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Antitrust Policies: American Experience in Twenty Industries, by Simon N. Whitney

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BOOK REVIEWS

ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES. By Simon N. Whitney. New York: Twentieth Century Fund, 1958. Two volumes: Pp. xxiii, 560; x, 541. \$10.00.

In 1950 the Trustees of the Twentieth Century Fund commissioned Dr. Whitney to explore the question: "How effective had the antitrust acts actually been in curbing monopolies and restoring conditions of competition?"¹ The Fund's Committee on Antitrust Policy in an afterword explained that the antitrust literature had concentrated on the question of "whether violation has occurred" while slighting an examination of the economic effects of decrees "on the behavior of firms or the status of competition in the affected industries."² In the process of fulfilling his assignment, Dr. Whitney simultaneously sought to "shed some light on the relative merits of the viewpoints expressed by two conflicting groups of antitrust supporters: "those who feel it is working well and either needs no change or at most relaxation in certain details, [more reliance on the rule of reason] and those who feel that it is not effective and should be applied much more drastically [dissolution of giant corporations or divesting of their advantages in raw material, patent or distribution positions]. . . . Their clash arises over the question whether [governmental] watchfulness has in practice been successful in preserving the kind of competition a successful economy needs."³

The author, who became chief of the Fund's Research Department prior to assuming in 1956 his present position as Chief Economist of the Federal Trade Commission, seeks to accomplish his dual task by means of studies of twenty representative industries. The eight studies selected for the first volume—meat packing, chemical manufacturers, steel, paper, automobiles, cotton textiles, bituminous coal and petroleum—include one each from six broad classes of the Census of Manufacturers as well as the two largest minerals industries. To supplement the eight "major" studies with a broader sample on which to rest conclusions, the second volume employed an analysis of industries with "famous antitrust suits."⁴

1. WHITNEY, ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES vii (1958) [hereinafter referred to as WHITNEY].

2. 2 *id.* at 442.

3. 1 *id.* at 9-10.

4. *Id.* at 13.

The twelve included were cast iron pipe, tobacco products, anthracite, aluminum, shoe machinery, motion pictures, tin cans, farm machinery, corn products, cement, Pullman cars and insurance. One can scarcely complain of any obvious bias in the overall selection.

Each study is treated in much the same manner: an historical description of the industry's industrial organization; the antitrust cases which have emerged and (at least when won by the government) their effects; an examination of the industry's resulting competitive status as reflected in its structure, behavior and performance; and a handy summary. In addition an appendix to Volume 2 includes brief critical comments on each of the twenty case studies. For this purpose the author attempted to secure comments from both an industry representative and a disinterested scholar. The thirteen industry representatives who accepted the challenge (labor, government, or former governmental representatives substituting in the remaining situations) were far more charitable toward Whitney's analysis and conclusions than the academicians, including this reviewer in his critique of the cement chapter.

The book is well organized and its preparation reflects painstaking effort. Dr. Whitney and his staff of researchers have assembled a wealth of valuable economic data from industry publications, government reports, published monographs and unpublished doctoral and master theses—as well as court decisions and decrees. The veritable cornucopia of legal and economic data and their related source citations insures that the two volume study will find a useful spot on the reference shelf of any economist or lawyer interested in industrial economics and anti-trust policy. However, his deliberate effort to eschew theoretical study in order to achieve “a practical study of industry and national policy in action”⁵ results in a failure to ask many important economic questions and to present (or to indicate the difficulty or impossibility of supplying) data helpful toward their answering.

Summarizing in a final section⁶ the impact of the antitrust laws on the economic organization and operation of these twenty industries, the author reaches the following conclusions concerning the economic effect of antitrust on today's economy:

1). Dissolution cases have not made a major contribution toward the growth of competition, nor are they likely to. In the classic cases of government defeat (American Can in 1916,⁷ U.S. Steel in 1920⁸ and

5. *Ibid.*

6. 2 *id.* at 385-438.

7. *United States v. American Can Co.*, 230 Fed. 859 (D. Md. 1916).

8. *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).

International Harvester in 1927⁹) economic events generated a decline of the defendants' market shares anyway. Moreover, other forces (including the Surplus Property Act of 1944) are leading to declines in market concentration in aluminum, titanium and meat packing despite aborted quests for dissolution. In the classic cases of government victory (Standard Oil¹⁰ and American Tobacco¹¹ in 1911) declines would have come about notwithstanding, though government intervention speeded the process. Although dissolution of the du Pont "powder trust" in 1912 is said to have been beneficial to the explosive industry, the divestitures in 1918 of Corn Products' unimportant plants and International Harvester's secondary lines of equipment were found to produce insignificant results, especially since other factors were encouraging the growth of rivals. Divorcement suits are somewhat more enthusiastically received for reason of their creating freer market relationships. But no great practical consequences can be traced to the anthracite divorcements, while motion picture divorcement is said to have aggravated the impact of television upon exhibitors, since formerly integrated producers have fewer incentives to grind out pictures in volume and exhibitors are encouraged to bid sharply for the reduced film supply. Whitney believes that dissolution directed at oligopoly structures would probably be wasteful and accomplish little since he finds no evidence that big business "operates less efficiently for the public welfare than industries composed of many small firms."¹² Since there are almost no firms left that are vulnerable as monopolies under Section 2 of the Sherman Act, Whitney believes that dissolution can be retired from our antitrust arsenal, while we concentrate on divestiture proceedings under the revised Section 7 of the Clayton Act. In summary, dissolution served a useful function "in some instances, by shortening the period needed for competition to assert itself against an original near-monopoly; but it has not achieved, and has not seemed likely to achieve, valuable results when used in oligopoly situations."¹³

2). The antitrust laws, by creating a fear of prosecution and rendering collusive agreements unenforceable has successfully reduced the prevalence of *overtly* collusive price, output, basing-point and other cartel-like activity. (However, the role which mergers and other concentration-inducing or perpetuating activities may have played in reducing the need for illegal collusion is not discussed.)

9. United States v. International Harvester Co., 274 U.S. 693 (1927).

10. Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

11. United States v. American Tobacco Co., 221 U.S. 106 (1911).

12. 2 WHITNEY 392.

13. *Id.* at 390.

3). The antitrust laws have also helped to prevent the monopolistic use and to lessen the competition-inhibiting use of such practices as tying clauses, exclusive dealing and price discrimination—although such practices are said to be less a cause than consequence of monopoly.

4). No characteristic tendency is found toward greater or lesser concentration. Certain near-monopolies have disappeared, but the leading firms as a group have usually “held their own or gained some ground as a combined result of economies of size and of growth through merger.”¹⁴ Vertical integration has constituted a real economic issue in fourteen of the twenty industries studied, while entry is found to have become increasingly difficult.

5). Competitive practices in the typical industry studied are found to reflect the oligopolistic structure. Prices are “administered” rather than “market determined.” Price leadership and a form of price uniformity conducive to price stability is prevalent. There is little prospect of generating more price competition. Moreover, if somehow success were achieved in attaining significant price competition, it is likely to be cutthroat and result in either monopoly or secret agreements. However, to the non-price product rivalry induced by lack of price competition is attributed our rising standard of living. Even the \$9 billions per year of advertising (as of 1955) is found to constitute not really waste, but a blessing in disguise. Not only is 20 to 25 per cent of it presumed to subsidize consumers of the press and air waves, but advertising also provides the basis for raising living standards by informing the public about new products and by enabling economies of scale (the relationship between volume and long-run average costs) in both production and distribution, through concentrating demand on particular brands in a national market. Moreover, advertising has contributed to the growing intensity of interindustry competition.

6). Finally, almost every industry is given a gold star for its glowing “performance” whether measured by its vast increases in production or output per man hour. (No effort is made to determine whether any of these industries might have done better, equally as well, or worse under different conditions. Moreover, improvement in agricultural productivity during the past two decades would exceed that of virtually all on his roster. That supplying industries may largely explain the performance in agriculture is irrelevant in terms of Whitney’s measuring rod, since he makes no effort to ascertain the extent to which efficiency gains are the result of improvements in a supplying industry.)

14. *Id.* at 405.

7). In a final overview Dr. Whitney concludes that the economic progress which characterizes American industry is at least in part attributable to the kind of competition which prevails—and which our antitrust laws have helped to promote, both directly and through the omnipresent hauntings of Sherman's ghost. But vast natural resources, a huge domestic market, American political policies and traditions (political stability, respect for property, a minimum of controls, positive encouragements to business), relative freedom from costly wars, and a pioneering and competitive national character must share the credit. Indeed the antitrust laws are found to be as much an effect as a cause of our national spirit. However, their presence has helped to preserve the "competitive spirit" by (1) erecting "a barrier to the 'cartelization' of American industry along European lines; (2) reducing "attempts to create monopolies, by merger or otherwise"; and (3) helping "to maintain both equality of opportunity and freedom of entry in industry—a never-ending struggle in which there are bound to be defeats along with successes."¹⁵

Dr. Whitney's evaluation that our antitrust laws have made a modest, though significant, contribution to our economy seems accurate enough to this reviewer. But I find unconvincing his recurring assurance that the remedial character of our current antitrust policy is sufficient. Especially disturbing is his calm acceptance of the suppression of price competition in oligopolistic industries—at least when it develops "spontaneously," and without *formal* collusion. "Spontaneous" may have been the round of cigarette price increases in 1931 when tobacco prices had plummeted, as well as recent rises in steel prices during periods of appreciable unutilized capacity, and the hike in Ford's previously announced prices on its 1957 models following General Motor's announcement of a greater price increase. But it is certainly inconsistent with independent action designed to increase an individual firm's market share.

In his critical analysis of the Bituminous Coal Commission, he correctly states, "There is no way to express in a statute or regulation any wholly just and equitable reconciliation of the conflicting claims of producers and consumers."¹⁶ However, he expresses no similar concern for a "conflicting claim" when the resolution is privately administered by price leadership. Whitney finds no undesirable consequences in General Motors' ability for the past thirty years to set "a 'standard' price

15. *Id.* at 436-37.

16. 1 *id.* at 403.

which would yield a 'standard' return on its investment."¹⁷ Nor does Whitney comment upon the "standard" return which has enabled GM to realize on the average well above 20% after taxes on its net worth since World War II, notwithstanding the appreciable cost inflating effects of advertising and annual styling changes. The "spontaneous price leadership" of oligopoly—or monopoly for that matter—*might* over the long haul (but not cyclically) generate prices close to the level which price competition would generate if either entry or interindustry competition is a pervading force. However, such latent competition ordinarily appears to provide insufficient consumer protection, since Whitney admits the presence of substantial barriers to entry. Even in his defense of the cellophane industry¹⁸ he fails to show that the substitutional effects of "interchangeable rivals" were sufficiently great to create an exceedingly high elasticity of demand for cellophane—as might be expected under conditions of monopolistic (differentiated) competition among many products sold in the same market.

Progressiveness and product competition are, of course, commendable, but many will remain unconvinced that these are inevitably inconsistent with greater market (or alternative) controls over the price-making process. Industrial statesmanship (with or without prods by Sherman's ghost) will scarcely be deemed an adequate substitute in a democratic society. Moreover, it is not at all clear that the occasional statesman-like, self-abnegation of steel oligopolists in underpricing their product during the extreme shortage of postwar periods¹⁹ constitutes a compensating advantage, since private allocation schemes will inevitably add to the disadvantages of new entrants (lacking historical quotas) in purchasing industries. (In a later chapter Whitney reports that Kaiser-Frazer paid \$40 million more than rival auto firms would have had to pay for steel during the gray market period of shortage.²⁰)

Dr. Whitney's explanation of oligopolists' resistance to price declines in times of redundant capacity is both deficient in economic analysis and questionable in its conclusions. Steel,²¹ cement²² and farm machinery²³ producers are defended in their resistance to price reductions during recessions in demand because the price-quantity response for the industry as a whole is found to be inelastic. But a monopolist would

17. *Id.* at 491.

18. *Id.* at 219-220.

19. *Id.* at 312-13.

20. *Id.* at 477.

21. *Id.* at 309.

22. 2 *id.* at 289.

23. *Id.* at 252.

behave likewise and inelasticity of the total demand schedule does not inhibit farmers or bituminous coal producers²⁴ from cutting prices when demand declines. Whitney suggests that the economy would not be benefitted by price decreases because potential net savings to consumers would not bulk large from reductions of particular products²⁵ and because consumers would not appreciably step up their quantity demanded (and, hence, the amount produced) because of a particular price reduction. But a fallacy of composition is entailed in each handle of his rationalizations, and he fails to examine the issue of consumer real purchasing power.

Greater gross margin (price-marginal cost) flexibility in administered price industries during recessions in demand could generate an appreciable shift in the money flows from gross cash retentions by business to household incomes. In turn, households might be expected to have a higher marginal propensity to spend than would business which is confronted with excess capacity. Hence, a less expansionary governmental monetary-fiscal policy could suffice in combatting the macro-economic problem of deficient demand, thus lessening the dangers of inflationary consequences. Indeed, many economists would attribute at least part of the persistent upward drift of the American price level since 1952—despite recurrent periods of deficient aggregative demand—to the failure of administered price industries to behave in a competitive price direction.

Whitney applauds only those increases of price competition which antitrust action can bring about by attacking collusive agreement. (But, "Supporting evidence, such as letters, minutes of meetings, or testimony of participants, is necessary to prove collusion."²⁶) He commends attacks on the formal exchange of price lists in the paper industry, although conceding that it was more a matter of convenience and that a basic change in results can scarcely be expected.²⁷ He likewise commends the attack on collusive use of the basing-point system, but he admits and appears unconcerned that a virtually equivalent formula results when oligopolistic sellers use the system without overt agreement.²⁸ He has little regard for those who would infer either collusion, unfair competition, or discrimination from an industry-wide adherence to a rigid pattern of delivered prices. Whitney believes such efforts to induce unsystematic "beating" of competition might only harm buyers themselves (by creating, in turn, more uncertainty and price competition among them?).

24. 1 *id.* at 419-20.

25. *Id.* at 209-10; 2 *id.* 207-09.

26. 2 *id.* at 417.

27. 1 *id.* at 342.

28. *Id.* at 287; 2 *id.* at 395.

Dissolution, as a tool for reducing oligopolistic pricing restraints, is also opposed. He fears that, if successful, it will generate such great price flexibility that losses due to cutthroat competition in depression would probably result either in monopoly through merger, excessive exits or secret agreements.²⁹ If the industry managed to remain competitive, insufficient capacity and exceedingly high profits would accompany the next boom,³⁰ although high profits might induce excessive entry and capacity during the boom.³¹ Concerning Whitney's latter fears, it would appear that he sells businessmen much too short in suggesting that they neglect longer-run prospects when they make investment decisions concerning abandonments or additions to an industry's stock of capital. Expectations of high prices and profits during the next boom would slow down decisions to retreat during a recession's "cutthroat" price competition and vice versa. Indeed, such long run considerations are not entirely lacking in bituminous coal and textiles—in which industries, it might also be added, "cutthroat" competition has resulted in neither monopoly or effective secret price agreements.

However, Whitney's objections to the remedy of dissolution are not confined to his impression that modern industry cannot survive price competition. The "advantages of size" would be sacrificed. Save for his admission that U. S. Steel has no production economies over its major rivals and that production economies of scale are reached at a relatively low level in cigarettes, Dr. Whitney makes little systematic effort to examine quantitative estimates of scale economies. Indeed, Joe Bain's much-cited estimates, surprisingly, are nowhere mentioned.³² He is confident that an increase in the number of cigarette firms, especially if accompanied by reduced advertising expenditures, would lead to a rise in distribution costs which would more than offset any reduction in profit and advertising margins.³³ Any dissolution of the major farm machinery producers "might have the effect of increasing both unit costs of both manufacturing and distribution."³⁴ Any split-off from General Motors of either an automotive or non-automotive division, it is said, would result in higher all-around costs or reduced quality³⁵ yet one might wonder if division executives would not get a greater "boost in morale"

29. *Id.* at 313; 2 *id.* at 420.

30. 1 *id.* at 313.

31. *Id.* at 312.

32. Bain, *Economies of Scale, Concentration and Entry*, 44 AM. ECON. REV. 15. Whitney does, however, refer briefly to Bain's estimates of capital requirements for entry in his concluding summary. 2 WHITNEY 407.

33. 2 WHITNEY 27, 51-54.

34. *Id.* at 249.

35. 1 *id.* at 484-85, 494.

by becoming full-fledged bosses than they obtain from their unit's growth within the confines of an "executive bonus plan."³⁶ The relief sought in the abandoned dissolution suit of 1948 against the biggest meat packers "would probably have added to waste rather than to competition."³⁷ Yet the medium-packers have been more profitable than the giants;³⁸ only industry opinion is offered to support the proposition that independent brokers could not provide the arbitrage function in distributing meat as well as national packers;³⁹ and buying rivalry as between neighboring stockyards could have been enhanced, although economic concentration at each particular stockyard would not have been altered by the decree.⁴⁰ Any dissolution of major paper companies "would do damage to the policy of 'sustained yield' which most of them have adopted,"⁴¹ but no attention is given to the adoption of alternative governmental controls, where necessary, to promote conservation of timber.

Whitney also believes that any dissolution of large aluminum companies would entail a net loss of research development despite an achievement of "greater diversity" of approach.⁴² He fears that the higher cost of small scale shoe machinery manufacture might have offset the gains of competitive technological progress which could have accompanied dissolution of United Shoe.⁴³ Finally, he states, an outstanding record of progress has earned the chemical industry "the right not to be the first target of proposals to reform the patent system or dissolve large corporations."⁴⁴ But how could an industry based on rapidly advancing modern science fail to show a record of rapid technological progress? Even such European monopolists as I.C.I. and I.G. Farben have done this. Moreover, since the American chemical industry stands among the leading proponents of tariff protection, one might wonder if it has been significantly more progressive than its lower wage paying, European rivals?

Thoughtful proponents of dissolution do not propose to restructure American industry into the early nineteenth century, although Dr. Whitney's contrasting references to "small firms" suggests that the issue is one of particles versus planets.⁴⁵ Whitney's data and references suggest that although pure competition scarcely described the structure of the

36. *Id.* at 482.

37. *Id.* at 390.

38. *Id.* at 68-70.

39. *Id.* at 68, 71.

40. *Id.* at 40, 57.

41. *Id.* at 380.

42. 2 *id.* at 116.

43. *Id.* at 142-44.

44. *Id.* at 252.

45. *Id.* at 392, 437-38.

steel industry during the 1890's, it frequently described its price behavior. We know too little about economies of scale, but it seems improbable that most industries could be fragmented, without excessive sacrifice, to the moderate level of concentration which characterized steel just before 1900.⁴⁶ Nevertheless, substantial social gains might be forthcoming from even modest dissolution—even at some slight sacrifice in short run production efficiency: (1) Variegated competition in research activity and product introduction might generate a somewhat faster rate of progress by increasing the number of trial and error experiments of heretical ideas. By way of illustration, without the chance for American consumers to demonstrate their response to foreign manufacturers and American Motors, how long might we have had to wait for a refutation of the Big Three's certainty that no significant minority in the U. S. desired a smaller and simpler automobile. (2) A greater number of manufacturers in a given field can increase the independence and security of dealers or suppliers. Would not this provide a safer and less feudal solution than Dr. Whitney's suggestion that auto manufacturers exercise *noblesse oblige* by developing as "constructive human relations policies with their dealers as they do with their employees."⁴⁷ Moreover, one wonders if many of Whitney's listed "economies of size" might not be private rather than social. For example, in autos⁴⁸ the pre-emption of dealer positions and the manipulation of consumer tastes through styling cycles, mass advertising and the omnipresent weight of fashion-setting volume may contribute less to a further reduction of unit costs of majors than to an inflation of unit costs of minor rivals who are left unable to sell the modest volume necessary for production economies. (3) Political, social and psychological benefits would flow from decreasing the extent to which individuals, as consumers of ideas, products and personnel policies, are manipulated by the self-imposed, "socially responsible" decisions of a relatively small number of corporate managements possessing substantial exemption from pressures to allocate resources according to the dictates of market forces.⁴⁹ Surely an evaluation of an industry's contribution toward the public welfare must entail more than a counting of the physical output achieved. In turn, I suspect that most Americans would presume that the dissolution of corporations, which could be accomplished with no or only minor sacrifices in the production of physical goods, would result in industries which operate more "efficiently for the

46. 1 *id.* at 288.

47. *Id.* at 514.

48. *Id.* at 472-79.

49. Kaysen, *The Social Significance of the Modern Corporation*, 47 AM. ECON. REV. 311, esp. at 316-19.

public welfare."⁵⁰

Moreover, whenever society is reluctant to carry far the process of dissolution, strict limits might be placed on particular business practices which are conducive to coercion or exclusion when practiced by firms possessing (separately or jointly) significant market power. The entry-detering impact of full line forcing, exclusive dealing and systematic price discrimination is recognized by Whitney. But he is immobilized when it comes to proposing a "double standard" test by which such practices might be combatted where they fail to contribute to new entry or to behavior which enhances competition.⁵¹ He is worried that limiting the ability of major sellers to get "adequate representation" in the distribution of their products will result in a deterioration of dealer service or add to the supplier's costs. He fears that limiting the ability of major producers to meet the threat of potential competition by discriminatory price offerings will lead to wasteful duplication through backward integration by large canners⁵² or make any major petroleum refiner "a 'sitting duck' unable to resist raids by little competitors. . . ."⁵³ However, would not the emergence of such entrance and independent behavior (or the alternative general reduction of prices by majors) be socially desirable?

Furthermore, might not an application of the revised Section 7 of the Clayton Act be desirable against the current merger movement for geographical and product diversification when practiced by leading firms? Whitney appears to be unconcerned with this development. However, both existing and potential competition may be reduced by: (1) effecting the elimination of specialized enterprises more prone, upon occasion, to behave independently; (2) decreasing the tendency of enterprises bent upon gaining diversification to increase the number of alternative sources of supply through lateral entry with newly constructed facilities; and (3) increasing the areas where diversified firms, through their ability to meet competition selectively, may coerce existing or deter the emergence of new relatively specialized firms (without at least having contributed to competition by adding an extra seller when entering a new area).

Whitney also hesitates to recommend the development of a double

50. 2 WHITNEY 392.

51. Exclusive dealing or long term requirement contracts, when used by a new firm may assist entry into a concentrated industry. Unsystematic price discrimination will undermine basing point systems and other cooperative forms of oligopolistic price behavior.

52. 2 WHITNEY 226.

53. 1 *id.* at 136.

standard for related antitrust policies beyond the confines of litigation. This could be done, for example, by limiting advertising expenditures of relatively large enterprises, inducing the expansion of defense-related industries by means of direct governmental loans to new or smaller enterprises (in lieu of accelerated amortization which favors enterprises currently realizing appreciable earnings) and limiting the patent protection of leading corporations to defensive, non-exclusive grants. The only approval accorded by Whitney to extra-conventional antitrust policy appears in his commendation of provisions of the Surplus Property Act which facilitated the emergence of new entrance into basic aluminum and synthetic nitrogen manufacture.

One major shortcoming in Whitney's contention that government defeat in its quest for dissolution of U.S. Steel, American Can and International Harvester was relatively unimportant, is his failure to explain the inevitable stimulus that these decisions gave to a merger movement among the lesser firms in both these and other industries. Indeed, Whitney applauded the subsequent merger movement for its contribution toward reducing the overwhelming dominance by the above firms in their respective industries. However, might not the degree of concentration in these, and some other, industries be somewhat less today if the courts had dissolved these leaders—in turn reducing both subsequent incentives to merge and the toleration accorded merger in succeeding anti-trust proceedings?

On the whole, I think that Dr. Whitney has succeeded admirably in detailing for the Twentieth Century Fund the effectiveness of the anti-trust laws.⁵⁴ But his very success has only confirmed this reviewer's prior impression that these laws have not (to date) in practice been successful in preserving the kind of competition a successful economy needs. Since August Heckscher reminds us in his Foreword that the previous Twentieth Century Fund study in this field by Stocking and Watkins concluded that the trend toward collective controls and concerted action "is not, in our view, inevitable," perhaps it is now about time for the Fund to commission a comprehensive study to ascertain what particular changes in our antitrust laws and their administration (as well as related governmental policies) might increase the effectiveness of competition.

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54. *Id.* at vii.

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