How Far Back Should We Go?: Why Restitution Should be Small

Tyler Cowen

Department of Economics

George Mason University

Fairfax, VA 22030

tcowen@gmu.edu

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I. Introduction

How far back should we go when deciding to restitute? Does a theft or political crime cease to be morally relevant, simply because it occurred in the very distant past? Should we care about each link in a long chain of thievery and oppression, should we care only about the most recent link, or should we care only about the first link?

Should the passage of time matter at all for moral claims?

The Hopi charge that their lands were stolen from them by the Navajo. If the United States government returns lands to the Navajo, should it also return some Navajo property to the Hopi?

In the post-communist and transition economies, should we remedy only the injustices of the communist era? Or should we go much further back and try to rectify previous injustices as well? Should it matter that the nobles virtually enslaved the Russian peasantry? Should it matter that the Ghenghis Khan sacked Baghdad in 1258?

Everyone living today, if they go back far enough, can find ancestors who were oppressed and victimized. Few land titles have been acquired justly. Subsequent corporate assets have been built on stolen land or generated by investments on originally stolen land endowments.

The choice of time horizon for restitution becomes especially important to the extent we compound past losses at positive interest. For a loss of a billion dollars worth of resources two hundred years ago, a three percent rate of compounding makes the relevant restitutional award $369.4 billion; the sum jumps to $17.3 trillion at a five percent rate of compounding. Marketti (1990, p.118), in his estimate of the restitution due from slavery, comes up with a figure of over $53 trillion for 1983 U.S. dollars, using a compounding rate of six percent. If not for various Nazi and Communist injustices, the Czech Republic might today be as rich as West Germany. Is so much owed to victims of past injustices?[1]

[1] Waldron (1992) and Sher (1992) have been the two most influential pieces. Other articles of interest include Lyons (1981), Morris (1984), Simmons (1995), Tucker (1995) and Wheeler (1997). Elster (1998) provides a clear survey of the broader issues behind transitional justice; see also Kritz (1995) and Greenfield (1989). Pogany (1997) covers eastern Europe. Palmer (1978) and Birks (1985) are two leading legal sources on the law of restitution. Cowen (1997) considers relevant issues surrounding compounding and argues for less than full compounding.

II. Why pure rights approaches fail

Intergenerational restitution cannot be performed in accordance with strict libertarian or Nozickian standards. Robert Nozick, in his 1974 book Anarchy, State, and Utopia outlined a libertarian theory of distributive justice. In Nozick's account, property is justified by either Lockean "homesteading" from the state of nature or by chains of voluntary exchange, starting with original homesteaders. Conversely, property not acquired in these manners is unjustified and should be returned to its original owners.[2] The Nozickian standard fails most clearly in the case of land. As mentioned above, few current land titles in the world would satisfy Nozickian criteria. Yet it is obviously impractical and almost certainly unjust to redistribute all of the world's land. Ignorance of previous transgressions offers no escape here. We would not wish to overturn all current land titles, even if we knew exactly who had stolen what from whom.

Defining restitution as a right to physical property also fails in the cases of torture and less tangible historical injustices. Often there is no specific property title available for rectification. Furthermore, the sons and daughters of torturers do not inherit the moral liabilities of their parents, least of all in a Nozickian framework.

Resource constraints further limit the sum available for restitution. If oppression destroys economic value (a plausible assumption) the sum total of claims may exceed the resources available for rectification. In the former Soviet Union, there is not nearly enough to give everyone "what they would have had", had Lenin instituted liberal capitalist democracy. Nor can ex-dictators of Haiti give back all the economic value they have destroyed, or even a sizeable fraction thereof. According to some estimates, the total national wealth of Hungary was not greater than the value of the assets confiscated from Hungarian Jews during the Second World War (see Pogany 1997, p.177).

Finally, the Lockean proviso states that property acquisition should harm no one. If we apply a similar standard to rectification -- which is simply another means of assigning just property titles -- we are back to having no clear answers.

Nozick (1974, p.231) hedged on these issues and comes close to retracting the anti-utilitarian, anti-welfarist tone of his work: "These issues are very complex and are best left to a full treatment of the principle of rectification. In the absence of such a treatment applied to a particular society one cannot use the analysis and theory presented here to condemn any particular scheme of welfare payments, unless it is

[2] For a more recent application and defense of the Nozickian view, see Block and Yeatts (1999). Roemer (1996, chapter six) surveys some of the more general objections to the Nozickian standard.

clear that no considerations of rectification of injustice could apply to justify it." Nozick notes that Rawls's Difference Principle (!) might provide the best operable rule of thumb for rectification.

Understandably Nozick shied away from defending rectification on pure libertarian terms. But for obvious reasons, he was reluctant to admit that a pure process approach to restitution is untenable. In reality, no theory of property can avoid evaluating patterns, as evidenced by Nozick's desire to have real world rectification proceed in line with plausible endstate standards. Furthermore, restitution of the stolen item is impossible in many (most?) cases. Instead, we aim to provide compensation, to "make the victim whole again" or to serve some other "endstate" moral standard.[3]

III. The Role of Counterfactuals

Given the untenability of a pure libertarian solution, it is no surprise that restitutional approaches typically start by comparing one end-state to another. In the context of past injustices, the obvious comparison is between what has happened and what would have happened had the injustice not taken place. The information portrayed by this comparison is then used, in combination with other moral arguments, to produce a restitutional sum. I refer to this as the counterfactual method.

The counterfactual method provides potential limits on the temporal scope of restitution. Assume, for instance, that one million dollars had been stolen from my ancestors five generations ago. But had this theft not occurred, my ancestors might have consumed most of the fortune within a generation or two. The restitution due to me therefore is limited. I am not due the whole sum, I am due no more than what I would received, had the theft not taken place.

With the passage of generations, a given act of injustice may have decreasing relevance for the misery of current individuals (Sher 1992 makes this argument). As time passes, more proximate events and injustices may assume greater importance. I am of largely Irish background, but I do not feel greatly disadvantaged by the British land thefts of the seventeenth century. Those thefts have not hindered my productivity, in large part because my ancestors moved to the United States for a fresh start.

These arguments, however, can increase restitutional sums rather than limiting them. Stephan

[3] McDonald (1976) argues at length that application of the Nozickian standard requires use of "end-state" and "pattern" considerations. See also Simmons (1995).

Dedalus, in James Joyce's Portrait of the Artist as a Young Man, asks what is owed if a person steals a pound from another. Does one owe back the pound, or owe back the entire fortune made from that pound? What if an ethnic group, such as the Chinese in southeast Asia, has a strong history of business skill? Are thefts from those groups to be compensated at especially high rates of compounding?

Modern economic theory emphasizes increasing returns to scale and hysteresis, or path dependence. Both phenomena suggest that initial advantages and disadvantages, even small ones, can be self-cumulating over time. Ghettoes are centers for violence and crime, not because of their intrinsic locational properties, but rather because they have been established as problem areas some time ago. For the opposite reasons, resources are especially productive in Beverly Hills. Potential rates of return therefore may be extremely high, if the stolen resources would have been used to produce self-cumulating advantages. This can compound intergenerational awards to very high levels.

Sometimes a counterfactual shows that a victim received a net gain from oppression, not a net loss. Many Western countries have stolen or "removed" art treasures from the developing world, later claiming that the works otherwise would have perished or not been maintained. Some victims of the Nazis, had they not been driven from their home countries, would not have emigrated to America and become millionaires. If we restitute according to the full counterfactual, no sum will be due at all, which is a morally problematic conclusion. A wrong still was done to those individuals, regardless of how well the final outcome turned out for them.[4]

Two conflicting forces influence political practice here. On one hand, if a victimized group subsequently shows an ability to generate high rates of return on their investments, this is commonly viewed as weakening the claim for restitution, not strengthening it. On the other hand, if the victimized group has little wealth, they probably have little political influence and less chance of obtaining anything at all. Both factors played some role in the reparations for the Japanese-American victims of WWII

[4] On this point, see Tucker (1995, p.354). Jon Elster has pointed my attention to an analogous question about the Gypsies. A German source from 1945 argued that they should not receive restitution for being denied an education, since they would not have exploited this opportunity anyway.

incarceration. The political influence of the group created pressures for some award, but their relative wealth meant that not so much was seen as needed.

In the intergenerational case, the problems with counterfactuals are especially severe. Derek Parfit (1984) has pointed out that almost all policies change the identities of those individuals who are born. Had land not been stolen from the New Zealand Maori, the Maori victims would have married different people or at least conceived their children at different times. The entire biographical history of the Maori would be different and no current Maori individual ever would have been born. The land theft therefore has made all the current Maori much better off. No land theft would have meant non-existence. The application of the counterfactual, if taken literally, yields a restitutional award of zero.[5]

The Parfit thought experiment is not a philosophical "trick," but rather it is a thought exercise designed to uncover our intuitions about harm. It shows that our intuitions are not strictly rooted in individual rights and in what Parfit calls "person-affecting" principles. Instead, we must be placing intrinsic value on entitlement patterns for their own sake, above and beyond how the interests of specific individuals are affected. We might, as Sher (1992) suggests, compare the welfare of the person who was born to some equivalent "person who would have been born." But this maneuver, whether or not we find it plausible, accepts the primary point of Parfit's example. We still end up comparing distributional patterns, rather than tracing back all notions of right and wrong to the welfare of specific individuals.

The Parfit argument implies that we can limit restitutional claims by uncovering their microfoundations. If our sense of current injustice is rooted in an evaluation of the resulting distributional pattern, rather than individual rights, restitutional claims must be evaluated in terms of this bigger picture. We must ask whether intergenerational restitution would bring about more desirable distributional patterns or not. Our evaluation of a pattern may depend, in part, how that pattern came about, but the goodness of the pattern is not reducible to claims about individual rights or individual

[5] Morris (1984) stresses the same theme in his discussion of intergenerational restitution. Sher (1992) claims we should compare the current victim to the individual who would have been born, had not the aggression occurred. See also the discussion of Simmons (1995, pp.178-179).

welfare.

Can counterfactuals be applied?

Counterfactuals are underdetermined. Take the land thefts from the native American Indians. What do we mean when we refer to "what would have happened, if the land had not been stolen"? What do the settlers do in lieu of stealing Indian lands? Do they trade peacefully with the Indians? Do they remain in England and Spain? Do they steal something else? Do they still bring valuable medicines? "What would have happened" depends on how we define the relevant alternative. Since there are many possible futures, and the only unique history is the one that has happened, the above questions about the counterfactual can never be resolved. It is not just a matter of imperfect knowledge, there is no factual answer to the question in the first place. The counterfactual standard therefore cannot produce determinate restitutional sums.[6]

Elster (1998) notes that in Norway, after the Second World War, the authorities decided to compensate Jews for stolen property, but according to an unusual principle. If there was one surviving member from a family of eight, that individual would receive only one-seventh of the property of the head of the family. Had the Nazis not killed the rest of the family, the individual would have received only one-seventh of the bequest. Ordinary legal reasoning, of course, would award the surviving individual the entirety of the family property. Whichever outcome is morally correct, this discrepancy illustrates the lack of a unique answer where counterfactuals are considered.

The importance of choosing a counterfactual is especially clear in the case of American slavery. Most current American descendants of former slaves are better off than the blacks who remain in Africa. One possible counterfactual is to compare the consequences of slavery to what would have happened, had the victims and their descendants remained in Africa (I have heard this view attributed to Pat Buchanan). Individuals hostile to slavery reparations typically cite this comparison to show that African-Americans

[6] See Waldron (1992), Cowen (1997), and Elster (1993) on related problems. The counterfactual standard also cannot specify a clear end to the calculations. We would, for instance, have to calculate how I would have spent my diamond profits, which merchants would have benefited, how they would have spent their profits, and so on.

are not doing so badly. An alternative counterfactual is to compare slavery to the voluntary importation of free African labor; this is the scenario typically preferred by advocates of slavery reparation.

Counterfactuals also draw our attention to whether the current descendants of the Settlers have in fact benefited from the stolen resources. If we ask "what would today's descendants of the Natives have had?" we also might ask "how much did today's descendants of the Settlers actually receive?"

Consider two alternate scenarios. In one case, my great-grandfather stole resources from the Indians and promptly squandered the resources. I never profited from the theft. In the second case, my great-grandfather stole resources from the Indians, invested the proceeds at compound interest, and bequeathed the entire sum to me. Today I am a millionaire as a result. The claims of the descendants of the Indians against current descendants of the thieves might be weaker in the first case than in the second. Individuals who benefit from a theft may be subject to a greater moral and restitutional liability than individuals who do not benefit from a theft, and we may need to adjust restitution accordingly. In other words, if we attach moral importance to the hypothetical rates of return specified by the counterfactual, we also should attach moral importance to the rates of return actually realized by the beneficiaries of the theft.

The debate over the profitability of slavery has implications for moral questions. Economic historian Robert Fogel created a stir when he argued that slavery was not especially profitable for the American South. If today's southern whites are not enjoying "bequeathed stolen wealth" the case for reparations is presumably weaker. Debates over the profitability of imperialism have similar implications. How much aid the wealthy West owes to the third world may be linked to how much the West has exploited those countries in the past.

In defense of counterfactuals?

The strongest argument in favor of counterfactuals is that it is impossible to do without them. Rights theories, for instance, define aggression relative to a baseline state of affairs of "what would have happened," had the ostensibly aggressive act not occurred. The "multiple causality" problems involved with defining strict liability are well known. If ten marksmen shoot at an innocent prisoner, we do not judge each marksman innocent of murder. Yet if any single marksman had been removed, the prisoner still would have died. What is the relevant counterfactual comparison? If all ten marksmen had been removed? When judging an individual for a crime, to how large a group should the relevant counterfactual be allowed to extend? Since most issues of transitional justice concern oppression in groups, these issues are especially relevant.

Nor do utilitarian approaches avoid reliance on counterfactuals. Defining the marginal consequences of an act or rule requires a baseline comparison of what would have happened, had the act or rule not been implemented. The example of the prisoner and the marksmen can be reformulated in utilitarian terms, with a similar ambiguity about how to define the relevant counterfactual. If a potential marksman is concerned about right action, and an outsider offers to donate a dollar to charity if the marksman partakes in the execution, what does utilitarianism suggest? The "marginal product" of shooting an extra bullet is zero, given the presence of nine other marksmen. But is a utilitarian committed to accepting this offer? Or should the utilitarian somehow consider the total effect of the group action? If so, to how large a group should we make reference when defining the results of actions? In essence, we cannot strictly define the "marginal products" for a given action, whether for rights or utilitarian purposes.[7]

Most generally, there can be no empirical guide to choosing the appropriate counterfactual. By construction of the query, there is no empirical investigation of "what would have happened, if X had not

[7] Simmons (1995) makes a similar point in defense of counterfactuals. The literature on rule vs. act utilitarianism discusses some of these ambiguities. See, for instance, Regan (1980).

occurred." The investigation itself must stipulate what is postulated in lieu of X and its underlying causes. We can ask, "if Y had happened in lieu of X, what would have been the consequences of Y?" But this procedure cannot determine Y as the relevant alternative, as opposed to Z. That remains a matter of stipulation and thus we face an ineradicable indeterminacy.

One approach to end-state restitution is to use moral theory to determine the relevant counterfactual. We might compare an act of oppression to some notion of "doing the right thing" as defined by the appropriate moral theory. This comparison does not commit us to the prediction that "the right thing" would have happened. Rather it establishes that outcome as a moral benchmark for estimating comparative liabilities. The law engages in this sort of comparison frequently. If a man walks away from a drowning woman in the river, his liability is high if he could have easily thrown her a life jacket, an act he was morally compelled to perform. The liability dwindles if no life jacket is available, the man cannot swim, and no external help is available. In that case, no amount of benevolence can save the woman.

Consider how this method might be applied to the case of American slavery. If the relevant oppressors are the American slaveowners, we can ask what is the best action the slaveowners could have performed. The likely answer involves freeing each slave upon purchase or receipt, which defines one relevant counterfactual. Under this approach, current African-Americans would be owed the difference between how well off they are now, and how well off they would have been if their ancestors had been freed upon receipt.[8]

Yet this view is not without pitfalls. Often moral theory offers no clear guidance on the relevant "best alternative action." Is it buying the slaves and setting them free? Or is it simply ceasing to buy slaves from slavetraders? Without knowing how far the relevant moral obligation extends, it is difficult

[8] See below as to whether they would be owed for the suffering of their ancestors.

to pin down a single morally relevant counterfactual scenario.[9]

Similarly, the settlers treated the native Americans very badly, but we may not know what the best alternative would have been. Should the settlers have left the Indians alone or tried to live in harmony with them? The uncertainty here extends beyond knowing how alternative courses of action would have developed. We may, for instance, have fundamental uncertainty about the value of maintaining Indian society intact, as opposed to seeking integration. Furthermore, moral theory may be ambiguous on what duties American citizens had to positively help the Indians.

For these reasons, the law tends to make restitutional awards small and conservative. When the appropriate counterfactual is indeterminate, we know that a wrong was done in the past but its marginal import is undefined.

Restitutional claims have the greatest moral force when the value of the loss or stolen resource is well-defined in material or dollar terms. If John steals $100 from Thomas, it is plausible to believe that John owes Thomas (at least) $100. If John steals a diamond from Thomas, but no one knows how much the diamond was worth, the relevant liability is small rather than large. Just as the law takes special care to protect the innocent, it should be especially reluctant to overpunish the guilty.

As the number of generations increases since the crime, and the number of hypothetical counterfactual scenarios increases, the value of the stolen resources becomes less well-defined. The concept of restitution as a strict property right becomes inapplicable in those situations. We make a smaller, more symbolic award rather than a larger award rooted in the principles of strict right. The law is conservative by nature, and is pushed towards this same end by the muddiness of the underlying rights claim, combined with the practical difficulties of enforcing large-scale restitution.

[9] Furthermore, the above standard gives the slaveholders a greater liability than the slavetraders, a conclusion which is not obviously correct. Presumably the slaveholders were obliged to free their slaves into an American labor market, whereas the slavetraders were only obliged not to hunt the slaves down in the first place.

IV. Are claims to restitution heritable?

Full restitutional demands for living victims of theft does not imply full rights for the heirs of victims. Even if rights claims are trumps, rights may be temporally more limited than the Nozickian approach to rectification suggests. The time horizon for restitution -- at least as a matter of right -- may last the only to the victimized generation, as a first approximation.

The logic of this view runs as follows. If A has stolen from B in the previous generation, B has been wronged. But the descendants of B have not been wronged in an equivalent manner. True, the descendants of B are worse off, for not having received a bequest (the original victim might have bequeathed some of the stolen property). The descendants of B, however, have not suffered injustice. They simply have failed to receive a windfall gain in wealth. The relevant injustice is the following: B was denied the option to bequeath resources to his or her heirs. This is a violation of the rights of B, not the rights of the descendants of B.

This injustice to B is not restitutable, given that B has passed away. Therefore no restitution is required on the grounds of justice. The relevant wrong, which was done to B, can never be righted. The descendants of B have suffered windfall losses but their rights have not been infringed. They had no intrinsic right to the property of B, as illustrated by the fact that if B had consumed all of the wealth, and left no bequest, the descendants could not claim any injustice.

Even if "B would have given them the money," the descendants do not have a full moral right to the resources. Would-have-been hypotheticals do not necessarily create full moral rights. Jeremy Waldron (1992, p.11) notes, for instance, "It is the act of choosing that has authority, not the existence as such of the chosen option."

An analogy suggests why we might treat the losses of B's descendants as a windfall loss. Assume that I own a diamond and a wealthy man across town is planning to buy the diamond at a very high price, far more than anyone else would pay. A fascist government then comes along and sends the man to a concentration camp and confiscates his wealth. Clearly I, the diamond seller, am worse off. Had the rich man been left alone, he would have bought my diamond, at great profit to me. In the absence of this man, I ended up selling the diamond at a much lower price.

Many years after the fact, the fascist government has fallen and a new, more benevolent government seeks to implement restitution. The victimized rich man deserves to receive his money back. But do I, as the would-have-been diamond seller, deserve restitution as well? Although I was made worse off by the fascist government, most observers would regard the case here for restitution as weak. Had the

man stayed free, I would have received his funds, but I had no right to those funds. What the rich man would have done, had he kept the money, does not have compelling moral force for determining restitution.

Critics may invoke the legal conception of property to distinguish family inheritance from the diamond case. In the family case, we might treat B as acquiring a claim against his oppressors at the moment of the crime. B then holds a property right in this claim. When B dies, that claim passes down to his descendants, just as his other property does. It can be argued that B did in fact bequeath his wealth to his descendants. No such claim is passed down in the case of the diamond merchant.

From a legal point of view, restitutional claims are not obviously a form of heritable property. The statues of limitations on the presentation and collection of debt claims are typically short. While restitution has occurred across longer time horizons (e.g., Maori lands in New Zealand or reparations to the imprisoned Japanese-Americans during World War II), these decisions have been matters of public policy rather than treated as automatic legal rights.[10]

More philosophically, a restitutional claim is not the same kind of property as a piece of land or a bank account. The purpose and justification of restitution is to make the victim whole again; once the opportunity to achieve this end passes, restitutional claims lose moral force as claims to physical property (although restitution may remain desirable for other, consequentialist or symbolic reasons).

Many restitutional claims no longer exist in the form of heritable property. Assume that a poor criminal steals a million dollars apiece from four individuals and then squanders the resources immediately. Those four victims have person-to-person claims against the poor criminal, but they do not own claims to particular pieces of physical property. Therefore they have nothing to bequeath in the traditional sense. And the heirs of the squandering criminal, who inherit nothing from the theft, hold no property liability.

Consider also individuals who are tortured, murdered, or deprived of self-respect. Restitution may be owed for a variety of reasons, but it is difficult to argue that the tortured victim holds a well-defined claim to particular physical assets of the torturer. If no particular claim to concrete assets exists, heritability is not automatic. And again, the descendants of the torturer inherit no liability.[11]

Or consider a man who steals a duck and then sells the duck to an innocent third party for money. If the choice is to take the money from the thief or to take the duck from the third party, moral intuition

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[10] For some philosophical remarks on the doctrine of "prescription," see Margalit and Raz (1990, p.459).

[11] Or consider the law of the sea, which gives an individual a right to a reward from the person whose property he has saved during a shipwreck (Birks 1985, p.304). Few individuals would argue that such claims be treated as heritable wealth, if the original claimant has received no reward in his lifetime.

suggests taking the money from the thief. Remedying the person-to-person injustice is more important than restoring the physical property of the duck, which again suggests that restitution is a person-to-person claim, rather than a title to concrete assets.

A related issue is whether a third party payment can extinguish a restitutional claim. Assume that non-German Communists donate money to East German Stasi victims, hoping that those sums relieve former Stasi agents of their restitutional obligations. Can a third party transfer take on this meaning? The person-to-person view of restitution suggests not. The rectification claim is unique to the parties involved, rather than representing a more impersonal legal obligation such as a debt. A third party typically is allowed to pay off a debt, but not to remedy a moral injustice of this kind.

Similarly, legal systems do not usually allow restitutional claims to be sold to third parties, pending resolution of a dispute. Many aging victims of injustice may prefer a cash payment upfront to an uncertain restitutional award later in the future. Again, the failure of legal institutions to allow such sales suggests that restitutional claims do not have the alienability aspects of traditional property. The person-to-person nature of the restitutional claim may prevent heritability for the same reason it prevents alienability.

We might, in pursuit of a literal-minded consistency, argue that restitutional claims are strictly heritable when a durable physical asset has been stolen, such as land, but otherwise not heritable. Claims to land therefore would last as long as the land did, but restitution for torture victims would cease with the passage of a generation. Note, of course, that this policy would encourage oppressors to substitute torture for land theft.[12]

An alternative and more persuasive approach is to treat <u>all</u> restitutable claims as rooted in the desire to make victims whole again, rather than defined across very specific pieces of heritable physical property. This places the land theft and torture on potentially equal footing -- an intuitively appealing result -- but removes both from the category of heritable property as a matter of strict right.

Restricting the heritability of restitutional claims has legal precedents. The claim to heritable property is in any case one of the weaker property rights. Many democracies tax inheritances at high nominal rates (admittedly the real rate may be lower, given loopholes). The would-be recipient of the inheritance did not create the wealth or earn it with his or her productive labor. The right to bequeath is

[12] German reparations policy to Nazi victims has been criticized for its focus on documentable material losses, and its corresponding neglect of psychic burdens and costs. The German government has tried to estimate "persecution-induced reduction in earning capacity" [verfolgungsbedingte Minderung der Erwerbsfhigkeit, vMdE for short]. For a criticism, see Pross (1998).

not regarded as absolute, given that governments must raise revenue through some means.[13]

V. Resurrecting limited intergenerational claims

The above arguments suggest the extreme conclusion that restitutional claims disappear entirely after the relevant generation dies. Three factors, however, may open up some limited room for restitution across the generations. I consider in turn violations of basic rightful needs, the preferences of the dead, and tribes and groups as legally meaningful entities.

Violations of basic needs

Extreme conditions may create room for intergenerational restitution as a matter of right. Assume that the past pattern of theft was so severe and so pervasive that the descendants must live in shacks and cannot afford to educate themselves; many Latin American countries provide examples here. If we believe that individuals have rights to certain "basic needs," the previous pattern of theft arguably has violated their rights and they are due restitution. They have not merely lost a windfall, rather they have lost an opportunity to receive their due rights.

I do not wish to push this argument too far. Whether individuals have "rights to basic needs," and what those rights may be, is a matter of contention. Even if such rights can be established, usually a number of forces combine to deprive individuals of those rights. The thefts from older, now deceased indigenous peoples are not the only factor contributing to the misery of current descendants. Current oppressions may be equally or more important. When multiple factors conspire to produce misery, it is difficult to isolate the moral significance of any single factor, when judging the extremity of a rights violation. Nonetheless, the basic point stands: the case for rights-based intergenerational restitution is stronger when the previous theft has had extreme and persistent negative effects.[14]

Note that these extreme cases still demand only a limited restitutional sum, rather than full restitution of the stolen amount. The descendants would be due the resources that would enable them to lead decent lives and have their basic positive rights satisfied, but no more. Any amount above that sum would be considered a windfall and thus not subject to demands of right.

The resulting recommendations correspond roughly to some intuitions and real world practices. The first intuition is that intergenerational restitution is due only when the historical crimes have

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[13] Lyons (1981) offers some apt remarks on the weakness of the heritability right, with reference to the context of restitution.

[14] Lyons (1981) argues that intergenerational restitutional rights lie fundamentally in the circumstances of the present, rather than the histories of the past.

produced persistent and severe negative effects. It is for this reason that the U.S. government restitutes to the American Indians, while ignoring the ancient crimes of the English against the Irish, even though it could arrange transfers between English-Americans and Irish-Americans.

Second, not all descendants of victims have a claim to restitution. The windfall gains and losses from historic injustices should not be accounted for when the losers now have relatively free and comfortable lives. If I, as an upper-middle class white male, could demonstrate one-eighth Navajo blood, I would not be entitled to an eighth of a per capita settlement intended for the Navajo. New Zealanders are allowed to legally define themselves as Maori through announcement alone, but this should not (and does not) give them rights to a share of Maori land claims.

Third, for living individuals, all victims have a claim to restitution, on the grounds of justice alone. All of their losses are matters of strict right and wrong, rather than windfalls across generations.

Remedies for the dead?

An alternative means of resurrecting intergenerational restitutional claims invokes the preferences of the dead. Under some accounts, the preferences of the dead are morally or legally binding. Western legal systems do not typically overturn wills (although they do not allow trusts in perpetuity either). We (sometimes) heed the wishes of dying parents. I would care if I knew that people would spread scurrilous rumors about me after my death. Economists, who in any case do not rely on psychologistic notions of preference, should not find the idea of the "preferences of the dead" obviously absurd.[15]

Restitution may restore the welfare of the dead to some extent (Wheeler 1997), though such language sounds inevitably awkward. The now-dead victims may have had a preference for seeing the original injustice restored, if only through a transfer to subsequent generations. Insofar as we treat this preference as having validity after the death of its origin, restitution does satisfy the preferences of the original victim. The person-to-person account of restitution would not necessarily cut off all rectification at a single generation.

Coherently analyzing the "preferences of the dead" is a difficult task. It is plausible, however, that the relevance of those preferences "decays" over time. I care about what people say about my character immediately after my death. But do I really care what they say about my character two hundred years from now? Even if they damn "Tyler Cowen" commonly, no one two hundred years from now will know that the name Tyler Cowen corresponds to me. I may care whether my books will be discussed, or about my surviving descendants, but my character will have become an arbitrary reference point long

[15] Callahan (1987) considers some relevant issues.

before that time.

If taken too literally, preference decay can increase rather than limit intergenerational restitution. The original goal of restitution was to "make the victim whole again." If the now-dead victim does not care about his or her descendants very much, a very large award may be needed to restore the lost utility of the dead. Ironically, selfish victims who care the least about their descendants would receive the largest awards. Similarly, the needed award may be larger, the longer we wait to restitute. I won't care very much about my great-great-great--great-great-great-great-grandchildren.

More plausibly, preferences decay simply because later generations decide those preferences are no longer relevant. Rather than trying to restore the utility of the dead with post-death transfers, we become willing to accept less than full restoration. In other cases we wish to overrule the preferences of the dead on merit good grounds. The Serbs who lost the 1389 battle in Kosovo may "care" greatly about what is happening in Kosovo today. Or Southern slaveholders might have had a strong preference that the oppression of blacks survive many centuries. We typically believe, however, that those preferences are imperialistic and thus not deserving of public policy consideration.

Tribal claims?

A final means of reintroducing limited intergenerational claims invokes tribes and collectivities. If the relevant wrong has been done to a collectivity rather than to individuals alone, the associated restitutional claims may not expire with the deaths of any specific persons. Since the law recognizes that tribes, like corporations, can own property, presumably tribes also can hold restitutional claims. In the case of the American Indian, for instance, it is legally recognized that the original property ownership was tribal in nature, rather than individualistic. Related questions have arisen in the Eastern European contexts, where restitution to churches has been on the agenda.[16]

Tribal claims, like the claims of the dead, may decay or expire over time. The Navajo today are not the same tribe as the Navajo two hundred years ago, even though they have kept the same name. The culture has changed, the nature of tribal government has changed, the nature of Navajo property rights has changed, and the Navajo have interbred with other groups. How to weight these factors is far from clear, but in any case tribal restitutional claims need not last forever. If we combine the "decay of the tribe" with the inherent limits on counterfactual reasoning, as discussed above, the morally correct degree of restitution to tribes may be relatively small.

Some observers consider the tribal view objectionable for placing victims in tribes on a higher

[16] On tribes, see, for instance, Simmons (1995). On churches, see Pogany (1997, chapter nine).

moral plane than lone victims. What counts as membership in a tribe? Can any ethnic group count? Must a descendant still belong to a tribe or ethnic group, or does it suffice that the forefather belonged? Do individual victims have stronger claims if they belong to more than one tribe or group? What about individuals who join tribes only so that their restitutional claims may survive their death?

These questions have acquired real world relevance. American Indians, for instance, invest great effort in documenting the claims of their tribes to existence. Federal recognition of a tribe means that the members have access to special subsidized business loans, subsidized housing, scholarships, and special health care services. They become exempt from some state and federal laws and some tribes can run legalized gambling. Only tribe members are allowed to own eagle feathers.

Some (ostensible?) tribes are not recognized by the federal government. The Department of the Interior claims that the Chicora-Waccamaw tribe of South Carolina ceased to exist in the eighteenth century. Chief Harold Hatcher believes the Department is wrong. He submitted a several-hundred page petition to the Department, based on five years of work and the investment of hundreds of thousands of dollars. The very possibility of such a dispute suggests that restitution is relying on a distinction which is morally arbitrary to a considerable degree.[17]

Right now there are 554 legally recognized Indian tribes with nearly two million members. Yet at least 25 million other U.S. citizens have some Indian blood. Why should the official two million tribal members, rather than the others, receive special privileges? Alternative measures of "Indianness" may give very different answers. Of official tribal members, for instance, over half of the married have non-Indian spouses. More than half of official Indians live in large American cities. And only 23 percent speak a native language at home.[18]

A related question is whether restitution should be given to a tribal government, if one exists, rather than to individuals. The tribal view presumably suggests that the tribal government receive the restitutional payment. In reality, tribal elites receive disproportionate benefits from their control over such funds. For this reason, it may be more desirable to make restitution directly to the tribe members. If we accept this conclusion, however, perhaps the tribe is not the relevant legal entity after all. Following the letter of the law may conflict with achieving effective restitution. Our potential willingness to override the wishes of tribal governments suggests we do not place the tribe on a special moral plane after all.

Finally, we must reckon with incentive problems. If tribes are carriers of intergenerational

[17] On this saga, see Beinart (1999).

[18] See Wilson (1998, pp.xxiv, 424).

restitutional claims, aggressors will have incentives to destroy all traces of a tribe.

All of these issues suggest that the tribal account of restitution remains poorly defined. Tribal restitution should not be ruled out, but it does not provide a very firm base for intergenerational restitution. Most typically, we see the law perform tribal restitution only when the policy has symbolic value and serves as a practical means of maintaining or restoring social order.

VI. Concluding remarks

I have examined why the time horizon for intergenerational restitution is limited. Restitution may be a matter of right, but those rights carry across the generations only with serious limits. I do not mean, however, to oppose restitution per se. This paper arguably can be read as a defense of restitution, provided that the sums in question are relatively small. We can entertain restitutional policies without fearing a reductio ad absurdum, and without being forced to try to remedy all previous injustices.

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