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Coordination by Default

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COORDINATION BY DEFAULT: COMMENT ON STEVEN BURTON

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In his excellent essay, *Default Principles, Legitimacy, and the Authority of a Contract*,¹ Steven Burton urges us to recognize that default “principles guide the conduct of contracting parties and those who advise and judge them. . . . A sound default principle must have legitimate practical authority”² The principle that, according to Burton, meets this requirement is “a conventionalist default principle requiring parties in contract performance to coordinate their conduct by acting in the most salient manner to avoid contractual breakdown.”³ This is true and important. So I will argue, and in so arguing I will focus exclusively on the default principle Burton proposes rather than his criticisms of other proposals, trenchant criticisms with which I generally agree.

I also agree with Burton’s proposed default principle. Agreement makes criticism—in the sense of disagreement—impossible. But it leaves another option open: a different development of the same ideas. This is what I offer. My different development of the basic themes of coordination, salience, and avoidance of contractual breakdown reveals—and shows how to resolve—central issues in *Burton’s* defense of *his* principle.

Sections I and II focus on the key ideas of coordination and salience. While I follow Burton’s lead here, I depart from him on

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1. Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. CAL. INTERDISC. L.J. 115 (1993).

2. *Id.* at 124.

3. *Id.* at 146.

details—treating the notion of salience differently and at greater length than he does. Section III formulates a version of Burton's default principle in light of the discussion of the previous sections. Section III also raises a potential problem for this principle. The problem is a difficulty for *Burton's original* default principle, a problem revealed by the discussion of sections I and II. Sections IV and V resolve the problem.

I. COORDINATION GAMES AND COMMON KNOWLEDGE

To develop his conventionalist default principle, Burton invites us to think of contracts as coordination games:

Consider coordination games, which are defined by the following conditions: (1) two or more persons must choose one from among several permitted actions; (2) the outcome (desirability) of any player's action depends on the action chosen by the other players; (3) it does not much matter what action is taken so long as all players take the same action; (4) direct communication to settle on a coordination solution is not permitted.⁴

As a non-contractual example of such a game, suppose you and I are talking on the phone when we are disconnected.⁵ We both wish to continue the conversation, so we both have a reason to dial the other. But if we both dial at the same time, we will each get a busy signal. What we both want is that one should dial when the other does not; we want one of the pairs of actions: you dial, I don't; or, I dial, you don't. The two pairs of actions—(you dial, I don't) and (I dial, you don't)—are solutions to our coordination problem.⁶ We don't care which obtains, but we do prefer either to both (you dial, I dial) or (you don't, I don't).

We can represent the situation in the following diagram, using numbers to represent our relative preferences among the various outcomes. The number in the upper corner of a square represents your ranking of the relevant combined actions; the lower corner number represents my ranking:

4. *Id.* at 148.

5. David Lewis presents this example. See DAVID K. LEWIS, CONVENTION: A PHILOSOPHICAL STUDY 5 (1969).

6. This example shows us how to understand Burton's statement that "it does not much matter what action is taken so long as all players take the same action." Burton, *supra* note 1, at 148. The "same action" means "coordinate on the same solution." It does not, for example, matter much whether we all drive on the right or on the left as long as we all uniformly drive on one side or the other. For more on this point, see *infra* note 13.

	you dial	you don't
I dial	-1	1
I don't	1	-1

We talk regularly and get disconnected often. A pattern develops: the one who called calls back. The pattern makes coordination easy. Suppose we are disconnected. You called me. Because it is so well established that the caller calls back, I know you will call back; you know this as well; I know you know it; you know I know it; you know I know you know; I know you know I know; and so on, *ad infinitum*.⁷ Let us express this by saying that it is *common knowledge* between us that you will call back. Our common knowledge makes it easy for us to realize the solution (you dial, I don't).

Burton does not emphasize the role of common knowledge in coordination. He focuses on *salience* as the key to coordination. Salience is a special kind of prominence, a prominence particularly conducive to coordination. The past pattern of the caller calling back makes the solution (you call, I don't) salient in this sense. As Burton notes, "[t]he pioneering works on this game establish that a coordination problem will be solved, if at all, through *salience*."⁸ This is certainly correct. So why do I emphasize common knowledge over salience? Because common knowledge is more fundamental: it explains salience. What makes the solution (you dial, I don't) stand out with special coordination-relevant prominence? The past pattern. How does it do that? By making it common knowledge that you will dial.

To generalize: roughly speaking, a particular combination of actions is salient when it possesses a feature that makes it common knowledge that each party will act to realize that combination of actions. To see why this is rough speaking, suppose I am so tired and confused that I do not make the inference from the past pattern to the

7. More accurately, not "*ad infinitum*," but "until some natural limit is reached." There are interesting questions about common knowledge, and a deeper understanding of it may lead to a deeper understanding of default rules. The concept of common knowledge was developed in the mid-sixties by David Lewis. See LEWIS, *supra* note 4; see also STEPHEN R. SCHIFFER, MEANING (1972). Common knowledge plays a significant role in game theory. See ERIC RASMUSSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 50-51, 116-18 (1989).

8. Burton, *supra* note 1, at 148.

conclusion that you will call back. I *should* make the inference—insofar as I am acting fully rationally, but I fall short of the rational ideal and do not realize that you will call back. So, since I do not know you will call back, it cannot be *common* knowledge that you will. To speak less roughly, we should say a particular combination of actions is salient when (and only when) it is—or *should be*—common knowledge among the parties that each party will act to realize that combination of actions.⁹ The “or should be” qualification recognizes that the parties may—because of one or another defect in their rationality—fail to achieve common knowledge.¹⁰

The Prisoner’s Dilemma shows how and why common knowledge is essential to coordination. Suppose you and I have committed two crimes—one serious offense, one relatively minor one. When we are arrested, the police interrogate us separately. Unless one of us confesses, there is not enough evidence to convict us of the serious crime. However, even if we do not confess, there is enough evidence to convict each of us of the lesser crime, which carries a two-year sentence. The District Attorney offers you a two-part deal: (1) if you confess and I do not, you go free, and I get ten years of imprisonment for the serious crime; (2) if, however, we both confess to the serious crime, we both get five years. The District Attorney tells you that someone else is offering me the same deal. This matrix represents the situation:

		Me	
		C	NC
You	C	5 5	10 0
	NC	0 10	2 2

Suppose that, insofar as we are rational, each of us will act to minimize his or her imprisonment. What is the rational way to pursue that goal?

9. This definition is somewhat too restrictive. We should allow a *set* of combinations of actions (nodes) to be salient if it is common knowledge we will try to coordinate by realizing a node in the set, even though it is not common knowledge which node. I have suppressed this detail for simplicity’s sake.

10. See LEWIS, *supra* note 5, at 57.

It is rational to confess. If I confess, then it is better for you to confess: you get five years instead of ten. If I do not confess, it is better for you to confess: you go free instead of getting two years. I will either confess or not, so it is rational for you to confess. What is rational for you is rational for me as well, so it is rational for me to confess. Thus, if we both act rationally, we both get five-year sentences; we both prefer the two-year sentence of mutual non-confession, but if we each act rationally we cannot realize that alternative. Rational action works to our mutual disadvantage.

Common knowledge eliminates the Prisoner's Dilemma. Imagine, for example, that the District Attorney allows us five minutes to communicate. We make a solemn pact not to confess; the pact makes it common knowledge between us that neither will confess. The common knowledge moves us from the original matrix to the following one. Let us set the value of confessing and hence breaking the pact as equivalent to 100 years in prison:

		Me	
		C	NC
You	C	100 100	10 100
	NC	100 10	2 2

Clearly, neither of us confesses.

The Prisoner's Dilemma reveals the coordinating role of common knowledge. It shows that common knowledge is *sufficient* for coordination. To see that it is also *necessary* to achieving the goal of mutual non-confession, consider the scenario in which our common knowledge breaks down. Imagine us each alone again; we are again offered the opportunity to confess. What do you do? It depends on what you expect me to do. If you expect me not to keep my word and to confess, then you will confess. And *it is easy* for you to have reason to expect me to break my word. You can reason as follows: "Back in our separate rooms, we each face a temptation: to confess and go free. Given my partner's character, there is a real chance he will yield to the temptation. Therefore, it may be that I should confess." Call this reasoning (1). Now, *I* suspect that *you* are reasoning this way about me, so *I* reason as follows: "She has always had doubts about my

character, so she will go through reasoning (1) and may very well confess; therefore, it may well be that I should confess." Call this reasoning (2). Realizing that *I* will reason this way, *you* reason: "He is no fool. He will reason in way (2) and will probably confess even if he wasn't otherwise going to confess, so I should probably confess." Call this reasoning (3). *This reasoning gives you yet another reason to confess—in addition to the reason supplied by reasoning (1).* I realize that you are probably reasoning in this way, so I reason as follows: "She is reasoning in way (3), so she will most likely confess. Therefore, I most probably should confess." You realize I am reasoning in this way, so you reason as follows . . . , and so on *ad infinitum* (or rather until some natural limit is reached). Each step in the iterated reasoning gives each of us some *additional* reason to confess. The result is that our pact is ineffective and we both confess.

Distrust easily destroys common knowledge.¹¹ With common knowledge destroyed, coordination is impossible: we both confess. Of course, a *kind* of "coordination" can occur without common knowledge. Suppose, for example, that you take an extreme dislike to the District Attorney, and you refuse to confess because you prefer to suffer almost any punishment just to spite him. Unbeknownst to you, I feel and do the same. Mutual non-confession is the result, but our "coordination" was *not* the result of our attempts at coordination. The "coordination" is an *accident*; we were not trying to coordinate. Where we are aiming at coordination, common knowledge is essential to *non-accidental* success.

II. THE ROLE OF COMMON KNOWLEDGE IN DEFAULT RULES

The role of common knowledge in coordination shows us how to conceive default rules. To see why, it is helpful to develop the concept of coordination games in more detail. The key is to define the concept of an equilibrium: an equilibrium is a combination of actions in which no person would have been better off had that person alone acted

11. It is not even necessary that you suspect that I will betray you. It is enough that you suspect I suspect you suspect this. Then you will reason in way (3), and will have a reason to confess. Or, it could happen that you suspect I suspect you suspect I suspect you suspect that I will betray you. As a result, you reason in "way (4)," which is like way (3) iterated one level higher. Or it could happen that . . . , and so on. In fact, suspicion at any level of iteration can work downward to create distrust at all lower levels.

otherwise.¹² In the telephone disconnection example, the solutions (you dial, I don't) and (I dial, you don't) are *equilibria*—as the matrix makes plain:

	you dial	you don't
I dial	-1 -1	1 1
I don't	1 1	-1 -1

The matrix also illustrates a coordination problem: a coordination problem is a situation of interdependent action involving two or more parties where there is at least one equilibrium.¹³

I will focus—initially—on post-contracting behavior, not on negotiation at the time of contracting. *Hadley v. Baxendale*¹⁴ provides an example. Let us imagine that the shipper in *Hadley* is trying to decide on transportation for the broken shaft. He has two options: one is fast, reliable, and expensive; the other is cheap, slow, and less reliable. The shipper does not communicate with the Hadleys about the choice. He does not think it necessary; he thinks he is confronted with a certain coordination problem, and he thinks—mistakenly, it will turn out—that he possesses the *common knowledge* that provides the solution. In thinking that he possesses the relevant common knowledge, he thinks he already knows what the Hadleys want, so he sees no need to communicate. And, of course, the shipper may not communicate for a variety of other reasons as well: the Hadleys are unavailable; it is simply not the custom to communicate about such matters; there is no time; and so on.

12. So, for example, in the Prisoner's Dilemma, (confess, confess) is an equilibrium since I cannot make myself better off by not confessing (for then I get ten years imprisonment instead of five). Equilibria, as defined here, are sometimes referred to as *Nash equilibria*. See RASMUSEN, *supra* note 7, at 33.

13. This definition allows for communication; communication, of course, makes the solution easy. The notion of a coordination problem as defined here is very inclusive. A more restricted notion is the notion of a *pure coordination problem*. A pure coordination problem involves interdependent action between two or more people—where there are at least *two* coordination equilibria. Burton's discussion of coordination problems best fits pure coordination problems, since he includes the requirement that "it does not much matter what action is taken so long as all players take the same action." Burton, *supra* note 1, at 148. This is true in *pure* coordination problems where there are at least two equilibria having equal payoffs for the parties, and no equilibrium with a greater payoff than those two.

14. 156 Eng. Rep. 145 (Ex. 1854).

To see what coordination problem—better, problems—*Hadley* poses, we first need to see what the shipper's preferences are concerning the transportation options, and what the shipper *thinks* the Hadleys' preferences are. Of course, none of this is intended to be factually accurate. We are simply taking *Hadley* as the basis on which to build an illustrative, if mostly fictional, example. In constructing the example, I will assume that both contracting parties are *rational*. This assumption is crucial, but I will defer explicit consideration of its role until we have worked out the example.

The shipper, let us suppose (quite realistically), acts under uncertainty. He does not know what probabilities attach to the various potential losses from a delay in shipping. He knows that the losses range across a continuum with negligible losses at one end and large losses at the other, but he can, at best, only assign rough estimates of probabilities to some, not all, the potential losses. The shipper is willing to run the risk of relatively small losses—even where losses would considerably exceed his profits. He takes these to be sufficiently unlikely that the expected losses are less than the net profit he makes shipping. But the shipper is not at all willing to bear any *unusually large* losses. He finds it difficult to make even a rough estimate of the probability of large losses, but he is sufficiently risk-averse that he is unwilling to run the risk of such losses at the contract price he and the Hadleys agreed on.

So, for the shipper, the combinations of actions (unreliable shipping, Hadleys bear large losses) and (reliable shipping, Hadleys bear large losses) are *both* preferable to either (reliable shipping, Hadleys don't bear large losses) or (unreliable shipping, Hadleys don't bear large losses). Between the two most preferred alternatives—(unreliable shipping, Hadleys bear large losses) and (reliable shipping, Hadleys bear large losses)—the shipper prefers the former. The reason is that, at the price he is charging for shipping, shipping the more expensive way cuts deeply into his profits. Between the two least preferred alternatives—(reliable shipping, Hadleys don't bear large losses) or (unreliable shipping, Hadleys don't bear large losses), he prefers the former since he wants to minimize the risk of his bearing a large loss even if it means cutting into his profits.

To summarize—using “>” for “is preferred more than”: (unreliable shipping, Hadleys bear large losses) > (reliable shipping, Hadleys bear large losses) > (reliable shipping, Hadleys don't bear large losses)

> (unreliable shipping, Hadleys don't bear large losses). Is this preference order rational? There is no answer in the abstract: there is no rationality independent of the context in which one must judge and act.¹⁵ But it is easy to imagine many circumstances in which the shipper's preferences are rational, and let us imagine that some such circumstances obtain here.

The shipper thinks the Hadleys' preferences (at the time of contracting) match his in at least one crucial respect. He thinks they prefer (unreliable shipping, Hadleys bear large losses) to *any* other option. His evidence is their behavior at the time of contracting. He assumes that, had the Hadleys wanted special handling of their package, they would have requested it and paid the higher price it would have cost. Since they did not, the shipper assumes that the Hadleys prefer to bear large losses themselves; he thinks they think that the expected cost of such losses is smaller than the higher contract price the shipper would charge.

The upshot is that the shipper thinks that it is common knowledge that both parties prefer unreliable shipping, and this assumption guides his behavior. The following diagram represents the coordination problem the shipper thinks he is in:

	reliable shipping	unreliable shipping
Hadleys bear loss	Less preferred	Most preferred
Hadleys don't bear loss	Less preferred	Less preferred

The shipper will ship by the cheap method. In doing so, he thinks that he is coordinating with the Hadleys by doing what he and they *both* most want.

But he is wrong. Given the lost profits they actually face, let us suppose that the risk-averse Hadleys, who—like the shipper—act under uncertainty, have the following preferences: (reliable shipping, Hadleys *don't* bear large losses) > (unreliable shipping, Hadleys *don't* bear large losses) > (reliable shipping, Hadleys bear large losses) > (unreliable shipping, Hadleys bear large losses). These are their preferences at the current contract price, and, given the Hadleys' risk-aversion, they would remain so, even at a much higher contract price

15. At least not in ways that matter here.

the shipper would charge if he were to explicitly assume the risk of large losses. If the shipper were to communicate, the Hadleys would renegotiate their contract to pay the higher price and have the shipper assume the risk of loss. Again, there is nothing a priori rational about this preference ordering, but given appropriate circumstances—circumstances including placing great weight on avoiding the lost profits—such preferences would be rational.

The shipper failed to take the proper level of precautions because the Hadleys failed to inform him of the potential for lost profits. If they had informed him, the shipper's preferences really would have matched the Hadleys'. He would have charged the Hadleys considerably more for reliable shipping while also risking the potential loss. It would have been common knowledge that the parties preferred costly shipping with the shipper bearing the loss, and this would have been the coordination problem:

	reliable shipping	unreliable shipping
Hadleys bear loss	Less preferred	Less preferred
Hadleys don't bear loss	Most preferred	Less preferred

The *Hadley* rule penalizes the Hadleys for not conveying the relevant information, and for not making it common knowledge that the parties prefer reliable shipping. The *Hadley* rule places a premium on common knowledge.¹⁶ Such knowledge is, of course, a mere *means*; the *end* is coordination. To place such a premium on the means of common knowledge is to place a premium on the end of coordination. What is the justification for placing such a premium on coordination?

This question takes us back to Burton. Indeed, we have never been far from Burton's position. He thinks that default principles should require "parties in contract performance to coordinate their conduct by acting in the most salient manner to avoid contractual breakdown."¹⁷ We have developed the point that coordination to

16. This rationale for the *Hadley* rule does not work well when it is not reasonable for a party providing a service to adjust its quality control to the needs of individual consumers. This may cast doubt on the *Hadley* rule as the appropriate rule in such cases (typically cases of mass markets).

17. Burton, *supra* note 1, at 146.

avoid contractual breakdown requires parties to act in the “most salient manner”—with the difference that we have understood salience in terms of common knowledge. So, again, what is the justification for placing such a premium on coordination?

Burton answers that:

Like the implied covenant of good faith, the general obligation to coordinate is made whether or not the parties have it in mind. It is what their contract means even when it is not what they meant.

. . . Thus, the parties to a contract for goods must mean to tender and receive delivery at the same place, even if no such thought occurred to either. The parties’ actions in contracting as they did would be senseless if this commitment were not entailed. The covenant of fair dealing generalizes the parties’ specific commitments to coordinate into an abstract commitment to coordinate, applicable also in the range of default rules when a problem does materialize. This covenant remains abstract unless and until a problem materializes requiring it to be interpreted and applied.¹⁸

Burton’s idea is that the parties *agree* to coordinate their behavior; to contract is to undertake the “general commitment to coordinate.” Coordination requires common knowledge, and the Hadleys undermined coordination by withholding information crucial to the formation of the relevant common knowledge. In doing so, they breached their commitment—their *contractually* created commitment—to coordinate. This commitment to coordinate justifies using the *Hadley* rule to penalize parties for withholding information necessary to forming relevant common knowledge.

While I am very sympathetic with Burton’s position, I will not offer any arguments in support. My aim here is exposition, not defense; my goal is to show that it is illuminating to recast the position in terms of common knowledge.

III. A COMMON KNOWLEDGE DEFAULT PRINCIPLE

So, what is the “common knowledge” version of Burton’s “conventionalist default principle requiring parties in contract performance to coordinate their conduct by acting in the most salient manner to avoid contractual breakdown”?¹⁹ It is this: frame default rules so as to reward and promote relevant common knowledge. Of course, to do so, we must make assumptions about the rationality of the parties,

18. *Id.* at 161-62.

19. *Id.* at 146.

as we did in our discussion of *Hadley*. Without such assumptions, we cannot construct the preference-orderings in light of which the relevant coordination problems are defined.²⁰ So the suggestion really is: frame default rules so as to reward and promote relevant common knowledge, *assuming rational contracting parties*.

The focus on common knowledge brings out the need for an assumption of rationality, and I will turn to that assumption in a moment; but first we should briefly turn our attention from post-contracting behavior to negotiation at the time of contracting. Consider *Hadley* again. The potential penalty built into the *Hadley* rule creates an incentive to provide such information at the time of contracting. Let us focus briefly on this situation. With the *Hadley* rule in place, it is common knowledge among contracting parties that breachers will be liable only for foreseeable damages. It is common knowledge among the parties that potential breachers' attempts at coordination will be guided by this knowledge. Parties have an incentive to provide information relevant to foreseeability if they want to change the basis on which the parties will coordinate their behavior.

This argues for definite rules as opposed to vague standards.²¹ A vague standard may leave it unclear just what is common knowledge at the time of contracting, and so may not provide as clear an incentive to convey relevant information at the time of contracting. This is not to say that the common knowledge argument for definite rules is decisive. It is one consideration that may still be outweighed by others.

The "rules vs. standards" issue illustrates a more general and considerably more significant point: the law—through rules *or* standards—can exploit the role of common knowledge in the coordination of behavior in ways that will provide negotiating parties with incentives to convey information. This general issue merits attention—attention it has not received because the central role of common knowledge has been largely ignored. Debate could usefully shift from the often quite artificial focus on rules vs. standards to the more practically relevant issue of the role of common knowledge.

20. An appeal to common knowledge will not avoid the need for a rationality assumption. In the telephone disconnection case, for example, I know you know I know you will call back, in part because I know you are sufficiently rational to make the relevant inferences from the established pattern of the caller calling back. Attributions of common knowledge occur against background assumptions of rationality.

21. There is a growing literature on this issue. See Ian Ayres, *Preliminary Thoughts On Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L.J. 1 (1993).

IV. COMMON KNOWLEDGE, RATIONALITY, AND LEGITIMACY

We have suggested that we should frame default rules so as to reward and promote relevant common knowledge, *assuming rational contracting parties*. But how much guidance does this give about how to frame default rules? Consider *Hadley*. We made several assumptions about the parties' preferences. In making these assumptions, we were guided by a conception of what *rational* contracting parties would want. What counts as rational? There are many answers. Those inspired by law and economics answer one way; those who emphasize the legitimating role of consent answer another way; and others, other ways. So, again, what counts as rational? The question is crucial, both empirically and normatively. *Empirically*: we can predict that, given the *Hadley* rule, a rational contracting party (who is aware of the rule) will convey relevant information. But, until we say what counts as rational, we have not really made any empirical prediction. It is just as if we said, "A party who meets a certain as-yet-unspecified condition will convey the relevant information." We have no prediction until we specify the condition. *Normatively*: until we know what counts as rational behavior, we do not know what behavior we are trying to promote with the *Hadley* rule.

These remarks seem to reveal a decisive weakness in Burton's approach. Talk of coordination—whether in terms of salience or common knowledge—proceeds against a background model of rationality, as our discussion of *Hadley* demonstrates. Without a model of rationality, considering coordination provides no guidance about how to frame default rules. So how has Burton—or how have we—said anything particularly helpful in settling this debate?²²

Burton has an answer. He answers that we are constrained in our views about rationality by the requirements of respecting the authority of contracts:

[The authority of contract yields] three criteria for evaluating proposed default principles First, an acceptable default principle must rest on a sound ground of political obligation so judicial enforcement of rules justified by that principle will have legitimate

22. Clayton Gillette and Juliet Kostritsky emphasize this point in their comments on Burton's essay. Clayton P. Gillette, *Cooperation and Convention in Contractual Defaults*, 3 S. CAL. INTERDISC. L.J. 167 (1993); Juliet P. Kostritsky, *Looking for Default Rule Legitimacy in All the Wrong Places: A Critique of the Authority of Contract Model and the Coordination Principle Proposed by Professor Burton*, 3 S. CAL. INTERDISC. L.J. 189 (1993).

authority. Second, a default principle should respect the contract as a source of reasons for action in contract performance Third, it should respect the contract as an excluder of reasons of self-interest giving rise to the agreement and also reasons of background political morality.²³

I will focus initially on the first criterion, the requirement of legitimacy. This is the requirement that default principles be based on “a sound ground of political obligation.”

To see how the requirement that default principles be based on a sound ground of political obligation constrains our appeal to rationality in framing default rules, suppose for the sake of argument that one is convinced that morality requires that one act to promote the common good, and hence that—barring lack of information or lack of courage and the like—a rational person performs the action most likely to promote the common good. Even if this is true, one could not invoke this conception of rationality in framing default rules, for it is not based on a *political* obligation. Burton’s criticisms of economic efficiency, communitarianism, and relational theories rest in part on this very important point. Consider his critique of the principle of utilitarian efficiency: “Utilitarians hold that everyone should act such that the consequences will best serve the good of their community.”²⁴ Burton objects that this utilitarian principle fails as “a sound ground of political obligation.”²⁵ There is “no general background political obligation for everyone to act to produce the best social consequences.”²⁶ This is surely right. Suppose, for example, that Jones expresses political opinions that promote racial hatred. Such speech is protected by the First Amendment even though it has consequences that do not best serve the good of the community. There is certainly a *moral* obligation to refrain from speaking in ways that promote racial prejudice, but—within broad limits—there is no *political* obligation to do so.

Those who approach contract law from a social science perspective may feel on unfamiliar—or even uncomfortable—ground here, for our concern is not with explanation and prediction but with *obligation*. This focus on moral as opposed to empirical issues is essential. We asked, “What counts as rational?” Rationality is, at least in part, a normative notion; a model of rationality is, in part, a model of how

23. Burton, *supra* note 1, at 129-30.

24. *Id.* at 134.

25. *Id.* at 129-30.

26. *Id.* at 135.

people *ought* to act. Behavior that fails to conform to the model—irrational behavior—need not disconfirm the model; in the case of rationality, we demand that the world conform to the model, not the model to the world.

So Burton is right on target in taking normative considerations as relevant. But, even so, it may seem that he has changed the topic. His concern is really to delineate the boundaries of *politically permissible* behavior, and a democratic state will recognize some irrational behavior as politically permissible, on one or another conception of rationality. For example, we—most of us—may be convinced that it is irrational to talk in ways that promote racial hatred, but most of us also do *not* recognize a *political* obligation to refrain from such speech. The focus on political obligation is, however, not a *change* of topic; it is a *narrowing* of it. Genuine political obligations are not—as we will see—irrational constraints on behavior. Every genuine political obligation is rational; it is just that not every rational constraint on behavior is a political obligation. To see why, we need to develop the concept of legitimacy—the requirement that state action be grounded in political obligation—in more detail. Moreover, given its importance, the requirement merits extended treatment.

A government is legitimate when (and only when) citizens—at least most of them²⁷—have a *prima facie* general obligation to obey it.²⁸ Legitimacy so conceived defines a political ideal, an ideal relationship between the individual and the state. Ideals are rarely, if ever, fully realized; they are approximated, but even approximation places a stringent demand on the structure and function of the state: it must be so designed and operated that it generates the special political obligation. A central task of liberal political theory is to delineate the conditions under which such an obligation would exist. Utopian liberal visions define conditions not realized, or even realizable, in the massive, culturally diverse democratic nations that are our currently

27. The qualification is necessary; otherwise, legitimacy becomes an ideal with little practical application. See WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 298 (1991) ("Legitimate authority does not entail an obligation to obey on the part of all individuals A society can be legitimate if the preponderance of its members conscientiously subscribe to it").

28. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 191 (1986); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 23-25, 100-101 (1986); A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 7-8, 12, 195-96 (1979); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 285 (1989); cf. Rolf Sartorius, *Political Authority and Political Obligation*, 67 VA. L. REV. 3 (1981). Raz decisively criticizes Sartorius in RAZ, *supra*, at 23-24.

dominant form of political organization. A more practical liberal project aims at conditions realizable in contemporary democracies.

Answering two questions clarifies the content of this ideal: what is the force and point of talking about obligation? And what does it mean to say the obligation is general? Obligation contrasts with self-interest, and we can use the contrast to explain the point of the appeal to obligation. Taking the self-interest side of the contrast first, the essential point is that it is typically in one's self-interest to obey the government, at least to the extent that disobedience is likely to be punished. To that extent, the likely loss typically outweighs the unlikely gain. *Ideally*, however, our reasons for obeying are not *merely* of this self-interested sort. We obey because we have—and recognize—an obligation to do so, an obligation that would give us good reason to obey even when considerations of self-interest did not. One tradition in classical liberal political theory locates the source of this obligation in consent: citizens are obligated to obey the government because they consented—perhaps tacitly—to do so. The point is not, of course, to endorse classical consent theory but to illustrate one possible way in which a general obligation to obey the state might arise.²⁹

Of course, the contrast between self-interest and morality is crude to the point of being questionable,³⁰ but it is adequate for our purposes here. In particular, we need not concern ourselves with the objection that, insofar as a moral obligation is really an obligation, it is also (always, usually, typically) in our self-interest to meet the obligation. We are relying on the intuitive contrast between morality and self-interest, and we can do so without taking a position on the issue of whether this contrast turns out to be genuine or merely apparent.

Now what does it mean to say the obligation is general? The obligation is *general* in the sense that one is to have an obligation to obey *any* governmental directive *simply by virtue of its being a governmental directive*. Being obligated simply by virtue of something's being a governmental directive does not, as Gerald Dworkin has recently emphasized, mean "obeying commands just because they are

29. For a recent (and negative) evaluation of consent theory, see Edward A. Harris, Note, *From Social Contract to Hypothetical Agreement: Consent and the Obligation to Obey the Law*, 92 COLUM. L. REV. 651 (1992).

30. These remarks may suggest a simple opposition between morality and self-interest; the relation between morality and self-interest is actually quite complex. See RAZ, *supra* note 28, at 213-16.

commands.”³¹ One always makes “assumptions . . . about the nature of the state that is issuing the commands, or the ways in which the state is formed and functions.”³² The assumptions vary from theory to theory, but the basic idea is the same: *given* appropriate assumptions, then—*against that background*—a government’s issuing a directive is sufficient for citizens to have an obligation to obey. All theories represent political obligation as rational. Theories answer the question, Why obey?, by giving reasons—good reasons—to do so.

It is crucial here to distinguish between moral—or more generally rational—requirements and *political* ones. To see why, suppose Jones drives too fast, thereby imposing unreasonable risks on others. Jones has at least two reasons not to drive in such a fashion. Self-interest provides one; at least it does if the likely gains from speeding (the thrill of speed, saving time) are less than the likely costs (fines, increased insurance rates, civil and criminal liability). Morality provides the other reason: it is wrong for Jones to drive in such a way (at least assume so for the sake of the example).³³ Now the idea is that, given a legitimate judicial system, he has *another* reason as well: namely, the courts have held that driving in such a way is illegal. These judicial decisions give Jones a reason other than self-interest not to drive excessively fast, for the decisions *obligate* him not to drive in that way, and this obligation is also supposed to be one Jones has *in addition* to his moral obligation to drive safely. This is the essential idea: legitimate governmental directives are *in and of themselves* sufficient to place citizens under an obligation to obey them (assuming of course appropriate background conditions). Governmental directives create special, *political* obligations.

Some may object that consent theory, for example, explains the *political* obligation in terms of a *moral* obligation arising from the fact that one consented (i.e., promised) to obey. The driving-too-fast example suggests a reply. In that example, Jones has a moral reason not to drive too fast—a moral reason *arising from his extra-political relations to others*, not from the fact that Jones is a citizen standing in certain political relations to other citizens. On consent theory he has another—admittedly moral—reason to not to drive too fast *arising from the relation to the state* created by his consent. The relation to

31. GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 25-26 (1988).

32. *Id.* at 26.

33. These remarks may suggest a simple opposition between morality and self-interest; the relation between morality and self-interest is actually quite complex. See RAZ, *supra* note 28, at 213-16.

the state justifies counting the second reason as *political* and distinguishing it from the moral reason that arises from his extra-political relations to others.

What we have just explicated is the classical liberal notion of legitimacy. I am actually quite skeptical that legitimacy so conceived is a defensible political ideal. But this does not matter here. Even if we abandon the ideal, we certainly want to retain one of its central features—the distinction between moral and political obligation. We do not want it to be proper for the state to force us to meet each and every moral obligation. To limit state control over individuals, we should limit the state to enforcing political obligations.

This is why the task of justifying default rules is in part the task of grounding them in a *political* obligation. One of the great merits of *Default Principles, Legitimacy, and the Authority of a Contract* is its articulation and defense of this requirement.

IV. EXCLUSION OF REASONS

The exclusion of reasons requirement creates an apparent puzzle for Burton's defense of his conventionalist default principle. It would appear that this principle fails to meet the requirement. Burton argues that, not only should default rules rest on a sound ground of political obligation, the justifications for default rules "should respect the contract as an excluder of . . . reasons of background political morality."³⁴ How can default rules simultaneously be grounded in political obligations and "respect the contract as an excluder of . . . reasons of background political morality"?³⁵ Burton's answer is important and illuminating. To see the answer, we first need to see what it means for the contract to be an excluder of reasons of background political morality.

Burton's explanation of the reason-excluding force of contracts begins by noting that "[t]he decision to enforce an agreement entails an authoritative judgment that performance of the contract is consistent with all legally enforceable background obligations."³⁶ The consequence according to Burton is that

all enforceable background political obligations (except the obligation to keep a contract) drop out from further consideration (unless

34. Burton, *supra* note 1, at 130.

35. *Id.*

36. *Id.* at 129.

and until some new act or event changes the circumstances). They are supplanted by the authoritative judgment on enforceability, which must be made before the problem of default principles even arises. Accordingly, when that problem is considered, the implications of general background political obligations are, so to speak, *res judicata*.³⁷

Hadley again provides a convenient example. Suppose the shipper thinks it would be wealth maximizing to ship cheaply. On Burton's view, this is not a reason to ship that way, *even on the assumption* that there is a background political obligation to maximize wealth. Such reasons are excluded by the authority of the contract. Burton says that the reasons for performance provided by contract default rules must rest on grounds which differ from the background political obligations of the parties.³⁸ But then how are we to justify default rules by grounding them in an appropriate political obligation?

One possibility here is that Burton is simply wrong to think that contracts exclude reasons derived from political morality. To evaluate this possibility, we need to see why Burton thinks contracts exclude such reasons. He argues that

contract terms have legitimate authority when based on reasons which apply to the parties anyhow, but allow the parties to better comply with those reasons by following the contract's directives than by reassessing the reasons on which they are based. This is possible if the contractual obligations of the parties represent their view *ex ante* of how they ought to behave on balance, and they can identify their obligations without revisiting the reasons that gave rise to those obligations. . . . This is the primary justification for the exclusionary force of authority in the relevant context.³⁹

To see the idea, suppose the shipper in *Hadley* asks why wealth maximization is not a reason to ship cheaply and unreliably. The answer is that the contract represents the parties' "view *ex ante* of how they

37. *Id.* Elsewhere he puts the point this way:

A contract, in my view, contains directives to the parties that have authority with dual force. A contract provides the parties (and those who advise or judge them) with reasons for action and also excludes some kinds of reasons. As an agreement of the parties, it excludes the *ex ante* reasons of personal interest upon which the deal is based in the first place. As a contract (an enforceable agreement), it also excludes *ex ante* reasons of political morality.

Id. at 126.

38. *Id.* at 128.

39. *Id.* at 143. As he says elsewhere: "By following a legitimate authoritative directive, the subjects should be better able to comply with their *ex ante* obligations than they would by deliberating directly on them." *Id.* at 125.

ought to behave on balance."⁴⁰ Since the contract is enforceable, the shipper is required to conform to this *ex ante* view of how the parties ought to behave. The crucial claim is that he will "better comply with those reasons by following the contract's directives than by reassessing the reasons on which they are based."⁴¹ Of course, the contract does not explicitly specify what to choose as a means of transportation, but Burton contends the shipper should act in the way most consistent with the reasons for the parties' explicit *ex ante* agreement.⁴² Given the goal of acting in accord with the *ex ante* reasons, it would be *irrational* to reassess the reasons *ex post* in light of what will maximize wealth.

I do not think that this explanation is adequate. Why think that following the contract's directives will lead the shipper better to comply with the *ex ante* reasons than an *ex post* reconsideration of what to do? Default rules come into play when the parties fail to explicitly address the subject the default rule concerns. How will "following the contract's directives" help here? The explicit directives do not address the issue. Of course, the explicit directives may *imply* that certain actions and not others better comply with the *ex ante* reasons the parties agreed to those explicit directives. But surely this will not be true in all cases, and, even where it is true, implication will be a matter of assessing the *ex ante* reasons in light of the *ex post* situation that has arisen. In *Hadley*, for example, suppose that, after the contract is signed, a technological advance makes expensive but fast and reliable transportation an option, an option non-existent at the time of contracting. Do the *ex ante* reasons imply that the shipper should ship the expensive way? To answer, the shipper will have to determine how parties—insofar as they are rational—would evaluate those reasons given the newly arisen situation. But then why can't he reassess the *ex ante* reasons in light of general criteria of rationality? I see no reason why he cannot.

So should we abandon the idea that contracts exclude reasons of political morality? No. Contracts certainly do. Contracts are, or involve, legally enforceable promises. Part of promising is adopting a certain attitude toward future action, an attitude defined in part by the refusal to recognize certain considerations as reasons. For example, I promise to accompany you to the doctor on Tuesday; you face a

40. *Id.* at 143.

41. *Id.*

42. *Id.*

possible diagnosis of cancer and want moral support. However, when Tuesday arrives, it is a beautiful day, and I think that it would be quite enjoyable to take a walk. Taking the walk means not accompanying you; so, since the prospect of enjoyment is a reason for me to take the walk, then—other things being equal—it is also thereby a reason not to go with you. But other things are not equal here, for I have *promised* to provide support in the face of a possible diagnosis of cancer. When I promised, I made a certain commitment, a commitment constituted in part by the refusal to count considerations like the prospect of an enjoyable walk as a reason not to do as I promised.⁴³ Of course, one can promise and still properly regard *some* considerations as reasons to break the promise. I may have sufficient reason to break my promise if, through no fault of my own, accompanying you means leaving my two-year-old daughter unattended in a city park. The point is that having an adequate reason to break a promise is a two-stage matter. First, the considerations in question must be the *kind* of considerations that, in the circumstances, can be such a reason (e.g., the safety of a young child, as opposed to the enjoyment of a walk). Second, the reason provided by those considerations must be better than the reasons to keep the promise.

We can see this two-stage structure in a number of contract doctrines. The doctrine of impracticability is an example (similar remarks hold for frustration, mistake, duress, undue influence, and unconscionability). The doctrine is that a promisor may be excused from performance under two conditions: first, a contingency, unexpected at the time of contracting, makes performance commercially impracticable; and, second, it is not the case that the promisor seeking to be excused ought to bear the risk of loss from such a contingency.⁴⁴ The first condition identifies a type of consideration—the relevant unexpected contingency—as the kind of consideration that can be a reason not to keep a promise; it tells us that such a consideration is relevantly like the endangering of the child, not like the enjoyment of the walk. Given that one can show such a contingency, one then has to show that the reasons the contingency provides are better than the reasons one has to keep the promise. The second condition indicates that this

43. This is a point about our concept of promising. Moral theories that fail to find a place for this concept are deficient. Classical utilitarianism is arguably deficient in this way. The point about promising is generally recognized in moral philosophy. See, e.g., JUDITH J. THOMSON, *THE REALM OF RIGHTS* (1990).

44. See E. ALLAN FARNSWORTH, *CONTRACTS* § 9.6 (1982).

is a matter of risk assignment; one must show that one ought not to bear the risk of loss from the contingency.⁴⁵

But perhaps the current law should be different. Suppose that if I stopped selling to you, I could sell at a considerable profit—such a large profit that I could pay you whatever damages you sustained by my breach of contract and still make money. So it would be wealth-maximizing for me to stop deliveries to you. So why shouldn't I? "Because you promised" is one answer. But did I *promise*—promise in the sense that bars me from considering just breaking even as a reason to break my promise? It is certainly possible for parties to enter a contractual relationship which does not have this character. We might—explicitly or implicitly—agree that I should, in the above situation, sell for more money and share some of the additional profit with you by way of compensation for my breach. I will not try to resolve these issues. I assume that contracts involve promises.⁴⁶

Given that they do, contracts certainly do exclude certain reasons, including reasons of background political morality. But we have also seen that contracts are not an *absolute* bar to such considerations. They are a barrier to them, a barrier that one can overcome in the appropriate case. *Moreover, the contractual exclusion of such reasons is no bar at all in using them in framing default rules.* Promising excludes, to a certain extent, certain sorts of *excuses*. This is what the above reflections show. They do not show that promising excludes using political morality to figure out what counts as *compliance* with contractual obligations. What counts as compliance is our typical concern in framing default rules. In the *Hadley* rule, for example, we want to know what contractual obligation the Hadleys have to convey the relevant information.

VI. FAIRNESS

This discussion of background political morality brings us back to our earlier question: what is the political obligation that grounds

45. But then why have the first condition at all? Why not simply say that, where keeping the promise will impose a loss, one may be excused from performing if one can show that one should not bear the risk of that loss? Clearly, impracticability doctrine does *not* work this way. Arguments about risk assignment are not relevant unless one can meet the threshold condition of showing an appropriate unexpected contingency. Why should the doctrine have this structure? See Richard Warner, *Incommensurability as a Jurisprudential Puzzle*, 68 CHI-KENT L. REV. 147 (1992).

46. I am indebted to Richard Craswell for raising this objection.

default rules? Burton contends that, in entering the contract, the parties become subject to a general commitment to coordinate, applicable in the range of default rules.⁴⁷ But how do we show that entering a contract places one under the relevant "general commitment to coordinate?" Burton argues that this follows from the "fairness principle."

Burton derives his fairness principle from Rawls. Rawls explains that the

principle holds that a person is required to do his part as defined by the rules of an institution when two conditions are met: first, the institution is just . . . ; and second, one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests. The main idea is that when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission.⁴⁸

Burton argues that

contractual obligations can fit well with the principle of fairness. Consider its two main conditions. First, is the institution just? This depends on whether the law of contracts contains suitable rules for contract formation, including laws invalidating contracts infected by fraud, duress, incapacity, illegality, unconscionability and the like, together with legitimate rules of performance and enforcement. . . . Second, does a contract party voluntarily accept the benefits of the practice of promising or take advantage of the opportunities it offers to further his or her interests? A contract seems a paradigm case of the right kind of benefit-taking. A contract is a mutually advantageous cooperative venture according to rules, by which each party voluntarily restricts his or her liberty in ways necessary to yield advantages for both parties. Therefore, each party, having submitted these restrictions, has a right to a similar submission by the other party, who has benefitted from the scheme.⁴⁹

The *Hadley* rule illustrates the idea. The Hadleys and the shipper enter into (what they intend to be) a "mutually advantageous cooperative venture according to rules, by which each party voluntarily restricts his or her liberty in ways necessary to yield advantages for

47. Burton, *supra* note 1, at 160.

48. JOHN RAWLS, A THEORY OF JUSTICE 111-12 (1971).

49. Burton, *supra* note 1, at 160-61.

both parties.”⁵⁰ One of the liberty-restricting rules is the *Hadley* rule. The shipper submits to this rule by entering the contract, and he therefore has a right to similar submission by the Hadleys, who have “benefitted from the scheme.”⁵¹ This is why the *Hadley* rule is binding on the Hadleys.

Rawls’s fairness principle is open to serious objections—as Burton is well aware. But he argues that—suitably qualified—the principle is valid. It holds when, in addition to the justness of the institution of contract law, three conditions are fulfilled: (1) the parties are voluntarily engaged in a cooperative activity; (2) lack of cooperation will harm the parties; and (3) the costs of cooperation do not exceed its benefits. I will not discuss these additional conditions in any detail.⁵² What is important is what is *missing*: consent is missing. For example, suppose the Hadleys had no awareness of the *Hadley* rule and would have contracted around it if they had been aware of it. So they did not *explicitly* consent to the rule; and we cannot attribute “hypothetical consent” to them (since, hypothetically, had the issue been raised, they would *not* have consented). Of course, we might nonetheless regard their entering the contract as constituting *implicit* or *tacit* consent to the regime of contract law, a regime that includes the *Hadley* rule. Burton, however, thinks that the fairness principle alone, without any appeal to consent, explains why the *Hadley* rule binds the Hadleys.

Is he right? I do not think so. Consider a non-legal analogy.⁵³ Suppose you live on a street with six other neighbors. The seven of you form a neighborhood watch group to protect yourselves against crime. While you are out of town, the remaining six meet and decide that each person in the neighborhood watch group shall use his stereo to broadcast music throughout the neighborhood from three p.m. to seven p.m. Each person takes a day. Sunday is assigned to you in your absence. When you return on Monday, you enjoy the six days of music. But on Sunday you refuse to play music on your stereo. Are

50. *Id.* at 161.

51. *Id.*

52. The third requirement may seem problematic; it depends on what counts as “cooperation.” If, for example, paying damages counts as cooperation, the cost of cooperation may exceed its benefits. But let us put this to one side.

53. The example is adapted from ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 93-94 (1974). For discussion of such examples, see George Klosko, *Presumptive Benefit, Fairness, and Political Obligation*, 16 PHIL. & PUB. AFF. 241 (1987); Thomas D. Senor, *What If There Are No Political Obligations? A Reply to A.J. Simmons*, 16 PHIL. & PUB. AFF. 260 (1987); A. John Simmons, *The Anarchist Position: A Reply to Klosko and Senor*, 16 PHIL. & PUB. AFF. 269 (1987).

you obligated to do so? You might be. Suppose that, when you and your neighbors formed the cooperative association, the group adopted by-laws that allow a majority to adopt further rules—like the music rule—binding on all members. But here, of course, you explicitly consented to such legislative powers when the group formed. Suppose instead that all you consented to was to watch the neighborhood and report suspicious activity. Does the fairness principle obligate you to play music on Sunday? Certainly not. The law recognizes that this is not the case in that the restitution suit against you by your neighbors would certainly fail. But the point here is not primarily legal; rather, the point is that you are not *morally* obligated. Otherwise others could *always* limit one's freedom—obligate one in various ways—simply by gratuitously bestowing benefits on one, and that certainly is not true.

The problem for Burton is that it follows from the fairness principle—even with Burton's qualifications—that you are obligated in the neighborhood case. The neighborhood watch organization is, we may assume, a just institution, and: (1) the members of the organization are voluntarily engaged in a cooperative activity; (2) lack of cooperation will harm the parties; (3) the costs of cooperation do not exceed its benefits. So the fairness principle obligates you to play music on Sunday. This shows that the fairness principle, even with Burton's qualifications, is not a valid principle, and so we cannot use it to explain contractual obligation.

So what is the explanation? The natural alternative is to argue that the Hadleys, for example, *consented* to be bound by the rules that define the regime of contract law. Burton himself at times comes close to endorsing this position, for at times he seems to view contracting as sufficient for consent to the obligation of coordination. As he says in a passage quoted earlier:

Like the implied covenant of good faith, *the general obligation to coordinate is made whether or not the parties have it in mind. It is what their contract means even when it is not what they meant.*

. . . Thus, the parties to a contract for goods must mean to tender and receive delivery at the same place, even if no such thought occurred to either. The parties' actions in contracting as they did would be senseless if this commitment were not entailed. *The covenant of fair dealing generalizes the parties' specific commitments to coordinate into an abstract commitment to coordinate,*

*applicable also in the range of default rules when a problem does materialize.*⁵⁴

I will not pursue these issues further.

VI. CONCLUSION

Instead, I want to emphasize the breadth of Burton's conception: we began with game-theoretic considerations about coordination and ended with issues in political philosophy. This is no accident, for, as Burton makes plain, legal requirements require a ground in political obligation. Law is a normative endeavor; to ignore this is to delude ourselves to our detriment. One of the very many merits of Burton's excellent essay is that it shows how issues about coordination combine with issues of political philosophy into a unified view of contract law.

54. Burton, *supra* note 1, at 161-62 (emphasis added).