Tracking the Resilience of Hybridity

[Note to registrants: Thanks for registering. This paper is forthcoming in a festschrift in honour of Matt Kramer, but there is still an opportunity to revise it. It forms part of a larger project devoted to articulating and defending my hybrid Tracking Theory of (claim-)rights (it will be part of chapter 2, Counterexamples, in the handout). In my short talk, I plan on working through select aspects of that larger project, as detailed in the handout, and I'm open to questions on either this paper or the larger project. As a final note, I have a completed draft on the Nozickian epistemological foundations of the Tracking Theory (chapter 1, Tracking, in the handout), and I'd be happy to send that draft to those of an epistemological bent for further discussion.]

Abstract

Matthew Kramer is the preeminent contemporary proponent of the *interest theory* of rights – according to which rights function to protect the right-holder's interests. Kramer's meticulous articulation and refinement of that theory has involved countering alternative theories – in particular, most recently, *third-way* alternatives to both interest *and will* theories. Kramer has accepted certain of these alternatives are genuinely novel theories, and then sought to demonstrate their shortcomings. Gopal Sreenivasan's *hybrid* theory of (claim-)rights is one such theory, and Kramer has delineated a putative counterexample against it, and indeed against hybrid theories *in general*. My aim in this chapter is to counter the counterexample on behalf of hybridity in general – I am a hybrid theorist, but of a different stripe from Sreenivasan. And it's my contention that grappling with the counterexample serves as a useful expository aid to deeper articulation of hybridity. Hybridity's resilience emerges therefrom.

Keywords: Kramer; interest theory; Sreenivasan; hybrid theory; tracking theory

Matthew Kramer is the preeminent contemporary proponent of the *interest theory* of rights – according to which rights function to protect the right-holder's interests. It is not an overstatement to say that his ground-breaking essay, "Rights Without Trimmings", in the exemplary book, *A Debate Over Rights*, set the agenda for current rights theorising.[1] And thereafter, in a series of meticulously crafted papers, Kramer has continued the process of articulating and refining his interest theory, in the face of objections.[2]

[1] Kramer (1998)

[2] See, perhaps most notably, Kramer (1998), (& Steiner) (2007), (2010), (2013), and (2017).

One strand of that process of articulation and refinement has involved countering alternative theories – in particular, most recently, *third-way* alternatives to both interest *and will* theories. And one may divide Kramer's responses into two kinds. First, as exemplified by his response to Leif Wenar's putative third-way, Kramer has denied certain of these alternatives are genuinely novel theories. Wenar's third way, for example, according to Kramer, resolves into an expansive version of the interest theory.[3] Second, Kramer has accepted certain of these alternatives are genuinely novel theories, and then sought to demonstrate their shortcomings. Gopal Sreenivasan's *hybrid* theory of (claim-)rights is an example of this second kind, and Kramer has delineated a putative counterexample against it, and indeed against hybrid theories *in general*.[4] My aim in this chapter is to counter the counterexample on behalf of hybridity in general – I am a hybrid theorist, but of a different stripe from Sreenivasan.[5] And it's my contention that grappling with the counterexample serves as a useful expository aid to deeper articulation of hybridity. Hybridity's resilience emerges therefrom.

More specifically, I shall do the following. In section 1, I set out hybridity in general. It is only by first getting a grip on hybridity as a *genus*, zooming out from Sreenivasan's *species* of hybridity, that we can both get a feel for the distinctive strengths of hybridity and gain a true understanding of the nature of Kramer's counterexample thereto. In section 2, I set out Kramer's counterexample in its entirety, and delineate, with some criticisms, Sreenivasan's, to my mind, overly terse response thereto. Finally, in the most important section, section 3, I outline what I take to be a better response to Kramer's counterexample on behalf of hybridity. This section, after setting out the central elements of my own hybrid theory of rights, goes on to describe a taxonomy of ways to interpret Kramer's counterexample. Like any example in philosophy, Kramer's case is underdescribed, in the sense of being amenable to, and requiring, being filled in in different ways. I then chart Sreenivasan's varying responses to Kramer's case *when operating under my taxonomy*, before coming to my own

[3] See Wenar (2005), (2008), and (2013), and Kramer (& Steiner) (2007) and (2017).
[4] See Sreenivasan (2005) and (2010), and Kramer (& Steiner) (2007) and (2013).
[5] Elsewhere ((2017) and (ms)), I have confronted Kramer's counterexample, in the course of articulating my own hybrid theory, the Tracking Theory (hence this chapter's title); but the confrontation here, while piggy-backing on certain elements from previous confrontations, is utterly fresh.

responses. So Sreenivasan's responses will be contrasted with mine, and, naturally, I take mine to be better.

In the course of this last section three important conceptual distinctions central to elucidation of hybridity will be introduced in detail and explored. These distinctions are, by turn, as follows. First, the distinction between, on the one hand, a *binary* notion of control over a duty (i.e. on/off) and, on the other hand, a *scalar* notion, admitting of degrees of control. Second, the distinction between, on the one hand (wholly) *vicarious/parasitic* interests, and, on the other hand *non-vicarious/non-parasitic* interests. Finally, third, the distinction between *subjective* and *objective* justification with which the relevant authority acts in conferring control or otherwise over the relevant duty.

Kramer's ground-breaking essay, "Rights Without Trimmings", in some senses was one of the works that set me on my path to becoming a jurisprudent. It was hot off the press while I was taking the undergraduate Jurisprudence course at Cambridge, and was a core element of the rights component of that course. It is nice, thus, to be able to pay tribute to Kramer's interest theory – first articulated at full-length in this ground-breaking essay of his – in the best philosophical way possible, namely, to criticise it. More specifically, I plan on showing here that hybrid theories of rights – theories which are viable and (more) nuanced genuine alternatives to the interest theory – are still standing in the advent of Kramer's counterexample. In fact, as noted, grappling with the counterexample, serves as a useful expository aid to deeper articulation of hybridity's unique strengths.

1. Hybridity in General[6]

Here, then, is Sreenivasan's (2005: 271; 2010: 488) last-pass formulation of his hybrid theory, called the *Complex Hybrid*:

> (CH) Suppose X is duty-bound to φ. Y has a claim-right[7] against X that X φ just in case: Y's measure (and, if Y has a surrogate Z, Z's measure) of control over a duty of X's to φ matches (by design) the measure of control that advances Y's interests on balance.

[6] This section draws heavily on material from my (ms).

[7] My note: I largely omit the 'claim-' qualifier in what follows. Sreenivasan's is a not theory of rights *simpliciter*, but rather of *claim*-rights. We can note that Sreenivasan has not articulated a theory of other types of right, such that there be.

Now at the most general level we have a hybrid theory, in the sense that the account of right-holding combines elements of the interest theory and will theory. The will theory, at its most fundamental level, according to which rights are aligned with (the degree of) *control* over – in the sense of power to demand/waive – a duty, is clearly referenced. Moreover, the interest theory, likewise, according to which rights function to protect the interests of the right-holder, is also clearly referenced.

All quite true. But I have in mind a thicker sense of hybrid theories of rights as a genus, of which Sreenviasan's and my hybrid theory are species. Examples will be useful here, in the course of which we can see hybrid theories' distinctiveness. I have in multiple places elsewhere charted and assessed the differing verdicts of hybrid theories versus *interest* theories over right-holding in classic so-called *third party beneficiary* cases.[8] But that literature has developed a complex life of its own. And partly as a result of this complexity, beyond noting that differing verdicts by hybrid and *interest* theorists as to right-holding *are given* in such scenarios, we do well to side-step its details here. So let me simply assert the following. In a core such case, with X and Y contracting for X to provide something for Z, the interest theory wants to ascribe rights to both Y *and Z*. They both stand to benefit *in the right way* for the interest theorist.[9] For the hybrid theorist, meanwhile, Y*, but not Z*, is a right-holder: while Y's control, as promisee, matches (by design)[10] his interests on balance, Z's (ex hypothesi) lack of control does not match his interests on balance.

We can begin, though, to much more tractably get at the core of hybrid theories by considering some classic cases where they contrast, in determinations of right-holding, with the *will* theory. Hybrid theories are more inclusive than the will theory in the following way. As is well known, the will theory, in its most general formulation, makes the holding of a power to demand/waive enforcement of – this control over – the duty in question necessary

[8] See my (2017) and (2020a & b).

[9] For the authoritative statement of details on this *right way*, see Kramer (2010), and his articulation of Bentham's test. It must be noted that, while this is the leading explicit test, adopted by a prominent contemporary version of the interest theory, other versions of the interest theory exist, most notably Raz's (1986), which do not use this test.

[10] These notions can just be utilised intuitively for now, particularly as we, here, are simply rolling out hybrid theories as a genus. So 'matches' means 'is equalled by' etc.; and 'by design' means 'deliberately', 'on purpose' etc. The 'by design' notion in particular will get filled in with much more detail as we proceed. In my (ms), drawing upon epistemological literature, I expound in detail on the central *anti-luck* dimension to 'by design'.

and sufficient for the holding of a right. As is equally well known, such a thesis (on account of its necessity precept) precludes the will theory from ascribing rights in the case of duties which are unwaivable, and also in the case of incompetent adults and children. In the foregoing cases, such powers are not in play, thus the will theory, counterintuitively, cannot ascribe rights. By contrast, hybrid theories *can* ascribe rights in such cases: in the case of unwaivable duties, a right is in play *provided* the candidate right-holder's *lack* of a power of waiver matches (by design) his interests on balance. And, plausibly, in many such cases — for example, unwaivable duties not to torture or enslave another — this can be the case. For hybrid theories, then, I (and you) can have a right not to be tortured or enslaved: my (and your) interests can be, arguably, advanced on balance by lacking a power (having a disability) to waive such duties. Likewise, *mutatis mutandis*, in the case of incompetent adults and children (setting aside, for another time, detailed investigation of *surrogacy* considerations).

Armed with this set of examples, and contrasts with the interest and will theories, we are in a position to do better in specifying the *thicker* sense of hybrid theories of rights as a genus, of which Sreenivasan's and my hybrid theory are species; better that is, than merely asserting that a hybrid theory combines elements of the interest theory and will theory. So on my thicker set of criteria for the genus hybrid theory, there are four severally necessary and jointly sufficient conditions for hybridity:

> (i) A *match* condition: one's interests on balance (or lack thereof) in control over a duty must *be equalled by* one's degree of control (or lack thereof).
>
> (ii) A *design* condition: (i) must obtain *deliberately*, or *on purpose*.
>
> (iii) The possibility of right-holding in *no control* cases: e.g. unwaivable duties, incompetent adults, children.
>
> (iv) Two routes to right-holding: the *control* (e.g. a promisee under a contract, or a property holder), and the *no control* (e.g. (iii)), routes.

Let's close this consideration of hybridity in general, before getting to Kramer's counterexample, by introducing one last telling example. The example picks up on all four of

these conditions for hybridity, but I want to put it to particular use to highlight a point about the design condition (ii).

A hybrid theorist's treatment of criminal law is particularly nuanced — more so, to my mind, than either the interest or will theory. Suppose powers to demand/waive criminal law duties are held, not by citizens, but rather by the public prosecution service. Suppose further that in some circumstances, and for some citizens, that is in these citizens' interests on balance.[11] Hybrid theories allow whether such citizens have corresponding rights or not to depend on the *justificatory reasons* of the relevant authority for giving such citizens no measure of control over such duties, and vesting such control, instead, in the public prosecution service.[12] In a nutshell, if the operative *reasons* are trained on *the interests of the citizen*, that citizen will have a right (in a *no control* case, a la criteria (iii) and (iv) above); if not, and if they are instead trained, for example, on *the smooth administration of justice* (i.e. *efficiency*), that citizen will not have a right. Hence the comparative nuance: by contrast, the interest theory will *categorically ascribe* a right to this citizen (on account of the duty's ex hypothesi protection of the citizen's interests); and the will theory will *categorically deny* a right to this citizen (on account of the citizen's lack of control over the duty).

2. Kramer's Counterexample to Hybridity, and Sreenivasan's (Overly) Terse Reply

Here, then, with the necessary orientation to hybrid theories in general, by way of preliminaries, completed, is Kramer's counterexample thereto (2013: 259):[13]

> Suppose that Mark is legally obligated to pay Paul $20,000. A third-party, Liam, does not have any legal power to waive Mark's duty. His not having any power of that sort is very much in his interests,

[11] The 'some' qualifiers indicate another nuance in hybrid theories: for any particular criminal law duty, it could confer rights on some citizens, but not on others, depending on their interests in control. I see this as a virtue; or, at any rate, certainly not a vice. I think there's a clear parallel here with the thought that, for example, for any particular criminal law, it could instantiate Razian authority vis-à-vis some citizens, but not others, depending on their knowledge of right reason.

[12] Of course, it is a further question whether the public prosecution service (additionally) holds such rights. Moreover, the possibility of the public prosecution service *additionally* holding such rights raises the spectre of overdetermination cases – the relevant authority acting for two (or more) reasons. This is an interesting question, but I bracket such cases for present purposes.

[13] A counterexample not materially different from this one first appeared in Kramer and Steiner (2007). And so we can take Sreenivasan's (2010) reply as a reply to this case. Finally, note that May (2012), in a broader sense of counterexample, has insightfully offered criticisms of hybridity. I engage with May's objections elsewhere (xx).

> since Paul (who is far stronger) would be violently furious if Liam were ever to exercise such a power. Objectively, the furtherance of Liam's interests in that fashion is a sufficient justification for his not being vested with the power to waive Mark's obligation. Now suppose that the judge or other legal official whose directive has placed Mark under a duty to pay Paul was focused on Liam's interests when determining whether Mark's duty should be waivable by Liam. We can presume that the official reasoned as follows: "I know that Paul is extravagantly selfish and that he will not waive Mark's duty even in circumstances where the fulfillment of it would render Mark destitute. Given that Liam is such a humane person, I'd like to endow him with a power to waive the duty. However, for his own good, I had better withhold any such power from Liam. If he were ever to exercise such a power—however wisely and justifiably—Paul would be irate and would vent his wrath by pummeling or even killing him. Thus, although it would be good for Mark and good for the general decency of this society if I were to equip Liam with a legal power to waive Mark's duty, I feel that I must concentrate instead on the interests of Liam. As a consequence, I will not confer any such power upon him." Accordingly, Liam's wholesale lack of any control over Mark's duty is justified subjectively as well as objectively by reference to Liam's own interests. His measure of control — no control at all — is precisely the measure that advances his interests on balance.

Kramer contends that hybrid theories, such as Sreenivasan's, lead to the conclusion that Mark's duty is owed, not only to Paul, *but also to Liam*. And the case is generalisable. Kramer contends, that is, that Liam's lack of a power of waiver matches (by design) his interests on balance. And he concludes (2013: 260) that this (and other like) counterintuitive conclusion(s) fells hybrid theories:

> In a situation where Liam is not involved in any way in Mark's bearing of a duty or performance of a duty to pay $20,000 to Paul — and where Liam has deliberately been kept uninvolved by the judge who imposed the duty — no tenable theory of rights will generate the verdict that Liam has a right to Paul's being paid $20,000 by Mark. Since Sreenivasan's [hybrid] theory does generate that verdict, his [hybrid] theory is unsustainable.

We can usefully tie the case back to our four criteria for the genus hybrid theory. Kramer's case involves a match (criterion (i)) between Liam's interests on balance (not to have control) and his degree of control (none). Moreover (design criterion (ii), putatively), the match is *deliberate*. And (criteria (iii) and (iv)) we are in the realm of a *no control* case of right-holding.

The very category of right-holding – the no control category – which I earlier lauded as a virtuous nuance of hybrid theories, using the example of its treatment of criminal law right-holding, is a natural locus or source for an objector to target. It's similar to sporting or personal characteristics being lauded as strengths and weaknesses depending on contextual variables: her one-handed backhand wins her a lot of points, but loses her many too; his gregariousness makes him a joy to be with socially, but lands him in trouble in the seminar room. So too with hybrid theories: this openness to a *no control* route to right-holding is a likely spot for counterexamplers to seek traction.

In sum, according to Kramer, all the conditions for hybrid theory right-holding are met with respect to Liam, yet it is wildly implausible to accord him a right, as hybrid theories seem to. This, then, is the single, prominent generalisable *no control* counterexample to hybrid theories. It is pleasing then, for hybrid theorists, that, not only can it be deflected, but grappling with it can serve as an aid to exposition of hybridity. I return to this matter – my response and exposition of hybridity – in section 3. Now, though, let me chart Sreenivasan's response.

Sreenivasan – as the foremost hybrid theorist at the time, and against whom Kramer was posing the counterexample – has indeed replied. Sreenivasan replies (somewhat tersely) as follows:

> [W]hile [Liam] therefore satisfies the matching condition by coincidence, he fails the design condition. Hence, on (CH) [i.e. the hybrid theory], [Mark] does not owe his duty to [Liam]. [Liam] fails the design condition because the assignment of control over [Mark]'s duty does not track the assignment that advances [Liam]'s interests on balance. Indeed, as Kramer and Steiner tell the story, it seems there is no one whose interests on balance are tracked by that assignment. (2010: n.68)

Now Sreenivasan's *direct* reply to Kramer's case is indeed, as noted, somewhat brief. However, that reply should be read in conjunction with the surrounding main text (489-91), in which Sreenivasan gives more information on how to understand the design condition. In particular, Sreenivasan provides suggestive remarks on the aforementioned counterfactual dimension of hybridity: "the design condition requires that the matching condition remain

satisfied over a range of relevant counterfactual scenarios" (490). Sreenivasan then cashes out some such scenarios, but in the context of a surrogacy scenario.[14]

Alongside some fascinating discussion of particular applications especial to surrogacy scenarios, Sreenivasan (490) notes:

> For example, [the design condition] requires that Z [the surrogate] would be vested with *less* than the full measure of control over X's duty, were Y's interests better advanced on balance by Z's having a lesser measure of control instead of the full measure. Similarly, it requires that *W* would be vested with control over X's duty and not Z, were Y's interests better advanced on balance by having W as a surrogate instead of Z. In this way, the design condition requires the actual assignment of control over X's duty (not to operate on Y) to *track* the assignment that advances Y's interests on balance, rather than simply to coincide with it.

Now, though this passage is trained on the surrogacy scenario, I think two morals of general application can be extracted therefrom. First, we get a general sense of the *kinds* of tracking questions that are germane to an enquiry into the design condition. Second, and this is relevant to a distinction already introduced, and to be picked up on later, we get a sense that the design condition must be appropriately sensitive to a *scalar* notion of control, admitting of degrees of control.

But this contextualisation of Sreenivasan's very terse direct reply to Kramer, while helpful, still, to my mind leaves hybridity short of a full answer. Put differently, hybridity is here selling itself short. Hybridity has more resources to hand to provide a complete answer to the counterexample.

In sum, one could think of a chief purpose of mine in the remainder of this chapter is to flesh out this rather condensed reply of Sreenivasan's, on behalf of hybridity in general, and to show how Kramer's counterexample doesn't dent hybridity. In essence, the point will be

[14] There are pros and cons to this. On the pro side, surrogacy issues, to my mind, are some of the most complex applications of right-holding. So Sreenivasan is to be congratulated on getting his hands dirty. But on the con side that very complexity potentially makes it a non-ideal context in which to *introduce* the counterfactual dimension to hybridity's design condition. I will be devoting extended treatment to hybridity and surrogacy in future work (ms2). Notably, my ensuing statement of my own hybrid theory prescinds from detailed investigation of *surrogacy* considerations, and so can at this stage be said to be at most a theory of core or paradigmatic claim-rights. At the risk of special pleading, the complexity of surrogacy demands extended treatment – treatment which is only apt once we secure an analysis of core or paradigmatic claim-rights.

that Kramer's and Steiner's case lacks the requisite – the right kind of – *counterfactual dimension*. And we can see that best by foregrounding the counterfactual dimension which, to my mind, is aptly at the heart of hybridity itself.

3. Doing Better: My Hybridity Formalised, and Responding to Kramer's Counterexample More Fully as an Expository Aid for Hybridity

I want to set up a natural taxonomy of ways of filling detail into Kramer's counterexample. More specifically, I want to carve things up into three (potentially exhaustive, but certainly not exclusive) ways of further specifying detail. In broad outline, and somewhat crudely, the carving up pertains to the *basis* or *method* – in essence, the *justificatory reasons* – on which the relevant authority is granting or withholding control over the relevant duty. We can, by turn, label these three bases as those with a significant *moral dimension*, those with a significant *prudential dimension*, and those with a *mixed* (i.e. moral and prudential) *dimension*. These are all permissible, and natural, ways of filling in further detail to Kramer's counterexample, while maintaining fidelity throughout to Kramer's stipulation that the relevant authority is trained on *Liam's* interests. Utilising this taxonomy (and formalisation of my species of hybridity) will be especially useful in charting and interrogating the three distinctions central to an understanding of hybridity – namely, binary/scalar, vicarious/non-vicarious,[15] and subjective/objective – which were introduced in bare outline, in the opening paragraphs.

A. My Hybridity Formalised, and the Binary/Scalar Distinction

Before getting to all that, we need to introduce *my own* gloss on hybridity, and on its design condition in particular. We've just seen that Sreenivasan's reply to Kramer – even zooming out to fully contextualise it – is still much too telegraphic and terse to be fully satisfying. Quite independently, I have articulated my own theory of rights which is a species of the genus hybridity. It is a species of the genus hybridity on account of meeting criteria (i) through (iv), delineated in section 1. It differs from Sreenivasan's in that, beyond hybridity's matching condition (i), I attempt to explain its design condition (ii) *wholly* in terms of the obtaining of a set of modal relations between an agent's interests on balance in control over a duty and that agent's control over said duty. Indeed, *explanation itself* of the design

[15] Or, which comes to the same thing, parasitic/non-parasitic.

condition – never mind my precise means of doing so – distinguishes my theory from Sreenivasan's. I lay bare, render explicit, a matter which is left implicit in Sreenivasan's theory. Now is not the time to *defend* my own hybrid theory, the Tracking Theory of (claim-)rights – I have done that elsewhere.[16] Now is simply the time to assert it and to extract from it the key *tracking* questions which must be asked by the lights of *any plausible hybrid theory of rights*.

Here, then, is my hybrid Tracking Theory of (claim-)rights formalised.

Y has a claim-right against X that X ϕ if and only if:

(A) (1) It is in Y's interests on balance to have control over X's duty to ϕ & Y has control over X's duty to ϕ. ('matching condition'; remainder 'design')

&

(2) If it were in Y's interests on balance to have control over X's duty to ϕ, then Y would have control over X's duty to ϕ (this read as a Nozickian subjunctive conditional).[17]

&

(3) If it were not in Y's interests on balance to have control over X's duty to ϕ, then Y would not have control over X's duty to ϕ (this read as a Nozickian subjunctive conditional).

Or:

(B) (1*) It is not in Y's interests on balance to have control over X's duty to ϕ & Y has no control over X's duty to ϕ. ('matching condition'; remainder 'design')

&

(2*) If it were not in Y's interests on balance to have control over X's duty to ϕ, then Y would not have control over X's duty to ϕ (this read as a Nozickian subjunctive conditional).

&

[16] See my (2017) and, especially, my (ms), in which I detail the Nozickian epistemological origins of the Tracking Theory, and claim its superiority over Sreenivisan's hybrid theory (which itself I take to be superior to rivalling theories of (claim-)rights). Book length articulation of the theory is to come (ms2). In brief, the design conditions exactly mirror conditions at the heart of Nozick's theory of knowledge.

[17] In brief, Nozickian semantics invites us to consider whether the closest *band* of antecedent-situations are consequent-situations. I highlight this as I elsewhere (2017, ms) ponder utilising non-Nozickian, Lewis-Stalnaker, semantics at certain junctures. But I omit this parenthetical qualifier in what follows.

(3*) If it were in Y's interests on balance to have control over X's duty to ϕ, then Y would have control over X's duty to ϕ (this read as a Nozickian subjunctive conditional).

Where, throughout, the *basis* on which the match occurs is held fixed across the counterfactuals.[18]

Sreenivasan, we've noted, asserts that "the design condition *requires* that the matching condition remain satisfied over a range of relevant counterfactual scenarios" (490, my emphasis). Of course, this leaves open that it requires more than this, for him.[19] For now I can simply maintain that the two counterfactual tests I've just set out – namely, (2) and (3) via (A), the *control* case disjunct; and (2*) and (3*) via (B), the *no control* case disjunct – are ones that Sreenivasan does (or, should) endorse as components of hybridity's design condition. They are fixed points for any hybrid theory.[20] What of Kramer? While it is unfair to castigate Kramer for not being attentive to counterfactual tests for hybridity not explicitly articulated at the time he formulated his counterexample, I hope he can now see the natural sense in which the tests that I've just delineated are central to the genus hybridity. Examples will help here.

Applying them at a highly general level using a core *control* case of a promisee under a contract[21] will enable us to shed light on the first distinction mentioned in the opening paragraphs central to elucidation of hybridity. This is the distinction between, on the one hand, a *binary* notion of control over a duty (i.e. on/off) and, on the other hand, a *scalar* notion, admitting of degrees of control. Sreenivasan's remarks, detailed in section 2 above, on surrogacy, in the context of responding to Kramer, highlight something to which any account of hybridity must be attentive. This is the relevance of *degrees* of control over a duty matching with *degrees* of interest in control over said duty. In the context of a

[18] Space here prevents vindicating this condition. Elsewhere (2017, ms), by drawing on the close parallel with Nozick's (1981) epistemology, and the famous case of Nozick's *Granny* in particular, I vindicate this constraint on hybrid right-holding. It is not something I place significant emphasis on in grappling with Kramer's counterexample, however. But it can be noted that the contextually salient bases which I utilise here, and hold fixed in the required way, are those with moral, prudential, and mixed dimensions.

[19] Elsewhere (2017, ms) I investigate this matter further.

[20] And their cognates are fixed points in Nozick's theory of knowledge (cf. n.16).

[21] Kramer's counterexample, involving Liam, as a *no control* case, is less explanatorily helpful in elucidating this first distinction. Our engagement with the counterexample is operationalised in elucidating distinctions two and three.

promisee under a contract, and drawing upon Steiner (1998: 240) (who was in turn drawing upon Hart (1982)), we can mention demanding/waiving *compliance*, *proceedings* for enforcement, and *enforcement* itself, of the duty in question; and Steiner deftly explains certain logical relationships between the powers, which we'll advert to presently. Though there is much more to be said here,[22] that numbers six powers, and we can imagine a scale on which a promisee has (differing interests in) differing degrees of control over the duty in question. Hybridity's design condition must capture, and be appropriately sensitive, to this.

As we are in a *control* case here, disjunct (A) is operationalised. In turn, in the realm of hybridity's design condition (the match condition (1) is straightforwardly met), it means the following two conditions are operationalised:

> (2) If it were in Y's interests on balance to have control over X's duty to ϕ, then Y would have control over X's duty to.
>
> &
>
> (3) If it were not in Y's interests on balance to have control over X's duty to ϕ, then Y would not have control over X's duty to ϕ.

Now, I take it that (2) and (3) are straightforwardly met in quotidian cases of a promisee under a contract. So long as ((2)) it *continues to be* in Y's interests on balance, qua promisee, to have control, Y *continues to be* granted control. And in the closest situations in which ((3)) it *ceases to be* in Y's interests on balance to have control, Y *ceases to be* granted control. A paradigm case of the foregoing cessation is when Y ceases to be a promisee, on account of there no longer being an operative promise. And classic instantiations of this paradigm case – three standard routes to this – would be waiver by Y, fulfilment of the terms of the contract by X, or breach of the terms of the contract by X.[23] Y, qua promisee, is straightforwardly a hybrid theory (claim-)right-holder.

[22] Kramer (2013), for example, has perceptively noted that the aptness of classification of some of these positions as 'powers' is a contingent matter, resting on the existence of certain background default rules in the normative system in question. Finally, I should note that I consider it something of a cheap shot against will theorists to pillory them in the event that they say that the will theory simply requires a *sufficient* number of these powers to be vested in the right-holder. Maybe inherent vagueness is apt here (cf. Wenar 2013: 222); moreover, so too may be any context-dependency of 'sufficient' here, depending on whether we are in the realm of public or private law right-holding.

[23] Of course, this is much too brief. In a moment I colour some details in to show complexities.

But, though it is independently useful simply to play out my species of hybridity in a core *control* case, this is not the principal use to which I wish to put this case here. Instead I want to say that, while the design conditions themselves ((2) and (3)) are enunciated at the *binary* level (control or otherwise over a duty), they are perfectly compatible with *degrees* of control over a duty. Moreover, the binary design conditions *being satisfied* may plausibly be taken to *fix* or *anchor* (sufficient) matching at the *scalar* level of degrees of control. And, in like manner, evidence at the ground level concerning what exactly is going on in the particular contract under assessment will, of course, serve to determine whether or not the binary design conditions are satisfied. Back and forth between the binary and scalar is perfectly permissible;[24] indeed the levels can be mutually reinforcing.

So, to use our example, if we are in a quotidian cases of a promisee under a contract, and so if conditions (2) and (3) are met, we can imagine, within the band of situations encompassed in evaluating (2), a sliding scale of shifting and diminishing interests in control of the promisee, reaching (3) in the limit case where no interest on balance in control subsists (i.e. as a paradigm case, when Y ceases to be a promisee), and no control is granted. And if all this is so, it is highly likely that the shifting and diminishing interests in control of the promisee in the band of situations encompassed in evaluating (2) are *sufficiently matched* by the degrees of control granted to, and possessed by, the promisee.

That is to roll things out in the *binary to scalar direction*, so to speak. We can – and should – flip things and roll things out in the opposite, *scalar to binary direction*. Doing so will provide necessary further details. Above, following Steiner (who followed Hart), I set out three stages of importance to rights theorists concerning this contract (and indeed in general): what I labelled the compliance, proceedings, and enforcement stages. Moreover, I mentioned three central performances of interest here: waiver by Y, fulfilment of the terms of the contract by X, and breach of the terms of the contract by X.

Now the fulfilment of the terms of the contract by X isn't especially interesting for our purposes here: there is compliance, and Y's control vanishes, matching his interests. What interest can one have in controlling nothing? To see the scalar dimension in action, we

[24] And so it is not at all the case that there is any causal relation in play here. In like manner, see my (ms) for discussion, tracing Nozick's epistemology, of why the relationship between *interests* in control and *control* itself is not best construed as causal either.

should ponder waiver by Y/breach by X. In the event of waiver by Y at the (pre)compliance stage, again Y's control vanishes, matching his interests. Again, what interest can one have in controlling nothing? But in the event of breach by X, we advance to the proceedings stage. Here, Y's live powers pertain to the proceedings themselves, and certain background powers in their enforcement should that next stage be reached. Again, we have a match between interests in control and control itself. If Y waives proceedings, (standardly)[25] Y's control vanishes, matching his interests. No proceedings, no enforcement. Finally, should Y demand proceedings, his remaining powers at the enforcement stage match his interests.

Now this is all somewhat rough-and-ready. But that is exactly how it should be: while hybridity's design condition(s) should be attentive and responsive to, and its satisfaction should ensure, a sufficient level of matching at the *scalar level*, it should not be enslaved thereby. The binary level design conditions (2) and (3) provide an appropriate set of *fixed points* or *anchors* so as for their satisfaction to sufficiently engender matching at the scalar level. Any effort to specify design conditions more fine-grainedly would be unwise, and fraught with difficulties.[26] As a matter of point-scoring with Sreenivasan, I have a worry that his elucidation of the design condition (pondered previously in section 2 in the context of surrogacy) veers towards just this misstep.

B. Kramer's Counterexample and Our Remaining Distinctions

We can now confront directly Kramer's counterexample – set out in section 2. In the course of this confrontation distinctions two and three – namely, vicarious/non-vicarious, and subjective/objective – central to elucidation of hybridity, will get fleshed out. As we are in a *no control* case here, disjunct (B) is operationalised. In turn, in the realm of hybridity's design condition (the match condition (1) is, again, straightforwardly met), it means the following two conditions are operationalised:

[25] It could, I suppose, be that another party demands proceedings, and that Y subsequently acquires control at the enforcement stage. But this would be non-standard.

[26] Pursuing the close connection with Nozick's epistemology (cf. n.16), Nozick's theory of knowledge requires *coarse-grained beliefs* to track truth, perfectly compatibly with which there can be *fine-grained degrees of belief* or *credences*; and tracking at the coarse-grained level, may in a like manner to the rights domain, in some sense *fix* or *anchor* tracking at a finer-grained level. Moreover, like in the rights domain, any effort to further precisify matching at the finer-grained level could lead to a host of (further, unwanted) difficulties (e.g. the notion of *degrees of truth* would need to be confronted).

(2*) If it were not in Y's interests on balance to have control over X's duty to ϕ, then Y would not have control over X's duty to ϕ.

&

(3*) If it were in Y's interests on balance to have control over X's duty to ϕ, then Y would have control over X's duty to ϕ.

Now, piggy-backing on the reasoning of the judge in Kramer's case, we can set out our taxonomy of ways of filling detail into the case. Let us, as foreshadowed, divide interpretations of Kramer's case into those emphasising a significant *moral dimension* to the judge's reasoning, those contrastingly emphasising a significant *prudential dimension* to the judge's reasoning, and finally (and perhaps most faithfully to the example itself) those of a *mixed* (that is moral and prudential) nature. As previously noted, this is a permissible and natural taxonomy. Moreover, crucially, in a dialectical sense this is a neutral taxonomy.

I will presently fill these in in more detail, by turn. But, most generally, for now, I can make three quick points. First, these dimensions are connected to the judge's *justificatory reasons* for granting, or not, control to Liam over the duty in question. Second, qua *dimensions*, they should not, in any of the divisions, amount to the *sole animating reasons* of the judge; the division is rather effected to highlight, or draw attention to, issues which might arise when one of the foregoing dimensions is a, or the, *significant animating feature* of the judge's decision. Third, and most specifically, and following Kramer's case, in all the divisions, the judge is throughout taken to be trained on *Liam's interests*; these divisions simply help us tease out *different dimensions* of Liam's interests. Now let me effect the division.

Moral dimension. So, assuming our match on balance between Liam's *lack* of overall interest in control and *lack* of control, there is clearly *a* moral dimension to the judge's reasoning. Liam is, Kramer posits (2013: 259), "a humane person" with an interest in *(seeing) justice being done*; here, specifically, by ensuring Mark doesn't become destitute. And the judge is evidently sensitive to this in his decision-making. The judge is sensitive, that is, in his decision not to allocate a power of waiver to Liam, not only to *Liam's* interests in not being pummelled (prudential dimensions, to which we shall come shortly), but also to Liam's interests *in Mark's interests* in not becoming destitute (moral dimensions). And

insofar as this moral dimension is a significant animating feature of the judge's reasoning, according to (satisfaction of) (2*), in the band of close situations where it *continues to be* defeated by other considerations, no control is granted; and according to (satisfaction of) (3*), when it *ceases to be* so defeated, control *is* granted.

How might a situation, like that envisaged in contemplating satisfaction of (3*), in particular, in the moral dimension scenario, appear concretely? Plausibly, in a situation where the moral interests of Liam point on balance in favour of control over Mark's duty, this would be a scenario in which Liam's interests in (seeing) justice being done defeat all other countervailing considerations.

Now as noted, we shall conclude our division of Kramer's case by considering the *mixed* interpretation – where both moral and prudential dimensions are (significantly) operative. And that interpretation may well be most faithful to the case itself. At that point I say more about the operation of hybridity's design conditions (2*) and (3*). For now we are effecting this division to see problems with specific dimensions of the judge's reasoning; and insofar as these specific dimensions form a component of the mixed interpretation, problems highlighted at the specific level will (to some degree) infect the mixed level.

So what is the chief problem here? A chief problem for Kramer – and this leads us to our second important distinction – is that this moral dimension to the judge's reasoning appears to involve the judge basing his attribution of control over a duty, a key element of right-holding for hybridity, on "wholly vicarious" interests. But such interests are *not* "interest[s] of the requisite sort" which could form "the bases for attributions of rights", according to Kramer (2007: 303). Kramer *precludes* invocation of such interests in determinations of right-holding.

This is all to say, the relevant *moral* dimension here of *Liam's* interests is an interest in *Mark's* interests in not becoming destitute. For Kramer (2007: 303), a wholly vicarious interest is an interest "resid[ing] wholly in the furtherance of somebody else's interests". I recognise that Kramer makes clear here that an interest can be benevolently other-directed and nonetheless not wholly vicarious. But, if Kramer is to argue that the moral dimension of Liam's interest in (not) being assigned the power to waive Mark's legal duty (here, say, for

the sake of justice) is *not* wholly vicarious, we need to hear more as to why this is so (cf. Sreenivasan 2005: 263-4, 2017: 140-142).[27]

Now there is an issue here as to the extent to which this is merely an *ad hominem* reply to Kramer. Consistently with *Kramer* being prevented from mounting this counterexample, what would stop *another* philosopher of rights not encumbered by the preclusion on vicarious interests from the right-holding enquiry from wielding it? Moreover, Kramer has recently indicated that, though he thinks the vicarious/non-vicarious distinction is an ethically important and significant one, he no longer wishes to place much reliance on it as a component of his account of right-holding.[28] But I have recently (2020b) sustainedly denied that Kramer *can* disavow reliance on this evaluatively laden distinction in his account of right-holding. So this way out *for Kramer* is not open.

Be all this as it may, my point here is simply to raise serious concerns about a significant moral dimension of the foregoing sort housed within Kramer's counterexample – a concern of especial weight for, if not exclusive to, Kramer himself. I shall return to the moral dimension in my concluding consideration of the *mixed* dimension, where it will become clear that no *hybrid* theorist should foreclose a priori Liam's interests in Mark's interests in not becoming destitute from the right-holding enquiry – either in this case, or in general. Put differently, the hybrid theorist has nothing to fear from the inclusion of such interests in the setup of Kramer's case, or in general. Indeed, albeit indirectly, I shall start on the path to vindicating these claims right now.

Thus, relatedly, and before leaving this dimension, I want to add Sreenivasan – my hybrid comrade – to the mix. Sreenivasan (2005: 263-4) himself (earlier) introduced the same distinction, but by use of different terms, namely, the *parasitic/non-parasitic* interests distinction. Moreover, though he is not *explicit* in print, he can be read as endorsing the position, a la (2007)-Kramer, that wholly parasitic/vicarious interests should *not* count in the

[27] Insofar as, as is the case under the *mixed* view which I consider last, this moral dimension is not the *sole* operative dimension in the judge's reasoning, surely, even if this moral dimension to Liam's interests *is wholly vicarious*, the interests considered by the judge wouldn't be *wholly* vicarious, on account of their having *other* dimensions? True. But insofar as the wholly vicarious moral dimension is still a *significant animating feature* of the judge's decision in the mixed case, its exclusion would be a critical blow to the sustainability of Kramer's counterexample.

[28] Kramer, personal correspondence.

determination of whether someone is a (hybrid theory) right-holder. And Sreenivasan has recently indicated that he is open to a reading ascribing this position to him.[29]

Now, on the one hand, such a position would readily dispense with Kramer's counterexample, insofar as that case relies on a *parasitic* moral dimension to the relevant interests of Liam's, of the foregoing kind. Such a position would, in essence, *short-circuit* Kramer's counterexample. But, on the other – and more important – hand, I counsel against any hybrid theorist incorporating this evaluatively laden distinction into their account of right-holding.

The most pressing type of case for the interest theory, in terms of forcing its proponents to invoke the *parasitic/non-parasitic*[30] distinction in its account of right-holding, simply has no purchase when it comes to hybridity. That case (Sreenivasan's (2017: 139, reprising 2005 sec: 3)) involves, at its most basic level, a simple contract according to which the chief beneficiary thereof has a grandmother with natural interests in her grandchild receiving benefits (here, under the contract). The issue for the interest theorist was to distinguish the grandmother from the grandchild and the promisee:[31] they *all* have (sturdy)[32] interests in the performance of the contract, yet the grandmother is surely not a right-holder. And (2007)-Kramer invoked the parasitic/non-parasitic distinction to cut off the grandmother as a right-holder (putatively without thereby cutting off the other relevant parties). Moreover, as noted, in my (2020b) I've argued this invocation is unavoidable for Kramer.

But it is clear that the *hybrid* theorist can cut off the grandmother straightforwardly as a right-holder (without thereby cutting off the other relevant parties), without need of this distinction.[33] There is no *match* between the grandmother's interest in control over the duty (a not insignificant one) and her control (ex hypothesi, none). Without more,[34] no hybrid theory right-holder. So I find any motivation of Sreenivasan's for incorporating the distinction between *parasitic/non-parasitic* interests into his hybrid account of right-holding

[29] Sreenivasan, personal correspondence.
[30] Or, which comes to the same thing recall, the vicarious/non-vicarious distinction.
[31] Assuming the promisee is a different agent from the grandchild. If not, let it be grandchild/promisee.
[32] Cf. n 9 above.
[33] Indeed, a selling point of my own hybrid Tracking Theory, is its (near) *value-neutrality*: the justificatory status of right-holding is explained in terms of the holding of certain counterfactuals. So it is not just *this* value-laden distinction of which my Tracking Theory has no need; it is *any* such distinction.
[34] That is, in particular, without needing to invoke the design condition(s).

(i.e. precluding the former from the right-holding enquiry) highly dubious. Moreover, Kramer's counterexample can be readily handled by the hybrid theorist without invoking this distinction. So let us move on, to another natural dimension of the judge's reasoning in Kramer's case.

Prudential dimension. Now it is important to stress a certain limitedness of what I've just done.[35] I've essentially simply posed a problem for Kramer's incorporation of a significant moral dimension of the foregoing kind into the judge's reasoning in Liam's case.[36] Moreover, I've yet to fully roll out and operationalise my own relevant design conditions – namely, (2*) and (3*) – to directly answer Kramer's case. That punchline will come in the third dimension, when confronting the *mixed* interpretation – the one I take to be most faithful to Kramer's case, and to inherit (to some degree) the defects of the moral and prudential dimensions.

Let us now focus on a, or the, prudential dimension of the judge's reasoning. Now, to flip things, Kramer tells us that the judge is sensitive, in his decision not to allocate a power of waiver to Liam, not only to Liam's interests in Mark's interests in not becoming destitute (moral dimensions), but also, critically, to *Liam's interests in not being pummelled* (prudential dimensions).[37] Again, we can take things a step further, by applying our design conditions. Insofar as this prudential dimension is a significant animating feature of the judge's reasoning, according to (satisfaction of) (2*), in the close band of situations where it *continues to* defeat (or play a role in defeating) other considerations, no control is granted; and according to (satisfaction of) (3*), when it *comes to be* defeated by other (prudential) considerations, control *is* granted.

As before, how might a situation, like that envisaged in contemplating satisfaction of (3*), in particular, in the prudential dimension scenario, appear concretely?[38] Plausibly, in a situation where prudential interests of Liam point on balance in favour of control over

[35] In philosophy, small gains are a cause for celebration, however.
[36] Alongside this, I've argued hybridity, contrastingly, isn't, or shouldn't be, encumbered by the addition of an evaluatively laden distinction such as the parasitic/non-parasitic into its account of right-holding.
[37] Of course, morally, it matters that Liam isn't pummelled, but *Liam's interests* in not being pummelled (of chief relevance here) is aptly classed as prudential.
[38] As we are in the prudential dimension scenario, I consider *other prudential (and not moral) reasons* defeating this non-pummelling prudential reason. An advantage of this is that it clearly holds fixed the basis for occurrence of the match (cf. n.18). In the coming *mixed* case, I perhaps more naturally, consider the moral reasons defeating this non-pummelling prudential reason.

Mark's duty, this would be a scenario in which Liam has some personal, likely pecuniary, interest in being able to waive the duty in question. Maybe Liam is likely to get the money himself in that case.[39]

For now, I want to postpone the consequences, in terms of the right-holding enquiry, of a situation in which Liam gets granted control over Mark's duty on the basis of a pecuniary interest in being able to waive the duty. For now, let us simply say that it is an odd case, to say the least. I will return to that shortly. For present purposes, it's worth noting that, in sketching out this prudential dimension, it could be argued that we have strayed quite far from the judge's reasoning. That is to say, though the judge in Kramer's case is attentive to Liam's prudential interests in not getting pummelled, we don't have a clear reason to think that the judge would come to grant control to Liam over Mark's duty when Liam's prudential interest in getting the money points in favour of control. Less still, that the judge would grant control to Liam *on that basis*. All just to say, by isolating the prudential dimension, we can be argued to have strayed some distance from Kramer's case. But putting on a prudential lens in this manner will prove salutary.

Now I will return to the prudential dimension in my concluding treatment of the mixed interpretation of Kramer's case – an interpretation where both moral and prudential dimensions are operative in a significant way. Before that, I want to reintroduce my hybrid comrade, Sreenivasan, to the mix. Kramer was at pains, in his presentation of the case, to set it up such that *subjective* and *objective* justification – subjective/objective being our third key distinction – was aligned. The judge was subjectively *motivated* by the objectively *right* reasons, in his decisions over allocation(s) of control over the relevant duty. Sreenivasan has recently indicated *his* hybrid theorist response to any interpretation of Kramer's case which puts significant weight on its prudential dimension, such as that just outlined.[40] In essence, Sreenivasan points out that any such interpretation of Kramer's case *prises apart* subjective and objective justification – the judge is ex hypothesi subjectively trained on objectively incorrect matters – and Kramer's counterexample promises to be

[39] Recall: this is to *isolate* the prudential dimension. In so doing, we *risk* departure from Kramer's case. But this is done to highlight problems along the prudential dimension (alongside ensuring a fixed basis for occurrence of the match), and any fidelity concerns can be assuaged in the concluding *mixed* interpretation.
[40] Sreenivasan, personal correspondence.

short-circuited again. Kramer set up his case intending to *align* subjective and objective justification.

Some notes of caution, however. As noted, *isolation* of a prudential dimension to the judge's reasoning does, arguably, take us some distance from Kramer's case as presented. Second, a hybrid theorist should *welcome*, as an expository aid, cases where subjective and objective justification come apart. So this is to contrast myself with Sreenivasan (2010: 490, n.66), who "do[es] not have anything particular to say about the special case(s) when objective and subjective justifications come apart". Pretty clearly, these two senses *can* come apart from one another: the objectively correct basis may not motivate the relevant authority, and – the flip side of the same coin – the relevant authority may be motivated by objectively incorrect bases. In both scenarios, tracking can obtain. The former scenario or perspective provides the germ of (one kind of) moral, but not legal, rights; while the latter (arguably, in a more basic or fundamental sense) provides the germ of (one kind of) legal, but not moral, rights. Further exploration of this distinction is something to be welcomed, not dodged, by hybrid theorists. Indeed, confronting cases where they come apart is non-negotiable.

Mixed. Now, as noted, I used, and *isolated*, the previous two dimensions to the judge's reasoning *not* to attempt to capture, by turn, *exactly* what is going on in Kramer's case. The truth is, I think, more complex and involves a mixture of the foregoing dimensions. Alongside helping to elucidate some important distinctions, and setting up some contrasts between myself and Sreenivasan, the foregoing dimensions were isolated for two reasons. First, to pinpoint a clear problem with the highlighted significant moral dimension to the judge's reasoning, at any rate for Kramer. And second, to pinpoint an oddity with the highlighted significant prudential dimension to the judge's reasoning. And, naturally, I think, the problem and oddity will (to a degree) infect any mixed interpretation of Kramer's case. Let me vindicate this claim.

We need to recall our operative hybrid design conditions:

(2*) If it were not in Y's interests on balance to have control over X's duty to ϕ, then Y would not have control over X's duty to ϕ.

&

(3*) If it were in Y's interests on balance to have control over X's duty to ϕ, then Y would have control over X's duty to ϕ.

Recall, Liam, the *total outsider* to the contract, is meant to satisfy hybrid right-holding conditions, on account of lacking interests on balance in control and not being granted control (match); and the relevant authority is trained, at least in part, on Liam's interests when making such a decision (putatively, design). And, in the realm of this mixed interpretation, which I take to be most faithful to Kramer's case, both moral and prudential dimensions (of Liam's interests) are operative in the judge's reasoning. Yet, it is, according to Kramer, highly counterintuitive to accord Liam a right.

As before, how might a situation, like that envisaged in contemplating satisfaction of (3*), in particular, in the mixed dimension scenario, appear concretely? Plausibly, in a situation where the mixed interests of Liam point on balance in favour of control over Mark's duty, this would be a scenario in which Liam's moral interests in seeing justice being done defeat his prudential interest in not being pummelled. Either or both of the following *change-ups* could obtain to reach such a result: the *intensification* of these moral interests, and the *abatement* of his risk of being pummelled.

Here, then, I will pose my challenge(s) to Kramer: First, can you overcome the problems posed in the foregoing *moral* and *prudential dimensions* divisions? Second, now that you have seen the stringent conditions posed by disjunct (B) of the (best hybrid) Tracking Theory for right-holding, are all those conditions met in your case? Are the stringent conditions (2*) and, particularly, (3*) *really* met in Liam's case?[41] If not, Liam has no right. If so, I am prepared to say Liam has a right.

[41] Additionally, on the assumption there is a match in Liam's case, what, for you, is the *basis* for that match, and is it held *fixed* counterfactually? (cf. n 18).

This is assuredly *not* bullet-biting, as the conditions are so stringent that no explosion of right-holding would ensue. In our foregoing work in the *moral*, *prudential*, and *mixed dimensions* divisions, we have gestured at what it would look like for conditions (2*) and (3*) to *really* be met in Liam's case. In (2*) we would need there to *continue to be* a match between Liam's lack of interests on balance in control over Mark's duty, and lack of control itself over the duty, up till the point Liam comes to, on balance, *have* an interest in control over the duty. This leads us to (3*) and considering situations in which Liam comes to have an interest on balance in control over Mark's duty.

Quite plausibly, no control would be granted to Liam in such scenarios, and, on account of the failure of condition (3*), no hybrid theory right would follow. But, if, almost *per impossibile*, we are countenancing a judge trained resolutely on either or both of the following dimensions, and delivering satisfaction of condition (3*), we would have the following scenarios. First, insofar as, amongst the mixed reasons, Liam's *moral i*nterests are *dominant*, we have a judge coming to confer control over a duty in a contract which seems *constitutively designed* to serve Liam's interest in *(seeing) justice being done*. By contrast, second, insofar as, amongst the mixed reasons, Liam's *prudential i*nterests are *dominant*, we have a judge coming to confer control over a duty in a contract which seems *constitutively designed* to serve Liam's interest in *financial gain*. On either limb, we have a very odd situation, and no longer one in which it should count as bullet-biting to ascribe right-holding status to Liam. So this is to reprise our isolation of the moral and prudential dimensions, as dominant dimensions within this mixed enquiry, and to, by turn, confirm the extreme nature of what we are *really* countenancing in contemplating design condition (3*) *truly* being met.

Finally, on the *resolutely mixed* interpretation – a situation where the mixed interests of Liam point on balance in favour of control over Mark's duty, with neither the moral nor the prudential holding dominance – this would be a situation in which Liam's moral interests in (seeing) justice being done defeat his prudential interest in not being pummelled. Insofar as the judge grants control to Liam in such situations, again, we have an extremely odd situation where Liam's (mixed) interests seem almost *constitutive* of the design of the

original contractual set up. It is no bullet for hybridity to bite to grant a right to Liam in such outre circumstances.

It is thus very hard to see how Kramer's case *truly* generalises to create any kind of *rights explosion* issue for the hybrid (Tracking) theorist. Cases in which Liam truly satisfies conditions (2*) and, especially, (3*) in order for the match to be by design, if we take the satisfaction of these conditions sufficiently seriously, are so outre as to be unconcerning for hybridity.

Conclusion

Matthew Kramer has advanced our understanding of right-holding in many ways. To come full circle, and speaking as a hybrid theorist, he has here advanced our understanding of hybridity in a way he would not have wanted. His example doesn't, I've hoped to show, ultimately work. But it demanded a detailed answer, and grappling with it has forced me to articulate hybridity – my Tracking Theory – in a clearer way. So, though he may not want my thanks for *this*, I am grateful.[42]

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[42] Thanks, though, to Matthew Kramer in innumerable other ways – including for setting me (and many others) on the path to becoming a legal philosopher. Thanks also to Joe Bowen, Andrew Halpin, and Visa Kurki for stimulating discussion.

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