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The Rule of Law: The New Leviathan?

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I

These are the best of times for the Rule of Law. In all parts of the world, states, governments, and individuals, have found in the rule of law, at various times, a rallying cry, a principle of social ordering that promises the dawn of a just society that its supporters in Euro-American democracies claim to be its crowning glory, or a set of practices that is a *sine qua non* of a good society. The pursuit of the ideal is nothing new: after all, even those states where it was observed more often in its breach always paid lip service to it. And the defunct socialist countries of Eastern Europe, while they existed, could not escape its lure even as they sought to give it a different nomenclature—socialist legality. The movement towards the rule of law has accelerated after the collapse of Soviet communism and its foster progeny in different parts of the world. Given the present momentum towards the rule of law and the widespread enthusiasm with which it is being embraced and pursued at the global level, some would consider it somewhat churlish for anyone to inject any note of doubt or caution. This is more so when such a note emanates from Marxist quarters. But that is precisely what I wish to do in this essay. Although I do not intend to rain on the rule of law's entire parade, I surely propose to rain on a segment of it: the Marxist float. I propose to look at the issue within the context of the Marxist politico-philosophical tradition.

I shall examine Marxist defences of the rule of law. I shall argue that if one accepts Karl Marx's strictures on what he called *political emancipation*, of which the ideal of the rule of law is a component, and his recommendation instead of *human emancipation*, for which the ideal is considered relevant but insufficient, it is difficult, perhaps impossible, to justify an unqualified avowal of the ideal within the Marxist tradition. This caution is not unwarranted. In the last two decades, long before the momentous changes of 1989 and the years since, there has been a renewed interest in law and its attributes among Marxists.[1] Foremost among the appurtenances of law that have attracted the most attention from Marxists is the idea of the rule of law. Indeed it is safe to say that the rule of law has been enjoying a renaissance of sorts among Marxists. One rarely finds these days a Marxist tract on or about politics or law which does not pay an almost obligatory obeisance to the ideal. The immediate impetus for this renaissance was E.P. Thompson's

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1. A representative sample will include: 1) Bob Fine, *Democracy & the Rule of Law* (London: Pluto Press, 1984); 2) J. Roland Pennock & John W. Chapman, eds., *Marxism: Nomos XXVI* (New York and London: New York University Press, 1983); 3) Piers Beirne & Richard Quinney, eds., *Marxism and Law* (New York: John Wiley & Sons, 1982); 4) Hugh Collins, *Marxism and Law* (New York: Oxford University Press, 1982); 5) Leon S. Jawitsch, *The General Theory of Law*, trans. H. Campbell Creighton (Moscow: Progress Publishers, 1981).

unabashed and spirited defence of the ideal in the now justly famous final ten pages of his *Whigs and Hunters*, where he called the rule of law "an unqualified human good".[2] Since then, either for or against Thompson, many Marxists have tried to enlist among the adherents of the rule of law. In the years since the collapse of the Eastern bloc, the attempts have assumed the dimensions of a scramble.

Meanwhile, in the aftermath of the collapse of 'really existing socialism', there has been no dearth of celebratory, sometimes triumphalist, "we told you so" attacks on Marx and on his legacy geared to show that either (1) Marx did not pay any or sufficient attention to law or the rule of law in his theoretical exertions that might have enabled those among his followers who wished to embrace the rule of law under socialism to withstand the nihilist tendencies towards law of the former socialist states[3] or; (2) he and the principal exponents of his legacy had an instrumentalist attitude towards law that easily lent itself to the kind of legal nihilism that dominated the socialist countries while they lasted. I sympathise with these motivations and I share some of them. Yet, in what follows, I would like to argue that this eagerness to embrace the rule of law, however it is brought about, is misplaced and attempts to write it into the Marxist programme are wrongheaded or, at least, problematic. I do not advance this position because I think that law is merely a class weapon that the rulers use to secure their rule over the ruled nor should Marxists think so.[4] Nor is it the case that Marxism cannot or does not have anything substantive or positive to say about the law.[5] Indeed, I propose to show that Marx was an ardent defender of some variant of the rule of law during his own time and that he did not call for the extirpation of law because he thought that law was a sham. Thus there is some convergence between Marx's own views and those of some non-Marxist and anti-Marxist defenders of the rule of law. If this is the case, then we must look elsewhere for the grounds of Marx's opposition to law and the rule of law in the final analysis.

The rule of law is not a sham. There is a lot to be said for it in its historical evolution. In light of some political experiences of this century in various parts of the world, the superiority of the rule of law to its rivals has been demonstrated. Having lived the better part of my life under military dictatorships,[6] I know the value of

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2. E. P. Thompson, *Whigs and Hunters* (London: Allen Lane, 1975) at 266.
3. See Martin Krygier, "Marxism and the Rule of Law: Reflections After the Collapse of Communism" (1990) 15 Law and Social Inquiry 633 at 635 [hereinafter 'Marxism and the Rule of Law'].
4. Here I would like to differ with Belliotti who suggests that "there is not so much a Marxist theory of law as there is a Marxist unmasking of law's alleged unsavory participation in domination and oppression." Raymond A. Belliotti, "The Legacy of Marxist Jurisprudence" in David S. Caudill & Steven Jay Gold, eds., *Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice* (Atlantic Highlands, NJ: Humanities Press, 1995) 3 at 3.
5. I have presented a substantive general theory of law and marxism in *Legal Naturalism: A Marxist Theory of Law* (Ithaca, NY: Cornell University Press, 1996).
6. I was born, raised and educated in Nigeria which has been in the clutches of military rule for twenty-eight of its thirty-eight years of independence. As at this writing, it is chafing under one of the most brutal of its many dictatorships. So, in a sense, there is an irony that is embedded in my ongoing work: following Marx's lead, as I write this, I am also engaged in other writing extolling the virtues of liberal democracy as a viable option for my homeland. But there is no

the ideal in contrast to the price of its denial or nonobservance for individuals and groups. However, I want to argue that even when it is not a sham, in its best manifestations, the ideal of the rule of law falls far short of the requirements of a Marxist political and revolutionary goal. The explanation is to be sought in the circumstances of its emergence in the dawn of capitalism and of its political twin, liberalism. It is an integral part of the ideology of "possessive individualism" and for this reason, it bears a close resemblance to Hobbes' Leviathan: it asks us to consign our freedoms not to Hobbes' sovereign (one person or assembly of persons), but to an impersonal concept: law. So understood, the rule of law ideal shares with Hobbes' Leviathan a common philosophical anthropology that sees humans as mutually-distrusting, rational self-interest maximizing individuals.[7] I suggest that the rule of law is more or less the latter-day ideological spin-off of this philosophical anthropology. Seen this way, it should be less controversial to argue that the issue between Marxists and their critics does not turn on whether or not Marxists can or do take law and the rule of law seriously. Marx did and some of his followers have. It also does not turn on whether or not Marxists place a limited value on the rule of law. They do. But so do many non-Marxist defenders of the rule of law. I cite two examples. Jeremy Waldron takes "it that it is not necessary nowadays to argue for the proposition that the rule of law, ..., is at most necessary, and certainly not sufficient, for a free society and social order that is just."[8] And Martin Krygier, who is concerned to indict Marx and the movement that took after his name of being partly responsible for the atrocities of Eastern European legal nihilism, could not bring himself to regard the rule of law as sufficient for a good society. "... [T]he rule of law is not sufficient for a good society, even though in large complex societies it is necessary for one."[9] "There is also room for argument that the rule of law is not all we should want and for recognition that, in case of conflict of values, we need not assume that only maintenance of the rule of law matters, or that any chink in what are fancied to be its formalistic preconditions spells its doom."[10] It is only when absolute value is invested in the rule of law or when law is considered indispensable to the constitution of a good society that Marxists, following Marx's lead, do or ought to part ways with the defenders of the rule of law. And they must do so because investing the rule of law with an absolute value can be traced to a vision of society and a philosophical anthropology that Marx sought to repudiate in the essay 'On the Jewish Question'. An exploration of this critique will be undertaken in the final section of this paper. I shall conclude that Marxist defences of the rule of law that seek to install it as a part of the revolutionary goal of Marxism can be

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contradiction here. One can embrace liberal democracy while at the same time seeking to create a world that one considers putatively superior to that of liberalism. That, as I argue momentarily, was Marx's attitude to liberalism and law.

7. Some non-Marxist commentators have noticed this, too. See Allan Hutchinson & Patrick Monahan, "Democracy and the Rule of Law" in Allan Hutchinson & Patrick Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) at 113-14.
8. Jeremy Waldron, "The Rule of Law in Contemporary Liberal Theory" (1989) 2 Ratio Juris 79 at 93.
9. *Supra* note 3 at 644.
10. *Ibid.* at 645. See also his reply to criticisms of this essay, "Marxism, Communism, and Narcissism" (1990) 15 L. and Social Inquiry 707 at 719-20.

shown to be wrongheaded. And it must be so defended to be plausible. An instrumentalist appropriation of it does not serve well to highlight the utopian proclivities that made Marx and other philosophers during his time and since then insist that a social order that requires law for its operation falls short of what a good society should be.

The paper is divided into four sections. The first expounds the ideal of the rule of law. The second describes briefly the attributes of the Hobbesian Leviathan and its underpinning philosophical anthropology. The third brings together the strands of the arguments in the first and second sections by showing the similarities between the Leviathan and the rule of law. The final section contains the argument that if Marx is right in his 'On the Jewish Question', a plausible avowal of the rule of law within Marxism must always be qualified. By showing that the issue between Marxists and their opponents concerning the rule of law turns on their divergent philosophical anthropologies and visions of society, I hope to interest both parties in moving away from a shared attitude that dialogue is impossible to one where we can debate the desirability or otherwise of a world without law or one with very little law. For that ultimately is the principal reason that Marx held law to be an inadequate instrument for the realization of a good society.

II

It is very difficult to talk about the 'rule of law'. There are almost as many conceptions of the rule of law as there are people defending it. Marxists who defend it are often guilty of failing to specify what precisely it is they claim to be defending. The effect is that defenders and opponents alike end up talking at cross purposes. It is very important to be clear about what the rule of law entails in its concept.

In one of the earliest formulations of the rule of law, A. V. Dicey held that the rule of law has three meanings. First, it means that "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."[11] In this sense, the rule of law is opposed to the sway of arbitrary power. The relations between the state and the individual must be in accordance with rules properly established and scrupulously observed by those whose responsibility it is to administer them. Second, it means that all are equal before the law, no one being above it whatever her rank or condition.[12] Lastly, it means that the general principles of the Constitution arise from judicial decisions.[13]

Although Dicey has been criticized for his provincialism, the main lines of his account of the rule of law have survived till the present time.[14] For example,

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11. A. V. Dicey, *The Law of the Constitution* 2nd. ed., (London: Macmillan, 1886) at 174.
12. *Ibid.* at 179.
13. *Ibid.* at 210.
14. If he is right, many countries of continental Europe and North America will be excluded from rule of law regimes. See Judith Shklar, "Political Theory and the Rule of Law" in Hutchinson & Monahan, eds., *Rule of Law: Ideal or Ideology*; Hutchinson & Monahan, "Democracy and the Rule of Law," *supra* note 7.

Wolfgang Friedmann asserted that the rule of law implies "the principle of equality before the law."[15] Elsewhere, he wrote:

> The other pillar of the rule of law, cardinal to all democratic thought, is the principle of equal individual responsibility. In Bentham's terminology, everybody counts for one. This does not exclude legal differences arising from the exercise of functions. ... It does exclude ... the retrospective punishment of actions. It does exclude the exemption of individuals or classes from legal responsibility and, on the other hand, punishment or persecution of individuals by virtue of their membership of a specific race, religion or other group characteristics.[16]

F. A. Hayek, for whom the rule of law assumed the proportions of cant, held that "[s]tripped of all technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand."[17]

> The Rule of Law thus implies limits to the scope of legislation: it restricts it to the kind of general rules known as formal law, and excludes legislation either directly aimed at particular people, or at enabling anybody to use the coercive power of the state for the purpose of such discrimination. It means, not that everything is regulated by law, but, on the contrary, that the coercive power of the state can be used only in cases defined in advance by the law and in such a way that it can be foreseen how it will be used.[18]

He concluded that "whatever form it takes, any such recognised limitations of the powers of legislation imply the recognition of the inalienable right of the individual, inviolable rights of man."[19]

In the preceding descriptions of the rule of law, there is some degree of convergence. The rule of law encompasses equality before properly promulgated, strictly observed, prospective law, as well as a shunning of the arbitrary use of the coercive power of the state. However if this is all that is entailed by the rule of law, it is doubtful that the principle would have generated as much controversy as it has over time. As Friedmann pointed out, if the rule of law means organized government, operating through the various instruments and channels of legal command, we may say that "all modern societies live under the rule of law, fascist as well as socialist and liberal states".[20]

If all that the rule of law requires is that rulers and ruled alike should obey the law, it must be a very slender ideal indeed. For as is clear from concrete historical instances, even the most repressive regimes carry out their repression by means of law. The Nazi regime was one of the most legalistic in history. When more than seventy people had been cold-bloodedly slain in the "Roehm purge" of 1934, the act was sanctified by a retroactive statute. Adolf Hitler was reported to have declared

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15. Wolfgang Friedmann, *Legal Theory*, 5th ed., (London: Stevens & Sons, 1967) at 422.
16. *Ibid.* at 424; see also Wolfgang Friedmann, *Law and Social Change in Contemporary Britain* (London: Stevens & Sons, 1951) at 284 [hereinafter as Friedmann, *Law and Social Change*].
17. F. A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944) at 72.
18. *Ibid.* at 83-84.
19. *Ibid.* at 84.
20. Friedmann, *Law and Social Change* at 282; See also Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979) at 211.

that the purge was legal; that during the period, "the supreme court of the German people ... consisted of myself".[21] While it lasted, the South African *apartheid* regime did not repress its Black majority without the intermediary of law. There were laws for where particular racial groups may live, who could be quoted in the press, how funerals were conducted! In fact the ideal of the rule of law was mocked by the irony of its enforcement in some of the most grotesque, inhuman laws ever invented by the human mind.[22]

Needless to say, the defenders of the rule of law from whose works I have quoted always attempt to distinguish between states in which the rule of law flourishes and those in which it does not. They are scandalized by a loose conception of the rule of law which admits all modern states. For instance, Hayek would not have been persuaded that the erstwhile socialist states were rule of law states. Nor would some of the current defenders of the doctrine. Yet it was not unusual to find jurisprudential literature from the defunct Soviet Union which professed ideas similar to the following:[23]

> Socialist legality presupposes the following:
> (1) rigorous guarantees of citizen's rights and lawful interests, the impermissibility of any display of arbitrariness or wilfulness of any kind, especially by officials;
> (2) an undeviating requirement of exact observance of the state's laws by all citizens and organisations, resolute prevention of breaches of the law, and the inevitability of punishment for crime;
> (3) the performance of all authoritative and administrative functions in full accordance with the law, and the rule of law over any socially significant activity.[24]

So the controversy over the rule of law cannot be about the absence of legal curbs on the exercise of the coercive powers of the modern state. What then is the disagreement about between defenders and opponents of the rule of law?

In my opinion, the disagreement is rather more fundamental. We can begin to unravel the terms of the controversy once we are clear that the attempts to establish criterion of distinction between 'rule of law' and 'non-rule of law' states are political ideologically coloured. Friedmann was quite aware of this ideological colouration.

> Usually, the term (rule of law) is given an ideological connotation. It is identified with a specific ideal of justice. In democratic society, most people understand by 'rule of law' a state of affairs in which there are legal barriers to governmental arbitrariness, and legal safeguards for the protection of the individual. This *political* conception of the rule of law applies to what we may broadly call 'democratic' society. It differs from Fascist or Communist or Catholic ideas of justice.[25]

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21. Quoted in Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart" in Joel Feinberg & Hyman Gross, eds., *Philosophy of Law*, 2nd ed., (Belmont, CA: Wadsworth Publishing Co., 1980) at 77.
22. Lon Fuller has argued that the law cannot serve evil purpose well. See the exchange between Fuller and H.L.A. Hart on this issue.
23. I have persisted in citing literature from the former communist states because it is important for the reader to know that in spite of the prevalence of legal nihilism in those states, there were intellectuals who managed to reflect in deep and insightful ways about the theoretical problems of law of all kinds. And we still can read them with profit even now.
24. Jawitsch, *The General Theory of Law*, *supra* note 1 at 243.
25. Friedmann, *Law and Social Change*, *supra* note 16 at 282.

It is the 'political conception' of the rule of law identified by Friedmann which is at issue between defenders of the doctrine and their opponents. What marks out the political conception is not that 'non-rule of law states' are lawless governments. Rather it is that those who hold the political conception value the rule of law differently from those who do not. We will presently come to examine why they so value the doctrine. Therefore, the disagreement in the literature is about the *value* of the rule of law itself.

Those who adhere to the broad, non-political conception contend that the rule of law is only one value among many and, for this reason, must in many situations be balanced against competing values. For those who share this viewpoint, the rule of law has only an instrumental value. Theirs is a pragmatic commitment to the doctrine. When it conflicts with what they consider a greater value, they are all too willing to override the rule of law. Only considerations of efficiency and real possibilities of disutilities make the rule of law highly-valued. This attitude towards the rule of law is shared by Marxists and non-Marxists alike. It is commonplace among some liberal defenders of the doctrine to point out that the doctrine may be requisite for a good society, but it is insufficient to bring one about.[26] This is not a position to be taken lightly. Such an attitude has implications for policy making. For example, it is becoming clear that some of the problems that plague multicultural societies or communities characterized by other kinds of pluralism cannot be solved unless there is a flexible attitude towards the operation of the rule of law. Remedies for sexual, racial, and other forms of discrimination may sometimes entail the overriding of the rule of law in particular circumstances. The guarantee of equal protection of the law under the Canadian Charter of Rights and Freedoms allows for the province of Quebec to override it for the sake of its cultural survival.

Opposed to this view are those who argue that the rule of law *must* be valued as an end in itself. Examples will include Lon Fuller,[27] F. A. Hayek,[28] and Ernest Weinrib.[29] Those who so argue work with the political conception of the rule of law. For them, the rule of law cannot be secondary to some other goal. On the contrary, the goal itself is the *Rule of Law*. Here the Rule of Law means that the Law, and nothing but the Law, must rule. The Rule of Law is contrasted with the Rule of Persons and defenders of the Rule of Law prefer it to the Rule of Persons. There is a sometimes explicit, but often unexpressed, assumption that there is something bad or unattractive about the Rule of Persons. It is assumed that the Rule of Persons can always become hostage to caprice, to privilege, to status. It is not clear how and why this is so until one examines the philosophical anthropology that underpins this understanding of the doctrine. But it should be remembered that the inadequacies of the Rule of Persons had been at the heart of the bourgeois revolt against feudal privileges.

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26. See *supra* notes 8, 9 and 10.

27. Lon L. Fuller, *The Morality of Law*, rev. ed., (New Haven, CT: Yale University Press, 1969).

28. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960); *The Political Ideal of the Rule of Law* (Chicago: University of Chicago Press, 1955), in addition to the text already cited.

29. Ernest Weinrib, "The Intelligibility of the Rule of Law" in Hutchinson & Monahan, eds., *supra* note 7.

The distinction between the Rule of Persons and the Rule of Law, which I take to be the quintessence of the political conception of the Rule of Law, is articulated by Aristotle in some passages in *The Politics*. "We must begin," he wrote, "by asking an old and fundamental question—whether it is better to be ruled by the Best Man or by the Best Laws."[30] He answered that "he who asks Law to rule is asking God and Intelligence and no others to rule; while he who asks for the rule of a human being is bringing in a wild beast; for human passions are like a wild beast and strong feelings lead astray rulers and the very best of men. In law you have the intellect without the passions."[31] As Weinrib points out,

> In this passage the rule of law is characterized in two ways: negatively, in being differentiated from the rule of men, and positively as the embodiment of intelligence without appetite. The nexus between the two characterizations lies in complementary conceptions of man and law, the former as a conglomerate of intelligence and appetite and the latter as an expression of intelligence independent of appetite.[32]

The reason that the Law must rule has then to do with the fact that persons are never completely free from the distortions occasioned by passions, whereas the law is free of these. The law, therefore, is more trustworthy as a regulator of human relationships than humans are. When it is inevitable that humans must rule, they rule best when they are guided by law than when they are not. The Rule of Law, therefore, must refer to the *Rule* of *Law*, rather than the rule of persons. Where the law *rules*, persons do not rule. Of course the law never rules by itself. Human beings are always required to carry out the rule of law. Nevertheless, even though persons are instrumental to the Rule of Law, in a polity marked by the Rule of Law, they do so only as agents of law, not of themselves or of some other persons.[33] This is the vision of the liberal political conception of the Rule of Law. It is more than an instrument. It is to be preferred because it is an embodiment of a vision of society and of the place of humans in it that, for those who accept the political conception, is superior to or better than alternative conceptions. Thus, even when Soviet jurists wrote about it and nonliberal theorists embrace it, their alternative visions of how society ought to be and of the place of humans in it disposed them, so the argument goes, to less willingness to place absolute value on the rule of law. But is this the vision that Marxists have when they defend the Rule of Law? This question must be answered negatively given what we already said about the other view of law, shared by liberals and Marxists alike, that its rule may yield to more fundamental values in the construction of a good society. So far I have suggested that it is only the political conception of the rule of law that is incompatible with a marxist defence of it. And it is the philosophical anthropology that it presupposes that renders possible an analogy between the rule of law and Hobbes' Leviathan.

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30. Aristotle, *The Politics* trans and with an introduction, T. A. Sinclair, (Harmondsworth: Penguin, 1962) at 139.
31. *Ibid.* at 143.
32. Weinrib, "The Intelligibility of the Rule of Law" at 60.
33. *Supra* note 30 at 145.

III

Let us for a moment leave the Rule of Law and take a brief look at Hobbes' Leviathan. According to Hobbes, the Leviathan is the common power instituted by individuals to regulate their relationships with foreigners and with one another. This power is the product of mutual agreement among the relevant individuals. It is at the same time their only guarantee of the agreement and of its durability. For Hobbes, there is only one way that the contracting individuals could institute this common power.

> [It] is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will: which is as much as to say, to appoint one man or Assembly of men, to beare their Person; and every one to owne, and acknowledge himselfe to be Author of whatsoever he that so beareth their Person, shall Act, or cause to be Acted, in those things which concerne the Common Peace and Safetie; and therein to submit their Wills, everyone to his Will, and their Judgements, to his Judgement ....
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> This done, the Multitude so united in One Person, is called a COMMONWEALTH, in latine CIVITAS. This is the Generation of that great LEVIATHAN, or rather (to speak more reverently) of that *Mortall God*, to which wee owe under the *Immortall God*, our peace and defence.[34]

I will not comment on Hobbes' description of the origin of the Leviathan. We should note, however, that once the Leviathan is installed, the relationship between it and those whose agreement brought it about is one of total surrender to it, except when this conflicts with the imperative of self-preservation. We shall find the same attitude recommended for those who are bound by the Rule of Law. The only difference is that the defenders of the political conception of the rule of law do not consider that it could be turned to evil ends. Of greater importance for our purposes is why Hobbes thought that the Leviathan is needed at all. The answer, I suggest, lies in Hobbes' philosophical anthropology—his understanding of the nature of human beings and his vision of society without it.

According to Hobbes, we can imagine a time prior to the invention of Leviathan. Human beings then lived in a state of nature—that is, human beings *qua* human beings *sans* rules, laws, and so on. By nature human beings are equal in the possession of the faculties of body and mind. Equality of ability generates "equality of hope in the attaining of our Ends."[35] The scarcity of resources makes the occurrence of conflicts inevitable. In this imaginary state of nature, conflicts were the order of the day—conflicts arising from competition over scarce resources, diffidence of one another and the quest for personal glory. It was to escape the insecurity of a condition of generalized war—endogenous and exogenous—that individuals saw fit to institute a common Power. Hobbes was quite explicit as to what such an institution must have meant for everyone. "[It is] as if every man should say to every man, *I authorise* and give up my Right of Governing my selfe,

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34. Thomas Hobbes, *Leviathan*, ed. and intro., C. B. Macpherson, (Harmondsworth: Penguin, 1968) at 227.

35. *Ibid.* at 184.

to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner."[36] We see from this brief discussion of Hobbes' Leviathan that it is a power standing outside of everybody, to which all submit, and from which they expect protection of their home and hearth from the predations of their fellows. I go on next to show the similarities between the Rule of Law and Hobbes' Leviathan.

IV

The similarities between Hobbes' Leviathan and the Rule of Law inhere in the philosophical anthropology which denominates both of them. It is an essentially negative view of humanity. Left to their own designs, under inevitable conditions of scarcity, but possessed of innumerable desires, human beings can be counted upon to seek to get the better of their fellows. The question is what to do to make sure that they do not engage in collective self-destruction. This was the question that Hobbes desired to answer. Of course, I do not want to suggest that proponents of the rule of law share Hobbes' account of the state of nature. But I surely want to argue that they do share Hobbes' concern that human beings, left to themselves, are mutually distrusting, egoistic, and cannot be trusted voluntarily to work for the common good. This is freely admitted by defenders of the rule of law. According to Noel B. Reynolds, "[t]he rule of law is a solution to a problem, and as the classical tradition has always recognized, the problem is tyranny—the social relationship in which some people can command the lives and property of others at will and in pursuit of discretionary ends."[37] In fact, for Hobbes and the defenders of the Rule of Law, there is no common good, save the aggregate of individual goods.[38] This is a fundamental claim of liberal political theory.[39] These individual goods do conflict with one another. The possibility of conflict is permanent. No individual good is to be rated higher and more worthy of realization than another. It is imperative that some means be found to mediate interpersonal relationships and ameliorate the incidence of conflicts between individuals if the society is not to self-destruct. The means suggested by Hobbes is the Leviathan. For the defenders of the Rule of Law, the Rule of Law serves the same purpose. In each case the search is for a neutral mediator of conflicts in socially-significant interpersonal relationships. This is the way Reynolds puts it in his exposition of John Lucas's defence of the rule of law. "[Lucas] begins with carefully developed empirical assumptions about men, describing them as possessed of limited knowledge, fallible in their powers of reasoning, and vulnerable to corruption in their inclination to pursue self-interest. Following Hobbes and Oakeshott, he argues that community life for such beings is only possible under law and authority."[40] The fact of conflict

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36. *Ibid.* at 227.
37. Noel B. Reynolds, "Grounding the Rule of Law" (1989) 2 Ratio Juris 1 at 5.
38. For a discussion, see Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) at 191.
39. As I show presently, such a view of humans or of the common good is foreign to Marx and the tradition that he inaugurated.
40. *Supra* note 37 at 13.

is a *datum*; it is taken for granted. It is not conflict *per se* that determines the choice of the rule of law. It is either that alternative means of conflict resolution are found wanting or that law ensures the best or most adequate means with the rule of law as its best realization. But why could this purpose not be served by a person or a group of persons *à la* Hobbes?

It should be obvious why this purpose could not be served by persons. The philosophical anthropology will not permit such a procedure. Human beings are essentially contentious, egoistic, and the like. Given that humans are conglomerates of intelligence and passions, and human passions are like a wild beast and strong feelings lead astray rulers and the very best of men,[41] it is no wonder that the next best alternative is an impersonal principle which is above persons and which inhibits the efflorescence of arbitrariness, whims and caprices, privileges, and so forth. The premise is the basic untrustworthiness of persons with power; the conclusion is the elimination of persons and the substitution of principles.

The Rule of Law truly is a substitute for the Rule of Persons. What starts out as a means to facilitate order, peace and amity among human beings in society is installed as the goal of social ordering. The assumption of the basic quarrelsomeness of human individuals leads to a reification of supposedly neutral principles which are themselves held to be above conflict. In sum, trust in bodiless principles supplants trust in persons, reification of ideals complements the alienation of human beings from one another. In defences of the Rule of Law in preference to the Rule of Persons, little or no effort is made to find out why we should be ruled at all by anything or by anyone, or whether there are possibilities for persons to rule without such rule degenerating into orders of privilege, or triumphs of arbitrariness. Nor is there any serious consideration for the idea that there may be ways of being human other than that presupposed by the negative conception that underpins the trust in the law. No, the philosophical anthropology we have identified will have to be jettisoned before we can even begin to pose these questions. Yet these questions must be posed because this philosophical anthropology shared alike by the Rule of Law and Hobbes' Leviathan bespeaks a radical insufficiency in human nature. Is this necessarily so? Must we accept this philosophical anthropology?

According to Karl Marx, no. But a non-instrumental defence of the Rule of Law is indissolubly linked to the acceptance, expressed or implied, of this philosophical anthropology and its allied vision of society. Marx did not deny that conflicts are endemic in human society. After all he, along with Frederick Engels, wrote that the history of human society is the history of class struggle. So he could not be accused of having a rosy picture of human nature or of harbouring the illusion that there is some angelic component of human nature that is waiting to be unwrapped in future society. Hence, as I show in the next section, Marx was unstinting in his praise of the rule of law when he lived and followed Hegel in his fulsome appraisal of the liberal democratic revolutions of the eighteenth and nineteenth centuries. What he refused to do, and what sets him apart from the defenders of the political conception of the rule of law, is (1) to accept that the conflicts in human society

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41. *Supra* note 30 at 143.

will forever require law for their resolution; (2) to concede that law is the only or the best means for ameliorating conflicts. So, even when he held that the rule of law must be adhered to, and did so in his own practice,[42] as well as in his historical analyses,[43] he never embraced the view that the law or the rule of law represented the best principle of social ordering for a good society. The reasons for this refusal make up the next and final section.

V

In this section, I examine E. P. Thompson's defence of the Rule of Law and why I think it is wrongheaded or, at least, problematic, to make the principle a Marxist revolutionary goal. Thompson's defence is used here as a starting point. His offers the closest to a marxist defence of the political conception of the rule of law. Much of what I have to say will apply with equal force to even more nuanced arguments in favour of the principle by other Marxists.

Thompson's polemical defence of the Rule of Law in the concluding pages of *Whigs and Hunters* is directed at those Marxists who see in the principle either a mere bourgeois hocus-pocus or an instrumental value to be used to undermine the bourgeois state but which has no place in the communist society of the future.[44] Against this attitude Thompson contended that even though there were and still are cases in which the ruling classes subvert the law, it does not follow that law is in every case a class weapon.

It is not always clear what Thompson meant by the Rule of Law.[45] However, one can distill a conception of the principle from Thompson's account which, I believe, is similar to, if not the same as, what I have identified as the political conception in section I.

> The law when considered as institution (the courts, with their class theatre and class procedures) or as personnel (the judges, the lawyers, the Justices of the Peace) may very easily be assimilated to those of the ruling class. But all that is entailed in 'the law' is not subsumed in these institutions. The law may also be seen as ideology, as particular rules and sanctions which stand in a definite and active relationship (often a field of conflict) to social norms; and finally, it may be seen simply in terms of its own logic, rules and procedures—that is, simply *as law*. And it is not possible to conceive of any complex society without law.[46]

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42. See *supra* note 5 at ch. 2.

43. See his discussion of the struggle over the working day legislation in England in *Capital* vol. 1.

44. For some criticisms of Thompson see: 1) Sol Picciotto, "The Theory of the State, Class Struggle and the Rule of Law" in National Deviancy Conference/Conference of Socialist Economists, *Capitalism and the Rule of Law* (London: Hutchinson, 1979); 2) Morton Horwitz, "The Rule of Law: An Unqualified Human Good?" (1977) 86 Yale L. J. 561; 3) Michael Mandel, "The Rule of Law and the Legalisation of Politics in Canada" (1985) 13 Int'l J. of Socio. of Law 273.

45. For an attempt to explicate the different senses of the Rule of Law in Thompson's writings see Steve Redhead, "Marxist Theory, the Rule of Law and Socialism" in Beirne & Quinney, eds., *supra* note 1 at 332-36.

46. Thompson, *supra* note 2 at 260.

So far there is not much to provoke criticism or controversy with the possible exception of the last sentence. Thompson went on:

> But I do not conclude from this that the rule of law itself was humbug. On the contrary, the inhibitions upon power imposed by law seem to me a legacy as substantial as any handed down from the struggles of the seventeenth century to the eighteenth, and a true and important cultural achievement of the agrarian and mercantile bourgeoisie, and of their supporting yeomen and artisans.[47]

If all that Thompson's defence of the rule of law commends is that power be curbed by law, his theoretical mountain would have brought forth a mere mouse. In fact all the controversy he has attracted would have been pointless. After all, as I have shown in section I, every modern state at least makes provisions for the legal exercise of coercive power. It is unlikely that Thompson would agree that every modern polity is marked by the Rule of Law. Furthermore, the most controversial parts of his defence of the Rule of Law suggest that Thompson is arguing for a lot more than that rulers should rule according to law. He averred:

> I am insisting only upon the obvious point, which some modern Marxists have overlooked, that there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good.[48]

Bob Fine remarks that "the importance of Thompson's approach is that it restores the classic liberal usage of the concept of the 'rule of law' against its corruption in contemporary conservative thought."[49] But Fine does not follow through on the consequences of this restoration for Marxism. I believe that this strength of Thompson's approach is also what marks it as an inadequate articulation of what a more plausible Marxist stance to the Rule of Law might be. In the passage just quoted from Thompson, we find the central thesis of his defence of the principle. He insists not merely that rulers rule according to law but that rulers should be instruments of the law, those through whom the Rule of Law is executed. An instrumental adoption of the doctrine will not suffice for purposes of defending the citizen from power's all-intrusive claims. It is a subversion of the Rule of Law to make it serve any momentary purposes of its executors and promulgators. What is primary is not that persons rule under the guidance of the law—there is nothing extraordinary about such a demand—but that the Law should Rule through human agents. Marx did, in fact, hold views similar to the preceding one earlier in his career when he had not come to his critique of the liberal standpoint that he shared initially.[50]

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47. *Ibid.* at 265.
48. *Ibid.* at 266.
49. Fine, *Democracy and the Rule of Law*, *supra* note 1 at 175.
50. For Marx's own views see, Karl Marx & Frederick Engels, *Collected Works* (Moscow: Progress Publishers, 1975) vol. 1 at 120, 161-62, 166, 231-32, 237, 243, 245. For an extended discussion of these aspects of Marx's attitudes to law, see *Legal Naturalism: A Marxist Theory of Law*, *supra* note 5 at 25-28.

Few Marxists would deny that the emergence of the Rule of Law was a development of epochal significance in the evolution of human societies. Even fewer would quarrel with the need for the Rule of Law as a curb on arbitrariness and "power's all-intrusive claims". Marx himself trenchantly criticized the rule of arbitrariness in his criticisms of the Prussian Censorship Bill and the law regarding the Freedom of the Press.[51] So why do Marxists so vehemently and trenchantly criticize the Rule of Law? The answer lies in the fact that the Rule of Law, in spite of its many laudable attributes and historical significance, is a principle based on an essentially negative philosophical anthropology, a basic pessimism about the human condition, and a fundamental suspicion that, left to their own designs, humans cannot be trusted to do right.

We have seen that the philosophical anthropology that led Hobbes to invent the Leviathan similarly underpins the Rule of Law. The basic mutual distrust which makes it impossible for us to deal with each other *directly*, necessitates the *Rule of Law* as a mediating principle that is designed to keep us from devouring one another. The principle represents the apotheosis of what Roberto Unger has called the shotgun conception of rights.

> For one thing, our dominant conception of right imagines the right as a zone of discretion of the rightholder, a zone whose boundaries are more less rigidly fixed at the time of the initial definition of the right. The right is a loaded gun that the rightholder may shoot at will in his corner of town. Outside that corner the other licensed gunmen may shoot him down. But the give-and-take of communal life and its characteristic concern for the actual effect of any decision upon the other person are incompatible with this view of right and therefore, if this is the only possible view, with any regime of rights.[52]

The Rule of Law is a sanctification of the perpetual state of conflict that Unger's analogy captures so well. It does not seek to eliminate conflict or division in society. Nor does it allow us to consider alternative ways of conflict resolution that might secure the advantages that the law confers but without the externalities that it brings in its wake. What it does is to make it more comfortable or, at least, less discomfiting, to live with conflict. And this is where the liberal tradition, of which the rule of law is an integral part, parts ways with other social theories. For it is a concern of other social theorists, among them Marx, Engels, Hegel, Saint-Simon, Robert Owen, to articulate alternative modes of social ordering in which the alienating consequences of adversarial, litigation-ridden, winner-takes-all Rule of Law are eliminated. An abiding faith in the attainability of such an outcome and in its desirability is what makes it problematic, if not impossible, for Marx to settle for a social theory of the sort typified by the rule of law. An acceptance, therefore, of the Rule of Law as an end in itself, as "unqualified human good" or a necessary principle of social ordering in a good society, is an acceptance of the impossibility of less mediated and more transparent social relations. It is an endorsement of the

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51. *Ibid.*

52. Roberto Unger, "The Critical Legal Studies Movement" (1983) 96 Harv. L. Rev. 563 at 567.

permanence of alienated existence in society.[53] These are the points of divergence that others have noticed but whose significance they have not explored. Krygier apprehends it but thinks it a defect in Marxism.[54]

Furthermore, any attempt to place any more than an instrumental value on the Rule of Law is bound to lose sight of the fact that as the principle restrains power-holders from arbitrary exercise of power it, in the same breath, prevents the benevolent exercise of power.[55] Nor does it permit institutions or practices that facilitate alternative and, sometimes, better visions of society. It is for this and other reasons that a Marxist cannot do more than place a limited value on the Rule of Law and must seek to realize a social ordering in which mediating institutions and their enabling doctrines like the rule of law are irrelevant or less important than they are now.

In the remainder of this paper, I adduce evidence from Marx to support the contention that a Marxist ought only to place a limited value on the Rule of Law. I believe that the main thrust of Marx's 'On the Jewish Question' is directed at defences of the Rule of Law such as that of Thompson. In what follows, I do not claim that the programme envisaged by Marx is unrealistic, realistic or even realizable. There is considerable latitude for disagreement on any of those scores. What is important for our purposes is that Marx insisted that a world without law is superior to one with it; that although law and its most significant appurtenance, the rule of law, are quantum leaps in the history of human development and a future society must preserve the gains made under their operation, a world in which we are able to accomplish what law does without its negative consequences is eminently desirable and worth striving for. Only if we restore Marx's broader metaphysical concerns respecting human nature and what social forms best conduce to its flourishing might we be in a position to sidestep the twin lures of legal nihilism and legalism.[56]

In 'On the Jewish Question', Marx assessed how far the liberal democratic revolutions inaugurated by the the American Revolution and continued by the French and subsequent revolutions in Europe, had pushed forward the quest to liberate human beings from the many institutions and practices that handicapped them from realizing the best life possible for their kind. The choice of the modern state, the state that had made the centrepiece of its *raison d'être*, the triad of *liberté, egalité, fraternité*, was not fortuitous. He justly celebrated the modern state and, in particular, its politico-legal innovations. Yet he adjudged this state insufficient for purposes of full human emancipation.[57]

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53. For a fuller case see the final chapter of *Legal Naturalism: A Marxist Theory of Law*, *supra* note 5.

54. *Supra* note 3 at 658.

55. For a similar point of view see Horwitz, *supra* note 44 at 566; also Fine, *supra* note 1 at 188-89.

56. See Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964, 1986).

57. The idea that there may be life beyond liberalism and its associated social theory is anathema to the sort of rule of law theorists we have been considering. It is, for them, the root of all evil. Others don't even bother to justify their preference for the rule of law. They work from the inevitability of the liberal model; they never question it. But N. E. Simmonds exaggerates when he argues that Marx always wrote about law, the State, and juridical thought, from a viewpoint external to them. But he is right in his insistence that Marx's attitudes to these phenomena "depend directly upon his belief in the possibility of communism." See Simmonds, "Bringing the Outside In" (1993) 13 Oxford J. Legal Stud. at 159.

Marx distinguished between *political emancipation* and *human emancipation*. Political emancipation is a very limited form of emancipation. This is apparent from the fact that, as Marx argues, the *state* can liberate itself from a restriction without humans themselves being genuinely free of this restriction. For example, the liberal democratic revolution liberated human beings from the bonds of privilege and status in feudal society. But it did not thereby liberate them from many of the restrictions that typified feudal society—indeed, to take an instance, human alienation has intensified under the liberal regime. More specifically, liberal democratic society instituted religious freedom by removing compulsion from the profession of faith and by allowing the profession of faith to be a matter strictly of personal conscience. It globalized religion and made it possible for each person to embrace whatever religion he or she chooses. Now for those who think that religion is a good thing to have there can be no downside to this outcome.[58] But for those who hold that religion is a pernicious presence in human life, globalizing access to the profession of faith will just mean that everyone now will have the chance to embrace a pernicious practice. It does not represent the emancipation of humans from religion.

Perhaps a better example of the limitations of political emancipation is offered by the process of decolonization in the former colonies. Under conditions of colonialism, independence would be the equivalent of political emancipation. The immediate object of the independence struggle was often the right of the colonized to become like their colonizers, to enjoy the status that their colonizers have—to have their own nation, state, flag, internal economy, etc. But not being able to self-identify as a nation, have a state, etc., may pale into insignificance where issues of survival, ignorance, health for all, and the like are concerned. As it happened, most of those states did achieve independence, political emancipation, but the creation of the conditions for their inhabitants to live *as* human beings—freedom from poverty, ignorance, ill-health, and alienation from one another—all elements of the equivalent of human emancipation have remained elusive. The result is that many of those states have remained nominally free with little else besides. Political emancipation is the emancipation of politics, the freeing up of the political space to all and sundry; it is not the emancipation of human beings from politics, the freeing of all and sundry from the necessity for politics. Again, this works only on the assumption that politics falls short of what our ultimate goal ought to be.

> (M)an frees himself through the *medium of the state* (that is) he frees himself *politically* from a limitation when, in contradiction with himself, he raises himself above this limitation in an *abstract, limited*, and partial way. It follows further that, by freeing himself *politically*, man frees himself in a *roundabout way*, through an *intermediary*, although an *essential intermediary*.... The state is the intermediary between man and man's freedom. ... (T)he state is the intermediary to whom man transfers all his non-divinity and all his *human unconstraint*.[59]

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58. Marx did so consider religion. See Karl Marx, "A Contribution to the Critique of Hegel's *Philosophy of Law*: Introduction" in Marx & Engels, *Collected Works, supra* note 50, vol. 3, at 175-87.

59. Marx, "On the Jewish Question," *ibid.* at 152.

Let us go back to our decolonization example. The colonized liberate themselves in a partial manner, politically, when they struggle to realize an independent state, a state free from the suzerainty of another. Even though the state is now nominally and/or actually independent, it is still the state — in Marxist analysis, an alienated force standing outside of individuals, mediating their relationships. It still is an intermediary between human beings and their freedom. The ultimate point of Marx's critique of Hegel's Philosophy of Right was that Hegel lost sight of the need to supersede the State, law, and the like. While a colonized state is further removed from freedom, a sovereign state is only less so—the problem is with the state, in whatever form it is realized. Until the colonized begin to tear down the state, to create the conditions for a disalienated existence in society—for genuine human freedom—their emancipation remains political, partial; the promise of truly human emancipation remains as yet unfulfilled. How does all this relate to the Rule of Law?

The Rule of Law is also an intermediary between humans and their freedom: it is external to people, it stands between them and their fellows.[60] It is the quintessential embodiment of the bifurcation of the public individual and the private individual; between the citizen and the individual; between the state and civil society. Political emancipation was completed when the relations of personal dominance and order of privileges of feudal society were replaced by the new bourgeois order. The new order did abolish privileges. It emancipated both law and state from the deformities of feudal personal rule. It universalized rights: the rights of the citizen relate to the realm of the community; those of the individual pertain to the private sphere. This private sphere—'civil society' as it came to be called—is the sphere of "egoism, of *bellum omnium contra omnes*".[61] This is the right to do as you wish in your private sphere, so long as you do not harm others or infringe on their spaces. This leaves individuals essentially divided and they are brought together in their mutual indifference through the agency of law.[62] This is the source of the communitarian critiques of the rule of law. It is central to the Marxist opposition to placing an absolute value on it.

Given the scarcity of resources there is bound to be conflicts. It is to regulate such conflicts that the Rule of Law is brought in as was Hobbes' Leviathan. It regulates the exercise of the rights of the individual when, as they are bound to, they come into conflict with another's. Insofar as the Rule of Law is not designed to eliminate conflicts, or to get at the root of the sorts of conflicts it is brought in to resolve, only to ameliorate their disruptive consequences, it entrenches the inevitability of conflict in society and of law as the indispensable guarantor of amicable social living. It elevates the alienation of individuals from each other and from their nature as social beings into an immutable datum—all it does is make sure that each individual enjoys her alienated existence free of state interventions as much as possible. Hence it remains alienated from the individuals and at the same

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60. See G.W.F. Hegel, *Natural Law*, trans. T.M. Knox, intro. H.B. Acton (Philadelphia: University of Pennsylvania Press, 1975).

61. Marx & Engels, *supra* note 50 at 155.

62. For similar charges made against the rule of law by non-Marxists see Hutchinson & Monahan, *supra* note 7 at 121.

time maintains the continued existence of the state as a power standing over and above individuals in society. It is an affirmation of the permanent dissolution of society into atomised, almost monadic individual 'loaded guns', to use Unger's appropriate analogy. "Political emancipation (from feudalism) is at the same time the *dissolution* of the old society on which the state alienated from the people, the sovereign power, is based. Political revolution is a revolution of civil society."[63] But, Marx went on: "The *establishment of the political state* and the dissolution of civil society into independent *individuals*—whose relations with one another depend on *law*, just as the relations of men in the system of estates and guilds depended on *privilege*—is accomplished by *one and the same act*."[64]

Political emancipation is a big step forward. But for all that it is an incomplete step. It did not abolish some of the restrictions on humans in feudal society, it merely incarnated them in new forms. Whereas persons ruled in feudal society through the medium of privilege, political emancipation substituted the Rule of Law. But it did not abolish *rule*. Being impersonal, the Rule of Law is the elevation into principle of the myriad forms of alienation abroad in a liberal regime. But alienation is something unwholesome.[65] Part of the promise of Marxism which gets short-shrift in defences of the Rule of Law is the vision of a future society that holds up the promise of a disalienated existence and of human relationships that are no longer mediated by politico-ideological contraptions like the Rule of Law. The aim is to complement political emancipation with *human emancipation*. The Rule of Law, the new Leviathan, is a move in the opposite direction from this aim. The possibility of this truly human emancipation and its desirability constitute the ultimate reason why Marxists cannot avow the Rule of Law without significant qualification. An unqualified avowal can only be an abandonment of a distinctive but significant variant of Marxism. And it is the refusal to consider that we may be able to organize society without the instrument of law, even when they acknowledge as they routinely do that law is a second-best option, that ultimately sets apart the defenders of the political conception of the rule of law from Marx and those among his successors who continue to take utopia seriously.

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63. Marx & Engels, *supra* note 50 at 165.
64. *Ibid.* at 167.
65. See Marx, "Economic and Philosophical Manuscripts", *ibid.* at 229-346.