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# THE INTEREST THEORY OF RIGHTS: STILL STANDING

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**ABSTRACT**
In two recent papers, Mark McBride has attacked the interest theory of rights, both introducing new arguments and claiming that interest theorists have not successfully deflected Gopal Sreenivasan's earlier arguments. This essay replies to all of McBride's criticisms, showing them to be mistaken.

## I. INTRODUCTION

Matthew Kramer's interest theory has become one of the most important theories of rights and right-holding in modern analytical jurisprudence.[1] It has also received its fair share of criticism, including a powerful attack by Gopal Sreenivasan.[2] I myself have presented a reformulation of the theory, arguing that the theory can in fact deflect much of the criticism that has been mounted against it.[3] However, in two recent highly sophisticated papers, Mark McBride has built upon Sreenivasan's attack, arguing that neither Kramer nor I have successfully salvaged the interest theory.

In "The Unavoidability of Evaluation for Interest Theories of Rights," McBride argues that the interest theory will end up either including certain problematic cases of right-holding or excluding certain canonical cases, unless it incorporates the distinction between vicarious and nonvicarious

* I would like to thank Matthew Kramer for very useful comments on a draft of this paper. This paper was written as part of my Academy of Finland Postdoctoral Fellowship (decision number 325302).

1. Some of Kramer's most important publications regarding rights are Matthew H. Kramer, *Rights Without Trimmings*, *in* A Debate over Rights: Philosophical Enquiries 7–112 (Matthew H. Kramer, N. E. Simmonds & Hillel Steiner eds., 1998) [hereinafter Kramer, *Rights Without Trimmings*]; Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 Can. J. L. & Juris. 29 (2001); Matthew H. Kramer, *Some Doubts About Alternatives to the Interest Theory of Rights*, 123 Ethics 245 (2013); Matthew H. Kramer, *Refining the Interest Theory of Rights*, 55 Am. J. Juris. 31 (2010) [hereinafter Kramer, *Refining the Interest Theory of Rights*].

2. Gopal Sreenivasan, *A Hybrid Theory of Claim-Rights*, 25 Oxford J. Legal Stud. 257 (2005).

3. Visa A.J. Kurki, *Rights, Harming and Wronging: A Restatement of the Interest Theory*, 38 Oxford J. Legal Stud. 430 (2018).

interests, which I have argued to be immaterial.[4] In his "Preserving the Interest Theory of Rights," on the other hand, McBride contends that certain issues brought to the fore by Sreenivasan's previous attack have not been adequately met by Kramer or myself.[5] In a somewhat surprising move, McBride then proceeds to provide his own reformulation of the interest theory—a reformulation that, he claims, is not afflicted by these issues.

Overall, McBride brings up four criticisms:

(1) My reformulation of the interest theory ends up doing too much, i.e., denying that promisees of third-party-beneficiary contracts have rights (*Problematic Promisee*).
(2) Bentham's test, used to determine the rights correlative to an existing duty, only discloses bare descriptions of events, not detriment, and thus does not manage to explain any right-holders at all (*Bare Descriptions*).
(3) The interest theory provides "false positives" because of vacuous truths obtaining under certain conditions, unless modified as suggested by McBride (*Vacuous Truths*).
(4) The interest theory also provides false positives in cases where detriment obtains by chance, unless modified as suggested by McBride (*Fortuitous Detriment*).

I will here provide responses to all four.

This paper will proceed as follows. I will first briefly set the stage by explaining the background of McBride's criticisms. I will then address Problematic Promisee and Bare Descriptions in a somewhat intertwined manner, as they relate to each other in a number of ways. I will then address Vacuous Truths and Fortuitous Detriment, which are also highly interrelated. The paper will then conclude.

## II. THE STAGE: INTEREST THEORY AND THE GRANNY ATTACK

The debate over rights has to do with the correct analysis of the notions of right and right-holding. The *will theory* and the *interest theory* have traditionally been the primary contenders. The *hybrid theory*—which seeks to combine certain features of the interest theory and the will theory—has recently entered the arena as well. Both Sreenivasan and McBride are hybrid theorists.

4. Mark McBride, *The Unavoidability of Evaluation for Interest Theories of Rights*, 23 CAN. J. L. & JURIS. 293 (2020). The distinction between vicarious and nonvicarious interests may of course be relevant elsewhere, but not in this context.

5. Mark McBride, *Preserving the Interest Theory of Rights*, 26 LEGAL THEORY 3 (2020). *See* Sreenivasan, *supra* note 2.

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Interest theorists have had to grapple with the specter of "rights explosion" for over a century. Roughly put, all sorts of parties can benefit from the performance of some duty D. However, most such parties do not hold any claim-rights correlative to D. The problem was likely first identified by Rudolf von Jhering, and made famous in the Anglophone world by H.L.A. Hart in the context of the third-party beneficiaries of contracts.[6] However, it is Gopal Sreenivasan's articulation of the problem—the "Granny Attack," as McBride labels it—that much of the recent debate has focused on.[7]

The Granny Attack involves the following scenario. Y makes a promise to X that Y will pay $100 to Z.[8] So far, we have the traditional problem with third-party beneficiaries: Given that the promisee and the beneficiary are different parties, who is the right-holder? The promisee, the beneficiary, or both? However, Sreenivasan adds a twist by throwing in Z's (the beneficiary's) grandmother, GM. Assuming that the grandmother has an interest in seeing her grandchildren receiving benefits, she will also benefit from the fulfillment of the duty to pay $100 to Z. Does the grandmother therefore hold a right-that-Y-pay-$100-to-Z? Any ascription of such a right would be unsustainable.

Kramer's reply to Sreenivasan involves a distinction between (wholly) vicarious and nonvicarious interests: vicarious interests are not of the right kind, and—given that the grandmother's interests here are wholly vicarious—she does not hold a right.[9] This solution might do the requisite work, but as McBride notes, it is evaluatively loaded, "in the sense that the distinction's full specification clearly rests on substantive moral argument in charting some region within a broader theory of well-being."[10] This is problematic, given the desideratum that theories of rights should be as thinly evaluative as possible. I myself, on the other hand, have argued that Kramer need not invoke any such distinction. Instead, the same tools that worked for the "classical" third-party problem will work here as well. More specifically, a refined version of "Bentham's test," originally sketched by Jeremy Bentham, will do the trick.

Bentham's test involves a focus on the breach of a duty. When asking, "Who holds a right correlative to duty D?" we should look at who stands to suffer detriment if D is not fulfilled. I have argued for the following formulation of the interest theory, which gives a prominent position to Bentham's test:

6. *See* Gerhard Wagner, *Rudolph von Jherings Theorie des subjektiven Rechts und der berechtigenden Reflexwirkungen*, *in* ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 319 (1993); H.L.A. HART, ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY (1982), at 187–188.

7. *See* Sreenivasan, *supra* note 2, at 264.

8. It is McBride who uses X, Y, Z, and so on to denote the parties, and since this is a reply to him, I will employ his nomenclature.

9. Matthew Kramer & Hillel Steiner, *Theories of Rights: Is There a Third Way?*, 27 OXFORD J. LEGAL STUD. 281 (2007).

10. McBride, *supra* note 4, at 13.

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X holds a right correlative to currently existing duty D if and only if

(i) X can hold rights and
(ii) a set of facts minimally sufficient to establish the contravention of duty D includes a fact that affects X's situation in a way typically detrimental for beings such as X.[11]

This formulation relies on the technical idea of *minimal sufficiency*. Kramer defines minimal sufficiency as follows:

> A set of facts is minimally sufficient to constitute a violation of a legal mandate if and only if (1) the set is sufficient to constitute such a violation, and (2) every element of the set is necessary for the set's sufficiency. In other words, a minimally sufficient set contains no redundant elements.[12]

My reformulation was not intended as a substantive change to the interest theory as propounded by Kramer; rather, its point was to serve as a distilled reformulation of his theory. I then argued that when the interest theory is understood along these lines, it resolves the Granny Attack without the need for any further distinctions: the grandmother does not figure in any set of facts minimally sufficient to constitute violation of the contract. As McBride builds his criticism on a passage of mine where I lay out the solution, I will quote that passage as well:

> Consider these two statements:
>
> (a) [Y] has not paid the agreed-upon [money] to Z.
> (b) [Z's grandmother's] interests as a grandmother are set back because of (a).
>
> By establishing (b), we have also established (a). Establishing (b) is hence sufficient for establishing the contravention, but it is not minimally sufficient—we can do without (b) when establishing the breach of duty. Kramer's distinction between vicarious and [nonvicarious] personal interests is unnecessary for our purposes here.[13]

11. Kurki, *supra* note 3, at 438. This is a "negative" formulation, focusing on the conditions of breach. However, a positive formulation is also possible:

X holds a right correlative to currently existing duty D if and only if

(i) X can hold rights and
(ii-b) a set of facts minimally sufficient to establish the fulfillment or noncontravention of duty D includes a fact that affects X's situation in a way typically beneficial for beings such as X.

*See id.* at 439.

12. Kramer, *Refining the Interest Theory of Rights, supra* note 1, at 37.

13. Kurki, *supra* note 3, at 441–442 (cited in McBride, *supra* note 4, at 306). The parts in brackets are McBride's. I had used first names, rather than capital letters, as the labels of the relevant parties.

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The response is evaluatively neutral, requiring purely conceptual tools, unlike the evaluatively laden vicarious/nonvicarious distinction. Let us note how McBride paraphrases the solution:

> [T]his line of response is contending that Z's GM can, modally, (very easily) drop out of the picture; counterfactually, she (very easily) does not have to exist. Insofar, as is the case, as this is true, her detriment might be said to become redundant (a modal notion), and not, thus, minimally sufficient for breach of the contract.[14]

Let me remark that I do not find it helpful to frame the matter in terms of counterfactuals. It is somewhat misleading to say that the grandmother may "drop out of the picture" because she is never allowed into the picture. Her existence is, rather, *inadmissible*, in a sense to be specified shortly.

McBride summarizes the upshot of my solution as follows:

> The main point is, on purely structural or formal grounds, Kurki takes himself to have demonstrated the intuitive status of Z's GM as a *non*-right-holder, on behalf of interest theorists, on account of the failure of setback to her interests to be minimally sufficient for breach of the contract. In contrast, as Kurki neatly establishes, this setback is *redundant*.[15]

However, McBride thinks the solution is flawed. He writes that "[t]he problem for Kurki here is that, on this (permissible) way of carving up the facts, we can run exactly the same line of reasoning, mutatis mutandis, to rule out X, the promisee, as a right-holder." McBride claims that (b), above, can be replaced with (b*):

> (b*) X's interests as a promisee are set back because of (a).[16]

And the problem is the following:

> On this (permissible) way of carving up the facts—to reprise and apply Sreenivasan's thought that Z's GM and X stand and fall together as right-holders—in excluding Z's grandmother, as Kurki does, we have (impermissibly) paved the way, by means of (b*), for also excluding X.[17]

McBride goes on to conclude that "[s]ome *evaluatively laden* distinction is needed to separate Z's GM from X (and Z)."[18] Insofar as theories of rights should be as evaluatively thin as possible, this will serve as "another strike

14. McBride, *supra* note 4, at 306.
15. *Id.* at 307 (references removed, emphases in original).
16. *Id.* at 308.
17. *Id.* at 308.
18. *Id.* at 315 (emphasis in original).

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against the interest theory"—a strike "at the core, rather than at the margins, of the interest theory."[19] A further worry is that—given that Kramer has not specified the distinction between vicarious and nonvicarious interests in great detail—"it is unclear that the current such evaluatively laden distinction does the job."[20]

Now, before addressing the just-outlined Problematic Promisee attack, it will be helpful to focus briefly on Bare Descriptions. Responding to the latter will necessitate specifying certain things that have previously been given insufficient attention. These specifications and distinctions will then be useful in replying to Problematic Promisee.

## III. BARE DESCRIPTIONS, NONREDUNDANCY, AND JUDGE BENTHAM

McBride's second attack against the interest theory is made *en passant*. He notes the following:

> Indeed, on the face of it, a case can be made that Y's non-fulfilment on the promise made to X does not itself disclose detriment to any agent, X, Z, or otherwise. It is a bare description of an event.[21]

Building on this observation, McBride claims that my proposition (a) ("Y has not paid the agreed-upon money to Z") is not "indubitably minimally sufficient in the required sense."[22] He concludes that "[p]roblems abound for the interest theorist."[23] In reply, I should clarify the scope of the minimal-sufficiency criterion in Bentham's test.

McBride is indeed correct in that Y's not paying the money to Z does not disclose that the latter has undergone a typically detrimental development. Such a conclusion can only be reached with the help of evaluative considerations about what is (typically) detrimental. This is why the minimal-sufficiency criterion needs to be augmented by the "thin evaluative stance" that forms a part of the interest theory.[24] This stance enables the assessment of events in light of whether they are beneficial or detrimental.

Let me start with an analogy. The process of determining who or what holds a right correlative to duty D can be thought of as a common law jury trial.[25]

19. McBride, *supra* note 4, at 315.
20. *Id.* at 315.
21. *Id.* at 313.
22. *Id.* at 313f. I haven't claimed that the fact "Y has not paid the agreed-upon money to Z" is minimally sufficient to conclude that Y has contravened his duty. Rather, I have claimed that this fact is part of a set of facts minimally sufficient for that conclusion. That set will contain a number of facts.
23. *Id.* at 313f.
24. Kramer, *Rights Without Trimmings*, *supra* note 1, at 91.
25. I have no common law legal education, so I offer no assurances about the accuracy of this account of jury trials.

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To simplify greatly, a jury trial employs two categories of facts: (1) facts that need to be proven, such as the defendant's whereabouts at time *t*, and (2) facts of "common knowledge" that do not need to be proven, such as the approximate distance between two cities. Facts falling under (1) are governed by strict admissibility criteria—for instance, some fact about the defendant's background may be undisputed and yet inadmissible—whereas facts under (2) are not.

Analogously, the interest theory employs two sets of propositions: (1) nonevaluative facts, such as whether X, Y, Z, and Z's grandmother exist, whether Y has paid the agreed-upon amount to Z, and so on; and (2) evaluative considerations, viz, considerations regarding the beneficiality and/or detrimentality of some development for beings such as X, Y, Z, and Z's grandmother. The minimal-sufficiency test, which governs the "admissibility" of facts, pertains only to nonevaluative facts. Judge Bentham will tell the jury to disregard all nonevaluative facts that are not part of a set of facts that is minimally sufficient for concluding that a breach has occurred. On the other hand, the evaluative considerations are the equivalent of "general knowledge" and thereby are not governed by the minimal-sufficiency admissibility criteria.[26]

In what follows, "admissible facts" are facts that Judge Bentham would allow, and "admissible parties" parties whose existence is admissible.

We are now equipped to reply to Bare Descriptions. Proposition (a), "Y has not paid the agreed-upon money to Z," accompanied by other relevant nonevaluative facts, is of course never sufficient for concluding that Z has undergone a typically detrimental development. We can only conclude that Z has not been paid, but we have no idea whether this is a good or bad thing for Z. However, we can then employ the thin evaluative stance to assess the beneficiality and detrimentality of admissible facts for admissible parties. Thus, Bare Descriptions is not an issue for the interest theory.[27]

## IV. THE PROBLEMATIC PROMISEE

With these distinctions at hand, let us now consider the Problematic Promisee. In my defense of the interest theory from Sreenivasan's attack, I had compared these two statements:

26. Evaluative considerations may be directly relevant for the minimal-sufficiency test, if such considerations figure in the content of a duty. For instance, if an animal cruelty provision obligates X not to treat animals cruelly, then evaluative considerations may be required to determine whether X has contravened his duty.

27. A sidenote: McBride has voiced his doubts about whether what Kramer presents as "efforts to tease out what was really there all along" are in fact "substantive shifts." McBride, *supra* note 5, at 16–17. Similarly, one may of course ask whether what I have offered here should be classified as clarifications, or rather as refinements or even changes to the interest theory. It is, however, quite clear that they are indeed only clarifications. For instance, the notion of a thin evaluative stance has been around since 1998, when Kramer first presented his theory in "Rights Without Trimmings." *See* Kramer, *Rights Without Trimmings*, *supra* note 1, at 91–101.

(a) Y has not paid the agreed-upon money to Z.
(b) Z's grandmother's interests as a grandmother are set back because of (a).[28]

I had argued that even though (b) could figure in a set of facts sufficient to establish that Y has breached his duty, (b) would contain elements that are not necessary for the sufficiency of the set (such as the existence of Z's grandmother). McBride has countered that the same goes for (b*):

(b*) X's interests as a promisee are set back because of (a).[29]

The promisee should count as a right-holder here. If the interest theory cannot account for this, this is a strike against the theory.

Now, just to be clear: if we wish to separate the evaluative from the nonevaluative, we should split (b) into two propositions:

(a) Y has not paid the agreed-upon money to Z.
(b1) Z has a grandmother.
(e1) Grandmothers' interests are typically set back if their grandchildren do not receive money that they should receive by agreement.

Propositions (a) and (b1) are nonevaluative and subject to the minimal-sufficiency criterion, whereas (e1) is part of the thin evaluative stance and not subject to said criterion. However, (b1) is inadmissible. The grandmother is therefore not a right-holder in this scenario.

We can also give the same treatment, *mutatis mutandis*, to McBride's proposition (*b). We will then get these results:

(a) Y has not paid the agreed-upon money to Z.
(b*1) Y promised to X to pay the money to Z.
(e*1) Promisees' interests are typically set back if promises made to them are not held.

Here, (b*1) is redundant with regard to the establishment of Y's having breached his duty, and X is therefore not an admissible party. Hence, the promisee will fall out of the picture—the two "fall together as right-holders."[30] Thus goes McBride's argument.

A number of things can be said in response to McBride. First, Kramer has preliminarily offered a very simple reply: in order to establish that a

28. McBride, *supra* note 4, at 306. This is McBride's paraphrasing of my defense, with brackets removed.
29. *Id.* at 307.
30. *Id.* at 307 (emphasis removed).

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contractual duty is breached, one must establish that the duty exists. The existence of such duties presupposes, in turn, that a contract has been entered. Finally, the existence of a contract presupposes contracting parties. Therefore, the promisee (qua promisee) is an admissible party. This seems a promising reply, but its details remain to be specified by Kramer when he offers it in written form.[31]

I will instead offer two responses to McBride.

### A. Alternative Descriptions of Duties

Duties can be described at various levels of specificity. For instance, at a very high level of generality, one's contractual duties can be said to consist of a single duty: the duty to fulfill one's contractual undertakings—*pacta sunt servanda*. Such a duty is borne *de dicto* toward the parties one has contracted with, whoever they may be.

Furthermore, duties can be given various descriptions even at roughly the same level of specificity. The choice of description may very well affect to whom it is natural to ascribe a right. In the context of a discussion of whether masochists could hold the "right to be tortured," Kramer makes the following remarks:

> [T]here is no canonical way of individuating or specifying the contents of any Hohfeldian entitlements. Some specifications are accurate, and some are inaccurate; but none is uniquely accurate.
>
> . . .
>
> Even if we stay at a single level of inclusiveness in recounting the content of this or that legal right, we can alter our descriptions to highlight certain aspects of the content while de-emphasizing other such aspects.[32]

Kramer suggests that the "right to be tortured"—in its strongest form, correlative to someone else's duty to torture—can be recharacterized as the "right-to-the-fulfillment-of-an-undertaking-which-one-has-gained-through-a-voluntary-exchange-notwithstanding-that-that-undertaking-for-the-commission-of-torture-against-oneself-would-strike-most-people-as-repulsive."[33] Under this description, it is more natural to understand the legal position as a right, rather than under the description "right to be tortured."[34]

Y's duty to pay Z can also be given various descriptions. The description used in the debate here has focused on Y's duty to pay Z. However, the same

31. Kramer offered this reply at the Workshop in Honour of Matthew Kramer, organized at Churchill College, Cambridge, on July 1–3, 2019.

32. Matthew H. Kramer, *Getting Rights Right*, *in* RIGHTS, WRONGS AND RESPONSIBILITIES 86 (Matthew H. Kramer ed., 2001).

33. *Id.* at 88–89.

34. However, under Bentham's test, facts should be described in a manner that preserves the sufficiency of the set without containing anything redundant. The latter part of the description, starting with "notwithstanding," would likely not pass muster.

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duty can also be characterized as Y's duty to fulfill his promise. Under this description, both the subject of the promise and X figure in the content of the duty, though merely *de dicto* as "whatever Y has promised" and "the party to whom Y has made the promise, whoever that may be."[35] This alternative description is in no obvious manner more (or less) parsimonious than the first description. Hence, describing Y's duty as the "duty to pay Z" and as the "duty to fulfill his promise" are both permissible under Bentham's test. They figure in mutually alternative sets that are each minimally sufficient to establish breach.

Note that this alternative characterization of the duty is, in fact, quite a natural way to think about the situation. Consider *why* Y's not paying the money wrongs Z and X, respectively. Z is wronged because he does not acquire the money that he would be entitled to acquire. X, on the other hand, is wronged because a promise made to him has not been kept. These explanations of wronging and harming rely on different descriptions of the duty in question.

### B. The Admission-by-Waiver Response

I will briefly mention another response, which builds on my earlier work on the interest theory. In one of Sreenivasan's criticisms, he discusses a case where Y has promised to his brother X that he will pay a sum of money to his sister Z. In response, I note that a set of facts minimally sufficient to establish a breach will include at least these facts:

a. Y has not paid his sister Z within the allotted time.
b. Y's brother X has not waived the duty.[36]

This will also entail that Y's brother—the promisee—is an admissible party. If we wish to establish that Y has contravened his duty D, we must also establish that D exists. X's waiving of D is a sufficient condition for its being extinguished, whereas X's *not* having waived D is a necessary condition for its continued existence, and thus a necessary condition for a breach. Hence, the admissible parties vis-à-vis duty D include the existence of any party that can waive D.[37]

## V. VACUOUS TRUTHS

In "Preserving the Interest Theory of Rights," McBride changes tack: rather than merely attacking the interest theory, he identifies certain problems

35. On the role of *de dicto* statements in the interest theory, *see* Kurki, *supra* note 3, at 441.

36. Kurki, *supra* note 3, at 442. As Kramer noted to me in private correspondence, a generally applicable formulation of clause b would be "Y's duty has not been waived by anyone empowered to waive that duty."

37. One could ask if this feature brings the interest theory somewhat closer to a hybrid theory. However, detriment at breach is still required, so the interest theory is not actually transformed into a hybrid theory.

with the theory, but then seeks to salvage it. Though he focuses on Kramer's formulation of the theory, he thinks my reformulation does not manage to solve the problem.

McBride takes as the baseline for this criticism his "streamlined" formulation of what he takes to be Kramer's interest theory:

> Q holds a right—correlative to a duty—under a norm iff at least one minimally sufficient set of facts [to constitute a breach of the norm] includes the undergoing of a detriment by some person Q at the hands of some other person R who bears a duty under the norm.[38]

He then suggests that it should be given this logical form:

> Z has a right (correlative to a duty) **iff** □ (Det D-B > Breach)[39]

The latter part should be read "if and only if, necessarily, there is at least one set of facts that contains no redundant elements and that includes the undergoing of a typically detrimental development by Z at the hands of the duty-bearer, and that entails a breach." As can be seen, McBride packs a lot under "Det D-B."

The reason why the modal concept of necessity should be invoked here, according to McBride, primarily has to do with vacuous truths, obtaining when the antecedent of a material conditional is false. The antecedent "Z suffers a detriment at the hands of the duty-bearer" might be false because there is no duty, and therefore no duty-bearer. The material implication would regardless be true. Hence, the theory would give a positive result—meaning that Z has a right—even though there is no duty-bearer at all. McBride wishes to tackle this problem by employing the modal notion of necessity. His solution might very well work, but I am not convinced that it was needed.

As already noted, McBride lumps a number of things under "Det D-B," namely, "there is at least one set of facts, which contains no redundant elements and which includes the undergoing of a detriment (by Q) at the hands of the duty-bearer."[40] Hence, "Det D-B" may be false merely because there is no set of facts that fits the requisite description, which will result in the vacuous truth. However, I do not think this problem of vacuous truth has afflicted my formulation from the start, nor do I accept that this formalization would reflect Kramer's overall position. One can only hold rights correlative to currently existing duties. Though I take this existence condition to be implicit in McBride's formulation, it could be made explicit for instance by using the following formulation:

38. McBride, *supra* note 5, at 26. The addition in brackets is McBride's.
39. *Id.* at 29 (emphasis in original).
40. *Id.* at 26 (parentheses removed for readability).

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> Q holds a right R, correlative to duty D, if and only if D exists and at least one set of facts minimally sufficient for the breach of D includes the undergoing of a detriment (by Q) at the hands of the duty-bearer.

I am not claiming this is a complete definition of right-holding according to the interest theory. However, this formulation brings to the fore the requirement that only currently existing duties entail rights.[41]

## VI. FORTUITOUS DETRIMENT

Yet another issue has to do with detriment occurring by chance. McBride provides the following example:

> [S]uppose R has a duty to pay S $100. And suppose R fails to pay S $100. Suppose finally R punches Q. Q has here undergone a detriment at the hands of the duty-bearer, R. And R has breached his duty to S. Were the relevant notion of "sufficiency" in BT [i.e., Bentham's test] bare material implication, BT would preposterously classify Q a right-holder under the $100-norm.[42]

Suffice it to say that my formulation is not vulnerable to this problem. First, the existence of Q is not admissible under the duty to pay S $100. Second, even if it were, the admissible facts must include a fact that *affects* the right-holder candidate's situation in a typically detrimental manner. We cannot infer that Q's situation has been affected negatively merely by employing the facts needed to establish a breach under the $100 norm. The punching is a completely separate event. I take it that the expression "detriment at the hands of the duty-bearer" in Kramer's formulation does much of the same work.

## VII. CONCLUSION

I have here offered responses to a number of attacks by McBride. Though interesting, they are unsuccessful. To summarize:

41. Again (as above—*see* note 27, *supra*), one might ask if this amounts to a "change" of the interest theory, or rather just a clarification. As regards my formulation, it begins: "X holds a right correlative to *currently existing duty D* if and only if . . . ." Kurki, *supra* note 3, at 438 (emphasis added). For reasons of style, I have included the existence requirement on the left-hand side of the biconditional, but this requirement could also follow as a third prong on the right-hand side of the biconditional. In a formalization, the existence requirement would need to be on the right-hand side of the biconditional. As regards Kramer's formulation, McBride is relying on a passage that—though offering both the necessary and sufficient conditions for right-holding—is regardless presented in the context of refining Bentham's test, rather than as an overall account of right-holding.

42. McBride, *supra* note 5, at 27.

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(1) *Problematic Promisee*: In a third-party beneficiary scenario, the promisee is admissible for a number of reasons: the duty can be described as the duty to fulfill one's promise; the promisee can waive the duty; and concluding that a contractual duty has been breached presupposes that a contract has been entered.
(2) *Bare Descriptions*: Facts admissible under Bentham's test are, indeed, most often bare descriptions of events, and therefore insufficient to conclude that a typically detrimental development has taken place. However, these facts are assessed in light of the thin evaluative stance.
(3) *Vacuous Truths*: The interest theory does not provide false positives due to vacuous truths. This happy result becomes apparent once the existence of duties is properly represented in the formulation of the theory.
(4) *Fortuitous Detriment*: Detriment occurring by chance does not provide false positives because such detrimental developments are not admissible under Bentham's test, and because of the requirement that the relevant facts must affect the right-holder candidate's situation.

McBride's strategy of criticizing the interest theory in one article and salvaging it in another is curious. At any rate, I have not taken issue with McBride's reformulation of the interest theory, but merely sought to defend my own (and to some extent, Kramer's) version of it.

Finally, as McBride notes, I am not a "card-carrying interest theorist."[43] I think the interest theory offers the best account of right-holding so far, but I am still prepared to change camps if a better theory comes along. Hence, I very much look forward to McBride's forthcoming full-length treatment of his hybrid theory of rights.

43. McBride, *supra* note 4, at 307f.

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