Law's 'Uncanniness': A Phenomenology of Legal Decisions

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1 Introduction

Bonnie Honig's paper, 'Between Decision and Deliberation', shifts the reader's attention away from the paradoxes of legitimacy and constitutional democracy, which have too long held democratic theory in thrall, and towards the paradox of politics: '[t]he subject postulated by politics is seen as never quite the cause because also always the effect of political practice'.[1] This paradox, she adds,

> 'presses us to begin the work of democratic politics in *medias res*, in a terrain grounded neither in the sort of universal principled justification embraced by deliberative democrats, nor in the groundlessness of pure decision that deliberativists imagine is the only alternative' (p. 118).

Honig is careful to show that 'decisionism' is the name bestowed by deliberativists on the political theories that gravitate around the work of Nietzsche, Schmitt, and (sometimes) Derrida. Not surprisingly, therefore, her paper deconstructs this opposition. By exposing the weaknesses of the pole whence the two terms of the opposition are constructed – deliberativism –, she opens up a space for understanding how decisions are a constitutive feature of democracy. In effect, the people

> 'may be called into being when called on in democratic politics (...) to *decide*, albeit not necessarily decisionistically, on matters of importance for their past, present, and future together' (p. 118).

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1 Bonnie Honig, 'Between Decision and Deliberation: Political Paradox in Democratic Theory', American Political Science Review (101) 2007 on p. 123 of this special issue. References that are to the original artical only are marked (ARSP). All further citations from this paper are indicated, by page number, directly in the main body of the text.

She later returns to this point, insisting that '[t]here is no getting away from the need in a democracy for the people to decide (...)', and highlighting the intensity and broad scope of popular decision-making in a democracy (ARSP p. 7). I support this deconstructive move. However, the concept of decision to which it gives rise remains largely underdetermined in Honig's paper. Taking my cue from her terse observation that law is 'uncanny' (p. 123), I propose to complement her analyses by outlining a phenomenology of legal decision-making. Focusing on the three-way distinction between legality, illegality, and a-legality, I will argue that acts of collective self-legislation are decisions because an irreducible hiatus separates and joins what calls for legal qualification and the legal qualification thereof. This 'opening', and not merely the *medias res* to which Honig alludes, is the 'between' that holds sway in democratic decision-making.

2 Decisions and Collective Self-Legislation

My initial assumption is that legislation (in a broad sense that includes all acts of law-making, ranging from the enactment of a constitution to a judicial ruling) is a privileged locus of political decision-making. If we limit the compass of political decisions to legislation, we can define decisions as, minimally, acts of positing the boundaries of a legal order – a *Grenzsetzung*, as Cassirer puts it. To 'decide' is to include and (implicitly) to exclude, *i.e.* to 'limit the unlimited'.[2] In other words, to insist that legislative acts are decisions is to emphasize that legislation posits legal boundaries.

Which boundaries? An answer to this question passes through the well-known distinction between the four 'spheres of validity' of legal norms. In effect, the legal doctrine parses legal norms into their subjective, material, spatial, and temporal spheres of validity. To decide is to posit legal boundaries because legislation establishes, in general or in particular, explicitly or implicitly, who ought to do what, where, and when.[3] Moreover, although they focus on different dimensions of human behaviour, each of these spheres of validity delimits behavior in terms of the binary distinction between the legal and the illegal. To decide is, for each of these four domains, to posit the distinction between legality and illegality.

What is the *ground* of such acts? According to modern political theory, legislative acts are grounded insofar as they are acts of collective *self*-legislation.

2 Cassirer notes that the general function of order is to 'limit the unlimited, to determine the relatively indeterminate'. See Ernst Cassirer, Symbol, Technik, Sprache, Hamburg: Felix Meiner Verlag, 1985, p. 100.

3 For a more systematic development of this idea see my 'Breaking Promises to Keep Them: Immigration and the Boundaries of Distributive Justice', in: LSE Law, Society and Economy Working Papers 3/2007, <www.lse.ac.uk/collections/law/WPS03-2007Lindahl.pdf>.

What sense are we to make of the notion of 'self' implied in collective self-legislation, and how does this pertain to the notion of legislative acts as being grounded or justified?
I take my cue from Philip Pettit's observation that 'the word "self" derives from the pronominal *se-* whereby we indicate that an attitude or action bears on the agent himself or herself (...)'. Drawing on this etymology, he propose to reserve the notion of selfhood 'for those agents who can in principle speak for themselves and think of themselves under the aspect of the first-person indexicals "I" and "me", "my" and "mine"'.[4] As he later points out, selfhood is not limited to the first-person singular perspective; the reflexive structure of selfhood includes the first-person *plural* perspective of a 'we' as a collective agent: 'As there is a personal perspective available only with talk of "I", so there is a personal perspective that becomes available only with talk of "we".'[5]

The reflexivity deployed in this first-person plural perspective manifests itself in references to 'our citizens', 'our law', 'our land', 'our history', and the like. These four examples are not coincidental: they evoke the four kinds of boundaries indicated above: the who, what, where, and when of a legal order. In effect, there is an internal correlation between collective selfhood and the four kinds of boundaries of legal order: as collective selfhood involves a manifold of individuals that refer to themselves as a unity in legislative action, these individuals identify themselves as a unity by way of the fourfold boundaries of legal orders. Conversely, the legal boundaries of a polity have a reflexive structure: they are posited from the first-person plural perspective of a 'we', and mark the fundamental contrast between collective selfhood and alterity. Crucially, the conception of selfhood advanced by Pettit links up with the central insight of contemporary studies in collective intentionality and action, which gives the lie to theories of social action that view the collective self as a summation of individual acts, while at the same time steering clear of an ontology that postulates that collectives exist independently of individuals and their acts.
These considerations explain why democratic theory, as Honig puts it, is 'unavoidabl[y] dependen[t]' on the agency of the people (in the *singular*): there is simply no politics or law in the absence of the first-person plural perspective of a 'we', even though, as she immediately adds, this dependence is 'uncomfortable' (p. 118). We will return to this shortly. For the moment, it suffices to note that political self-legislation is a species of collective action; it denotes those acts whereby the members of a polity articulate a common

4 Philip Pettit, A Theory of Freedom, Cambridge: Polity 2001, p. 80.
5 Philip Pettit, A Theory of Freedom, p. 117 (supra note 4).

interest by referring to themselves as the unity that enacts legal norms and for the sake of which those norms are enacted.[6] This nutshell definition of self-legislation suggests that decisions have a *reflexive* structure: they denote acts whereby the members of a polity refer to themselves as the unity that establishes in its own interest who ought to do what, where, and when. Legislation, on this reflexive reading, is *grounded* insofar as it is enacted by a collective as its interested author. In short, collective self-legislation not only yields the basic structure of decisions, as acts of positing legal boundaries, but also of what counts, in political modernity, as a grounded decision.

3 Legality, Illegality, and A-legaling

While the theories of collective intentionality and action advanced by Bratman, Pettit, and others offer a persuasive alternative to attempts to dissolve collective self-legislation into a summation of individual acts, those theories fall prey to a decisive difficulty. Indeed, the foregoing account of decisions as acts of collective self-legislation assumes that the fourfold *Grenzsetzung* that gives rise to a collective has already come about. But this assumption conceals that, by definition, acts that create legal orders cannot themselves be a part thereof. Indeed, the founding acts of legal order are themselves *neither legal nor illegal*, because both terms of this binary opposition already presuppose a legal order as the condition for their intelligibility. Instead, foundational acts are *a*-legal: they institute the distinction itself between legality and illegality.[7] More generally, the a-legality of foundational acts implies that these acts do not fall on either side of the master distinction between *selfhood and alterity*; to the contrary, they introduce the cleavage, both 'othering' and 'selfing' at one fell swoop. On this reading, collective self-legislation is *not* a reflexive act, as I had stated: it is the constitution *of* a collective self (and its others) through a legislative act.

But this is only part of the story. Indeed, inaugural acts can only posit legal boundaries *ab initio* by *re*positing these boundaries. So, the paradox of politics amounts to the paradox of *representation* – an act originates a collective by representing the original collective – and the paradox of *constituent power* – constituent power inaugurates a polity by acting as a constituted

6 See Bert van Roermund's powerful essay, 'First-Person Plural Legislature: Political Reflexivity and Representation', Philosophical Explorations (6) 2003, p. 235-252.

7 In a previous article I referred to this three-way distinction in terms of legality, illegality, and non-legality, but I prefer this rendition of it, which I borrow from Bernhard Waldenfels, Schattenrisse der Moral, Frankfurt: Suhrkamp 2006, p. 130-131. See my article 'Dialectic and Revolution: Confronting Kelsen and Gadamer on Legal Interpretation', Cardozo Law Review, (24) 2003, p. 769-798.

power. If constituent acts succeed, that is, if the individuals that such acts evoke as members of a group attribute these to themselves as their own constituent acts, the distinction between selfhood and alterity takes hold, albeit provisionally and incompletely, such that a-legal acts appear retrospectively as having been legal. If and to the extent that this happens, collective self-legislation is a decision in the sense of boundary-setting *by* a collective self.

Although recklessly abridged, this account of the paradox of politics goes part of the way in explaining why Honig can assert that democratic decisions take up the middle ground between deliberativism and decisionism. On the one hand, insofar as no polity can arise unless someone seizes the initiative to identify who are the members of the polity and what interest joins them in community, social contract in general, and theories of practical discourse or dialogue in particular, always come too late. Engaging in a discourse oriented towards consensus, or a dialogue oriented towards mutual understanding, presupposes an a-discursive, a-dialogical decision, an initiative that has no prior justification, yet which gets a discourse or dialogue going. In the same way that the question who is a party to a social contract cannot be decided by a social contract without begging the question, so also the prior issue concerning who is a party to a practical discourse or dialogue in view of grounding legislation requires a prior decision that is neither discursive nor dialogical.[8] On the other hand, the paradox of politics also suggests how and to what extent decisions can be defended against the charge of decisionism. Here again, the key resides in acts of seizing the initiative. On the face of it, such acts are groundless, for otherwise they could not be inaugural. Schmitt relentlessly exposes the implications of this insight in his discussion of decisions: 'Looked at normatively, the decision emanates from nothingness. The legal force of a decision is something other than the result of a grounding.'[9] Yet Schmitt overlooks the *attributive* character of decisions. Whoever seizes the initiative to found a polity must claim to legislate in the name of a collective, attributing her/his act to a group. In this sense, initiatives are never simply *ex nihilo*. Attribution always involves both a *representational* claim, the evocation of a collective ground of acts of setting legal boundaries, and a representational *claim*, the evocation of a

8 In the process of defending constitutional dialogue as the legal vehicle of political recognition, Tully inadvertently exposes the blind spot of constitutional dialogue, when he notes that 'only a dialogue in which different ways of participating in the dialogue are mutually recognised would be just (even if the first piece of business is to agree on which forms of dialogue are admissible).' Notice that the proviso within brackets is but the first step in what has already become an infinite regress. See James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity, Cambridge: Cambridge University Press 1995, p. 53.

9 Carl Schmitt, Political Theology, (Trans.) George Schwab, Cambridge, MA: MIT Press 1985, p. 31-32 (translation altered).

collective ground that can be contested, validated, or rejected. This allows for justifying decisions, albeit *a posteriori* and ever incompletely. In short, the paradox of politics deconstructs the simple opposition between groundless and grounded acts taken for granted by deliberativism and decisionism: a groundless act can only inaugurate a polity if it retrospectively succeeds in being viewed as grounded.[10]

But this 'success' is always ambiguous. While there is no simple disjunction between grounded and ungrounded acts, the self-attribution of legal norms by a group of individuals as their interested author never entirely neutralizes the residual groundlessness of the act whereby someone seizes the initiative to posit legal boundaries on behalf of a 'we'. Indeed, the normalization whereby a-legal foundational acts retrospectively become legal, if they catch on through acts of self-attribution, has its inverted image in the disruptions of legal boundaries whereby the prospective qualification of behavior as legal or illegal is challenged by a-legal behavior. Such behavior shows that foundational acts, as acts of positing the legal boundaries of a polity, do not merely include a collective self and exclude its others. Foundational acts – in fact, all legislative acts – are always acts of self-inclusion *and* self-exclusion. On the one hand, self-inclusiveness is linked to the unity claimed for a manifold of individuals when someone seizes the initiative to say 'we'. Yet this act of self-inclusion evokes, with varying degrees of political intensity, the counter-claim, 'Not in our name', thereby revealing that legislative acts are also acts of self-exclusion. Accordingly, the a-legal foundation of a polity catches up with it from behind by announcing itself from up front – from the future.

By a-legal behavior I mean an act that contests any or several of the four ways in which a legal order distinguishes between legality and illegality, *i.e.*, who ought to do what, where, and when, thereby intimating another way of distinguishing between these terms. In this strong sense of the term, politics is 'contestatory' (p. 120). A-legal acts expose the gap between actual and possible law; they not only break the law but also transgress it. Such is the case, for example, when individuals, appealing to values they deem constitutive for the political community of which they are citizens, actively undermine efforts by the authorities of that community to deport illegal immigrants. Their subversive acts contest the who, what, where, and when of a legal order: the 'who' and the 'what', by questioning the condi-

10 For extended analyses and illustrations of the paradoxes of representation and constituent power in conjunction with the problem of attribution, see my articles, 'The Paradox of Constituent Power: The Ambiguous Self-Constitution of the European Union', Ratio Juris (20) 2007, p. 485-505, and 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', in: Martin Loughlin & Neil Walker (eds.), The Paradox of Constitutionalism, Oxford: Oxford University Press 2007, p. 9-24.

tions under which immigration policy grants aliens the right to stay in the community; the 'where', by questioning the conditions under which, in the process of enacting and enforcing immigration policy, the polity emplaces itself as an inside over against an outside; the 'when', by challenging the sense of a collective past, present, and future which governs the enactment and enforcement of immigration policy. Importantly, the 'a' of a-legality does not mean the *other of legality*, for this is illegality; instead, it means that such acts transgress boundaries by revealing *another legality*, other possibilities of drawing the distinction between legality and illegality in the legal order they contest. More precisely, a-legal acts contest legal boundaries by intimating the possible *legality* of what counts as *illegal*, and the possible *illegality* of what counts as *legal*. And in the same way that a-legality disrupts one or more of the four ways in which a legal order draws the distinction between legality and illegality, it also disrupts the distinction between selfhood and alterity, intimating that self is other, and the other, self. I submit that this twofold experience of indeterminacy is the concrete meaning of what Honig calls the law's 'uncanniness' (p. 123), and phenomenology, the law's strangeness. A-legality is the privileged point of entry into a legal phenomenology of the strange.

4 Question and Response

The three-way distinction between legality, illegality, and a-legality allows me to sharpen these preliminary considerations on the nature of decisions and collective self-legislation. Indeed, although decisions can only qualify behaviour as legal or illegal, the object of decisions is ultimately *whether and how what calls for legal qualification is a-legal*. Let me outline more fully what is at stake in this idea.

Decisions are, to begin with, *responsive* to something that demands a normative, no less than a factual, qualification. Or, as Fitzpatrick deftly puts it, law is 'responsable'.[11] This is no arbitrary or occasional feature of decisions: legislation, even legislation enacted in foundational acts, always responds to a challenge.[12] Something demands legal qualification, in the very broad sense of a determination of who ought to do what, where, and when; as such, decisions respond to a *question* about legal boundaries. My claim is, therefore,

11 Peter Fitzpatrick, Modernism and the Grounds of Law, Cambridge: Cambridge University Press 2001, p. 76. Fitzpatrick's analysis of law's responsiveness is part of the book's central thesis that law is informed by 'the movement in and between determination and responsiveness' (ibid. p. 70).

12 For example, the foundation of the European Community by way of the Treaty of Rome was presented in terms of a response to challenges such as avoiding new wars between the Member States, dealing with the implications of economic globalisation, and the like.

twofold. Firstly, acts of setting legal boundaries – decisions – are responsive because, at every turn, human behavior renders legal boundaries questionable, if nothing else because it must be established whether behavior is legal or illegal – *derivative questionability*, as I would call it. But, secondly, decisions are responsive in a strong sense of the term because a-legal behavior betrays the residual groundlessness of legal boundaries – *primordial questionability*, as I would call it. On this strong reading of responsiveness, to decide is to deal, in one way or another, with the primordial questionability of legal boundaries, as revealed through a-legal behavior. In turn, to deal with this primordial questionability means, for a manifold of individuals, having to determine time and again, with respect to what demands legal qualification, *whether* they are (to become) a unity and *what* defines them as a unity, *i.e.*, which determinations of the who, what, where, and when of political community are their own possibilities.

An elemental objection arises at this point: if collectives can only qualify human behavior as legal or illegal, how can they at all be responsive to *a*-legality? The key to this problem resides in the paradox of politics: as noted earlier, inaugural acts originate a polity by repositing the boundaries of an original polity. Accordingly, not only must every collective qualify human behavior as legal or illegal, but what calls for legal qualification inevitably confronts it with the question concerning an original unity to which it has no direct access, yet which it has to determine time and again through acts of boundary-setting. This predicament is precisely what drives the question 'Who are we?'; it explains why decisions must be taken. Because the paradoxical foundation of political community ensures that there is no direct access to the original community, decisions are never only about enforcing boundaries, hence about enforcing the distinction between legality and illegality. The legal qualification of human behavior is always a *decision* because it unavoidably involves an assessment of what *counts* as legality and illegality, and therewith of what counts as a collective self and its others. In this minimal sense, decisions are always acts of boundary *constitution*. More properly, boundary enforcement and constitution are always intertwined, in such a way that although one or the other is more prominent, neither is ever given in pure form. For, in the same way that acts of boundary constitution claim to enforce the original boundaries of a collective, acts of boundary enforcement constitute those boundaries each time around, even when reaffirming their prior settings. Accordingly, and returning to the objection at the outset of this paragraph, decisions can respond *indirectly* to a-legality, by retroactively ordering anew the distinction between legality and illegality, and between selfhood and alterity.

Now, it is tempting to immediately map these two kinds of decisions onto the distinction between (il)legality and a-legality, in such a way that responses

are dictated by questions. On the one hand, decisions can *enforce* the boundaries of legal order in response to *(il)legal* acts. That we are and what we are as a collective are assumptions deemed to be more or less unproblematic in the decisions that enforce boundaries. In other words, boundary enforcement takes for granted and confirms the distinctions between legality and illegality, and between selfhood and alterity, as posited in existing legal boundaries. On the other hand, decisions can *constitute* the boundaries of legal order in response to *a-legal* acts. In the face of a-legal challenges to legal boundaries, a decision can constitute a collective while claiming to do no more than restore its original boundaries. Boundary constitution is, of course, a foundational act, an a-legal response to a-legal behavior. The disruption of the distinctions between legality and illegality, and selfhood and alterity, elicited by a-legal challenges to legal boundaries, is responded to by acts that posit the distinction (anew) from a position that is neither that of a collective self nor of its others.

There is, however, no simple sequence going from illegal behavior to boundary enforcement on the one hand, nor from a-legal behavior to boundary constitution on the other. Indeed, there is an irreducible *hiatus* between the questionability of legal boundaries and the responsiveness of decisions. This hiatus has two aspects. On the one hand, what demands legal qualification *precedes* the law, not merely temporally but most fundamentally because human behavior never entirely fits legal expectations. Human behavior is always at least minimally a-legal, because it in some way upsets the anticipations of legality/illegality encoded in legal norms. This 'precedence' precludes that the meaning of human behavior can ever simply be a legal construct. In other words, what calls for legal qualification does not simply collapse into the legal qualification thereof. To this extent, questions do precede responses. On the other hand, the responsiveness of decisions is never merely subordinate to what calls for legal qualification, never a fixed reaction to a pre-coded stimulus. This is not only the case because, when deciding, a collective can marshal a variable range of responses to what calls for legal qualification. More radically, decisions are responsive because they establish *retroactively* whether and how behavior is a-legal. Consequently, the sequence going from (il)legality to boundary enforcement, and from a-legality to boundary constitution, has its double in the inverted sequence: behavior *becomes* (il)legal when legislation enforces boundaries, and a-legal when legislation constitutes boundaries. A decision is responsive in a strong sense of the term, because 'that to which it responds occurs only in responding to it'.[13]

13 Bernhard Waldenfels, Antwortregister, Frankfurt: Suhrkamp 1994, p. 266. My treatment of 'precedence' and 'retroactivity' draws on what Waldenfels calls, respectively, the 'Vorgängigkeit' of questions and the 'Nachträglichkeit' of responsiveness.

5 Between Decisionism and Deliberativism

The hiatus between the 'precedence' of what calls for legal qualification and the 'retroactivity' of legislation allows us to outline an interpretation of decisions qua decisions that eschews both decisionism and deliberativism. (1) As to decisionism, consider Schmitt's claim, cited in Section 3: 'Looked at *normatively*, the decision emanates from nothingness. The legal force of a decision is something other than the result of a grounding' (emphasis added). I had pointed out that Schmitt overlooks the attributive character of decisions, such that decisions always involve a representational claim. But I had not dealt with a more radical aspect of Schmitt's thesis, to which we must now turn. Indeed, it seems that if these representational claims catch on, decisions are groundless in that they mark the pure *beginning* of legal normativity. An act (*e.g.*, of constitution-making) becomes the act of a collective, which, as its author, is not itself subject to any rules other than those it imposes on itself. The foundation of a political community, and all further legislative acts, amounts to a *self*-grounding. Schmitt does not stand alone in defending this thesis; it articulates the concept of freedom that dominates the greater part of Western philosophy. Arendt formulates this concept as follows:

> [t]he great consequence which the concept of beginning and origin has for all strictly political questions comes from the simple fact that political action, like all action, is essentially always the beginning of something new; as such, it is . . . the very essence of human freedom.[14]

By contrast, to acknowledge the 'precedence' of what calls for legal qualification is to recognize that decisions, including foundational decisions, are never pure beginnings because they cannot but *respond* to normative claims intimated in a-legality.[15] This last point is important, because what is at stake in the question concerning the ground of legal boundaries is what renders them binding. The precedence of what calls for legal qualification suggests that a-legality introduces a form of normative constraint that cannot be reduced to a collective *self*-binding. To a greater or lesser extent, 'we' are *already bound* by what evokes us into being as a collective; whether we are and what we are as a collective only emerges through what come to be 'our' normative responses to normative claims evoked by a-legality. Free-

14 Hannah Arendt, 'Understanding and Politics', republished in her Essays in Understanding, New York: Schocken Books 1994, p. 320-321. See also 'What is Freedom?', in her collection of essays, Between Past and Future, London: Penguin Books 1993 [1961]), p.143-171.

15 See Bernhard Waldenfels, Schattenrisse der Moral, p. 106 ff (supra note 7).

dom has, therefore, an irreducibly asymmetrical structure: it begins as a *summons* that is prior to anything 'we' might decide that 'we' ought to do. To put it paradoxically, an act of collective self-legislation – a decision – can only come first by coming second, that is, as a re-action to what calls into question who ought to do what, where, and when. Sharpening this paradox yet further, collective freedom is only possible as a heteronomous autonomy. I submit that this paradoxical concept of freedom can save decisions from the charge of decisionism.

(2) If saving decisions from decisionism requires emphasising the precedence of what calls for legal qualification, refusing to view them merely as the outcome of a deliberative process requires insisting on the retroactivity of such qualifications. In the same way that the 'precedence' of what calls for legal qualification introduces an element of objectivity into decisions, the 'retroactivity' of legal qualifications adds an aspect of subjectivity thereto. In other words, while the normative meaning of legal behavior does not merely collapse into the legal qualification thereof, its normative meaning is never fully independent of the first-person plural perspective whence it is qualified as legal or illegal.

The subject-relativity of decisions has two aspects. On the one hand, there is no third person perspective, no overarching, independent normative viewpoint, whence it would be possible for 'all relevant parties' to establish whether and how behavior is a-legal, and how it should be responded to. For, as we have seen, who counts as 'a relevant party' presupposes a foundational act that seizes the initiative to determine who is a party and what interests join a manifold of individuals into a collective. If I may be allowed to give Habermas's vocabulary a twist he would not relish, legislation does not merely conjoin 'facticity *and* validity'; more radically, the paradox of politics exposes an irreducible facticity *of* validity. On the other hand, to a greater or lesser extent *responses frame questions in ways that render them amenable to a response*. The interpretation of behavior as a-legal is bound up with an assessment about what normative possibilities are the collective's *own* possibilities. For this assessment determines the range of the collective's available responses to a normative claim. So, decisions do not only establish whether an act is a-legal; also, and most fundamentally, they establish what kinds of a-legality a collective can deal with.

On this reading, the responsive framing of questions by decisions has two limits. The first would be an act of legal qualification in which the distinction between legality and illegality, as posited in the existing legal order, exhausts the meaning of what calls for qualification. This extreme would mark a hypothetical situation in which behavior has no residual a-legality, raises no normative claim of its own; instead, it would have a merely factual status that calls for normative qualification as legal or illegal. In such cases,

decisions would cease to frame what calls for legal qualification, because what they qualify poses an entirely derivative question, in the sense noted in Section 4. In other words, decisions would cease to be responsive, in the strong sense noted in that Section. The second limit situation consists in the characterisation of behavior as terrorist. By qualifying an act as terrorist, legal authorities deny that it can be the index of another legality, claiming, instead, that it is the expression of sheer illegality. Paradoxically, what raises normative claims that definitively elude the distinction between legality and illegality, as posited by a polity, is qualified as the definitive confirmation thereof, such that there is no option but to enforce the distinction, or so legal authorities claim. Terrorism is the form of human behavior that is deemed indisputably illegal, because viewed as irredeemably a-legal. Terrorism marks a limit case of the responsive framing of questions, because terrorism is the form of primordial questionability that can only be responded to by leveling it down to an entirely derivative form of questionability, or so authorities hold. Here again, a decision ceases to be responsive, in the strong sense noted in Section 4.

In short, decisions display a *finite* responsiveness to what challenges legal boundaries, which means that decisions frame human behavior in such a way that it provokes the collective self with a *finite* questionability. In responding, legislative acts neutralize, to a greater or lesser extent, the a-legality of what calls for legal qualification. This finite questionability and responsiveness lies at the heart of the fact that 'the people, though solicited as a unity by the lawgiver, are never fully captured by his law' (ARSP p. 7). The 'uncanny', on this strong reading of Honig's term, is the 'remnant' (p. 122) that resists inclusion in the so-called 'dialectic' of self and other.[16] Consequently, if the 'precedence' of what calls for legal qualification deploys an asymmetric relation with respect to its legal qualification, so also the 'retroactivity' of responses ensures that decisions deploy the converse asymmetry as well.

6 The Opening

Accordingly, the hiatus that separates and joins behavior and its qualification by legislative acts speaks to a double asymmetry between the two terms of the hiatus. As a result, there is an irreducible *indeterminacy* concerning the 'objective' normative status of an act and its 'subjective' legal qualification. Whether and how an act is a-legal, and how a-legality should

16 Paul Ricœur, Oneself as another, (Trans.) Kathleen Blamley, Chicago, IL: Chicago University Press, 1992 [1990]). A fuller development of this theme would require critical engagement with a second strand of deliberativism that receives little attention in Honig's paper: theories of recognition.

be responded to, are issues that resist definitive resolution. For this reason, legislative acts are always decisions. Conversely, the term 'decision' is the condensed expression of this irreducible indeterminacy. Consequently, democracy does not merely institutionalize collective self-legislation by means of procedurally safeguarded venues that allow for popular decision-making. More fundamentally, it institutionalizes the insight that, in principle and not merely in fact, acts that purport to be acts of collective self-legislation are *decisions*, in the strong sense outlined heretofore.
This insight allows us to revisit Honig's discussion of the paradox of politics and to sharpen its implications for democratic theory. As she notes in a passage cited at the outset of this response, the paradox of politics

> 'presses us to begin the work of democratic politics in *medias res*, in a terrain grounded neither in the sort of universal principled justification embraced by deliberative democrats, nor in the groundlessness of pure decision that deliberativists imagine is the only alternative'.

Decisions, as the foregoing analysis makes clear, are neither simply entirely grounded nor entirely groundless; to this extent, democratic decision-making occupies a *medias res*, a position between decisionism and deliberativism. By stressing this intermediate position of decision-making, Honig resists – correctly, in my view – the temptation to massively oppose 'conflicting principles' or 'incommensurable "logics"', an opposition which 'drive[s] us into binary paradoxes that shuttle us back and forth between decision and deliberation', and, I would add, between politics and law (p. 135-136). But, in the light of the responsive framing of questions indicated in the preceding section, refusing this massive opposition does not amount to embracing Habermas' thesis concerning the 'co-originality' of private and public autonomy.[17]
There is, however, a deeper sense in which 'betweenness' can be predicated of democracy and democratic decision-making. The upshot of the foregoing analyses of question and response is that there is a double asymmetry, a hiatus that separates and joins behavior that demands qualification, on the one hand, and the legal qualification thereof, on the other. If this double asymmetry conditions democratic decision-making, then this double asymmetry, rather than Honig's *medias res*, is, most fundamentally, the 'between' that holds sway in democracy. Crucially, this 'between' can only hold sway if we refuse to understand it as a 'thing' (*res*), however broadly defined, or as a 'terrain' (p. 118). Otherwise, the hiatus becomes a ground,

17 Jürgen Habermas, 'On the Internal Relation between the Rule of Law and Democracy', in: Inclusion of the Other, Cambridge, MA: MIT Press 2002, p. 253-264.

albeit incomplete and insufficient. Pushing this point yet a step further, I would say that this double asymmetry is the primordial form of openness. More precisely, it is an open*ing* that precedes and renders possible all forms of institutional open*ness* – and closure. This Opening, as I would call it, conditions the possibility of politics and publicity because it is not a *res* nor a *res publica*, but rather what precedes and makes possible all claims to and contestations of commonality.

Having begun with the conceptual temperateness of analytical theories of collective intentionality, allow me to conclude by indulging in an unabashedly speculative question that resonates with Heidegger's difficult ruminations about the concept of ground: might the 'between', the Opening that joins and separates what calls for legal qualification and the qualification thereof, be the abyss – *Abgrund*, as one would put it in German, and *afgrond*, in Dutch – whence claims to collective self-legislation can manifest themselves as grounded *and* groundless, that is, as decisions?