

Chapter 2

Contingency, Law and the Practice of Value

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[I]t is by being at variance with itself that it coheres with itself: a backward-stretching harmony, as of a bow or a lyre ... One must realize that conflict is common to all, and justice is strife, and all things come to pass according to strife and necessity.

Heraclitus of Ephesus, *Fragment 51* (IX, 9, 2) DK

Inverting the inquiry

Law creates a unique space of possibilities. It imposes binding limits on human conduct while providing a facultative framework within which other conduct can occur. In Lon L Fuller's description, law is both as an instrument of social control and a means to facilitate human interaction.¹ Through this dual operation, law creates and protects settled inter-personal expectations. This allows law's subjects to make and execute plans and projects; including by freeing them from the need to deliberate many incidental aspects thereof. So understood, law appears to be a powerful and reasonably autonomous *source* of social and individual value.

The previous chapter, and much that follows, explores the role of exogenous social values and intellectual disciplines – morality, history, economics, science, international legal norms, and so on – within legal reasoning and practice. In this chapter we pause, before continuing this exploration, to analyse two related but inverse inquiries: to what extent, and in what ways, does law constitute, or contribute to, sources of social value; and to what extent, and in what ways, can legal practice conflict with individual values?

1 See Lon L Fuller, "Law as an instrument for social control and law as a facilitation of human behaviour" in L Legaz y Lacambra (ed), *Die Funktionen des Rechts* ARSP Beiheft 8 Neue Folge Nr 8 (Frans Steiner Verlag, Wiesbaden, 1974) at 99-105 (also published in (1975) 1 *Brigham Young University Law Review* 89); and Lon L Fuller, "Human Interaction and the Law" (1969) 14 *American Journal of Jurisprudence* 30.

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