handled by the Regional Court elsewhere, especially offences investigated by the *Stasi* (security police). After the building of the Berlin Wall in 1961, "asocial behaviour" (mostly refusal to work) became a major topic for the criminal justice system. Later, judges devoted considerable time to cases of attempts to leave the GDR. Would-be escapees whose demands for release from the GDR were turned down were prosecuted for contacting Western authorities or organizing protest among like-minded citizens. Markovits also uses her material to show the imbalance of power in criminal proceedings: warrantless arrest, non-disclosure, exclusion of the public, letting the text of the verdict only be read rather than taken home (p. 193).

The book is a gem in legal history. It describes in vivid language and with unique richness the everyday justice under a socialist regime and may be used in classes for comparative law for the case of negligence of due process. When the book was first published in German in 2006, the reviewers were enthusiastic. Only Erich Buchholz, until 1991 a professor of criminology at Humboldt University then in East Berlin, wrote in the journal of the *Gesellschaft zur rechtlichen und humanitären Unterstützung e.V.* (a self-help organization of former Stasi and SED functionaries) a damning criticism.[1] He asserted that Inga Markovits was unable to interpret the material correctly because she had never lived in the GDR. For example, her analysis of the influence of the SED on judges' decision-making was wrong, according to Buchholz, because the socialist party had the same aims in establishing a new society as the judges. Buchholz characterized her interpretations as "malicious and hostile." The choice of these terms, which were widely used by GDR officials until November 1989 to label critics, may in fact illustrate the accuracy of Markovits' analysis.

* * *

Emergency Politics: Paradox, Law, Democracy. By Bonnie Honig. Princeton, NJ: Princeton University Press, 2009. 218 pp. $26.95 cloth.

Reviewed by Paul A. Passavant, Hobart and William Smith Colleges

Bonnie Honig's *Emergency Politics* is a critique of two prominent approaches to political and legal theory. The first approach is that of deliberative democratic theory elaborated by Jürgen Habermas and

[1] Erich Buchholz Ein—unbeabsichtigtes—Loblied auf die DDR-Justiz Information Nr. 5 / Juli 2007 Berlin. Available online at http://www.grh-ev.org/html/body_information_5_07.html.

https://doi.org/10.1111/j.1540-5893.2011.0455.x Published online by Cambridge University Press

amplified by Seyla Benhabib, which argues that democratic politics must conform to certain moral principles to be legitimate, such as legal procedures and universal norms. The second approach is that of Giorgio Agamben's influential formalization of sovereignty that draws from the work of the Nazi jurist Carl Schmitt to highlight the dangers of sovereign decisionism (Hussain & Ptacek 2000).

Emergency Politics uses paradoxes posed by Jean-Jacques Rousseau as its conceptual apparatus. Rousseau distinguishes the general will, which is always right, from the will of all, which can err. What does it mean for democracy that the people might fail to see the general will? Additionally, to found a new republic, the effect would have to be the cause since "men would have to have already become before the advent of law that which they become as a result of law" (Rousseau 1968: 87). Likewise, what if Rousseau's lawgiver is a charlatan? How do we decide? For Honig, these Rousseauean paradoxes are not limited to democracy's origins. Rather, she reads Rousseau diagnostically to conceive these dilemmas as ineluctable. There is no solution that transcends politics and guarantees the rightness or democratic orientation to the practices of democracy. There is "no getting away from the need in a democracy for the people to decide" (p. 23). Honig refers to this pervasive challenge as the "paradox of politics" (p. xvi).

Honig finds that Habermas fails to solve this paradox by either referring to particular revolutionary events like the assemblies of Philadelphia and Paris (violating the norm of universality through the embedded particularities of these political events) or by relying on a retrospective judgment of constitutional practices (such that the act of judgment remains within the frame produced by that which is judged: pp. 34–38). Benhabib resorts to a moral standpoint or the rule of law as a way to judge and regulate the decisions of the people. This proposed "solution," however, presumes that law and people are independent of each other. Much law and society scholarship has demonstrated the mutually constitutive relation between "law" and "society." Law is constitutive of interests, property, and social identities (Passavant 2002). Socioeconomic forces determine law's forms (Horwitz 1977). In an argument that is homologous to this scholarship, though not drawing from it, Honig finds Benhabib's proposed solution fails since law and the people are products of each other—there is no independent standpoint from which to judge the people (or the law).

Honig critiques the concept of an all-powerful sovereign in Schmitt and Agamben by drawing from the Jewish theologian Franz Rosenzweig. Schmitt likens the sovereign's decision to a "miracle," and presumes such an intervention to be unambiguous.

https://doi.org/10.1111/j.1540-5893.2011.0455.x Published online by Cambridge University Press

Rosenzweig, however, emphasizes that the people must be prepared to receive the miracle—they must be so oriented that they are receptive to it already. In this way, "sovereignty," in fact, does not so much determine the fate of peoples as the people determine sovereignty. There is no escaping the need for the people to decide (chapter 4). Here I wish Honig had gone further. If the people must be prepared to receive the decision, if the "decision" is already happening in anticipation of its announcement, then is "emergency" conceptually useful for parsing contemporary law and politics?

Law is often, incorrectly, opposed to sovereign or administrative decisions (Butler 2004). Honig returns to U.S. Assistant Secretary of Labor Louis Post's interpretations of legal procedures that blunted many of young J. Edgar Hoover's efforts to deport peremptorily immigrants for anarchist political beliefs during the first Red Scare. In so doing, she troubles the alleged dichotomy between law and administration by demonstrating Post's scrupulous attention to legal interpretation. Post *decided* to interpret legal procedures the way that he did. Often, the role of decision in legal practices is occluded with rhetorical flourishes stating that a legal decision anticipated legal developments as if law was "discovered" rather than created. At the moment of decision, nothing could be known of a future that has yet to occur, and the political battles that need to be won in order to secure the future from which the decision could be rendered as "legal" (chapter 3). Law and administration, law and politics, are mutually intertwined.

Those familiar with law and society scholarship will be interested in Honig's arguments. They will not, though, be as surprised as some political theorists may be at the observation that law and administration are not strangers, and that the rule of law ultimately rests on the rule of man. In sum, law and politics are inescapably imbricated within each other. Nevertheless, scholars of law and society will benefit from *Emergency Politics* because Honig presents the normative implications of the paradox of politics—the mutually constitutive relation between law and society and law and politics—for democratic theory and practice.

References

Butler, Judith (2004) *Precarious Life: The Powers of Mourning and Violence*. New York: Verso.

Horwitz, Morton (1977) *The Transformation of American Law 1780–1860*. Cambridge, MA: Harvard Univ. Press.

Hussain, Nasser, & Melissa Ptacek (2000) "Thresholds: Sovereignty and the Sacred," 34 *Law & Society Rev.* 495–515.

https://doi.org/10.1111/j.1540-5893.2011.0455.x Published online by Cambridge University Press

Passavant, Paul A. (2002) *No Escape: Freedom of Speech and the Paradox of Rights*. New York: New York Univ. Press.
Rousseau, Jean-Jacques (1762/1968) *The Social Contract* (Maurice Cranston, trans.) New York: Penguin.

* * *

Making Our Democracy Work: A Judge's View. By Stephen Breyer. New York: Alfred A. Knopf, 2010. 270 pp. $26.95 cloth.

Reviewed by Charles F. Jacobs, St. Norbert College

Over the last several years, scholars of the United States Supreme Court, as well as interested Court watchers, have been entertained by a series of public discussions between Associate Justices Antonin Scalia and Stephen Breyer regarding the nature and process of appellate decision making and the interpretation of the United States Constitution. These friendly debates pit one of the Court's strongest advocates for the use of originalism, Justice Scalia, against Justice Breyer, a vocal supporter of a methodology of interpretation that views the Constitution as a living document with the capacity to adapt to the changing needs of the nation. In *Making Our Democracy Work: A Judge's View*, Breyer synthesizes many of the ideas expressed during these conversations and his career as a jurist into an explanation regarding how the Court makes the law and the Constitution work for the American people.

For those familiar with Justice Breyer's earlier book, *Active Liberty: Interpreting Our Democratic Constitution* (2005), the central theme of his current work will be familiar. In *Active Liberty*, Breyer offered his thesis concerning the proper approach to constitutional interpretation, suggesting that judges rely not only on language, history, tradition, and precedent to decide cases, but also on the purposes of legal text and the consequences of decisions. This approach, he argues, helps to restrain judges while emphasizing the democratic nature of the Constitution and political process. In *Making Our Democracy Work*, Breyer adapts his theoretical discussion for a more "general audience" in an attempt to "increase the public's general understanding of what the Supreme Court does" (p. ix). Specifically, Breyer notes that "the present book focuses on the Supreme Court's role in maintaining a *workable* constitutional system of government" by describing why the public supports the decisions of the Courts as legitimate and illustrating how the Court goes about participating in and maintaining the democratic functions of the nation (p. xii).

The work is divided into three parts. Part I attempts to unravel the reason why the public supports the Court's decisions as

https://doi.org/10.1111/j.1540-5893.2011.0455.x Published online by Cambridge University Press