

BEYOND HEGEMONY

Towards a new philosophy
of political legitimacy

DARROW SCHECTER

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For Diana, Luca and Francis

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D.S.

Introduction

SINCE the recent consolidation of what is often referred to as the linguistic turn of social and political thought and the related rise to academic and cultural prominence of postmodernism, it would appear that the modernist aspiration to elaborate an updated version of the Enlightenment has failed. Many observers regard the collapse of Soviet state socialism in 1989–90 and the subsequent globalisation of both capitalism and anti-capitalist protest movements as symptomatic of the irreversibility of the modernist capitulation to postmodernism in economics, politics, international relations, art and philosophy. According to this line of interpretation, the term modernism indicates a circumscribed historical period marked by attempts to appropriate the philosophical and scientific ideals of the Enlightenment and French Revolution for utopian experiments in politics and aesthetics within the framework defined by the emergence of nation-states and the rise of industrial capitalism. Examples of the modernist attempt to combine radical politics and aesthetics in Europe include early Bolshevism in Russia, futurism in Italy and surrealism in France and Spain. As these examples suggest, modernism is characterised by the links between reason, the imagination and the possibility of revolution suggested by the events of 1789 and 1917. By contrast, postmodernism emerges with the rise of the new left and new social movements following the student and worker revolts in Paris and Strasbourg in 1968, and is characterised by the ascendance of the combined forces of the media, communication, the advance of marketing techniques and the democratisation of consumer choice. Whilst many modernist and postmodernist thinkers regard reason and technology to be forces for progress, postmodernists generally decouple reason and technology from grand-scale visions of political alternatives to liberal democracy and capitalism. Utopia remains but is articulated in more fragmented and small-scale versions such as those realised in alternative lifestyles and identities, self-ironic literary satire and movement politics. Supporters and opponents of the very notion of postmodernism seem to agree that, whatever postmodernism means, it suggests something about a vaguely post-political cultural form in which the grand narratives of modernist politics have been jettisoned for the more modest claims of individuals in their search for intra-personal dialogue and understanding.¹ Manifestations of this change can be seen in the shift from the universal claims of Enlightenment rationality commonly ascribed to Rousseau and Marx to the more textual and interpretative orientation exemplified in theories of communicative action, deconstruction and pragmatism. The political programme implied by the transition from Enlightenment reason aiming at

knowledge to communicative reason aiming at understanding is that language and language games offer an interactive and humanist perspective on the possibility of solving conflict and reaching consensus on fundamental issues that is appropriate for politics after the fall of metaphysics and the demise of traditional idealism associated with thinkers like Kant and Hegel.² Theorists of communicative action are likely to oppose this juxtaposition by insisting that communication and understanding are in fact instances of post-metaphysical knowledge that emerge in dialogue, and as such, communicative and pragmatic reason mark an epistemological step beyond the dogmatic and solipsistic premises of the philosophy of consciousness developed by the thinkers of traditional idealism. There is thus a series of elective affinities uniting contemporary liberal and democratic notions of freedom of expression, value-neutral inquiry in the arts and sciences, suspicion of metaphysics and the defence of individual liberty, on the one hand, with the emphasis on the diversity of individual experience, the plurality of local contexts, and the impossibility of foreseeing the outcomes of open dialogue that characterises the writings of the theorists of postmodernism and the linguistic turn, on the other.

Construed in these terms, it appears that the illiberal and undemocratic features of particular modernist movements such as state socialism and futurism can be traced back to the Enlightenment notion of the perfectibility of humanity through reason, which is used by political fanatics to impose systems of illegitimate rule on populations that never wanted to pursue such integral visions of the good of all or the general will in the first place. Against the excesses of the radical modernist interpretation of Enlightenment, the liberal democratic interpretation of the Enlightenment which has in effect prevailed to date and is rearticulated in different ways by postmodernists and theorists of communicative action stresses the danger of any political project aiming to establish the legitimate good for all of humankind. Instead, the state must remain neutral with regard to competing claims of what constitutes the good life, and thus limit its interventions in the private affairs of citizens to those actions that can be squared with the universal postulates of legality. In defence of this position it can be claimed that it is the liberal democratic freedoms of assembly and expression that are the first casualties whenever an attempt is made to entrust the state with the task of deciding what is good for the citizenry. Through the legal enforcement of a free press, freedom of communication, and free exchange of goods and information, the citizenry can decide these things for themselves. From the liberal democratic perspective, the ideals of the Enlightenment are thus best preserved through free institutions which do not attempt to impose a metaphysical and tyrannical vision of political legitimacy. Neutral and objective law is the foundation of liberal democratic legitimacy – not extra-legal conceptions of the legitimate good. Extra-legal conceptions of the good are moreover irrational or in any case private and purely subjective. Hence liberal democratic

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Enlightenment requires that reason indicate the boundaries of legitimate state intervention, but more important, it requires that the claims of reason and legitimacy stop with the delineation of those boundaries. These are epistemological and political boundaries beyond which reason becomes irrational and states become illegitimate. Political legitimacy that limits itself to legitimate intervention and enforcement of a form of law that is itself neutral with regard to competing conceptions of legitimacy is the indispensable *precondition* of freedom. Liberal democratic epistemology proceeds from a starting point which is also a conclusion: liberals know what the preconditions of liberty are from a perspective that is *already* emancipated from illegitimate political intrusion into the naturally legitimate private sphere of interpersonal interaction and economic exchange. It is from this already emancipated position that the difference between the practice of legitimate law enforcement and the illegitimate abuse of law is ascertainable.

One of the central tasks of the current book is to analyse this circularity in liberal argument with a view to radicalising its premises rather than simply deconstructing it. Hence the book offers amongst other things an immanent critique of liberalism rather than an immanent reparation of liberal ideas or an attack on liberalism from supposedly post-liberal political positions. It will be seen that an immanent critique of liberal epistemology leads to a re-examination of the question of the *conditions* of political legitimacy. Liberalism regards this question as an epistemological and political question centrally concerned with law. When the question of the conditions of political legitimacy is radicalised in terms of its premises and conclusions, liberalism is undermined without undermining the possibility of a non-instrumental praxis of law which mediates between humanity and nature in a way that produces knowledge rather than the fabricated consensus characteristic of hegemony. This book attempts to challenge the liberal democratic interpretation of the Enlightenment without advocating a return to metaphysical conceptions of the good or the establishment of a dictatorial order necessary to impose any such political programme. To this extent it seeks to provide the philosophical and political impetus for a relaunching of the Enlightenment project and the centrality of reason and law involved in that project. This may sound like an attempt to re-consolidate the bases of the liberal world-view in the face of contemporary socio-political realities, but it is not. It will be useful for the reader if I state at the outset that the present study is guided by the idea that the path beyond liberalism and liberal democratic versions of the Enlightenment starts with an examination of the fundamental tenets underpinning the juridical bases of liberal epistemology. The book seeks to provide this examination in a way that challenges the assumptions of liberal democrats, postmodernists and advocates of the linguistic turn in social and political thought. What is attempted is a reconfiguration of reason, legality and legitimacy which breaks

decisively both with the liberal democratic understanding of the mediated relation between those terms and with authoritarian projects to establish extra-legal legitimacy. In this context, the first questions that may arise include: why focus on reason, legality and legitimacy as the best way to mount a critique of liberal democracy, postmodernism and recent social and political thought, and how does this critique indicate an alternative to radical modernist and liberal democratic conceptions of Enlightenment?

Despite the many problems with liberalism which will be explored here, there is as yet no credible theory of politics capable of envisaging the contours of a legitimate political order outside the mediations of reason and law, i.e. outside the epistemological and political boundaries which are theorised with particular rigour in the liberal tradition from Kant to the present. The reasons why this is so will be examined in chapter 1. Moreover, political projects aiming to adjust the boundaries of liberal conceptions of reason and law as a way of moving from liberal legitimacy to democratic legitimacy fail in supposedly post-liberal and post-metaphysical democratic humanist theory and practice. The reasons for this failure will be explained in detail in chapter 2 by way of an analysis of state socialism and new social movements. Albeit in very different ways, state socialism and new social movements attempt to move beyond the limited legitimacy of liberal democratic forms of legality. The failure of various attempts to steer a non-authoritarian and non-paternalistic (or politically correct) path beyond liberal theory and practice has a long history. A pivotal moment in the critique of liberal legality is found in the works of the early Marx, in which he distinguishes between the political emancipation secured by the French Revolution and a form of human emancipation to be realised in a coming revolution. With hindsight it is clear that the libertarian revolution Marx was thinking of did not come to fruition in the former USSR, but what remains unclear is how it might be possible to break the boundaries of liberal democratic legality associated with political emancipation without embracing state socialist despotism, social democratic reformism, academic irrelevance or sheer political marginality. From the Bolsheviks to the new social movements, it appears to a great number of Marx's interpreters that the trick to moving beyond liberalism is to move beyond liberal law or law full stop. This is true but it is also in an important sense absolutely false. It will be argued here that it is false if what is meant by this is the determination to temper or soften liberal conceptions of reason and law with more humanistic and democratic conceptions of the legitimate good based on the experiences of social classes and minority groups which are oppressed by political emancipation in its liberal democratic instantiation. It may seem like a very unusual line of interpretation, but Marx himself warns against this notion of democratisation in *On the Jewish Question* (1843). Arguing in a polemical vein with Bruno Bauer, Marx observes that the project to define political emancipation in opposition to racial exclusion remains locked within the humanist

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parameters of the liberal democratic interpretation of the Enlightenment. Without denying or dismissing the real discrimination against Jews in his day (and foreshadowing a look ahead to new social movements today without dismissing discrimination against women, blacks, gays, indigenous peoples, religious minorities and ethnic-linguistic regionalist movements) Marx explains why the enfranchisement of the Jews amounts to their integration within a political order that does not address a more radical question in the literal sense of going to the root of a problem. The latter concerns the relation between collective humanity and nature considered independently, at least in the first instance, from ethnic origin and other particular anthropological notions of group identity and political loyalty. For Marx, the relation between collective humanity and nature is mediated by (1) the intellectual, sensuous and imaginative labour that transforms nature into the objects, tools and resources which make human transcendence of need possible, as well as (2) the legal property relations which structure the labour process and the ownership and distribution of its fruits. In this context the mediating processes and movements denoted by the terms humanity, nature, labour, transformation, objects, transcendence, need and legal property relations are of central importance for Marx as well as for the argument developed in the present study. He is correct in thinking that there can be no decisive move beyond the legal boundaries of political emancipation without a radical change in the work conditions and property relations which structure the labour process in liberal democratic states. But although Marx goes to the root by seizing upon the centrality of the instances of mediation between humanity and nature, he does not analyse all the implications of his own insights in nearly enough detail. The reasons why and the implications will become clear in chapters 2–5.

Marx's non-socialist opponents consistently raise the point that there is more to the mediation of humanity and nature than labour, however broadly conceived by Marx, and also more to that mediation than the laws codifying property relations. This can be reformulated as the twin claim that there is more going on in civil society than labour–capital relations, and more going on in the state than law. A recurrent claim made by postmodernists and proponents of the linguistic turn is that because of the ability of humans to communicate with each other, make collective decisions, settle disputes, etc., the humanity–nature relation has to be grasped dialogically rather than in the solipsistic fashion that Marx uses. Marx confuses humanity with labouring humanity when in fact he should be considering humans in their speaking and acting capacity as political beings with individual histories situated in the most variegated contexts and communities. It is said that Marx forgets that this key dimension of the human condition is already underscored by Aristotle in the *Politics* and the *Nicomachean Ethics*. A number of contemporary Aristotelians and communarians argue that rhetorical subterfuge and oral virtuosity are political virtues

which capture something about the essentially human capacity for action and expression that sets humans apart from other forms of natural life such as plants and animals. Postmodernists add that the ambiguities and figurative masks enlisted in literary expression so adeptly employed by Nietzsche indicate that the modernist quest for metaphysical truth and meaning in history must cede place to the reality of rhetorical device and the multiple interpretability of dramatic performance. Moreover, Arendt, Habermas and a range of other thinkers suggest that Marx's methodological monism is explainable in terms of the residual idealism he inherited from Kant and especially from Hegel. In his aspiration to use Hegel's dialectical method whilst turning Hegel upside down in order to convert philosophical idealism into historical materialism, Marx allegedly reduces the richness of the social fabric to the economy in a manner analogous to Hegel's attempt to secure absolute knowledge by collapsing the individual terms of the subject-object and humanity-nature dichotomies in the overarching unity of what Hegel calls spirit. On this account Marx cancels and preserves Hegel's dogmatism in a kind of materialist metaphysics. He is wont to misconstrue the humanity-nature dialogue as a monologue of working humanity directed at silent nature, and in the process ignore that humanity enters into dialogue with other humanity in a series of learning processes structured by language and speech and capable of taking a myriad of different possible turns. The problem with such interpretations is not so much that they are caricatures, since there are passages in Marx that can be read in the way advocated by his critics. But it is in any case erroneous to ascribe positivist monocausality to Marx since, as stated, Marx regards the humanity-nature relation to be mediated by socio-political and legal institutions. What interests him is not monocausal *essence*, but rather the institutional *forms* through which that mediation between humanity and nature achieves an intelligible and knowledge-yielding institutional profile. One can raise many subtle objections concerning areas where Marx is one-sided and where he seems to have gone wrong. Much of contemporary social and political thought indicates that it is relatively easy to do this and lose sight of the simple point that there is no real freedom in the form of transcendence of need and socio-politically created necessity without a form of economy that guarantees a stable material existence for all citizens. Whilst *laissez-faire* supply-side economics palpably cannot guarantee this, it is becoming clear that welfare state and Keynesian economics are also incapable of doing this to the extent that they are being systematically dismantled as part of the ongoing expansion of a globalised economy regulated by capitalist relations of production. These relations have ruptured the political integrity of the sovereignty of individual nation-states to such an extent that many citizens in Europe and the rest of the world are increasingly likely to regard national elections as symbolic exercises necessary for the legitimisation of political and economic decisions that have already been taken elsewhere in

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places like New York, Washington, London, Paris, Strasbourg, Brussels, Frankfurt and Milan. It is a truism to say that if there is a collective decision to revolutionise legality and overturn the existing relations of production this will entail speech and dialogue; it is rather more cynical and politically strategic to suggest that the reason why this decision has not yet happened and will not happen is because of the irreducibility of speech and dialogue to the instrumental dimension of labour.

Although he never says as much, the young Marx intimates that liberal thinking about reason, law and politics is most radical precisely in those instances in which the liberal vision is ostensibly most anti-democratic and most anti-humanist in the sense implied by the standpoint adopted in 1843. The reasons why this is so will become clear in the discussion to follow in subsequent chapters, but they can nonetheless be briefly sketched in this introduction. Marx attempts to think the humanity–nature relation in a way that places him in an unsuspected proximity with certain liberal thinkers such as Kant. This proximity constitutes a simultaneous distance from pragmatic, communicative action, linguistic, communitarian, postmodernist, new social movement and other democratic humanist critiques of liberalism. The latter generally seek to retain the juridical understanding of the relation between knowledge and freedom in liberals like Kant and the early Rawls, and to then broaden that juridical base of political legitimacy by including ostensibly wider, non-juridical considerations on the specificity of what is essentially human drawn from Aristotle and to a lesser extent Hegel. These include speech and communication, the struggle for recognition, considerations of ‘the political’, the politics of friendship, friend–enemy relations, community, ambiguities in the definition of gender and other perspectives addressing what are construed as instances of lived experience escaping the violence of juridical formality. In admittedly very divergent degrees of admixture, and however updated and modified to suit current socio-political realities they may be, Kantian legal epistemology and Aristotelian anthropology define the parameters of virtually all of contemporary social and political thought in the mainstream and on the margins alike. At the risk of great simplification, one could say that mainstream and marginal perspectives outside of anarchist circles generally seek to retain the idea of the rule of law or *Rechtsstaat*, and then widen and temper the formality of law with the informality and local and historical dimensions of individual and group identity/particularity. Taken together, one is generally looking at instances of formal juridical essence coupled with instances of non-juridical plural essence. Though the latter component is now known to students and the public as sociology and anthropology rather than Aristotelian philosophy, the fact remains that much of the social and political thought that has been presented as radical since 1968 actually has an ancient lineage. Moreover, little of this thought is radical in the sense suggested by Marx’s early writings. In contrast to the latter, the advocates of the

democratic humanist perspective insist that (1) humanity enters into dialogue with other humanity and (2) it is impossible to understand socio-political institutional forms independently of ethnic and other particular anthropological notions of human identity, origin and aspiration. It will be demonstrated in chapter 1 and at various junctures throughout this book that Kant's juridical epistemology is different from liberal democratic humanist epistemology and politics in one decisive respect that links Kant with Marx rather than Rawls. Apart from his writings on the public sphere, Kant is interested in the conditions of the possibility of experience, knowledge and freedom. The key to discerning those conditions is to be found in the mediation between humanity and nature. For Kant that mediation is rational and legal. It is not in the first instance interpersonal, communicative, interactive, politically agonistic or identity-creating. Kant intimates that reason and law are not subjective attributes of the human 'anthropos', but rather instances of mediation between humanity and the world. Insofar Kant is in agreement with Marx. Well before Nietzsche, Freud, Heidegger and Lacan, Kant decentres the epistemological subject by stripping it of essential attributes. It is thus misleading to dismiss idealism as metaphysical, since Kant is already a post-metaphysical and post-anthropological thinker for whom the mediation of humanity and nature is a knowledge-creating process in which humanity is both united and separated from nature by reason and law. Kant forfeits the immensity of this discovery in those moments in his thinking when he tries to square this discovery of idealist philosophy with his political commitment to liberal notions of individual autonomy and negative freedom; insofar he is at loggerheads with Marx. Those are moments in which he shifts the idealist argument acknowledging the more than exclusively subjective dimension of law and reason to the anthropological argument that humanity gives itself laws and is rational when it does so. Kant uncovers the link between humanist metaphysics and anthropology, and discerns that the move beyond them is to be sought in reason and law. When he intuitively feels that this takes him beyond the premises of liberalism, however, he retreats to anthropological and metaphysical notions of human essence that close humanity off from the processes of mediation and contact with the world. Reason and law become instrumental devices in the struggle of the autonomous individual subject pitted against nature in antagonistic isolation. The implications of this instrumentalisation of reason are a major concern of critical theory and important for the argument developed here. Hence a quick introductory word of explanation is in order.

As the aforementioned indicates, there is a moment in philosophical idealism that is post-metaphysical, potentially post-anthropological and post-liberal in a distinctly non-humanist way without embracing Heidegger's ontological post-humanism or the post-humanist systems-theoretical approach to legality and legitimacy associated with people like Niklas Luhmann (1928–98). That

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epistemological moment will be traced at different stages in the unfolding of the central arguments of *Beyond Hegemony*. It is a rational and legal moment which suggests that a form of post-humanist idealism is the key to the possibility of non-instrumental knowledge, but that this possibility is lost if the law and rationality, as the bases of Enlightenment, are abandoned to the instrumental project of individual survival pursued through the strategies of class domination. That particularly antagonistic form of securing the means of survival is inimical to the discovery of non-instrumental knowledge necessary to satisfy the conditions of legitimate law, that is, of political legitimacy understood and practised in epistemological rather than hegemonic terms. It is in this sense that it is Marx and not Rawls or other neo-liberals who takes the baton from Kant. In chapter 3 it will be seen why there is no plausible way to shore up liberalism in its traditional and contemporary guises for reasons that have to do with law, legitimacy, class domination and instrumental reason. In chapters 4–5 it will become clear why the best way to move beyond Kant, liberalism and sociologically informed versions of Aristotelianism is via Marx, and further, that the best way to rediscover what Marx's thought represents in terms of the possibility of legitimate law beyond state socialist Leninism, social democracy and academic hagiography is via the combined efforts of legal theory and critical theory. The project sketched in the following chapters does not at all intend to rescue Marx from ignominious association with state socialism in order to preserve the intellectual prestige of Marxism: that would be a rather conservative academic exercise. It is rather to help renew and continue the trajectory of critical theory and politics that moves from Kant to Marx and then dramatically stagnates in the state socialist regimes in Eastern Europe and Cuba, on the one hand, and which has been unable to decisively break with liberalism in the West, on the other. The term critical theory as it is used in this book refers in the main to the body of ideas expounded in the writings of the philosophers and legal theorists affiliated with the Institute of Social Research founded in Frankfurt in 1930 by K. A. Gerlach, subsequently taken over by Max Horkheimer, and widely known today as the Frankfurt School.³ The arguments deployed in the search for an epistemological conception of political legitimacy in *Beyond Hegemony* are indebted to and informed by the founding members of the first generation of Frankfurt School theorists, and particularly by the ideas of T. W. Adorno. There is no space in this introduction or in the chapters that follow to provide a detailed critical commentary on the origins of critical theory, the Institute of Social Research or the ideas of the individual theorists. Their ideas guide the present study and are noted and referenced where appropriate. But the ideas of Adorno, Horkheimer, Benjamin, Marcuse and others are not treated systematically at any stage: they must be borne in mind as useful background material. For a very thorough introduction, interested readers should consult Rolf Wiggershaus's critical study, *The Frankfurt School* (1994).⁴ One might say that

the original intention of the first generation is to steer a path beyond positivism, functionalism and traditional idealism through wide-ranging interdisciplinary research extending from legal theory and political economy to sociology and aesthetics. One of the sources of inspiration for *Beyond Hegemony* is the goal of redressing the virtual theoretical silence that seems to have reigned between the legal theorists Franz Neumann (1900–54) and Otto Kirchheimer (1905–72) and the other theorists connected with the Institute.

The attempt to re-evaluate Marx beyond state socialist Leninism, social democracy and academic preservation or simplistic critique is attempted by the present author in *Radical Theories: Paths Beyond Marxism and Social Democracy* (1994). That study is followed by *Sovereign States or Political Communities? Civil Society and Contemporary Politics* (2000). In order to situate the approach taken in the following chapters, it is helpful to mention what is attempted in the two preceding works. *Radical Theories* outlines the contours of an entirely feasible non-statist socialist economy that differs quite notably from the Soviet and social democratic systems. To this extent, it defends a libertarian socialist alternative to state socialism and social democracy which is elaborated on the basis of the ideas of Marx, a number of syndicalist and anarchist movements, and especially the ideas of G. D. H. Cole (1889–1959). *Sovereign States* attempts to locate and analyse instances of non-statist politics that exist in contemporary civil societies and which could eventually flourish given the economy sketched in *Radical Theories*. The present study can be seen amongst other things as an implicit critique of the argument developed in *Sovereign States* insofar as that book deploys a version of democratic humanist anthropology of the kind that is criticised in chapter 2 of the current book. In *Sovereign States* the public sphere, community and recognition are cited as examples of non-statist politics in which a form of human freedom which is essentially political is able to assert itself against instances of instrumental reason at work in the economy in general and in the capitalist economy in particular. As such, the book tries to argue for a kind of Marx–Arendt synthesis which brings together Marx’s critique of political economy and Arendt’s Aristotelian defence of republican politics. That synthesis as formulated by this author fails for reasons which will become clear in chapter 2 and subsequent chapters. The critique of the metaphysics of sovereignty in that book is nonetheless valid and is useful to bear in mind for what follows. Yet the critique of metaphysics cannot stop with sovereignty – that critique must address the larger question of democratic humanism and its relation to liberalism. Seen from the perspective of *Beyond Hegemony*, the previous book presents an account of informal, non-statist democratic legitimacy without any sustained theoretical critique of law, liberalism or traditional idealism. One can look at Foucault’s care of the self, Derrida’s politics of friendship, the various accounts of the politics of recognition, or any one of myriad possible alternative forms of informal extra-legal legitimacy. A close inspection of

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these theories reveals that a theory of a *legitimate form of law*, combined with a theory of non-instrumental reason, is considerably more radical in Marx's sense and more elucidating in an Enlightenment sense than celebrating what is excluded or marginalised by *legal forms of legitimacy*. This distinction will attain clarity in successive stages. What remains from *Radical Theories* is the theory of libertarian socialism which is re-articulated in chapters 4 and 5 of the present study, whilst what remains of *Sovereign States* is the critique of the metaphysics of sovereignty. Those arguments now need to be brought together in order to develop the theory of a legitimate form of law that is offered here.

There are thus four principal sources informing the present study. They are critical theory, legal theory, a radically modified form of idealism and libertarian socialism. It will be seen that the version of critical idealism elaborated here in response to ostensibly post-metaphysical post-idealism incorporates elements of the Kantian insistence on the conditioned nature of experience, knowledge and freedom with elements of Hegel's theory of objective spirit and the notion that the real is rational. Both these dimensions of idealism will be explained in relation to the overall argument concerning the formulation of a legitimate form of law. At first glance it looks as if Kant presents the world of existing institutions with a series of *a priori* moral prescriptions about reason and law which are hopelessly formal and abstract, whilst Hegel's historicism seems to rescue reason and law from abstraction only by completely eradicating the difference between what is and what ought to be. This is to misconstrue Kant as a theologian and Hegel as a positivist sociologist. It will be explained why both interpretations are wrong and what is missed by overlooking the juridical and transcendental character of Hegel's thinking as well as the sociological implications of Kant's thought that are carried forward by Marx. The links between (1) the libertarian socialist alternative to Soviet state socialism and social democracy in *Radical Theories* and (2) the political possibilities suggested by legal theory are discussed in chapters 4 and 5 without re-rehearsing the more intricate and practical details of Cole's proposals in favour of non-statist socialism. Instead, libertarian socialism is analysed as the most appropriate kind of economy implied by critical idealism and a legitimate form of legality. The unsuspected proximity between certain dimensions in Kant and certain dimensions in Marx (and, by extension, in Cole and libertarian socialism in general) alluded to in this introduction is a juridical proximity which addresses property relations and the conditions of transcendence in relation to the possibility of freedom from necessity and knowledge. What Kant in his theory of practical reason and in writings on the public sphere (chapter 1) regards as a prerequisite of legitimate law is revisited by Marx from a post-Hegelian standpoint as a valid injunction. But validity here for Marx is not *a priori* in Kant's sense of practical reason. Validity concerns the creation of the socio-political institutions which would make an epistemological and juridical condition more than an eternally

posited epistemological *limit*, that is, more than ideology. Marx discovers that only a radical change in the legal relations governing humanity's transformation of nature in order to transcend dumb dependence on nature for all citizens can ensure that the conditioned nature of experience and knowledge can be explored in an epistemological dimension addressing questions of freedom rather than in an instrumental dimension addressing questions of functional stability and crisis management. That is, the liberal democratic freedoms of the press, assembly and contractual exchange cannot ensure the fulfilment of the conditions of legitimate law, any more than public-sphere deliberation by itself can guarantee that law is epistemologically valid rather than merely politically effective. The re-articulation of the Enlightenment project pursued in the following chapters re-evaluates the importance of this discovery and draws out its most significant implications.

Notes

- 1 The notion of the postmodern as symptomatic of the end of the grand narratives of modernism has become a standard interpretation since the publication of Jean-François Lyotard, *La Condition postmoderne (The Postmodern Condition)*, Paris, Minuit, 1979. The fact that so many of the questions taken up by postmodernists and post-structuralists are recurrent themes in the writings of modernists makes it impossible to insist on the categorical separation of these terms. For example, many post-structuralist writers such as Michel Foucault celebrate the perspectival pluralism and anti-metaphysical vitalism they find in the writings of Friedrich Nietzsche. In terms of the period of his life and the central concerns of his work, however, Nietzsche is clearly a modernist.
- 2 Ludwig Wittgenstein's theory of language occupies a central place in this evolution from metaphysics and idealism to post-metaphysics and pragmatism. For an introduction to the major ideas of the author of the *Tractatus* (1921), see David Pears, *Wittgenstein*, London, Fontana, 1971.
- 3 The Institute was forced into American exile during the National Socialist dictatorship (1933–45) and re-established in Frankfurt after the Second World War. It still exists today, albeit with the rather drastically modified political agenda associated with the second generation of critical theorists such as Jürgen Habermas, under the direction of Axel Honneth.
- 4 See too the very informative and extremely competent introductions provided by David Held, *Introduction to Critical Theory: Horkheimer to Habermas*, London, Hutchinson, 1980, Raymond Geuss, *The Idea of a Critical Theory*, Cambridge, Cambridge University Press, 1981, Joan Always, *Critical Theory and Political Possibilities: Conceptions of Emancipatory Politics in the Works of Horkheimer, Adorno, Marcuse, and Habermas*, Boston MA, Greenwood Press, 1995, and Diana Coole, *Negativity and Politics: Dionysus and Dialectics from Kant to Poststructuralism*, London, Routledge, 2000. These are four of the best exegetical works on the Frankfurt School and critical theory available in English.

Chapter 1

Liberalism and discourses of legality: limiting human agency in the name of negative liberty

THIS chapter seeks to shed some light on a somewhat contradictory situation. The priority of legality over legitimacy which lies at the heart of liberalism from Kant to the present is both the source of liberalism's critical power and its crucial weakness. This separation is the source of liberalism's critical power insofar as it provides the adherents of the doctrine with the possibility of insisting on formal and legal conceptions of freedom and justice against various populist notions on the political right and left of an extra-legal conception of communitarian well-being which is ostensibly bridled by legal formality. The strategies of such discourses of legitimacy will be examined in chapter 2. For now it might simply be observed that contemporary discourses of legitimacy tend in various ways to stress a communicative or agonistic or expressive dimension of human action which is frustrated by the formalism necessary to secure a set of universal principles equally applicable to all citizens. For defenders of legitimacy, the price exacted for legal universality is too high – citizens can be legally equal only in negative terms of non-infringement. The almost exclusive concern with negative forms of liberty in liberalism serves to undermine more fundamental, non-contractual, positive ties which bind citizens in political communities. Moreover, in the history of political thought, and especially with Kant, legality appears to be closely wedded to an idealist and deeply individualist notion of human subjectivity which, despite Kant's critique of metaphysics in the *Critique of Pure Reason*, is still too metaphysically reified and static to do justice to the plural and transient dimensions of existence and being. Thus discourses of legitimacy seek to move beyond the historical insensitivity implicit in the timeless conceptions of human nature and subjectivity characteristic of liberal forms of idealism, in order to embrace more worldly and open visions of human essence and possibility. Against such (arguably equally) arbitrary versions of legitimacy, liberal legality seems to have the great advantage of neutrality and of allowing individuals to choose their allegiances as they see fit. That is, against the more or less authoritarian/paternalistic implications of different versions of positive liberty toward which discourses of legitimacy in