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An Analysis of a Reciprocal Theory of Rights

*Examining how rights can be forfeited and to
whom rights can be allocated*

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1 Chapter 1: Introduction

1.1 Background

Within the field of human rights that encompasses politics, morality, ethics, law and sociology a centre point of disagreement is who are allowed to have rights, how and why. In both the theory and the practice of human rights the ascription of human rights to all is a contested issue¹. From a legal perspective human rights are based on the Universal Declaration of Human Rights (UDHR)² or the International Covenant on Civil and Political Rights (ICCPR) which say that human rights are based on the dignity of humans³. The substance of dignity is ambiguous and thus other explanations have risen to try and ground human rights. The Will and Interest theories are popular explanations⁴. The former explains rights based on the exercise of choice and the latter on protecting interests. Popular proponents of these ideas are H. L. A. Hart and Joseph Raz respectively⁵. A recent example of a modern strategy is James Griffin's justification of human rights from the principle that humans have personhood and agency that is worth protecting via the strong protection of rights⁶.

David Rodin offers human rights theorists an alternative to how we can think about rights through his theory of reciprocity. Rodin's reciprocity theory is relatively new and can be explored further. This thesis will examine the validity of David Rodin's reciprocity theory independent of other human rights foundationalists. The research question for the thesis is how valid is Rodin's reciprocity theory? I will examine how Rodin's theory justifies right-holders and how it allows certain classes of agents to be right-holders. The way I will do this is by examining two things. The first is by answering the sub-question how Rodin's arguments of

¹ David Luban, "Human Rights Pragmatism and Human Dignity," in *Philosophical Foundations of Human Rights* (Oxford: Oxford: Oxford University Press, 2015). & Wenar Leif, "The Nature of Claim-Rights," *Ethics* 123, no. 2 (2013).

² UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

³ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

⁴ David Rodin, "The Reciprocity Theory of Rights," *Law and Philosophy* 33, no. 3 (2014): 301.

⁵ Joseph Raz, *The Morality of Freedom*, (Oxford: Clarendon, 1986). 165-92. & H. L. A. Hart, *Essays on Bentham : Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982).

⁶ James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 33-35.

rights forfeiture holds up. The second is by answering the sub-question, how valid is Rodin's claim that incompetents are allowed to possess rights through his reciprocity theory. I call these my two points of inquiry. This is a philosophical undertaking to understand Rodin's reciprocity theory and will (within his theory) examine moral rights⁷.

This is interesting for human rights theory because in the philosophy of human rights the grounding of human rights has been a central issue⁸. Some theories of rights have found difficulty in allowing all humans to possess human rights because of what they ground them on. Rodin claims his does not face the same challenges and allows a greater range of humans to possess rights than the will theory⁹. The second reason why Rodin's theory is interesting for human rights theory is how Rodin accounts for forfeiture of rights explicitly. This is something he claims that other rights theories fail to accomplish such as the interest theory¹⁰. Human rights theorists can use this theory to better explain how rights are possessed and forfeited, and under what circumstances.

To note, my understanding of human rights is that they are claim rights in the Hohfeldian sense meaning that they are demands and claims made by those who possess human rights¹¹. I do not limit all human rights to be only moral claims as they can be certain freedoms such as freedom of expression or to democratic government¹².

1.2 Rodin's motivation and outcome of reciprocity theory

Before I explain my two points of inquiry we must understand his motivation for writing his reciprocity theory which is to rebut Cécile Fabre's argument¹³ in her book *Cosmopolitan War*

⁷ Elizabeth Ashford, "A Moral Inconsistency Argument for a Basic Human Right to Subsistence," in *Philosophical Foundations of Human Rights* (Oxford: Oxford: Oxford University Press, 2015), 534.

⁸ Griffin, *On Human Rights*, 30-33.

⁹ Rodin, "The Reciprocity Theory of Rights," 294.

¹⁰ *Ibid.*, 288.

¹¹ Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," *The Yale law journal* 26, no. 8 (1917): 711-12.

¹² Allen Buchanan, *The Heart of Human Rights* (Oxford: Oxford University Press, 2013), 51.

¹³ Rodin, "The Reciprocity Theory of Rights," 281.

that the poor may be justified in engaging in a war against the wealthy if the wealthy fail in their duties towards the poor¹⁴. In Chapter 2 I shall be giving a thorough account of Rodin's reciprocity theory and how he attempts to rebut Fabre. It must be noted that this thesis is not an examination of just war or self-defence but the validity of Rodin's reciprocity theory independently. I present Fabre to show the reader where Rodin enters this discussion and where I come in.

Rodin, in his paper, puts forward in detail the reciprocity theory of rights. He argues that rights and duties should be thought in a reciprocal relationship and that it is advantageous to think of them in such a way. The way he has put forth his theory, however, is seemingly only meant to be done in interpersonal relationships¹⁵. The reciprocity theory, in short, is that I have a right because and to the extent that I fulfill my obligations to your right. Likewise, you have a right because and to the extent that you fulfill your obligations to my right¹⁶.

Rodin's paper on his reciprocity theory amounts to three things in my view. These three things are also the motivations for this thesis and why his theory is important and worth examining for human rights theory. The first is that he points out serious problems in the interest theory¹⁷. The second is that he provides an account that he claims is superior to the interest theory because, a) it can account for possession and forfeiture conditions of rights¹⁸ and, b) explain the different stringency between rights against harm and rights to assistance¹⁹. Lastly, Rodin claims that the theory of reciprocity is better positioned than the interest theory to explain the rights of incompetents (such as the severely handicapped) which other rights foundationalists have found difficulty in justifying²⁰.

¹⁴ Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford: Oxford University Press, 2012), 97-129.

¹⁵ Rodin, "The Reciprocity Theory of Rights," 281-308.

¹⁶ *Ibid.*, 287.

¹⁷ *Ibid.*, 284.

¹⁸ *Ibid.*, 293.

¹⁹ *Ibid.*, 286.

²⁰ *Ibid.*, 307.

1.3 Two Points of Inquiry

As mentioned, the research question for this thesis is how valid Rodin's reciprocity theory is. I will attempt to answer this by answering two sub-questions. The first is, how valid is Rodin's account of rights forfeiture within his theory. The second is, how valid is Rodin's claim that he allows incompetents to be right holders within his theory. These two sub-questions are further explained below.

1.3.1 Forfeiture

In Rodin's theory of reciprocity, he argues that a forfeiture of rights can occur if individuals do not fulfil their duties to those who have rights (if they fail to comply)²¹. Rights are best explained as reciprocal between individuals. I respect your right and so you respect the same right that I have. He, as well as David Miller, points out that rights theories generally have not well accounted the forfeiture of rights as the prevailing view is that rights are "inalienable"²². I shall present David Miller's arguments that accounting for a forfeiture of rights is important in human rights theory. Then, I will present Rodin's account of how a forfeiture of rights can occur. Rodin claims that he gives a better account of forfeiture than other accounts (such as the interest theory)²³. David Miller points out that rights forfeiture does occur in human rights practice²⁴ regardless that some human rights are peremptory norms in international human rights law²⁵ which is why it is important to account for forfeiture.

Rights are forfeitable under Rodin's theory of reciprocity through a failure of compliance. Rodin explicitly discusses conditions of possession and forfeiture of rights. In this explicit logic

²¹ Ibid., 287.

²² David Miller, "Are Human Rights Conditional?," *Human Rights and Global Justice: The 10th Kobe Lectures* (2012): 2.

²³ Rodin, "The Reciprocity Theory of Rights," 293.

²⁴ Ibid.

²⁵ Olivier de Schutter, *International Human Rights Law : Cases, Materials, Commentary*, 2nd ed. ed. (Cambridge: Cambridge University Press, 2014), 87.

rights are forfeitable and the basis for a person's duty in interpersonal relationships is their right²⁶. I shall appropriately explain Rodin's reciprocity theory of rights in Chapter 2 and in Chapter 3 I shall engage in an examination of the first sub-question how valid Rodin's account of forfeiture is. This I shall do by examining three things. The first is examining how Rodin's reciprocity theory identifies actions that amount to a failure of compliance. Especially in cases where it is more difficult to say that that specific action equated a failure of compliance of that specific right. The second, is to examine whether innocent threats (forwarded by Judith Thomson²⁷) also equates to a failure of compliance. If it does how it may be counter-intuitive to think of them as such. The third, is exploring the implications of how, when the ground for a duty is absent (the right) the duty is also forfeit in Rodin's forfeiture account.

1.3.2 Incompetents

Rodin's reciprocity theory requires individuals to comply with their obligations to others. This compliance is divided into two forms. The first is actual compliance which is compliance of one's obligations in the here and now and refers mainly to rights against harm. For example, person A is complying with my right not to be killed thus I ought to comply with their right not to be killed. The second is "counterfactual reciprocal compliance" which is compliance by a person judging what the other person would do in a comparable but reversed situation²⁸. This mainly refers to rights to assistance, for example, person A is stuck in a snare and person B walks by, B has a duty to A if it is counterfactually true that B would help A if their situations were reversed.

Rodin claims that through actual compliance and counterfactual reciprocal compliance he can explain the rights of severely mentally and physically handicapped people²⁹. How do such people comply with their obligations to respect the rights of others within Rodin's reciprocity theory? Rodin claims that his theory includes the "poor, the weak, the indigent and the

²⁶ Rodin, "The Reciprocity Theory of Rights," 288-89.

²⁷ Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, Mass: Harvard University Press, 1990), 369.

²⁸ Rodin, "The Reciprocity Theory of Rights," 296.

²⁹ *Ibid.*, 294.

disabled”³⁰ but admits that it may not be able to account for animals or infants because they are not capable of holding duties³¹. In Chapter 4 I shall examine whether Rodin’s reciprocity theory explains the rights and duties of severely mentally and physically handicapped people and whether his theory truly excludes animals and infants from possessing rights and duties.

1.4 Methodology

I will go about answering the research question by using Rodin’s theory of reciprocity and its mechanisms. My interpretation and understanding of Rodin will be paramount in my examination of his theory through my two points of inquiry.

A method I will be using to examine Rodin’s theory is John Rawls’ reflective equilibrium method³². In my understanding of Rodin’s theory, I have certain intuitive views about cases, moral principles about the topic and of various authors’ views. I will present my views through the use of cases as arguments and compare them against the views of other authors within this topic. In short, this method is to identify certain moral judgements I have made and am confident in. Then we identify “principles” and “implications” of the theory and examine how they are in line with my intuitions³³. For example, a case where an individual lost their right to life is also exempt from the duty not to kill for the grounds of the duty (the right) are absent is not intuitive but Rodin’s theory may concede this. The goal is to bring an equilibrium between our intuitions (by perhaps revising them) and/or the principles and implications that the theory yields³⁴. This is the reflective equilibrium method which I shall use. The way I shall do this is present my intuitions through cases as arguments. I will show implications or

³⁰ Ibid., 298-99.

³¹ Ibid., 307.

³² T. M. Scanlon, "The Aims and Authority of Moral Theory," *Oxford journal of legal studies* 12, no. 1 (1992): 2. & John Rawls, *A Theory of Justice*, Rev. ed. ed. (Oxford: Oxford University Press, 1999), 18, 40-45.

³³ Scanlon, "The Aims and Authority of Moral Theory," 2.

³⁴ Christian List and Laura Valentini, "The Methodology of Political Theory," in *The Oxford Handbook of Philosophical Methodology*, Oxford Handbooks (Oxford University Press, 2016), 542. & Scanlon, "The Aims and Authority of Moral Theory," 2-3.

principles that do not align with my initial intuitions. I will identify the most disagreeing (and show how it is the most disagreeing) implication and bring that to equilibrium.

To reiterate, this is a philosophical thesis, not a legal one, on human rights theory. I acknowledge arguments from Allen Buchanan that when philosophers theorize morally on rights. We have tended to assume that moral rights are antecedent to legal rights³⁵. I make no such claim in my thesis and aim to examine Rodin's theory of reciprocity as an independent theory of rights.

³⁵ Buchanan, *The Heart of Human Rights*, 51, 54-55.

2 Chapter 2: Background on Rodin's Reciprocity Theory

2.1 Introduction

In this chapter I aim to give a fuller account of Rodin's reciprocity theory before I go into my two points of inquiry. Though I shall present Fabre's account and Raz's interest theory the presentations are to give background to Rodin's reciprocity theory. Rodin's theory begins as a criticism to Fabre but ultimately shows to be interesting independent of Fabre's account because it presents an alternative perspective on how we can ground rights.

Rodin's theory of reciprocity is a response to Fabre's account of a just subsistence war by the impoverished. Fabre's account is based on Raz's interest theory. Thus, in Rodin's response he targets both Fabre's account and its base (the Interest theory) to argue how Fabre's account is flawed. Rodin attacks the Interest theory and offers his reciprocity theory as a superior alternative. Rodin's criticism on Fabre's account does not solely lie on his criticism of Raz's interest theory. Fabre's account is also based in the view that rights against harm and rights to assistance are equally enforceable. Rodin further criticizes Fabre by arguing that they are not. Thus, to fully understand this discussion it is best to begin with the Interest theory. After that I will present Fabre's account of a just subsistence war by the impoverished. I shall then discuss Rodin's response to both accounts and how he ends up with the reciprocity theory. Ultimately this chapter will end by showing how Rodin's account, though well put, leaves us with two points of inquiry.

2.2 Interest Theory

In the discussion of human rights, it has been a point of controversy to say how we ground our purported rights. So arose the interest theory to provide an explanation of why we have rights and how to base them. Raz brought forward a definition of what a right is which I quote below.

“Definition: ‘X has a right’ if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.”³⁶

The interest theory addresses both right and duty simultaneously. I have a sufficiently important interest in an aspect of my well-being. Due to that interest I can hold someone else to a duty to fulfil that interest which makes it a right. This allows me, the individual, to claim that I have a right to such and such because I was able to justifiably hold someone else to a duty that arose from my sufficiently important interest

2.2.1 The Role of Rights

The interest theory argues that for every right there is a corresponding duty. This is because the role of the right in Raz's conception is to ground the duty upon the individual's interest. To Raz, not every duty has a corresponding right, but every right has a corresponding duty. This is an evolution from Hohfeld's take on the relationship between rights and duties where if one says I have a right it is tantamount to making a claim that you have a duty and vice versa³⁷. Rights and duties in that sense mirror each other. Thus, claiming that I have a duty is saying that you have a right. What Raz does in his interest theory is keep the part where saying I have a right means you have a duty but not vice versa because the right grounds the duty but the duty does not ground the right. To Raz one justification of saying you have a duty is I have a right and the justification for my right is my interest.

This is to be distinguished with the putative idea that what is important is the status of the individual as a person. The goal of rights in this sense would be to respect that status. This can be seen in both the UDHR in the preamble which states that the “dignity” of humans is the foundation to rights³⁸ and in James Griffin's conception of human rights is based on protecting

³⁶ Raz, *The Morality of Freedom*. 166.

³⁷ Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," 71.

³⁸ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 1 & Preamble.

our personhood³⁹. Since human rights are supposed to be strong protections, they should protect things that are of value which is personhood⁴⁰. Personhood, Griffin suggests, is from the notion of being an agent which is divided into three things; 1) choosing one's own life, 2) the choice must be informed and resourced, and 3) the choice may not be blocked⁴¹. Alongside Raz's interest theory, H. L. A. Hart's will theory of rights are prominent⁴² where rights are based on the exercise of an agent's choice⁴³. These are a few other foundational ideas of rights.

Raz rejects grounding rights in the status of a person (which is what Griffin's account does as he grounds human rights in personhood and does not ground rights in the agent's exercise of choice either). Raz grounds rights in interests and grounds duties in rights. This grounding of duties is especially important when we examine Rodin's reciprocity theory and how he grounds rights and duties further in Section 2.4.

2.3 Fabre's Just War

In the previous section I presented Raz's interest theory where he grounds duties in rights and rights on sufficiently important interests of an aspect of an individual's well-being. In this section I will (briefly) present how Cécile Fabre, in *Cosmopolitan War*, argues that the poor can engage in a just war against the wealthy in order to enforce their duties to help the impoverished using the interest theory as a foundation.

Through the interest theory Fabre argues that the poor have a right to food, water and other necessities for a minimally decent life⁴⁴. They have such a right because of their interest in a minimally decent life which is significant to their physical wellbeing⁴⁵. Their interest in this

³⁹ Griffin, *On Human Rights*, 33.

⁴⁰ *Ibid.*, 35.

⁴¹ *Ibid.*, 33.

⁴² Rodin, "The Reciprocity Theory of Rights," 294.

⁴³ Hart, *Essays on Bentham : Studies in Jurisprudence and Political Theory*, 185.

⁴⁴ Fabre, *Cosmopolitan War*, 106.

⁴⁵ *Ibid.*, 103.

aspect of their well-being (for a minimally decent life) is sufficient to ground their right to it⁴⁶. This is how Fabre justifies the poor's right to a minimally decent life. Then, if the duties of the wealthy to help them or duties not to interfere in their endeavours for a minimally decent life are "derelict" then the poor have some grounds to engage in a subsistence war⁴⁷.

I have presented Fabre's justification of how the poor have an interest and right to a minimally decent life. I shall now explain Fabre's argument that when the rights of the poor are violated, they have "narrow" grounds for a justified subsistence war⁴⁸. According to Fabre, a traditional perspective on how defensive war for a community is justified has two conditions: "(a) its jointly held rights to political self-determination and territorial integrity (b) are subject to an armed attack"⁴⁹. In the event of such an armed attack where both conditions (a) and (b) are fulfilled the attacker forfeits their right not to be attacked. In subsistence wars the first condition is met according to Fabre because leading a minimally decent life is vital for the community to carry out its self-determination, to preserve their territorial sovereignty and for them to fulfil their political duties⁵⁰. Fabre dismisses the second condition in that it must be an armed attack because of how narrow that condition is as the nature of an attack can differ. She offers the example of a cyber-attack on a country's defence system. While it is clearly not an armed attack it is still an attack which can be justly retaliated against for self-defensive purposes. She includes subsistence wars as a response to such attacks that are "non-military, non-kinetic" because the failure of a duty to assist is a form of attack which forfeits the affluent's right against an attack by the poor to enforce their duties⁵¹. Thus, subsistence wars can be a defensive response by the poor against the affluent when they fail in their duties to assist the poor and to not interfere with the poor's pursuance of a minimally decent life.

This creates a distinction between two types of self-defensive just war. One, is the 'traditional' paradigm of a defensive war against a military attack on a country's land and residents to

⁴⁶ Ibid., 58.

⁴⁷ Ibid., 103.

⁴⁸ Ibid.

⁴⁹ Ibid., 105.

⁵⁰ Ibid.

⁵¹ Ibid., 109.

maintain their rights to security. The second is a defensive war to maintain a country's right to assistance against a failure of another country's (an affluent one) failure of duty to assist. Fabre makes both types of rights "equally enforceable" as David Rodin points out⁵². What this means is that both the right to security and the right to assistance can be enforced in similar means; through self-defensive war. The interest theory, as seen in the previous section, grounds both the rights on equal grounds; a sufficiently important interest. Fabre uses this parity to argue that if the breach of both rights has comparable consequences then the response to them can be comparable as well which brings her to her justification of the poor's subsistence war.

This brings us to the next section which is Rodin's reciprocity theory in which he examines Fabre's argument that the two types of right, rights to security (or as he puts it rights against harm) and rights to assistance, are equally enforceable. In addition, he also criticises the interest theory on which Fabre bases her arguments. What is at stake then, is not only whether Fabre's just war account is valid but also whether, in general, different rights are equally stringent in their enforceability if we are to base rights on interests⁵³.

2.4 The Reciprocity Theory

2.4.1 Outline of section

The aim of this section is to present Rodin's reciprocity theory as an independent account of rights. I shall present his criticisms to Fabre as they are the background to his theory of reciprocity. I will begin by explaining Rodin's hypothesis of how rights and duties are grounded. This grounding of rights and duties stem from his principle of forfeiture which is crucial to his theory. I will present this principle in Section 2.4.3. This presentation will naturally lead into Rodin's criticisms in Section 2.4.4 of the interest theory which are also criticisms of Fabre's arguments because her arguments are based on the interest theory. I shall elucidate how

⁵² Rodin, "The Reciprocity Theory of Rights," 283.

⁵³ Ibid.

Rodin deems his criticisms critical to the interest theory and to Fabre's arguments. Then, I will present Rodin's discussion against the equal enforcement of rights that Fabre endorses in her arguments for subsistence wars (which I presented in the previous section). Lastly, I will present Rodin's points of why he thinks the reciprocity theory is superior to the interest theory.

2.4.2 Presentation of the reciprocity theory

Rodin notes, that this is not a theory which comprehensively lists what rights we possess nor states what rights conceptually are. Rodin claims, rather, that some rights are best understood in a reciprocal relationship⁵⁴. These are the general rights against harm and rights to assistance. Rodin formulates the reciprocal relationship between individuals it as such:

"...I have [a] right to [x] because and to the extent that I comply with your right to [x]. Similarly, you have [a] right to [x] because and to the extent that you comply with my right to [x]."⁵⁵

This reciprocal relationship provides the conditions of the possession and forfeiture of rights, and its justificatory grounds (why we have them). Rodin's reciprocity theory does not ground rights on interests. He writes:

"The reciprocity theory begins from a basic hypothesis about the genesis of rights: agents can come to possess rights when they comply with the obligations generated by the rights and status of others. The mechanism by which rights are generated through reciprocity is one of the most basic and deeply rooted in moral psychology – the requirement to give respect and consideration to those who manifest appropriate respect and consideration towards us. Rights are in this way both reciprocal and mutually reinforcing."⁵⁶

Rodin discusses a "mechanism" that is fundamental and embedded in "moral psychology"⁵⁷. Those that can possess rights are agents and they are agents who possess a reciprocal moral

⁵⁴ Ibid., 286.

⁵⁵ Ibid., 287.

⁵⁶ Ibid., 286.

⁵⁷ Ibid.

psychological mechanism. It is not entirely clear what this is. Perhaps agents feel obligated to show respect and consideration when they are shown it or perhaps, they mentally process that when someone else showed respect and consideration towards them they are morally obligated to do so likewise. I shall understand moral psychology as being able to mentally process moral issues to an extent. As a side note, my understanding of Rodin's moral psychology will turn out to be problematic because it excludes a certain class of people that Rodin claims are included through his reciprocity theory, but I shall discuss that more in Chapter 4. Within this apparatus there is an elementary mechanism which is that we respect those who have shown respect towards us. Rodin does not specify exactly who can possess rights but says how those who are capable of possessing rights can. The only specification from Rodin of who can be agents and how they can, is through their compliance of their duties created "by the rights and status of others"⁵⁸. Thus, what is most important for Rodin's reciprocity theory is the relationship between those agents and within that relationship their compliance with each other's' rights and duties⁵⁹. Agents must be able to reciprocate respect and consideration and the way they are able to do so is through their moral psychology.

This reciprocal relationship between individuals is further divided into two categories. The first is actual compliance and the second is counterfactual reciprocal compliance. The former explains reciprocity between individuals in interpersonal relationships by examining whether they actually complied with their obligations to others. This is most easily seen in the rights against harm where an individual can know with near certainty whether others at that moment are complying with their obligations to not harm them. For example, a butcher walks by me and is carrying a carving knife. I comply with their right not to be harmed because I know that they are complying with my right not to be harmed because they are not actually harming me right now.

In some situations, applying actual compliance would not function because there is a lack of certain knowledge. Thus, applying counterfactual reciprocal compliance help explains reciprocal rights and obligations between individuals when there is a lack of certain knowledge.

⁵⁸ Ibid.

⁵⁹ Ibid., 294.

Rodin gives the example of a wealthy neighbour who owns a Ferrari and a Land Rover who drives by me stuck in a snowdrift mocking my poverty without offering assistance. Later, he gets stuck in a snowdrift because he took his Ferrari instead of his Land Rover. I am driving past and sees he needs assistance, but I know that I have no reciprocal obligation towards him because in the past when I needed assistance, he did not aid me thus forfeiting his right to assistance from me⁶⁰. This is an example with certain knowledge. I tweak the example below to explain counterfactual reciprocal compliance.

Let us say the wealthy neighbour has never mocked my poverty nor ever seen me stuck in a snowdrift to my knowledge. I, by chance, happen upon him stuck in a snowdrift. I ask myself whether I have a reciprocal obligation to assist him. However, I have no comparison to make unlike the first example to know if he would help me were I stuck in a snowdrift. Thus, I must imagine whether he would help me if I were stuck in a snowdrift and he was passing by. This imagining of a reversed situation due to a lack of certain knowledge is counterfactual reciprocal compliance. I think counterfactually to ascertain whether I think they would help me if our situations were reversed. If I think that they would then I do indeed possess a reciprocal obligation towards them.

Rodin makes a point that there is a “lexical priority” between the two types of compliance in Rodin’s reciprocity theory⁶¹. What this means is that though there may be such a distinction between compliance it is not a matter of choosing whichever type of compliance benefits me most, rather it is about epistemic certainty. Through actual compliance one can know with near certainty that they did in fact fulfil their obligations and so I must reciprocate, or they did not and so they forfeit their rights against me. There is a much weaker level of certainty in counterfactual compliance, thus counterfactuals have a lower priority in ascertaining obligations. There is no point in using counterfactuals when I already know what the person would do in a comparable situation (refer back to the wealthy neighbour example). Thus,

⁶⁰ Ibid., 297.

⁶¹ Ibid., 300.

counterfactuals are to be used when there is a lack of certain knowledge in order to ascertain whether one does have an obligation.

To sum, Rodin's reciprocity theory argues that rights against harm and to assistance are best understood in reciprocal interpersonal relationships. This reciprocal relationship is one where I have a right because, and to the extent, that I complied with the right of another person. This other person has a right because, and to the extent, that they comply with my rights. Compliance has two forms; actual compliance and counterfactual compliance. The first asks whether the other person is complying with my right now and the second asks if the person would comply with my right if our situations were reversed.

2.4.3 Possession and Forfeiture of Rights

Rodin's reciprocity theory sets out a condition for the possession of a right which is that a right is possessed when the possessor complies with the right of another person. That right then is absent when compliance is absent. The reciprocity theory accounts for both the conditions of forfeiture and possession, and their necessary correlation⁶² through what Rodin calls the "forfeiture principle" which is:

"If x is a necessary condition for the possession of y, then the absence of x is a sufficient condition for the forfeiture of y.

Similarly,

If x is a sufficient condition for the forfeiture of y, then the absence of x is a necessary condition for the possession of y."⁶³

Rodin points out that forfeiture is important to discuss for a "normative theory of rights"⁶⁴ because it needs to account for conditions of possessing rights for when these possession conditions are absent the rights are then forfeit. David Miller points out that forfeiture is

⁶² Ibid., 288.

⁶³ Ibid.

⁶⁴ Ibid.

important to discuss in human rights because of the presupposed unconditionality of human rights but in practice engaging in war and punishing criminals are justified⁶⁵. Both authors make good points that forfeiture should be accounted for which adds value to Rodin's theory. In a discussion of rights, accounting for forfeiture seems to be significant as it is a ubiquitous occurrence across "standard accounts" of rights⁶⁶. Forfeiture happens in the legal and moral realm of rights as individuals may lose their rights or have them suspended in the presence or absence of legal institutions. In Chapter 3 I shall discuss forfeiture of rights more alongside Miller's discussion of why forfeiture is important to discuss.

Rodin's forfeiture principle when applied to rights means that the conditions that are necessary for me to possess a right, when absent, is sufficient for me to forfeit that right. Turning it around, if there is a condition that is sufficient for me to forfeit my right then the absence of that condition is necessary for me to possess that right. This forfeiture principle is how Fabre justifies forfeiture in her arguments for a just subsistence war as she argues that the rights against harm of the affluent who failed in their obligations are forfeit⁶⁷. This also reflects how forfeiture functions in Raz's⁶⁸ and other standard accounts of rights⁶⁹.

2.4.4 Rodin's criticisms against the interest theory and equal enforceability

For Rodin, Fabre's account of a just subsistence war is unsatisfactory not because of what it argues for but rather how Fabre grounds rights on interests using Raz's interest theory⁷⁰. Hence, the problems that Rodin points out in Fabre's account are problems within the Interest Theory⁷¹. His reply to these issues is the reciprocity theory which he claims is advantageous over the interest theory because it can account for conditions of forfeiture and possession,

⁶⁵ Miller, "Are Human Rights Conditional?," 3.

⁶⁶ Rodin, "The Reciprocity Theory of Rights," 289.

⁶⁷ Fabre, *Cosmopolitan War*, 97.

⁶⁸ Raz, *The Morality of Freedom*. 275.

⁶⁹ Hart, *Essays on Bentham : Studies in Jurisprudence and Political Theory.*; Griffin, *On Human Rights.* & Rodin, "The Reciprocity Theory of Rights," 288.

⁷⁰ "The Reciprocity Theory of Rights," 283.

⁷¹ *Ibid.*, 284.

and it can explain the differing enforceability of rights. I shall explain Rodin's two concerns in the follow sub-sections.

2.4.4.1 *Failure to account forfeiture*

The first, is that the interest theory does not adequately account for conditions of possessing and forfeiting rights. This is key for Fabre's account of just war because it states that the affluent failed in their duty to assistance thus forfeiting their rights against harm against the impoverished. Rodin argues that if the interest theory cannot account for conditions of forfeiture then Fabre's arguments fail because her justification for rights is based on interests⁷².

Raz's interest theory does not account for forfeiture according to Rodin because an interest is neither a sufficient condition nor a necessary one for possessing a right⁷³. An interest is not sufficient a condition for possessing a right because the sufficient condition for the forfeiture of a right is infringing the rights of others according to the forfeiture principle by Rodin. If we accept that a person unjustly attacking another is a sufficient condition for them to forfeit their right against harm (as Fabre does⁷⁴), then the absence of that sufficient condition is necessary for them to possess their right against harm. The possession of an interest does not sufficiently explain why the right was forfeited. As Rodin writes, "...it is never the case that possessing an interest in x is a sufficient condition for possessing the right to x. This is because the absence of forfeiture conditions functions as a necessary condition for possession of any right."⁷⁵.

Secondly, an interest is not a necessary condition either because if it is to be such a condition for possession then its absence should be a sufficient condition for the forfeiture of that right. However, as we can see simply because people do not have a direct interest in something does not mean that they then sufficiently lose their right to it. Rodin gives the example of him having some unneeded and unwanted baby equipment. He does not have an interest in the equipment, yet he continues to possess a right to it. The interest then is not a necessary

⁷² Ibid., 291.

⁷³ Ibid., 289.

⁷⁴ Fabre, *Cosmopolitan War*, 58.

⁷⁵ Rodin, "The Reciprocity Theory of Rights," 289.

condition for him to possess the right to it. The interest theory may reply saying that it is general interests that they are concerned with, however, Rodin replies by saying that people do not have a general interest in “redundant or superfluous objects”⁷⁶ or more broadly, when there is no general interest in x then there cannot be a right to it.

Rodin thus establishes how the interest theory can fail. The interest theory may allow for forfeiture but cannot explain it. They can still accept that compliance is important in rights alongside claiming that rights are justified by interests and so include it as an independent condition for possession along with the individual’s interest. However, they cannot show how the two go together because in the case of an aggressor they are clearly non-compliant so must forfeit their right against harm but the other condition of possession, their interest, still holds that they have a right against harm. If the aggressor forfeits their right, the one defending the interest theory cannot claim that it was due to non-compliance. If they do, they concede that the individual’s interest was neither necessary (because absence of an interest does not lead to a forfeiture of a right) nor sufficient for the possession of that right⁷⁷.

This criticism against Raz is also a criticism against Fabre because she bases her arguments on the interest theory. The affluent and poor have rights because of their interest. The affluent forfeit their rights in a failure of duty but their interest is still not lost. The interest theorist does not explain how the affluent then forfeit their rights against harm when they did not lose their interest in it.

It is for these reasons Rodin claims that his reciprocity theory is a better alternative⁷⁸. It accounts for conditions of possession and forfeiture because his reciprocity theory is based on relationships being of reciprocal compliance. It explains why rights are forfeited, because they are not complied with, and it explains why rights are possessed, because the holder complies with the rights of others.

⁷⁶ Ibid., 290.

⁷⁷ Ibid., 292.

⁷⁸ Ibid., 308.

2.4.4.2 *Equal Enforceability of Rights*

In the previous sub-section, we saw how Rodin replies to Fabre by arguing against the interest theory's lack of an explanation for forfeiture conditions. The other point that Rodin replies to Fabre is that the enforceability of rights against harm and rights to assistance have differing stringencies. Rights against harm are more stringent than rights to assistance. I will present his claims that his reciprocity theory can better account for this differing stringency and also explain why different classes of individuals that have equivalent interests have differing obligations.

Rodin argues that our intuitions and our legal systems on the enforceability of rights against harm and rights to assistance show that they are not equally stringent⁷⁹. Rodin discusses two ways stringency is different, one through compensation and the second through enforcement. For the former he compares two cases to explain our moral intuitions. The first is of a lost hiker in the woods who breaks into a cabin for shelter. Whether the owner is present or not we think that the hiker has a right to assistance and the hiker is not in the wrong for doing so. In addition, we also think that the hiker has a duty to compensate the owner *ex post*.

This is different in a second case of self-defence where an aggressor unjustly attacks another. We think the victim has a right against harm and that their retaliation in self-defence is right, but we do not think that the aggressor has a right to compensation from the victim. In both cases a person was harmed by a defensive action; the hiker breaking into the cabin and the aggressor by the victim's retaliation. However, in only one do we think is owed compensation which suggests that the stringency of a right to assistance and a right against harm are different⁸⁰.

Rodin further backs this difference in stringency through a second way by presenting a difference in the enforcement of rights in legal systems across the world. Numerous legal systems allow for individuals to defend themselves through comparable lethal force (comparable

⁷⁹ Ibid., 285.

⁸⁰ Ibid., 284.

against the attacker) without “prior public authorisation”⁸¹ but legal systems do not allow for individuals to enforce their rights to assistance through private lethal force⁸².

It is the second difference in stringency that is salient for Fabre because the enforcement of rights against harm and rights to assistance must be equally enforceable for her arguments for subsistence war to function. Rodin focuses on this because our moral intuitions and what legal systems say contrast to what Fabre argues for⁸³. If it is true that rights against harm and to assistance are equally enforceable then we must revisit our moral intuitions and what legal systems accord to. Rodin gives an example of self-defence where an aggressor A unjustly attacks person B. Person B can save themselves by using an innocent bystander C as a shield.

Rodin argues that the stringency of the duty not to kill is so high that B may not kill C even if the bystander is a stranger⁸⁴. Whereas in another situation where person B should sacrifice their own life to dutifully assist person C is challenging to conceive. As Rodin writes, “It is difficult to imagine any circumstance in which a duty to assist a stranger could require the sacrifice of one’s own life”⁸⁵. If both rights are equally enforceable then it suggests that in both situations B should sacrifice their own life. However, for Rodin, the interest theory fails to explain why both the rights should have the same stringency because both the rights are grounded on an individual’s interest⁸⁶. Thus, why one can impose greater compliance costs is unclear⁸⁷.

Rodin argues that his reciprocity theory can explain the differing stringency in rights against harm and rights to assistance; that it can explain in rights against harm that person B ought to sacrifice their own life for person C but not in rights to assistance. He first points out that it has been traditionally argued that rights to assistance have higher costs of compliance which he rejects because rights against harm calls for the sacrifice of one’s own life for

⁸¹ Ibid., 282.

⁸² Ibid., 284.

⁸³ Ibid., 285.

⁸⁴ Ibid., 301.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

compliance but rights to assistance does not⁸⁸. Why person B should sacrifice their own life for person C, according to Rodin's reciprocity theory, is because C at that moment is actually complying with B's right against harm thus B owes a reciprocal duty to comply with C's right. This explains why rights against harm's compliance cost is so high. He also explains why rights to assistance are less stringent through his reciprocity theory. Rights to assistance are to be reciprocated through counterfactual compliance if there is no prior knowledge (if there was no "actual past assistance")⁸⁹. We do not know if we owe a duty to people who have never assisted us or are not assisting us now. However, through a counterfactual we see whether we do owe a duty. We examine whether that person would assist us in a comparable circumstance, if we think they would then we do owe a reciprocal duty. Thus, through counterfactual compliance a duty may be justified, and its lesser stringency explained because a counterfactual is only used when there are no prior considerations, no knowledge of previous action, to be had. This makes it less stringent than rights against harm where one can know with current considerations whether they are currently complying with my right against harm.

Thus, Rodin argues how his reciprocity theory can account for the differing stringencies between rights against harm and the rights to assistance which the interest theory and Fabre does not. This criticism is against Fabre's equal enforcement of rights in her arguments for a just subsistence war.

2.5 Conclusion

In this chapter I have given background on the interest theory, Fabre's account on just subsistence war (briefly) and on Rodin's reciprocity theory. I presented Rodin's claims that it is superior to the interest theory in two ways. The first was that it could better account for conditions of possessing and forfeiting rights which we saw it could as the interest theory would not be able to allow forfeiture of rights without abandoning the claim that interests ground rights. The second was that it could better explain the differing enforceability of rights which

⁸⁸ Ibid.

⁸⁹ Ibid., 303.

it did through the reciprocity theory by showing the functioning of reciprocity via actual compliance and counterfactual compliance. I move now to my two points of inquiry.

3 Chapter 3: Forfeiture

3.1 Introduction

This chapter will look more deeply at the forfeiture of rights according to Rodin in order to see how well his reciprocity theory stands against objections. I shall begin in section 3.2 by highlighting why forfeiture is important to discuss using David Miller's and Rodin's arguments. I will highlight some similarities of both these authors and how they are relevant to each other's work. I present Miller's work because of his arguments for why forfeiture is important to discuss and because he argues that a reciprocal theory of rights can overcome a problem that standard accounts of self-defence could not. I shall discuss three objections to reciprocity. The first (of Miller's), in section 3.3, is the difficulty of identifying when a rights forfeiture occurs for individuals. The second difficulty is how reciprocity holds against 'innocent threats' using cases from *The Realm of Rights* by Judith Jarvis Thomson to assess how Rodin's reciprocity deals with such innocent threats in section 3.4. Then, in section 3.5, I shall discuss the idea of a duty forfeiture in Rodin's reciprocity theory arguing that if rights can be forfeit then so can duties because of the correlation between the two. I will examine this premise, its implications for reciprocity and forfeiture, and the grounds for duties independent of reciprocity. This independent justification is the point that leads me to the topic of Chapter 4. I will then conclude this chapter.

3.2 The Importance of Forfeiture

The importance of forfeiture has been well described by David Miller. He points out that the fact of the matter is that the theory and practice of human rights do not match each other when it comes to the conditionality (or unconditionality) of human rights. Authorities take away rights of persons when they deem it necessary to do so such as imprisoning them, entering a justified war or taking away their freedom of speech⁹⁰. There are some rights that are denied from peoples such as the right to life, movement and to vote. This denial is sometimes

⁹⁰ Miller, "Are Human Rights Conditional?," 2.

justified because of the deeds of the individual or the by goals of the authorities. This, for Miller, is strange because human rights are held to be unconditional and held by all humans⁹¹. The practice does not match what human rights “manifestos” claim⁹².

From a theoretical standpoint, Rodin argues that it is “critical” for normative theories of rights to be able to explain conditions for possession of a right and conditions for forfeiture of rights⁹³. This is because of his “forfeiture principle” where such conditions of possession and forfeiture are necessarily correlative as we saw in section 2.4.3. As they are necessarily correlative, when the possession conditions are absent the rights are forfeit. However, this accounting has not been well done in theories of rights. Thus, both from a theoretical and practical standpoint forfeiture is significant.

Miller asks whether human rights should be distinguished between rights that cannot be lost regardless of the actions of the bearers and rights that can be forfeited⁹⁴. He thinks that in practice “the principle” of forfeiting rights already exists⁹⁵. Thus, identifying which human rights can be lost and “under what circumstances” is salient in order to account for the practice of human rights⁹⁶. Miller forms forfeiture on a reciprocal basis for holding and losing rights⁹⁷. People claiming human rights for themselves is recognising that other people are also bearers of those same human rights⁹⁸. Thus, a forfeiture occurs when a person acts in a way that “indicates” their lack of recognition of other people as bearing the same rights and being held to obligations⁹⁹.

We can immediately see similarities between Miller’s idea of human rights being reciprocal and Rodin’s theory of reciprocity. They both claim that rights can be possessed through

⁹¹ Ibid., 3.

⁹² Ibid.

⁹³ Rodin, "The Reciprocity Theory of Rights," 288.

⁹⁴ Miller, "Are Human Rights Conditional?," 3.

⁹⁵ Ibid., 4.

⁹⁶ Ibid.

⁹⁷ Ibid., 7.

⁹⁸ Ibid., 15.

⁹⁹ Ibid.

compliance of other people's rights. To clarify, I am discussing Rodin's account of forfeiture and reciprocity independently. I shall bring a claim of Miller's in section 3.3 to examine how Rodin's forfeiture account deals with that claim.

3.3 Identifying when rights are forfeited

As we saw in the previous chapter, Rodin argues that a right is forfeited when the individual has failed to comply in their reciprocal obligations. If certain rights are reciprocal, then the conditions for possessing them and forfeiting them are based on whether the individual complies with the rights of others¹⁰⁰. For example, if person A was unjustly attacking to fatally harm person B, then A forfeits their right against harm because they failed in complying with their obligation towards B. A possessed such an obligation because B was complying with A's right against harm. In this sub-section, I discuss two objections to Rodin. One is whether Miller's claim, that an immediacy of a threat is no longer a necessary condition for a forfeiture of a right, is true for Rodin. The second, is whether Rodin's theory of reciprocity can explain A losing right X if he has violated B's right Y.

Miller argues that human rights can only be claimed if the claimants are willing to accept that others are also bearers of the same human rights¹⁰¹. Miller recognises a rights forfeiture to occur when individuals act "in a way that clearly indicates that [they] do not recognise such rights"¹⁰².

Identifying when a rights forfeiture occurs is identifying the moment that the aggressor did not comply (I shall use comply to mean both that A failed to actually comply, and that A indicated a lack of recognition of B's rights). Miller points out that in typical self-defence cases a loss of rights occurs because the threat is imminent. It is when a threat "cease[s] to be imminent" that self-defence accounts of loss of rights face problems because then the forfeiture of

¹⁰⁰ Rodin, "The Reciprocity Theory of Rights," 293.

¹⁰¹ Miller, "Are Human Rights Conditional?," 15.

¹⁰² Ibid.

a right is no longer justified¹⁰³. Miller argues that this necessary condition for a rights forfeiture is lost if we take rights to be reciprocal¹⁰⁴. The forfeiture of a right in reciprocity (of both Rodin and Miller) occurs when the condition for possession of the right is absent, i.e. when the individual fails to comply with the rights of others. I use the following case of domestic abuse to explain both my objections:

A husband, A, has been physically and psychologically abusing his wife, B, over the period of two months. B, fearful for her life and believing to have no other option (such as to flee), kills A to protect herself.

I firstly argue that it is difficult to identify the point at which the husband forfeits his right against harm if he forfeits his right at all under both Rodin and Miller's reciprocity. Typically, in self-defence it is appropriate to inflict more harm to an extent than taken by the attacker¹⁰⁵. However, this does not help recognise when the threat from A became immediate and thus recognising the moment the right not to be killed is forfeited. If we take compliance to be a necessary condition for possession however then we can see that if it is true that A did not comply with B's rights, then A forfeits his right regardless of whether the threat was immediate or not

We can use Rodin's reciprocity loosely or strictly. It can be used loosely as the husband forfeited his right not to be killed by the wife because it was fairly certain that he would kill her eventually. On a strict perspective, the husband did not forfeit his right not to be killed because he had not acted in a way that threatened the life of the wife. He threatened her security, caused bodily and psychological harm so forfeited those rights in those occurrences but not the precise right to life. For it is not the case that at *t1* the husband threatened her life and so failed to comply; the abuse was ongoing. Thus, identifying actions that amount to a failure of compliance in such cases is difficult under Rodin's theory of reciprocity.

¹⁰³ Ibid., 16.

¹⁰⁴ Ibid.

¹⁰⁵ Thomson, *The Realm of Rights*, 371.

My second objection is that though Rodin's reciprocity may no longer need the condition of an immediate threat identifying a forfeiture of a right can still be difficult in such cases because a failure to comply with a certain right(s) may amount to a forfeiture of another right. This is problematic because in the case of domestic abuse, for example, no matter how mild or severe the abuse from Husband A is. Wife B could never be justified in self-defence if we take Rodin's and Miller's take on reciprocity strictly. We may wish to say that in especially severe cases of abuse, failing to comply with certain rights justifies the forfeiture of some other rights. My explanation for Rodin's reciprocity looks like this:

A has a right X. B has a right X.

A fails to comply with B's right X. B still complies with A's right X.

A forfeits his right X because of his failure to comply with B's right X and because B continues to comply with A's right X.

However, what is suggested for Wife B to justifiably kill Husband A in reciprocity is:

A has a right X. B has a right X.

A fails to comply with B's right X. B still complies with A's right X.

A, failing to comply with B's right X, loses his right Q.

A's failure of compliance to right X leads to a forfeiture of not right X but right Q

Can A lose right X if he has violated B's right Y?

The salient question that is to be taken from this discussion is whether the actions of A amounted to a failure of compliance of B's life even if A did not directly fail in his duties not to kill B. As mentioned, in self-defence, the victim may inflict greater harm (to an extent) to the attacker than what the attacker did. In reciprocity (Rodin's) this may also be applicable, but the explanation is lacking. It is strange then in my failing to comply with my obligations to your right X I forfeit my different right Q. Reciprocity can justify B's taking of A's life however, Rodin would need to account for how a lack of compliance of certain duties to rights X, Y and Z lead to a forfeiture of a right to Q.

3.4 Assessing Innocent Threats in Reciprocity

My second objection towards Rodin's reciprocity is that reciprocity can be an inadequate answer to the question of whether an innocent threat justifiably loses their right. This is because individuals need to indicate that they are complying with other people's rights. In her book, *The Realm of Rights*, Judith Jarvis Thomson discusses moral rights extensively¹⁰⁶. In the final chapter she discusses how people can cease to possess rights¹⁰⁷. She argues that rights can be forfeited even when a fault is lacking¹⁰⁸. I shall lay out two of her cases to illustrate¹⁰⁹ first then present her arguments how an innocent threat forfeits a right. Then I will examine the same cases with Rodin's reciprocity theory to show how in the first case both Thomson and Rodin can reach the same conclusion. In the second case I will present two views. One how they may reach a similar conclusion but at a cost for Rodin, and two, Rodin's reciprocity can reach a different conclusion. The cases are so:

1. Innocent Aggressor

Lachlan, a mentally ill person, attacks Taylor on an elevator. Taylor has no way of defending herself other than by killing Lachlan¹¹⁰.

2. Innocent Threat

Tristan falls accidentally into a well where Taylor is stuck at the bottom. Tristan's fall will kill Taylor. Taylor can save herself by killing Tristan¹¹¹.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid., 350.

¹⁰⁸ Ibid., 367.

¹⁰⁹ The cases are from Thomson, but I have changed the names of the subjects for clarity.

¹¹⁰ Thomson, *The Realm of Rights*, 366.

¹¹¹ Ibid., 370-71.

In the first example “Innocent Aggressor” there is no ill intention and yet Thomson wants to claim that Taylor is permitted to kill Lachlan because he is an aggressive threat who is about to commit a violation on Taylor. Thus, Thomson claims that in example 1 it is not about intention or fault. As Lachlan is about to violate the claims of Taylor, whether at fault or not, it is permissible for Taylor to stop their violations¹¹². However, in example 2, there is no aggression from Tristan, but Thomson retains that Taylor can kill Tristan permissibly. They are still a threat which may be removed without violating Tristan’s rights as he lost his right because he was a threat to Taylor¹¹³.

In the first example, Thomson argues that the victim is permitted to defend herself because Lachlan is about to aggressively commit a violation. In the second example, Tristan would not be committing a violation but is still a threat. Thus, Taylor is permitted to kill Tristan to remove that threat even if the ones responsible for the threat are something outside of control like a gust of wind¹¹⁴. Thomson also notes that if there was a third person who could kill the threat if the one being attacked could not. This third-party is permitted to kill the threat¹¹⁵.

In Innocent Aggressor, if we take actual compliance as a necessary condition for a possession of a right, then Lachlan’s attack on Taylor is a sufficient condition to forfeit his own right not to be harmed. This is true regardless of Lachlan’s mental illness because his aggressive threat amounts to a failure of compliance. Rodin states that the comatose (and the mentally ill) are included in reciprocity in rights against harm because they are able to passively reciprocate not harming others even if they are comatose¹¹⁶. Rodin has an example where he writes that if the only way Taylor could save herself was to kill an innocent bystander, Tristan. She may not kill Tristan to save herself. The reason being that Tristan is actually complying with Taylor’s right not to be harmed at that moment¹¹⁷. If we say that Tristan was comatose or mentally ill (in the same way Lachlan is mentally ill but presently not a threat to Taylor) Taylor

¹¹³ Thomson, *The Realm of Rights*, 370-71.

¹¹⁴ *Ibid.*, 371.

¹¹⁵ *Ibid.*

¹¹⁶ Rodin, "The Reciprocity Theory of Rights," 295.

¹¹⁷ *Ibid.*, 301.

still may not kill Tristan because Tristan is actually complying even if comatose. Thus, in Rodin's reciprocity, it is not permissible to kill Tristan because he is actually complying.

However, if we change Tristan to a threat, like in Thomson's second case Innocent Threat. We can view this in two different ways. One where Rodin and Thomson reach the same conclusion that it is permissible for Taylor to kill Tristan. Two, Rodin can conclude that it is not permissible to kill Tristan

For the first view, Tristan accidentally falls down a well. Taylor, who is at the bottom, will die from the impact. Taylor is permitted to kill Tristan to save herself because he is a threat. Even if Tristan was comatose or mentally ill the result that Taylor is permitted to kill does not change because Tristan is still a threat. The reason why Taylor is permitted to kill Tristan is because Tristan, regardless of intention, consciousness or illness is a threat to Taylor which means that he is not actually complying with their obligations to Taylor. In this way, Rodin's reciprocity and Thomson's innocent threat discussion are consistent with each other which would mean that being a threat is failing to comply. This conclusion is counter-intuitive because it would remain true even if it was Lachlan who maliciously pushed Tristan to kill Taylor, for the actual threat is Tristan, not Lachlan.

However, we can view it another way through the lens of Rodin's reciprocity. It was Lachlan who failed to comply with Taylor's rights not Tristan for he is merely being used as a tool to kill Taylor. Then, it would not be Tristan that forfeits his rights but Lachlan, meaning that Taylor would not be permitted to kill Tristan because the subject who failed to comply is not the threat. It is not clear whether Tristan should be viewed as actually complying or not for he is definitely a threat but lacks intention. We have seen that intention is not necessary in Rodin's reciprocity either because a comatose person can actually comply without indicating intention.

However, the threat still exists, and Taylor needs to make a decision. We can think that Tristan is neither failing to comply with Taylor's rights nor complying with her rights; he is merely a tool and thus actual compliance is inapplicable. Then, a way out of this dilemma, according to Rodin's reciprocity theory, we would need to employ a counterfactual to ascertain whether he is complying or not. With this Taylor can imagine what Tristan would do if he was stuck at

the bottom of the well and she, hurtling towards him. If she thinks that Tristan would kill her then she may kill Tristan, if, however, she thinks that Tristan would not kill her then she has an obligation not to kill Tristan.

I conclude this sub-section that Rodin's reciprocity can align with Thomson's conclusions of innocent threats if we take being a threat amounting to failing to comply with a right which would make it a sufficient condition for rights forfeiture. This, however, would be counter-intuitive because no intentional action was made by the threat. A way for this to be resolved is to regard Taylor as neither failing to comply nor actually complying. Then, in Rodin's reciprocity theory we must use a counter-factual to ascertain whether it is permissible to kill.

3.5 The Absence of the Grounds of Duty

In this section I wish to examine what grounds a duty in Rodin's reciprocity theory. We have seen in Chapter 2 how Rodin's reciprocity theory functions. I have a right because and to the extent that I comply with your right. Likewise, you have a right because and to the extent that you comply with my right. In this way, Rodin lays out how individuals can forfeit rights through a compliance failure which he calls the forfeiture principle¹¹⁸. If X is a necessary possession condition of a right, then the absence of that condition is a sufficient condition for a forfeiture of that right¹¹⁹. I argue here, two things. One, it follows from the forfeiture principle that duties are forfeit when rights are forfeit because the two are correlative to each other. I will argue that it is counter-intuitive to think of duties being forfeit. Two, it is unclear, in Rodin's reciprocity, how third parties can justifiably intervene to kill aggressor's if that is the only way for the victim to be saved. I shall end presenting Fabre's reply that Rodin's arguments may be circular and lacks independent justification for why rights are held.

¹¹⁸ Ibid., 288.

¹¹⁹ Ibid.

3.5.1 Loss of obligation

Firstly, I give an example where Lachlan is unjustly attacking Taylor. Taylor can save herself only by killing Lachlan. Using Rodin's reciprocity theory and forfeiture principle we can see that Lachlan forfeits his right not to be killed by failing to comply with Taylor's right not to be killed. A failure of compliance led to a forfeiture of a right. A forfeiture of a right however, also leads to a loss of a duty. I lay out the argument below:

1. At t_1 Lachlan attacks to kill Taylor (but misses his shot).
2. Because he attacked, he failed to comply with Taylor's right.
3. Because he fails to comply, he forfeits his own right against harm against Taylor, at t_1 .
4. Because Lachlan's right against harm is forfeit, Taylor can justifiably kill Lachlan in self-defence.
5. At t_2 Lachlan continues his attack on Taylor (firing another shot).
6. Because Lachlan's right is forfeit, he no longer is held to an obligation to comply with Taylor's right.

In this example, because Lachlan failed to comply, he forfeited his right, thus the grounds for his obligation to not harm Taylor are gone (the possession condition for his obligation, his right, is absent). If we wish to say that Lachlan continues to hold an obligation not to harm Taylor it cannot be his right because the right is already forfeit. I do not mean to say that Lachlan is justified to kill Taylor because the grounds of his duty (his right) is forfeit. Taylor still retains her right not to be harmed. Her attack on Lachlan is justified thus she does not forfeit her right against harm. However, it is not Taylor's right that holds Lachlan to an obligation to comply with her right. Rather, it is Lachlan's right not to be harmed that holds Lachlan to an obligation to comply with her right. Only, there no longer are grounds to say that he continues to possess that duty because he has forfeited the corresponding right.

The implication is that because Rodin's reciprocity theory necessitates compliance as a condition for possessing a right, the moment this condition is absent, the grounds for the duty also are absent. We may then no longer hold an aggressor to further obligations. The failure of

compliance is still the aggressor's fault but if at t_2 (t_1 being the first attack on Taylor) Lachlan's right is still forfeit then we may not hold him to the corresponding obligation because the grounds of the obligation are absent.

3.5.2 Third-party Intervention

Secondly, if we include Tristan in the example, I gave in Section 3.5.1. If the only way Taylor can be saved is if Tristan, a random passer-by, kills Lachlan then it is unclear on what grounds third parties can intervene to kill the aggressor. I explore how they can and cannot intervene.

According to Rodin if Taylor had saved Tristan's life in the past then Tristan "may be obligated" to assist Taylor¹²⁰. If Tristan has no past relation to Taylor, he could use a counterfactual to imagine if, in comparable circumstances, Taylor would save him. If Tristan thinks she would then Tristan has an obligation to assist Taylor. Thus, we can establish how Tristan can be obliged to assist Taylor. Tristan can kill Lachlan because Tristan is obligated to assist Taylor.

However, Tristan cannot kill Lachlan because Lachlan is actually complying with Tristan's right not to be killed. This is because Rodin mentions that "actual compliance always trumps counterfactual compliance"¹²¹ because what people did do has greater weight than what they would do. Tristan's duty to assist Taylor is based on counterfactual compliance but his duty not to kill Lachlan is based on actual compliance.

If Tristan's obligation not to kill Lachlan and obligation to assist Taylor are both based on actual compliance it is unclear which one should have priority within the reciprocity theory. Lachlan is actually complying with Tristan's right now; Taylor did actually save Tristan in the past. This is counter-intuitive because Lachlan is the one that failed to comply against Taylor.

We may wish to say that Tristan is justified in killing Lachlan to assist Taylor, but we must clarify under what grounds in Rodin's reciprocity theory this obligation is based on. For if we say that it is based on his obligation towards Taylor then we must explain a) how Tristan does

¹²⁰ Ibid., 303.

¹²¹ Ibid., 300.

not have an obligation not to kill Lachlan when Lachlan is actually complying. If we say that that it is based on Lachlan's failure to comply with Taylor's right, we must explain b) how failing to comply with Taylor's right makes Lachlan forfeit his rights not only against Taylor but against Tristan as well.

This is a startling conclusion because unjust aggressors like Lachlan are at fault and under Rodin's reciprocity theory their rights forfeiture is justified through compliance failure. Yet, Lachlan may not be killed by those he has not failed to comply against. Tristan may kill Lachlan if Lachlan fails to comply with Tristan's right not to be killed however that has not occurred. This is interesting because in standard examples of self-defence the aggressor loses rights against third parties¹²². In Rodin's reciprocity the unjust aggressor has not failed to comply against a third party and yet seemingly forfeits rights against them. If that is true, then that means they forfeit their obligations against third parties as well. Lachlan did not fail to comply against Tristan, yet we wish to say that Lachlan forfeits his right not to be killed against Tristan in order for Tristan to save Taylor.

A strength of Rodin's reciprocity theory is his forfeiture principle. However, I have argued that when the grounds of duty are absent, the right, the individual no longer possesses obligations to those he forfeited his rights against. Furthermore, the aggressor forfeits his right against the victim but may be actually complying with a third party's right. Thus, he cannot forfeit those rights under Rodin's reciprocity theory. However, that is counter-intuitive for we wish the victim to be aided. Thus, if the victim is to be aided via the third party and the third party's actions against the aggressor justified. The result then is that the aggressor loses his obligations against the third party because his right against the third party is forfeit. The grounds for the duty are absent. Holding the aggressor to obligations towards the third party goes beyond Rodin's reciprocity theory and an independent justification for holding rights is needed.

¹²² D. Kretzmer, "The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum," *European journal of international law* 24, no. 1 (2013): 238.; Fabre, *Cosmopolitan War*, 59.; Thomson, *The Realm of Rights*, 370.; Uwe Steinhoff, "Proportionality in Self-Defense," *The journal of ethics* 21, no. 3 (2017): 264-65.

3.5.3 Circularity of Reciprocity

This lack of independent justification is Fabre reply to Rodin in her paper *Rights, Justice and War: A Reply* which is a defence against criticism of her book *Cosmopolitan War*¹²³. One of her arguments against Rodin's reciprocity is that it can account for conditions of possession and forfeiture but not simultaneously a justification for that right on pain of being circular¹²⁴.

A circular argument is: A is true because B is true. B is true because A is true. If A is the statement 'I am under a duty not to harm you' and B is the statement 'You are under a duty not to harm me' then A and B together becomes 'I am under a duty not to harm you because you are under a duty not to harm me'. Then it must be explained what justifies B independent of A being true¹²⁵. Fabre argues that just because I do x for you it does not justify an obligation onto you to do x for me. For her, the justification of placing an obligation onto you cannot be that I fulfilled my obligation towards you because the justification for my obligation towards you is lacking. To say that the justification for my obligation towards you is because you fulfilled your obligation towards me is a circular argument¹²⁶. Thus, Rodin's reciprocity theory does not provide a sufficient explanation for why we possess rights.

Rodin's sufficient explanation within his reciprocity theory, as I explained in Chapter 2, is a moral psychological mechanism that persons possess which enables them to give and receive respect based on the status and actions of others. Persons deserve respect and consideration to the extent they show respect and consideration to other persons¹²⁷. It is this way that Rodin provides his independent sufficient explanation for why agents can come to possess rights.

This is the topic of Chapter 4. I shall examine this moral psychological point that allows persons to reciprocate rights towards one another especially those who are incompetent, animals and infants.

¹²³ Cécile Fabre, "Rights, Justice and War: A Reply," *Law and Philosophy* 33, no. 3 (2014).

¹²⁴ *Ibid.*, 395.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*, 397.

¹²⁷ Rodin, "The Reciprocity Theory of Rights," 293.

3.6 Conclusion

In this Chapter, I provided a discussion to show why discussing forfeiture of rights is important using arguments from David Miller and David Rodin. I also pointed out some similarities between the two's reciprocity theories. I had three objections to Rodin's reciprocity theory.

The first was that the reciprocity theory of Rodin cannot explicitly indicate when a right has been forfeited. I argued that for an ongoing threat the identification of when a right was forfeited is still difficult to pinpoint because there was a lack of clear indication of what actions constitute a forfeiture of a right. Further, I argued that in such cases there may be justification lacking as to why certain actions leads to a forfeiture of differing rights.

My second point against Miller and Rodin's reciprocity was that their reciprocity would inadequately deal with innocent threats as described by Judith Jarvis Thomson. I described two cases that she used to describe cessation of rights and argued that if Rodin's reciprocity is to be consistent with Thomson's cessation of rights then a threat, innocent or aggressive, must be considered failure to comply.

My third objection was that due to the rigidity of his forfeiture principle when the grounds for a duty are absent the bearer no longer is obligated. I argued how an unjust aggressor could lose their obligations towards their victim. This was significant because we wish to continue for the aggressor to be held to obligations. I also argued that the grounds for a third-party intervention is unclear. The third party may not kill an aggressor under Rodin's reciprocity theory because the aggressor is actually complying with the third party's right. If we wish to argue that the third party may justifiably kill the aggressor without any direct action from the aggressor to the third party. Then the aggressor may forfeit their obligations towards the third party and attack them justifiably. I argued that this was counter-intuitive and that an independent grounding for duty is needed. I presented Cécile Fabre's arguments that Rodin's reciprocity theory risks circularity which bolstered this criticism. Through, Fabre, it was exhibited that Rodin's reciprocity theory needs independent justification for possessing rights. Rodin claims his independent justification is based on a moral psychology that people possess. This leads me to my next chapter where I examine how Rodin's reciprocity can be applied to those with limited agency and limited capacity for reciprocity.

4 Chapter 4: Applicability of compliance to various kinds of agents

4.1 Introduction

In Chapter 2 I presented Rodin's arguments that rights against harm and rights to assistance are best understood through reciprocity. He argued that I have a right because and to the extent that I comply with your right. This set up his forfeiture principle where in the absence of compliance a right is forfeit. The role of compliance is that it allows agents to possess rights.

It is this that leads me to this chapter where I shall discuss how various agents mentioned by Rodin are allowed to possess rights through actual compliance and counterfactual compliance. This chapter is divided into two sections. In 4.2 I question whether actual compliance is overly inclusive and what requirements we may set to appropriately attribute rights. In 4.3. I argue why counterfactual compliance is difficult to apply and that it is not entirely clear how we are to think counterfactually.

I shall assess how various classes of agents can give respect and consideration to those that do so towards them; how they can actually comply and counterfactually comply with the reciprocal rights of other agents. Compliance is divided into actual compliance and counterfactual compliance and for Rodin, rights against harm are partially grounded in the former and rights to assistance are partially grounded in the latter¹²⁸. Actual compliance is when I know with near certainty that the other person is or has complied with my right. Counterfactual compliance is employed to ascertain if I have an obligation towards another person when I do not have current or prior knowledge of them helping me. Thus, I imagine what the other person would do if they were in my position and I, in theirs. If I think that they would assist me then I do possess an obligation towards them.

The various agents are incompetents (the comatose, i.e. the unconscious), infants and non-human animals (henceforth just animals). I have chosen the comatose because Rodin mentions specifically that the comatose are allowed to possess rights both in actual compliance

¹²⁸ Ibid., 286.

and in counterfactual compliance within his reciprocity theory¹²⁹. Infants, because Rodin mentions that allowing them to possess rights within his reciprocity theory is “challenging” and animals because they are incapable of being subject to duties which is an important requirement to be able to reciprocate within Rodin’s theory¹³⁰. Rodin does not discuss infants or animals in detail in his reciprocity theory as he only mentions animals once and infants sparingly. His main concern is the inclusion of the comatose.

I shall first explain what actual compliance is with examples then engage in a discussion of how rights against harm can be applied to almost all humans. I will begin by discussing what qualifications are required to be able to possess rights in Rodin’s reciprocity theory. I find six requirements: 1) to be able to actually comply (even if it is unintentional); 2) enter into interpersonal relationships; 3) be able to give respect and consideration by having the ‘mechanism’ to mentally process moral issues (even if the ‘mechanism’ is dysfunctional or limited); 4) being an agent; 5) being able to counterfactually comply; and 6) capable of being subject to duties. I will discuss the first four requirements in Section 4.2 because I am examining who can come to possess rights through actual compliance. I shall use a reply of Fabre to Rodin on this matter of who may be excluded and why. 5 and 6 will be discussed in Section 4.3 because I am examining who can come to possess rights through counterfactual compliance. I shall explain counterfactual compliance using examples. I will argue that though counterfactual compliance may function in asymmetrical relationships, an aspect of that relationship must be symmetrical in order for that relationship to be reciprocal under Rodin’s theory of reciprocity.

My assessment finds the comatose, infants and animals can come to possess some rights through actual compliance but through counterfactual compliance it is more difficult to see how they may be allowed to possess rights when it is not clear how they can counterfactually comply. This is in part due to the ambiguity of a moral psychological mechanism possessed by agents (which I shall discuss in 4.2.1.2), a lack of specification of who agents are and a lack of clarity of how we are to think counterfactually.

¹²⁹ *Ibid.*, 294.

¹³⁰ *Ibid.*, 307.

4.2 Actual Compliance

In this section I shall present what actual compliance is and how three kinds of agents (comatose, infants and animals), through actually complying, can come to possess rights. I will also examine who can come to possess rights through actual compliance. I discussed in Section 3.4 how the comatose can come to forfeit rights but here I shall examine how they can come to possess rights. Actual compliance is mostly seen in rights against harm. An example: If person A is not attacking person B then person A is actually complying with Person B's right not to be harmed. Rodin argues that even if A is an incompetent (comatose) his reciprocity still allows the comatose to possess rights through actual compliance because if the comatose is at that moment actually complying with B's right then they possess a right not to be harmed¹³¹. The question I aim to answer in this section is if it is true for the comatose and infants to possess rights through such actual compliance (as Rodin claims¹³²), why is it not so for inanimate objects and animals. Hence, I identify four requirements for agents to possess rights against harm and assess whether the three kinds of agents fulfill them.

4.2.1 Qualifications to be allowed to possess rights against harm through Rodin's reciprocity theory

Rodin claims that one of the advantages of his reciprocity theory is that it allows infants, the comatose and the mentally disabled to possess rights against harm because of the requirement that as long as one is actually complying one can come to possess rights¹³³. He argues that this is an advantage over the Will Theory of Rights which is focused on the individual's ability to choose. Thus, if an individual is unable to exercise choice, they cannot be a right

¹³¹ *Ibid.*, 294.

¹³² *Ibid.*, 294-95.

¹³³ *Ibid.*, 295.

holder¹³⁴. Indications that one is exercising choice is difficult to identify among infants, the comatose and the mentally disabled.

4.2.1.1 Requirement of Actual Compliance

Let us begin by examining this requirement of actual compliance. Rodin tries to show that the comatose, infants and mentally disabled can possess rights through actual compliance by example of a comatose person fulfilling their duties not to harm another person even if they are not intentionally carrying them out by being largely inactive. The other person then must reciprocate towards the comatose person by not harming them because, and to the extent, that the comatose person is actually complying at that moment¹³⁵. We saw in Chapter 3 how Thompson points out that intention is not necessary to forfeit rights¹³⁶ and Rodin points out that intention is not necessary to possess rights¹³⁷. Intentionally complying is not necessary to reciprocate obligations not to harm.

4.2.1.2 Requirement of Moral Psychology and Indicating respect

Rodin's explanation of how agents can come to possess rights is by giving respect and consideration to others. This is based on the principle that persons are "deserving" of respect and consideration because (and to the same extent) they show respect and consideration to others.

This principle, for Rodin, is based on a moral psychological mechanism that agents possess. As I wrote in Chapter 2, Rodin does not write much on this moral psychology thus I have interpreted much. I understand moral psychology to be "able to mentally process moral issues to

¹³⁴ Ibid., 294.

¹³⁵ Fabre, "Rights, Justice and War: A Reply," 397.

¹³⁶ Thomson, *The Realm of Rights*, 371.

¹³⁷ Rodin, "The Reciprocity Theory of Rights," 295.

an extent"¹³⁸. I wrote that this may exclude the comatose; it is difficult to imagine the comatose mentally processing moral issues to any extent.

Let us imagine what this moral psychological mechanism can be for two competent adult humans to illustrate the difficulty. I may think that because I do not want to be harmed by you, I should not harm you. This can be a feeling or even a mental thought process that because I wish not to be harmed by you I ought not to harm you. Thus, because I gave you respect and consideration (by not harming you) you are obliged to not harm me. The comatose are included because even if they do not actively give respect and consideration, they are not harming you now which still places an obligation on you not to harm them.

However, as Rodin himself points out, we can include a loaf for a "loaf in my kitchen is not currently slicing me in two" but I do not obtain a duty to reciprocate against harming the loaf¹³⁹. What separates those who can and cannot reciprocate is the ability "to give respect and consideration to those who manifest appropriate respect and consideration towards us"¹⁴⁰. This ability to give respect and consideration comes from a mechanism in moral psychology. Thus, even if the comatose cannot process such issues but still possess the apparatus. It does not exclude them from actually complying, the same for infants. The loaf then does not possess this mechanism because it cannot mentally process moral issues and thus, cannot give respect and consideration when given it. This is how a loaf of bread is excluded for Rodin because it cannot possess rights and duties¹⁴¹.

4.2.1.3 Requirement of Being an Agent

Rodin writes that an "agent" comes to possess rights through obligation compliance¹⁴². From the outset Rodin qualifies that those who can possess rights are agents. In the previous subsection, I discussed the requirement of indicating respect and consideration. As such, if a

¹³⁸ Refer to Chapter 2, p. 17.

¹³⁹ Rodin, "The Reciprocity Theory of Rights," 295.

¹⁴⁰ *Ibid.*, 286.

¹⁴¹ *Ibid.*, 295.

¹⁴² *Ibid.*, 286.

possible right-holder is capable of indicating respect and consideration even if they show it only passively (like the comatose) they fulfill the requirement of being an agent. I do not mean to say that the comatose or infants are full agents as competent adult humans only that they fulfill the requirement in Section 4.2.1.2 for having the capacity for indicating respect and consideration even if the capacity is limited.

4.2.2 Fabre's Reply

It is at this juncture that Fabre replies to Rodin by pointing out his reciprocity theory allowing unintentional actual compliance is at odds with his claim of the mechanism (rooted in moral psychology) to give respect and consideration to those that show it to us being possessed by all humans. She argues that Rodin's assumption that all humans possess this mechanism by virtue of being human is clearly false¹⁴³. She gives examples of children who will not grow past the age of five and the severely mentally handicapped. We would be hard pressed to say that they do possess such a moral psychological mechanism.

Let us examine the strength of this reply. For Rodin's reciprocity theory, reciprocating or complying is necessary even if the compliance was not intentional¹⁴⁴. The problem with this line of thinking is that the loaf mentioned earlier can be included. We wish to include children and incompetents but wish to exclude such inanimate objects because, according to Rodin, the best way to understand interpersonal relations is through reciprocity¹⁴⁵. If the comatose, mentally disabled and infants can show respect and consideration towards others by not harming, then so can the loaf. However, Rodin excludes the loaf because even if it can actually comply unintentionally it does not possess the moral mechanism to give respect and consideration, does not possess moral psychology, and is not an agent. However, we can argue similarly for the infant. Then, Rodin must make clear what differentiates between the severely mentally disabled, the loaf and the infant.

¹⁴³ Fabre, "Rights, Justice and War: A Reply," 397.

¹⁴⁴ Rodin, "The Reciprocity Theory of Rights," 295.

¹⁴⁵ *Ibid.*, 300.

4.2.2.1 Reply to Fabre: Requirement of entering into interpersonal relationships

We can perhaps reply to Fabre's objection by excluding the loaf because we may consider that it is unable to enter into an interpersonal relationship with us. Though, it would be unclear how a comatose person reciprocates an interpersonal relation with us if they have always been comatose. Another line of thinking would be to refer back to the qualification I mentioned in the introduction that perhaps what can qualify the infant and the comatose is that even if they cannot show intentional agency, they still possess the mechanism to. Thus, even if the mechanism is damaged, dysfunctional or underdeveloped it is still present which qualifies them to possess rights but not the loaf since the mechanism is absent. To illustrate we can think of a car that has a damaged engine, or an engine that has not yet been fully built. The car still possesses the engine, similarly infants and the comatose still possess the mechanism. Hence, we can exclude the loaf for it does not possess the mechanism.

Though even if we exclude the loaf Fabre's points still stands; some agents do not show respect or consideration. We may reply to her by returning to the point that it is not necessary for them to actively show respect and consideration. The agents can simply reciprocate by actually complying. An example would be if Jim enters Eli's room. Eli is comatose and Jim is wielding a knife about to harm Eli. Jim considers whether Eli has a right against harm. Jim realises that Eli is not harming Jim at that moment and so must reciprocate by not harming Eli. We can replace Eli being comatose to being mentally disabled, a child or an infant and the result would be the same. Even if these various categories of right holders are not showing respect and consideration, they are actually complying which is vital for attributing rights and duties through reciprocity. We know at least one reason that replacing Eli with the loaf will not work, because the loaf does not possess even the damaged ability to show respect and consideration.

4.2.3 Inclusion of Animals

Whether this can be extended to animals is unclear, for an adult tiger has more a far more functioning ability to give respect and consideration than a comatose human or a human

infant. In the context of rights against harm, humans and animals can reciprocate through refraining from harming the other person.

Animals in rights against harm in Rodin's reciprocity theory could be allowed to possess rights against harm due to their unintentional compliance. It is strange that though human infants are less of an agent than an adult tiger Rodin still includes human infants in rights against harm but not animals. Perhaps it is because the animals are not human and cannot to the extent of a human engage in interpersonal relationships. However, we can see that a dog can enter into such an interpersonal relationship far better than a comatose adult human¹⁴⁶.

Then, we must see whether they fulfill other requirements such as being able to counterfactually comply and being able to be subject to duties.

4.2.4 Section Conclusion

In this section I discussed how infants, the comatose and animals can come to possess rights against harm through actual compliance using Rodin's theory of reciprocity. I began by an explanation of how through actual compliance, they could come to possess such rights then moved on to what qualifies these possible candidates to possess rights against harm. I examined actual compliance, their deeply rooted principle in moral psychology to indicate respect and consideration and how they can be agents. I then presented a criticism by Fabre that Rodin's reciprocity theory is at odds with including the comatose and infants in rights against harm. I then brought a possible reply that these classes can still have rights due to the qualification of being able to enter into reciprocal relationships. I posited that animals could have just as much reason to possess rights against harm if infants and the comatose can in Rodin's reciprocity. Though they all differ in their agential capabilities we can see how an adult tiger, for example, may have a better agential ability to reciprocate respect and consideration than

¹⁴⁶ We can compare this discussion of who has rights with Griffin's account of the same. I briefly mentioned in Chapter 2 Griffin's idea that human rights are to protect personhood and personhood is to be understood as being an agent. Griffin excludes "infants, the severely mentally retarded, people...in a coma" as agents. He accepts that some "higher animals" can be included in his notion of agency but confines human rights to human agents. Griffin, *On Human Rights*, 34, 38, 44-45.

a human infant. I ended that discussion by saying that it was necessary to see how these possible candidates can come to possess rights to assistance through counterfactual compliance because that being able to counterfactually comply may also be a requirement to possess rights general in Rodin's reciprocity theory. I thus move on to section 4.3 to discuss this.

4.3 Counterfactual Compliance

In Rodin's reciprocity theory he discusses how agents can come possess rights and obligations through counterfactual compliance if actual compliance is not applicable in a situation because of a lack of certain knowledge¹⁴⁷. Through counterfactual compliance he argues that the comatose can come to possess rights to assistance¹⁴⁸. Rodin argues that duties to assist rise from interpersonal relations that are asymmetrical in "power and need"¹⁴⁹. It does not matter what persons are able to do what matters is what they would do¹⁵⁰. Thus, he argues that it is through counterfactual compliance we can ascertain whether we have a duty to assist now.

Counterfactual compliance is thinking what the other party would do in my situation, what would they do if our circumstances were reversed. In this section I will examine how counterfactual compliance can allow infants, the comatose and animals to possess rights. I will also show how it is unclear exactly how we are to switch the positions (use counterfactuals to imagine a reversed situation) to conclude on whether we have a counterfactual obligation.

I will begin with two examples of counterfactuals. I present in the examples below how Rodin believes counterfactuals can help us find out whether we have an obligation to assist in that situation. I show in the examples that there is another way to think counterfactually in situations. In the second way to think counterfactually it is difficult to see how the other party can be subject to duties if they are comatose, an infant or an animal. Rodin includes the comatose but not animals and infants. I argue that it is not clear what exactly we are swapping between

¹⁴⁷ Rodin, "The Reciprocity Theory of Rights," 300.

¹⁴⁸ *Ibid.*, 299.

¹⁴⁹ *Ibid.*, 296.

¹⁵⁰ *Ibid.*, 299.

the two parties (when we use counterfactual thinking to imagine reversed positions) which brings about confusion of which candidates of right holders to include over others. I will argue that animals and infants can come to possess rights to assistance if the comatose can as well. Rodin does not discuss in detail how infants and animals cannot possess rights to assistance through counterfactual compliance. He mentions that infants could be a challenging candidate and animals not candidates at all because they cannot be subject to duties.

4.3.1 How counterfactual compliance works (with examples): Requirement of being subject to duties

Rodin argues that his theory of reciprocity is applicable to incompetents (the comatose) but perhaps not to animals and infants. His reasoning is that “one be capable of being subject to duties”¹⁵¹. It is difficult to think that animals and infants ought to possess obligations and that competent humans should then expect infants and animals to fulfill such obligations. Saying that infants and animals ought to possess rights is easier to see because they can be protections that others (adult humans) can claim for them. However, in Rodin’s reciprocity, one comes to possess rights when one complies with the rights of others. Thus, expecting infants and animals to reciprocate obligations would be lofty when they have virtually no understanding of moral reciprocity.

I thus, have two objections in this subsection. Firstly, that these three classes of agents cannot think reciprocally and secondly that they cannot be subject to duties in situations where they cannot carry out their duties. We saw that in actual compliance incompetents can be included because it would not matter whether the person was incompetent or not, what matters is whether they are actually complying at that given moment. Thus, one can be comatose, incompetent or otherwise disabled but still be actually complying.

In counterfactual compliance this is much more difficult to see. I give two cases of asymmetrical need and power, Ravi and Siddhartha, and John and Tenzin. In these cases, at the other

¹⁵¹ Ibid., 307.

end of the reciprocal relationship is a competent adult human. In both cases I shall give two ways to swap situations. The first case:

1) *Two competent (adult human) individuals, 'Ravi and Siddhartha':*

- a. Siddhartha is walking in a forest and happens upon Ravi caught in a trap. Siddhartha has an obligation to help Ravi because Ravi would help Siddhartha if Ravi was the one walking by (with competence like Siddhartha's) and Siddhartha caught in the trap (with competence like Ravi's).
- b. Siddhartha has an obligation to help Ravi, who is caught in a trap because if it was Siddhartha who was trapped and Ravi walking by, Ravi would help.

In this first case both Ravi and Siddhartha are competent adult humans, their 'state of agency' is the same which means that both 'a' and 'b' are the same. What I mean by this is that both Ravi and Siddhartha have corresponding agential capabilities; they can both be subject to similar duties and thus come to possess similar rights. The state of agency is being able to think counterfactually rather than having the power to help. Even though I swap their state of agency in '1a' it does not matter. The asymmetry of power and need here is not in their state of agency, because it is the same, rather it is in their difference of who is caught in the trap. Even when we see it from a different perspective of '1b' their state of agency remains the same even if we swap who is the one caught in the trap.

The second case, however, has both an asymmetry of state of agency and an asymmetry of power and need:

2) *Incompetent (comatose) and competent (adult human) individual, 'John and Tenzin':*

- a. Tenzin is walking in a forest and happens upon John who is comatose and caught in a trap. Tenzin has an obligation to assist John because if John were competent and walking by, and Tenzin incompetent and caught in a trap, John would assist Tenzin. John cannot assist Tenzin right now but if he could, if their roles were reversed, then he would assist Tenzin now, thus Tenzin has an obligation to assist John right now.

- b. Tenzin has an obligation to assist John because if it was Tenzin who was caught in a trap (but still competent) and John (still comatose) nearby, John would help.

In '2b' Tenzin is still a competent and John still comatose, their state of agency (being comatose or being a competent adult human) remains the same but who needs help changes. Thus, it is hard to see how John could help Tenzin since John is an incompetent who is comatose.

Through the perspective of the competent adult human side of the relationship, through '1a' and '2a' we could see how counterfactual compliance could function. In 'John and Tenzin' in '2b' there is an asymmetry of a state of agency (who is the comatose) and an asymmetry of power and need yet it is harder to see how the comatose could help the other party out of the trap.

We can replace John with an animal (say a tiger) or an infant and the result would be the same. Tenzin may think 'I should assist John/the tiger/the infant because if John/the tiger/the infant was a competent adult human and I an incompetent/tiger/infant and caught in a trap they would assist me'. This thinking could be correct because it may certainly be the case that if John or the tiger or the infant were a competent adult human then they would provide assistance to Tenzin caught in a trap. Thus, in this way we can see how these three kinds of agents would function at first glance in rights to assistance in reciprocity due to counterfactual compliance. This, however, also includes the loaf. I may think I should assist the loaf 'Havre' because if Havre were I, Havre would assist me.

My first objection is that the other side of the reciprocal relationship is harder to see how they may think counterfactually. If it was Tenzin who was caught in a trap but still a competent adult ('2b') it is not clear that John/the tiger/the infant would think 'I should assist Tenzin because if he was a comatose/tiger/infant he would assist me'. They would not because they are a comatose, a tiger and an infant all of whom lack capability to think of a reciprocal relation in a similar way the competent human does. They may have some idea of reciprocity because of instinct or their nature or what they have observed but we cannot be sure that they do possess the idea of reciprocity within them which would allow them at least the option of fulfilling their reciprocal obligations. Thus, we ought not to think of counterfactuals in the way

I have described in '2b' where the asymmetry of need and power is swapped but not the state of agency.

My second objection is that we cannot even be sure that they are capable of assisting us because they are a comatose/tiger/infant. Rodin makes the point that the one who we think is obliged to assist must be capable of possessing and being subject to rights and duties¹⁵². Though comatose/tigers/infants can come to possess rights against harm through unintentional actual compliance it is unclear how they are capable of possessing rights to assistance when they cannot be subject duties even counterfactually that a competent adult human would expect reciprocity from. In a case of actual compliance, comatose/tigers/infants could all possess the right against being harmed. Tenzin is obligated not to harm John/the tiger/the infant because at that moment all three were actually complying with the right against being harmed possessed by Tenzin. However, in a case of counterfactual compliance, the comatose/tiger/infant would not possess the right to assistance from Tenzin because John/the tiger/the infant would not be able to assist their counterparts because of their state of agency; that they are comatose, a tiger and an infant thus having low capabilities to help. This is another reason we should not think of counterfactuals in Rodin's reciprocity through the way I have done in '2b'.

4.3.2 Decoupling asymmetrical relationships

In this sub-section I argue that one's state of agency and being able to assist is welded together for the comatose, infants and animals which is why they cannot counterfactually comply through the second perspective in '2b'. In 'Ravi and Siddhartha' it is clear what we are to swap when we use counterfactual thinking because their state of agency is not linked with their ability to help.

In '1a' Ravi is caught and Siddhartha is walking by. Ravi needs assistance from Siddhartha because he is trapped and Siddhartha not. Siddhartha assists Ravi because if Siddhartha was

¹⁵² Ibid., 297.

caught and Ravi walking by, Ravi would help Siddhartha. The state of agency of being Ravi or Siddhartha is not coupled with who requires assistance and who is assisting. Siddhartha walking by is directly linked to him being in a position to help. Ravi's being trapped is directly linked to him being in a position that requires help. Even if we swap their state of agencies (the state of agency of being a competent adult human like Ravi or the state of agency of being competent adult human like Siddhartha) they can still help the one that is trapped and can still think counterfactually. Their stage of agencies is quite equal because both are adult humans. Here it is irrelevant who possesses which state of agency and so counterfactual compliance works smoothly because they are both humans and the only asymmetry is who is in need. It is possible for them to decouple their state of agency and their asymmetry of power (ability to think counterfactually and ability to help).

However, for the other three kinds of agents it must be clarified how their roles are to be reversed. Counterfactual compliance does not function as smoothly because changing who is in need but keeping their state of agency (being comatose, a tiger and an infant) does stop the one needing assistance from receiving it. Them being caught in a trap is not the only way the relationship is asymmetrical; their state of agency is asymmetrical as well.

Let me explain using 2b) John and Tenzin why we must clarify what we are swapping because it matters who can receive and give assistance. If we keep the state of agency but change who needs help, we obtain '2b'. Tenzin is a competent and John is an incompetent. Tenzin is obliged to assist John because were Tenzin in need of help then John would assist Tenzin (Tenzin is still a competent and John still an incompetent). However, we see that John cannot actually provide assistance because he is an incompetent. If we try to swap only who needs help but keep the state of agency then we see that counterfactual compliance does not work because though Tenzin is a competent and in a position where he needs help, John is not in a position where he can help. We can decouple Tenzin's competence to his ability to aid or need of aid, but we cannot decouple John's incompetence with his ability to aid or need of aid. This is true for the other two kinds of agents (the tiger and the infant) as well. If the tiger or the infant were an adult (competent) human, then they would help. However, if they were still a tiger and an infant, but it was Tenzin that were in need, then neither the tiger nor the infant could help. They cannot fulfil the reciprocal relationship by counterfactually complying.

Being able to decouple one's state of agency (being comatose, a tiger or an infant) with one's ability to help is necessary to think counterfactually through the second perspective of '2b'. I thus conclude that Tenzin should think counterfactually through way of '2a' because it is in that one that John can counterfactually help. It is in that one that John can be subject to duties counterfactually. We cannot subject duties to John if Tenzin is the one in need and John the one nearby to assist which means that John does not fulfill the precondition that Rodin set out for those who can come to possess rights¹⁵³.

4.4 Conclusion

In this chapter I explained how three classes of agents could come to possess rights against harm through actual compliance and rights to assistance through counterfactual compliance. I presented some qualifications that I argue were required. They were actually complying, having a moral psychology to give respect and consideration when shown it, being an agent, being able to enter into interpersonal relationships and being able to counterfactually comply.

I explained actual compliance and how the comatose, infants and animals could come to possess rights against harm. I argued that I do not see a good reason from Rodin to exclude animals from actual compliance in reciprocity but include infants and the comatose because if intentional agency is not necessary to possess rights against harm then animals could come to possess such rights as well. The problem would be defining how they are able to enter into interpersonal relationships for some animals fare better than the comatose and infants. Thus, rights against harm needs to include animals in reciprocity or exclude the comatose and infants along with animals.

The requirements then to come to possess rights against harm are: 1) to be able to actually comply (even if it is unintentional), 2) enter into interpersonal relationships, 3) be able to give respect and consideration by having the 'mechanism' to mentally process moral issues (even if the 'mechanism' is dysfunctional or limited) and, the requirement 4) being an agent. The

¹⁵³ Ibid., 307.

requirement 6) capable of being subject to duties, is necessary only in the way that the possible right-holder is subject to the duty of not harming others because that duty can be fulfilled unintentionally. Requirement 5) being able to counterfactually comply, is missing because not being able to counterfactually comply does not hinder one to actually comply as I argued in Section 4.3.

I then discussed how the comatose, infants and animals can come to possess rights to assistance through counterfactual compliance. Rodin includes the comatose in counterfactual compliance however does not explicitly include infants and explicitly excludes animals¹⁵⁴. I argued that counterfactual compliance can be murky because there are multiple ways to think counterfactually. I argued that in order for counterfactual compliance to work, the agents in the interpersonal relationship must be able to decouple their state of agency with their ability to assist.

This being said, the requirements to come to possess rights to assistance are '2', '3', '4', '5' and '6'. Requirement 2 is necessary because counterfactually complying with another one means entering into an interpersonal relationship with another. Requirement 3 is also necessary as I argued in Section 4.3.3 because at least one of them needs to be able to give respect and consideration when shown it in order to counterfactually comply and fulfilling this also fulfills '4' being an agent. 5, the requirement to counterfactually comply is necessary to possess rights to assistance because it is in this way one obtains obligations. It is also required for the possible right-holder to be capable of being subject to duties (requirement 6) because it is necessary for them to be able to fulfill duties to assistance counterfactually in order for them to counterfactually comply as we saw in Section 4.3.2.

Reciprocity is not a blanket rights theory where if one is an agent then they automatically are suitable to hold all rights and duties. Reciprocity can include a variety of agents and depending on their agential capabilities (intentional or not) they are fit for holding certain rights. It is not necessary for agents to be able to possess rights to assistance as well as rights to harm simultaneously to have any rights at all.

¹⁵⁴ Ibid.

5 Chapter 5: Conclusion

5.1 Summary

I introduced this thesis with the question of whether Rodin's reciprocity theory was valid. I sought to answer this by examining two things. The first was examining how forfeiture works in his theory of reciprocity. The second was whether incompetents could obtain the rights to assistance and rights against harm the way Rodin argued.

I began in Chapter 2 by showing the reader the point in this discussion where I step in. I gave background that Rodin's theory is a reply to Cécile Fabre's arguments that war by the poor towards the rich is justified. She uses Joseph Raz's interest theory to base her arguments on. I presented Rodin's theory and aimed to examine it independently as an alternative theory of rights.

Firstly, I engaged with the forfeiture of rights. A topic whom both Rodin and David Miller say is underdeveloped and underdiscussed in theories of rights. Miller points out that human rights are conditional in practice even if they are not legally¹⁵⁵. Rodin laid out the necessary and sufficient conditions for possessing a right and thus, necessary and sufficient conditions for losing that right. The solid logic of these conditions coupled with Rodin's reciprocity theory shows that rights are forfeitable not because they should be but because of the mechanism of reciprocity in the theory. I discussed three problems: 1) It is difficult to pin point when a person failed to comply; 2) It is not clear why innocent threats should forfeit rights against harm, and; 3) I argued that if one can forfeit a right then one can forfeit a duty as well. It would be undesirable to say that a person forfeits a duty because they would be justified in not fulfilling a reciprocal right.

In Chapter 4, secondly, I endeavoured to develop Rodin's theory of reciprocity to examine whether three certain classes of individuals can be right holders. These classes are incompetents (the comatose), infants and animals. Rodin discusses incompetents in his article but not so much the latter two. He suggests that the theory of reciprocity could be extended to them

¹⁵⁵ Miller, "Are Human Rights Conditional?," 15.

as well. I presented that rights against harm to all three classes are plausible under reciprocity and pointed out that it was strange that Rodin did not also include them there. My second point, I argued, is that it is unclear how we are to think counterfactually when the other side of reciprocal relationship cannot engage in such counterfactual thinking. Thus, I was left with 6 possible requirements for candidates to be right-holders: 1) to be able to actually comply (even if it is unintentional); 2) enter into interpersonal relationships; 3) be able to give respect and consideration by having the 'mechanism' to mentally process moral issues (even if the 'mechanism' is dysfunctional or limited); 4) being an agent; 5) being able to counterfactually comply; and 6) capable of being subject to duties.

Rodin's theory of reciprocity I argue is an important step forward in both rights and human rights discourse for a core reason that it explains our common intuitions of mutual obligations in our relations with others we see to have the same or similar agential statuses as ourselves¹⁵⁶. We feel pressured to help others when they have helped us. We feel pressured to help others when we have good reason to believe that they would help us in the same situation. The theory of reciprocity is not perfect, yet I argue that there lies strength in its core and thus I endeavoured to develop the theory in two ways, one that Rodin only briefly mentioned, to see how far this theory can go.

5.2 Implications for Theory and Practice

Rodin's theory of reciprocity has two implications for the theory and practice of rights and more specifically human rights. I think he is correct that we have a common intuitive understanding of rights and duties being reciprocal. This greatly helps in explaining rights of individuals morally and perhaps legally. They have rights because they complied with their duties or they do not have rights because they did not comply and hence are forfeited. It is controversial to say that certain human rights are forfeitable, for example, the right to not be tortured. It is hard to see how individuals can forfeit their right to be tortured even if they did torture another person. If we cannot agree on what is right and wrong morally or even legally, we can

¹⁵⁶ Rodin, "The Reciprocity Theory of Rights," 305.

at least agree that failure to comply means forfeiting a right. This does notably concede that anyone who is a right holder of reciprocal rights can forfeit them.

Another implication but primarily towards the theory is that Rodin's reciprocity is flexible towards various possible right holders. It is a strength of the theory that what rights individuals possess is directly linked to their agential capabilities. Thus, we would not need to give infants full rights, but rights based on their agential capability thereby including a wider range of right holders. In practice we already do this to a certain extent, incompetents occupy a wide range and the rights applicable to them vary depending on that range of capability. Reciprocity, then, allows us to explain why so and how so.

5.3 Suggestions for future studies

Rodin's article on reciprocity was short and I have endeavoured to develop his suggestions in this thesis. I would suggest a further study on how reciprocity can be integrated into international legal human rights through institutional reciprocal rights. Rodin also concludes similarly that perhaps reciprocity could be a framework to explain institutional rights. It is a popular view that human rights are rights against the state and the theory of reciprocity does support that for in a reciprocal relationship between an individual and a state the individual would have rights against the state. It may be unfavourable to give states rights against their citizens in a stronger way however theories of territorial rights already function in that way¹⁵⁷.

A further study would be to develop the theory of reciprocity so that states can be right holders in a reciprocal relationship with individuals using my six possible requirements.

This discussion would need more background from theorists discussing the rights of institutions and states. One area would be to engage in justificatory discussion on territorial rights of states. This, however, would be entirely theoretical which would not necessarily be

¹⁵⁷ Anna Stilz, "Why Do States Have Territorial Rights?," *International theory* 1, no. 2 (2009).; Brown Philip Marshall, "The Rights of States under International Law," *The Yale law journal* 26, no. 2 (1916).; Cara Nine, "A Lockean Theory of Territory," *Political studies* 56, no. 1 (2008). & Hugh King, "The Extraterritorial Human Rights Obligations of States," *Human rights law review* 9, no. 4 (2009).

applicable to the practice of human rights against states. Another area to discuss reciprocal rights of institutions is to examine commonly held intuitions such as that if citizens pay taxes then they should obtain services from the state for example by providing health institutions. If we are to frame institutional rights in a reciprocal way, then it may be worth examining legal practices where states and individuals are owed an obligation because they fulfilled theirs. Some rights and duties could function in a reciprocal relationship between a state and an individual however certain rights and duties are not applicable to the state such as the right not to be killed, for the state cannot be killed, or the right to food cannot be reciprocated back towards the state because the state does not eat.

It is uncertain whether my six criteria to be a right holder in Rodin's reciprocity would be necessary. This is because even if an entity such as the state may not fulfill the requirements they may still engage in reciprocal relations with individuals. States can enter into other reciprocal relationships with individuals that would generate reciprocal institutional rights rather than reciprocal interpersonal rights. The interesting question is what those rights would be and whether this line of thinking is worth exploring to explain international legal human rights.

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