

4 Mutual consent divorce

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Voluntary agreements have a central role in the efficient allocation of society's scarce resources. Subject to their constraints, people are assumed to pursue the transactions from which they expect the largest net benefits. Economists generally see little need for legal restrictions on the conditions that the transacting parties impose on themselves except when there are substantial external effects or a party has inordinate market power. Even then, efficiency dictates that legal restrictions force people to recognize the external costs or benefits of their actions or limit the exercise of market power rather than prohibit certain aspects of transactions. Yet when people reach probably the most important agreement of their lives – the decision to marry – they have very little control over the arrangement into which they are entering, owing to legal restrictions imposed on their transaction by the state. They have essentially no control over the basis upon which their agreement will be terminated, and, if it is terminated, the legal system gives them only limited control over the repercussions of the termination. Although a divorce can have external effects on the couple's children and society at large, the law does not address these concerns systematically. Market power is not a concern about these agreements.

In this chapter, I argue that increasing individuals' control over their marriage, especially the circumstances in which their marriage will be dissolved and the financial arrangements if that occurs, would be an improvement over the fault and no-fault grounds for divorce and the statutory requirements for the financial and custodial arrangements that have existed in the United States.¹ Although the grounds for divorce appear to be only one component of a marriage agreement, I argue that they have a fundamental impact on the quality of the relationship. Permitting divorce by the mutual consent of the spouses would also reduce the importance of the current faulty statutory financial arrangements at divorce.

¹ Most industrial countries have also adopted no-fault divorce laws, so the analysis presented here is equally appropriate in those countries. For a more detailed discussion of no-fault divorce in the United States, see Parkman (2000).

The state would still have a role in addressing the external effects of divorce on children.

1 A successful marriage

The essence of a successful marriage is a diligent search for a congenial spouse and then a commitment by all parties to make decisions based on the best interests of their family (Becker, 1991). The most obvious benefit from a diligent search is a reduction in the likelihood that the couple will experience the pain and anguish associated with divorce. Most adults want to marry and, among those who marry, essentially all believe that they would benefit from and are making a long-term commitment to their spouse (Glenn, 1996). People marry when they expect to be better off in that state and they divorce when at least one spouse concludes that has not been the result.

A divorce is more likely to occur if there is a faulty investigation of prospective spouses prior to marriage. After marriage, people obtain information about their spouse and other alternatives that cause some to conclude that their earlier optimism about the relationship was incorrect (Becker, Landes, and Michael, 1977). Some of this information could not have been anticipated during courtship, such as a dramatic change in a spouse's health, and, therefore, would not have altered their decision to marry. Other information, however, could have been obtained with a more thorough inquiry into fundamental issues, such as their mate's views on the desirability and number of children. A diligent search that revealed this type of information prior to marriage could alter at least one party's expectation about marriage to a particular person.

Although a successful marriage is clearly fostered by love and sexual attraction, it also benefits from the spouses making a stronger commitment to the welfare of other family members than they make to participants in markets or social activities. Marriage involves an ongoing relationship between people that seldom exists in other settings, so that many decisions by someone within a family have effects on the other family members. To the extent that these effects – which frequently follow from the parties' assuming more specialized roles – increase the welfare of the family members and, therefore, reflect the gains from marriage, they should be encouraged. A major source of their encouragement is the expectation of reciprocal actions then or later. A meal cooked by one spouse benefits all family members, as does the income earned by another spouse. In a market setting, a person seldom has the same incentives to address the concerns of others because the relationship is usually temporary.

The benefits of a strong commitment to marriage are especially important if a couple want children. Most adults want children and children present substantial opportunities for a couple to enhance their welfare. However, this welfare will usually follow from the parents' assuming more specialized roles. A married

couple who do not have children can continue to have careers and domestic roles that are similar to those that they had before marriage. Children change this situation by increasing the pressure for a couple to specialize within a relationship. The arrival of children usually results in one parent increasing the emphasis that he or she places on household activities. Because parents usually view having happy and well-adjusted children as being important, they may be tempted to share the responsibilities for child rearing. However, on closer inspection most conclude that a higher income will result from just one parent altering his or her employment rather than both altering their employment. Higher-paying jobs often require unexpected overtime and travel. If both parents reject that type of employment, they may be worse off than if only one parent – usually the one with the higher income-earning potential – makes that choice and the other, if he or she is employed, accepts employment that accommodates child care. The family, therefore, benefits from the couple's assuming more specialized roles.

Although searching diligently for a spouse and considering the welfare of other family members have obvious benefits, these choices can also impose costs on a party. The search for someone with whom you want to spend a significant part of your life can be costly in terms of time, money, and forgone opportunities. The time and money are obvious costs. Also, because it is often difficult to investigate new relationships while having an established one, a potential cost of additional search is the sacrifice of a current situation.

Making decisions during a marriage based on the best interest of one's family also can be costly. One spouse may have the opportunity for a career relocation that will impose adjustment costs on the other spouse. A psychological commitment to a spouse can be particularly devastating if eventually a person discovers that his or her spouse has not made a similar commitment. The cost of a long-term commitment to marriage is particularly apparent when a couple have children. Increased specialization within a relationship can impose long-term costs on a party. A couple can often avoid this type of specialization until they have children. They can maintain their careers, while dividing the responsibilities within their household. The specialization that results from parenthood can have longer-lasting effects than those commonly associated with people living together. Although this specialization is usually in the best interest of the parents and their children while a relationship lasts, it can be revealed as costly if the relationship ends. Skills developed in one household may have little value in another relationship and even less value in the marketplace, leaving a spouse who has emphasized domestic work vulnerable at divorce.

Although this can be a problem in a marriage of short duration, it is particularly a concern in longer marriages. If spouses specialize in income earning, that skill will be intact if the relationship ends. Those persons would lose their share of the household commodities provided by their spouse, but those commodities

may have decreased in value after any children have grown up and left the home. During the relationship, the spouses who worked in the home may have developed skills producing household commodities that do not have substantial value outside their relationship, and their income-earning capacity has deteriorated because of their working primarily at home. They may be worse off if the relationship is dissolved, compared with the situation they would be in if they had never entered the relationship in the first place.

When people make these critical decisions about marriage, they would be expected to weigh the benefits and costs of their choices with their being expected to pursue activities only so long as the benefits exceed the costs. They will search only as long as the benefits of additional search exceed the costs. Two particular problems occur in this decision-making process during marriage. First, some of the benefits are external to the decision maker and fall on other family members. Second, the benefits and costs of actions may not be simultaneous, with the costs frequently occurring before the expected benefits. Over the duration of a marriage, the potential contributions of both spouses create the incentives that are the basis for the marriage, but the asymmetry of their contributions can create incentives for income-earning spouses, for example, to dissolve their marriage later (Cohen, 1987). To increase the gains from marriage, it is important to encourage spouses to search diligently for a spouse, to appreciate the benefits of their actions to others, and to anticipate that their sacrifices will be reciprocated by the actions of others.

2 The legal environment

The quality of the decisions that people will make prior to and during marriage is very much a reflection of the incentives that they face, and those incentives in turn are very much a product of the legal environment. In marriage, the most relevant legal constraints are the grounds for divorce and the associated financial and custodial arrangements at divorce. Throughout most of American history, it was difficult to dissolve a marriage except when a spouse had committed acts that were so fundamentally detrimental to the marriage that he or she was held to be at fault for the failure of the marriage. These acts were usually adultery, desertion, or cruelty. During the period from 1969 to 1985, all the states in the United States replaced those grounds with the no-fault grounds of irretrievable breakdown or incompatibility or added the no-fault grounds to the existing fault grounds. Although technically the change was from fault to no-fault, the important change was from divorces being based on mutual consent to their being available to either spouse unilaterally.

The fault divorce system was predicated on the belief that the failure of a marriage could be traced to the actions of one spouse. However, marriages frequently failed because they did not meet the expectations of at least one

spouse, especially if the conditions discussed above did not occur: there was not a diligent search or both spouses did not make a strong commitment to the relationship. Seldom did a marriage fail just because one party had committed adultery, deserted their spouse, or been unacceptably cruel to their spouse. Even if these particular acts occurred, the reasons for the failure of the marriage were often more complex. Adultery could be the result of a belligerent attitude toward sexual relations by the other spouse, causing a spouse to look for satisfaction elsewhere. Desertion could be caused by a spouse being driven out of the home for a variety of reasons such as excessive drinking or drugs. Last, physical acts of cruelty could be the result of less obvious verbal acts, such as revealing an extramarital sexual relationship. Although these statutes recognized the type of acts that are detrimental to a successful marriage, the reasons for the failure of most marriages lay elsewhere.

More likely, when a marriage failed it was due to the spouses being exposed to new information about each other and their relationship as well as opportunities outside their marriage. If a divorce required evidence of fault and neither spouse had committed those acts, or at least their commission could not be proven, then a divorcing couple had to agree to fabricate testimony to establish the grounds. As the divorce rate rose under fault divorce, especially in the period after World War II, it became more common for couples to fabricate testimony to establish the fault grounds (Rheinstein, 1972, p. 247). That is not to say that they did this harmoniously. Frequently, only one spouse initially wanted the marriage to end and he or she was forced to make concessions to obtain his or her spouse's cooperation. These concessions, being based on the agreement of the parties, could ignore the arrangement provided by law. A spouse who had limited a career for the benefit of the marriage and faced the prospect of a fall in income if the applicable statutes were applied could demand more compensation to participate in the divorce. A combination of the reality of the marriage and these concessions was important in obtaining both spouses' cooperation.

Fault divorce was attractive because it encouraged spouses to make sacrifices that benefited their family based on the expectation that the marriage was a long-term commitment. The spouses knew that it would be difficult for their partner to dissolve the marriage without their cooperation. On the other hand, it gave substantial power to a spouse who did not want a divorce, potentially imposing a large cost on a spouse who made a mistake by incorrectly estimating the gains from this marriage. If the courts had limited divorces to unambiguous, non-fabricated evidence of fault, the outcome would have been a disaster. Numerous couples who eventually recognized that they had made a mistake would have been forced to continue a marriage that by any reasonable standard was a failure. By permitting fabricated evidence of fault, the courts permitted couples to dissolve marriages by mutual agreement when the net benefits to all parties were probably negative.

The difficulty of obtaining a divorce under fault without committing perjury led to a reform movement that resulted in the enactment of the no-fault divorce laws (Parkman, 2000). Initially, some states anticipated that courts would determine if the no-fault grounds had been established. Courts quickly realized that determination was a futile exercise and divorces became available automatically, based often on the preferences of only one spouse.

The laws regulating the financial arrangements at divorce have been ignored in the deliberations about the change in the grounds for divorce. The statutory arrangements can consist of a division of any marital property, child support from the non-custodial parent to the custodial parent, and short-term rehabilitative spousal support. These arrangements have practical problems because couples frequently have only limited marital property and child and spousal support are often difficult to collect.

In addition to these practical problems, the statutes covering the financial arrangements at divorce tend to underestimate the costs of divorce (Parkman, 1998–9). An obvious omission at divorce is a systematic consideration of the effect that the marriage had on the spouses' income-earning capacities. Frequently, spouses have limited a career during marriage so that they cannot anticipate a future income similar to the one that they would have had if they had not married or had not limited their career during marriage. If they are not compensated for the reduction in their income-earning capacity, all the costs of the divorce are not being recognized. Less frequent, but still a concern, is the situation in which an income-earning spouse's future income has increased as a result of the marriage. If this occurred, one spouse may have incurred a cost in making investments in the primary income-earning spouse. Lack of compensation for these investments can also be a cost of the divorce. Although these omissions might be addressed with new statutes, there are other costs of divorce that the courts are incapable of estimating. Even with the knowledge that the other spouse wants to dissolve the marriage, the divorced spouse may still be strongly attracted to that person and their children. The loss of or reduction in these relationships will be a cost to that spouse. The current marriage was potentially the result of a long and costly search. Now, the divorced spouse is going to be exposed to a new and undesired search for a new living arrangement. Last, the quality of life of any children is potentially going to deteriorate relative to what would still be possible if their parents stayed together.

The likelihood of an inefficient outcome increases if the costs of an alternative are underestimated. This can be illustrated with commercial agreements. Economists have generally found contract law attractive because it attempts to confront a party who wants to terminate an agreement with the alternatives of performing or compensating the non-breaching party for the costs that he or she is about to incur (Posner, 1992). Therefore the parties to the contract have an incentive to breach it only if the benefits of breaching exceed the costs of

performance. If the costs of a breach are underestimated, the contract may be breached when the net benefits are negative.

Similarly, if the arrangements at divorce underestimate the cost of divorce, a divorce can occur when the net benefits of all affected parties are negative. Consequently, with no-fault divorce, a divorce can easily occur when the benefits to all family members are less than their costs. Still, as far as divorcing spouses are concerned, their benefits exceed their costs, so the divorce seems reasonable and rational to them.

No-fault divorce is attractive to some people because it permits someone who made an incorrect decision about a relationship to escape from his or her commitment at a fairly low cost. As the costs of poor decisions are reduced, rational people respond by expending less effort to avoid them. Predictably, the result is more poor decisions about prospective spouses. No-fault divorce can also reduce the compensation to people who have made sacrifices based on their marriage being a long-term commitment. Consequently, people have weaker incentives to make these sacrifices. In terms of incentives, no-fault divorce has to be viewed as a very unattractive system. Because a marriage can be dissolved unilaterally, often at a very low cost, people have less incentive to search diligently for a spouse, and after marriage they have less incentive to make sacrifices for the benefit of the family.

In summary, the fault divorce statutes were usually employed by parties to limit divorces to circumstances in which the spouses mutually agreed to dissolve their marriage. This encouraged people to search diligently and to make the sacrifices that lie at the core of the gains from marriage. The major problem with fault divorce was that it made it potentially costly for a spouse who had made an ill-advised decision to marry. Meanwhile, from the perspective of incentives, there is little to say in defense of no-fault divorce because it discourages diligent search and commitment to marriage. It does have the advantage of reducing the costs of making a mistake when choosing a spouse.

3 The preferred grounds for divorce

The preferred grounds for divorce should limit a divorce to situations in which the net benefits for all parties are positive. Mutual consent is most likely to produce this result for established marriages. Since spouses often receive important new information about each other early in marriage when the costs of divorce are small, no-fault divorce can be attractive at that time. A requirement for mutual consent could lock a spouse into an abusive relationship whose dissolution would yield substantial benefits, but the abusing spouse will not cooperate. In that case, fault divorce would meet the criterion established above.

A combination of no-fault, mutual consent, and fault grounds for divorce will provide a major improvement in the incentives that face adults who want to

marry. States have traditionally been reluctant to become involved in the normal interactions within a family and that is a position that is supported here.² The state's role in protecting children is obvious, so it is appropriate for states to have statutes that establish rules for protecting children during and after a marriage. It is important to recognize that the conditions that accompany the dissolution of marriage have far greater effects on the quality of the marriage itself than has been commonly accepted because they strongly influence the quality of search before marriage and the commitment that the spouses make to their family after marriage.³

Mutual consent divorce

Mutual consent should be the primary ground for divorce. A marriage should be dissolved only if both spouses agree that it is a failure. The opponents of fault divorce – and more recently those who support no-fault divorce – do not appear to have given serious consideration to mutual consent divorce (Kay, 1987). Among those willing to consider a change, the normal alternative to no-fault divorce that is considered is fault divorce rather than mutual consent divorce (Ellman, 1996; Bradford, 1997; and Ellman and Lohr, 1997). If we recognize that the problem with the current laws is their permitting unilateral divorce, then the appropriate alternative to consider is mutual consent divorce rather than fault divorce.

The debate over the grounds for divorce represents the triumph of the obvious over the subtle. No-fault divorce is defended because it protects people who have made a miscalculation by marrying someone with whom they no longer want to live – the obvious case of the unfortunate women who would be locked into loveless marriages if the grounds for divorce were either mutual consent or fault (Coontz, 1997, p. 82).⁴ Ignored – because it is a great deal subtler – are the gains from encouraging and rewarding those who have made or are attempting

² Traditionally, the American family has been viewed as the cornerstone of society, with the result that the state legislatures and courts have been reluctant to intervene in family affairs. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 205 (1888). Still, if a legislature wanted to intervene, its powers were viewed as broad until 1965. In *Griswold v. Connecticut*, 381 U.S. 479 (1965) the Supreme Court held that the Connecticut statute forbidding the use of contraceptives was unconstitutional as applied to married couples.

³ Since the state controls the grounds for divorce, people who do not like the legally prescribed ease of and arrangements at divorce have been forced to turn to premarital agreements. These agreements traditionally were difficult to enforce, but that situation has improved in the states that have passed the Uniform Premarital Agreement Act, 9B U.L.A. 369 (1987); see Bix (1998). Still, premarital agreements are not attractive for most couples because they do not have a clear idea of the range of potential future events and what are the conditions that they want to attach to these events. Also see Alexander (1998).

⁴ Others argue that no-fault divorce protects children from the mistakes of their parents without recognizing the benefits to children from parents having incentives to make better decisions. See Gordon (1998).

to make better decisions. They want to search diligently for a congenial spouse and then after marriage they want to make the decisions that increase their and their family's gains from marriage.

Knowing that the ground for divorce for established marriages is mutual consent would encourage spouses to make sacrifices that benefit their marriage. Meanwhile, not all established marriages are successful and, if a couple is questioning the durability of their marriage, mutual consent would increase the incentives for them to recognize and place a value on the collective benefits and costs of marriage and, potentially, divorce.

Under mutual consent divorce, a party who does not want a divorce would have an incentive to require compensation for these costs as a basis for agreeing to the divorce. This point can be illustrated with two examples. A husband who is being asked for a divorce by his wife may feel that he is no longer strongly attracted to her, he could continue to have a satisfactory relationship with his children, he has not made substantial sacrifices for the sake of the family, and he could find someone just as attractive with a limited amount of effort, and he may believe that any children would not be adversely affected by a divorce. He might therefore be willing to reach a divorce agreement at a small cost to his wife. Since the benefit of the divorce exceeds the cost, social welfare would be improved by permitting the divorce. Alternatively, he may still be strongly attracted to his spouse, and he might feel that the quality of his relationship with his children would deteriorate substantially, that he has made substantial sacrifices based on his expectation that the marriage was going to last, and that only a long and costly search would find another comparable spouse or living situation, and he may believe that the children would suffer compared with the quality of life that is still possible if the parents stay together. He might in those circumstances ask for a level of compensation that the other spouse is unwilling to provide. In other words, the party who wants the divorce does not value the divorce as much as the other spouse and the children value the continuation of the marriage. In that case, social welfare is improved by continuing the marriage.

One of the attractive aspects of mutual consent divorce is the increased likelihood that both parents will address the costs incurred by their children as a result of a divorce. These costs go far beyond just maintenance, which is covered by child support. If the divorcing spouses are forced to recognize the full costs of their divorce, some parents might be able to make their marriage work and, thereby, provide benefits to their children.⁵ The parents who expect custody of any children after a divorce are most likely to recognize the costs that the children will incur. If the children are less happy after divorce, their attitudes will affect the welfare of the custodial parent. These changes in the

⁵ Under no-fault divorce, many divorces occur when there has been only a minor discord between the spouses. See Amato and Booth (1997, p. 270).

welfare of the children and the custodial parent are a cost that mutual consent divorce would encourage those parents to address when considering a divorce.

Another attraction of mutual consent divorce is the incentives it creates for couples to consider the rules that are appropriate for their marriage. If people knew that mutual consent was the primary ground for dissolving an established marriage, that knowledge might increase the incentive for them to negotiate premarital and postmarital agreements. Neither fault divorce nor no-fault divorce provides marrying individuals with the opportunity to construct their own grounds for the dissolution of their marriage. With mutual consent divorce, the dissolution of marriage would be based on the parties' criteria rather than those of the state. In those circumstances, the parties might be more inclined to specify their own grounds for divorce, such as a career conflict, at the time of marriage. Any agreement of the spouses should be subject to regulations that attempt to protect the interests of any children.

Mutual consent is not a perfect solution. It can result in the continuation of a marriage if one party wants to ignore the costs imposed on the parties by the marriage. This can occur when a spouse, basing a decision on spite, is opposed to a divorce in any circumstances. However, people can be surprisingly rational even when dealing with emotional issues such as marriage and divorce. In most divorces, at least one spouse initially wanted the marriage to continue (Wallerstein and Kelly, 1980, p. 17) but, when the benefits for all affected parties – especially any children – from divorce exceed the costs, social welfare is increased by a divorce. In those circumstances, the spouses have incentives to construct an agreement that leaves them both better off. The large number of divorces based on mutual consent under the fault grounds illustrates the willingness of spouses to negotiate even under trying conditions.

Although mutual consent as a basis for divorce is unappealing to some people because it appears to lock people into unsuccessful and potentially abusive marriages, recognition is seldom given to the benefits of mutual consent that would flow to people willing to make a long-term commitment. The provisions for no-fault and fault grounds for divorce discussed below should address some of the concerns about unsuccessful marriages. Moreover, we need to recognize the limited ability of mutual consent to keep an antagonistic couple together. Either spouse can always leave the relationship, with the only restrictions being the response of others, any financial obligations imposed by law on the spouses to each other and their children, and – of course – the ability to marry anyone else.

In reaching their agreement to divorce, the couple could ignore any statutes except those that attempt to protect the interests of children. Still, it would be appropriate for there to be default statutes for the financial and custodial arrangements that would apply unless modified or rejected. The most important change from current statutes should be a more systematic recognition of the effect of marriage on the parties' income earning capacities (Parkman, 1998–9).

No-fault divorce

No-fault divorce is still attractive during the early period of a marriage. Mutual consent divorce gives substantial power to spouses who do not want a divorce. To limit abuse of this power, it would appear to be attractive to permit no-fault divorce when the potential costs of divorce are likely to be low, as they tend to be early in a marriage and when there are no children. Early in marriage, a couple are still involved in an evaluation process. During this period of evaluation, no-fault divorce should continue to be the grounds for divorce, giving the parties incentives to investigate their commitment to their relationship.

Eventually, at least one spouse may make sacrifices based on a long-term commitment to the marriage and then the grounds for divorce should shift to mutual consent. These sacrifices will usually occur because a spouse is limiting a career or the couple are having a child. In our highly mobile society, it is common for a couple to relocate. Frequently in this process a spouse is forced to relinquish a desirable job so that the other spouse can take advantage of an employment opportunity that appears to be in the couple's long-term best interest. In addition, children usually require one parent to adjust his or her career to assist in child care. With these changes in the couple's circumstances, the grounds for divorce would shift to mutual consent. Since accommodations for the long-term benefit of the marriage may be subtle, setting a predetermined period, such as five years, as the basis for the shift from no-fault to mutual consent divorce would seem to be reasonable. Recognizing that the grounds for divorce are going to change in certain circumstances – a relocation, a child, or a specified time period – will force a couple to re-evaluate their commitment to each other. If they are uncomfortable with the restrictions that would accompany mutual consent divorce, they can mutually agree to maintain no-fault grounds for divorce.

With no fault divorce, there would have to be laws to govern the financial arrangements. However, without career adjustments and children, the range of financial considerations should be limited.

Fault divorce

Fault divorce too can still have a role in dissolving marriages. Mutual consent can create problems when someone is "driven out" of a marriage rather than "wanting out." It is often difficult for anyone, including the spouses and judges, clearly to identify fault. Being driven out of a marriage raises concerns similar to those addressed with the fault divorce statutes. Under fault divorce, the "guilty" spouse did something that gave the "innocent" spouse a right to dissolve the marriage: the innocent spouse was driven out of the marriage. Mutual consent

would not provide a solution for the situation in which one spouse is the victim of acts such as cruelty or adultery but the "guilty" spouse does not want a divorce. Courts during the fault divorce era showed little skill, however, at making determinations in these cases (Rheinstein, 1972). Often the grounds given for fault divorce were hypocritical and the marriage had failed for other reasons. And, even when the fault grounds could be proven, the reasons a marriage failed were probably a great deal more complicated than just the acts that established the grounds. Nonetheless, fault divorce would appear to be appropriate when there is clear evidence of fault, such as abuse of a spouse or any children. Because abuse is socially unacceptable behavior and should be discouraged, it should also be the basis for an adjustment in the default financial and custodial arrangements at divorce.

4 Conclusion

Mutual consent as the grounds for the dissolution of most marriages is not a perfect solution to problems facing the family, but it is superior to the alternatives, especially no-fault divorce for all marriages. Mutual consent is attractive because it creates incentives for people to search diligently for a spouse and, during marriage, to make decisions based on the best interests of the family rather than taking a narrow focus on themselves. No-fault divorce early in marriages provides spouses with an opportunity to evaluate their commitment to each other at a fairly low cost. The potential for a fault divorce encourages spouses to avoid socially unacceptable behavior.

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