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Domestic Violence Law Reforms: Reactions from the Trenches

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In recent years, feminists have worked hard to pressure society and the criminal justice system into taking domestic violence seriously. These efforts have resulted in more government funding and increased services to victims. In addition, there have also been legal and policy reforms which have affected the way cases are handled in the criminal justice system. This article reports on research on the reactions to those reforms by those most directly affected by them, the victims themselves and those who provide services to them.

Introduction

In recent decades, one of the central goals of feminism has been to pressure society and the criminal justice system into taking domestic violence seriously (Dobash and Dobash, 1992; Schechter, 1982). Feminists were concerned about statistics which indicated how widespread the problem was and the secrecy in which it was held. They hoped that using the court would provide protection to women and reduce the incidence of domestic violence. These efforts have been successful on several levels. Criminal justice personnel no longer treat domestic violence as a family matter, out of the reach of the legal system. The police no longer take the perpetrator for a walk to discuss "keeping the little woman in line" and then return him home without further action. Instead, they make efforts to arrest and prosecute offenders. There have been legislative reforms which attempt to increase the arrest

and conviction rate in domestic violence cases. The government has allocated a significant amount of money for research and the provision of services within the criminal justice system, as well as to provide services for the victims of domestic violence in the non-profit sector (Crowell and Burgess, 1996).

At the same time, feminist legal scholars have exposed the legal system as one which is patriarchal on several levels (e.g. Smart, 1992; Mackinnon, 1987; Rhode, 1990). Smart argues that the law is sexist in that it generally treats men better than women. There is widespread support for this disparity which exists in both the civil and criminal areas (Sugarman and Kay, 1990; Schafran, 1989). On another level, it is patriarchal in that "ideals of objectivity and neutrality which are celebrated in law are actually masculine values which have come to be taken as universal values" (Smart, 1992: 32). Feminists argue that the legal system in general does not represent women's interests or their ways of thinking and functioning. It is also insensitive to the social realities of women's lives. Scholars of legal language support this view when they point out that the language itself is gendered, emphasizing "rule-oriented" language (more "male") rather than "relational" language (more "female") (e.g. Cameron, 1998; Conley and O'Barr, 1998). Thus the power and the benefit of the law is more accessible to those who frame their claims in certain legally acceptable ways.

Not surprisingly, then, the effect of the increased seriousness with which domestic violence is treated by the criminal justice system has placed more women within the reach of the patriarchal legal system described by feminist legal scholars. Thus, the "success" of feminists in having the criminal justice system take domestic violence seriously comes at a price. There have been several legal reforms which specifically address the ways in which domestic violence is to be handled by the police and the courts, limiting the autonomy of victims themselves. Since the changes come within the framework of the patriarchal legal system, it means that punishment and prosecution are the goal for all domestic violence cases. This "one size fits all" approach leaves little room for a victim to make her own decisions about the best way to solve her problem. She is not asked for her assessment of her situation or encouraged to take control of her life; to the contrary, her wishes are often superseded by the new policies.

This article examines the reactions to the legal and prosecutorial changes of both victims and those who provide social services to them. Its purpose is to assess whether those on the "front lines" of domestic violence share the enthusiasm of legislators and court personnel for the changes in law and practice.

The Empirical Base

The basis for this work comes from a research project undertaken by the authors funded by the National Institute of Justice through the Ohio Office of Criminal Justice Services. The purpose of the research was to obtain a picture of the type of services provided and received, the reasons women seek services for domestic violence problems, and the desired outcomes of those services. It also focused on ways to evaluate the outcomes of services provided by the various agencies in the sample. The relevant part of that research for this article involves focus groups we conducted of clients and service providers in a total of fifteen social service agencies providing services for domestic violence victims around the state of Ohio. These agencies were selected because they had received funding through the Ohio Office of Criminal Justice Services from federal money through the Violence Against Women Act, 1994. They provided a wide range of services, including hot lines, victim advocacy, shelter, counseling, and referrals to job and housing opportunities.

Each of the focus groups lasted 1–1.5 hours and the discussions were audio-taped for later transcription and analysis. The number of participants in each group ranged from two to 16. No demographic data were collected on the participants to protect the confidentiality of the clients and staff, and the research team did not want to connect people to any specific agency or city. While several open-ended questions were posed to the focus groups about services, the team member running the group encouraged free discussion on issues perceived as important by participants. One of the most frequently mentioned topics in these discussions was the legal system and the encounters clients and service providers had with the law.

The transcripts from the focus groups were reviewed by the research team to establish reliability, and were subsequently coded and analyzed using NUD*IST software. This computer

program allows researchers to code and categorize the data in a systematic and logical way which is often difficult with hand coding. The themes in the qualitative data emerged based on an initial analysis of the staff interviews and the client interviews. These themes were coded using the NU*DIST tree framework which allows the researcher to categorize the data based on thematic areas.

The Reforms

The service providers and their clients are working within a system in which the approach to domestic violence has been affected by recent legislation and changes in the approach of the criminal justice system. The two major areas of reform, both in Ohio where the research was conducted, and around the country have to do with mandatory arrest policies, "no drop" policies, and victimless prosecutions.

Beginning about twenty years ago, there was a marked change in the way the police handled complaints of domestic violence. Traditionally, police officers, if they were trained at all, were trained to defuse the situation when called to a domestic disturbance. Beginning in the early eighties, the police started arresting those responsible for domestic disputes. Several factors were responsible for this change: a number of lawsuits against public authorities for the negative consequences of failure to take domestic violence incidents seriously, a study in Minneapolis indicating that arrest had a deterrent effect on future domestic violence, and legislation mandating arrest in cases of battering (Eigenberg, Scarborough, and Kappeler, 2001). These mandatory arrest policies, which are now fairly widespread around the country, are intended to counter the traditional police unwillingness to treat domestic violence as a crime in which they arrest the perpetrator. The new laws vary somewhat, but generally require the police to arrest the batterer when responding to a domestic violence complaint. Ohio recently passed a modified version of mandatory arrest law known as preferred arrest" (ORC 2935). Under that law, police are now supposed to arrest the "primary aggressor" at the scene of a complaint, or justify why they did not make an arrest.

The other major area of reform has to do with the handling by prosecutors of complaints after they have been made. In many communities, as part of a concerted effort to take domestic violence cases more seriously, prosecutors have adopted policies which "deny the victim of domestic violence the option of freely withdrawing a complaint once formal charges have been filed. In turn, the policy limits the prosecutor's discretion to drop a case because the victim is unwilling to cooperate" (Corsilles, 1994: 856). Thus a victim is (depending on one's point of view) encouraged to continue the prosecution, discouraged from refusing to cooperate, or even bullied or threatened into "cooperation". The purpose of these policies is to increase the number of domestic violence complaints which go to trial (or are plea bargained under a threat of trial). If such efforts fail, the prosecutor nevertheless may continue to proceed without the victim, using a combination of legal techniques and the fruits of more aggressive methods of evidence collection by the police.

Both of these areas of reform have generated a mixed reaction in the literature. It is now much less clear than originally believed that mandatory arrest policies have a deterrent effect on recidivism (see Eigenberg, Scarborough, and Kappeler, 2001 for a discussion of the research). Regardless of the mixed research results, the laws are enthusiastically supported by those in the criminal justice system, especially prosecutors (Sengupta, 2001). Some researchers, however, argue that treatment might be a better alternative than arrest. Others argue that the laws serve to disempower women as well as punish them for their efforts to seek help (Sengupta, 2001; Yegidis and Renzy, 1994; Corsilles, 1994). They believe that no-drop policies are sexist in implying that women cannot make adult decisions about their well-being and that they drop charges for frivolous reasons. They also point out that the policies reinforce the view that the patriarchal criminal justice system "knows better" than victims do what is appropriate for them (Robbins, 1999). On a more practical level, others argue that efforts to prosecute with a reluctant victim or without the victim's testimony as the complaining witness are often doomed to failure, because of evidentiary requirements and constitutional protections for the defendant (Corsilles, 1994).

The Findings

Our findings indicate a mixed response by those in our sample to the new reforms. They also indicate differences in the way clients and service providers react to the new reforms, with the former generally being less enthusiastic than the latter. While some of the service providers express ambivalence, many are very supportive of the reforms. In accord with this support, a number of service providers echo the criminal justice system's focus on the individual rather than the social sources of domestic violence. Some of them also have adopted the language of prosecution which is widespread within the criminal justice system. Virtually none of them are legally trained, nor even well-versed in the nature and goals of the legal system, yet much of their language mirrors that which takes place in the court room as do the attitudes they express.

Framing: The Perceptions of Domestic Violence as a Crime

One of the justifications for the reforms discussed above is that they help to change the framing of domestic violence from private family behavior to public criminal behavior (Corsilles, 1994; Robbins, 1999). The history of domestic violence law has been well-documented (Dobash and Dobash, 1992; Schechter, 1982) and it is now widely known that wife beating used to be legal as long as one used a stick no wider than a man's thumb. All along, our legal system has been very reluctant to intervene in what has been considered private family behavior. It is against this backdrop that reformers have been pressing for a reframing of legal perceptions of domestic violence.

Reformers argue that changes are needed because the participants in the criminal justice system have also fed directly into victims' beliefs that domestic violence is not a crime. "[P]rosecutors dissuade battered women indirectly by downplaying the seriousness of the crimes. Some prosecutors, for instance, routinely undercharge domestic abuse cases . . . delay charging or following up on the victim. . . . Some prosecutors have gone so far as to impose mandatory waiting or 'cooling off' periods. . . . This conduct sends a message to the victim that the system does not view the batterer's conduct as a crime. . . . (Corsilles, 1994: 869-870).

The respondents in our research have their part to play in this reframing. One of the roles some service providers perceive for themselves is to help clients frame the events which happened to them as criminal behavior so that it fits within the criminal justice system. We learned from the focus groups that many victims do not see the behavior in question as criminal. The difficulty of accepting the idea that someone one knows could be a criminal is echoed by victims of other interpersonal assaults, like, for example, acquaintance rape (Bohmer and Parrot, 1993).

A recognition of the behavior as criminal is an important part of obtaining the client's cooperation in the prosecution of the batterer within the criminal justice system. As one service provider said: "Sometimes they just don't understand why it is that just because he pushed me or smacked me or pulled the phone out of the wall why that's a crime. They don't even understand that it is a crime." And another, "a lot of ladies that show up here are not the ones pushing the charges, a neighbor called 911. . . . you have to show them that they are in the middle of the charges. . . . they don't think it's a crime." Here the service provider is persuading the victim to accept the criminal justice system's framing of the batterer's behavior, rather than offering a victim the autonomy of choosing her own framing of events.

Even those service providers who stress the autonomy of the victim nevertheless work to persuade their clients that domestic violence is criminal behavior. For example, one said: "you know we might not be able to convince her that this isn't healthy, it's none of our business, but frankly. . . . what he's doing is a crime, whether she wants to stay with him, that's her personal choice, she's a grown woman but what he's doing the bottom line is criminal."

In addition to framing the events themselves as criminal, service providers are inclined to accept the criminal justice system's perspective by arguing that prosecution and punishment are the preferred modes of handling the situation. "My ultimate goal is prosecution, nip it in the bud right there." And "well I think as far as prosecution goes, they need to kind of get their life and get control. I mean they want to see, . . . some kind of action taken on their behalf, some kind of legal action." Here the term "get their life and get control" in fact means accepting the framing of

the criminal justice system and participating in it. Another staff member said: "I think a woman . . . giving him an ultimatum and then expecting him to change, I don't see that happening much. I think she's almost got to make a statement some way, criminally or civilly." This staff person clearly has accepted the superior advantage of using the legal system over alternative methods of handling the situation, despite the absence of clear empirical evidence that using the legal system in fact is more likely to stop the abuse.

For some victims, it is not just that they do not see the behavior as criminal, resulting in prosecution and punishment. Specifically they do not consider that it should result in their batterers going to jail. This is exacerbated by the emotional relationship between batterer and victim. One provider expressed the concern of clients: ". . . (that he would) go to jail because they advised the court system that their rights have been violated . . . that they are sending the father of their children . . . the person they still care for to jail." The fact that victims continue to feel positively toward their batterers is a source of frustration both to the players in the criminal justice system (police, prosecutors, and judges) and to some service providers. Mandatory arrest and no-drop policies ignore these feelings because they believe that prosecution and punishment is always the appropriate method of handling domestic violence.

Unintended Consequences of the Reforms: Who to Arrest?

Ohio's preferred arrest policies have raised the stakes in the calculus of how to approach the criminal justice system. One of the side-effects of the preferred arrest policy is that more women are themselves arrested under these policies than they were before such policies were instituted. One Ohio study indicates that, while arrest rates in general have risen 142% in the year since the implementation of preferred arrest policies, the increase in arrests of women has been 428% (Alliance for Cooperative Justice, 1998). While there is not yet any research about the nature of this increase, those who work with victims argue that women are likely to be arrested when they respond to the aggression of the batterer, even when they are not the primary aggressor (Sengupta, 2001). One member of a focus group was arrested for throwing

a yogurt container at her batterer. Service providers have also told us that under these policies, when women are prosecuted for domestic violence, they are treated more harshly than are men. Again, there is not yet direct research to support this view, but it is in line with related evidence in which, for example, women found guilty of killing their partners receive significantly harsher sentences than do men who kill theirs (Crites, 1987). As yet, there is no empirical evidence as to *why* more women are being arrested, despite the fact that the policy requires only the arrest of the *primary* aggressor.

There is a lively debate in the literature about the relative responsibility of men and women in domestic violence (George, 1994; Dobash et al. 1992; Gelles and Strauss, 1988; see Mignon, 1998: 143–146, for a discussion of the literature). Whatever the “truth” of this debate, it is clear that problems can arise when police, responding to a domestic disturbance, are required to arrest someone under mandatory arrest policies, or, in the case of preferred arrest, required to justify why they arrested no one. Some women’s groups argue that the police have not been trained properly to determine who is to blame (Sengupta, 2001). One other possibility is that women are the primary aggressor more often than previously thought. Anecdotal evidence suggests that police officers often simply arrest both parties to a domestic dispute in cases where the evidence is at all ambiguous, thereby satisfying the letter, if not the spirit, of mandatory arrest laws.

Ohio’s preferred arrest policies raise special problems of their own. Some of the service providers in our study speak of difficulties the police have in deciding who is the primary aggressor when they arrive at the scene and find both partners involved in the fight. Some police apparently deal with this problem as happens under mandatory arrest states, by simply arresting both parties. As one service provider reported “A lot of my cases are not one-sided. A lot of cases I have two people beating up on each other . . .” In cases such as these, police can justify arresting both parties. Difficulties arise in those cases (which may be more typical) in which the man starts the violence and the woman “fights back”, “defends herself”, or “responds” (the choice of language here is, of course, political).

Some service providers see the new policy as a punishment

for women. This perception makes it more difficult for a service provider to continue to act as spokesperson for the criminal justice system. "It's retaliatory . . . all they have to do is call the police . . . and she's hauled off." Another one said "my victim was arraigned yesterday. She filed a domestic violence report against the father of her child and when the police went to arrest him, he said that she had poked him in the eye, so they turned around and arrested her in front of her children." And another "well, I had one that it was domestic violence and in retaliation the man said she had pulled a gun on him. This woman is this big and never owned a gun in her whole life and was scared to death of this man, cried every time you'd mention his name, and yet she's going to court on this, had to spend thousands of dollars to get an attorney to defend herself on this totally ridiculous charge and I've been seeing it happen over and over again." The clients echo this concern. One of them said "Sergeant X was wonderful, but then a rookie police officer showed up. . . . and I was charged with disorderly conduct. . . . So it cost me a lawyer. I have disorderly conduct on my record because my husband pushed me off a porch, and I called [911] for help. . . . I didn't touch my husband. I did nothing."

Male Power in the System

It is not surprising that men are better able to use the system in domestic violence, just as they are in other contexts. Evidence shows that men are generally better able to frame claims in ways that will be accepted in the legal system (Conley and O'Barr, 1998: 132). It is also likely that the police, who only recently were agreeing with batterers that a woman "needs to be slapped around a bit to keep her in line," would be willing to believe the man's allegations over the woman's. Research has shown that men are perceived as more reliable in various contexts (Hall and Sandler, 1982). In the case of domestic violence, different perceptions about who started the fight are also played out along gender lines. For example, in Strauss and Gelles' 1985 National Study, husbands responded that they hit first in 44% of the cases while wives perceived that their husbands hit first in 53% of the cases (Strauss and Gelles, 1990).

The negative consequences of this gender imbalance is not

lost on service providers. As one said, referring to her domestic violence clients, "sometimes we see the same legal system that is supposed to help them out is also abusing them, because in retaliation the suspect is filing bogus police reports against the victim." In domestic violence, as in other areas of the law, men seem to be more adept at using the system to their strategic advantage.

In one city, women batterers are required to go to a group for treatment, which is run by one of the agencies in our sample. They have had great difficulty in deciding on an appropriate content for the groups, since they did not believe that the women were aggressors.

Benefits and Detriments of Mandatory Arrest Policies

Reformers cite a number of benefits of mandatory arrest policies. In addition to those which do not directly affect victims, such as the reduction of the risk of liability and the response to political pressure, they cite several advantages. They argue that it does help reduce domestic violence, though empirical evidence on the effect of these arrest policies on future violence is mixed (Sherman and Berk, 1984; Sherman et al. 1992; Binder and Meeker, 1996). Thus it is not clear that this policy does reduce recidivism in general. Reformers believe that despite the mixed research results, mandatory arrest policies are worth a try as other methods have failed and there seems to be no evidence that mandatory arrest makes the situation worse (Wanless, 1996; Eigenberg, Scarborough, and Kappeler, 2001). The wide support by lawmakers and criminal justice personnel for mandatory arrest laws is illustrated by the recent debate about the renewal of the law in New York (Sengupta, 2001). In addition they argue that arrest rates (as distinct from other measures of "success") are increased, which they view as a positive benefit, though even here the research record is unclear, as few studies have compared arrests in domestic cases with other similarly serious assault cases (Eigenberg, Scarborough, and Kappeler, 2001).

For some of the individual clients and the service providers in our study, preferred arrest policies had distinctly negative implications. One service provider explained, . . . "the man will go back and he will tell her, if I'm going to jail, I'm going for a

reason. So now I'm really gonna show you." Or, as one client put it: "You know, I wanted him not to go to jail 'cause I knew that if he come out of jail, he'd be worse than when he went in, you know, and I knew that but he got off so he got nothing. So it backfired on me."

For many women, it is the fear rather than the reality of the battering, and the belief that *they* are in the best position to know what will trigger violence in their partners, that makes them react negatively to preferred arrest policies. For the criminal justice system as a whole, any change for the benefit of society risks a few casualties. For victims and service providers such a casualty would represent an individual failure of major proportions. Thus they live in mortal fear of the batterer who comes back and kills his partner. Anything (including mandatory arrest policies) that limits the victim's belief that she is in control or limits her ability to assess the risk is viewed negatively.

Victims also have more practical, but no less serious objections to the reforms. Most of these are financial in nature, or a combination of fear and financial dependance. "I think a lot of time though too it's a lot of threats going on, and there's a lot of financial reasons" said one service provider. A victim put it as simply as this: "Well I need him to pay the bills more than I need him to pay for the violence." The financial needs of the family may be combined with fear of threats by the batterer. "I think a lot of times. . . there's a lot of threats going on, that there's a lot of financial reasons to dismiss. . . he's the primary financial caretaker for the kids or whatever." So they see preferred arrest as a way the criminal justice system takes away their financial provider without really giving them any monetary security in return. Even though he is very unlikely to receive a prison sentence for his behavior, the disruption caused by arrest and (in some cases) a trial may cause him to lose the job and the paycheck on which she is dependent.

Some of those who write in support of mandatory arrest recognize that there are financial implications to the criminalization of domestic violence, but justify the changes as a way of "sending a strong message that domestic abuse will not be tolerated" (Wanless, 1996:554). They also respond to victims' financial concerns by pointing to funding which the victim can use to find support.

This, however, is not the case among the respondents in our research. Both victims and service providers repeatedly spoke of the absence of financial assistance for victims to help them start afresh.

Effects of No-Drop Policies and Victimless Prosecution

"No-drop" policies and victimless prosecutions are another reform designed to increase the rate of prosecution in domestic violence cases. Under these policies, criminal justice authorities pressure women in various ways not to drop the charges against their partners and when this fails, continue with the prosecution without the victim's testimony. The police are encouraged to collect sufficient evidence so as to make the testimony of the complainant unnecessary in a subsequent trial (Corsilles, 1994). Legally, this is justifiable in that the state is actually the entity which institutes the prosecution and the victim is merely the complaining witness. Various arguments are made about the benefit of this approach, ranging from general criminal principles under which it is the state's responsibility to protect the public and victims of crime, to arguments that victims are less likely to be the subject of retaliation by the batterer if matters are seen to be out of their hands (Wattendorf, 1996). None of them are currently supported by data.

There is little evidence at present which addresses the question of how successful such prosecutions are or whether they would survive constitutional challenge. Prosecutors recognize that going forward without a victim is very difficult; perhaps for this reason, such cases are rare. They are so rare, in fact, that two police officers in Columbus received a "Peacemaker" award from a local service provider for helping to convict "an abuser without testimony of a terrified victim" (Carmen, 1999).

For our purposes, however, no-drop policies are important as they once again shift the decision-making out of the hands of the complainant, and increase the power of the officials in the criminal justice system. In addition, prosecutors have used evidence, such as photographs of the victim taken just after the violence has occurred, to pressure her into continuing to cooperate in pressing charges. Victims report having been shown photographs of them just after the battering and asked: "Do you want to look like that

again?" Service providers also spoke of police officers who went to victims' homes on several occasions to make sure they would come to court. Such frequent visits were seen as intimidation by several victims in our groups.

Some service providers in our groups justify the conflicts when no-drop policies proceed against the victim's wishes by accepting the framing of the criminal justice system. "So even though they want to dismiss, but sometimes. . . they feel better when it's the state, and if we tell them, well, we'll do what we can to help you, but that's not your decision, it's not really violating the self-determination because . . . it's the law, and . . . they are only a prosecuting witness. So that's sort of how I balance that . . . because it's really not their decision, it was against the law, and they're just a witness, they're not pressing charges."

Conclusion

Our focus groups have shown that the reaction of those directly affected by the reforms in domestic violence policy has been decidedly mixed. Clients, particularly, do not for the most part see the criminal justice system as a solution to their problems. They are more concerned about their future financial and personal well-being. For them, the criminal justice system can be an impediment to that future rather than a source of help. Service providers are more mixed in their reactions. Some of them have bought into the discourse of prosecution and punishment which is the linchpin of the system, while others see the system as being at least in part a barrier to the goals of their clients.

The major difference between the perceptions of those in our study and the policymakers and criminal justice actors is one of perspective. Our respondents are concerned at the individual level and tell stories of those who are negatively affected by the reforms. They, as well as some feminist scholars, are also concerned about the impact of the reforms on the autonomy of victims at the very time when they consider it most central to them. By contrast, policymakers and those writing about the reforms as well as those criminal justice actors with whom our sample come into contact are concerned about general changes in how domestic violence victims are treated by the system. For them, negative impact for a few individuals may be perceived as a necessary by product of a greater good; in this case, more frequent

and more successful prosecution of batterers and a reduction of the rate of domestic violence. Whether the reforms have reached these goals, or will in the future, is beyond the scope of this article, and requires future research. So far, however, it does not appear to have happened. Thus victims are faced with inroads on their autonomy with little sense that it is worth the price either on an individual or a social level.

So where does this leave us? Are we willing to allow individual women the autonomy to decide whether the violence perpetrated against them should be defined and prosecuted as a crime? Should women be able to choose to trade violence for economic security? This hardly seems an appropriate solution. Our research indicates that the lack of enthusiasm for the reforms discussed in this article and the control they exercise over decisionmaking has much to do with victims' sense that those reforms do not work for them. Many victims and service providers expressed their skepticism that the criminal justice system was really taking domestic violence cases seriously, despite all the new reforms. For example, they pointed to the likelihood that a defendant would receive a very "light" sentence, and cynically suggested that a perpetrator should be arrested at the beginning of a long weekend so that at least he would be in jail for three days. We also heard from both victims and service providers that what many women needed most, financial assistance, especially during the period immediately after they left their batterers, was simply not available. If more interim financial assistance were available, women would have less need to trade violence for economic support.

While our research makes no claim to offer solutions to this problem, we do believe that reformers would do well to consult those who are at the other end of the reforms to find out not only what their reactions are, but also the reasons for them. If it can be demonstrated to victims that the reforms are truly beneficial to them, they are much more likely to choose to be a part of the effort to respond seriously to domestic violence.

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