

Because of our moral disagreements, we could not predict with any certainty what others were going to do. And because what is the morally correct conduct for me often depends upon what others are doing, my inability to predict and coordinate with others will lead me to do what is morally wrong even if I am trying to do what is morally right. Legal settlement of what I and others are obligated to do allows me to coordinate my acts with others' acts and avert the moral costs of colliding good intentions.

Legal settlement also can improve moral decision-making through giving decision-makers the benefits of others' expertise. I may know that polluting is wrong, but I may not know whether the substance I am about to dump in the river is a pollutant. I may know that I should not operate equipment that endangers others, but I may be ignorant of the fact that this particular piece of equipment is dangerous. Good intentions without factual expertise can be as problematic, in terms of morally significant consequences, as bad intentions are. Legal settlement can improve our moral decision-making if the law makes use of expertise.

Legal settlement also makes moral decision-making more efficient in terms of time and other resources. Even if I could eventually acquire expertise and the ability to predict how others will act, my decisions regarding what I am morally obligated to do, if unaided by law, may require a great deal of time and energy that could be put to better use if there were a legal settlement of the issue that was clear and easily accessible.

Thinking of law in terms of settlement of what we are enforceably morally obligated to do explains how law and morality coexist on the same terrain. Both purport to tell us what we are obligated, forbidden, or permitted to do. So the question might be asked, "Why do we need law, given that we already have morality?" Why do we have many volumes chock-full of laws rather than only the one, Spike Lee law, "Do the right thing"? The answer is that although the Spike Lee law is in one sense perfect, and would be appropriate for a society of omniscient gods, in another sense, in our world of less than omniscient humans, "Do the right thing" is not "the right thing." Although we are neither gods nor angels, law is a response to the fact that we are not gods—not to the fact that we are not angels. If we were omniscient gods, but some of us were not angels, "Do the right thing" would suffice. If one of us did the wrong thing, others, being omniscient, would know the right thing to do in response. But if we were angels but not gods—always motivated to do the right thing, but uncertain of and disagreeing about the right thing to do—specific laws settling what we should do would effect a moral improvement over the Spike Lee law. It is paradoxical perhaps, but true nonetheless, that the perfect Spike Lee law is morally inferior to a regime of quite specific and likely imperfect laws.

Of course, to fulfill its settlement function and improve upon Spike Lee, law will have to consist of determinate rules. It is determinacy that produces settlement and its moral benefits of coordination, expertise, and efficiency. Standards—those legal norms that are not determinate rules but rather instruct us to do what is "reasonable," "fair," or "just"—leave matters unsettled. In effect, they tell us to "do the right thing" within the region of decision-making subject to them. They fail to fulfill the settlement function. Rather, they defer settlement.

3. The Nature and Functions of Constitutional Law If law's function is to settle what ought to be done through determinate rules, constitutional law's function is to settle the most basic matters regarding how we ought to organize society and government. One can think of a constitution's being basic law