ON THE RIGHTFUL DEPRIVATION OF RIGHTS

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When people are deprived of their property rights so that the state can build a highway, a school, or a hospital, they are typically compensated through what is commonly referred to as "takings" doctrine. But when people are deprived of their free speech rights because of a clear and present danger, or deprived of their equal protection, due process, or free exercise rights because of a "compelling" governmental interest, they typically get nothing. Why this is so, and whether it should be so, is the puzzle that motivates this Article. Drawing on the philosophical literature on conflicts of rights and the idea of a moral residue, the Article explores the seeming anomaly between the routine availability of compensation for the rightful deprivation of property rights and the equally routine unavailability of compensation or any other form of redress for the rightful deprivation of other rights. One possibility is that this is a genuine anomaly in need of repair, such that compensation for the right holders whose rights are justifiably restricted ought to be taken more seriously than is now the case. But another possibility, sketched here, is that a different and novel picture of the nature and structure of rights may explain and justify why compensation for the rightful deprivation of rights is so rarely available.

INTRODUCTION: THE PUZZLE

A. An Anomaly

When someone's land is taken by the government, even if rightly in order to build a road, school, or hospital, the landowner is entitled to compensation for this rightful deprivation of the owner's right to property.[1] But when someone's First Amendment, equal protection,

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or due process rights are rightly deprived because of a clear and present danger or a compelling interest, the person whose rights have been rightly deprived gets nothing. This is the anomaly that motivates this Article.

More abstractly, the question to be addressed here is about the rightful deprivation of rights, a question arising whenever rights are understood as nonabsolute—overridable—even within their scope of application. Consider two examples, both of which will be developed at greater length in what is to come. First, imagine a speaker whose otherwise-protected speech induces an angry and potentially violent reaction from a hostile audience. Under existing doctrine, law enforcement is required as a first resort to take action against the hostile audience and not the speaker.[2] But if such action is unavailing, and a genuine "clear and present danger" of mass violence still exists, then speakers can be restricted, even if they have done nothing wrong.[3] Assuming that there actually is a clear and present danger, then restricting speakers' First Amendment speech rights is rightful. And the speakers get no redress, even though they have been deprived of speech rights no less than property owners whose property rights are deprived by state takings.[4] The rightfully deprived holders of property rights are entitled to compensation while the rightfully deprived holders of First Amendment rights are not.

Or consider *Grutter v. Bollinger*,[5] whose likely doctrinal obsolescence[6] as this is being written does not obscure the basic analytic point. Barbara Grutter applied to the University of Michigan Law School and was rejected.[7] Her subsequent lawsuit was based on the apparently

1 U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation.").

2 *See* Gregory v. City of Chicago, 394 U.S. 111, 111–12 (1969); Cox v. Louisiana, 379 U.S. 536, 550–51 (1965); Edwards v. South Carolina, 372 U.S. 229, 236–37 (1963); Bible Believers v. Wayne County, 805 F.3d 228, 248 (6th Cir. 2015); Wolin v. Port of N.Y. Auth., 392 F.2d 83, 94 (2d Cir. 1968). *See generally* Frederick Schauer, *Costs and Challenges of the Hostile Audience*, 94 NOTRE DAME L. REV. 1671 (2019).

3 *Edwards*, 372 U.S. at 237 (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

4 The parallel is especially close when the state taking is a use restriction rather than a complete confiscation, as in, for example, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (holding that even a "minor" permanent physical occupation is a taking for Fifth Amendment purposes).

5 539 U.S. 306 (2003).

6 *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. 365, 376–77 (2016); Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297, 311 (2013). It is likely that not only *Grutter* but also *Fisher* will be rendered obsolete by the forthcoming decisions in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 20-1199 (U.S. argued Oct. 31, 2022), and *Students for Fair Admissions, Inc. v. University of North Carolina*, No. 21-707 (U.S. argued Oct. 31, 2022).

7 *See Grutter*, 539 U.S. at 316.

sound empirical claim that, given her qualifications, she would likely have been admitted but for the affirmative action policies of the University of Michigan Law School.[8] In the Supreme Court, Justice O'Connor's majority opinion implicitly acknowledged that Grutter had been denied her equal protection rights by virtue of having been the victim of a policy that preferred other applicants because of their race.[9] But those rights were not absolute, the Court concluded, and thus the Michigan Law School, by demonstrating a compelling state interest in taking race into account, had acted rightly.[10] Grutter's equal protection rights had been denied, but rightly so. Grutter was consequently entitled to nothing, despite the denial of her rights, because the rightfulness of the denial precluded compensation, once again in marked contrast to the compensation routinely available to those whose property rights are similarly rightfully denied.

B. On Rightful and Wrongful Deprivations

The anomaly just described emerges from the premise of there being rightful deprivations (or restrictions)[11] of rights. Although describing rights deprivations as "wrong" has a felicitous symmetry, felicitous turns of phrase are often misleading, as with characterizing rights deprivations as "wrong."[12] Both positive law and generations of philosophy have recognized that rights may be overridden by other rights or policy considerations of great strength.[13] When that is so, a restriction of rights is not wrong, but may, on balance, be rightful.

8 *Cf. id.* at 320 (noting the statistics).

9 *See id.* at 326.

10 *Id.* at 327, 343.

11 Throughout I will use "deprivation" when the exercise of a right is completely eliminated, and "restriction" when some exercises of a right remain possible, or when the exercise of a right is made more difficult or costly, even if not impossible.

12 *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 188–89 (1977).

13 In the philosophical literature the *locus classicus*, focusing on duties and obligations, is W.D. ROSS, THE RIGHT AND THE GOOD 19–47 (1930) (describing duties as binding but prima facie only). For more recent contributions, more explicitly about rights, see, for example, Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHIL. Q. 1, 2 (1981), which defines "infringements" as including justifiable overrides of rights; Robert Nozick, *Moral Complications and Moral Structures*, 13 NAT. L.F. 1, 12–15 (1968), which theorizes and formalizes the way in which the right-making features of moral judgments may be overridden or outweighed by wrong-making features, and vice versa; and JUDITH JARVIS THOMSON, *Some Ruminations on Rights*, *in* RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY 49, 54 (William Parent ed., 1986), which distinguishes between rightful and wrongful infringements of rights. With respect to positive law, a now-familiar feature of constitutional rights is that they can be overridden by considerations of special weight, as with the traditional "clear and present danger" formulation of free speech rights, *see* Schenck v. United States, 249 U.S. 47, 52 (1919), and the susceptibility of due process and equal protection rights to override in cases of "compelling" governmental interest. *See, e.g.*, Roe v. Wade, 410 U.S.

Even when rights are rightfully restricted, however, the right holder has still lost something. The holder of a free speech right that is overridden by a clear and present danger[14] has still lost the ability to exercise a constitutional right. And so too when holders of equal protection rights have those rights overridden by compelling state interests, or when due process and free exercise rights are similarly overridden.[15] In all such cases, the rights deprivation is rightful, but the rightfulness of the deprivation is not inconsistent with the right holder having been deprived of the ability to exercise a right.

The question, then, is whether the loss of a right does or should entitle the rightfully restricted right holder to some form of redress, or even compensation. We might suppose that to be so, and that those whose rights are overridden in the interest of other rights or for the public good are as entitled to redress or compensation for their loss of rights as is the landowner whose land is rightfully taken for the public good.[16] Yet the law rarely entitles the right holder whose rights are rightfully deprived to compensation or other redress.

In addressing this question, the analysis will be about rights against the state, in particular the most familiar constitutional rights.[17]

113, 155 (1973) (observing that due process and other fundamental rights can be overridden by compelling state interests), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *Grutter*, 539 U.S. at 327 (same for equal protection rights); *see also* Griswold v. Connecticut, 381 U.S. 479, 497–98 (1965) (Goldberg, J., concurring) (observing that the right of privacy can be overridden by a compelling state interest); *In re* Gault, 387 U.S. 1, 69 (1967) (Harlan, J., concurring in part and dissenting in part) (same for procedural due process).

14 Although the "clear and present danger" formulation, *Schenck*, 249 U.S. at 52, has long since been superseded as the applicable standard when the state wishes to prohibit the advocacy of illegal action, *see* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), it retains some force in other First Amendment contexts. *See, e.g.*, City of Houston v. Hill, 482 U.S. 451, 461 (1987) (suggesting that "clear and present danger" is required before individuals may be prosecuted for interfering with police officers); Edwards v. South Carolina, 372 U.S. 229, 236–38 (1963) (suggesting that a "clear and present danger" is required before demonstrators may be prosecuted for provoking a hostile audience).

15 *See supra* note 13. On the susceptibility of free exercise rights to "compelling interest" overrides, see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993), for a summary of existing doctrine allowing actions targeted at religion or particular religions to be justified, but only when there is a compelling governmental interest.

16 U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation."). The Takings Clause, originally applicable only to the federal government, has been applied to the states through the Fourteenth Amendment ever since the late nineteenth century. *See, e.g.*, Chi., Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 233–41 (1897); Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896).

17 The specific question whether someone whose rights have been rightfully infringed is entitled to compensation or other redress, although almost entirely ignored in the context of constitutional rights and other aspects of public law, has been the subject of extensive analysis in private law contexts. Here, the most widely discussed decision is that of the Supreme Court of Minnesota in 1910 in *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221

And although the analysis proceeds from the premise that there are rightful deprivations of rights, this is not to deny that many, perhaps most, deprivations of constitutional and related rights are simply wrong. Most acts of discrimination on the basis of race, gender, and sexual orientation are wrongful deprivations of the right to be free from such discrimination.[18] Similarly, restrictions on political communication designed to entrench the power of political leaders and

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(Minn. 1910), involving the owner of a ship threatened by a storm who tied the ship to a privately owned dock, probably saving the ship but causing damage to the dock. *Id.* at 221. The Minnesota Supreme Court acknowledged that the ship owner had behaved justifiably in using the private property of another in case of necessity, but nevertheless concluded that the dock owner was entitled to compensation from the ship owner. *See id.* at 222. The court in *Vincent* claimed support from the also-prominent *Ploof v. Putnam*, 71 A. 188 (Vt. 1908), but *Ploof*, holding that necessity justified what would otherwise have been a trespass, did not address the question of compensation directly, concluding only that the dock owner was responsible for damages incurred to the boat and its passengers as a result of the dock owner's unmooring of the boat during a storm. *See id.* at 189–90. The *Vincent* court did read *Ploof* as holding that the boat owner would have owed compensation to the dock owner for damage to the dock had the boat not been unmoored, *Vincent*, 124 N.W. at 222, but this reads the *Vincent* conclusion back into the *Vincent* court's reading of *Ploof*, rather than reporting what was actually said or held in *Ploof*. Indeed, the *Ploof* court's observation that "every one ought to bear his loss to safeguard the life of a man" casts doubt on the too-easy conflation of the two cases. *Ploof*, 71 A. at 189. And although a full exploration of the issues in private law (or the related aspects of the necessity defense in criminal law) would take us too far afield from the primary focus of this Article on constitutional rights, the *Vincent* conclusion that obligations of compensation are consistent with rightful infringements of the rights of others is compatible with much of what I examine here. For a sampling of the extensive scholarship on *Vincent* and the issues it exposes, see, for example, George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975, 981–89 (1999) (surveying the existing law and concluding that compensation is rarely required in cases of necessity); John Gardner, *Wrongs and Faults*, 59 REV. METAPHYSICS 95, 100–01 (2005) (distinguishing between wrongful acts and doing the wrong thing); Mark P. Gergen, *What Renders Enrichment Unjust?*, 79 TEX. L. REV. 1927, 1954 n.131 (2001) (criticizing the *Vincent* result as "creative[]"); John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 FORDHAM L. REV. 743, 765 n.89 (2016) (arguing that the obligation of compensation in *Vincent* arises out of trespass and an invasion of a property right); Gregory C. Keating, *Property Right and Tortious Wrong in* Vincent v. Lake Erie, ISSUES LEGAL SCHOLARSHIP, 2005, at 1, 50–52 (understanding the ship owner's justifiable act as nevertheless a wrong requiring compensation); George P. Fletcher, *Corrective Justice for Moderns*, 106 HARV. L. REV. 1658, 1670–71 (1993) (reviewing JULES L. COLEMAN, RISKS AND WRONGS (1992)) (challenging the characterization of the damage to the dock in *Vincent* as a "wrong").

18 *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (invalidating prohibition on same-sex marriages); United States v. Virginia, 518 U.S. 515, 519 (1996) (invalidating wrongful exclusion of women from the Virginia Military Institute); Loving v. Virginia, 388 U.S. 1, 2 (1967) (invalidating prohibition on interracial marriage).

immunize them from criticism are legally and morally wrongful deprivations of the right to freedom of speech.[19]

But although many rights deprivations are indeed wrong, others are not.[20] A quarantine aimed at preventing the spread of an epidemic will restrict rights to personal liberty and freedom of movement but may be necessary as a matter of morality and public policy.[21] And when the state takes private land by eminent domain in order to build a highway, a school, or a hospital, it infringes rights to private property in order to enhance the general welfare.[22] And so too with some of the justified restrictions on free speech, equal protection, and due process rights noted above.

Even though a taking of land for a legitimate public purpose renders the deprivation of property rights justifiable, the positive law of most industrial democracies still provides for compensation to landowners as redress for the deprivations of those property rights.[23] And philosophers have long argued that the victim of a rights deprivation should be entitled either to redress or some form of repair, with rights deprivers being required to put those who have had their rights deprived in as good a position, or almost a good a position, as they would have been had the deprivation not occurred.[24] Indeed, sometimes

19 *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964) (holding that the right to criticize public officials is the "central meaning" of the First Amendment); Grosjean v. Am. Press Co., 297 U.S. 233, 251 (1936) (invalidating a tax intended to penalize the press for criticizing the state government).

20 On the basic proposition that a rights violation may not constitute a wrong, see Arthur Isak Applbaum, *Are Violations of Rights Ever Right?*, 108 ETHICS 340 (1998).

21 *See* Alberto Giubilini, Thomas Douglas, Hannah Maslen & Julian Savulescu, *Quarantine, Isolation and the Duty of Easy Rescue in Public Health*, 18 DEVELOPING WORLD BIOETHICS 182, 183 (2018) (offering moral arguments for quarantines); *see also* Hickox v. Christie, 205 F. Supp. 3d 579, 584–85 (D.N.J. 2016) (upholding constitutionality of eighty-hour quarantine of nurse exposed to contagious disease).

22 For the more prominent moral, economic, policy, and legal analyses of the foundations of takings law and practice, see, for example, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

23 *See* EMINENT DOMAIN: A COMPARATIVE PERSPECTIVE (Iljoong Kim, Hojun Lee & Ilya Somin eds., 2017); André van der Walt, *Comparative Notes on the Constitutional Protection of Property Rights*, *in* HUMAN RIGHTS AND PROPERTY: A BILL OF RIGHTS IN A CONSTITUTION FOR A NEW SOUTH AFRICA 39, 43–56 (Roel de Lange, Gerrit van Maanen & Johan van der Walt eds., 1993).

24 *See, e.g.*, JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 93–96 (1990) (arguing for compensation for rights infringements); THOMSON, *supra* note 13, at 59–60, 71–72, 76–77 (same); D.N. MacCormick, *The Obligation of Reparation*, 78 PROC. ARISTOTELIAN SOC'Y 175, 176–77 (1978) (U.K.) (arguing for a claim to repair by the victim of a rights violation); Adam Slavny, *Negating and Counterbalancing: A Fundamental Distinction in the Concept of a*

even an apology or sincere expression of regret—"I feel your pain"—might count as a form of redress.

Although redress of some sort seems intuitively plausible when rights have been deprived, that intuition is rarely reflected in the positive law when the rights deprivation is considered rightful. In contexts other than the taking of property, the legitimacy of a justification for infringing a right appears ordinarily to extinguish the right holder's claim to compensation or other tangible redress. When legitimate interests in national security, for example, are taken to justify what would otherwise be a "restriction on freedom of speech,"[25] those who endorse such a restriction are rarely heard to suggest that those who are restricted are entitled to any redress at all. When the interest in diversity overrides the right to be free from decisions made on the basis of one's race, as in *Grutter*,[26] existing law again offers no compensation or redress for those whose rights have been justifiably infringed. And when the Religious Freedom Restoration Act allows the rights it entrenches to be overridden in cases of compelling state interest, it says nothing about what might be owed to those who rights are so overridden.[27]

This Article starts with an abstract exploration of the structure of rights, paying particular attention to the claim that rights can be overridden (or outweighed) and still count as, and function as, rights. Then, drawing on the philosophical idea of a *moral residue*, it examines the claim that duties may persist—create a residue—even when those duties are overridden. And if that is so with respect to duties and obligations, then so too with rights. Accordingly, the argument then turns to overridable rights, and to the peculiarity of thinking that there is no analog to the idea of a moral residue in the case of rights that are rightfully overridden, with property and its associated takings doctrine being the noteworthy exception.[28]

Although the failure to provide redress for those whose rights have been sacrificed to other rights or to the public interest might seem inconsistent with "taking rights seriously," and although that failure might suggest that our existing practices of noncompensation and nonredress are in need of radical revision, this Article concludes with an alternative and less conventional understanding of the nature of a right and of what the right holder gets by virtue of holding a right.

Corrective Duty, 33 L. & PHIL. 143, 144 (2014) (distinguishing between negating a violation by repair from counterbalancing a violation).

25 Dennis v. United States, 341 U.S. 494, 550 (1951) (Frankfurter, J., concurring in affirmance of the judgment).

26 Grutter v. Bollinger, 539 U.S. 306, 325–33 (2003).

27 *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b)(1) (2018).

28 The phrase "taking rights seriously" has become prominent by virtue of DWORKIN, *supra* note 12.

And if this alternative and unconventional picture of the nature and structure of rights is sound, it may provide not only a plausible justification for the seemingly anomalous failure to compensate those whose rights have been rightfully infringed, but also to suggest that perhaps it is compensation in the case of property and not noncompensation in the case of other rights that is truly the anomaly and truly in need of additional justification.

II. OVERRIDING RIGHTS

It is a commonplace that rights may be overridden.[29] Susceptibility to override is not a necessary feature of rights. Some rights may be absolute—infinitely stringent in the face of considerations inclining in the opposite direction.[30] And some theorists have argued that rights are by definition absolute, such that what may initially appear to be an overridable right is in reality a right whose defined scope excludes any seemingly overriding considerations.[31] For such theorists, it is a mistake to think that a right to personal physical liberty is overridable by considerations of national defense (and hence that conscription is justified) or defeasible by the criminal activities of the right holder (and hence that imprisonment for crimes is permissible). Rather, there is a right-to-personal-liberty-absent-considerations-of-national-defense-and-absent-having-committed-a-crime, and so on. The definition of the right incorporates all of the necessary exceptions, qualifications,

29 *See supra* note 13.

30 *See* Natasa Mavronicola, *What Is an 'Absolute Right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights*, 12 HUM. RTS. L. REV. 723 (2012) (providing examples of absolute rights from various international human rights documents).

31 *See* CHARLES FRIED, RIGHT AND WRONG 10, 9–17, 81–82 (1978) (arguing that seeming overrides and exceptions to norms actually "lie[] outside th[]e boundaries" of those norms); John Oberdiek, *Specifying Rights Out of Necessity*, 28 OXFORD J. LEGAL STUD. 127, 140–41 (2008) (defending a "specificationist" account of the structure of rights). Samantha Brennan valuably describes such views as maintaining that rights "are only absolute within the boundaries that define their concepts." Samantha Brennan, *Thresholds for Rights*, 33 S. J. PHIL. 143, 145 (1995). Under such a view, all of the normative work is done in defining the boundaries of the right and none by the degree of strength within the boundaries. Much the same idea exists in the First Amendment literature under the rubric of "definitional balancing." *See* Norman T. Deutsch, *Professor Nimmer Meets Professor Schauer (and Others): An Analysis of "Definitional Balancing" as a Methodology for Determining the "Visible Boundaries of the First Amendment"*, 39 AKRON L. REV. 483 (2006); Melville B. Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 942 n.24 (1968) (coining the phrase "definitional balancing").

and caveats, and as a result a properly defined right will make overrides nonexistent.[32]

Understanding rights as precisely delineated and nonoverridable, however, appears both descriptively inaccurate and normatively undesirable. As a matter of positive law, it is descriptively inaccurate because most constitutions and human rights documents explicitly provide for override.[33] For example, The Canadian Charter of Rights and Freedoms provides that the rights and freedoms it guarantees are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[34] Similarly, Article 10 of the European Convention on Human Rights, which protects the freedom of expression, allows restrictions "as are prescribed by law and are necessary in a democratic society."[35] Article 36 of the Constitution of South Africa allows its specified rights to be limited by "reasonable and justifiable" laws of general application,[36] and the Universal Declaration of Human Rights, in Article 29, proclaims that the rights it guarantees may be restricted in the service of protecting "the rights and freedoms of others and of meeting the just requirements of morality, public

32 Or almost nonexistent. FRIED, *supra* note 31, at 10, 12, acknowledges a catastrophe exception for a right's infinite stringency, and ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 30 n.* (1974), accepts that this is a possibility.

33 Jamal Greene has argued against what he perceives as the Supreme Court's "absolutism" in their understanding of constitutional rights. *See* Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 38 (2018). The heart of Greene's complaint is a worry that the Court has not adopted the proportionality approach common in many other liberal constitutional and human rights regimes. In offering his argument, however, Greene adopts a definition of "absolutism" different from the one I employ here, for he does not challenge the view that American constitutional practice regarding due process, equal protection, and other rights allows for overrides. Rather, he argues that even the strongly presumptive but overridable conception of rights that dominates American constitutional adjudication leads to an underappreciation of other values and the consequent "distortion," *id.* at 70, of the full range of rights and interests applicable to most constitutional controversies. Greene's challenge is important, but for purposes of this Article is at best indirectly relevant. Even proportionality review, at least in the context of constitutional rights, assumes that rights have weight, and thus proportionality review differs from open-ended and unweighted balancing. *See* JACCO BOMHOFF, BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE 19 (2013) (noting the "clear indications of difference" between proportionality and open-ended balancing). Accordingly, even a determination that a deprivation or restriction of some right is proportional to the value of what is lost presupposes that there is a loss. And thus even proportionality review raises that problem highlighted in this Article of whether such a loss entitles the right holder to compensation or other redress.

34 Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

35 Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221 (listing the permissible restrictions).

36 S. AFR. CONST., 1996 ch. 2, § 36.

order and the general welfare in a democratic society."[37] And even when a constitution or other document contains no explicit limitations clause, as most obviously with the Constitution of the United States, judicial decisions ubiquitously allow overrides in cases of "clear and present danger,"[38] "compelling interest,"[39] or "legitimate overriding purpose."[40]

Even apart from the positive law, understanding rights as being of limited specificity but overridable fosters the goal of formulating rights so as to guide and control private and official conduct. For if we do not know whether a right exists until after we have determined in a particular context whether countervailing considerations will prevail, it is difficult to see how rights can guide and constrain.[41] Moreover, understanding rights as incorporating all foreseeable exceptions and qualifications would be unduly inflexible. The philosopher Willard Quine once observed that "a painter with a limited palette can achieve more precise representations by thinning and combining his colors than a mosaic worker can achieve with his limited variety of tiles."[42] And thus Quine concluded that we have greater flexibility in the face of an uncertain future when we "superimpos[e] . . . vaguenesses [rather than] fitting together . . . precise technical terms."[43] Much the same applies to rights formulations, where understanding rights as general but overridable allows them to be more adaptable to future

37 G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 29 (Dec. 10, 1948).

38 *See supra* note 14.

39 *See supra* note 13.

40 Loving v. Virginia, 388 U.S. 1, 11 (1967).

41 Marcus Singer acknowledges that we can prevent conflict between rules by including full statements of their qualifications and exceptions, but concludes that this can be accomplished only with the help of an "among other things" clause, which would make the rules of little use. Marcus G. Singer, *Moral Rules and Principles*, *in* ESSAYS IN MORAL PHILOSOPHY 160, 167 (A.I. Melden ed., 1958). Singer usefully quotes Mill on this point: "It is not the fault of any creed, but of the complicated nature of human affairs, that rules of conduct cannot be so framed as to require no exceptions, and that hardly any kind of action can safely be laid down as either always obligatory or always condemnable." J.S. MILL, UTILITARIANISM (1861), *reprinted in* UTILITARIANISM AND OTHER ESSAYS 272, 297 (Alan Ryan ed., 1987); *see also* R.M. Hare, *Principles*, 73 PROC. ARISTOTELIAN SOC'Y 1, 14 (1973) (observing that "principles of more than a certain degree of specificity cannot be taught"). It may, however, be appropriate for a rights-applying body to be more able (than the original promulgator) to reformulate and increasingly precisify rights in the context of particular applications, much in the style of Rawlsian reflective equilibrium. *See* RICHARD H. FALLON JR., THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY 68–95 (2019).

42 WILLARD VAN ORMAN QUINE, WORD AND OBJECT 127 (1960) (citing I.A. RICHARDS, THE PHILOSOPHY OF RHETORIC 48, 57, 69 (1936)).

43 *Id.*

and unanticipated circumstances than would precisely delineating rights in advance of their application.[44]

The examples above illustrate the common and normatively appealing practice of formulating rights in general terms and allowing them to be overridden. And thus we see the common description of most moral, legal, and constitutional rights as prima facie. W.D. Ross had earlier used this term to describe overridable moral duties,[45] but prima facie, which translates as "at first sight,"[46] misleadingly suggests that overridable rights (and duties) exist only until they are defeated, and are thus more apparent than real.[47] But having a duty is different from what one should *do*, all things considered,[48] and consequently there is no cause for believing that a duty that is overridden disappears, or was never a duty in the first place. And so too with overridable rights. If I possess a right to freedom of speech, and thus a right to make a particular speech, and if that right is overridden because of, say, a clear and present danger,[49] I have still lost something to which

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44 *See* Stephen D. Hudson & Douglas N. Husak, *Legal Rights: How Useful Is Hohfeldian Analysis?*, 37 PHIL. STUD. 45, 51 (1980) (observing that general rights formulations need not subsume all possible specifications).

45 *See* ROSS, *supra* note 13, at 19–20.

46 *Prima facie*, BLACK'S LAW DICTIONARY (11th ed. 2019).

47 *See* BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 176 (1985) (resisting the term "prima facie" for overridable rights). But Williams, like Fried, *see* FRIED, *supra* note 31, at 9–17, 81–82, and like Onora O'Neill (then Nell), *see* ONORA NELL, ACTING ON PRINCIPLE: AN ESSAY ON KANTIAN ETHICS 133 (1975), insists that prima facie duties are in some mysterious way not "actual." *See* WILLIAMS, *supra*, at 176. But the better reading of the positive law and of Ross maintains that overridable obligations are real even when they do not prevail against opposing considerations on particular occasions. *See* THOMAS HURKA, BRITISH ETHICAL THEORISTS FROM SIDGWICK TO EWING 69–78 (2014).

48 *See* GILBERT HARMAN, CHANGE IN VIEW: PRINCIPLES OF REASONING 132 (1986) ("[W]e can distinguish saying what someone *ought* 'prima facie' to do from what he or she *ought* to do 'all things considered.'"); Joseph Raz, *Introduction* to PRACTICAL REASONING 1, 11 (Joseph Raz ed., 1978) ("[T]he main task of [a] theory of practical reason is to establish what one has (*prima facie*) reason for doing and how to resolve conflicts of reasons and establish that which one should do all things considered."). The same distinction between *prima facie* reasons and what one should do, a distinction equally applicable to obligations and to rights, is also found in Barry Loewer & Marvin Belzer, Prima Facie *Obligation: Its Deconstruction and Reconstruction*, *in* JOHN SEARLE AND HIS CRITICS 359 (Ernest Lepore & Robert Van Gulick eds., 1991), and JOHN SEARLE, Prima Facie *Obligations*, *in* PRACTICAL REASONING, *supra*, at 81. Recognizing the problems with the term "prima facie," contemporary theorists often refer to overridable rights, duties, obligations, and reasons, as *pro tanto*, *see* SHELLY KAGAN, THE LIMITS OF MORALITY 17 (1989); Maria Alvarez, *Reasons for Action: Justification, Motivation, Explanation*, STAN. ENCYCLOPEDIA OF PHIL. (Apr. 24, 2016), https://plato.stanford.edu/entries/reasons-just-vs-expl/ [https://perma.cc/6Q34-R5C8], although *pro tanto*, which translates as "to that extent," is equally susceptible to the misleading reading that an outweighed duty, obligation, reason, or right somehow ceases to exist, *Pro tanto*, BLACK'S LAW DICTIONARY (11th ed. 2019).

49 *See supra* note 13.

my right entitled me, and the right having been overridden is not to say I never had the right in the first place.[50] And if I have still lost something, the question then is what, if anything, follows from the fact that there is still a loss.

III. THE RESIDUE QUESTION

We are now in a position to inquire into the duties of those—especially the state—who have rightfully deprived others of their rights, or correlatively, into the rightful claims of those whose rights have been rightfully deprived. This inquiry is an application of what is most commonly called a "moral residue."[51] The basic idea can be illustrated with respect to duties or obligations. Suppose I promise to attend your party, knowing both that I will enjoy it but also that my presence means a great deal to you. But the day before the party, my mother becomes gravely ill, and asks me to come to her bedside. And I do what my mother wishes, consequently not attending the party, because my duty to my mother overrides my promise-based duty to attend the party.

50 Ronald Dworkin, with his distinction between principle and policy, *see* RONALD DWORKIN, LAW'S EMPIRE 178–244 (1986), might be interpreted as maintaining that rights can be overridden only by other rights, and not "mere" considerations of utility or aggregate welfare. But not only the positive law but also the weight of philosophical opinion supports the view that nonrights considerations of utility and policy can, if present in sufficient quantities or weight, override a right. *See* F.M. KAMM, INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES, AND PERMISSIBLE HARM 248–60 (2007) (discussing how the aggregate good might outweigh a right); F.M. Kamm, *Rights*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 476 (Jules Coleman & Scott Shapiro eds., 2002) (same); Rex Martin & James W. Nickel, *Recent Work on the Concept of Rights*, 17 AM. PHIL. Q. 165, 173 (1980) (arguing that rights can be overridden by "other considerations"). Such a view is also a component of what is ordinarily referred to as "threshold deontology," the view that rights will prevail, but only up to some threshold of consequentialist consequences, above which the consequences may dictate the outcome even if doing so will restrict a right. *See generally* Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893 (2000); Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 30, 2020), https://plato.stanford.edu/entries/ethics-deontological/ [https://perma.cc/2CU2-WJZT]; EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS, AND MORALITY 41 (2010). Little in this Article turns on resolving this issue, but it is worth noting that references here to "overriding" are agnostic as between overriding by other rights and overriding by aggregate or especially weighty considerations of policy and utility.

51 *See* WALTER SINNOTT-ARMSTRONG, MORAL DILEMMAS 44–53 (1988). *See generally* THOMSON, *supra* note 13, at 84–86; Terrance McConnell, *Moral Dilemmas*, STAN. ENCYCLOPEDIA OF PHIL. (July 25, 2022), https://plato.stanford.edu/entries/moral-dilemmas/ [https://perma.cc/DN7B-AQNF]. Much the same idea is described by Frances Kamm as "negative residue." KAMM, *supra* note 50, at 328–29. And John Gardner characterizes the phenomenon in terms of the "continuity" of infringed rights. John Gardner, *What is Tort Law for? Part 2. The Place of Distributive Justice*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 335, 338–39 (John Oberdiek ed., 2014).

The question is then whether I owe you something. Under one view, I owe you nothing, because in doing the right thing I have done nothing wrong.[52] And this view follows logically from the position that prima facie obligations are in some way only tentative, thus disappearing when defeated by weightier obligations. But if we adopt the better view that there is a difference between what we have an obligation to do and what we should do all things considered,[53] then the obligations we have do not go away when they are overridden. Rather, they persist, or *continue*, as Gardner puts it.[54] And in doing so they leave a residue behind. Thus, the view that overridable duties generate real obligations leads to the conclusion that a moral residue remains even after I have done the right thing, the residue arising from the breach of a duty, no less because the breach is justifiable. And although for some commentators this residue might be manifested in feelings of remorse or regret, thinking that that is all there is to it seems an unduly infringer-centric view. Rather, we might focus instead on the victim of the infringement and consider what victims might be owed by virtue of the breach of a duty to those victims. Most obviously we might thus think that the moral residue can produce an obligation to compensate the victim, understanding "compensate" in a capacious sense. In the context of the example of the party, we might imagine (counterfactually) that I am famous, such that my nonpresence at the party will disappoint both you and your guests. Then perhaps I should offer to organize and pay for another party at which I will be in attendance. Or, to use a similar example, suppose I promise to meet you for lunch, with the implicit understanding, based on our past practices, that we will split the bill. If I justifiably break that promise, perhaps again because of a family emergency, we might think I should compensate you in some way, possibly by offering to reschedule at your sole convenience and perhaps also to pay the entire bill myself. All of which is to say that, at least in the context of duties, a position that is as sound as it is widespread would insist that one who is under an obligation remains under that obligation, and thus with consequent responsibilities,[55]

52 *See* Philippa Foot, *Moral Realism and Moral Dilemma*, 80 J. PHIL. 379, 388–89 (1983) (arguing that there is no obligation to "make restitution" when one has made the right choice in the face of competing obligations).

53 *See supra* note 48.

54 *See* Gardner, *supra* note 51.

55 Although at times compensation, monetary or otherwise, may be the appropriate way to embody those responsibilities, at times it may be just the opposite, and indeed insulting. Consider the difference between "I am afraid I can't come to your party. Here's ten dollars," and "I am afraid I can't come to your party. I know this is disappointing. How can I make it up to you?"

even if and when that obligation is overridden by other and more powerful obligations.

IV. AND SO TO RIGHTS

The foregoing discussion was about overridable duties, but the same considerations apply to the rightful overriding of overridable rights.[56] Just as an overridden duty leaves the duty unfulfilled, so too does an overridden right still leave the right holder without what the right is aimed at providing. And just as a residue in the case of duties or obligations generates a residual duty to engage in compensating behavior on the part of one who has breached a duty, even if justifiably, then so too should an analogous residue generate duties (and correlative claims) on the part of those who have, even if justifiably, restricted the rights of others.

Such a residual obligation arising out of a justifiable restriction of rights is familiarly embodied in the law of takings by eminent domain. Although not all takings are justifiable,[57] it seems safe to hypothesize that most of them are, and that taking private property to construct a public school, a public highway, a railroad, or a public highway, for example, is indeed justifiable.[58] Importantly, even such a justified taking triggers the constitutional obligation of "just compensation" by the government, even though, to repeat, the taking is entirely justifiable.[59] Takings by eminent domain thus exemplify the *persistence* of the right to property—and therefore the right to compensation—even when the right is justifiably overridden.[60]

56 *See* Stanley I. Benn, *Rights*, *in* 7 THE ENCYCLOPEDIA OF PHILOSOPHY 195, 197 (Paul Edwards ed., 1967) ("A right is no less a genuine ground of claim for being rightly overridden in particular instances.").

57 Indeed, this is just what the dissenters maintained in *Kelo v. City of New London*. *See* 545 U.S. 469, 497 (2005) (O'Connor, J., dissenting); *id.* at 507 (Thomas, J., dissenting).

58 *See* Rindge Co. v. County of Los Angeles, 262 U.S. 700, 710 (1923) (upholding right to take property to build a highway); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 530–31 (1906) (same for a railroad); Searl v. Sch. Dist. No. 2, 133 U.S. 553, 564 (1890) (same for a school); Van Brocklin v. Tennessee, 117 U.S. 151, 154 (1886) (same for a hospital).

59 U.S. CONST. amend. V. Indeed, under the law of some states, the obligation of compensation follows even when property is justifiably impaired or damaged, even if not taken outright. Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341 *passim* (2018).

60 And on a similar obligation when property is taken or damaged by a nonstate actor. *See* discussion of Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910), *supra* note 17; *see also* Goulding v. Cook, 661 N.E.2d 1322, 1324 (Mass. 1996) (Fried, J.) (referring to "self-help with financial adjustments thereafter"). But going in the opposite direction is most of the existing law concerning the destruction of private property to prevent the spread of a fire, where the traditional view is that there is no right to compensation by the owner of the destroyed property. *See* Surocco v. Geary, 3 Cal. 69, 71 (1853) (rejecting compensation); Henry C. Hall & John H. Wigmore, *Compensation for Property Destroyed to Stop the*

V. BEYOND PROPERTY

The right to compensation for the justified deprivation of property contrasts with the fact that such a right to compensation is largely absent with respect to most other rights. When rights other than property rights are involved, and especially with respect to constitutional liberties against state interference,[61] positive law (and perhaps political practice and rhetoric as well) appears to treat a rightful deprivation of rights as generating no duty on the party of the rights-depriving state to provide compensation or other redress to those who rights have been rightfully deprived, but who have nevertheless lost the ability to exercise a right that they otherwise would have possessed.

Before offering examples to support the conclusion in the previous paragraph, it is important that we draw an important distinction. Sometimes the justifiability of a deprivation or restriction of rights is attributable to the right holder's own conduct. When free speech rights are restricted because of the actual or potential consequences of the speaker's own speech, for example, it is the right holder's conduct that has produced the restriction.[62] So too when freedom of religion

Spread of a Conflagration, 1 ILL. L. REV. 501 (1907) (collecting and analyzing the cases); Brian Angelo Lee, *Emergency Takings*, 114 MICH. L. REV. 391, 396–401 (2015) (same). For the suggestion that cases such as *Vincent* are distinctive to private property and do not generalize to all rights, see Dennis Klimchuk, *Property and Necessity*, *in* PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 47, 48, 54 (James Penner & Henry E. Smith eds., 2013). And in the case of eminent domain, the Supreme Court may not view a taking as a right-infringement at all, once opining that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power. [This clause] is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference." First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314–15 (1987) (citations omitted). Indeed, a reluctance to generalize from the taking of land to other rights deprivations is exemplified by a traditional unwillingness to compensate even for taking personal (as opposed to real) property. *See* Miller v. Schoene, 276 U.S. 272, 277 (1928). That unwillingness, however, has recently been cast into doubt. *See* Horne v. Dep't of Agric., 576 U.S. 351, 357–61 (2015). The general problem of justified governmental interference with the right to use one's property also arises when the police commandeer a private vehicle in order to apprehend a suspect, but such behavior, common in movies and on television, is almost nonexistent in real life. *See id.* at 358.

61 There is some debate about whether typical constitutional rights against state interference are best conceptualized as Hohfeldian rights entailing state duties, or instead as Hohfeldian privileges (now commonly described as "liberties") entailing state "no-rights" of interference. *See* Joseph Blocher, *Rights to and Not to*, 100 CALIF. L. REV. 761, 771 n.52 (2012) (noting both possibilities); Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 344 n.4 (1993) (same); Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989, 1040 (1994) (same, but with a seeming preference for the latter). Nothing in this Article requires taking a position on the issue.

62 *See* Schenck v. United States, 249 U.S. 47, 50–52 (1919); Debs v. United States, 249 U.S. 211, 216 (1919). Although neither the outcomes in these cases nor the test they

rights are overridden by the demands of equality, as in recent events involving the refusal of merchants to refuse, on religious grounds, to provide goods or services for same-sex wedding ceremonies.[63] And when a Fourth Amendment right to privacy in one's home is overridden by law enforcement necessity, often it is the holder of the right to privacy who has created the emergency necessitating law enforcement action.[64]

There are interesting questions to be asked about whether, in such cases, the right holder can in some way be deemed responsible for (morally) wrongful exercises of a right,[65] and whether such wrongful exercises might negate an otherwise-applicable entitlement to redress. But those questions need not detain us here, because there also exist instances, conceptually and morally cleaner, in which justified overrides cannot be attributed to (or blamed on) the right holder's own conduct. Consider, for example, the override of a Sixth Amendment right to a public trial in the interests of national security.[66] In some such cases, the national security interests are unconnected with the defendant's own conduct, and thus the defendant has lost what would otherwise be a constitutional right for reasons not at all of the

employed represent current law, *see supra* notes 13–14, they still represent the basic conceptual point about an override being justified by the very conduct of the right holder whose rights are overridden.

63 *See* Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013) (rejecting the freedom of religion claim). The same issue was before the Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018), but the Court's decision was based entirely on evidence of governmental animus and not on any weighing of rights. *See id.* at 1724. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Court upheld the application of antidiscrimination laws against a religious freedom objection by holding the governmental interest to be a "compelling" and "overriding" one that "outweigh[ed]" rights to the free exercise of religion. *Id.* at 603–04.

64 *See* Carpenter v. United States, 138 S. Ct. 2206, 2222–23 (2018) (listing grounds for emergency overrides to Fourth Amendment requirements).

65 An example of a morally wrongful exercise of a legal and constitutional right would be, in the United States, racist speech. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992) (protecting cross-burning against viewpoint discriminatory regulation); Forsyth County v. Nationalist Movement, 505 U.S. 123, 133–36 (1992) (protecting white supremacist marchers against imposition of viewpoint-discriminatory cost imposition); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (protecting a Ku Klux Klan speaker). An interesting question is whether a morally wrongful exercise of a legal right would defeat an otherwise existing entitlement to compensation. Given the absence of such an entitlement under current law, the question is purely hypothetical, but it implicates the issues raised by a large literature on the abuse of rights. *See generally* Anna di Robilant, *Abuse of Rights: The Continental Drug and the Common Law*, 61 HASTINGS L.J. 687 (2010); Ori J. Herstein, *A Legal Right to Do Legal Wrong*, 34 OXFORD J. LEGAL STUD. 21 (2014); Ori J. Herstein, *Defending the Right to Do Wrong*, 31 L. & PHIL. 343 (2012); Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L.J. 1444 (2013); Frederick Schauer, *Can Rights Be Abused?*, 31 PHIL. Q. 225 (1981); Jeremy Waldron, *A Right to Do Wrong*, 92 ETHICS 21 (1981).

66 *See* U.S. CONST. amend. VI.

defendant's own doing.[67] Given that closing a trial denies defendants their rights to a public trial,[68] and assuming that conviction is at least slightly more likely with a closed trial than with one open to the public, the defendant in such a closed trial has suffered a loss from the denial of a constitutional right, but is entitled to no redress.

Consider also, and far less obscurely, the Supreme Court's relatively recent cases on affirmative action in higher education.[69] Controversially, the Court has held that taking race into account in university admissions infringes white applicants' rights under the Equal Protection Clause not to have their race used in government decisions concerning them.[70] And equally controversially, although with a different normative valence, the Court has held in the same cases that the interest in racial diversity in higher education is a compelling governmental interest, consequently overriding the equality rights of the white applicants.[71] Thus, in both *Grutter* and *Fisher*, the plaintiffs had what the Court itself had determined were equal protection rights overridden by the compelling interest in diversity. Yet despite the fact that the plaintiffs lost what otherwise would have been their equal protection rights, there appears to have been no suggestion that these losing plaintiffs, even if it was right that they lost, were entitled to any form of redress. Their rights having been rightfully overridden, the Court and the larger political and legal environment implicitly concluded, no residue existed, and no recompense of any form was justified. Thus, if Jennifer Grutter and Abigail Fisher had lost their property rights for the public good, they would have been entitled to compensation. But having lost their equal protection rights (in the Court's estimation), no compensation was needed or justified.

Much the same might be said about one of the most shameful episodes on the Supreme Court's history—its upholding in *Korematsu v.*

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67 *See, e.g.*, United States v. Alimehmeti, 284 F. Supp. 3d 477, 480–81 (S.D.N.Y. 2018) (allowing partial closure of criminal trial in order to protect identities of undercover officers).

68 *See* Gannett Co. v. DePasquale, 443 U.S. 368, 379–84, 394 (1979) (holding that the Sixth Amendment is a right of the defendant and not necessarily of the public).

69 Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. 365 (2016); Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297 (2013); Grutter v. Bollinger, 539 U.S. 306 (2003).

70 *See Fisher II*, 579 U.S. at 376 (citing *Fisher I*, 570 U.S. at 309) (reiterating that strict scrutiny was applicable to all affirmative action uses of race); *Fisher I*, 570 U.S. at 309–10; *Grutter*, 539 U.S. at 328–33. I say "controversially" because four Justices in *Regents of the University of California v. Bakke* would have applied something less than strict scrutiny to uses of race that disadvantaged only whites, 438 U.S. 265, 357–59 (1978) (Brennan, White, Marshall & Blackmun JJ., concurring in the judgment in part and dissenting in part), and because some commentators have argued that such uses of race might not create constitutional problems at all. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 293–315 (1985) (arguing that so-called reverse discrimination does not violate the equality principle).

71 *See Grutter*, 539 U.S. at 325, 328–33.

United States[72] of the internment of American citizens and American legal resident noncitizens during the Second World War.[73] Although the wrong of the internment and its judicial validation was acknowledged long after the fact,[74] and although that acknowledgement was accompanied by some compensation to some of the victims,[75] one of the things that made this shameful episode even more shameful at the time was that there was then no suggestion that even an internment thought by government officials and a majority of the Supreme Court at the time to be justified might nevertheless have generated an obligation to provide compensation or other redress to the victims. The long-delayed apology and acknowledgment of wrongness was understood to require compensation, but what is anomalous is that never was there anything close to the suggestion that even if the internment was justified, compensation of some sort might still have been appropriate in recompense for the coerced sacrifice of those who were interned.

To the same effect, and perhaps most clearly, consider the free speech cases in which the justification for restricting a speaker's speech cannot be attributed to any wrongness, in the larger sense, on the part of the speaker. So although we might say that overriding Charles Schenck's First Amendment rights because of the clear and present danger his words might (or so the Supreme Court thought in 1919) have produced is acceptable,[76] the same does not hold when speakers are prevented from exercising what would otherwise be their First Amendment rights because of a clear and present danger produced not by the speaker but by audience reaction. The circumstances in which speech may be restricted because of violent audience reaction remain doctrinally unclear,[77] but if there are at least some

72 323 U.S. 214, 219 (1944) (upholding the internment); *see also* Hirabayashi v. United States, 320 U.S. 81, 83, 92 (1943) (upholding a curfew order covering only those of Japanese ancestry).

73 An important contemporaneous and vehement condemnation is Eugene V. Rostow, *The Japanese American Cases—a Disaster*, 54 YALE L.J. 489 (1945).

74 *See* COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982); *see also* Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (vacating Korematsu's conviction).

75 *See* Civil Liberties Act of 1988, 50 U.S.C. §§ 4211–4220 (2018).

76 Schenck v. United States, 249 U.S. 47, 52–53 (1919); *see* Schauer, *supra* note 2.

77 Under one view, the standard in this context, even if not for a speaker who advocates unlawful action, *see supra* note 13, remains that of a clear and present danger. *See* Edwards v. South Carolina, 372 U.S. 229, 237–38 (1963); Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949). Others maintain that the standard is now even stricter after *Gregory v. City of Chicago*, 394 U.S. 111 (1969), but even the view that the standard is stricter would allow restriction of a speaker as a "last resort" if that were the "least restrictive" way of preventing violence. Bible Believers v. Wayne County, 805 F.3d 228, 253, 255 (6th Cir. 2015) (en banc). And for the view that even the *Bible Believers* majority understated the circumstances in which speakers could be restricted, see *id.* at 266–70 (Gibbons, J., dissenting).

circumstances, as no one appears to deny, in which speakers may occasionally be restricted for hostile reactions they neither desired nor intended,[78] then we might think that speakers so restricted would be entitled to something by way of redress. Yet, again, even those who would allow such a restriction seem not to have considered that the restricted speakers might be entitled to something as a consequence of the loss of their First Amendment rights.[79]

Much the same can be concluded about the overriding of First Amendment rights to the free exercise of religion. Indeed, a particularly clear example is *Bob Jones University v. United States*,[80] in which the Supreme Court upheld the denial of an otherwise available tax exemption for a religious university that prohibited its students from engaging in interracial dating.[81] Although it is difficult to call up much sympathy for the university on these facts, the case is instructive insofar as the Court explicitly talked about the free exercise rights of the university as giving way to the "overriding" and "compelling" governmental interest that "outweighs" the university's interest in the free exercise of their religious beliefs.[82] Yet despite the fact that such language emphasizes that there were constitutional rights on the other side of the balance, we see not even a hint from the Court or in public commentary that the constitutional rights that were outweighed or overridden because of the public interest "in eradicating racial discrimination"[83] might ground a claim for some sort of tangible or intangible recompense.

The examples above are all about rights that are, in the United States, constitutional rights, but the same issue arises with respect to what are often understood as rights, even if not constitutional rights. One example would be the right to reputation, not considered in the United States to be a constitutional right,[84] although often understood as a constitutional or human right elsewhere.[85] The right to reputation is typically, at least in the common-law world, protected by the law of

78 *Schenck*, 249 U.S. at 52–53.

79 *See Bible Believers*, 805 F.3d at 267 (Gibbons, J., dissenting); *id.* at 277-78 (Rogers, J., dissenting).

80 461 U.S. 574 (1983). For a brief description, see *supra* note 63.

81 *See Bob Jones*, 461 U.S. at 605.

82 *Id.* at 603–04.

83 *Id.* at 604.

84 *See* Paul v. Davis, 424 U.S. 693, 712 (1976) (denying relief for state damage to reputation). Reputation does have formal state constitutional status in the constitution of Pennsylvania. PA. CONST. art. I, §§ 1, 11; R. v. Commonwealth, 636 A.2d 142, 148–49 (Pa. 1994).

85 *See* Stijn Smet, *Freedom of Expression and the Right to Reputation: Human Rights in Conflict*, 26 AM. U. INT'L L. REV. 183 (2010) (surveying different national and human rights approaches).

defamation, but often that right is justifiably restricted because of countervailing values of freedom of speech and freedom of the press.[86] Yet although individuals whose rights to reputation have thus been overridden—whose rights to reputation have been sacrificed to the public interest in uninhibited public, political, and policy communication—are provided no redress for what they have given up for the public good.[87]

The examples could be multiplied, but that would serve little purpose. For the examples already offered should make it apparent that the taking of private property is far more the exception than the rule, and that the prevailing law is such that justifiable restrictions or deprivations of rights, especially governmental restriction or deprivations of constitutional rights, produce no legal obligations to compensate those whose rights have been rightfully restricted. And although it is difficult to prove (or provide a citation for) a negative, it appears that the same applies to the larger political and policy environment, such that the absence of judicial concern for compensatory redress for those whose rights have been justifiably overridden is mirrored by an equivalent lack of concern by politicians, policymakers, and public commentators. In countless contexts, of course, a *wrongful* deprivation of rights is widely understood to demand compensation, but when the deprivations are not wrongful the demands disappear, even if the losses to the right holder are equivalent.

VI. AN ANOMALY, AN EXPLANATION, AND A NEW PICTURE OF RIGHTS

So how then are we to explain what appears to be an anomaly between the compensation provided to those whose property rights are taken for the public good and the lack of compensation provided to those whose rights of any other kind are analogously taken for the public good?

One possible explanation for the anomaly is that it really is an anomaly, and a troubling one. And if that is so, then perhaps courts,

86 See, most obviously, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

87 A particularly vivid example is provided by *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971), in which an undeniably false and undeniably negligent news report produced tangible harm assessed by a jury at $22,000. *Id.* at 298–99. But because the damaged party was a public official, and because there was no suggestion of the knowing falsehood necessary to satisfy the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. at 283, the Supreme Court, accurately, relied on *Sullivan* to overturn the Florida verdict. *See Damron*, 401 U.S. at 299–300. Nevertheless, the plaintiff had been deprived of reputational rights (or interests) that were given a tangible value by the jury, yet was not thought to be entitled to any sort of redress for what he had given up for the public and not his own benefit. For tentative suggestions on how such redress might have operated, see Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1328–34 (1992).

policymakers, and commentators ought to consider the various ways in which compensation or other redress ought to be provided to those whose nonproperty rights are justifiably overridden. If the wrongful deprivation of right *X* producing a loss valued at *y* is easily compensable, as much of American law now embraces,[88] then it is not obvious why the rightful deprivation of the same right producing the same loss with the same value could not be compensable as well.[89] But as the examples in the previous Part indicate, this approach would entail a major change in the landscape of American constitutional and civil rights law. Perhaps such a change is justified, and such a conclusion might be a fair implication of the argument to this point. More specifically, if people actually do have rights, and if those rights are deprived or restricted, then it seems as if those whose rights have been lost or constricted are truly entitled to something—perhaps money, perhaps some form of compensating advantage provided by the rights-depriving entity, or perhaps some other form of redress. If people genuinely have rights, if those rights are worth something (even in a nonmonetary sense), and if society takes those rights seriously, then we might well expect society to recognize the loss and to make appropriate recompense. In the existing American legal environment, people are entitled to something when the state takes their land to build a highway or a hospital. And it is at least plausible that people should also be entitled to something when the state takes, even if similarly justifiably, (some of) their rights to personal liberty, to freedom of speech, to freedom of religion, or to a public trial.

Before too quickly embracing the normative desirability of such a dramatic change in the legal landscape, however, it is worth exploring various explanations for the existing terrain, explanations that might help us to understand why what seems like such an anomaly has come to exist.

Chief among the explanations for what seems like an anomaly, and perhaps more of a rationalization than a justification, is that for generations property rights have been considered different from other rights. Thus it has been argued, even in the private law context, that cases such as *Vincent v. Lake Erie Transportation Co.*[90] are distinctive to private property, and do not generalize to other rights.[91] Indeed, even

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88 *See generally* JOHN C. JEFFRIES, JR., PAMELA S. KARLAN, PETER W. LOW & GEORGE A. RUTHERGLEN, CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION (4th ed., 2018); 2 JOSEPH G. COOK & JOHN L. SOBIESKI, JR., CIVIL RIGHTS ACTIONS (2012).

89 Obviously punitive damages, available in some civil rights actions for wrongful deprivations, *see* JEFFRIES, JR. ET AL., *supra* note 88, at 360–75 (quoting Smith v. Wade, 461 U.S. 30 (1983)), would not be available for rightful deprivations.

90 124 N.W. 221 (Minn. 1910); *see supra* note 17.

91 *See* Klimchuk, *supra* note 60, at 67.

with respect to eminent domain itself, the Supreme Court may not view a taking as a rights infringement at all, once opining that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power. . . . [This clause] is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference."[92] Accordingly, it is possible that a reluctance to generalize from land takings to other rights deprivations is based, the traditional "bundle of rights" view notwithstanding,[93] on an understanding of property as a "thing," and thus located in a different category from intangibles such as rights.[94] But however we conceptualize the position, at least one explanation for seeing the deprivation of property rights as different from other rights, and thus for providing compensation in the former case and not the latter, is something about the distinctiveness of property.[95]

There is still another explanation, however, and it is an explanation that rests on a very different picture of the nature of rights. And it will help to see this picture if we suppose that one of the things that people who have been deprived of their rights are entitled to is, at the very least, an explanation or justification. Perhaps when rights are wrongly deprived, the agent of the deprivation owes the victim an apology. But even when there is no wrongness and thus no call for an apology, we might think that the victim is at least owed an explanation. And the obligation to offer at least an explanation might be understood as itself a form of moral residue. If so, then we can use analogy between the idea of moral residue and the obligation to offer an explanation conclusion as an entry into offering a different picture of just how we understand the nature and structure of rights, a picture that may both illuminate the idea of a right and also provide a more than plausible justification and explanation for what at first glance seems like an anomaly between the treatment of rightful deprivations of property and rightful deprivations of other rights.

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92 First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314–15 (1987).

93 On modern understandings of the bundle of rights view of property, see generally Shane Nicholas Glackin, *Back to Bundles: Deflating Property Rights, Again*, 20 LEGAL THEORY 1 (2014); Stephen R. Munzer, *Property and Disagreement*, *in* PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW, *supra* note 60, at 289.

94 *See* J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 802–07 (1996).

95 One possible explanation is that property losses are more easily quantified and valued, but that explanation does not stand up against the widespread availability of monetary damages, including nonpunitive damages, for wrongful violations of rights. *See supra* notes 88–89.

To be more specific, we seem typically to believe that someone who has a right to something has the (overridable) entitlement actually to do the thing that a right is a right to. A right to speak, for example, is an (overridable or defeasible) entitlement to speak. And if a right to something is an entitlement to do (or have) that thing, then losing the entitlement is indeed a loss. And thus the traditional view of rights as entitlements, or claims, fits comfortably with the idea that the loss of such an entitlement requires compensation or other redress. As we have seen, however, this view of rights as entitlements fits far less comfortably with our actual legal and political practice. In practice, and with the exception of property, redress is typically, to repeat, unavailable. And to the extent that the existing law provides at least some evidence of widespread and longstanding attitudes, the law's typical failure to compensate in the kinds of cases we are considering suggests a flaw in the view that rights are entitlements. This traditional failure to compensate, however, may suggest a different and better view of what rights are and of how they operate.

The gateway to this alternative picture of rights, a picture fitting better with the existing positive law and arguably even with existing political and policy attitudes, is the possibility that a right to *X* is not actually a right or entitlement to *do X*, but is instead a right simply that there be a heightened justification for any putative *X*-infringement. Just as defendants in criminal trials do not have the right to go free, but only the right that there be proof beyond a reasonable doubt before their freedom may be taken away,[96] perhaps the holders of a right to freedom of speech, for example, do not simply have the right to speak, but rather the right that there be a higher standard of proof or burden of justification for restricting their speech than would have been in force had the right not existed.[97] The right is in effect a burden-shifting or burden-raising device, and the content of the right is

96 *See In re* Winship, 397 U.S. 358, 362–64 (1970) (holding that the presumption of innocence and the requirement of proof beyond a reasonable doubt are requirements of due process).

97 The idea of a "justification" here is slippery. Just to be clear, I understand the idea of a justification—or a reason—in this context as being about what would in fact justify some decision and not about what some decisionmaker would actually *say* in support of a decision. *Cf.* U.S.R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (distinguishing between "plausible reasons" for congressional action from what Congress may actually have articulated in support of the action). This use of "justification" is thus more ontological than rhetorical—it is about the reasons that actually support a decision and not about the reasons that the decisionmaker might provide, or even the reasons that a right holder might demand. And on the distinction, more broadly, among *being* a reason (or justification) in this ontological sense, *having* a reason in a motivational sense, and *giving* a reason in the rhetorical sense, see Frederick Schauer, *Being a Reason, Having a Reason, Giving a Reason*, 2017 ANALISI E DIRITTO 101 (2017) (Spain).

defined not by the conduct that the right encompasses, but by the content of the putative infringement that shifts or raises the infringer's burden of justification.

The foregoing formulation presupposes some baseline standard of justification applicable to the behavior-infringing actions of a potential infringer, whether that infringer be the state, one's parents, one's employer, or any other entity in power. But regardless of the context, the baseline standard is what we have reason to expect even when rights are not part of the picture. The standard might be that of incremental gain in utility or welfare, such that no restriction would be justifiable unless the restriction would produce some marginal increase in utility or welfare.

As should be apparent, this idea of a baseline (and thus rights-free) burden of justification is exemplified in American constitutional law by the idea of a rational basis, the standard applicable in evaluating the constitutionality of any legislation, or at least to evaluating legislation restricting individual or corporate conduct, and thus applicable even when the heightened scrutiny coming from particular rights is not triggered.[98] Rational basis is the American baseline rule, but different baseline rules might be applicable in other systems.

When the behavior designated by and thus covered by a right is to be restricted, however, the baseline rule, whatever it may be, is no longer applicable. When the coverage of a right is activated, then, under the picture offered here, there is a requirement of a stronger justification than that applicable under the baseline rule. The government, for example, would need to have a better reason—satisfy a higher standard of justification—to deny the forms of equality covered by a right to equality than it would need to draw distinctions that did not implicate the right to equality. Specifically, and in the United States, the government would need a better reason to draw distinctions based on race[99] or gender[100] than it would need to draw distinctions

98 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (using "rational basis" for the first time to describe minimal scrutiny and the presumption of constitutionality); *see also id.* at 152 n.4 (noting how the baseline of rational basis will be raised when, inter alia, a "specific prohibition" of the Bill of Rights is implicated, or when laws are directed at "discrete and insular minorities"). For applications of this minimal baseline burden of justification, applications illustrating just how minimal minimal scrutiny is, see City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (rejecting equal protection challenge); Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) (rejecting due process challenge); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–89 (1955) (rejecting both due process and equal protection challenges).

99 *See* Loving v. Virginia, 388 U.S. 1, 8 (1967) (explicitly rejecting mere rational basis review for racial classifications).

100 *See* United States v. Virginia, 518 U.S. 515, 532–33 (1996) (requiring state to produce an "exceedingly persuasive" justification to justify gender-based distinctions); Craig v.

based on, say, age,[101] the former two but not the latter one being encompassed by the right to equal protection. Similarly, if there is a right to freedom of religious practice, then restrictions on such practices require a stronger justification than necessary to justify otherwise equivalent but nonreligious practices.[102] And if there is a right to freedom of speech, then the content of the right is not so much a right to speak per se as it is a right to require that a potential infringer have a stronger justification than would have been necessary for restricting nonspeech conduct, even nonspeech conduct having equivalent consequences.[103]

The understanding of the nature of rights—or at least of conventional liberty rights—just sketched can help to explain the typical lack of legal (or, usually, political) redress for justified rights denials and the typical lack even of any close analogue to a moral residue or continuing force under such circumstances. If my right to freedom of religion, for example, is a right that the state possess a stronger (or heightened) justification for restricting my religious practices than the state would need for restricting my nonreligious practices[104]—driving for example, or choosing a place of residence—and if the state actually does have that heightened justification, then I have received all that to which the right entitles me.[105] And if I have received all to which having the right entitles me, then in fact I have lost nothing by the deprivation. Having lost nothing, there is no moral residue, and I am owed no redress.

This account of rights, which we might label the "heightened justification" account, can explain many of the issues, controversies, and cases described above. If Jennifer Grutter and Abigail Fisher, for example, have a right not simply to be turned down by the Universities of Michigan and Texas, respectively, because of their race, but only that there be a heightened justification before they are turned down, then, such a heightened justification existing and being offered, they

Boren, 429 U.S. 190, 204 (1976) (establishing so-called intermediate—and not rational basis—scrutiny for statutes distinguishing on the basis of gender).

101 *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312–13 (1976) (rejecting heightened scrutiny for age-based classifications).

102 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (reaffirming heightened "compelling interest" scrutiny for restrictions aimed at religiously motivated practices).

103 "[O]n any very strong version of the doctrine [of freedom of expression] there will be cases where protected acts are held to be immune from restriction despite the fact that they have as consequences harms which would normally be sufficient to justify the imposition of legal sanctions." Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFS. 204, 204 (1972).

104 Assuming noncoverage by any other right.

105 *See* A.I. MELDEN, RIGHTS AND RIGHT CONDUCT 20 (1959) (arguing that having a right does not entail "being justified by the particular circumstances . . . in exercising it").

have received what their equal protection rights granted to them, and there is no occasion for redress. Similarly, if a speaker is restricted because there genuinely is a clear and present danger, then the speaker, whose right we can now understand as simply the right that the state has a justified belief in the existence of a clear and present danger before restricting the speaker, has not lost that which this account of the nature of rights has provided.[106]

The heightened justification account of the structure of rights is premised, in part, on a distinction between the foundations (or sources) of rights and the structure of rights—between when we have a right and what it is when we have one, or what we have when we have one. But although the heightened justification account fits better with many of our existing practices than does its more conventional precursors, it is far from a perfect fit. More specifically, the heightened justification account, although fitting well with much of American legal, constitutional, and political practice, fits less well with the law and practice of providing compensation of the justified taking of real property. This transformed version of the anomaly might be a function of the textual entrenchment of the Fifth Amendment's Takings Clause, or, more plausibly, might be a consequence of longstanding and equally entrenched but contingent historical, social, and psychological views

106 The heightened justification account of the nature of rights is agnostic among various philosophical accounts of the nature of rights. For example, whether we understand rights as claims, *see, e.g.*, Joel Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243, 250 (1970), or as valid claims, *see* Rex Martin, *Human Rights and Civil Rights*, 37 PHIL. STUD. 391, 391 (1980), or as claims in the sense of entitlements, *see* Kamm, *supra* note 50, at 476, there remains the question of just what rights claimant is claiming. The instant account posits that the right to Φ, even if understood as a claim, is not a claim to be able to Φ, but a claim—a demand—that there be a justification of a certain type and strength before Φ-ing may be restricted. Moreover, the picture offered here of the structure of rights is compatible with a wide variety of accounts of the foundations of rights. Whether rights reflect the *interests* of the right holder, *see* JOSEPH RAZ, THE MORALITY OF FREEDOM 165–92 (1988); Matthew H. Kramer, *Some Doubts About Alternatives to the Interest Theory of Rights*, 123 ETHICS 245, 245 (2013); Katharina Nieswandt, *Authority and Interest in the Theory of Right*, *in* DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE 315, 316 (David Plunkett, Scott J. Shapiro, & Kevin Toh eds., 2019), or instead the right holder's *will*, *see* Leif Wenar, *Rights*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 24, 2020), https://plato.stanford.edu/entries/rights/ [https://perma.cc/72SP-5QUA]), or *dignity*, *see* John Tasioulas, *Human Dignity and the Foundations of Human Rights*, *in* UNDERSTANDING HUMAN DIGNITY 291, 292 (Christopher McCrudden ed., 2013), or even something else, *see* Laura Valentini, *On the Justification of Basic Rights*, 45 NETH. J. LEGAL PHIL. 52, 53–54 (2016), the fundamental claim here about the structure of the ensuing rights will still hold. As it will if rights do not have some sort of deep moral ontology, but instead are rule-consequential devices designed to achieve long-term consequence (including utility) maximization even when doing so requires some degree of consequence sacrifice in the short-term. *See* BRAD HOOKER, IDEAL CODE, REAL WORLD: A RULE-CONSEQUENTIALIST THEORY OF MORALITY (2002); Martin & Nickel, *supra* note 50, at 172.

about the real-ness of real property and thus the real-ness of property rights compared to other rights. Accordingly, the structure of this Article is intentionally ambivalent as between the anomaly of pervasive noncompensation for justified rights deprivations under current practice and the anomaly of compensation in the case of real property under the heightened justification account. This ambivalence might be seen as the difference between two paths. One path is normative, suggesting greater attention to redress for the victim of a justified rights infringement than now appears to exist. And the other path is conceptual, suggesting a different picture of the structure of rights—one that might better explain existing practices, even if, and especially for taking of real property, it does not explain all of those existing practices. But nothing in this Article should be taken to suggest the strong superiority of one of these paths over the other.

CONCLUSION: OF RIGHTS AND REMEDIES

Questions about compensation or other forms of redress for the rightful deprivation of rights can be understood as components of the larger topic of the relationship between rights and remedies. Law has long associated rights with remedies,[107] although it remains controversial whether there can be rights without remedies.[108] The converse—can there be remedies without wrongs?—has rarely been explored. But once we see that rights can be and frequently are overridden, and that many of those overrides are justifiable, then we are faced with a new set of questions, questions rarely even noticed in public law outside of the context of taking of real property, and, indeed, not that much explored even in private law.

Once we understand that not all deprivations of rights are wrong, an examination of the rightful deprivations of rights can, as this Article has attempted to examine in a preliminary way, tell us a great deal about the structure of rights. That the United States and most other liberal industrialized democracies seem rarely to compensate or otherwise remedy the rightful deprivations of rights, and especially of liberty rights against the state, appears to reflect a view that rights evaporate when they are overridden. There is no reason to suppose that this must

107 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169–70 (1803).

108 *See generally* Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 56–57 (1997); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 859 (1999); Bruce K. Miller & Neal E. Devins, *Constitutional Rights Without Remedies: Judicial Review of Underinclusive Legislation*, 70 JUDICATURE 151 (1986); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212–13 (1978); RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 412–13 (2011) (resisting the notion that unenforceable legal or constitutional norms count as law at all).

be so, however, and much of the current practice about rights may tell us much, to borrow from Ronald Dworkin,[109] about just how seriously those democracies take rights in the first place.

109 *See* DWORKIN, *supra* note 12.