

Privatization and Prayer: The Challenge of Charitable Choice

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Introduction

In 1996, as part of comprehensive welfare reform legislation, Congress enacted Section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PWORA). That provision, which has subsequently come to be known as “Charitable Choice,” has subsequently been included in Welfare-to-Work legislation, the Community Services Block Grant Program, the Substance Abuse and Mental Health Services Administration’s drug treatment programs, and the Children’s Health Act. Charitable Choice has been heralded as a new and promising approach to delivery of government social services: state contracts with “faith-based organizations,” or FBOs.

The passage of Section 104 inaugurated a policy debate that continues currently with Congressional squabbling over President George W. Bush’s “faith-based initiative.” Proponents of greater religious involvement in social service provision argue that “faith-based” organizations have untapped resources, that they have encountered unnecessary barriers to their participation, and that they are more effective than are government or secular contractors. Opponents note the absence of evidence of greater efficacy, the historic involvement of religious providers including Catholic Charities, Lutheran Social Services and the Salvation Army,¹ and the absence of additional funding, and charge that the new rules are merely an effort to erode the Constitutional separation of church and state. Public administrators are left with a number of thorny questions, among them, how to identify and recruit the “faith-based organizations” targeted by these initiatives, how to evaluate and augment their capacity to deliver services, and how to encourage their increased participation while adhering to constitutional principles.

Confounding both historical and constitutional analyses of Charitable Choice and President Bush’s subsequent faith-based initiative is the fact that our public debate, and much existing First Amendment case law, assumes the interchangeability of “religious,” “sectarian,” and “faith-based” as descriptive terms. There has been and is, however, enormous variation among the entities so labeled, and certain of those variations are both constitutionally significant and politically relevant to the

¹ In a 1969 study of findings from a 1965 survey of 406 sectarian¹ agencies in 21 states, Bernard J. Coughlin reported that 70 percent of them were involved in some type of purchase of service contract with the government. A 1982 study by F. Ellen Netting, focusing on government funding of Protestant social service agencies in one Midwestern city, found that some agencies received between 60 and 80 percent of their support from the government, and that approximately half of their combined budgets were government-financed. In 1994, government funding accounted for 65 percent of the nearly two *billion* dollar annual budget of Catholic Charities USA, and 75 percent of the revenues of the Jewish Board of Family and Children’s Services (Monsma 1996, Brown and McKeown 1997, Minow 2000).

passage of Charitable Choice, as will be discussed below. Many of the religious providers with the longest histories of social welfare provision are “faith-based” in the most literal sense—that is, the provision of essentially secular social services is motivated by their religious beliefs. Feeding and clothing the poor, tending to the sick, and housing the aged are approached as religious duties, rather than as opportunities for proselytizing or transforming the individuals served. However, this is by no means universally true of religious organizations that have historically received government funding, especially old-age and child-care facilities (AJC 1990). Twenty percent of congregations that provided social services prior to passage of Section 104 already collaborated with government agencies in the process (Chavez 2001). Indeed, the relationship between the state and the various types of sectarian agencies has historically operated on a pragmatic, not a theoretical basis. The concern of each has been not a constitutional/theological consistency, but the creation of a system which allows the state, in effect, to buy services from the private sector without either subverting the essential mission of the agency or disregarding the church-state separation principle to which the state is bound (AJC 1990, 8).

The character of these relationships has been anything but clear and defined; indeed, the network of social service provision is complex, intertwined, and frequently ad hoc (Wineburg 2001). While government may pay the bills, social services in the United States are largely delivered by a mix of for-profit, nonprofit and religious contractors, rather than by government agencies. As a Task Force of the American Jewish Committee has delicately noted, “problems” may arise when provision of services by a religious provider is inconsistent in some fashion with the mandates of state law or with constitutional imperatives. For example, Catholic foster care agencies are funded in Illinois despite their noncompliance with state law mandating that teens be provided with birth control. The Salvation Army receives substantial funding despite being “pervasively sectarian” by almost any definition of that term (Winston 2001). These and other “problems” have frequently been “solved” by unspoken understandings, “otherwise known as ‘not talking about it’” (AJC 1990, 8). One of the unanswered (and troubling) questions raised by the political debate over Charitable Choice and its progeny is the effect increased public attention to these partnerships will have on those longstanding pragmatic and unspoken understandings.

Given this history and background, one might have expected that Congress would address several important questions: what is meant by “faith-based” organizations (FBOs) for purposes of the

legislation? Do the FBOs targeted by Charitable Choice differ from those with a long history of governmental contractual relationships? If so, how? What are the barriers to their participation in social service delivery? To what extent are those barriers constitutionally mandated? What is the level of availability and interest, and what are the capacities, of these organizations? Few of these questions, however, found their way into either the legislation or the Congressional dialogue.²

Assumptions and Evidence

As Kennedy and Bielefield have noted (2002), Congressional support for adoption of the Charitable Choice provisions rested primarily upon three assumptions:

The existence of untapped resources to address social ills (the “armies of compassion” to which President Bush and others frequently allude.)

The existence of barriers preventing participation in contracting by FBOs unwilling to secularize; and

Superior performance by FBOs when measured against traditional nonprofits or government agencies.

However, evidence for these assumptions is sketchy at best.

(1) Armies of Compassion

In “Religious Congregations and Welfare Reform: Who Will Take Advantage of Charitable Choice” (1999a), Mark Chavez used data collected in 1998 by the National Congregation Study to determine the extent to which congregations might be inclined to take advantage of the funding opportunities offered by Charitable Choice. He found that larger congregations—those with over 900 regular attendees, or fewer than 5% of all congregations—were more likely to have social service programs; that ethnicity was the most significant predictor of willingness to participate (predominantly black congregations were five times as likely to seek public support); and that theologically liberal congregations were more willing to work with government. Chavez concluded that it was unrealistic to expect an increase in the relatively small number of congregations providing social services, a conclusion bolstered by additional findings that congregations are limited in their capacity to operate formal programs. Only 12% of American congregations operated such programs under their own auspices in 1998, and the programs they are most likely to engage in are those that address

² In contrast to other portions of the welfare reform legislation, the record contains relatively little debate over Section 104. “What little Senate debate there was on Charitable Choice focused on the provision’s constitutionality” (Friedman 1997).

immediate, short-term needs. While congregations are adept at mobilizing small groups of volunteers to conduct well-defined, periodic tasks, they are less able to mount programs requiring sustained involvement and long-term goals (1999b).

Thus far, Chavez' predictions have held up; even those states mounting significant outreach efforts have seen only minor increases in participation by FBOs who had not previously contracted with a government agency (Kennedy and Bielefield 2002; Center for Public Justice 1999).

(2)Anti-religious Bias

A few weeks after the establishment of the White House Office on Faith Based Initiatives, the *Wall Street Journal* published an article by John DiIulio, Jr., the first director of that office. While DiIulio explicitly recognized the absence of social science research on efficacy, he repeated the assertion that

The 'Charitable Choice' provision of the 1996 welfare reform law changed the federal government's procurement and performance-based contracting rules so that religious organizations that provide social services could compete for support on the same basis as other non-governmental providers of these services, and do so without *having to hide their religious basis*. (emphasis supplied) (DiIulio 2001)

The assumption—the “given”—is that prior to the passage of Charitable Choice, faith-based organizations could contract with government only if they were willing to secularize, to mask their religious roots and identities. However, Stephen Monsma, a well-regarded scholar and an enthusiastic proponent of Charitable Choice, found relatively little evidence of such bias. In his 1996 widely reviewed book *When Sacred and Secular Mix*, Monsma reported on the religiosity of schools and agencies receiving government funds, and the problems they experienced related to their religious expression. While 30% of respondents noted that questions had arisen related to religious practices, only 11% reported that they had been required to curtail such practices. As Monsma notes, most of those had to do “with required religious activities, especially with required attendance at Sunday church services.” (Monsma 1996, 89) Monsma also documents extensive and open religious activity by faith-based contractors.

It is difficult to reconcile the reality of long-standing religious involvement in government social service provision with the assertions of widespread anti-religious bias that accompanied passage of

Section 104. One plausible explanation is that Congressional supporters were simply unaware of the degree of religious involvement in social service delivery. Others have suggested an alternative explanation: that Charitable Choice represents an attempt by some elements of the Christian Right to “control the narrative”—to define what is to be considered genuinely religious for purposes of accessing limited government funds (Chavez 2001, Sullivan 2001). They point out that Catholic Charities, Lutheran Social Services and even the Salvation Army have been faulted for having become “secularized” (Loconte 1997, Loconte 1998); the very attributes that have made those agencies attractive as government contractors—norms of professionalism, use of licensed social workers—have been cited as examples of a diminished “faith” component. Under this view, the use of “faith-based” terminology is a subtext of the larger culture war, and the issue is not whether religious organizations should be receiving government funding but rather which religious contractors should be preferred (Sullivan 2001).

Those who believe, with Marvin Olasky, that the poor “need the internal pressure to [as Booker T. Washington said], live honored and useful lives modeled after our perfect leader, Christ” (Chernus, 2001), seek an end to poverty through individual transformation, achieved through conversion of the poor to a particular version of Christianity. Poverty, in this formulation, is a result of individual moral inadequacy, the lack of proper values and internalized norms. Other religious organizations, like Catholic Charities, argue that “generally the poor are no more in need of religious instruction and worship than the rest of society” (Daly 2001), that poverty is predominately a societal issue to be addressed by job creation programs, educational reform or similar structural approaches. Those who hold to the necessity of personal transformation believe that organizations that don't equate poverty with a failure of values are not authentically “faith based.” On this account, Charitable Choice is at base a theological dispute between religious traditions with different theological perspectives on the causes of—and remedies for—poverty, a return to religiously-informed historical disputes about the deserving versus the undeserving poor (Handler and Hansenfeld 1997).

Indeed, the distinctions between and among religious organizations have become a critical element in early efforts to study implementation of Charitable Choice and to determine the legitimacy, or lack thereof, of barriers to their equal treatment. When the White House issued its report on those barriers, “The Unlevel Playing Field,” it cited as evidence of “a widespread bias against faith and community-based organizations” that “some kinds” of religious organizations are restricted from

applying for government funds. The typology of various religious organizations, and the consequences of those categories, was recently explored by Smith and Sosin in an article entitled “The Varieties of Faith-Related Agencies.” Acknowledging the doctrinal assumptions underlying Charitable Choice, Smith and Sosin noted that

“ ‘Faith-based’ agencies are attractive to many policy makers, scholars and lay people because they appear to emphasize thrift, individual responsibility, less government, responsiveness and flexibility in the provision of services. They also seem to allow clients to be personally invested in their own rehabilitation. Nevertheless, these are hypothesized benefits, and it is not simple to assess the hypothesis.” (2001)

Smith and Sosin conclude that most agencies—faith-based or secular—focus on protecting the dignity and rights of clients, rather than on building individual responsibility or achieving personal transformation, and that if governments are trying to encourage such transformations, they will have to be “extremely selective.” Selectivity among religious providers on the basis of their beliefs, of course, would raise significant constitutional concerns.

More recently still, “Finding Common Ground” published by the Working Group on Human Needs and Faith-Based and Community Initiatives, included a recommendation that

“Research and evaluation should pay attention to the issues that arise from the different types of faith-based and community organizations in the provision of service, and from the inclusion of a greater number and variety of faith-based and community organizations in service provision.”

The report included a sophisticated typology of religious characteristics of social service and educational organizations, ranging from those described as “faith-saturated” through “faith centered” “faith related” “faith background” “faith-secular partnership” and finally, secular. Other scholars have pointed to important distinctions among the characteristics of organizations that would collectively be considered “faith-based,” and have noted the policy implications of these variations (Jeavons 1998).

A recognition of the significant theological and organizational differences among religious organizations reinforces the difficulty for public administrators of determining which barriers are inappropriate and which may be constitutionally required.

The White House report on barriers faced by FBOs lists a number that implicate accountability. The report lists as a major barrier, for example, “needlessly burdensome” regulations. While there are undoubtedly regulatory excesses, even relatively simple administrative reporting can burden very small, grassroots organizations unfamiliar with such requirements. The report suggests that it is these smaller organizations that are the target of Charitable Choice and the President’s Initiative: it notes as evidence of bias that smaller groups receive relatively little financial support from government. But one is justified in asking whether this bias has anything at all to do with the faith component of such organizations, or whether it reflects instead a concern about organizational capacity. Other White House findings are more straightforward: it is clearly appropriate to ensure that restrictions not required by the constitution be eliminated, and that the free exercise rights of FBOs be honored. If Charitable Choice and its progeny make government agencies and public managers more conscious of the rights of both religious contractors and their clients, that result alone will be a favorable outcome.

If the attempt to identify bias and remove barriers teaches us anything, it is that the wide variety of faith-related and religious organizations, and the long-standing and complex interrelationships between secular and sectarian providers, defy the easy sorts of characterizations that accompanied passage of Section 104 (Wineburg 2001) and that have characterized the ensuing political and policy debates.

(3)Comparative Efficacy

While DiIulio and others who have studied faith-based social service delivery have been careful to note the dearth of empirical evaluation data, political figures—beginning with the President—have treated the greater efficacy of FBOs as a proven fact. A review of the literature, however, yields very little evidence of efficacy, pro or con, and suggests areas deserving of further attention and study.

Indeed, while there has been a flurry of scholarship addressing issues peripheral to efficacy—for example, capacity of FBOs (Edin and Lein 1998, McCarthy and Castelli 1998, Alexander 1999),

feasibility of FBO participation in welfare reform (Bartkowski and Regis 1999), the impact of government contracting on program planning (Netting 1982, Bolduc 1984, Netting 1984), likelihood of congregational participation in Charitable Choice initiatives (Olson et al. 1988, Chaves 1999), congregational activity in social service delivery (Wineburg 1992, Thomas et al. 1994, Grettenberger 1997, Wood 1997, Printz 1998, Williams et al. 1999, Cnaan 2000), political and constitutional questions (Esbeck 1997, Friedman 1997, Segal 1997, Minow 1999, Kennedy 2000, Ryden 2000), and the early impact of the legislation itself (Sherman 2000, Winston 2000, Wubbenhorst 2000)—there has been virtually no disinterested examination of comparative effectiveness.

In 1978, Rudolf Moos, Barbara Mehren and Bernice Moos evaluated a Salvation Army alcoholism treatment program, and determined that it performed as well as other similar treatment programs (Moos, Mehren, and Moos 1978). In 1981, David Desmond and James Maddux investigated the impact of religious programs on chronic heroin users. Desmond and Maddux noted that abusers who joined the program willingly achieved abstinence more frequently than those whose participation was coerced, and that some participants (notably Hispanic clients) tended to self-select treatment options according to religion. The researchers, however, could not conclude that religious programs were more effective than other treatment options. (Desmond and Maddux 1981). A study conducted by Carolyn Voorhees in 1996 attempted to determine the impact of church-based smoking cessation interventions; Voorhees compared an “intensive, culturally relevant and spiritually-based church intervention” involving sermons, testimony, volunteer counselors and follow up evaluations to a “minimal self-help” approach. The intensive intervention was found to be more effective (Voorhees et al. 1996), but whether this was due to intensity or religion was not addressed. And in 2000, Alan Richard, David Bell and Jerry Carlson followed recovering drug addicts after treatment in order to examine the relationship between reduction in alcohol and drug use and religiosity. While study findings supported the hypothesis that participation in a “religious moral community” can affect use, the authors concluded that there was no clear relationship between behavior and individual religiosity. (Richard, Bell, and Carlson 2000).

By *efficacy* is meant the measurement of outcomes: when someone is placed in a job by a faith-based organization, for example, do they hold the job for a longer time than clients placed by government or by a secular contractor? Do they make more money? Stay off public assistance longer? Any measurement of efficacy requires careful definition of terms. If the intended beneficiaries of Section

104 and its progeny are not the more traditional religious organizations that have been doing business with the state for decades, what characteristics shall be used to distinguish the YMCA, Salvation Army, Catholic Charities, Jewish Welfare Federation and countless other undeniably religious organizations that have long been involved with government social welfare programs from the sorts of faith-based examples cited by Senators Ashcroft, Abraham and others during Congressional debates³? Size? Lack of a 501(c)(3) charitable affiliate? Lack of previous experience as a governmental contractor? Location on the typology produced by Finding Common Ground? If it is the difference between organizations that witness and those that evangelize, as some have suggested, what do we make of the fact that these are concepts exclusive to Christianity?

Administrative Context and Challenges

While a number of pundits dismiss recent political enthusiasm for faith-based partnerships as a cynical attempt by Republicans and President Bush to placate, or play to, the Christian Right, this explanation ignores the bipartisan embrace of such initiatives, their timing, and—most significantly—the political context within which they have emerged. It is far more illuminating—and arguably more accurate—to view Charitable Choice and its progeny as the latest extension of a trend that has been reshaping governments, particularly at the state and local level, for at least the past twenty-five years (Guislain 1997, Besley and Ghatak 1999). While that trend is generally referred to as “privatization,” or “reinvention,” the more accurate term is “contracting out”—and it is used here to mean the vastly increased use of private for-profit and nonprofit providers to deliver government services pursuant to contractual agreements.

While governments have always purchased goods and services—including social services—in the market, the practice has grown significantly since the late 1960s (Starr 1988). It has grown particularly in the social service arena (Smith and Lipsky 1993), where contractors are as likely to be nonprofit agencies driven by mission than business organizations driven by the profit motive, and where it presents issues quite different from agreements to purchase computers or pave city streets (Dannin 2001, Kennedy 2001).

The enormous growth of contracting out, where services are increasingly provided and paid for by government but delivered by private contractors, raises significant public policy issues, many of

³ See Appendix

which (despite a copious literature dealing with privatization) have been ignored by policymakers intent upon “reinventing” government, with the result that public sector partnerships with businesses and nonprofit organizations are arguably creating a new definition of government (Kennedy 2000). The rise of the liberal state specifically entailed a sharpening of the public-private distinction. Public and private are “central terms in the language of claims making.” (Starr 1988). The blurring of that distinction has significant and far-reaching implications.

To pose the issue in another way, we might consider whether contracting is *extending* rather than shrinking, the state. That is, does the substitution of an independent contractor for an employee equate to a reduction in the scope of government, as proponents believe? Or, as Donald Kettl has suggested (1993), does the substitution operate instead to shift the locus but not the scope of government activities, and thereby blur the boundaries between public and private, making it more and more difficult to decide where “public” stops and “private” begins (Gilmour and Jensen 1998, Kennedy 2001)? If we are, indeed, altering traditional definitions of “public” and “private” by virtue of these new relationships, public managers will have to cope with the effects of that alteration on a constitutional system that depends upon the distinction as a fundamental safeguard of individual rights.

Providing government service through contracts with private organizations also raises more traditional management and accountability issues (Gilmour and Jensen 1998, Rosenbloom, Carroll, and Carroll 2000). While not the most recent exploration of those issues, perhaps the best description appears in Nonprofits for Hire (Smith and Lipsky 1993), where the authors note

American social policy is in the midst of a dramatic restructuring of the way public social services are provided. Although government funding of nonprofit organizations dates to the colonial period, only in the last 25 years did this government-nonprofit strategy emerge as a widespread and favored tool of public service delivery. But entrusting the most vulnerable citizens and the most delicate service tasks to private agencies is not simply a matter of choice between “making” or “buying” services. This might be the case when one considers contracting out for pencils, computer services or strategic weapons. But when it comes to purchasing the care and control of drug addicts, the safety and nurturing of children, the relief of hunger and the regulation of family life (through child protective activities) from private agencies, other values than efficiency are at stake. We contend that

the impact of this transformation on the future of the American welfare state has not received adequate attention. (11)

Among the issues Smith and Lipsky address is the transfer of state power to private providers.

Like teachers, police officers and welfare workers, service providers in the nonprofit sector manage scarce resources by coping with their jobs in such ways as to render them not simply implementers of public policy, but ‘makers’ of public policy. (116)

In fact, if workers in nonprofit agencies are executing government contracts, logic compels us to consider them government agents. Failure to recognize that reality, and the lack of transparency of such arrangements for service delivery, threatens to compromise both legal and political accountability—a problem that is inevitably compounded when government services are provided by pervasively sectarian, faith-based organizations with a First Amendment right to religious autonomy.⁴

In fact, there are two distinct types of accountability implicated by contracting out in general and by contracting with FBOs in particular: constitutional accountability and political accountability. Constitutional accountability is a “regime” problem: insuring that the method of delivering government services is consistent with the legal framework and overarching values of the *polis*. The other is a management problem: developing and implementing methods that will ensure compliance with relevant rules and achievement of desired outcomes.

Constitutional accountability is complicated by the fact that the American constitutional system begins with a view of rights as essentially negative. That is, rights are defined as limits on the action of government rather than as affirmative entitlements. Despite the extension of positive rights through legislative action, courts still begin examination of challenges under the Bill of Rights by asking whether there has been state action. If there is no state action, there is no constitutional violation. To put it another way, only the government can violate the Bill of Rights. When we refuse to recognize that contractors are government agents, we lose the right to hold them to constitutional

⁴ Smith and Lipsky have also noted the effects on nonprofits of increased reliance on government funds. Among those effects is so-called “mission creep.” It is this experience of secular nonprofits that worries many religious organizations. They fear a loss of prophetic voice if they accept government funding. (Kennedy and Bielefield 2002).

standards. Despite a quarter century of increased contracting-out, constitutional jurisprudence has yet to address this reality (Kennedy 2001).

Political accountability includes government's obligations to providers, clients and taxpayers. Charitable Choice was originally described as an attempt to meet fairness obligations to faith-based providers by ensuring them a level playing field. The practical difficulties for public managers will come in attempting to provide that fair treatment of FBOs while still ensuring that clients' constitutional rights are safeguarded and their programmatic needs met, and while engaging in oversight sufficient to protect the public purse. When government is providing a service—whether directly or through an intermediary provider—government must ultimately be responsible and accountable.

Pretending that services delivered through faith-based or community organizations aren't being provided by government may satisfy those who are ideologically opposed to the welfare state, but it is a position that doesn't accurately reflect reality. If we decide, after full examination of all the issues involved, that it should be American public policy to continue and/or expand delivery of social services through nonprofit and faith-based providers, we need to shape rules and expectations to govern that process (Dannin 2001). At a minimum, we need to decide when government is acting for purposes of constitutional accountability; we need to fashion methods for evaluating performance and compliance; and we need to determine, as a matter of public policy, what the rights as well as the obligations of contractors—faith-based or otherwise—shall be.

At the very least, Section 104 requires federal and state governments to treat faith-based organizations equally in procurement and contracting. Before revising their public bid processes, if necessary to bring them into compliance, public administrators will need to consider a number of thorny constitutional issues.

What mechanisms are needed to ensure that non-mainstream and minority religions are treated equally in the bid process? If Charitable Choice is truly intended to invite greater participation by all faith-related organizations, politically controversial faiths like Nation of Islam or Wicca cannot be excluded.

Will the provisions of Section 104 allowing FBOs to engage in employment discrimination pass constitutional scrutiny? Provisions allowing such discrimination have been dropped from the current

version of President Bush's Faith Based Initiative, but they remain in Section 104 and several other Charitable Choice measures that are now law. Unless and until the Supreme Court weighs in, administrators are bound to follow the law as it currently reads; however, in some states, doing so may violate state constitutional provisions or state public policies.

What about programs that incorporate into their service delivery judgmental theological beliefs about race, or homosexuality, or the proper role of women? On the one hand, government is constitutionally prohibited from distinguishing among otherwise qualified bidders on the basis of theology. On the other hand, services incorporating such teachings may be harmful to some clients; certainly some professions (notably social work) consider such approaches inconsistent with appropriate treatment modalities. Professional judgments about the effectiveness of treatment regimens *are* appropriate when evaluating the responsiveness of a particular bid, but in this context their use can easily lead to charges of religious discrimination.

Government fiscal or programmatic monitoring of religious organizations cannot rise to the level of entanglement for purposes of the *Lemon* test (or what is left of it). This restriction on the permissible level of government scrutiny requires public managers to strike a delicate balance between accountability and intrusiveness.

There are also purely administrative issues involved in implementation of Charitable Choice. How shall organizational capacity be developed? How shall previously unused FBO providers be identified and persuaded to enter into contractual relations? How should government units deal with the cash-flow issues that bedevil most small, grassroots organizations? What skills do government middle-managers need in order to monitor FBOs for constitutional compliance?

In the wake of Section 104, different states have taken different approaches to these issues, and to Charitable Choice implementation generally (Kennedy and Bielefield 2002). Their experiences, and the experiences of the for-profit, non-profit and religious providers that have participated in the privatization of government service over the past twenty-five years, must provide what guidance is available as public administration embarks on yet another extension of service delivery privatization.

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