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Indivisibility and Linkage Arguments: A Reply to Gilabert

*James W. Nickel**

ABSTRACT

This reply discusses Pablo Gilabert's response to my article, "Rethinking Indivisibility." It welcomes his distinction between conceptual, normative, epistemic, and causal forms of support from one right to another. It denies, however, that "Rethinking Indivisibility" downplayed linkage arguments for human rights (although it did call for careful evaluation of such arguments), and rejects Gilabert's suggestion that we understand the indivisibility of two rights as two rights being highly useful to each other (interdependence) rather than as mutual indispensability. In the final section, I offer two new worries about the system-wide indivisibility of human rights.

I am grateful to Pablo Gilabert for his thoughtful response to my article on the indivisibility of human rights. The goal of my article was "to sow doubt about indivisibility that stimulates reflection and deeper understanding,"¹ and Gilabert's response furthers the realization of that goal. This brief reply does not attempt to respond to all of Gilabert's criticisms and suggestions. Instead it identifies some areas where I am happy to accept his suggestions as well as some areas of continued disagreement.

I. TYPES OF SUPPORT AND THE EXTENT OF INDIVISIBILITY

Gilabert usefully distinguishes between conceptual, normative, epistemic, and causal forms of support from one right to another. A conceptual (or

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1. James W. Nickel, *Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights*, 30 *HUM. RTS. Q.* 984, 985 (2008).

constitutive) relation holds between freedom of movement and freedom of assembly because moving is part of (physical if not electronic) assembly. Normative support from one right to another occurs when the first enriches the normative meaning of the second right—as when democratically implemented social benefits have a “different normative significance”² than ones that are implemented without popular participation. Epistemic support occurs, if I understand Gilibert correctly, when the exercise of one right helps promote people’s knowledge of the existence, meaning, and possible uses of their rights. Examples 2, 3, and 5 in the paragraph below illustrate causal relations.

These types of support crosscut the more specific forms that were suggested in “Rethinking Indivisibility.”³ Those were: (1) promoting the supported right against some of its main threats—as when “a right to freedom of movement protects against those violations of the right to freedom of assembly that block people from moving to the location of the assembly;”⁴ (2) providing a remedy or process that helps protect the supported right—as when the right to petition government or of access to the courts helps uphold many rights; (3) making institutions used to implement the supported right less vulnerable to corruption and abuse—as when rights to freedom of the press expose corrupt voting systems; (4) improving the capacities of right holders—as when the right to education helps make people knowledgeable about their other rights; and (5) ameliorating a problem such as climate change or a global economic crisis that is likely to undermine⁵ the abilities of governments to respect and implement human rights. The example in 1 above is conceptual or constitutive. As mentioned above, examples 2, 3, and 5 above are causal. Example 4 above illustrates epistemological support.

“Rethinking Indivisibility” distinguished between “system-wide indivisibility” and “widespread indivisibility.” Gilibert proposes a third category that is weaker, namely, “partial but not widespread indivisibility.”⁶ This is a helpful suggestion. A fourth and still weaker category could be added as well, namely, “has a few instances of indivisibility.” Although I continue to doubt that system-wide indivisibility occurs in today’s systems of rights, including the ones that are best implemented, the other three categories are likely to be useful in describing systems of rights in various countries with their different levels of implementation (high, medium, and low quality, along with non-implementation).

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2. Pablo Gilibert, *The Importance of Linkage Arguments for the Theory and Practice of Human Rights: A Response to James Nickel*, 32 HUM. RTS. Q. 425, 429 (2010).
 3. Nickel, *supra* note 1, at 988.
 4. *Id.*
 5. Note the distinction here between violating and undermining. Conditions that do not violate a right may nevertheless undermine it by greatly weakening its system of implementation or conditions required for its implementation.
 6. Gilibert, *supra* note 2, at 428.

II. THE USE OF LINKAGE ARGUMENTS DOES NOT COMMIT ONE TO SYSTEM-WIDE OR EVEN WIDESPREAD INDIVISIBILITY

Linkage arguments defend controversial rights by arguing that they provide indispensable support to one or more accepted or already justified rights. Gilibert worries that I am urging that we drop or downplay linkage arguments for human rights. Gilibert's worry is unfounded for three reasons. One is that I have often used linkage arguments—as Gilibert notes.⁷ Second, I think that under medium and high quality implementation, at least, all systems of rights have some strong supporting relations and these can generate interesting linkage arguments. And third, linkage arguments are still possible in the total absence of indivisibility. To see this, imagine a system of rights that has many strong one-way indispensability relations but none that are bidirectional. Those one-way indispensability relations would support a number of sound linkage arguments, but the system would, by hypothesis, lack indivisibility because that requires strong *bidirectional* support between at least two rights.⁸

The purpose of "Rethinking Indivisibility" was not to discourage the use of linkage arguments, but rather to encourage and facilitate the careful evaluation of such arguments. I would like linkage arguments to be better even if that makes them fewer. As I suggested, in evaluating linkage arguments, we should carefully attend to the strength of the supporting relation(s) between the rights in question, consider different levels of implementation and what they imply for supporting relations, and choose an appropriate baseline for comparing scenarios where the supporting right is absent in one case and present in the other.

III. AGAINST REPLACING "INDISPENSABLE" WITH "HIGHLY USEFUL" IN THE ANALYSIS OF INDIVISIBILITY

In "Rethinking Indivisibility," I proposed understanding the idea that two rights are indivisible as the claim that they are mutually indispensable (strongly supportive in both directions). If this is the right way to understand indivisibility, then system-wide indivisibility is not very plausible. Gilibert seems to accept this conditional proposition, but proposes to avoid accepting the consequence of the conditional (that is, that system-wide indivisibility is implausible) by denying the antecedent (that indivisibility should be understood in terms of mutual indispensability). He proposes that we

7. *Id.* at 435 n. 19. See JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS* 129–32, 144–46 (2d ed. 2007).

8. Nickel, *supra* note 1, at 990–91.

understand the idea that two rights are indivisible as the claim that they are highly useful to each other:

[T]alk of indivisibility could be couched in weaker (but still robust) terms by saying that R1 and R2 are indivisible if the fulfillment of any one of them is highly useful to the fulfillment of the other. . . . I do not claim that those who use the notion of indivisibility mean it in this way, but it would not be a bad idea to do so.⁹

I resist this suggestion. First, we already have good language for saying that two rights are highly useful to each other, namely saying that they are “interdependent” or “mutually supportive.” Second, if human rights advocates and theorists used indivisibility this way, their statements would be highly misleading because they would be saying something weak, but—because indivisibility has a well-established meaning—their listeners would understand them to be saying something strong.

There is a clear distinction between mutual usefulness and mutual indispensability. A person’s left and right hands are highly useful to each other’s functioning, but are not indispensable. A person can lose one hand while retaining the full function of the other. In contrast, a functioning liver and a functioning heart are indivisible; you cannot have one for very long without the other. The contrast between mutual usefulness and indispensability has existed for a long time. It appears, for example, in Thomas Hobbes’ *Leviathan* where he discusses the powers of the sovereign.¹⁰ He states that there are various rights that a sovereign could give away and still be a sovereign, that is, while retaining “the power to protect his subjects.”¹¹ Hobbes presents the right to coin money as an example of something that is useful, but not indispensable, to the sovereign. However, there are a few rights that a sovereign cannot relinquish while remaining a sovereign. For example, “if he transfer[s] the militia, he retains the judicature in vain, for want of execution of the laws; or if he grants away the power of raising money, the militia is in vain.” These rights of the sovereign are “indivisible, and inseparably annexed to the sovereignty.”¹²

Human rights discourse is widely suspected of containing numerous exaggerations (I hear these suspicions from my students every semester), and I see little reason to recommend adding one more by saying that human rights are “indivisible” when we really mean “interdependent” or “mutually useful.”

9. Gilabert, *supra* note 2, at 430.

10. THOMAS HOBBS, *LEVIATHAN* ch. 18 (1660).

11. *Id.*

12. *Id.*

IV. A WEAKER UNDERSTANDING OF “INDISPENSABLE” IN THE ANALYSIS OF INDIVISIBILITY

Perhaps we can go a modest distance, at least, towards accommodating Gilbert’s desire for a weaker notion of indivisibility by adopting an interpretation of “indispensable” that is weaker than the one I used in “Rethinking Indivisibility.” This slightly weaker notion takes into account costs and other practicalities in deciding whether a plausible alternative exists to some allegedly indispensable supporting right. To find out whether R1 is indispensable to R2 at some level of implementation, we need to consider whether there is some plausible alternative Z that could support R2 just as well in those circumstances. Z could be another right or some other sort of institution or governmental program. To be a plausible alternative, Z needs to work as well or better as R1 in supporting R2 and have about the same level of costs and risks. If there is no such alternative, then R1 is indeed indispensable to some level of implementation of R2.

Let’s call this weaker notion “practical indispensability.” To illustrate this idea, consider a traveler who wants to go from Atlanta, Georgia, to Brattleboro, Vermont, by commercial airliner and rental car. This traveler has no interest in sightseeing or visiting friends along the way. Someone tells the traveler that to make such a trip, it is indispensable to fly to Hartford and rent a car there. We can show the falsity of this claim by observing that although Hartford is the closest commercial airport to Brattleboro (77 miles), there are good alternative airports such as Boston (105) and Providence (117). We could not make such a rebuttal, however, if Syracuse (220) were the only alternative. The costs in driving time and mileage are too much higher than those of flying to Hartford or Boston. This example demonstrates that costs and benefits often enter into deciding whether an alternative is plausible to a rational person—and thus into deciding what counts as practically indispensable.

When a right supports several rights rather than just one, the notion of practical indispensability can take this into account. A supporting right may be indispensable or near-indispensable because it provides substantial support to several rights even though it is not indispensable to any single one of them. Consider the household pliers as an analogy. This tool is useful for so many purposes as to be practically indispensable in one’s home, yet one could almost always find some other tool that could do any one of its jobs. Perhaps we can explain the practical indispensability of the household pliers in terms of the higher cost of its alternatives. Because the cost of the dozens of specialized tools that could replace the pliers is much higher than buying a pair of pliers, the purchase of all those specialized tools is not a rational alternative to the many-purpose tool. We can use this pattern of argument to defend the indispensability of broadly useful rights such as the rights to free public education and freedom of the press.

Protecting rights is not a one-shot activity like taking a trip to Brattleboro. It is something that must be done continuously over a long period of time. Accordingly, another condition for an indispensable supporting relation is that it be sustainable—something that is possible to accomplish over a long period under changing circumstances.

Practical indispensability in both directions seems to be a beneficial way to understand indivisibility. It preserves the distinction between rights that are highly useful and ones that are genuinely indispensable, while avoiding turning indispensability into an impossible test. I doubt, however, that understanding indivisibility in terms of practical indispensability weakens the idea of indivisibility enough to make plausible the system-wide indivisibility of human rights—even under high-quality implementation. If, as I suspect, the right to freedom of religion does not contribute much to the realization of due process rights, then a weakened notion of indispensability will not save the claim that these rights are indivisible.

V. THE IMPORTANCE OF SUPPORTING RELATIONS BETWEEN HUMAN RIGHTS FOR DEVELOPING COUNTRIES

In “Rethinking Indivisibility,” I argued that the strength of supporting relations between rights varies with quality of implementation. The strength of support that one right provides to another will tend to decline as quality of implementation declines. If developing countries generally have a lower quality of implementation than developed countries, then they are likely also to have fewer supporting relations between rights. A general weakening of supporting relations makes claims of indivisibility less plausible and makes fewer sound linkage arguments available. The recognition of this result, I suggested, explains why early claims about the indivisibility of rights were restricted to “full realization.”¹³

“Rethinking Indivisibility” did not deny the possibility that some strong supporting relations could exist under medium or low quality implementation. For example, under medium quality implementation, due process rights may in fact provide indispensable or highly useful support to the fundamental freedoms. Nor did I deny that some support from a partially implemented right can be of great importance to the partial or full implementation of another right. Gilabert rightly emphasizes in his fire escape example that a rusted and unsafe set of stairs is far better than none when they provide the only way of getting down from a burning apartment.¹⁴

13. Nickel, *supra* note 1, at 985, 992.

14. Gilabert, *supra* note 2, at 435.

The following is a case of a poorly implemented right providing low or medium strength support to other rights. In a country with low-quality implementation of the right to free public education at the elementary and secondary levels, the education provided in the public schools will generally be of low quality. Facilities will be overcrowded (with the possible result that school days are restricted to four hours so that several daily sessions can be run), schools will charge fees for books and supplies that many families cannot afford, and free public schools will simply be unavailable in remote areas of the country. Many developing countries are in this situation. Some children do receive at least a partial education, however, which supports the implementation of other rights to some degree because these children, once grown up, are more capable of understanding, using, and protecting their rights and of assisting others in doing so. But this rusty escape only allows some people to survive the fire.

The claim that supporting relations between rights tend to be weaker in developing countries is bad news because it means that fewer sound linkage arguments are available to defend the justifiability and priority of controversial rights in those countries. Other justificatory strategies have to be used. But I believe this claim also brings good news, namely that developing countries are free to choose which rights to emphasize and in which to invest as they formulate their own development and rights implementation strategies. They are not required to do a little each year for each and every human right. Haiti can emphasize security rights while Bolivia emphasizes equality rights for indigenous peoples. This is particularly important as the number of internationally recognized human rights continues to grow.

VI. TWO NEW CRITICISMS OF INDIVISIBILITY

Since publishing "Rethinking Indivisibility" I have identified two additional worries about system-wide (and perhaps widespread) indivisibility. One is that indivisibility is hard to assess when we lack a settled list of which rights are genuine human rights (what we have now, I think, is a partially settled but still expanding list). For example, Kim could maintain that there is system-wide indivisibility because she thinks there are forty genuine human rights that are all indispensable to each other's realization. Lee, on the other hand, could deny system-wide indivisibility while agreeing with Kim about the forty rights, because he thinks there are forty-two human rights and believes that the forty-first and forty-second do not satisfy the strong mutual support criterion with all of the other forty.

My other new worry about indivisibility concerns the potential impact of bringing what we might call "undermining" or "conflict" relations between rights into the discussion of indivisibility. In "Rethinking Indivisibility," I noted

that rights can conflict and suggested that we subtract the amount of harm done by the supporting right from the amount of positive support it provides to determine the degree (if any) of net positive support.¹⁵ The example I provided was that security rights support rights to the fundamental freedoms, but the system of criminal law used to implement security rights creates serious risks to those freedoms and to other rights as well. Even if conflict relations between rights were only one third as frequent as supporting relations, their impact on the strength of supporting relations could be substantial. Further, conflict relations may be *worse* under high quality implementation because in that happy situation each right is likely to do more, have bigger implementation machinery, and require more support from other rights. An account of the varieties of conflicts between rights needs to be developed and then applied to discussions of linkage arguments and indivisibility. The effect of accounting for undermining relations between rights, I suspect, will be to render some linkage arguments unsound and make very strong claims about the extent of indivisibility still less plausible.

15. Nickel, *supra* note 1, at 989.