

Restitution and Distributive Justice

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Introduction

There is no question but that historical injustices perpetrated by some people and nations against others continue to cast a shadow over contemporary economic circumstances. Current disparities between racial and ethnic groups within countries and between nations—in wealth and income, human capital, privilege, freedom, and technology— in part reflect what we recognize today to be egregious historical violations of fundamental rights. Examples of this include, though are certainly not limited to, the colonial expansion by Europeans and others from the late 16th to the mid-20th century as well as the enslavement of Africans in Europe and North America from the late 15th through the 19th century (Brennan 2009). See Table 1 for a selection of restitution cases and their current status. In the United States, racial injustice in the form of explicit (legal) discrimination in employment, housing, voting, and access to education and other government services carried on for well over a century after emancipation. Indeed, even today racial minorities in the US face substantial barriers to the achievement of genuine equality. See Table 2 for estimates of US reparations for these historic injustices. *Prima facie* evidence of the effects of past injustice is found today in racially differentiated rates of employment, educational attainment, income, wealth, health, political representation and incarceration.

The continuing, compounding effects in the present of past historical injustice raise the question whether governments today ought to enact restitution¹ that would bring about some sort of monetary transfer or other compensation from its beneficiaries to its victims. Restitution for

¹ Literature in this subject tends to emphasize restitution *or* reparations. We refer to the less encompassing term: restitution—returning of a piece of stolen property to the original owner—instead of reparations—defined as re-establishing just relationships broadly and pertaining to property restitution, but also emotional rehabilitation, etc. However, the arguments in this paper apply to both restitution and reparations.

Table 1: Cases Involving Restitution

Injustice	Suggested Restitution Amount	Outcome
Trans-Atlantic slave trade	The African World Reparations and Repatriation Truth Commission in 1999 demanded 777 trillion USD from Western Europe and the Americas, also called for Africa's debts to be unconditionally cancelled	No payment made <i>(a)</i>
Austrian treatment of Jews during WWII	Payment of 25 million to survivors of Holocaust	Payment made <i>(b)</i>
German treatment of Jews during WWII	More than 50 billion USD from Germany to victims	Payment made over decades since the war <i>(b)</i>
Japanese Americans jailed during WWII	20,000 USD to survivors	Restitution paid to survivors in 1988 Civil Liberties Act. Total of 1.2 billion USD paid <i>(b, c)</i>
Japanese treatment of South Koreans during WWII	800 million USD from Japan as a) \$300 million grant b) \$200 million in low-interest loans c) \$300 million in private credits	Payment made over 10 years starting 1965 <i>(d)</i>
Argentina military junta's treatment of dissidents	Range of restitution based on degree of violation determined by Argentine law	In 2004, \$3 billion USD was provided for reparations to victims of unlawful detention. Victims had to prove that they had been detained without trial between 1976 and 1979. The military, however, was uncooperative. <i>(e, f)</i>
Colombian treatment of dissidents	Fourteen extradited warlords have paid \$4.6 million; Chiquita Brands fined 25 million USD in 2007 for making payments to paramilitary groups that engaged in human rights violations and murders; establishment of a reparation fund. Also, Chiquita now faces lawsuits from family members of people killed or disappeared in the fighting, which could represent 4,000 claims	Fine paid <i>(f, g)</i>
Chilean treatment of dissidents	Either lump sum payment or annual payment, depending on wages and determined by Chilean courts	Restitution paid <i>(f)</i>
Chemical weapons used on Kurdish minorities in Northern Iraq during Iran-Iraq war sold by Dutch national to Iraq	Dutch criminal court ruled that victims could receive no more than 680 Euros; 15 Kurds sought this payment as civil parties to the case but the Dutch Supreme Court ruled their claims were too complicated and they must seek compensation through civil courts	Dutch national convicted of war crimes, original plaintiffs still not compensated <i>(h)</i>

Iraqi treatment of property owners during Saddam Hussein's rule	Court treatment of restitution involving re-payment for those forcibly removed from land and reconciliation with current land-owners.	Over 40,000 decisions made out of more than 140,000 cases (f)
Iraqi treatment of Kuwait in 1991	UN Security Council mandated restitution of all cultural property seized and Iraq must pay 5 percent of its oil revenues into a special UN reparations account until all claims deemed worthy by the UN have been satisfied	Iraq has so far paid out \$34.3 billion to claimants for Saddam Hussein's 1990 invasion of Kuwait, of which around \$25 billion has gone to Kuwait. Iraq still owes roughly \$18 billion (i, j)
Bosnian treatment of Serbs	Court ordered payment of government funds to the creation of a cemetery and memorial fund along with property restitution for nearly 2.2 million internally displaced persons and over 400 houses damaged or destroyed	By 2003 more than 92 percent of claims settled (f)
Rwandan genocide	Returning of all looted items, establishment of memorial sites with sales tax revenue, no full monetary restitution for victims	Many goods returned, many people participate in community service (f)
South African apartheid	Payment to surviving victims benchmarked to family income with ceiling and floor	Payment made (f)

Sources: a) BBC News, 1999; b) du Plessis, 2003; c) O'Brien and Fugita, 1991; d) Manyin, 2001; e) United States Institute of Peace, 2011; f) Ferstman et al, 2009; g) CNN, 2011; h) van Hasselt, 2010; i) United Nations News Centre, 2011; j) The Daily Star, 2012.

Table 2: Estimated Restitution for US Slavery

Estimation of Restitution to African Slaves in US	Source
Restitution in 1983 was 3.4 billion USD calculated from the value of slave production not returned as food or shelter.	Ransom and Sutch (1990)
Taking a proximate wage for a free person as a proxy, calculated restitution is 1.4 billion USD in 1983	Neal (1990)
Income diverted from enslaved Africans during slavery calculated restitution to be 1.4 trillion in 1983	Marketti (1990)
Taking the "40 acres and a mule" as a basis, author calculates restitution to be 1.3 trillion USD in 2008	Conley (2002)

past injustices has been advocated in all manner of contexts—both within countries and between sovereign states, with varying impacts.

The intuition behind campaigns promoting restitution is clear: where some have been wronged, and where the effects of those wrongs extend into the present, they or their descendants ought to be compensated by those who perpetrated the wrongs, or by their descendants who are the innocent beneficiaries of the wrongs. Where the injustice involved the actions of members of some groups against members of another, the case can be and is made that restitution should involve inter-group transfer. This may occur alongside cases of restitution involving particular individuals when rights violators and their victims can be identified.

Programs of restitution intend to achieve three things: “...acknowledgement of a grievous injustice, redress for the injustice, and closure of the grievances held by the group subjected to the injustice” (Darity 2008: 656). The three objectives build incrementally: acknowledgement precedes redress, redress precedes closure. Restitution claims can be organized into three types: 1) those of individuals who suffered injustice who are still alive at the time of restitution (e.g., Japanese Americans and WWII); 2) those made by communities on behalf of previous promise breaking (e.g., Native American petitioning of US government); and 3) claims made by individuals who are descendants of victims of injustice (e.g., the African American attempt to achieve restitution for the harms associated with slavery) (Thompson 2001:114-5).

As the foregoing suggests, the end goal of restitution can differ widely from retribution to rehabilitation. Restitution claims can require that wrong-doers be punished, and restitution to victims might properly form a part of the punishment—the treatment of Germany after WWI provides one notable example. Here, restitution is tied up with demands for retribution. But this

claim by itself would limit the field of potential restitution too narrowly to those cases where the wrong-doers are both identifiable and surviving. A second claim casts a much broader net: restitution is intended to restore those whose rights were violated, or those who suffer today from the past rights violations of others (such as their ancestors), to the position they had enjoyed prior to the rights transgression; or, more ambitiously, to the situation they would enjoy today had the past violation not occurred. This second claim founds restitution proper (independent of retribution); it applies both in cases where the unjust act or practice is very recent and where it is long since past; and where the perpetrators and victims of injustice are individually identifiable, and where they are not. Here the drive is not to punish, but to rehabilitate damage from past transgressions. Punishment and restitution proper are not inconsistent, of course: but they are nevertheless distinct. In what follows, we will focus exclusively on restitution proper and leave aside the matter of retribution.

If the intuition founding the case for restitution proper is clear, restitution is nonetheless fraught with complexities. As Vernon states: "... although there is, in principle, a clear case of restitutive justice, its elements rarely, if ever, exist in the real world in an unmixed state" (2003: 542). Restitution claims require all sorts of empirical and normative judgments about which reasonable people may and certainly do disagree. Not least, even if we agree on the contours of a past injustice that continues to generate inequality in the present, we may very well disagree about whether restitution is *the* or even *an* appropriate means for addressing it. Might not it be better, the welfare consequentialist might argue, to let bygones be bygones and instead search for non-restitutive policies that will best promote social welfare in the future? Moreover, especially in post-conflict environments (such as civil wars involving genocide and other atrocities), it can well be argued that the promotion of peace and prosperity are better advanced by truth and

reconciliation processes that acknowledge but do not attempt to provide payment for past injustices. People might rightly fear in this context that restitution processes could re-inflate passionate antipathies. Restitution following World War I is a widely recognized determinant of the rise of fascism in post-war Europe, for example.

Here we do not take a position on if and when restitution is an appropriate response to past injustice. This reflects in part our awareness of the salience of the particular circumstances surrounding each case and associated complexities. What is both warranted and efficacious in one context might be unwarranted and self-defeating in another. This implies that determinations about if and when restitution should be made ought not be rule-based, but tied to the very specific contexts in which one group today suffers the effects of past injustices.

The goal of this paper is more limited. Here we demonstrate that careful consideration of restitution, where it is taken to be an appropriate means for responding to past injustices, necessarily involves substantial normative work. One cannot hope to offer well-reasoned and compelling answers to questions like which historical practices and institutions warrant restitution, and what magnitude of restitution is sufficient to redress historical wrongs, if one has not first worked out the normative criteria that will guide these judgments. Indeed, whether restitution is warranted at all will depend on a normatively-inscribed reading of history. Like so many other areas of social investigation, analyses of past injustice are necessarily founded upon a thorough integration of the normative and the positive. In this context, and as we hope to show, the mathematical calculations required to quantify the effects of past injustice are shot through with prior, normative choices.

Of the many normative matters that arise in the context of restitution, we will focus here on just one: on the question of justice. The tie between conceptions of justice and the project of

restitution is signaled by the “theory of restitution” itself. This theory is founded on a strong empirical premise that is in turn predicated on a claim of justice, described by Richard America as follows:

Whenever nations, races or other large social groups have chronic grievances, a fundamental issue is invariably the sense that one party has perpetuated unremedied historical economic injustices (America, 2005: 327).

Substantiating this claim is by no means straightforward. It requires an account of justice against which one can assess the historical record. And while it might be the case that some social practices achieve notoriety under virtually all accounts of justice, it is very likely that others will be normatively contested—indicted under one or more accounts, but validated under others.

The restitution project may also require the quantification of the impact of historical wrongs, which presumes of course that such an accounting can in fact be done. In America’s words,

The theory of restitution is based on the intuition that it is possible to reconstruct historic economic relations; to specify “fair” standards ... that were violated, usually by force; to audit the historical pattern of transactions between the groups and compare the actual with the ‘fair’ standard; to then estimate the deviation from ‘fairness’ (America, 2005: 327).

This exercise, too, certainly requires that normative judgments be made—as the term “fair” standards makes clear. What forms of economic enrichment are just, and which are unjust? If my grandfather got the better of your grandfather in a voluntary economic transaction, is that indictable against a standard of fairness—and ought it appear today in the restitution board’s ledger of past injustices? Clearly, these decisions, too, will depend on the normative framework that guides the assessment.

The notion of justice has been the site of intense controversy in moral and political philosophy and beyond over the past several centuries. Indeed, it is likely to remain contested in

perpetuity. The question that naturally arises, then, is whether the striking lack of consensus on what makes for just social arrangements is problematic for the project of restitution. It does not necessarily follow that it is: it may very well be that alternative, respected accounts of justice reach substantial agreement in their interpretations of the historical record (as concerns, for example, the practice of slavery), in which case the lingering philosophical controversy need not overly concern those who press for restitution. On the other hand, if it is the case that different accounts of justice produce disparate assessments of the historical record, then we must take account of these differences as we undertake the work of identifying historical wrongs and estimating magnitudes of restitution. Our claim is that we must pay explicit attention to these different justice frameworks before engaging in politically charged discussions like those surrounding issues of restitutions.

In what follows we explore the extent of consensus and disagreement among alternative contemporary accounts of justice on the matter of the kinds of events that might warrant restitution and, consequently, the computation of the magnitude of restitution. The goal is not to adjudicate the relevant normative controversies, but rather to illustrate the significance of normative theory for the restitution project. For purposes of demonstration, we focus on three important traditions in the recent scholarship on economic justice; and we focus in particular on just one theorist from each tradition. The first is the libertarian tradition of political philosophy; our exemplar is the work of Robert Nozick. The second is the liberal contractarian approach, and we focus on the work of John Rawls. The third is the capabilities approach, a chief advocate of which is Amartya Sen.

This narrow focus allows us to achieve the objective of demonstrating that normative controversy surrounding the concept of justice bears heavily on considerations pertaining to

restitution. Even limiting our attention to these three perspectives we find striking disagreement regarding the practices and outcomes that warrant redress and, consequently, the appropriate magnitudes that would suffice as restitution. This is particularly notable because of the parallels between Rawls and Sen.² This implies that a wider review of accounts of justice would likely yield even more disagreement about restitution than we find among the three scholars we examine here. We will see that these three approaches yield overlapping but distinct conclusions about which kinds of historical practices might warrant restitution today and, were restitution to be pursued, what would be the magnitude of the required payments. The paper concludes with some thoughts about how to take account of this normative controversy in the restitution project.

A Stylized Historical Account

For simplicity of exposition, let us presume a stylized account of certain features of international affairs during the sixteenth through twentieth centuries. During this long historical epoch several European and other powers exerted extensive colonial control over regions in Asia, Africa, the Americas and beyond. Salient features of colonialism include the proliferation of enforced labor and exploitation through taxation and other enforced transfers from indigenous populations to the colonizers. Moreover, colonialism was associated with what at best might be thought of as “uneven exchange” in markets involving colonizers and colonized but often entailed little more than piracy, plunder and simple expropriation of resources. Colonial relationships could also involve the destruction of the indigenous economy, especially those industries in the periphery that might otherwise have presented competition to the colonizer’s industries back home. Moreover, colonialism could be and sometimes was associated with

² Indeed, Sen initially offered the capabilities approach as a friendly amendment to Rawls’ framework. Since then Sen has arguably moved further away from Rawls, but there remains important affinities between their respective accounts of justice.

genocide and indigenous cultural collapse – sometimes as a consequence of explicit policy and other times as a consequence of the material, political and social transformations that colonizers imposed on those under their domain.

Though not a necessary feature of colonialism, slavery also proliferated during this historical period and was likewise associated with international conquest. For instance, the African-North American slave trade endured for several centuries. The seized African slaves were traded for profit and exploited in agriculture, mining, manufacturing and other sectors. The harms of the trade were borne by the enslaved themselves, of course, but also by the African communities from which they were abducted.

We presume that these transgressions continue to reverberate today in terms of intra-national and international inequalities. Following America (2005), we presume that part of the existing inequality in economic development across countries today stems from the colonial history and enslavement of previous centuries. Moreover, we will presume that within national contexts, such as the US, part of the inequality that persists today between racial minorities (most importantly, African Americans and Native Americans) and the Anglo majority is rooted in its history of enslavement and colonialism.

For present purposes we will consider just three types of interaction that may arise between members of any two distinct groups. While by no means exhaustive, these three interaction types cover many of the practices that proliferated during the colonial era, and that might and do form the basis for restitution claims:

1. Extra-Market Appropriations, Takings or Transfers: Interactions from which one community secures appropriations from another community through force, coercion or other illicit activity. These might entail enslavement and other forms of forced labor, theft, fraud, destruction of property or community, systematic terror and murder that yielded economic advantage and disadvantage, and related practices.

2. *Market-based Appropriations*: Interactions from which one community secures market-based appropriations from another community.³ These interactions might entail “unequal exchange” that results from discrimination (such as in the labor market), the exercise of monopoly power, etc. For our purposes unequal exchange refers to transactions where the terms of the exchange (such as the content, quality or price of the goods or services being exchanged) reflect an asymmetry in bargaining power of the respective agents, perhaps owing to differences in their opportunity sets or fall-back positions.

3. *Differential Gains*: Interactions that benefit both communities, but from which the gains enjoyed by one systematically exceed those enjoyed by the other. The causal drivers in this case may be the same as, similar to, or different from those described under case 2.⁴

The inequalities in evidence today, across nations and across distinct groups within nations, reflect *inter alia* some combination or other of these three kinds of processes. The nature and extent of inequality results from the interplay of all three processes, of course, which complicates greatly the task of computing the contribution of each for the purpose of restitution. Different economic perspectives (e.g., Marxian versus neoclassical theory) would also undoubtedly reach different conclusions about the contribution of each kind of social process to inequality. Any account of restitution should address in one way or another each of these types of misappropriation. For present purposes, we will assume that reasonable estimates (of upper and lower bounds) could be made of the contribution of each kind of process to existing inequality.

³ Despite the fact that in slave societies markets for slaves exist, the injustice to the slave results not from the terms of the market transaction between buyers and sellers, but from the preceding act of enslavement that permits this trading. Hence, even in this case we theorize the injustice of slavery as an extra-market appropriation.

⁴ Later on we will distinguish between those differential gains that arise from previous extra-market or market-based appropriations, and those that do not. The distinction will be important in assessing the degree to which differential gains ought to appear as an argument in the Rawlsian function that determines restitution payments.

Formalizing, we have the following result:

$$D = \sum_{i=1}^n (X_i + M_i + G_i) (1+r)^{(n-1)} + f [\sum_{i=2}^n D_i]$$

where D is the cumulative difference in capacities (as represented, for instance, by income) between two groups of people (such as two racial or ethnic groups, or two nations) in any year n ; X_i is net extra-market appropriations between the two groups in year i (1, above), M_i is net market-based appropriations (2, above), and G_i the net difference in gains from interaction between the two groups (3, above). The term r is the compound rate, and allows for the calculation of the present value of past and present differential impacts.

The final term in the equation, $f [\sum D_i]$, captures the present effect of past differential impacts that exceed the normal compound rate. Continuing our previous example, if in some period i the Anglo American community secured a positive D , then it is likely that in period $i+1$ it will enjoy the potential to convert that past gain into greater capacity (for entrepreneurship, technological innovation, human capital formation, and so forth) than is given by any standard compound rate (such as the rate of interest). The $f [D_i]$ term therefore reflects cumulative causation where, over time, advantage yields further advantage. For the African American community, which suffers a loss in period i , the result will be the opposite: it will experience a diminution in its capacities in period $i+1$ that is independent of its interaction with Anglo Americans in period $i+1$, and which exceeds the standard compound rate. The inclusion of this term, then, reflects the fact that the differential impact is not fully reducible to resource flows in any given year, or even to the present value of the sum of such flows over an extended period. These flows—and the means deployed for securing them—may be expected to induce additional effects that are likely to amplify inequality over time. Hence, the differential in any given year is

to be seen to result from the contributions in that year of X, M and G, as well as the contribution in that year of the differences in capacity that resulted from earlier differentials.

Competing Conceptions of Distributive Justice

The three accounts of justice surveyed here are among the most influential in contemporary debates over social arrangements and policy.

Libertarian Justice:

The contemporary libertarian account of justice that appears in the work of Robert Nozick (1974) descends from the work of John Locke and other theorists in the liberal tradition. Locke asserts that an individual has property rights in those elements of nature with which s/he has mixed her/his labor. This right to appropriation is a natural right which precedes the intervention of civil society. Moreover, and more importantly for present purposes, this natural right extends to those things produced by the resources one owns and hires, such as the labor of others (MacPherson 1962, 219-220; Locke 1690).

The right of property, including the right to alienate what one owns, provides the basis for establishing the legitimacy of market transactions, regardless of the patterns of inequality that may emerge therefrom. Locke's liberalism and Nozick's libertarianism defends formal liberty rather than substantive equality—the right of the individual to contract freely takes precedence (in most cases) over fairness of outcomes. The Lockean defense of market exchanges and outcomes as fair regardless of the substantive inequality that emerges therefrom, provided the transactors are formally free to contract as they see fit, certainly carries forward to contemporary libertarian thinking.⁵

⁵ And, it should be said, to neoclassical economic thought. It should be noted that the most ardent defenders of market processes and outcomes tend to draw on both the libertarian emphasis on

For Nozick, the defense of market-based distributions builds upon his view of rights as “side-constraints” that may not be violated regardless of the social benefit that rights violations might promote. In the side-constraint view of rights, the interests of the group (in economic efficiency, “justice,” etc.) cannot trump the right of the individual to live his life free from coercion. If we recognize the inviolability of this right, then we are led to see that market exchanges between free transactors must not be constrained by the state so as to promote greater equality of income, wealth or other measures of human welfare.

Nozick’s “historical” account of justice builds on these insights. Nozick’s account is historical in the sense that the justice or injustice of a distribution depends strictly on how it came about. In his words,

A distribution is just if it arises from another just distribution by legitimate means.
... Whatever arises from a just situation by just steps is itself just (Nozick, 151).

Nozickean justice requires justice in the “*original acquisition of holdings*” and justice in the “*transfer of holdings* from one person to another” (150; emphasis in the original). Justice in acquisition speaks to “the appropriation of unheld things”: the manner in which un-owned assets or goods are initially claimed.⁶ Justice in transfer refers to processes by which assets justly

negative rights, and on the welfarist consequentialism of neoclassical thought. Milton Friedman comes to mind in this regard. In his major philosophical work, *Capitalism and Freedom*, he routinely drifts back and forth between libertarian and welfarist defenses of the free market. This is important for the restitution project: the welfarist consequentialism of neoclassical thought does not provide much basis for theorizing restitution, other than by claiming that failure to provide restitution for past transgressions might induce perverse incentives in the present (by undermining confidence in property rights). There is a much stronger basis for restitution in the work of those economists, like Friedman, who also draw on libertarian insights.

⁶ Following Locke, Nozick appends a proviso to his account of justice in acquisition. An agent may not properly appropriate unheld assets to such a degree that the position of others is worsened thereby. In Locke’s words, the appropriator must leave “enough and as good...in common for others” (cited in Nozick 175). As Nozick demonstrates, the proviso is complex, and yields competing accounts of which acquisitions are and are not legitimate. See his treatment of

acquired can come under the ownership of another. Such processes include exchange, gifting, bequeathing and other mechanisms by which those with an ownership right over a good may sacrifice that right.

Were there no violations of the principles of justice in acquisition and transfer, there would be nothing further to say about the justice of existing distributions. Virtually no extent of inequality would be indictable so long as it results fully from agents acting in accordance with their rights of acquisition and transfer. But Nozick's historical account of justice recognizes that rights violations do take place, and that current distributions of goods and income are shaped in part by these historical injustices. In Nozick's words,

“Some people steal from others, or defraud them, or enslave them, seizing their product and preventing them from competing in exchanges. None of these are permissible modes of transition from one situation to another. And some persons acquire holding by means not sanctioned by the principle of justice in acquisition” (152).

Hence, the need in the Nozickean framework for a third justice principle – the “rectification of injustice in holdings” (152). The effects of past injustice must be rectified by transfers from beneficiaries to victims of past injustice before we can validate current distributions. Establishing the magnitude of the warranted rectification requires the use of “historical information about previous situations and injustices done in them (as defined by the first two principles of justice and rights against interference), and information about the actual course of events that flowed from these injustices, until the present...” (152).

One final point warrants attention in this regard. Nozick counterposes his historical account of justice (which he claims is implicitly shared by socialist thought) to what he calls

the issue on pp. 174 to 182. While we do not pursue the matter further here, we would note that a violation of the Lockean proviso implies a violation of the justice in acquisition principle, and so warrants rectification (as discussed immediately in the text).

“time-slice” accounts of justice. Time-slice (or “patterned”) accounts judge who gets, has or enjoys what in the present against “some *structural* principle(s) of just distribution” without any attention at all to whether that distribution came about through voluntary exchange or through violence and plunder. Utilitarianism represents one such approach, insofar as it judges any particular distribution by the criterion of maximum aggregate utility. And so does welfare economics, since “the subject is conceived as operating on matrices representing only current information about distribution” (154). Nozick ridicules this kind of reasoning for focusing on the wrong set of facts. Is there no difference, Nozick asks us, between two distributions that are identical in every respect except for the fact that one came about through extortion while the other came about through a voluntary transaction that both parties took to be beneficial? It bears reiteration that what ought to matter in ascertaining the legitimacy of a distribution, for Nozick, is how it came about – not who now has what.

Rawlsian Contractarian Justice:

Rawls’ theoretical work is perhaps the best known approach to distributive justice outside of the field of political philosophy. Rawls (1971) argues that distributive outcomes are just only if they would result from the rational deliberations of a hypothetical committee of representatives of all the groups that constitute society, with these deliberations occurring behind a “veil of ignorance.” The deliberators operate in the “original position”. That is, this hypothetical body would do its work prior to any of the participants knowing to which group they will be assigned, and in the absence of specific knowledge of their own respective comprehensive accounts of society. The deliberators are taken to be disinterestedly rational, and are driven in their deliberations exclusively by “general considerations” (Rawls 1971, 118).

For Rawls, the committee of disinterested, rational people would generate two principles

of justice. The first is taken to be paramount: it concerns the equal distribution across individuals of what he calls “primary goods” which are theorized as general purpose means that people need to achieve that which they have reason to value. In his words,

a) “Each person has an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for all” (Rawls 1993, 271).

Primary goods include, *inter alia*

“political liberty...freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and the freedom from arbitrary arrest and seizure as defined by the concept of the rule of law” (Rawls 1971, 61).

The second principle is the “difference principle.” This principle provides for deviations from the equal distribution of primary goods under two conditions:

b) “Social and economic inequalities are permissible provided that they are i) to the greatest expected benefit of the least advantaged; and ii) attached to positions and offices open to all under conditions of fair equality of opportunity” (Rawls 1993, 271).

The intuition underlying the difference principle is appealing, though in fact it is obviously correct only in very simple cases. For instance, those cast adrift in a lifeboat might rightly distribute more food and water to those who will perform the onerous task of rowing the boat, since this unequal distribution would better serve all in the boat (including those who are too weak to row) than would an equal distribution. Importantly, the two principles working in concert seem to allow for even rather substantial inequality in economic circumstances, provided they improve the condition of those who are worst off. But the principles do not countenance the sacrifice of any and all rights in pursuit of economic improvement. For Rawls, the principles are lexically ordered, with priority given to equality of political rights over economic gain. In his words, “being arranged in a serial order they do not permit exchanges between basic liberties and economic social gains” (Rawls 1971, 63). These features bear directly on restitution, as we will

see momentarily.

We will argue below that Rawlsian justice can found a case for restitution of certain past injustices. But we note here that Douglas Ficek (2002) has argued that the Rawlsian account of justice does not permit an adequate conception of restitution to victims of racial oppression. For Ficek, the deficiencies in the Rawlsian account stem from

“the racist baggage of being a theoretical extension of Kantian deontology; and second, the inability of color-blind theorizing to appreciate the distinct historicities of racialized Others (or ‘non-Others’, as Lewis R. Gordon has argued) and their specific claims of justice” (Ficek 2002, 2).

To make this case, Ficek demonstrates the under-specification (by Rawls) of and consequent confusion surrounding the information and knowledge that the deliberators in the original position would have. They are to have “the general facts about human society” but no specific knowledge of particulars—of “contingencies that set them in opposition” (Ficek 2002, 3). But, then, what are we to presume they would know about race, if they are to have no knowledge of the “concrete historicity and intentionality” that define racism and racial oppression? And if they are to have access to an account of history that recognizes racial oppression, “who is writing it? Is it Adam Smith or Karl Marx? D.W. Griffith or W.E.B. Du Bois?” (Ficek 2002: 6). Whose account is consistent with “the general facts about human society,” access to which is presumed by the Rawlsian original position?

We cannot respond adequately here to the important claims Ficek makes. Instead, we take his essay as further evidence of the claim that founds our own—that is, the demand for reparation depends fully on normative judgments and philosophical inquiry. Whether Rawlsian justice is *the* or even *an* appropriate foundation for the restitution project (in regards to racial or other historical oppressions) depends on a careful specification of just what the framework

presumes about what are and what are not violations of rights and interests that warrant restitution, and the means that it provides for theorizing these violations and the strategies that are appropriate to address them.

Capabilities Equality and Restitution

Amartya Sen has emerged recently as an important contributor to the debate over distributive justice. Sen's early work in this field (1992) was deeply influenced by the work of Rawls, but he presents an alternative approach to distributive justice that reaches beyond that of Rawls in important respects. For Sen, those advocating equality ought to focus on people's "capabilities to achieve functionings." The term "functionings" refers to states or conditions that people have reason to value, such as being well nourished, well housed, or being politically efficacious. "Capabilities" refer to the complete set of functionings that a person can actually achieve given her allocation of primary goods, the institutional structure of her community, her personal intellectual and physical attributes, etc. The demand for capabilities equality may be interpreted, then, as a claim that people ought to enjoy equal substantive freedom to live valued lives.

When taken as an approach to distributive justice the capabilities framework differs from the Rawlsian account in one vital respect. Sen's egalitarianism focuses on actual achievements that are possible for the individual (given her means and other circumstances), rather than on the *means* to achieve (Rawls' primary goods) (Sen 2009:66). Because of interpersonal differences, people will vary in their ability to transform means into achievement. Valuing substantive freedom to achieve, Sen's capability approach to equality therefore demands that we equalize achievements (capabilities) rather than means. Indeed, this approach calls for the unequal distribution of primary goods to offset inter-personal differences in the ability to convert means

into achievements.

Sen and other theorists operating in the capabilities framework (such as Nussbaum 2000) have paid particular attention to the ways in which group identity can and does affect capabilities. Members of racial, ethnic or gender groups that are oppressed over time may suffer both in terms of the means they secure to promote their goals, and especially in their ability to convert available means into achievements. Two actors with identical income but from different social groups may face very different opportunities and obstacles as they convert this income into the aspirations for good health and longevity, professional expertise, political efficaciousness, self respect and other vital functionings. Making matters worse, those who are long denied important freedoms may come to suffer “adaptive preferences” (Elster, 1982) – they may come to discount the desirability of the goods or states that they believe to be beyond their reach. Adaptive preference formation may allow the oppressed to achieve a greater degree of happiness, to be sure, since it is easier to live a life believing that you do not want or need what you cannot have. But the psychological adjustment to oppression that leads the oppressed to deny the value of what they cannot have represents a significant loss of human freedom – the freedom to imagine and seek a better life (Elster, 1982). All of this implies that historical oppression of social groups may haunt the members of those groups long into the future – even after the formal practices of oppression are terminated.

There is implicit in the capabilities approach an argument (not intended by Sen) against Rawls’ difference principle (see DeMartino 2000), which bears directly on the restitution project. We can see this if we disaggregate capabilities into distinct categories such as political capabilities (the ability to be politically efficacious); economic capabilities (the ability to purchase primary goods, or to secure valuable work); and cultural and psychological capabilities

(the ability to appear in public without shame or feel self worth in one's community).

Disaggregating in this way leads us to appreciate the interdependence of different capabilities, as Sen often emphasizes. A capabilities failure in one realm (e.g., the economic) may be expected to generate capabilities failure in others (e.g., the political or cultural). A relatively poor person may not only be deprived of important welfare goods, like housing, but may also find it difficult to participate meaningfully in the political life of her community. This then leads to a second critical insight, also emphasized by Sen, that relative poverty might therefore be expected to undermine capabilities across the spectrum. It may be worse in important respects to have a low income in a high-income community than in a community where everyone else is similarly poor. In the former, the poor person may suffer other capabilities failures associated with being relatively poor, while in the latter context, she would not be so disadvantaged.

Taking these two insights together, we discover that Rawls' difference principle is difficult to integrate into the capabilities perspective. A defense of the difference principle would require a demonstration that the capabilities set facing the poor expands as inequality increases. But through the lens of the capabilities perspective, we discern the many pathways by which relative inequality may harm those worst off. Inequality in one domain (such as income) may both undermine equality in others, and may contribute to a general capabilities failure for the relatively impoverished. In short, those advocating the difference principle in a Senian egalitarian framework must bear a very heavy burden of proving that inequality does not impair the capabilities of those with least, taking full account of capabilities interdependence.

It bears emphasis that unlike Nozick's libertarian account of justice, neither Rawls' or Sen's accounts appear to be explicitly historical. Both focus attention on what is a just distribution at a given moment in time, and both prescribe a distribution that is, in Nozick's

words, “patterned.” Upon first approach they seem to be “time-slice” accounts. Indeed, this insight founded part of Ficek’s critique of Rawls, as we have seen. But we suggest that this is not the whole story and for several reasons. First, both frameworks explicitly indict outcomes that arise from unfair processes. On this point, Rawls argues that

“the distribution resulting from voluntary market transactions (even if all the ideal conditions for competitive efficiency obtain) is not, in general, fair unless the antecedent distribution of income and wealth, as well as the structure of the system of markets, is fair” (Rawls 1993, 266).

Hence, we are required to investigate the historical conditions that yielded the present distribution. Sen surely concurs in this judgment. Indeed, for Sen, unequal capabilities are indictable in part because of the inequality in outcomes (substantive freedoms) to which they give rise.

Second, in both accounts the question arises as to what we are to make of inequalities that develop over time, *on account of the decisions actors make as they exercise the freedoms that their primary goods or capabilities afford them*. Two actors who in period t make different decisions about, say, investing in their human capital will achieve different levels of capabilities in some future period $t+i$. Moreover, an agent may choose to undertake an action, like riding a motorcycle without a helmet, that interferes with his ability to achieve valued functionings in the future. But then are these later inequalities indictable, and do they sustain demands for restitution, if they arose from the enjoyment of the freedoms that these approaches provide? Surely, accounts that emphasize positive freedoms must, to some degree or other, hold agents accountable for their actions; otherwise, they would require re-equalization in every period to make up for the “mistakes” that agents made in previous periods.

We find no warrant for thinking that perpetual redistribution to override the outcomes

that resulted from the exercise of freedom is entailed in the Rawlsian or Senian frameworks. Far better to presume that in each account the inequality that results from the expression of genuine freedom is not in itself indictable. In Sen's words, "Freedom to choose gives us the opportunity to decide what we should do, but with that opportunity comes the responsibility for what we do – to the extent that they are chosen actions" (Sen 2009, 19). Hence, not all inequalities in the present are to be rectified under these accounts. As with Nozick, then, we need to know under both the Rawlsian and Senian accounts *how existing inequalities came about* before we can say much about whether and how they should be addressed (through restitution or other means). The Rawlsian and Senian accounts would indict inequalities that result from past interference with the enjoyment of primary goods or capabilities, respectively. And it is this "historical" feature of these accounts, we suggest, that allows us to infer restitution claims.

A further insight complicates the matter, however. If we take seriously the demands of equality in primary goods or capabilities, then we might recognize grounds for periodic redistribution to those who have not fared well over time as a consequence of the unpredictable and uncontrollable contingencies of events (rather than obviously foolhardy decisions or character flaws on their part). For Rawls, the evolution of the background conditions under which actors make their decisions is paramount. "Fair" background conditions (those that entail equality of primary goods) may give way over time to unfair background conditions, even if no actor commits indictable offenses against others. In Rawls' view, "background justice" tends to be eroded

"even when individuals act fairly... We might say: in this case the invisible hand guides things in the wrong direction and favors an oligopolistic configuration of accumulations that succeeds in maintaining unjustified inequalities and restrictions on fair opportunity. Therefore, we require special institutions to preserve background justice" ... (Rawls 1993, 267).

For Rawls, examples might include “such operations as income and inheritance taxation designed to even out the ownership of property (ibid, 268).

Where does all of this leave us with respect to the question whether the Rawlsian and Senian accounts are compatible with the restitution project? We conclude most importantly that they are – that they not just permit but even require historical accountings of the sort that the restitution project entails. That they also emphasize that responsibility of the actor does not contradict the restitutive impulse of these accounts, though it may be that individual responsibility must figure into judgments in any particular case about the appropriateness and magnitude of restitution. Finally, there are also other grounds in these accounts for redistribution from the relatively privileged to the relatively impoverished – grounds that derive not from particular offenses in the past, but from an injustice that inevitably builds up over time as a consequence of agents acting fully within their rights. But we emphasize that redistribution for this reason falls outside the jurisdiction of restitution proper, since the latter involves only those claims that stem from the perpetuation of injustice by one individual or group against another.

Restitution and Justice

Having briefly sketched some of the chief contours of these three perspectives on justice, we can address the central question of this paper: what does each account of justice imply about restitution in general, and in the stylized historical case before us?

Nozick’s Libertarian Justice:

Under Nozick’s libertarian account of justice, inhabitants of those countries that were colonized and/or enslaved are due restitution from those of the colonizing nations and enslaving groups since they have suffered the effects of extra-market appropriation (case 1, above). For

Nozick, extra-market forms of appropriation of others' property rights are clearly unjust since they certainly violate justice in exchange and may also violate justice in acquisition (Nozick 152-3; 230-1). In the case before us, this would include enslavement and other forms of forced labor, coercion, theft, fraud, plunder and all forms of violence against persons, property and community institutions. Indeed, in cases of colonial exploitation and slavery, there are most certainly egregious violations of the Lockean proviso against appropriating unheld assets to such a degree that the appropriator fails to leave "enough and as good...in common for others." This provides further grounds for a definitive finding of violations of the justice in acquisition principle.

In contrast, the Nozickean framework does not validate claims for restitution that cite market-based appropriation, such as unequal exchange (case 2), since there is no injustice if in a "voluntary" transaction one party gains at another's expense.⁷ This begs the question of just what is meant by "voluntary," of course. For instance, consider a case in which racial prejudice manifests as a long history of market discrimination that yields depressed wages for African Americans (then and now). This outcome is not indictable (or, if morally indictable, not correctable through restitution) so long as the parties who engaged in the transactions were formally free to choose as they see fit and they acted in accordance with their rights. In this case, the majority enjoys the freedom to associate with each other, even if this results in job segregation and the offer of lower wages to African Americans. That the majority's so choosing diminishes the opportunity set of the minority does not represent a violation of the minority's rights; nor does it diminish the voluntary nature of the minority's behaviors. Nozick puts the

⁷ The only exception would arise in cases that involve the "Lockean Proviso". Following Locke, Nozick rejects an agent's right to appropriate in full an un-owned resource upon which others depend for their survival. For instance, justice in acquisition or transfer does not permit the right to monopolize a scarce source of potable water in the desert.

matter this way. Imagine some agent Z whose opportunity set is highly constrained, owing to the decisions taken by all other actors A through Y. Then we must conclude that Z “does choose voluntarily if the other individuals A through Y each acted voluntarily and within their rights” (263), even if Z’s only effective choice is to accept an exploitative wage bargain. He concludes this thought experimenting with the view that

“[a] person’s choice among differing degrees of unpalatable alternatives is not rendered nonvoluntary by the fact that others voluntarily chose and acted within their rights in a way that did not provide him with a more palatable alternative” (263-4).

This bears on the question of restitution for unequal exchange stemming from historical patterns of racial discrimination, of course. So long as African Americans (post-slavery) enjoyed the formal right to refuse any market offer that they deemed to be inadequate, they (and their descendants) have no redress for the unpalatable nature of the bargains they were forced to accept. Since both parties acted within its rights, there is no basis now to legislate forced restitution for the consequent patterns of inequality between the two communities. Indeed, in this case, forced restitution by the state would represent a grave injustice – one different in kind from and far more dangerous than the discrimination that it seeks to redress (Nozick 1974; Friedman, 1962);⁸ Nor, finally, does Nozick’s libertarianism permit restitution claims that are based on

⁸ Milton Friedman’s distinction between “positive” and “negative” harm is relevant in this regard. For Friedman, positive harm results from the use of coercion – what we have called here extra-market appropriation. In his view, and consistent with Nozick, this form of harm should be rectified by the state. In contrast, negative harm results when two nominally free parties fail to reach a bargain that yields a market transaction. In Friedman’s view, negative harm does not justify state rectification.

Friedman theorizes racial discrimination that prevents a black worker from securing employment from a white employer, or a wage that is equal to that of a white work, as an instance of negative harm. Such outcomes are regrettable, but they do not justify state intervention. In his words, “I believe strongly that the color of a man’s skin or the religion of his

unequally distributed gains from exchanges that do not violate rights (case 3).

A libertarian account of distributive justice would therefore justify restitution from the beneficiaries to the victims of colonialism and slavery only in case 1 (see Table 3). The magnitude of illegitimate harm would be equal to the present value of the sum of net extra-market appropriations (X) over the past several centuries, plus a magnitude that reflects the present value of the cumulative effects of past injustice (D). The expression for restitution (R) is then given by a function (h) of D,⁹ defined as follows:

$$R = h(D) = \sum_{i=1}^n (X_i) (1+r)^{(n-1)} + f \left[\sum_{i=2}^n D_i \right]$$

Rawlsian Justice:

Under the Rawlsian approach to justice, restitution is warranted not only in the case of extra-market appropriations, but also in the case of market-based appropriations (cases 1 and 2). Unlike the libertarian approach, the contractarian approach indicts the inequality that exists today that originated in discriminatory market practices since these reflect inequality across social groups (the privileged and the oppressed) in primary goods. Regarding the magnitude of illegitimate harm, Rawls’ contractarian approach adds to the libertarian equation the present value of the market-based appropriation (M). It would also include the present value of the

parents is, by itself, no reason to treat him differently; that a man should be judged by what he is and what he does and not by these external characteristics. I deplore what seems to me the prejudice and narrowness of outlook of those whose tastes differ from mine in this respect and I think the less of them for it. But in a society based on free discussion, the appropriate recourse is for me to seek to persuade them that their tastes are bad and that they should change their views and their behavior, not to use coercive power to enforce my tastes and my attitudes on others” (Friedman 1961, 111).

⁹ We say restitution (R) is given by a “function (h) of D” (rather than simply by D) since we recognize that other factors besides justice come into play in determining the amount of warranted restitution.

cumulative effect of past injustice (D) to take account of the fact that rewards that are founded on prior, illicitly-won advantages (the inequality in primary goods) are themselves illicit. It bears repeating in this context that for Rawls, political rights and economic benefits are not fungible. Violations of the political rights that appear among the primary goods are to be avoided at all economic costs.

What might the Rawlsian perspective make of case 3, where both parties gain from the interaction between them, but at differential rates? For the sake of precision in this context it is important to set aside the economic disparities resulting from cases 1 and 2, though in practice they occurred together.¹⁰ Let us imagine that there are at least some differential gains that are not grounded in or stem from the practices reflected in the other two cases. Here we confront some ambiguity. On the one hand, the greater benefits that have flowed to the beneficiaries of colonialism and slavery over the past centuries violate the requirement of equal distribution of primary goods for present generations. Some today enjoy greater general purposes means to achieve their objectives than do others. On these grounds, there appears to be a strong Rawlsian case for restitution for the unequal flows that are captured by the present value of G, the differential gains. But it must be emphasized that this broader claim for restitution is offset by complications stemming from the difference principle to the degree that it can be plausibly

¹⁰ To the degree that we fail to treat case 3 (or either of the other two cases) as distinct, we risk applying to it a normative judgment that ought instead to be applied to one of the other cases. We are mindful, however, that it is far easier to treat case 3 in isolation for analytical purposes than it is to do so in the context of the investigation of any particular historical case. In actual cases of past injustice, it would be necessary to attempt to identify the degree to which differential gains in any one period were the produced result of previous or concurrent extra-market and market-based appropriations. To the degree that differential gains have tainted origins, the difference principle defense of the gains evaporates. We also note that those differential gains that arise as a consequence of prior extra-market or market-based appropriations are already incorporated in the restitution function in the term $f[\sum D_i]$.

argued that the victims of inequality (in income or wealth) today have benefited in an absolute sense from the growing inequality between them and the immediate beneficiaries of unequal gains.

For instance, it might be argued that the extraordinary advances in science and achievements in information and medical technology over the past several decades were funded with the concentration of wealth that is a byproduct of the current inequality that originated in differential gains that were not themselves the consequence of past extra-market and market-based appropriations. Today, the argument goes, the poor benefit tremendously from new technologies – in the form of cell phones, anti-retroviral drugs, micro-nutrient supplements, and so forth. The more equal distribution of income and wealth over the recent and distant past that would have resulted had there been no differential gains might have retarded these developments, to the detriment of all of the world's present population. Those opposing this claim would be forced to produce a plausible counter-factual in which a more equal distribution of the mutual gains would have yielded no fewer advances—or more precisely, no fewer benefits to the poor from these advances. In this case, the Rawlsian indictment of inequality in access to income or wealth (or health care, housing, and other goods) is attenuated. Indeed, those arguing for restitution under a Rawlsian conception of justice must clear an important hurdle: to show counterfactually that the descendants of the victims of colonialism and slavery have not ultimately benefited from the ill-gotten accumulation of wealth by others at least as much as they would have from a more equal distribution of primary goods over the past several centuries. The difficulties of establishing a counterfactual case of this sort that would be convincing to opponents of restitution hardly needs elaboration here.

The expression for restitution under the Rawlsian framework is given, then, as a function

of D defined in terms of X and M. It is given by the following:

$$R = h(D) = \sum_{i=1}^n (X_i + M_i) (1+r)^{(n-1)} + f [\sum_{i=2}^n D_i]$$

Justice as Equality of Capabilities

The victims of colonialism and slavery are due restitution not only in the case of extra- and market-based appropriation, but even in the case where the effects on the victimized community from its interaction with the beneficiary community, while positive, were less than those flowing to the beneficiaries (cases 1, 2 and 3, above). From a capabilities perspective, the inequality that now exists (for example) between the Anglo and African American communities in the US that resulted from the interaction between them (as a consequence of extra market and market-based appropriation, and differential gains) is unjust. Hence, in calculating illicit harms, one would add to the Rawlsian equation an estimate of the degree to which the fortunes of the Anglo and African American communities have diverged as a consequence of their interaction over the past several centuries (G). The Senian approach is much less apt to find that any inequality in capabilities over the past centuries (or today) is defensible on grounds of the difference principle, since (as discussed above) any substantive inequality in capabilities is apt to induce absolute capabilities failures for those who are worst off. As a consequence, the capabilities approach is likely to yield a greater magnitude for warranted restitution. The expression for restitution under the Senian approach is given by a function of X, M and

$$R = h(D) = \sum_{i=1}^n (X_i + M_i + G_i) (1+r)^{(n-1)} + f [\sum_{i=2}^n D_i]$$

The most significant difference between the Rawlsian and Senian approaches to justice

may not be quantitative but methodological. In the Rawlsian approach we are directed by the difference principle to explore a counterfactual: how much better or worse off is the victimized group (e.g., African Americans) today than it would have been under a more equal distribution of primary goods over the past several centuries. The Senian approach does not appear to demand this counterfactual computation. What is at issue in the capabilities equality approach is extant inequality between the two communities in the extent of their substantive freedoms, not the inequality between the present condition of the victimized community and what it would have been had there been greater equality between the two communities over the past several centuries.

Conclusion

Table 3 summarizes the results of the preceding investigation of the implications of the three perspectives under review here for the matter of restitution for historical injustice. But which of these approaches (if any) is the right one to adopt in approaching the matter of restitution? DeMartino (2000) argues at length that Sen's capabilities approach to equality is extraordinarily fruitful as we encounter the massive inequalities that characterize many societies today, and global affairs. We believe that it is also an appropriate normative standard to apply to the field of restitution, since we share Sen's commitment to the equalization of substantive freedom across members of diverse groups that constitute society. But the goal of this paper is not to advocate this approach over the others. Instead, it is simply to show that restitution project must be founded on normative claims, and that the choice of normative grounding matters – perhaps quite significantly in the recognition of indictable harms, and in the computation of the magnitudes of transfers that restitution claims demand.

A pragmatic approach in the face of philosophical disagreement might be to adopt an

agnostic normative view, preliminarily at least. This attitude would recommend a consideration of what each of several accounts of distributive justice implies about the validity of restitution claims and the magnitude of the warranted transfers. This would require far more philosophical work than is provided in this brief paper, to be sure. Such an exercise would yield a range of magnitudes, from which could be taken upper and lower bounds.

Orthodox economists tend to avoid studiously the value judgments that sorting out competing conceptualizations of distributive justice entails. The agnostic approach of developing multiple estimates based on alternative accounts might therefore encounter least resistance among those economists who might become involved in the restitution debate. Moreover, if it is to occur at all, restitution to the victims of past injustice will result from complex negotiations where accounts of justice will be but one factor among many determining the outcome. Hence, providing multiple estimates based on alternative normative accounts may not only be the best that economists can do, it may also be all that we should do if our goal is to facilitate the process of negotiation and reconciliation that restitution will require.

Table 3: Accounts of Distributive Justice and Restitution

		Accounts of Justice		
		Libertarian Justice	Rawlsian Justice	Senian Justice
Interaction Effects	Extra-Market Appropriation (X)	Yes	Yes	Yes
	Market-Based Appropriation (M)	No	Yes	Yes
	Disparate Gains (G)	No	Uncertain	Yes

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