



Criminal Aggravation for Perpetrators of Sexual Violence Crimes

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Abstract - The policy of aggravating penalties for perpetrators aims to reflect the state's firm stance against sexual assault crimes. In actuality, different penalties for sexual assault do not align with the goals. Current penalties for sexual assault often fail to align with the intended severity of punishment, resulting in inconsistent sentencing that undermines the goals of deterrence and justice. The ruling that has no deterrence effect is advantageous to the offender. Although victim precipitation should be understood as a crime mitigation strategy to lessen the likelihood of victimization, the judge may be able to reduce the perpetrator's sentence if they consider the victim's role in the crime when imposing a sentence (precipitation victim). In order to prevent victimization from serving as a justification for lessening the severity of a crime committed by a perpetrator of sexual violence, this research attempts to reframe victimization and present an overview of the criminal aggravation regulations, including those found in the new Criminal Code and the Special Law on Sexual Violence. This study employs in-depth interviews, literature analysis methods, and a socio-legal research strategy. The results of this research show that the concept of criminal enforcement regulated in Law No. 12/2022 concerning Crimes of Sexual Violence contains the threat of serious criminal and criminal aggravation, however this provision does not regulate the pattern of special minimum criminal threats (*minima straf*) while in Law No. 1/2023 concerning the Criminal Code as a *lex generalis* regulates the concept of criminal punishment which can be considered as criminal aggravation, for example *deelneming*, *concursum*, and *recidive*.

Keywords: Penal weight, victim precipitation, Sexual violence

I. INTRODUCTION

Crimes involving sexual assault frequently target women and children as their victims. They are highly likely to become targets of this crime given these two victim typologies. Sexual violence, predominantly targeting women and children, remains a pervasive issue. In 2020, the National Commission on Violence Against Women documented 1,731 cases of violence against women, including 229 rapes, 166 instances of sexual abuse, and 181 cases of sexual harassment (Perempuan, 2021). Power imbalances, often rooted in societal stratification, are a key factor in these crimes (Kurniawan et al., 2023). This initiation then becomes a means of committing this crime and eliminating traces by intimidating the victim so that this crime is not revealed.

The formation of a legal instrument that specifically regulates this criminal act is a response to the fact that sexual violence has not been fully resolved by existing laws and regulations. Investigations, prosecutions and examinations in court have not paid attention to the rights of victims and even tend to blame the victims. Criminal aggravation is a policy for legislators to achieve certain targets, the aim of which is to provide deterrence to perpetrators. Even though the Criminal Code actually provides additional practices which can be seen as aggravating the crime, such as the concepts of *concursum*, *deelneming* and *recidive* which provide additional penalties as long as they meet the requirements set by the law.

The state's resolute commitment to reducing crimes involving sexual assault is demonstrated by its policy of punishing offenders. In actuality, though, the penalty meted out to offenders is frequently far from being fire. Many rulings pertaining to sexual violence are at odds with the criminal goals that govern severe criminal penalties for those who commit such crimes. Consequently, even if the maximum penalty of 15 years with aggravation for criminals is quite likely to be implemented, the offender gains from a decision that has no deterrent impact.

This is the urgency of this research, because throughout the author's search for several court decisions that have legal force, it still shows that there is consideration among judges in making decisions by paying attention to the role of victims in the occurrence of crimes (victim precipitation). Victim precipitation as a criminological theory which was later developed into the science of victimology provides an overview of the role of victims which is very likely to influence crime occurs (Petherick, 2017). Therefore, the role of the victim (precipitation) should be interpreted as a prevention method to identify motives and new dimensions of sexual violence in order to minimize the risk of victimization. Interpreting precipitation as a legal ratio of reducing punishment for perpetrators of sexual violence provides an illustration of the burden of blame on the victim. The victim's involvement in encouraging the perpetrator to commit a crime does not constitute a basis for reducing the crime or the basis for eliminating the crime because it does not have a strong argumentative basis and is contrary to the spirit of eradicating sexual violence.

This research builds on several previous studies. For example, research conducted by Chairul Huda with the title "Pattern of Criminal Weighting in Special Criminal Law" this research describes the basis for forming laws to determine the "type and amount" of crimes that indicate the nature of blame (Huda, 2011). Then Warih Anjari with the title "Application of Criminal Aggravation in Corruption Crimes: Study of Decision No.10/PID.TPK/2021/PT.DKI" this research analyzes that criminal aggravation can be applied using the approach of articles 52 and 65 of the Criminal Code so that the defendant should be prosecuted 20 years or lifetime (Anjari, 2023). Next, Ari Wibowo, with the title "Policy on the severity of punishment for perpetrators of sexual violence against children from the perspective of the purpose of punishment," this research focuses on the policy on the severity of criminal punishment as regulated in Perppu No. 1 of 2016 concerning chemical castration as a penalty aggravation (Wibowo, 2017). Meanwhile, in this research, the study carried out is to provide an overview of the concept of criminal aggravation as regulated in the Special Law on Sexual Violence and the new Criminal Code. as well as reinterpreting the concept of victim 3 precipitation which is often misunderstood as a basis for reducing criminal acts for perpetrators.

Research Problems Based on all the background descriptions above, the focus of this research is (1) to provide an overview of the criminal aggravation regulations, both those regulated in the Special Law on Sexual Violence and the new Criminal Code (UU No.1 of 2023). (2) repositioning the meaning of victim precipitation so that it does not become the basis for reducing criminal acts for perpetrators of sexual violence crimes.

II. METHOD

Research using field data—such as the findings of observations and interviews—as the primary data source is employed, or empirical research. Since law is viewed as a predictable social behavior in people's lives, empirical study is employed to analyze it. This study employs a qualitative approach, which is a technique for producing analytical descriptive data—that is, data that is verbally or in writing articulated along with actual behavior that is investigated and evaluated as a whole—by analyzing research findings (Qamar et al., 2017).

III. RESULT AND DISCUSSION

Criminal aggravation in the Special Law on Sexual Violence and the Criminal Code (Law Number 1 of 2023).

The pattern of criminal aggravation is one part of the pattern of punishment. In reference to Barda Nawawi Arief in Chairul Huda, the sentence pattern is a guide for lawmakers when they

are creating or drafting criminal penalties; it is not the same as guidelines for judges when they are imposing sentences, (Huda, 2011). A response to the extremely loose regulations governing the area and extent of sexual violence is the passage of Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence (henceforth referred to as the TPKS Law). As sexual abuse occurs and spreads throughout society, current laws do not adequately address the situation. Not only do investigations, prosecutions, and court exams often ignore victims' rights, but they also frequently place the responsibility on them. The Sexual Violence Crime Law regulates at least four novelties, specifically: 1) Classification of sexual violence criminal actions; 2) The rights of victims are the state's obligations, which must be carried out in accordance with their circumstances and needs. 3) Comprehensive procedural law arrangements beginning from the stages of investigation, prosecution, and examination in court. In addition, the offender makes restitution to make up for lost wages; 4) crimes involving sexual assault cannot be prosecuted through restorative justice, with the exception of situations involving minors. At that point, the victim receives compensation from the state.

The criminal aggravation regulated in the Sexual Violence Crime Law is a law-making policy to achieve certain targets. Criminal penalties are formulated to provide deterrence to perpetrators because sexual violence is a form of violent action that is contrary to divine and human values. The criminal severity of sexual violence is considering that the legal interests violated by this crime are very diverse, including life, body and honor. There are many legal interests to be protected from this act so this crime must be eliminated.

Indonesia's commitment to eliminate all forms of torture and treatment that degrades human dignity as well as discrimination against children, women and people with disabilities is a ratification of the ratification of several international conventions.

If we look back at the definition of sexual violence in the laws and regulations that existed before the TPKS Law, there were three types rape, sexual exploitation, and human trafficking are examples of sexual violence, while it did not expressly address sexual purposes. The laws pertaining to these three types of sexual assault are extremely restrictive since the nature and extent of sexual violence are constantly evolving. Based on its 15 years of monitoring (1998–2013), Komnas Perempuan identified the following types of sexual violence: 1) rape; 2) sexual intimidation or attempts; 3) sexual harassment; 4) trafficking of women for sex; 5) sexual exploitation; 6) sexual slavery; 7) forced prostitution; 8) forced marriage, including divorce; 9) forced abortion; 10) forced pregnancy; 11) forced sterilization and contraception; 12) punishment that is cruel and has an overtly sexual theme; 13) sexual abuse; 14) gender-biased conventional sexual practices; and 15) sexual control measures, such as those that impose restrictions based on morality or religious beliefs. Because there are probably many forms of sexual violence that have not been identified, the fifteen types of sexual violence discovered by the National Commission on Women are not an exhaustive list, (Nurisman, 2022).

Nine (9) of the fifteen (15) types of sexual violence identified by the National Commission on Violence Against Women are prohibited by the TPKS Law. These include: 1) physical and non-physical sexual harassment; 2) physical and forced contraception; 3) forced sterilization; 4) forced marriage; 5) forced marriage; 6) sexual torture; 7) sexual exploitation; 8) sexual slavery; and 9) electronic-based sexual violence. In addition to the nine categories listed above, the TPKS Law further specifies that sexual violence encompasses the following: 1) rape; 2) obscene acts; 3) sexual relations with minors, obscene acts against minors, and/or sexual exploitation of minors; 4) morally repugnant actions that go against the victim's wishes; 5) pornography featuring minors or pornography that overtly depicts violence and sexual exploitation; 6) forced prostitution; 7) trafficking in persons with the intent to exploit them sexually; 8) domestic violence; 9) money laundering when the initial offense is sexual violence; and 10) other crimes that are specifically crimes against sexual violence as defined by statutes.

The expansion of the objects of sexual violence regulated in the TPKS Law is a legal reform to provide protection, access to justice and efforts to eliminate all forms of sexual violence. In fact, another fundamental change in the TPKS Law is that there are updates regarding the subject of criminal law. The legal subject in the a quo law is called "every person" whose scope

is expanded to include individuals and corporations. This expansion of the scope of legal subjects is contained in article 1 number 2 of the TPKS Law.

Meanwhile, provisions regarding criminal aggravation in the TPKS Law are regulated in article 15 paragraph (1) which contains criminal aggravation with the addition of 1/3 (one third) if the act is committed: a) within the family sphere; b) health personnel, medical personnel, educational personnel, or other professional personnel who are mandated to carry out treatment or protection; c) employees, administrators or officers of people entrusted or handed over to them to be looked after; d) public officials, employers, superiors and others; e) more than 1 (one) time or committed against more than one person; f) two or more people in alliance; g) towards children; h) towards people with disabilities; i) pregnant women; j) in a state of unconsciousness or helplessness; k) in case of emergency, conflict, disaster or war; l) using electronic means; m) the victim has serious injuries, serious infectious or psychological diseases; n) damage to reproductive function; o) the victim died.

In addition to additional imprisonment, fines or other penalties, judges are also required to determine the amount of restitution for criminal acts of sexual violence which carry a prison sentence of 4 (four) years or more. Apart from restitution, the judge can also impose additional penalties in the form of: 1) Revocation of child custody or revocation of pardon; 2) announcement of the perpetrator's identity; and 3) confiscation of profits and/or assets obtained from criminal acts of sexual violence. Additional criminal penalties do not apply to death sentences and life imprisonment.

Likewise, with corporations as subjects regulated in this Law in article 18 paragraph (2) of the TPKS Law states that criminal sanctions can be imposed on administrators, givers of orders, control holders, beneficial owners of corporations, and/or corporations. Additional penalties for corporations as contained in article 18 paragraph (4) are in the form of: a) confiscation of profits and/or assets from criminal acts of sexual violence; b) revocation of certain permits; c) announcement of the judge's decision; d) permanent prohibition on carrying out certain acts; e) freezing all or part of the corporation's place of business; f) closure of all or part of the corporation's business premises; and/or f) dissolution of the corporation.

1. Criminal aggravation within the Victim's Immediate Scope

Parents, guardians, and other family members are examples of the people that make up the victim's immediate circle. However, the definition of a school encompasses educators and education staff, and the definition of a health facility includes medical staff and other health personnel or other professionals who are required to provide treatment, protection, and recovery, such as administrators, officers entrusted with their care, public officials, employers, supervisors, or administrators of individuals who are employed or collaborate with them.

If sexual violence is committed by those closest to the victim, 1/3 (one third) of the maximum penalty is added. For example, in article 5 of the TPKS Law which contains non-physical sexual acts with a penalty of 9 (nine) months, 1/3 (one third) of the penalty can be added.

This weighting is motivated by the fact that these parties are people closest to the victim who have the potential to commit sexual violence by taking advantage of situations and conditions or because of their position due to privileges from certain levels of society (stratification) vertically within institutions or institutions. certain. Weighting is meant because of the denial of obligations inherent in a person

2. Criminal aggravation based on the concept of concurrent criminal acts (concursum)

In criminal law theory, *concursum* or in Dutch terms known as *samenloop* (concurrent criminal act) is the occurrence of two or more criminal acts by one person where the first criminal act has not been sentenced to a crime or between the first act and the next criminal act has not been interrupted by a judge's decision. (Adami Chazawi, 2021) In the new Criminal Code, concurrent criminal acts are regulated from article 125 to article 131.

In a *quo* provisions, if an act carries more than 1 (one) criminal provision, it is punishable by the same criminal threat, only 1 (one) criminal penalty is imposed, but if the criminal threat is different, the most serious principal punishment is imposed. However, because this

provision is general in nature (*lex generalis*) then if there are special provisions (*lex specialis*) then special provisions are used unless the law determines otherwise.

The crime of sexual violence as stated in article 15 paragraph (1) letter (e) of the TPKS Law strictly regulates that the criminal aggravation contained in article 5, article 6 and articles 8 to article 14 can be increased by 1/3 (one third) if the action falls into the category of concurrent criminal acts (*delic concursus*)

3. Criminal aggravation based on the concept of inclusion (deelneming)

The doctrine of *deelneming* or the offense of inclusion questions the responsibility of each participant in the commission of a criminal act, which in this case is the crime of sexual violence. The crime of sexual violence questions what criminal sanctions can be applied to each participant in the crime of sexual violence and what their respective roles are and their responsibilities for those roles.

Forms of *deelneming* are governed by articles 20 to 22 of Law Number 1 of 2023 respecting the Criminal Code (KUHP), which is the first book of general rules of the code. *Deelening* criteria are outlined in Article 20 of the Criminal Code in the following scenarios: 1) the offender commits the crime directly; 2) uses means to commit the crime or directs others who cannot be held accountable; 3) engages in the crime themselves; or 4) encourages others to commit the crime by offering or promising something, abusing authority or dignity, using threats of violence, committing violence, committing misdirection, or providing opportunities for means or information.

The New Criminal Code states that assistance in committing a criminal act is punishable by 2/3 (two-thirds) of the maximum principal penalty, except for assistance in committing a criminal act which carries the death penalty or life imprisonment, which is punishable by a maximum imprisonment of 15 (fifteen years).

This shows that the criminal aggravation regulated in the Criminal Code as a *lex generalis*, especially for the offense of accompaniment (*deelneming*) is an effort to apply criminal responsibility to two parties in the offense of accompaniment, namely the perpetrator of the offense and the accomplice of the offense. Parties who can be considered as perpetrators of an offense include the perpetrator (*pleger*), the person who ordered it to be committed (*doenpleger*), the person who participated (*medepleger*), and the person who recommended it (*uitlokker*). Meanwhile, the offense assistant is called *medeplichtiger*. So, if sexual violence is committed by more than one person together, then criminal penalties can be applied to all participants involved, whether as perpetrators or as accomplices.

4. Criminal aggravation based on the concept of repetition (Recidive)

The offense of repetition in criminal law is known in 3 (three) forms, namely first, general recidive, namely a criminal act where the perpetrator has served a sentence but commits the crime again within 5 (five) years. Second, special recidive, namely the act committed is the same as the previous criminal act. Third, *tussen stelsel* recidive, namely when the criminal act committed is not exactly the same but still falls under the same offense qualifications as the previous criminal act. The criminal aggravation is regulated in article 58 jucto article 59 of the new Criminal Code where it is stated that the criminal aggravation as in article 58 is added to a maximum of 1/3 (one third) of the maximum criminal threat

The meaning of victim precipitation is not a basis for reducing criminal acts for perpetrators of sexual violence crimes

Sexual violence as a form of crime that degrades human dignity and constitutes a violation of human rights is definitely classified as a serious crime. This view refers to criminal provisions regarding sexual violence which contain serious criminal threats. The threat of serious criminal charges in criminal acts of sexual violence as a response to the rise of sexual violence. The impact of this crime is also very large, physical, psychological, mental, health, economic, social and even political suffering can affect the victim's life.

Referring to the 2023 annual record of violence against women by the National Commission on Violence Against Women regarding data on gender-based violence related to

sexual violence, there are two main data sources, namely data from Service Institutions and data on complaints to the National Commission on Violence Against Women which can be seen in the table below:

Table 1: Sexual Violence Cases based on complaints to the National Commission on Violence Against Women and Service Institutions

Complaint Data	Komnas Perempuan	Service Agency
Personal Domain	1.086	3.236
Public	1.127	866
Country	15	0
Total	2.228	4.102

Source: Catahu 2023

Table 1 shows that data sourced from complaints to the National Commission on Violence Against Women contained 2,228 cases of sexual violence, 1,086 of which occurred in the personal domain, 1,127 cases in the public domain and 15 cases in the state domain. Meanwhile, there were 4,102 cases in service institutions, of which the largest number of cases occurred in the personal domain, amounting to 3,236 cases and the public domain, 866 cases.

Meanwhile, if we refer to court decisions regarding criminal acts of sexual violence after the issuance of the TPKS Law, it does not have a major impact on the punishment of criminal penalties for perpetrators of sexual violence, but instead tends to give decisions that are not commensurate with the perpetrator's actions, the impact of the damage must be borne by the victim. In the table below are several examples of court decisions in cases of sexual violence using the TPKS Law approach which are not in line with the objectives of the TPKS Law.

Table 2: Court Decisions Based on the TPKS Law

No	Decision	Criminal articles and sanctions
1	Putusan No.52/ Pid. Sus/2023/PN.Tar	Article 6 letter c carries the threat of imprisonment for 5 (five) years
2	Putusan No.47/Pid.Sus/2023/PN Gst	Article 6 letter c jo. Article 64 Paragraph (1) of the Criminal Code with a prison sentence of 10 (ten) years
3	Putusan No.85/Pid.B/2023/PN Dpu	Article 6 letter a with imprisonment for 1 (one) year
4	Putusan No 1245/Pid.B/2023/PN Mdn	Article 12 in conjunction with Article 15 letter H with a prison sentence of 7 (seven) years
5	Putusan No. 148/Pid.Sus/2023/PN Smn	Article 12 with imprisonment for 4 (four) years, 6 (six) months
6	Putusan No.117/Pid.B/2023/PN Pmk	Article 6 letter c with a prison sentence of 10 (ten) years
7	Putusan No. 40/Pid.Sus/2023/PN Tar	Article 6 letter b with a prison sentence of 1 (one) year and 6 (six) months
8	Putusan No. 113/Pid.Sus/2023/PN Unh	Article 6 letter b with a prison sentence of 10 (ten) months
9	Putusan No. 349/Pid.Sus/2023/PN Btl	Article 6 letter C with a prison sentence of 3 (three) years and 6 (six) months
10	Putusan No. 169/Pid.Sus/2023/PN Unh	Article 14 Paragraph (1) Letter a Jo. Article 65 paragraph (1) of the Criminal

		Code with a prison sentence of 10 (ten) months
11	Putusan No 131/Pid.Sus/2023/PN Pwk	Article 6 letter b Jo Article 15 paragraph (1) letter h with a prison sentence of 10 (ten) years
12	Putusan No. 1083/Pid.Sus/2023/PN Sby	Article 14 Paragraph (1) letter a with imprisonment for 1 (one) year and 8 (eight) months
13	Putusan No. 412/Pid.B/2023/PN Jkt.Brt	Article 6 letter b with a prison sentence of 7 (seven) years and 6 (six) months
14	Putusan No. 47/Pid.Sus/2023/PN Kph	Article 6 letter b with a prison sentence of 5 (five) years
15	Putusan No. 72/Pid.Sus/2023/PN Pdl	Article 6 letter c with a prison sentence of 6 (six) years
16	Putusan No.18/Pid.B/2023/PN Ffk	Article 12 with imprisonment for 12 (twelve) years

Source: Directory of Indonesian Supreme Court Decisions

Table 2 shows that the judge's decision on criminal acts of sexual violence is still very far from the severe punishment as regulated in the TPKS Law. Article 6 letters (b) and (c) of the TPKS Law which contains a maximum threat of imprisonment of 12 years for physical sexual assault is still far from providing a deterrent effect where the average decision in the a quo provisions only carries a penalty of 7 years or less. One of the weaknesses in the provisions of the TPKS Law is that it does not use the provisions for a special minimum criminal threat pattern (*straf minima*), namely a minimum prison sentence of 5 (five) years, or if there is an aggravation, a minimum of 10 years.

Basically, the pattern of using special minimum threats is an effort to strengthen the deterrent effect against criminals and to minimize disparities in court decisions (Wibowo, 2017). Reducing sentences for perpetrators of these crimes is not in line with the spirit of the establishment of the TPKS Law which aims to prevent all forms of sexual violence and ensure that sexual violence does not recur.

The problem is that the granting of criminal penalties to perpetrators is based on the victim's contribution to the victimization process which caused this crime to occur. In fact, the role of the victim in victimology terms is known as the concept of victim precipitation. This concept was introduced by Menachem Amir in 1971 and used to analyze rape victims (Daigle, 2021). Menachem Amir further stated that rape is not entirely true. He is of the view that rape occurs because there is a victim's role in the victimization process, he even divides it into two types of roles, namely commissioner (active role) and commissioner (passive role).

Menachem Amir's views above have received a lot of criticism and are not entirely correct. Victim precipitation is a term in social science that refers to the victim's activities which are seen as a trigger for the crime to occur from the perpetrator's perspective (Kurniawan et al., 2023). It must be remembered that our criminal law system recognizes a dualistic principle where criminal acts and criminal responsibility are strictly separated. A person can only be held accountable in criminal law not because his actions meet the definition of an offense but because there is evil intention in the perpetrator or what is commonly known as *daad-dader strafrecht*. This shows that the justification for a person's actions is based on criminal law regulations. The perpetrator is a person who has the will to carry out an act or is careless or careless, resulting in prohibited consequences. Meanwhile, the victim is the person who is harmed by the perpetrator's actions. These two things are clearly different.

Precipitation cannot be seen as a reason to reduce the punishment or sentence for perpetrators of criminal sexual violence. On the other hand, the perpetrator really deserves to receive criminal sanctions for the impacts arising from the act. The causal factors of the victim are not appropriately seen as a reason to reduce the punishment of the perpetrator. (Ding & Zhao, 2021)

Precipitation (the role of the victim) should be interpreted as part of the criminal act mitigation mechanism to provide more recognition of the modes and potential that arise from this crime so as to reduce the risk of victimization.

Observing the provisions in Article 60 (1) of the TPKS Law firmly states that "Examinations of Witnesses and/or Victims are carried out while still upholding their human rights, honor and dignity' without intimidation, not justifying mistakes, way of life and decency, including experience Witnesses and/or Victims with questions that are ensnaring in nature or that are not related to the Crime of Sexual Violence as a mitigating reason for the defendant," it is clear in this article that there are strict limits to the judge's principles in giving considerations. The role of witnesses and/or victims is not a basis for the judge to mitigate the defendant's actions.

IV. CONCLUSION

Based on the discussion in the previous chapter, the following conclusions can be drawn: **First**, the criminal severity regulations regulated in the TPKS Law reflect the state's efforts to eliminate all forms of sexual violence and ensure that sexual violence does not recur. Meanwhile, the new Criminal Code contains general rules regarding additional penalties as aggravation if the crime committed falls within the concepts of concursus, deelneming or recidive. **Second**, even though the regulations in the TPKS Law contain serious criminal threats, they do not use specific minimum criminal threat patterns (straf minima) so that even though the maximum criminal threat is 15 (fifteen) years, it is possible for perpetrators to receive a sentence of less than 5 (five) years. At this point, disparity in decisions has become a phenomenon in our law enforcement, especially criminal acts of sexual violence. **Third**, the disparity and reduction in sentences for perpetrators of sexual violence cannot be separated from the judge's consideration of mitigating the defendant by approaching non-legal factors, one of which is the role of the victim or in theory known as victim participation. However, this approach is not relevant in our criminal law system which is based on a dualistic principle which strictly separates actions and criminal responsibility. In addition, there are provisions in the TPKS Law which strictly regulate the limitations of judges in mitigating the sentences of perpetrators who look at the circumstances and justification for the victim's mistakes.

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