (in fact, cousin), Bran Stark becomes the three-eyed raven, who sees things in the past and in the present, happening all around the world. He is shown in a vision the birth of Jon Snow, and he learns, together with the viewers, who are the real parents of Jon Snow – and what is his real name.

This is important, because he has Targaryen blood, but he still remains a bastard. Magic does not do it all. Samwell Tarly receives scrolls and books that he needs to copy, as a punishment. Gilly then reads one of them and they find out that Rhaegar got a divorce earlier.⁷⁷ As a result, the parents of Jon/Aegon were legally married when he was born.⁷⁸ To be fair, Gilly and Sam's piece also would not matter in itself – magic and human records are both necessary. Concerning the power of maesters, both magic and human records belong to their realm.⁷⁹

If we look at the various positions, we see a pattern of delicate power sharing. King Stannis, arriving to the Wall with an army, and anyway just one of the 'kings' competing for the Iron Throne, captures and executes the 'King-beyond-the-Wall', and nobody intervenes, the Night's Watch brothers participate, even though it's their duty to deal with what is north to the Wall. (Although Jon Snow eases his suffering and kills him with a bow before the flames reach him on the stake.) King Stannis, on the other hand, does not interfere with the important decision to elect the new Lord Commander, even though he is present at the Choosing and the preceding debate.⁸⁰

In a way, the oath itself is meant to keep the separation of powers: it banishes earthly values like family and wealth from the realm of the Night's Watch ('no wife', 'no children', 'no lands', 'no crowns', 'no glory'), and there seems to be a ban on interfering in fighting for the Iron Throne or wars in general that do not concern the protection of the Wall. Albeit even here, depending on the level of

⁷⁵ Snow is the name given to bastards in the North.

⁷⁶ We come to know this quite late in Season 7.

⁷⁷ A lot of interpretational aids come from books: Sam tells us that three blasts of the horn means White Walkers – a rule he 'read in a book', a common answer from him that his fellow brothers keep repeating jokingly.

⁷⁸ The exact word is annulment, this is the expression that Gilly asks Sam about, and this is how he learns that the divorce and the marriage took place, and this is why he can complete the picture when he meets Bran Stark. Note the play with the discrimination and empowerment aspects: the application of a discriminatory rule (being a bastard) is falsified by information read by a wildling girl who only recently learned to read.

⁷⁹ But not to them only: there is magic beyond the Order. The competing religion, worshipping the Lord of Light (R'hloor), relies more directly on magic (mainly fire and blood). It is Melisandre, Red Priestess of this religion who resurrects Jon after he is killed by fellow brothers.

⁸⁰ His only remark, uttered silently that even his aid does not understand, is to correct a grammatical error, see note 73.

abstraction, a contrary argument can be made: it is not farfetched to claim that only a united Westeros has a chance against the White Walkers. If we understand Jon Snow's involvement in the wars, helping Daenerys Targaryen in her fight, even this could be seen as in line with 'protect[ing] the realms of men'. If building this alliance is essential to fulfil the mission of 'protect[ing] the realms of men', then this interpretation of the oath cannot be excluded. Other conventions might contradict this reading, but the text allows for it. The danger of course is that this interpretation becomes a slippery slope, and all involvement becomes defensible because it eventually serves the distant goal of a peaceful and united Westeros that can fight the northern threat. Even Jon's desertion to help his half-brother (in fact, cousin) Rob Stark in his march on King's Landing could have been interpreted as helping the unification that is essential to fulfil the goal of protection. I can imagine one possible exception, where the Night's Watch itself is attacked. We know of one such threat, from Ramsay Bolton who threatens to go to north and attack Jon Snow, which can be taken as a threat to attack the Night's Watch.⁸¹ This raises the question of preemptive attack on the side of the Night's Watch, with all the problems it raises, known from the international law of armed conflicts.⁸² Such an expansive interpretation would certainly require institutional checks – and would most likely be confronted by lords and armies of the 'realms of men', before the guardians of knowledge, the maesters would declare anything about the right interpretation.

Maester Aemon himself seems to exercise self-constraint and act more like an advisor, taking up the role of a 'wise man' who often play an important role in sustaining and interpreting social rules in traditional systems, without commanding actual physical force and power. But we also see occasional interventions that are more than mere advising. When Janos Slynt wants to Jon Snow to be executed for breaking the vow⁸³ (joining the wildlings and sleeping with one) and Alliser Throne seems to agree, Maester Aemon who is also at the table (with two additional black brothers) seems to block this by saying that he believes Jon and that he was only following the plan their fellow brother Qhorin set up right before his death (by Jon, being part of the plan to infiltrate into the wildlings). It is Maester Aemon who releases Jon Snow while the others keep silent, announcing that 'we won't be taking your head today, Jon Snow, go on'. Alliser Throne seems to question this decision by saying, once Jon Snow left the hall, that 'I am acting Lord Commander here', and instead of arguing about competences, Maester Aemon replies that he knows when someone is lying for he was raised in King's Landing (being a Targaryen).⁸⁴ And it is ultimately the elderly master, who would seem to be qualified to settle the question of interpretation, who uses his vote to decide that Jon Snow becomes Lord Commander, instead of weighing in in the interpretational debate directly.

Maesters are also known as the 'Knights of the Mind',⁸⁵ act like the guardians of human knowledge. Their mission is made clear by a statement by the Lord Maester, heading the Order, who says that it is their job to question everything – they are the par excellence critical intellectuals, making their profession to question historical accounts, present discourses etc. The Lord Maester embodies an extreme version of rational agent: he does not seem to care about the world around them, the Citadel has been standing despite turmoil in the outside world: people were talking about the end

⁸¹ 6x4.

⁸² It was the Iraqi intervention that sparked renewed interest in the question of preemptive use of self-defense. See, e.g., W. Michael Reisman and Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525 (2006).

⁸³ 'The boy must die', says Janos Slynt. The statement is later paraphrased by Maester Aemon as 'kill the boy and let the man be born' as a life advice to Jon Snow.

⁸⁴ 4x1.

⁸⁵ Maester Luwin.

several times before, and none of those events proved to be fatal to the existence of the realm – and the library. It is this orderliness, rigidity and bureaucratic attitude that Sam questions: When the Citadel master does not want to let Sam in the library Sam because Jon, whose letter he shows, is not registered as Lord Commander, Sam replies: ‘Life is irregular.’⁸⁶ But not that irregular that oaths could be disregarded right away. But the critical attitude and the wish to learn makes Samwell Tarly a maester-like figure well before he goes to Oldtown to visit the Citadel. He in fact emerges as the par excellence public lawyer in the series,⁸⁷ with his utterances on the right interpretation of the oath, including the relationship with women, but also with wildlings in general.

As we have seen, Sam and Jon stick to the oath, and not only superficially, just because they are forced to look like acting as dictated by established norms. Jon’s decision is to effectively grant asylum to the Free Folk. His decision upsets many, not only including his rival, Alliser Thorne, but also the boy who assists him and who most likely voted for him, and both participate in the mutiny: they conspire and kill Jon Snow. The new Lord Commander does not prove to be a wise prince under Machiavellian standards, and fails to prevent his own to turn against him. When Jon Snow, the embodiment and personal guarantor of the inclusive interpretation is killed by a handful of his own, the interpretational turn is in danger. The storyline takes a twist when he is resurrected and makes sure that inclusiveness reigns – as if the writer would think that magic alone can save such a humanitarian-multiculturalist turn.

The ultimate triumph of Jon Snow – through might and magic, but rather the latter – makes the more persuasive understanding reign. If a personal decision matters this much, it is important to understand how that person comes to the conclusion he reaches, and what the actual rule, the oath, plays in that, if any. As a final aspect of the decision, let’s look into the personal motivations behind.

The Human Choice

What drives the fight for the inclusive interpretation? The interpretational debate arises only after Sam and Jon fall in love with wildling girls. There is another factor that emerges at the same time: the military situation that raises the question of what to do with the wildlings, not united any more under the rule of Mance Rayder, that are pushed to the south by White Walkers, the common enemy of the two fighting human groups. It can be argued that both elements – emotional and strategic – are independent of the oath and are extralegal in this sense. But many approaches to tackle the legal dilemma that we have reviewed show that these questions feed back into the decision on which interpretation rules. If law is simply seen as favoring certainty by prescribing who makes the decision; or if the (preliminary) decision is a moral (utilitarian) one on moral equality of wildlings; or else if it is a question about the original meaning of the oath, with some level of uncertainty: the Lord Commander’s respective views are crucial.

One could also phrase the question as how humans think and argue: is it that the feelings come first, and all rationalization is after the decision is already made, or vice versa, or else the two systems are competing kings in the same realm. But this would be to commit the mistake that Jonathan Haidt argues against. He reviews a recent line of evidence from psychological experiments and concludes

⁸⁶ Season 6.

⁸⁷ Although see the argument, from a practicing lawyer, that Lady ‘Brienne of Tarth would make the best lawyer in Game of Thrones’: Andrew Wallace, *Who in Game of Thrones would make the best lawyer?*, LINKEDIN (August 24, 2016), <https://www.linkedin.com/pulse/who-game-thrones-would-make-best-lawyer-andrew-wallace>.

with a metaphor: the rational rider of the elephant of emotions. The rider does have an influence, but where strong pushes come from below, all it can do is mitigate the consequences and engage in post hoc rationalization.⁸⁸

Sam and Jon are both motivated by various factors, albeit to a different degree. They share the wish to keep the oath, both want to remain faithful and seem to be sincere in that, at least prior to the decision to let the wildlings through the gate. They are also interested in strategy that is arguably a key concern for Jon: help from the wildlings helps them in fighting the White Walkers and their army. They need everything, knowledge, magic, giants, dragons to fight the threat from the north. And both Sam and Jon come to realize that wildlings are also human, very much so: they both fall for wildling girls, Sam for Gilly and Jon for Ygritte. The first time that we face the dilemma is when Sam introduces Gilly to Jon and says (but does not finish, as Jon interrupts him) 'we are sworn to protect'.⁸⁹ This means that Sam realizes soon that the oath can be used to save Gilly and his son (who would otherwise be offered for the White Walkers).

Seeing the interpretational shift as a result of personal experience confirms Holmes who famously wrote in 1881: 'The life of the law has not been logic; it has been experience.'⁹⁰ Both interpretational revolutionaries have an important experience, not shared by others, that make them more receptive to the inclusive argument. Sociopsychology calls this the contact theory; literature the Capulet-Montague theorem. When Jon says that Sam cannot steal Gilly, Sam argues that 'I can't steal her. She is a person, not a goat.'⁹¹ Later, Jon Snow, arguing with King Stannis, says that 'Northerners can be a bit like the Free Folk, loyal to their own.'⁹² Before going to the Citadel, Samwell Tarly heads home and introduces Gilly and baby Sam to his family. When his father finds out that the woman is a 'wildling', he starts referring to her as 'it' with a furious rant about how they are not human, and collectivizes all wildling-instigated suffering, connecting it to the 'wildling' in front of him, referring to the long history of war between the two groups – which is a fact, although the sufferings of the other side and anti-wildling cruelties are emphatically omitted. This is a powerful scene portraying the everyday cruelty of racism,⁹³ with a cruel father figure questioning the humanity of one of the most humble and humane characters of the series. This way, even the most skeptical viewer is persuaded that the 'not human' argument is cruel and comes to feel that it cannot be 'right'.

Sam is forced to defend his choice to bring over Gilly to Maester Aemon upon return to Castle Black. Sam cites (then deceased) Lord Commander Jeor Mormont who said that it is hard to believe that the Wall was built to keep away wildlings, hinting that it was built to keep away a graver danger. It is also the first time when Sam elaborates on the argument that Gilly is, as all wildlings are, human, and the reference to the 'realms of men' includes them. Maester Aemon reminds him of the oath and he says he remembers every word of the oath, starts to recite and repeats the part on the 'realms of man': 'that means her as well as us'.⁹⁴ Maester Aemon seems to approve this reading and the fact that Gilly takes refuge with them. What starts off, at first sight, as a haphazard argument to make sure Gilly is not sent away not holds the approval of the man of knowledge, and becomes a blueprint for

⁸⁸ HAIDT, *supra* note 43, at 73–94, Chapter Three: Elephants Rule.

⁸⁹ 2x2.

⁹⁰ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881).

⁹¹ 2x2.

⁹² 5x2.

⁹³ In addition to the series of scenes where gender discrimination is portrayed, including when Gilly is not let in to the library and is hardly tolerated in Black Castle, the headquarters of the Night's Watch.

⁹⁴ 3x10.

extending protection for all those beyond the Wall: wildlings and even giants. This shows law's universalizing potential, that takes time, and it is not an easy route.⁹⁵

But should we take 'experience' as a justification, not only an explanation, for the inclusive turn? After all, when Sam offers his inclusive interpretation, the direct threat that keeps the Night's Watch engaged is the threat from wildlings, united under the leadership of Mance Rayder. Maester Aemon discusses the question of faithfulness with Jon as well, and describes emotions not as informing the interpretation of the oath, but as a prime danger to it:

*Tell me, did you ever wonder why the men of the Night's Watch take no wives and father no children? So that they will not love. Love is the death of duty. [...] What is honor compared to a woman's love? What is duty against the feel to a newborn son in your arm? [...] We are all human, we all do our duty when there's no cost to it [...] but sooner or later in every man's life there comes a day when it is not easy, a day when he must choose [...] and live with it for the rest of your days.*⁹⁶

Jon only seems to accept this as honest advice when he learns that Maester Aemon is a Targaryen who lived through the devastation of his own family and yet chose to stay and remain faithful to his oath.

Whether we like it or not, human decisions (in this case, on interpretation) is informed by our emotions. There is a background vision, or ideology, if you like, of what world one would like to live in. The deep conviction shared by Jon and Sam comes from a personal account, mixing emotional and intellectual elements – and this is not to imply the two can be neatly separated. It is important to see, however, how the decision is informed and constrained by law. The first push to make the case for the inclusive reading gets tested (Sam's discussion with Jon; Sam's discussion with Maester Aemon; electoral debates; decision and mutiny; resurrection and execution) before it becomes the official interpretation, manifesting law's universalizing logic from a girl to all peoples living north to the Wall – outside the realm, but within the 'realms of men'.

Outlook

The game of interpretations is won by persuasion, power and magic. The inclusive interpretation holds: wildlings are to be protected, they are granted asylum and survivors of the Free Folk go on to fight with Jon Snow, including cross-species help from a giant. The Children of the Forest, who also are presented as non-human, but no less humanoid than the White Walkers help the human cause, as they did during the Long Night, as evidenced by drawings in the caves of Dragonstone. Can this go any further?

The White Walkers and their undead soldiers manage to bring down the Wall at one location, enough for them to march south. This extraordinary event (unique in thousands of years, since the building of the Wall) in itself changes the oath. The mission to act like 'the shield that guards the realms of men' is not on the 'Walls' any more and black brothers should not 'live and die at [their] post'. Unless we are willing to give up the literal reading and adopt a figurative interpretation of what it means to be a 'watcher on the Walls' (e.g., by saying that 'the Walls' are wherever the front with the White Walkers runs), and we accept that the 'post' can be south to the Wall, part of the oath seem to be

⁹⁵ For an account of the role of emotions in law, see ANDRÁS SAJÓ, CONSTITUTIONAL SENTIMENTS (2011).

⁹⁶ 1x9.

rendered outdated, and should be amended.⁹⁷ Finding out the true mission of the White Walkers might also challenge the relevance of the oath and the mission of the Night's Watch. If we learn that the task of White Walkers is simply to kill all humans, and White Walkers can appear any time later, then the mission of the Night's Watch holds until we have 'the realms'. If, however, the Night King has a different goal, that might undermine the oath.

Let's assume we are all persuaded that the inclusive interpretation holds – or it is adopted by whoever has the power to decide – and let's further assume that White Walkers are extinguished. Could this resurrect the exclusivist understanding (just waiting for the return of the White Walkers or a similar threat, if it ever happens), or we are stuck with Night's Watch rendered meaningless: either it is abolished, or does nothing meaningful, or else one can try to amend its mission and oath (e.g., to protect Westeros from invaders coming from the east)? A more intriguing question is whether the White Walkers and the army of the dead could also become part of the 'realms of men' under a superinclusive interpretation? Or, more precisely, can this only happen through magic, by transforming them to ordinary humans (assimilation) or inclusion can happen while maintaining their uniqueness, allowing for diversity (integration)? While the wights seem to have a serious mental condition, their activity being narrowed down to kill humans, the White Walkers are a different matter. They were initially called to life by the Children of the Forest to protect against humans who threatened their habitat, and they are humans who were transformed⁹⁸ – it might be possible to transform them back.

This demonstrates how real-life events enter the seemingly sterile text-based discussion, triggering the principle of *clausula rebus sic stantibus*: if things change substantially, so do the legal obligations. We see at the end of Season 7 that the Wall (part of it) comes down with the Night King, other White Walkers and the Army of the Dead walk right through the ruins. The wildlings are already on the Wall, but this does not help, only changing how many people are killed falling down. The inclusive reading wins, but cannot step the great evil at the center of the oath. Somewhat ironically, what does help the Night King is the goodwill effort of Jon Snow & co. to unite the forces of Westeros by bringing a wight before the queen. In this, they ultimately succeed, but they lose a dragon in the process – and it will be this dragon, resurrected as a wight, that will be the key for the Night King to down the Wall. Successful and benevolent self-sacrifice, outside the scope of the oath and the Night's Watch, undermines the oath and the Night's Watch.

While the debate on interpretation lasts, the story shows that even in a non-rule-of-law setting, the interpretation of texts, wills and intents can play a role. Whether it is decisive or auxiliary will depend on many factors, including extra-legal elements. When the 'wildlings are like us, we need to protect them' argument first appears, with Sam raising the possibility of helping Gilly escape, we agree with Jon Snow that this is an impossibility. Little by little, with unforeseen developments and the insistence of the inclusive revolutionary, Sam, a 'constitutional moment' builds that changes not only the fate of Gilly, but of wildlings and non-wildlings alike: the oath and its dominant interpretation stops to treat them as enemies: they become friends, politically and, in many cases, personally.

⁹⁷ We don't know if the oath has been amended earlier, and some parts are later additions, but this can't be ruled out.

⁹⁸ Possibly all of them, but not necessarily: the first White Walker, the Night King (who 'turned them all') was transformed by the Children of the Forest, and we know that all of Caster's sons, save Gilly's little Sam, were also turned to White Walkers.

The series demonstrate the struggles of legal interpretation in a world where chaos is the ruling analogy, by viewpoints as diverse as Varys and Lord Baelish: Varys strives for order,⁹⁹ seeing chaos as a pit – showing a Kelsenian aversion to the collapse of normativity and a desire for a logically sealed universe; Lord Baelish, on the other hand, sees, famously, chaos as a ladder,¹⁰⁰ which seems to cherish unbounded decisions and exceptions, but in fact goes beyond the Schmittian view¹⁰¹ and would abolish all elements of an order, other than sheer striving for power.

It is in this context that Game of Thrones validates the emancipative potential of legal norms and the importance of some hard-to-find, hidden knowledge, buried in black-letter books – including knowledge on the White Walkers – as with King Stannis: ‘Keep reading, Samwell Tarly.’¹⁰² Which he does, and so should we, with the critical eye of the habitants of the Citadel, aware of the game of interpretations.

⁹⁹ In the TV series and in this debate. The Varys of the books serves Blackfyre restoration.

¹⁰⁰ His interpretation, ‘chaos is a ladder’ and ‘climbing is all there is’, lines up nicely with Timothy Snyder’s interpretation of Putin. Sean Illing, *How Russia pioneered “fake news”. And then used it to sow chaos in America*, Vox, April 5, 2018, <https://www.vox.com/world/2018/4/5/17172754/russia-fake-news-trump-america-timothy-snyder>.

¹⁰¹ For Schmitt, the political creates and defines law, but it is order.

¹⁰² 5x5.

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