

The Very Idea of Rights

A critique of human rights discourse

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Note: this is an excerpt from Rites of the Nomads — a longer paper that was written several years back for an animal rights conference. This section, which engages critically with rights discourse, was designed to be more generally applicable and I am reproducing it here, slightly rewritten, in order to make my views on rights clear in the context of recent debates on rights, law and state power.

What are rights?

There is no one clear definition of rights, but they are generally understood to be a set of nomological (i.e., law-, principle-, or rule-based) normative principles about the freedoms and entitlements accruing to people within a particular social arrangement (most often a nation state or, occasionally, a supra-national collection of states). These rights are most often divided into supposedly perennial moral/natural rights (e.g, the right to life) and contingent legal/civil rights (e.g., the specific rights held by citizens of a particular state). They are also divided into positive and negative rights/freedoms: negative rights are rights not to be subjected to something (the right not to be submitted to random searches, the right not to be asked for identification when in a public space, i.e., freedom from) whereas positive rights are the right to something (the right to water and electricity, the right to housing, the right to free healthcare). Embedded within normativity but not always made explicit is the assumption that both any given norm and the underlying reasoning that led to its emergence is universalizable or categorical, i.e., that the norm applies equally to people in all cases said to be comparable in relevant ways by this reasoning.

Moral/natural rights, the most fundamental rights said to accrue to people, usually appeal to some or other form of Kantian-style thought and thus reproduce some of the assumptions of the Kantian moral framework: humanism, universalism, the self-identical, transcendental, reasoning subject with a priori pure intuitions of time and space and so forth. Within this Enlightenment-style framework, morality is seen as an abstract discourse with timeless foundations and universally applicable claims. While for their part secondary legal/civil rights are usually based upon primary moral/natural rights, they also frame these in varying ways within different socio-political contexts — the exact relationship between any particular legal/civil right and the moral/natural right it is connected to seems to be informed largely by the contingencies of time and place.

What can be recognized straight away is that these normative principles, given that they are meant to apply across the whole of a field and given their regulation through laws and rules, are necessarily dispensed, enforced and reproduced within this field by what Gilles Deleuze and Félix Guattari term *arrangements* (or *assemblages*, the more common translation from the original French terms *agencement* and *dispositif*) of both intersecting institutions that in almost all cases include, at minimum, a legal apparatus and a state, as well as other practices for achieving social convention and the distribution of homogeneous moral theory; what Foucault terms *the conduct of conduct*. (Foucault 2007: 389)

More abstractly, we can argue that the distribution of the just and the good, the purview of rights as an application of the moral philosophy emerging from what is generally regarded as modern thought, is continuously codified, framed and regulated across — and simultaneously serves to codify and regulate, to unify, totalize and integrate — various categories of human experience (property, body, expression, sexuality), various social categories (workers, women, children, asylum seekers) and various practices (free movement, public presentation, gender expression, substance use) via the aforementioned arrangements; this is an aspect of what Deleuze

and Guattari call *State overcoding* — a reification of these arrangements of coded institutions and practices, as well as various material flows, that allows them to resonate together:

“The State...makes points resonate together, points that are not necessarily already town-poles but very diverse points of order, geographic, ethnic, linguistic, moral, economic, technological particularities. It makes the town resonate with the countryside. It operates by stratification; in other words, it forms a vertical, hierarchized aggregate that spans the horizontal lines in a dimension of depth. In retaining given elements, it necessarily cuts off their relations with other elements, which become exterior, it inhibits, slows down, or controls those relations; if the State has a circuit of its own, it is an internal circuit dependent primarily upon resonance, it is a zone of recurrence that isolates itself from the remainder of the network, even if in order to do so it must exert even stricter controls over its relations with that remainder. ...Thus the central power of the State is hierarchical, and constitutes a civil-service sector; the center is not in the middle (*au milieu*), but on top, because the only way it can recombine what it isolates is through subordination.” (Deleuze and Guattari 1987: 478)

Overcoding ‘defines a rigid segmentarity’ and makes the centers of each segment resonate with the others, defining a divisible and homogeneous space that is strictly demarcated in all directions. The function of overcoding is described as an abstract machine that is effectuated by the State apparatus. (ibid. 223) At least some forms of overcoding are directly influenced by the same Enlightenment framework from which contemporary rights discourse emerges; the same strict, taxonomic thinking that leads to such concepts as a Great Chain of Being — a correctly defined place or order or set of structural relations for and between each reified type of thing or being in the world — is reflected in the operations of the State apparatus as it seeks to impose the logic of ‘fixed and proportional determinations which may be assimilated to “properties” or limited territories within representation’ (Deleuze 1994: 45).

The picture is complicated as we move through history: the State has also taken various forms through time and in the modern capitalist era the State apparatus combines overcoding with social subjection and subjectification (as well as machinic enslavement and a general conjugation of flows, which are outside of the scope of the current discussion). One of the ways in which subjectification works is to directly affect the discursive and non-discursive spaces within which rights operate and thus, As Deleuze and Guattari argue, signification under a State apparatus tends towards a ‘uniformity of enunciation, a unification of the substance of expression, and control over statements’ (Deleuze and Guattari 1987: 135). A particularly relevant example they provide of this is the juridical expression of overcoding as the social contract; beyond this, if we observe how the form and content of law changes along with shifts in the functions of the State, it is not hard to see the emergence of contemporary rights discourse within what they describe as a ‘subjective, conjunctive and “topical” law’ that serves the ends of hierarchical power:

“The bond becomes personal; personal relations of dependence, both between owners (contracts) and between owned and owners (conventions), parallel or replace community relations or relations based on one’s public function. Even slavery changes; it no longer defines the public availability of the communal

worker but rather private property as applied to individual workers. The law in its entirety undergoes a mutation, becoming subjective, conjunctive, “topical” law: this is because the State apparatus is faced with a new task, which consists less in overcoding already coded flows than in organizing conjunctions of decoded flows as such. Thus the regime of signs has changed: in all of these respects, the operation of the imperial “signifier” has been superseded by processes of subjectification; machinic enslavement tends to be replaced by a regime of social subjection. And unlike the relatively uniform imperial pole, this second pole presents the most diverse of forms. But as varied as relations of personal dependence are, they always mark qualified and topical conjunctions. It was the evolved empires, of the East and of the West, that first developed this new public sphere of the private, through institutions such as the consilium and the fiscus in the Roman Empire (it was through these institutions that freed slaves acquired a political power paralleling that of the functionaries).” (ibid. 451)

Deleuze and Guattari argue that, to a certain extent, we desire the organization that results from this overcoding because it sustains our need for coherence and continuity even as it serves to dominate us. They also suggest, however, that this desire might be misplaced: the certainty we feel by virtue of the shared values, morals, etc., provided by State overcoding gives us a false sense of permanence and stability which is not borne out by the history of State societies. (ibid. 227) The State, they remind us, is assuredly not the locus of liberty (ibid. 460).

Given the distributions of power that are implied by these arrangements — by contemporary State overcoding — there are clear implications for individual and collective agency and freedom, broadly understood. More specifically, it seems that the relationship between the State and society might be the reverse of what we commonly assume: that instead of arrangements of power transparently serving the ends of rights as an unproblematic manifestation of some or other ‘social contract’, rights is primarily employed to serve the ends of power. In other words, as a set of codified nomological normative principles regulated by specific hierarchical arrangements of power via a State apparatus, does it not seem entirely likely that rights are, albeit not exclusively, employed in the service of — and even partly produced by — moral and political imperialism as a means for the perpetuation of hierarchical power?

It is to this question that we now turn.

One nation, overcoded

“The greatest crimes against humanity (and by humanity) have been perpetrated in the name of the rule of reason, of better order and greater happiness.” — Zygmunt Bauman, *Postmodern Ethics*

As critical legal theorist Costas Douzinas argues, echoing Foucault and Deleuze’s work on disciplinary societies (Foucault 1991) and societies of control (Deleuze 1992), underlying any collective discourse of rights are relations of power/knowledge and mechanisms of control that enforce rights through surveillance, classification and bio-political modulation of individuals and populations. Rights also mask the functioning of these hierarchical arrangements of power, from state institutions and capitalist property relations through to the micropolitical counterpart of these arrangements in the family and other cultural forms and, beyond this masking function,

rights, being necessarily collective and operating within the ambit of overcoding, can also be used to organise mass populations for exploitation and regulation.

Within this domain, according to Douzinas, what we experience is a 'thin equality' and an 'emaciated democracy' and if we see an ameliorative potential in this regard in liberal transnational cosmopolitanism, in 'Universal Human Rights', this is simply because we do not recognise this faux-cosmopolitanism for what it is: the inverse of neoliberal globalization that contains, embedded within it, a moral imperialism that is in awe of sovereignty and the nation state. (Douzinas 2007: 292)

When this is coupled with Deleuze and Guattari's observation that the State monopoly on the legitimate use and definition of violence can also be defined as a State monopoly on the imposition of the law that serves as the regulatory function of rights and that the State apparatus gains this monopoly through historical acts of direct violence and ongoing structural violence, it can be argued that rights actually form a part of the propaganda and conduct of conduct that operates within structurally violent hierarchical arrangements of power.

"State policing or lawful violence is something else again, because it consists in capturing while simultaneously constituting a right to capture. It is an incorporated, structural violence distinct from every kind of direct violence. The State has often been defined by a "monopoly of violence," but this definition leads back to another definition that describes the State as a "state of Law" (Rechtsstaat). State overcoding is precisely this structural violence that defines the law, "police" violence and not the violence of war. There is lawful violence wherever violence contributes to the creation of that which it is used against, or as Marx says, wherever capture contributes to the creation of that which it captures. This is very different from criminal violence. It is also why, in contradistinction to primitive violence, State or lawful violence always seems to presuppose itself, for it preexists its own use: the State can in this way say that violence is "primal," that it is simply a natural phenomenon the responsibility for which does not lie with the State, which uses violence only against the violent, against "criminals" -against primitives, against nomads-in order that peace may reign." (Deleuze and Guattari 1987: 445)

Rights, to the extent that it operates on normative interpretations of humanity, itself seeks a further monopoly through which it can impose a humanist, imperialist, neo-colonialist view of the subject and subjectivity, even though historically it is this exact identity that was imposed on colonized others (both external, through 'civilizing' missions and internal, through the humanist, universalist declarations, charters and bills of rights that follow each 'revolution') in the services of Empire, justifying 'enslavement, atrocities, and even annihilation as strategies' (Douzinas 2013) whereby the savage other is brought into the fold of liberal Enlightened humanity. This has continued to the current day, perhaps most notably in the US's noble 'bringing of human rights' to the Middle East and various other 'underdeveloped' peoples, this despite that fact that 'the idea of *humanity* has no fixed meaning and cannot act as the source of moral or legal rules. Historically, the idea has been used to classify people into the fully human, the lesser human, and the inhuman. If humanity is the normative source of moral and legal rules, do we know what humanity is?' (ibid.)

Stepping back, it appears that this is an almost complete inversion of the commonly assumed relationship between power and morality, hierarchy and rights, national territoriality and in-

ternationalist cosmopolitanism. Whereas these coupled terms are usually understood to be in tension with each other, we can now instead begin to see them as various interlocking parts of the State apparatus — as sets of terms in zero-sum games that elide the real terrain of distributions of power in which these games are played. Within this terrain, human rights, for all that it is hailed as the bedrock of universal humanity, serves to legitimate, whether through imposition or normative inclusion, a complex array of hierarchical material and ideological relations, from class stratification right through to entrenched race, gender and ethnic inequalities:

“[R]ights turn real people into abstract ciphers. The abstract man of the declarations has no history or tradition, gender or sexuality, colour or ethnicity, those elements that make people real. All content is sacrificed at the altar of abstract humanity. This gesture of universalisation conceals however their real subject: a human-all-too-human, wealthy, white, heterosexual, male bourgeois standing in for universal humanity who combines the dignity of humanity with the privileges of the elite. The emancipation of universal man subjects real people to a very concrete rule: ‘the rights of man as distinct from the rights of the citizen are nothing but the rights of the member of bourgeois society, i.e. egotistic man, man separated from other man and the community.’ (Douzinas 2010)

While it may be argued that these are contingent features of rights enacted within a particular socio-economic context, there is also a sense in which these issues are inherent in rights as a necessarily abstract, majoritarian discourse; rights imply constants of content and expression, standard measures of humanity that reproduce dominant social identities — Deleuze and Guattari’s ‘average adult-white-heterosexual-European-male-speaking a standard language.’ (Deleuze and Guattari 1987: 105)

While according to Douzinas legal rights offer ‘the minimum recognition of abstract humanity, formal equivalence and moral responsibility, irrespective of individual characteristics,’ they also simultaneously place people on a ‘grid of distinct and hierarchical roles and functions, of prohibitions, entitlements and exclusions.’ In other words, social and economic rights recognize gender, race, religion, and sexuality, in part ‘moving recognition from the abstract equality of humanity to differentiated qualities, characteristics, and predications,’ but they do so in a way that reinforces a center and a measure of proximity that are the sole arbiters of their worth.

“Human rights may promise universal happiness but their empirical existence and enforcement depends on genealogies, hierarchies of power and contingencies that allocate the necessary resources ignoring and dismissing expectations or needs. The legal person that rights and duties construct resembles a caricature of the actual human self. The face has been replaced by an image in the cubist style; the nose comes out of the mouth, eyes protrude on the sides, forehead and chin are reversed. It projects a three-dimensional object onto a flat canvas.” (Douzinas 2013)

The history of human rights struggles and victories, of groups and individuals pitted against relations of hierarchy and domination, is then also a history of the capture of these struggles by the State apparatus; it is a history written by a hegemonic arrangement of power that, through the logic of recuperation and incorporation, manages to make all victories its own while simultaneously falsely presenting itself as identical with the original victors. The specific victory of the

State apparatus here is the ‘tacit but increasing inscription of individual lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves.’ (Agamben 1998: 128) In other words, as rights proliferate as the codified outcome of social struggles, so too does biopolitical regulation increase. If, on the other hand, there are any rights genuinely and consistently defended by the State within contemporary social arrangements, these are the negative rights of laissez faire market neoliberalism: the right to property, the right to consumer choice and, more generally, the right to absence of external constraints. Rights/freedoms of this kind act as a moral sheen on ruthless profiteering via unregulated markets, lending legitimacy to exploitative labour conditions that in many cases, especially in the so-called developing world, resemble nothing so much as indentured labour and voluntary servitude.

Positive rights/freedoms, on the other hand, while equally codified and rhetorically defended, are concretely defended only to the extent that this defence is required as part of a claim to or retaining of legitimacy; the State will thus loudly announce the isolated cases in which it defends or cultivates positive rights even as it wholly fails to support these rights in any kind of substantial or consistent way (The City of Cape Town, for instance, will make much of its tokenistic and massively insufficient provision of nominally flushable toilets in impoverished areas while doing almost nothing to provide for the basic rights to a decent life enshrined in the Constitution). Here and in countless other contexts, what is experienced is an endemic structural violation of rights by the same State institutions set up to support them, but it is a violation that is most often disavowed because of the trauma involved in disentangling from the imagined bond between citizen and State. The very stability provided by the ideals codified by rights and supposedly defended by a benevolent State is deemed more important than whether or not these rights enjoy any material basis at all.

“The imaginary domain of rights creates an immediate, imaged and imagined bond, between the subject, her ideal ego, and the world...Our imaginary identification with a good society accepts too easily that the language, signs and images of human rights are (or can become) our reality. The right to work, people assert, exists since it is written in the Universal Declaration, the international Covenants, the Constitution, the law, the statements of politicians. Billions of people have no food, no employment, no education, or health care – but this brutal fact does not weaken the assertion of the ideal. The necessary replacement of materiality by signs, of needs and desires by words and images makes people believe that the mere existence of legal texts and institutions, with little performance or action, affects and completes bodies.” (Douzinas 2013)

Of course, our experience here is heavily tempered by the intersections of power and privilege that construct each of our identities. Simplifying this point somewhat, we can agree again with Douzinas when he argues that ‘for the middle classes, to be sure, human rights are birth-right and patrimony. For the unfortunates of the world, on the other hand, they are only vague promises, fake supports for offering obedience, with their delivery permanently frustrated. Like the heaven of Christianity, human rights form a receding horizon that allows people to endure daily humiliations and subjugations.’ (ibid.)

Finally, where positive rights/freedoms are defended, in wealthy Northern European nations, for instance, this is largely because the material and social comforts provided to citizens in these

social democracies rely on the defence of negative freedoms in the interests of neoliberalism abroad: the historical and contemporary extraction of materials and cheap labour from (neo-)colonized nations is what truly, in the final analysis, provides such security, not a benevolent State acting on behalf of rights-bearing citizens.

While we have been discussing the State and neoliberalism near-interchangeably up until this point, it is worth noting that Deleuze and Guattari remain ambivalent on the role of the State within contemporary capitalism and, while what they describe as the capitalist axiomatic might not have replaced State overcoding to quite the extent that they sometimes appear to suggest, they do make the interesting observation that as this axiomatic takes hold, what we understand as rights might at some point become embedded within capitalist social relations themselves, eventually ceasing to require the State or even a distinct juridical form and becoming coextensive with what Marx once humorously described as ‘freedom, equality, property, Bentham,’ i.e., bare economic exploitation in free market conditions:

“Private property no longer expresses the bond of personal dependence but the independence of a Subject that now constitutes the sole bond. This makes for an important difference in the evolution of private property: private property in itself relates to rights, instead of the law relating it to the land, things, or people (this raises in particular the famous question of the elimination of ground rent in capitalism). A new threshold of deterritorialization. And when capital becomes an active right in this way, the entire historical figure of the law changes. The law ceases to be the overcoding of customs, as it was in the archaic empire; it is no longer a set of topics, as it was in the evolved States, the autonomous cities, and the feudal systems; it increasingly assumes the direct form and immediate characteristics of an axiomatic, as evidenced in our civil “code.” (Deleuze and Guattari 1987: 453)

Beyond the proselytizing of negative rights in the service of neoliberal interests, the complete lack of defence of positive rights, the channelling of social struggle victories into the State apparatus and the creation and perpetuation of structural inequalities through rights discourse, rights also serve to depoliticize populations. Primarily, this depoliticizing functions by limiting the practice of politics to participation within the structures internal to State power. All demands and oppositional energy, all movement for change, is diverted into a legal framework that positions itself as the sole legitimate arbiter of anything that could be defined as political. This leads to a withdrawal from politics as contestation, which is re-framed as anti-social, counter-productive, violent or anti-democratic. This is not to say that through the demands, appeals, rights claims and so forth that form part of this captured politics there is not still a cultivation of awareness of social injustices — of dominations, exploitations and exclusions of whatever types — but this awareness raising operates within a context that is exceedingly unlikely to result in any concrete changes to underlying material relations; at best, the changes we can hope for within this form of political engagement are ad hoc or tactfully applied palliatives, changes that conceal just much as they purport to remedy by individualizing claims and rendering them legitimate to the precise extent that they map to dominant ideological preferences (and the ideal claimant in this scenario, of course, is precisely the abstract normative individual whose rights are coextensive with the current distribution).

For Jean-Luc Nancy, this subsuming of politics under rights discourse via an all-encompassing juridical edifice is coupled with the ‘formal abstraction of the law, which undoubtedly ‘does

right' by every participatory and every relation, but without giving this right any meaning other than itself...In this sense, law becomes a cipher for the reality of the relation of forces—whether economic technical or the forces of passion.' (Nancy 2000: 47).

In some sense then, what we understand as politics is precisely the opposite of real politics. This is the case made by Jacques Rancière in *Hatred of Democracy* — that within what he calls the political and opposes to genuinely transformational politics, rights claims serve to reinforce established arrangements of power by virtue of the fact that current distributions of power are to be taken for granted as outside of the scope of any desire for social change, with the result that social and political tensions are transformed into a set of grievances that are compatible with the internal logic of the State apparatus that overcodes these distributions (Rancière 2006). Calls for transformation are themselves transformed, partly through the hegemonic operations of rights, into non-disruptive appeals for inclusion — real or more often symbolic — within the existing order. It is only when an excluded group or class — what Rancière calls *the part of no part* — demands inclusion in a radical way, creating a *dissensus* that disrupts the stability of operations of the existing order and challenges its very frame, that something like genuine politics can be said to take place (ibid.)

What stops this politics from happening is its opposite: the police. Rancière describes the police as a *partition of the sensible* [*le partage du sensible*], a demarcation of the possible that renders it precisely coextensive with the dominant socio-politico-economic order, i.e., without allowing for a sense that there is anything beyond, or in excess of, the current functioning of this order. It is a closing down of possibility and it is only through a renewed vision and subsequent enactment of possibility, of pointing to what lies outside of this partitioning, beyond police lines, that we can practice *politics*:

“The essence of the police is to be a partition of the sensible characterized by the absence of a void or a supplement: society consists of groups dedicated to specific modes of action, in places where these occupations are exercised, in modes of being corresponding to these occupations and these places. In this fittingness of functions, places, and ways of being, there is no place for a void. It is this exclusion of what 'there is not' that is the police-principle at the heart of statist practices. The essence of politics, then, is to disturb this arrangement by supplementing it with a part of the no-part identified with the community as a whole. Political litigiousness/struggle is that which brings politics into being by separating it from the police that is, in turn, always attempting its disappearance either by crudely denying it, or by subsuming that logic to its own. Politics is first and foremost an intervention upon the visible and the sayable.” (Rancière 2001)

Rancière is explicitly critical of the role of rights as a part of the police order, reiterating some of our earlier claims in arguing that 'rights promote 'choice' contra freedom, conformism versus imagination. Children are given rights against their parents, patients, students and welfare recipients are termed 'customers' and are offered consumer rights and fake 'choices.' In western capitalist societies, freedom and choice have become the mantra of politics. Rights have become rewards for accepting the dominant order but they are of little use to those who challenge it.' (Rancière 2006: 57)

Human rights then, to extend Rancière's metaphor, is, at least in some ways, the riot gear of the police. In this reading rights discourse is so fundamentally and inherently co-opted that it is

of little use pursuing it further if we seek radical, concrete social change; if we wish, in short, to do politics.

This all said, can rights discourse not perhaps still serve some small function as a merely discursive project that facilitates the sharing of new values and new visions? Can we not at least employ rights language rhetorically, as way of pointing through the police barricades? To the extent that rights separates us from our capacities to act by sublimating our desires into demands addressed solely to a benevolent State apparatus, this does not seem likely. When a politics of demand framed within the discourse of rights does succeed this is most often due to the specificities of the material context the demand emerges from as well as the specific content of the demand, a content that could equally be delivered in a form not so easily transformed and generalized into an abstract right that plays into the hands of the police and, eventually, starts to resemble them. An *undercover cop*. When the movements of the poor channel their desire for housing and sanitation into the rallying cry ‘we have the right to housing’ then, whatever mobilizations might result from this, they are giving up on politics in favour of the political; if, however, they follow this by stating that ‘...or we will take housing’, then they are suggesting that politics has a possibility of taking place. Whatever small victories may be won through the language of rights and demands, rights discourse as we have explored it here clearly cannot withstand the structural tensions inherent to its form and we must begin to look elsewhere if we wish to transform social relations in an egalitarian direction. As Wendy Brown observes in her pithy summary of the argument thus far:

“We must take account of that which rights discourse does not avow about itself. It is a politics and it organizes political space, often with the aim of monopolizing it. It also stands as a critique of dissonant political projects, converges neatly with the requisites of liberal imperialism and global free trade, and legitimates both as well. If the global problem today is defined as terrible human suffering consequent to limited individual rights against abusive state powers, then human rights may be the best tactic against this problem. But if it is diagnosed as the relatively unchecked globalization of capital, postcolonial political deformations, and superpower imperialism combining to disenfranchise peoples in many parts of the first, second, and third worlds from the prospects of self-governance to a degree historically unparalleled in modernity, other kinds of political projects, including other international justice projects, may offer a more appropriate and far-reaching remedy for injustice defined as suffering and as systematic disenfranchisement.” (Wendy Brown 2004)

What is finally lost within rights is not just freedom but actually lived life itself. We have sold out the material world to, or had it sold out or captured from under us by, or had it and ourselves overcoded by, a set of abstractions, an abstract machine effectuated by a hegemonic State form. The formal freedoms guaranteed by rights do not even ‘grasp the stakes of “freedom”’. They delimit necessary conditions of contemporary human life without considering existence as such.’ (Nancy 1993: 2)

In considering a way out of this bind, however, perhaps it is, ironically, State overcoding itself that points beyond the political, at least by virtue of the fact that this overcoding occurred through extra-political means:

“Behind every legislative and executive act of the state lies a ‘right to law’ based on the constituent force that inaugurated the legal system.” (Douzinas 2010)

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