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Response

Understanding Legal Redundancies

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Introduction

Our legal system has many redundancies, but until very recently it had no theory that explains them.

Now it has such a theory. Professor John Golden wrote an important article that identifies, categorizes, and explains overlapping rules and institutional practices that pervade our legal system.[1] Professor Golden's account of legal redundancies makes a significant contribution to legal theory along a number of dimensions. Those dimensions include common law, statutory interpretation, and economic analysis of the legal system.

In this Response, I make three points about Professor Golden's theory of legal redundancies after outlining it in Part I. In Part II, I supplement this theory by pointing to and analyzing a puzzling redundancy problem in evidence law. In Part III, I identify a redundancy phenomenon in the constitutional doctrine of equal protection and offer some initial thoughts about its implications for constitutional theory. In Part IV, I introduce an important "equality constraint" for redundancies that function as backup protections against errors in civil cases. I argue that lawmakers will do well not only to set up legal backups when those are necessary, but also to distribute them equally across plaintiffs and defendants. This discussion is followed by a short conclusion.

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1. John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEXAS L. REV. 629 (2016).

I. Professor Golden's Theory

Professor Golden demonstrates that our laws repeat themselves in many different contexts. Those contexts include constitutional law, contracts, torts, patents, and appellate review. Some of those repetitions and overlaps—identified as redundancies—operate on the law's surface and are easily detectable. Others are hidden, and Professor Golden uncovers them by applying high erudition and rigorous analysis. Critically, he demonstrates that many legal redundancies are designed, rather than accidental. From a purely conceptual viewpoint, many rules and practices say the same thing. Yet, they are not redundant operationally. Rather, they reduce the probability of error in people's decisions that follow and apply the law.

Overlapping rules and practices thus make our legal system work better under constraints of time and resources. As Professor Golden shows, these rules and practices perform the same role as backup mechanisms in mechanical, electrical, and other engineering systems.[2]

This insight is indisputably correct. Backups that appear as redundancies pervade our ordinary lives and have even been observed in some biological organisms.[3] When I repeatedly tell my nine-year-old daughter, while she is playing in the sun, that she must drink water to avoid dehydration, I am being a tad tedious and possibly overprotective. Yet, neither of my instructions is redundant. Each of them increases the probability that my daughter will follow one of them and get hydrated. The more overlapping instructions I give, the higher the probability that I will have my daughter take a break from her play and drink water.

This mechanism is identical to multiple defenses that exist in contract law. Consider a company facing a breach of contract suit. The suit accuses the company of failing to deliver its product on time. The company responds that it could not deliver the product on time because unexpected military activities in the Middle East blocked its access to oil supplies. Based on this fact, the company raises two overlapping legal claims: a claim that its nonperformance did not amount to a breach under the contract's proper interpretation, and a claim that the nonperformance constituted an excusable breach under the "impossibility" defense.

According to Professor Golden's theory, making such overlapping legal claims available to the company and similarly situated defendants has a purpose.[4] Overlapping claims protect their holders against bad choices that attorneys make in choosing litigation strategies and against errors in

2. *Id.* at 632.

3. *See* J. Reuveni et al., *High Ambient Carbon-Dioxide Does Not Affect Respiration by Suppressing the Alternative Cyanide-Resistant Pathway*, 76 ANNALS BOTANY 291, 294 (1995) (identifying otiose respiration in plants).

4. Golden, *supra* note 1, at 636.

courts' and jurors' decisions. The company's failure to perform the agreement may not constitute a breach, but the court may interpret the agreement wrongly and hold the company in default. Under such circumstances, the company will still have a fallback or backup: the court may grant it the impossibility defense, which will keep it out of harm's way. Hence, the company's claims—nonbreach and impossibility—are only redundant conceptually, but not operationally.

Not all redundancies are good, however. Professor Golden demonstrates that a legal system might develop operational redundancies that impose unnecessary social costs.[5] Moreover, from a societal welfare standpoint, some legal backups may be more costly than beneficial. Courts may misinterpret a backup provision as a freestanding entitlement or duty and assign it a broader meaning. This meaning will expand the scope of the underlying duty or entitlement for no good reason.[6] Courts consequently must be very discriminate in creating, upholding, and avoiding legal redundancies. They should create and uphold redundancies that improve the functioning of the legal system. When the cost–benefit tradeoff shows no such improvement, courts will do well to avoid the redundancy.[7] This is the main takeaway from Professor Golden's article, which he supplements by a number of revealing examples and an illuminating analysis of patent law as a whole.[8]

Professor Golden's discussion of patent law is most illuminating: it shows how courts artificially expand patents' scope by combining the claim-differentiation doctrine with the anti-redundancy canon, imported (without much thought) from the interpretation of contracts and wills.[9] This combination creates a strong (but still rebuttable) presumption "that each claim in a patent has a different scope."[10]

Under this presumption, for example, courts would differentiate between "a nail" and "a metal nail"—expressions that appear in two separate claims delineating the scope of the patentee's right. As Professor Golden explains,

> In the presence of the second claim and the doctrine of claim differentiation . . . the addition of the term "metal" in the second claim generates a presumption that the "nail" of the first claim is not necessarily metal because otherwise the two claims will have identical scope. As a result of this presumption, one might more likely conclude that the nail of the first claim might be made of

5. *Id.* at 647–49.

6. *Id.* at 672.

7. *Id.* at 658.

8. *Id.* at 673–99.

9. *Id.* at 653.

10. *Id.* at 655 (quoting Dow Chem. Co. v. United States, 226 F.3d 1334, 1341 (Fed. Cir. 2000)).

> wood, ceramic, or a semiconductor as an alternative to metal. In short, the presence of the second claim and the doctrine of claim differentiation together make it more likely that the first claim will be read more broadly.[11]

This overbroad interpretation of the patent's scope is detrimental to society: it gives patent-holders an undeserved power to veto the production and commercialization of new technologies.[12]

Professor Golden's theory of legal redundancies also draws an important distinction between formulaic and institutional overlaps (while using a slightly different taxonomy).[13] Formulaic (or linguistic) overlaps are present in statutes and common law doctrines that *say* the same thing. Institutional overlaps are present in the operational design of legal institutions (e.g., trial and appellate courts) that *do* the same thing.[14] Formulaic overlaps can be illustrated by "unconscionability" and "bad faith" defenses of contract law. By asserting these defenses, contracting parties can rescind their agreement based on the same underlying facts.

For a paradigmatic example of an institutional overlap, think of our federalist system of governmental and adjudicative checks and balances. As part of that system, courts, government agencies, and legislators—both state and federal—often make decisions that duplicate each other. The checks and balances system was designed purposefully and is widely considered indispensable despite its operational costs and gridlock potential.[15] Formulaic overlaps, on the other hand, are not always necessary and not always intentionally designed. On the positive side, they create backups that minimize the consequences of errors in court decisions. On the negative side, they impose additional costs on the legal system and create the potential for undue expansions of individuals' duties and entitlements.[16]

As far as positive law is concerned, Professor Golden shows that courts' treatment of redundancies has been a one-way ratchet.[17] Our courts have developed a strong (although defeasible) interpretive presumption against redundancy.[18] Based on that presumption, courts systematically generate two anomalies that distort the path of law. By artificially assigning different scopes to backup rules, they inflate the entitlements protected by those rules. The underlying entitlements consequently acquire

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11. *Id.* at 681.
12. *Id.*
13. *Id.* at 649.
14. *Id.* at 647.
15. *Id.* at 648.
16. *Id.* at 649–50.
17. *Id.* at 655–56.
18. *Id.* at 655.

broader meanings than they ought to have.[19] By interpreting overlapping rules as different, courts also erode those rules' ability to function as backups.[20] This interpretation weakens the rights holders' protection against courts' erroneous failures to recognize their entitlements.

II. Redundancies in the Law of Evidence

Our evidence law includes many presumptions that tell jurors how to decide uncertain issues of fact. Many of those presumptions are mandatory rather than discretionary. Oftentimes, they tilt the scales in favor of the regular course of events by shifting the burden of persuasion to the party whose claims run against the regular pulse. Consider the standard presumption that an attorney acts with the authority of her client.[21] To convince the fact finder that the attorney in question acted outside the scope of her authorization, the party opposing the presumption must prove this scenario to be more probable than not. To that end, the opposer calls the attorney's former client to testify that he did not authorize the attorney to do what she did on his behalf. The fact finder starts evaluating this testimony with suspicion because attorneys do not normally deviate from their clients' directives. The fact finder subsequently hears the attorney's story which attests that the client authorized all her actions on his behalf. The fact finder starts evaluating the attorney's testimony by taking it to be presumptively credible because it conforms to the normal course of events. After considering the rest of the evidence, the fact finder concludes that the client's and the attorney's stories are equally probable. Under the presumption of authority, the fact finder must now adopt the attorney's account of the events and base its decision on that account. The fact finder must follow this mandate because attorneys normally do not deviate from their clients' authorization.

This mandate distorts fact-finding because the fact finder has already taken into account the probabilities reflecting the regular course of events. By taking these probabilities into account, the fact finder has already added credibility to the attorney's testimony and discounted the credibility of the client's testimony. Doing so once again on the basis of the same information about the regular course of events is unjustified.

This and similar presumptions[22] engender redundancy that Professor

19. *Id.* at 672.

20. *Id.* at 673.

21. *See* Tom R. Mason, *The Little Rule that Never Was: Mississippi Rule of Evidence 301 Presumptions in Civil Actions and Proceedings*, 70 MISS. L.J. 743, 780 (2000) (mentioning the attorney authorization presumption that requires rebuttal by a preponderance of the evidence as part of a comprehensive doctrinal analysis). For important policy analysis of civil presumptions that finds many of them redundant both conceptually and operationally, see generally Ronald J. Allen, *Presumptions in Civil Cases Reconsidered*, 66 IOWA L. REV. 843 (1981).

22. *See* Mason, *supra* note 21, at 771–72.

Golden's theory would ban, and properly so. Our jury system is premised on the idea that jurors evaluate evidence by applying common knowledge that consists of regularities. If so, when jurors reach an impasse, which brings into play the burden of persuasion, they must have already processed the relevant regularities in evaluating the parties' evidence. A mandatory regularity-based presumption thus forces jurors to count the same regular course of events twice. This double counting—the bane of legal redundancies—seriously prejudices the party with the burden of persuasion. This party's evidence, which stands for what it stands without the presumption, has already been discounted by the jurors' common knowledge of regularities. Further discounting of that evidence and the probabilities to which it gives rise on account of the same regularities is unjustified.[23]

III. Redundancies in Constitutional Law

Bolling v. Sharpe[24] is probably the most important constitutional decision that rejects the anti-redundancy canon and embraces the backup type of redundancy. In this well-known decision, the Supreme Court banned racial public school segregation in the District of Columbia by reading its historic holding in *Brown v. Board of Education*[25] into the Constitution's Fifth Amendment that was—and still is—lacking the words "equal protection" or "equality." The Court held that citizens' entitlement to due process, guaranteed by the Fifth Amendment, incorporates equal protection as well.[26]

As Chief Justice Warren explained on behalf of the unanimous Court,

> We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which

23. Professor Vaughn C. Ball first noticed this anomaly in his influential article. *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 817–18 (1961) ("The risk of non-persuasion is allocated (a great part of the time, at least) upon the basis of the probability of the existence of the fact in the run of cases of the particular kind, absent any specific evidence. Since the evidence and the jury's consideration of it have come to naught, we will make the fewest mistakes if we let the case fall back into the general class, to be decided on those original probabilities. But the jury, unless it lacks the common knowledge we ascribe to it by definition, has begun its own deliberation with those probabilities in mind, and it is the combination of both those and the probabilities drawn from the specific evidence, that the jury says are at a balance. If we then use the initial probabilities to remove the balance, we are in some sense counting them twice." (footnote omitted)).

24. 347 U.S. 497 (1954).

25. 347 U.S. 483 (1954).

26. *Bolling*, 347 U.S. at 499–500.

> applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases.[27]

Scholars are divided over whether this holding had a basis in constitutional precedent.[28] The Supreme Court, however, has reaffirmed *Bolling*'s understanding of due process not only in the context of equal protection,[29] but also in connection with the criminal defendants' Sixth Amendment right to confront witnesses.[30] Specifically, the Court opined that inculpatory hearsay evidence is constitutionally suspect for two reasons rather than one: such evidence raises confrontation concerns in that it curtails the defendant's right to cross-examine adverse witnesses, and it also potentially violates due process in that it may unduly increase defendants' exposure to the risk of erroneous conviction.[31]

Viewing due process rights as backups has far-reaching consequences for constitutional law. Under the backup theory, due process rights are designed to cover the space that specific constitutional entitlements left unattended. Put differently, the backup theory attributes to the framers an admission of their inability to project into the future and the consequent decision to authorize the Supreme Court to develop new constitutional rights that bear resemblance to the entitlements enshrined in the Constitution's text.[32]

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27. *Id.* at 498–99.

28. Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 496 (2013) (offering an insightful and updated analysis of the *Bolling* debate and attesting that most constitutional scholars believe "that the Court's holding was unsupportable on originalist grounds"). *Compare* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 32 (1980) (rejecting the idea that due process incorporates equal protection as a matter of text and history), *and* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 409 (1995) (arguing that *Bolling* departed from the accepted meaning of due process), *and* Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 997 (2006) (describing *Bolling*'s reasoning as "less than satisfactory"), *with* David E. Bernstein, Bolling, *Equal Protection, Due Process, and* Lochner*phobia*, 93 GEO. L.J. 1253, 1253–55 (2005) (arguing that *Bolling* had support in the Supreme Court's prior interpretations of due process).

29. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

30. *See* Michigan v. Bryant, 562 U.S. 344, 370 n.13 (2011).

31. *Id.* ("Of course the Confrontation Clause is not the only bar to admissibility of hearsay statements at trial. State and federal rules of evidence prohibit the introduction of hearsay, subject to exceptions. Consistent with those rules, the Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission of, for example, unreliable evidence.").

32. This view aligns with Jack Balkin's "living originalism"—a method of constitutional interpretation that combines the Constitution's text with its underlying principles. *See generally* JACK M. BALKIN, LIVING ORIGINALISM (2011).

This interpretation assigns the Due Process Clause of the Fifth and the Fourteenth Amendments the role of the residual category in a legal catalog.[33] Whether this interpretation of the Constitution is plausible from a historical point of view is a separate question that lies beyond the ken of my expertise. Conventional wisdom holds that this interpretation does not reflect the historical meaning of due process.[34]

IV. Equalizing Backups

In this Part, I address the potential problem with error-minimizing backups in civil litigation. When these backups do not protect plaintiffs and defendants equally, overlapping claims and defenses are bound to create distortions.

To see why, consider plaintiff, P, who files a suit against defendant, D. The suit faces two overlapping defenses, bad faith and unconscionability. In this and similar suits, D's backup advantage would have been of no consequence if the courts were omniscient. But the court, like all human courts, makes mistakes. D's backup advantage consequently gives her a greater immunity against the court's errors. When the court erroneously strikes out D's bad faith defense, it might still keep D out of harm's way by granting her the unconscionability defense. Plaintiff P, for his part, must convince the court to deny both defenses asserted by D. By erroneously granting one of those two defenses, the court will doom P's meritorious suit. As a result, P's chances of losing the case undeservedly are much higher than D's. Any rate of adjudicative errors—random and completely unbiased—increases P's prospect of losing the case while decreasing it for D, regardless of whether her defenses are rightful.[35]

Assume for simplicity that P sues D for $1,000,000 in damages allegedly resulting from D's breach of contract and that the suit is meritorious. To defeat the suit, D raises the bad faith and unconscionability defenses, as indicated in the preceding paragraph. After analyzing the evidence and applicable legal rules, P forms an estimate that he should prevail on both issues, subject to a 20% chance that the court will reach a mistaken decision on one of D's defenses. For P, the expected judgment would consequently equal $640,000 (80%×80%×$1,000,000). If P is rational, he would accept $640,000 in exchange for the removal of his unquestionably meritorious suit against D. D's alternative defenses thus reduce the value of P's suit by $360,000 ($1,000,000–$640,000).

Now assume that D's defenses are meritorious and that she deserves to

33. For foundational work on legal catalogs, see Gideon Parchomovsky & Alex Stein, *Catalogs*, 115 COLUM. L. REV. 165, 194 (2015).

34. *See* ELY, *supra* note 28, at 32.

35. This structural bias was originally identified in Jef De Mot & Alex Stein, *Talking Points*, 2015 U. ILL. L. REV. 1259, 1261–62.

win the case. Similarly to the previous scenario, D forms an estimate that she should successfully establish both defenses, subject to a 20% chance that the court will reach a mistaken decision on one of them. For D, the expected judgment would then equal $40,000 (20%×20%×$1,000,000). The prospect of adjudicative error consequently increases D's expected payout from $0 to $40,000. If D is rational, she would refuse to pay P more than $40,000 for the suit's removal.[36]

The defendant's backup advantage thus not only helps her, but also unfairly reduces the value of the plaintiff's suit. The overlap between our tort system's "duty of care" and "proximate cause" requirements[37] illustrates this problem. Under the proximate cause requirement, it is not enough for a plaintiff to prove that the defendant's negligent action caused her damage. The plaintiff also must establish that the defendant's failure to reduce the probability of her damage was among the reasons that make the defendant's action negligent as a matter of law. When she is unable to show that her damage tracks the defendant's negligence in this way, she should recover no compensation. Consider the following scenario that appears in the *Third Restatement of Torts*:

> Richard, a hunter, finishes his day in the field and stops at a friend's house while walking home. His friend's nine-year-old daughter, Kim, greets Richard, who hands his loaded shotgun to her as he enters the house. Kim drops the shotgun, which lands on her toe, breaking it.[38]

Assume that Kim fails to make the requisite proximate cause showing: her injury is not related to the shooting risk to which she was negligently exposed by Richard.[39] However, the judge mistakenly denies Richard's motion for a direct dismissal of Kim's suit. Although this mistake hurts Richard, it does not yet allow the case to proceed to trial because Richard can still ask the judge to dismiss Kim's suit on account of her failure to establish a duty of care. Specifically, Richard can argue that he owed Kim no duty to protect her toes against falling objects, and this argument might carry the day. This argument overlaps Richard's denial of proximate cause, but it still gives him another chance with the judge, who may get it right this time; should Richard lose once again, it would allow him to appeal an unfavorable verdict on two grounds instead of one.

Assume now that Kim deserves to win this case.[40] To achieve this

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36. These examples are adapted from De Mot and Stein. *Id.* at 1261–62.

37. *See generally* DAN B. DOBBS, THE LAW OF TORTS § 180–82 at 443–51 (2000) (describing the proximate cause and duty requirements and how they relate to each other).

38. RESTATEMENT (THIRD) OF TORTS § 29 cmt. d, illus. 3, at 496–97 (describing liability for physical and emotional harm).

39. *Id.*

40. As was suggested by Ariel Porat, *Misalignments in Tort Law*, 121 YALE L.J. 82, 126 & n.127 (2011).

outcome, she needs to prevail on both duty and proximate cause issues. The fact that these issues overlap each other will surely play into her hands, but she is still not as well positioned as Richard to protect her entitlement against errors that the judge and, subsequently, the jurors might make. Lawmakers will therefore do well to formulate rights, duties, and obligations in a way that gives plaintiffs and defendants the same number of backups.[41]

The point I am making here proceeds on two standard assumptions. First, costs of error in civil litigation are symmetrical.[42] Second, errors that courts occasionally make are random rather than skewed or biased. When a lawmaker has a good reason to give plaintiffs or defendants a stronger protection against errors at their opponents' expense, its backup rules need not be equal for both sides. The preferred category of litigants should receive more backups than their opponents. Backup rules should always reflect the lawmaker's preference as to how to allocate the cost of anticipated errors in the application of the law.

Conclusion

John Maynard Keynes famously noted that "the difficulty lies not so much in developing new ideas as in escaping from old ones."[43] Professor Golden's meticulous deconstruction of the anti-redundancy canon, deeply entrenched in our understanding of the law, must have followed the same intuition. His redundancy theory is the logical follow-up of that meticulous deconstruction. Sometimes law repeats itself for a good reason and at other times it does so for a bad reason. Professor Golden's theory tells us how to separate between these two phenomena. This theory has important policy implications for our entire legal system and especially for patent law. My refinements (hopefully, not redundant) aim at supplementing this insightful theory and promoting its discussion.

41. For possible solutions to this problem, see De Mot & Stein, *supra* note 35, at 1276–86.

42. *See* ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 219–25 (2005) (explaining the symmetrical cost assumption and citing relevant literature).

43. DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 23 (1993) (quoting Keynes' adage).