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Linkage Arguments For *and* *Against* Rights

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Abstract—This article is about relations of support and conflict within systems of fundamental legal rights—and the arguments for and against rights that those relations make possible. Justificatory linkage arguments defend controversial rights by claiming that they provide very useful support to the realisation of well-accepted rights. This article analyses such arguments in detail and discusses their structures, uses and pitfalls. It then shows that linkage arguments can be used not just to defend rights, but also to attack them. When rights conflict—whether severely or weakly, logically or practically—negative linkage arguments attacking them can be based on the trouble they make for other rights. Many examples of conflicts of rights are provided. Negative linkage arguments provide reasons for rejecting, repealing or trimming the criticised right. Such arguments are already in regular use, but their close relation to justificatory linkage arguments has not been recognised.

Keywords: Conflicts of rights, fundamental legal rights, human rights, indivisibility, linkage arguments, realisation of rights, realisation sensitivity, Henry Shue, support relations among rights.

1. *Introduction*

The success or failure of legal rights often depends on their relations with their neighbours, that is, other norms in the same legal system. When rights are good neighbours, they support and fortify each other. When rights are bad neighbours, they contradict, limit and undermine each other. And perhaps some rights are like neighbours who keep to themselves, are self-sufficient and neither harm nor help.

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This article is the story of these relations among rights—and their argumentative uses. One familiar way of arguing from one right to another claims that the realisation of a well-accepted right is impossible without the realisation of a controversial right. I call such arguments 'linkage arguments'.[1] Henry Shue was a pioneer in the use of such arguments. He used them to defend rights to security and subsistence.[2] This article explains linkage arguments in detail and illustrates their uses and pitfalls. It also suggests understanding linkage arguments as having the ability not just to defend rights, but also to attack them.

The kinds of legal rights I am mainly concerned with here are fundamental legal rights. These are especially important legal rights that appear in constitutions, bills of rights, statutes and international human rights treaties.[3] Examples are rights to freedom of religion, due process and education. The framework offered also applies to norms that are not legal rights, such as legal prohibitions, duties and goals. And it can be applied as well to moral rights and to cases in which one norm is moral and the other is legal.

Linkage arguments defend controversial rights by claiming that they contribute greatly to the success of other rights. For example, having well-realised due process rights, such as guarantees of habeas corpus, assistance of counsel, fair public trials and appeals of convictions, can be defended by showing the positive contribution these rights make to the effectiveness of rights to fundamental freedoms, such as the rights to expression and assembly. Due process rights make the criminal law system, with its police and prisons, less dangerous. Without effective rights to fair criminal procedures, oppressive governments can easily neutralise critics and protesters by simply throwing them in jail with no trial.

Linkage arguments have been widely used in the last 70 years to defend rights such as rights to subsistence and healthcare. As noted earlier, Shue claimed that a well-realised right to goods necessary for survival and functioning provides such valuable and indispensable support to the realisation of other rights that even if a person endorses only one right, such as the right against torture, that commitment alone yields very strong reasons to endorse the right to subsistence. Shue argued that at least two rights, subsistence and security, play such important supporting roles for other rights that without their full realisation no other rights can be fully realised.[4]

[1] James Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights' (2008) 30 Human Rights Quarterly 984.

[2] Henry Shue, *Basic Rights* (Princeton UP 2020, first published 1980).

[3] On the concept of a right, see Leif Wenar, 'Rights' in *The Stanford Encyclopedia of Philosophy* (2020) <https://plato.stanford.edu/archives/spr2020/entries/rights> accessed 15 April 2021.

[4] A similar argument for economic and social rights was already circulating at the time Shue wrote *Basic Rights*. The 1968 Proclamation of Teheran asserted that 'Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible': United Nations, *Final Act of the International Conference on Human Rights* (1968) Document A/conf.32/43, art 13.

Linkage arguments can and currently do play an additional role that has been insufficiently recognised, namely *attacking* proposed or established rights. Besides support relations, systems of functioning legal rights contain relations of conflict and undermining. Conflicts between rights occur when one right contradicts another, makes the other's functioning more difficult, or gobbles up resources that the other right needs. If a controversial right severely and frequently conflicts with a well-accepted right, that conflict can provide a strong reason for rejecting or trimming the controversial right. Instead of being based on a support relation, these arguments are based on relations of conflict. They are linkage arguments in attack mode. Let us call them *negative linkage arguments* (NLAs).

For present purposes, it is important to view legal rights as including their essential implementation measures. These measures are actions, policies and institutions that are used to protect and fulfil rights. They include legal systems with law makers, laws, courts, judges and law enforcers. Having appropriate implementation measures is one of the main things that transforms paper rights into living and functioning legal rights. Implementation measures contribute heavily both to support and conflicts among rights. Even when two rights have harmonious content, their implementation measures can conflict.

Section 2 of this article explains *justificatory linkage arguments* (JLAs), their uses and some common errors in their use. The third section explains NLAs. Since NLAs are based on conflicts, a view of how functioning legal rights can contradict and undermine each other is offered. This account of conflicts of rights is broad; it covers not just cases where one right contradicts another, but also cases in which rights compete for resources and undermine each other. The concluding section uses what was learned about the complex roles of NLAs to refine and expand our understanding of the work that JLAs can do.

It is not the purpose of this article to either oppose or advocate the use of linkage arguments. My personal preference is to use linkage arguments mainly as supplements to substantive normative arguments that appeal to underlying values and norms. There are contexts, however, in which linkage arguments may appropriately take a leading role. For example, defenders of environmental rights as human rights have relied heavily on linkage arguments.[5]

2. *Justificatory Linkage Arguments*

In JLAs, one *well-accepted right* (or group of rights) is said to benefit from the support of another right (or group of rights). The other right, the *defended* or

[5] John Knox, former UN Special Rapporteur on Human Rights and the Environment, wrote: 'The interdependence between human rights and the environment has become undeniable. A healthy environment is necessary for the full enjoyment of human rights, including the rights to life, health, food, water and development' (2014) <https://www.universal-rights.org/blog/its-time-we-all-recognize-the-human-right-to-a-healthy-environment> accessed 15 April 2021. See also John Knox 'Constructing the Human Right to a Healthy Environment' (2020) 16 Annual Review of Law and Social Science 79.

supporting right, is thought to be controversial and in need of defence. JLAs allege a positive linkage between the two rights; they assert that the operation of the defended right provides, or would provide if enacted and realised, valuable support to the success of the well-accepted right. Linkage arguments seem simple, but it will become clear as we proceed that they are surprisingly tricky and involve many more issues than first appear.

JLAs have been used to defend a variety of legal rights, including subsistence, security, education, healthcare, access to courts, voting, economic liberties and environmental rights. JLAs can be used at any point in the life of a right. These occasions include when a bill of rights is being written or amended, when judges are debating forward steps in the evolution of a right, when calls are made for a right's content to be narrowed or expanded, when there are political pressures to abolish a right or cut its implementation measures and when a right that has fallen into desuetude is being resurrected by judges.

The idea of realising a right covers the various measures that make rights successful in actual operation. These include acceptance and use of the right by political elites and the public; implementation measures of various sorts, including complaint procedures; effective law enforcement; and monitoring of compliance with the right by public officials, journalists, activists, non-governmental organisations, and national and international courts. As mentioned above, Shue claimed that realising a right to subsistence is indispensable to the full realisation of all other rights. In conversation with a person who endorses the right to vote, Shue might have offered the following JLA in defence of the right to subsistence:

> *Premise 1*: You accept the right to vote and endorse its realisation.
>
> *Premise 2*: There is a very strong positive linkage from realising the right to subsistence to the realisation of the right to vote. The support provided by the former right is indispensable to the successful realisation of the latter.
>
> *Premise 3*: A person who accepts and endorses the realisation of a particular right, such as the right to vote, has a very strong reason to endorse the realisation of every component and means necessary to the realisation of that right.
>
> *Conclusion*: You have a very strong reason to accept the right to subsistence and endorse its realisation.

As this example illustrates, a typical JLA has three premises. The first premise identifies a right that is thought to be *well accepted*. It assumes or claims that this right is uncontroversial, at least among people in the target audience. The second premise—the *linking premise*—alleges a substantial positive connection between the defended right and the well-accepted right. Controversy about the soundness of linkage arguments usually focuses on

this premise.[6] The strongest linkage is when the defended right's realisation is not merely useful, but is actually indispensable to the well-accepted right's success. In such a case, the supporting right is so useful and so greatly needed that it is logically or practically *impossible* to realise the well-accepted right without it. A strong linkage of this sort can yield a very strong reason to recognise and realise the supporting right (or continue doing so if the right is already established). A less strong but still important form of linkage is being very useful to the well-accepted right's success. A weaker linkage based on substantial usefulness can yield a good reason to recognise and realise the supporting right.

The third premise of a JLA sets out a principle of rationality. This principle is that a person who endorses and seeks to achieve an end (such as the success of the well-accepted right) has a very strong, or at least good, reason to endorse and pursue all the components and means necessary to achieving that end (such as the realisation of the supporting right). As an analogy, if one seeks to have a working office computer, one has a very strong reason to get a screen (component) and a source of electricity (means).

The conclusion of a JLA, as I have formulated it, is that there is good reason to enact and realise a right. JLA's can also be used to defend the expansion of a supporting right, improved implementation measures, better funding for its realisation or reform of social and political conditions that inhibit its success.

JLAs frequently lead to disputes about the actual or preferable content of rights. Someone who dislikes the conclusion of a JLA can argue that it is based on an overly broad conception of the well-accepted right and that a better conception of that right's content would be narrower and consequently not need all of the support the disliked conclusion presupposes.

Claims of support between rights can be applied to the past, the present, and both probable and hypothetical futures. In the past tense, we can say, for example, that one right failed because it lacked support from some other right that was poorly realised or not realised at all. In the present tense, we can say that one right is currently not succeeding because it lacks support from some other right. In a conditional tense, we can say that a newly established right will succeed only if it gets adequate support from some other right—and go on to use a JLA to call for changes that will ensure such support. And in a future tense, we can say that a newly established right will likely succeed because it will get the support that it needs from some other right that is well realised

[6] For an extended evaluation of the usefulness of the right to healthcare to other rights, see James Nickel, 'Can a Right to Health Care Be Justified by Linkage Arguments?' (2016) 37 Theoretical Medicine and Bioethics 293.

and has appropriate content. These temporal possibilities also apply to conflicts of rights and NLAs.[7]

JLAs are philosophically shallow because they simply start by identifying a right that is taken to be widely accepted. They need not appeal to underlying normative grounds for the well-accepted right. The shallowness of linkage arguments makes them less interesting to theorists but useful in defending rights to people who lack patience for complicated moral and philosophical arguments. It is possible, however, to make JLAs less shallow by changing the first premise to assert that the well-accepted right is justified and by offering supplemental arguments that explain its justification(s).

There are lots of ways in which the realisation of one right can promote the realisation of another. For example, one right can support another by: (i) doing some of the second right's work or making that work easier or less expensive; (ii) reducing threats to the second right; (iii) making the realisation of the second right more secure, stable, sustainable or immune to corruption; (iv) maintaining or broadening the availability of the second right to all of its right holders; (v) blocking conditions or threats that undermine or hinder the realisation of the second right; (vi) providing backup protections and remedies when the second right fails; (vii) mitigating the dangers of the implementation measures the second right uses; and (viii) improving the knowledge and capacities of the people who use and protect the second right.

Giving examples of all eight of these is unnecessary, but it is worthwhile to acknowledge the importance of the last item. Right holders often have legal powers to activate or waive their legal rights. And even if rights are not explicitly waived, they can be ignored and never used. People whose rights are violated may not know that they have those rights, or even if they do know their rights they may think it useless to protest and seek remedies. A number of fundamental legal rights contribute to helping people to be both able and willing to use their rights. Here are some examples. Well-realised rights against murder and torture help prevent people from being terrorised into not claiming and not protesting violations of their rights. Due process rights help make right holders less afraid that government will use the criminal law to punish people who 'cause trouble' by publicly demanding respect and protection for their rights. Freedoms of expression, association and movement permit people to learn about their rights from others and to communicate about possible remedies for violations. A well-realised right to free public education helps people learn about their rights and how legal and political systems work—or

[7] For better understanding of the temporal dimensions of support and conflict and of how JLAs can be used when supporting rights are poorly realised, I am indebted to the presentations of Pablo Gilabert and Jesse Tomalty at an American Philosophical Association workshop on this article, 25 February 2021. Both emphasised the ways in which JLAs can call for changes in law and society that will improve levels of realisation and thereby increase the levels of useful support available to other rights.

not—to protect their rights. And well-realised rights to economic opportunities and adequate income prevent people from being so economically desperate that they are willing to work under very dangerous conditions or waive the rights of their children to go to school so that they can be put to work to help support the family.[8]

Linkage arguments argue from one right to another, but so do arguments for rights that claim that the normative grounds for a well-accepted right equally support a controversial right. I call such arguments *shared grounds arguments* (SGAs). For example, the right to freedom of assembly could be defended by arguing that it has the same underlying values or norms as the right to freedom of expression. If one right is justified by those grounds, then perhaps the other is too.[9] In *On Human Rights*, James Griffin used an SGA to defend a right to a basic minimum. He argued that:

> If human rights are protections of a form of life that is autonomous and free, they should protect life as well as that form of it. But if they protect life, must they not also ensure the wherewithal to keep body and soul together—that is, some minimum material provision?[10]

SGAs are similar to linkage arguments because they defend controversial rights by appealing to a way in which a controversial right is linked to one or more well-accepted rights. The connection, however, pertains not to support between two rights, but rather to normative grounds that they share. SGAs are different from linkage arguments because they address normative grounds directly instead of focusing on acceptance. They can be thought of as less shallow cousins of linkage arguments.

Support relations between rights are of two main types: logical and practical. In cases of logical support, one right assists another by being adequately realised and sharing content with the supported right. As an example, consider the way in which the realisation of the right to freedom of movement supports the realisation of the right to freedom of assembly. These two rights overlap conceptually since moving physically to the place of assembly is usually an essential part of assembling. And suppressing people's movement is often used as a means of suppressing their ability to assemble. Both rights prescribe respect and protection for assembly-related movement. Because of this overlap, some aspects of realising the right to freedom of movement are constituent parts of and can contribute to realising the right to freedom of assembly. In consequence, a JLA defending the right to freedom of movement can claim

[8] Elizabeth Ashford, 'A Moral Inconsistency Argument for a Basic Human Right to Subsistence' in Rowan Cruft and others (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 515.

[9] I say 'perhaps' here because there are additional steps in justifying rights besides finding normative grounds for them. For example, we need to satisfy ourselves that a proposed right is not excessively burdensome. For an account of the steps in justifying a right, see James Nickel, *Making Sense of Human Rights* (Wiley-Blackwell 2007) 70.

[10] James Griffin, *On Human Rights* (OUP 2008) 180.

that it is logically inconsistent to endorse the right to freedom of assembly while rejecting all parts of the right to freedom of movement. Here, the indispensability involved is based on a logical or conceptual linkage.

Another example of a logical relationship among rights can be seen in the roles that rights to equality before the law and freedom from discrimination play in supporting the distributive dimension of all other fundamental legal rights. Rights to equal citizenship, equality before the law and non-discrimination supply additional clarity about universality and equality to the content of all other rights.

The second and more common type of support relation is causal or practical. Here, a recognised and implemented right helps bring about—through the real-world consequences of its success—the realisation of another right. For example, successful implementation of a right to free public education that includes instruction in nutrition, health and sanitation will contribute to the success of a right to healthcare. The distinction between indispensable and useful support also applies to practical support relations. For example, the practical support that due process rights provide to the fundamental freedoms is, I believe, indispensable. In contrast, the support that the right to free public education provides to the realisation of rights of political participation is substantial but possibly not indispensable.

Causal outcomes of the realisation of legal rights are empirical matters and are often difficult to predict or measure. The result is that claims about the presence and strength of practical support relations are often controversial. Further, simultaneous support and conflict between two rights is not uncommon. Supporting rights sometimes have content, implementation measures and large costs that are harmful to the rights they support. In law, as in medicine, helpful remedies sometimes harm. For example, legal rights to education and to healthcare both support each other and—because both are very expensive to realise—often compete for scarce public resources. When there is simultaneous support and conflict, we face the difficult task of estimating whether the support or the conflict is greater.

Both logical and practical links between rights come in stronger and weaker forms. As suggested earlier, linkage arguments can claim either an indispensable connection or one of substantial usefulness. If it is the former, we get a very strong, nearly conclusive, reason in the conclusion, while if it is the latter, we get a good reason that may have to compete with other good reasons. Unsurprisingly, this difference in the weight of the reasons provided has resulted in controversies about exactly what indispensability requires in this context.[11]

[11] A weaker sense of 'indispensability' is proposed in Pablo Gilabert, 'The Importance of Linkage Arguments for the Theory and Practice of Human Rights' (2010) 32 Human Rights Quarterly 425; a defence of a stronger sense was offered in James Nickel, 'Indivisibility and Linkage Arguments: A Reply to Gilabert' (2010) 32 Human Rights Quarterly 439.

Indispensable support can be explained positively as assistance that is both greatly needed and irreplaceable in the sense that there are no practical alternative measures that will adequately provide the support in question. Negatively, indispensable support can be explained as assistance that it would be logically or practically inconsistent to advocate doing without. Rights can provide indispensable support, however, without being indispensable in every single case or area. To use an analogy, an indispensable tool for surgeons, such as a scalpel, need not be indispensable in every single surgery. Similarly, a right to access independent courts is indispensable to upholding other fundamental rights, but not in every single case. Further, a right can be systemically indispensable because it provides useful support to many rights or to the whole system of rights.

Support from one right to another is *realisation sensitive*.[12] That is, the ability of one right to assist the realisation of another right depends on how well the first right is realised. For example, if free public education is only provided in some areas of a country and if the quality of instruction is very inadequate in the areas where it is provided, then the support that the right to education can provide to other rights, such as rights of political participation and the right to due process, will be weak and in some areas of the country non-existent. To realise a right is to make it effective, well implemented, successful and usable. Levels of realisation can range from non-existent to low, medium and high. A system of rights in which all the supporting rights are fully realised will have great capacity to provide rights that need support with effective assistance. Rights with low or medium levels of realisation sometimes help other rights to succeed, but the modesty of their own success will often limit how much assistance they can provide.

Recognising the realisation sensitivity of support relations helps us understand why Shue's claims about the indispensable supporting roles of rights to security and subsistence were explicitly limited to the *full* realisation of the supported rights. Support that is indispensable under full realisation may not be necessary under lower levels of realisation. The result is that linkage arguments work much less well when applied to countries where levels of realisation of fundamental legal rights are generally low. In that circumstance, poorly realised supporting rights often cannot provide much support. In such cases, JLAs are best replaced by or used together with substantive normative justifications that are not realisation sensitive.

Consider an example in which a right to nutritional assistance for children from low-income families (in the form of free school meals) is needed to support causally the realisation of the right to education. Hungry children frequently do poorly in school. When the right to nutritional assistance in school

[12] This label was introduced as 'the implementation sensitive character of judgments of indivisibility' in Ariel Zylberman, 'The Indivisibility of Human Rights' (2017) 36 Law and Philosophy 389.

is first enacted, we can imagine, the levels of funding provided fall far short of what is needed to reach and feed adequately all low-income children. Because of this inadequate funding, the right to nutritional assistance in school has a low level of realization, with the result that it does little to support the success of the right to education except in the cases of a few lucky children. Perhaps school meals are available only in some schools on some days, and the quality of the food is poor and the portions small. The result is that the nutritional assistance provided, while helpful, cannot do much to improve educational outcomes.

A few years later, legislation, funding and improved compliance by public officials yield a medium level of realisation for the right to nutritional assistance (one that provides adequate food to a majority of low-income children), with the result that it significantly helps the right to education to succeed in one part of the population of schoolchildren. A few decades later, in this happy imaginary world, even better implementation measures are provided for the right to nutritional assistance, with the result that it reaches its maximum possible level of assistance to the right to education. All low-income children are provided with nutritional assistance fully adequate to their needs and chances of educational success. At that point, additional implementation measures for children's right to nutritional assistance will not provide additional support for the realisation of the right to education.

As we will see in the next section, realisation sensitivity applies to conflicts between rights as well. Fully realised rights are typically more powerful, use more machinery and require more resources than rights with lower levels of realisation. The result is that fully realised rights are more likely both to conflict with and compete for resources with other rights.

Not specifying the level of realisation being assumed is an important failure in using JLAs. As we saw above, rights with low levels of realisation typically provide less support to other rights and need less support from them as well. JLAs that fail to specify the level of realisation of the rights being linked are often difficult or impossible to evaluate. They leave out information that is usually necessary to evaluate the linking premise and estimate its strength. Further, when the first premise of a JLA claims that the target audience regards a right as well accepted, it should not be assumed—as Shue seems to have done—that people endorse its *full* realisation. Given the costs of fully realising legal rights and the many demands on government budgets, many people who endorse some well-accepted right would, if they thought about it, say that they support a medium or adequate level of realisation rather than its full realisation.

Exaggerated claims about the strength of linkages between rights are sometimes based on other exaggerations. People trying to show that one right is indispensable to another are sometimes tempted to make this easier by assigning a very large scope to the well-accepted right so that it will require lots of

support. For example, if the right to due process protections is expanded to include the availability of strong procedural protections whenever a person is dismissed from a job, then realising the right to due process will likely have more indispensable and useful conditions. When the expanded scope is necessary to make out the case for indispensability but is itself controversial, the JLA loses its power to pass on to the supporting right the uncontroversial status of the unexpanded well-accepted right. As noted earlier, disputes over the soundness of linkage arguments often turn into arguments about the actual or justifiable content of the well-accepted right. Shallow arguments, when challenged, often require the discussion to move to a deeper level.

Yet another error in using JLAs involves giving the defended controversial right credit for support that it does not cause. For example, it is a mistake to assert the indispensability of the right to freedom of peaceful assembly to other rights on the grounds that if no political assemblies occurred, this would be disastrous for the realisation of those other rights. The absence of a right to freedom of assembly does not mean that no assemblies to protest violations of rights occur. People are sometimes willing to run the risk of arrest, torture or death to express their criticisms of government policies. Similarly, a right to medical care and essential medications should not be given credit for the large improvements in human health caused by improved sanitation and water quality. The defended right should only get credit for the difference made by its realisation and provision of support.

A persistent worry about JLAs is that if widely used they will lead to an enormous proliferation of rights. This is because fully or even adequately realising a right is often complicated and likely to have many necessary and useful conditions. There are several ways to reduce this worry. First, legal and political measures may be used to promote or provide these conditions, but not in the form of legal rights. Further, the conclusions of linkage arguments, as I have formulated them, say, at most, that there is a *very strong reason* to have a right, not that there is a reason so powerful that it can never be overridden by other strong reasons. As we will see in the following section, the creation of new legal rights is sometimes damaging to already established and operating rights. When the damage is large enough, it can defeat the reasons for recognising and realising the new rights. Finally, JLAs often involve exaggerations and other mistakes described above. Carefully watching for such mistakes will help keep JLAs within reasonable bounds.

The purpose of this discussion of JLAs has not been to discourage their use; rather, it has been to help us understand them better and use them more carefully. In evaluating JLAs, I have suggested that we should: (i) attend carefully to the strength of supporting relation(s) by asking whether the defended right is indispensable or merely useful to one or more uncontroversial rights; (ii) recognise that support from one right to another is sometimes combined with simultaneous conflict, competition and undermining—and, when that is the

case, take the latter into account in estimating the strength of linkages; (iii) take account of realisation sensitivity by specifying the level of realisation envisioned and avoiding an across-the-board assumption of full realisation; and (iv) recognise that even the conclusions of JLAs based on genuine indispensability can sometimes be rebutted by even stronger reasons.

3. Negative Linkage Arguments

Some rights are troublemakers, and NLAs attacking them can be based on the trouble they cause for other rights. Simultaneously thinking about support and conflict relations within systems of rights reveals the possibility of seeing both as sources of linkages useful in persuasion. This perception, in turn, suggests thinking of linkage arguments in a broader way—as based on either support relations or conflicts between rights and as having both justificatory and critical roles. NLAs are already in regular use but, to my knowledge, their close relation to JLAs has not been recognised. The goal of NLAs is to provide reasons for repealing or trimming the criticised right. Let us say that the right being criticised is the *target* right. Strong NLAs take this form:

> *Premise 1*: You endorse the ongoing acceptance and realisation of a legal right to A (the well-accepted right).
>
> *Premise 2*: Realising the right to T (the target right) is totally incompatible with realising the right to A.
>
> *Premise 3*: Anyone who endorses an end (such as the realisation of the right to A) has a very strong reason to reject all measures that are totally incompatible with that end.
> *Conclusion*: You have a very strong reason to reject or trim the right to T.

In a weaker NLA, premise 2 would claim that realising the right to T (to some degree) substantially hinders the realisation of the right to A. Also, it would conclude that the person to whom the argument is directed has a good reason to reject or trim the right to T.

The idea that the rights in a bill of rights or international treaty can conflict with each other and therefore need to have their scopes and weight adjusted to form a harmonious whole is familiar and uncontroversial. For example, John Rawls held in *A Theory of Justice* that each person's right to basic liberties should be adjusted so as to be as extensive as is compatible with 'a similar liberty for others'. In *Political Liberalism*, Rawls discusses how rights and liberties can be adjusted to each other so as to form a 'fully adequate scheme'.[13]

We saw earlier that there are many ways in which the realisation of one right can promote the realisation of another. There are analogous ways in which the

[13] John Rawls, *A Theory of Justice* (Harvard UP 1971) 60; John Rawls, *Political Liberalism* (Harvard UP 1993) 47, 173, 289.

realisation of one right can hinder the realisation of another. These include: (i) undoing or making more difficult some of the second right's work; (ii) constantly contradicting the second right with consequent legal uncertainty, disputes and litigation; (iii) increasing the costs of the second right's implementation measures by requiring cumbersome safeguards against their abuse; (iv) undermining the availability of agencies and infrastructure necessary to the success of the second right; and (v) gobbling up scarce human and financial resources that would otherwise support the second right's realisation (Table 1).

Table 1. Similarities and Differences between JLAs and NLAs

Elements of a JLA	Elements of an NLA
The *defended right*—the right that argument is trying to defend	The *target right*—the right that the argument is trying to criticise
The *well-accepted* right—the uncontroversial right that the defended right is alleged to support	The *well-accepted* right—the uncontroversial right whose realisation the criticised right is alleged to make impossible or more difficult
A *linking premise* asserting the indispensability or usefulness of the defended right to the realisation of the well-accepted right	A *linking premise* asserting that the realisation of the target right makes, or would make, the realisation of the well-accepted right impossible or more difficult
A premise saying that one who endorses the realisation of the well-accepted right has a very strong reason (or at least a good reason) to endorse rights that provide indispensable support to the realisation of the well-accepted right	A premise saying that one who endorses the realisation of the well-accepted right has a very strong reason (or at least a good reason) to reject or limit rights that make its realisation impossible or more difficult
A *conclusion* saying that there is a very strong reason (or at least a good reason) to enact and realise the supporting right	A *conclusion* saying that there is a very strong reason (or at least a good reason) for rejecting or limiting the target right

The structural similarities between JLAs and NLAs are no accident. Both are based on the same idea, namely that a controversial right's tendency to support or conflict with some other right that is well accepted can give us reasons to support or oppose it. Indeed, inconsistency between rights may be the most basic idea in this area because it is possible to define support relations as a logical or practical inconsistency between the realisation of a well-accepted right and the absence or inadequate realisation of a supporting right.

Like JLAs, NLAs are based on either a logical or a practical link between the content and operation of two or more rights. In NLAs, this linkage is inconsistency, competition for resources and/or undermining. We speak of a *conflict* when persons, activities or statements contradict, oppose, obstruct or work against each other. Conflicts frequently have winners, losers and stalemates. One way to express conflicts over something is by making contradictory statements about that thing ('It's mine!' … 'No it's not! It belongs to me!'). But not all conflicts involve language and contradiction. Two insects fighting over a scrap of food are having a conflict even though they are not making any linguistic statements.

Many conflicts of rights involve *practical opposition*, not contradiction. So let's divide conflicts of rights into two species: (i) contradiction conflicts, and (ii) practical opposition conflicts (POCs). By expanding our view of conflicts of rights to include POCs, we are able to cover a broader range of ways in which rights conflict—and thus recognise more grounds for NLAs.

For a group of legal rights to form a well-functioning *system* of rights, they cannot be in constant serious conflict, logical or practical. Although it would be unrealistic to expect there to be no conflicts in a complicated system of legal rights that was created long ago, evolved over decades or centuries and reflects a variety of underlying values, the amount of conflict must be limited and managed for the system to have a high degree of success. Both contradiction conflicts and POCs, like diseases, vary in their severity. Some of them one can quickly recover from but may recur, others one can painfully live with and still others are lethal. Like logical and practical inconsistencies in other complex systems, conflicts of rights can be present but undetected, recognised as possible should certain circumstances arise or be actual and recognised because a case or controversy involving a conflict between the rights has emerged in law or politics.

Contradiction conflicts occur when legally valid rights, properly understood and applied, issue contradictory directives. The addressees of these directives may be right holders, dutybearers or a mixture of the two. For example, a robust measure taken to implement rights to security against terrorism could easily be logically inconsistent with two or more rights to fundamental freedoms such as expression, assembly and privacy. Legal rights are often complex

norms that include duties, liberties, immunities and powers—and this increases the possibilities for conflicts. Liberties can contradict duties, duties can contradict duties, and immunities can contradict legal powers (and vice versa in each case).[14] Depending on their frequency and severity, contradiction conflicts can provide grounds for either weak or strong NLAs.

For a legal right to apply and issue a directive in a particular situation, it needs, among other things: (i) legal validity; (ii) the parties involved must be the ones addressed by the right; (iii) if the right requires activation by the right holder, this has occurred; (iv) the terms of the right apply to the situation the parties are actually in; and (v) defeaters such as exceptions and being outweighed by other rights or values are absent. Showing that just one of these conditions is not satisfied for one of the rights in a conflict will be enough to dissolve a conflict. If two rights are involved, there are consequently 10 conditions (two times five) that can fail to be satisfied. As a result, sceptics about an alleged conflict of rights have plenty of places to look for grounds to doubt its genuineness.[15]

Attaining adequate knowledge of these 10 conditions is difficult. Determining a right's legal validity is often far from easy, particularly if its legal status is due to custom or derivation from a line of judicial decisions. The content and proper application of legal rights is often unclear and insufficiently developed—and disputes and mistakes about content and application occur frequently. One or both rights may have been misapplied due to false views of the facts of the situation in which the rights are thought to conflict. Further, difficulty in complying with competing directives may be confused with impossibility. A standing priority ranking between the two rights may be present but unnoticed. And empirical premises needed to derive the conclusion that the two rights are in conflict may be false or uncertain. Still, there are plenty of cases in which all 10 conditions are satisfied.

POCs also come in strong and weak forms. Strong POCs support NLAs that provide near-conclusive reasons to abolish or trim one of the rights. Weak POCs support NLAs that provide good reasons to do the same. Here is an example of a POC-based NLA. Suppose that a defender of the right to free public education attacks, with the following strong NLA, the addition to the legal

[14] In 'Rights in Conflict' (1989) 99 Ethics 503, Jeremy Waldron restricts conflicts of rights to duty versus duty. I believe that this view is too narrow because it would exclude, for example, a conflict between a person's duty to do something under one right and a liberty to refrain from doing that same thing conferred by another right.

[15] 'Specificationists' are a familiar variety of sceptic about conflicts of rights. As Leif Wenar says, 'On the specificationist view, rights never do conflict in the sense of overlapping in a given case. Rather, rights fit together like pieces in a jigsaw puzzle, so that in each circumstance there is only one right which determines what is permitted, forbidden, or required': Wenar (n 2) s 5.2. This picture, though pleasing, provides a highly idealised view of fundamental legal rights. In reality, such rights often have large areas of indeterminacy as well as potential conflicts that have never been noticed or addressed. Some highly developed legal rights may approximate this view, but they are exceptional. Further, the jigsaw puzzle model does little to ensure that POCs will not occur even when, conceptually, the pieces fit together perfectly. See also John Oberdiek, 'Specifying Rights Out of Necessity' (2008) 28 OJLS 127; Russ Shafer-Landau, 'Specifying Absolute Rights' (1995) 37 ArizLR 209.

system of a right to a universal basic income (UBI). This argument alleges undermining or harming, rather than logical inconsistency.

> *Premise 1*: You endorse the ongoing acceptance and adequate realisation of a legal right to free public education for all children.
>
> *Premise 2*: Because of its enormous costs, an adequately realised legal right to a UBI is sure to handicap seriously the ongoing acceptance, enactment and adequate realisation of a legal right to education for all children.
>
> *Premise 3*: Anyone who endorses an end (such as the ongoing acceptance and adequate realisation of the right to education) has a very strong reason to reject measures (such as having a legal right to a UBI) that will seriously handicap measures to achieve that end.
>
> *Conclusion*: You have a very strong reason to reject the acceptance, enactment and adequate realisation of a legal right to a UBI.

As with JLAs, much of the controversy about an NLA is likely to centre on the strength of the alleged linkage between the two rights. In the case of a legal right to a UBI, the magnitude of its damage to the right to education would be greatly influenced by the right's content—by the amount of the UBI, by the effectiveness of the government in taxing back the UBI payments received by upper-income people and by how many existing programmes of government benefits the UBI replaces. Further, if the right to a UBI were both harmful *and helpful* to the right to education—which seems entirely possible—then those harms and benefits would have to be weighed against each other to see which is larger.

Here are three more examples of POCs: (i) Rights to fair criminal procedures often work against rights to security against crime. They sometimes keep guilty people out of jail, make trials take a long time, delay imposition of punishments in ways that make them psychologically less effective, and generally raise the costs of criminal justice. We might add that rights to fair criminal procedures also *support* rights to security by making their main implementation measure, the criminal law, less dangerous to people's lives, liberties and property. Here we have an example of combined conflict and support. (ii) The right to leave one's country permanently works against the right to healthcare in low- and medium-income countries. Doctors and nurses in these countries often migrate to richer countries that offer better conditions and pay, with the result that healthcare in the sending country suffers. Note that here it is the widespread use of a right to a freedom, not an implementation measure, that undermines the successful implementation of another right. (iii) Measures to protect people's rights to privacy and reputation sometimes burden and limit other people's rights to freedom of the press and freedom of communication.

Besides creating contradiction conflicts, these measures can have a 'chilling effect' on these same rights.[16]

POCs occur when one right's realisation (to some degree) produces harmful effects for another right. Forms of harm include working against another right, undermining it, creating obstacles to using it, hindering its realisation, decreasing its effectiveness, imposing undue burdens on its use, increasing the dangers it creates and greatly increasing its costs. POCs need not involve inconsistency between the directives coming from two rights, although such inconsistencies may be present as well. POCs often involve conflicts between implementation measures, or between the implementation measures for one right and the duties or liberties generated by another right. POCs are just as important as contradiction conflicts—and are probably more frequent as well.

The ways that functioning rights harm and hamstring other rights must be discovered empirically by observation or inference to the best explanation. They require us to observe the workings and relations between legal norms and implementation measures, and to advance and test causal hypotheses. The difficulty of doing this often makes controversial assertions that one right works against another. The enthusiasts of a right may resist claims that its operation damages other rights. And the opponents of a right may find, hypothesise or fantasise ways in which its operation obstructs other rights. Further, there is often disagreement about the amount of damage that a right's operation causes. For example, enthusiasts of a right may allow that it causes some damage to other rights but insist that the amount is small enough to be outweighed by the assistance that the right provides to yet other rights.

We often think of conflicts between rights as a bad thing, and in that light NLAs can be viewed as attempts to assign blame for bad states of affairs. Recognised conflicts can sometimes be good, however, when they involve a fully justifiable right and an unjustifiable right that has made its way into a system of fundamental legal rights. An NLA can then be used to call for the repeal of the unjustifiable right.[17] NLAs also play a useful role in identifying conflicts and calling for thoughtful deliberation about the content of and possible modifications to one or both of the conflicting rights.

The most obvious use of NLAs is to advocate repeal or non-enactment of a right. Less obvious, but equally important, is the use of NLAs to advocate trimming a right, that is, limiting its content in some way. Trimming a right, including its implementation measures, can be accomplished by narrowing its object (what the right is *to*), reducing its normative content; reducing its

[16] For more examples, see George C Christie, *Philosopher Kings?: The Adjudication of Conflicting Human Rights and Social Values* (OUP 2011); Claire Finkelstein, 'Two Men on a Plank' (2001) 7 Legal Theory 279; James Griffin, *On Human Rights* (OUP 2008); Ofer Raban, 'Conflicts of Rights: When the Federal Constitution Restricts Civil Liberties' (2012) 64 Rutgers L Rev 381; Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (OUP 2007) 95.

[17] I am indebted to Adam Etinson for this idea, which he presented at an American Philosophical Association workshop on this article, 25 February 2021.

priority or weight when it comes into competition with other rights; or lowering its level of realisation. Another way of trimming a right is to exclude some people or organisations from being right holders or duty bearers under the right.

In recent years, NLAs have been used by religious groups in the United States and Canada to oppose legislation making sexual orientation a suspect classification and thus making refusal to hire or admit an LGBT person an illegal form of discrimination[18] The well-accepted right typically used in these NLAs is freedom of religion. These arguments claim that a system of rights that includes both the right to freedom of religion and a right of LGBT people against discrimination will regularly give contradictory directives. For example, the right to freedom of religion prescribes a liberty of religious groups to refuse to hire LGBT people for leadership positions in their religious organisations, while the right against discrimination prescribes a duty of religious and other organisations to refrain from such exclusion. The conclusion of an NLA here may be to repeal LGBT rights against discrimination or to limit the kinds of institutions bound by those rights.

Now that the US Supreme Court has, in *Bostock v Clayton County*, extended to LGBT people the legal right to non-discrimination in employment, NLAs in the United States are likely to advocate limiting this right rather than repealing it.[19] Instead of claiming total incompatibility between the right to freedom of religion and the right of LGBT people against discrimination, the response of socially conservative religious groups is likely to be that rights against discrimination need to be limited by inserting exemptions for religious organisations. Defenders of rights against discrimination may well reply, of course, that their favoured right is of higher priority than the right to religious freedom—and hence it is the latter that needs to be pruned.

Another way of resolving conflicts of rights is to establish a *qualification* to one or both of them that explicitly permits government officials and judges to balance their application in particular cases against considerations that are listed or implied. For example, most of the rights to fundamental freedoms in the European Convention on Human Rights (ECHR) and subsequent international human rights treaties have qualifications. Article 10 of the ECHR, the right to freedom of expression, provides a good example. It first sets out the right: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'[20] This right is heavily qualified, however, since it explicitly permits regulation of

[18] See Carolyn Evans and Beth Gaze, 'Between Religious Freedom and Equality: Complexity and Context' (2008) 49 Harv Int'l LJ 40; Andrew Shorten, 'May Churches Discriminate?' (2019) 36 Journal of Applied Philosophy 709.

[19] *Bostock v Clayton County, Georgia* 884 F.3d 560 (2018).

[20] Council of Europe (1950) *European Convention for the Protection of Human Rights and Fundamental Freedoms* <https://www.echr.coe.int/documents/convention_eng.pdf>.

expression on a long list of grounds, including national security, public safety, the prevention of disorder or crime, the protection of health or morals and the protection of the reputations of others. Qualifications are more situational than general priority rankings.

Yet another way of making two rights more compatible is to limit the implementation and enforcement of one of them. For example, conflicts between the right to freedom of religion and the right against discrimination would matter less if the right against discrimination were rarely enforced against religious organisations. Practically, this comes close to writing an exception into the scope of the right. This technique reflects the more general idea, discussed earlier, that when rights have low levels of realisation contradiction conflicts with them will be less troublesome from a practical perspective since non-compliance is rarely penalised.

POCs can be mitigated in ways that go beyond rejecting and limiting. For example, if two expensive rights, such as the right to education and the right to healthcare, constantly compete for funding and thereby undermine each other's success, a big increase in the budget for social spending can reduce the competition. Practical opposition between functioning rights is a condition that exists in the world and can sometimes be reduced (or increased!) by changing surrounding circumstances.

There are possible mistakes in using NLAs that are analogous to the ones identified in JLAs. One mistake is exaggerating the strength of the conflict between two rights. The goal of this exaggeration is to reach a stronger reason for rejecting or seriously limiting the target right. For example, an enthusiast of the right to privacy may hope to provide strong reasons for limiting the scope of freedom of the press by depicting its conflicts with the right to privacy as broader and harder to manage than they actually are. Conflicts between rights are often occasional rather than constant. And modest limitations and ad hoc management by users and courts are often adequate responses.

A second mistake in using NLAs involves exaggerating the scope or weight of the well-accepted right. To succeed, someone offering an NLA needs to show that the target right seriously and regularly conflicts or competes with the well-accepted right. In attempting to show the seriousness of this negative interaction, one may be tempted to make this easier by assigning an exceptionally large scope or high weight to the well-accepted right so that it will have plenty of areas in which conflict and competition with it can occur. For example, if the right of freedom of the press is the target in an NLA whose well-accepted right is the right to privacy, treating the right to privacy as if it were nearly absolute will make the first premise about acceptance much less likely to be true.

A third mistake in using NLAs involves giving the defended or attacked right too much credit or blame for outcomes. In NLAs, this involves giving the target right too much of the blame for conflicts. If the realisation of the

right to education is undermined by many factors (eg inadequately qualified teachers, a poor transportation system and parents keeping girls home from school), and if competition for resources from the right to healthcare is only one of those factors, an NLA that advocates rejecting or limiting the right to healthcare on the grounds that it causes the failure of the right to education may commit this mistake.

A fourth mistake in using NLAs is neglecting levels of realisation. Both support relations and conflicts are realisation sensitive. If the target right is poorly realized, its potential for conflicting seriously with the well-accepted right tends to be reduced. As we saw earlier, conflicts tend to be more serious when both rights have high levels of realisation. This is partly because such high levels of realisation require strong implementation measures, such as criminal penalties or the creation of agencies to monitor compliance. In criticising proposed rights, we often assume full realisation because that is the circumstance in which the right's potential for conflict with other rights is most visible. If we know, however, that a proposed right would, if enacted, only enjoy a modest level of realisation, a critique based on conflicts that only occur under full realisation would be fallacious.

4. Concluding Reflections

The rights people endorse have implications for which other rights they should accept or reject (this applies as well, of course, to norms other than rights). Linkage arguments highlight these implications. This article has offered an extended analysis of linkage arguments and suggested viewing linkage arguments as coming in both justificatory and critical versions. The two types (JLAs and NLAs) have strong structural similarities and are vulnerable to similar mistakes. JLAs are based on support relations between rights, while NLAs are based on conflict relations. Both support and conflict come in degrees, and typically occur in some contexts but not others. How frequently and how strongly support and conflict occur are key questions.

The similarity between JLAs and NLAs is so close that it makes sense to consider both of them to be types of linkage arguments. There is, however, a historic difference in the way that they have been used. JLAs have been used almost exclusively to defend entire rights. NLAs are sometimes used to advocate rejection or repeal of rights, but more often are used to advocate limiting a right in one of the ways discussed above. One could take this difference to show that NLAs are not as similar to JLAs as I have been suggesting. A better perspective, in my opinion, is to take this difference to show that JLAs have untapped potential. Beyond their historic role of defending entire rights, they can also be used to defend increasing the scope of a right, increasing its weight in competition with other rights, providing it with better implementation measures and taking practical steps to reduce practical opposition from other

rights. If a supporting right's assistance to a well-accepted right could be greatly increased by an addition to its cast of duty bearers or by an additional implementation measure, a JLA could point out that we have very strong reasons to makes those changes.