

Adultery and the Limits of Tort Law: Toward a Theory of Relational Civil Wrong

Introduction

Modern tort law is commonly described as a law of harm. Judicial opinions, treatises, and much academic theory define tort liability as arising from conduct that causes injury to a legally protected interest. On this view, the central function of tort law is to identify harmful conduct and provide compensation for resulting losses.

Yet this familiar description only partially reflects the structure of private law. In numerous doctrinal contexts, liability arises not because measurable harm has occurred but because a legal duty has been breached. Nominal damages, fiduciary disgorgement, trespass actions, and statutory damages all illustrate that the law sometimes recognizes wrongdoing even where quantifiable injury cannot be shown. Tort law therefore contains both harm-based and breach-based forms of liability.

This distinction becomes particularly visible when the law encounters injuries that resist measurement. Adultery provides a striking example. Few acts are as widely perceived as a betrayal of trust and loyalty. Yet across most modern Western legal systems adultery does not constitute an independent civil wrong. Courts may acknowledge it in divorce proceedings or religious tribunals, but tort law almost uniformly refuses to recognize it as actionable.

I. The Harm Paradigm and Its Limits

Contemporary tort theory often proceeds as if injury were the essential organizing principle of the field. Economic analysis treats tort law as a mechanism for deterring harmful conduct and allocating risk efficiently. Corrective justice theory, though less instrumental, still commonly centers on wrongful injury to a protected interest. Civil recourse theory shifts the emphasis to the plaintiff's authority to seek redress for the breach of a legal duty, but even there the paradigm cases usually involve tangible harm.

In practice, however, doctrine is more pluralistic than theory often admits.

The law of nominal damages demonstrates that the violation of a right may itself justify judicial recognition even where compensatory injury cannot be shown. Constitutional adjudication offers the clearest example: courts may acknowledge the completed violation of a legal right through nominal damages despite the absence of measurable loss. Property law reveals the same structure. Trespass to land is actionable even where the plaintiff cannot prove economic damage. The protected interest is not a balance sheet; it is the right to exclusive possession, and its invasion suffices.

Fiduciary law is even more revealing. A fiduciary who breaches the duty of loyalty may be required to disgorge gains even if the beneficiary cannot demonstrate measurable financial loss. The point is not simply to compensate injury. It is to respond to disloyal conduct that violates the integrity of an institutional relationship. The wrong lies in the breach itself.

These doctrines matter because they show that tort and adjacent private-law fields do not rest on a single harm-based logic. They accommodate at least two structures of liability. One is harm-based: liability responds to measurable injury. The other is breach-based: liability responds to the violation of a duty or protected legal interest even where loss is difficult or impossible to quantify.

That distinction becomes conceptually important once adultery is placed alongside other breaches of loyalty. If the law recognizes that loyalty matters in fiduciary administration, agency, corporate governance, and property boundaries, then the complete refusal to recognize marital disloyalty as even potentially civilly significant becomes harder to treat as self-evident. The question is no longer whether harm can be measured. The question is why one institutional form of disloyalty is categorically excluded while others are not.

The answer, this Essay suggests, is not doctrinal necessity. It is normative reluctance.

II. Marriage as a Legally Structured Institution

The force of that reluctance can be understood only once marriage is seen for what liberal legal systems still treat it as: not merely a private emotional arrangement, but a formal legal institution.

American jurisprudence has long emphasized that marriage is “something more than a mere contract.” It is a legal status, publicly recognized and regulated, carrying rights, obligations, and consequences that do not exist in informal relationships. Marriage generates rules concerning inheritance, property, taxation, support, parental responsibilities, and decision-making authority. Even when modern constitutional doctrine celebrates marriage in the language of dignity and personal choice, it simultaneously reaffirms marriage as an institution structured by law.

England reflects the same duality. Marriage is no longer administered through a heavily fault-based regime, and no-fault divorce has significantly changed the language of dissolution. Yet marriage continues to generate legal consequences in property adjustment, succession, and family responsibility. The move away from fault has not dissolved marriage into a purely private arrangement.

Israel illustrates the institutional character of marriage even more sharply. For Jewish couples, marriage and divorce remain embedded in a formal legal structure administered by rabbinical courts functioning as organs of the state. Within that framework, adultery may affect matters such as ketubah entitlement and certain support-related questions. Even where civil tort law refuses to recognize adultery as actionable, the broader legal system clearly does not regard marital fidelity as normatively irrelevant.

Across these systems, then, marriage remains a legally constituted relationship. It is entered through formal legal recognition and accompanied by structured incidents of status. That point is foundational. The issue is not whether the law recognizes marital obligations. It plainly does. The issue is whether one of the institution's central obligations—loyalty or fidelity—should be treated as merely moral, or instead as institutional in character.

This Essay takes the latter view. The law's own treatment of marriage suggests that fidelity is not simply a private aspiration. Even when liberal legal systems decline to enforce it through tort, they do not deny its institutional place. The real structure of the problem is therefore not “duty versus no duty,” but **recognized duty versus denied remedy**.

III. The Historical Retrenchment of Marital Torts

The modern refusal to treat adultery as an independent civil wrong sometimes appears natural only because it is viewed from the endpoint rather than the historical path.

Anglo-American law once did recognize civil actions tied to marital interference. The best known were the heart-balm torts, especially alienation of affection and criminal conversation. Those actions allowed a spouse—historically, often the husband—to sue a third party for conduct said to have interfered with the marital relationship. Their doctrinal structure reflected older assumptions about consortium, exclusivity, and the legal importance of marriage.

Those actions eventually came under severe criticism, much of it justified. They were associated with blackmail, evidentiary abuse, humiliation, and proprietary or gendered conceptions of marriage. Legislatures abolished them across many American jurisdictions during the twentieth century, and English law had already moved earlier in the same general direction. The rise of no-fault divorce deepened this retreat. As dissolution became less centered on blame, it increasingly appeared anomalous to preserve tort actions built around adjudicating intimate fault.

But that history proves something narrower than is often assumed. It proves that liberal legal systems grew unwilling to enforce marital loyalty through older tort forms, especially against third parties. It does **not** prove that tort law is conceptually incapable of recognizing a civil wrong rooted in marital breach. The abolition of heart-balm actions was not driven primarily by a discovery that harm doctrine made such claims impossible. It was driven by policy judgments about privacy, abuse, equality, and the proper role of courts.

That distinction matters. A policy-driven retreat should not be redescribed as doctrinal inevitability. Once that mistaken redescription is rejected, space reopens for a more careful question: whether there might be a narrower, modern, non-proprietary, non-punitive form of civil recognition for institutional breach within marriage.

IV. Relational Harm and Relational Wrong

A useful way to clarify the issue is to distinguish **relational harm** from **relational wrong**.

Relational harm refers to the emotional pain, humiliation, anxiety, or loss experienced within a damaged relationship. Courts are understandably cautious about making such harms broadly actionable. Emotional suffering is real, but it is often difficult to verify, difficult to limit, and deeply entangled with ordinary human conflict. Expanding tort law on the basis of relational harm alone would risk turning courts into forums for adjudicating heartbreak.

Relational wrong is different. It refers to the breach of a duty arising from a legally recognized relational status. The focus is not primarily on subjective suffering but on the violation of an institutional obligation. In this sense, the closest analogies are not emotional distress torts but fiduciary and dignitary doctrines. The wrong lies in disloyalty, misuse, or invasion of a protected relational structure.

That distinction is central to the present proposal. The claim is not that adultery should become actionable because it hurts. Many things hurt, and the law rightly refuses to convert all emotional pain into liability. The claim is that adultery may, under a narrow conception, be understood as the intentional breach of an institutional duty of loyalty arising within a legal status the state itself creates and recognizes.

Once framed in this way, the conceptual analogy to other breach-based doctrines becomes clearer. A fiduciary's duty of loyalty is not merely a duty not to cause loss. It is a duty not to act disloyally. A trustee, director, or agent may incur liability even where no measurable economic injury can be shown. The law responds because institutional integrity matters.

Marriage is not identical to fiduciary law, and it would be a mistake to force the analogy too far. But the structural point remains: private law already knows how to treat loyalty-based obligations as legally significant even when damages are not the core of the claim. That is enough to undermine the claim that tort law must, by its very nature, remain blind to institutional betrayal within marriage.

V. Toward a Theory of Relational Civil Wrong

The proposed category of **Relational Civil Wrong** is meant to capture a narrow class of cases in which civil liability may arise from the knowing and material breach of an institutional duty inherent in a legally recognized relationship, without requiring proof of measurable economic loss.

This is not an invitation to revive heart-balm litigation. On the contrary, the proposed category differs from those older actions in critical ways.

First, it is limited to **legally constituted status relationships**. It would not apply to ordinary dating relationships, informal expectations, or generalized interpersonal disappointment. Its scope depends on formal legal recognition.

Second, the duty must be **institutional rather than subjective**. The wrong does not arise because one party privately expected loyalty. It arises because the legal structure of the status itself carries obligations that the law already treats as meaningful.

Third, the breach must be **knowing and material**. Trivial misconduct, ambiguity, or ordinary marital dissatisfaction would not suffice. The claim concerns deliberate conduct that meaningfully violates the core terms of the institutional relationship.

Fourth, the remedy must be **limited and non-punitive**. The best fit is nominal damages, declaratory relief, or similarly restrained forms of recognition. The purpose is not to monetize betrayal or to create windfalls. It is to acknowledge institutional breach.

This architecture matters because it preserves liberal caution while still recognizing doctrinal coherence. It avoids punitive moralism, avoids third-party suits, avoids proprietary framing, and avoids emotional-distress valuation. What remains is a modest proposition: where the law itself creates an institution carrying structured duties, the intentional breach of one of its central duties need not be treated as normatively invisible.

The significance of such a category is conceptual before it is reformist. It demonstrates that private law possesses the tools to recognize certain institutional wrongs without collapsing into moral surveillance.

VI. Objections: Autonomy, Privacy, and Liberal Restraint

The strongest objection is obvious: civil liability related to adultery risks intruding upon intimate liberty.

That concern must be taken seriously. Modern constitutional thought rightly rejects criminal punishment of consensual adult intimacy. Liberal legal systems are understandably wary of turning private relationships into sites of coercive state supervision.

But the present proposal does not seek criminalization, prohibition, or compelled fidelity. It does not prevent exit from marriage. It does not require the continuation of any relationship. It proposes only limited civil recognition for the breach of obligations voluntarily assumed through entry into a legally structured status.

That distinction parallels other parts of private law. Contract law does not criminalize breach, yet it recognizes consequences when voluntarily assumed obligations are broken. Fiduciary law does not prohibit all self-interested conduct in the abstract; it responds when such conduct violates the obligations attached to a recognized role. Liberal autonomy has never meant immunity from the consequences of one's own institutional commitments.

A second objection points to the abusive history of marital torts. That objection is also substantial. But it cuts mainly against broad, punitive, third-party, or proprietary

causes of action. It does not by itself foreclose a narrow doctrine restricted to formal status, direct breach, and symbolic remedies.

A third objection is practical: what would such a cause of action accomplish if remedies remain nominal? The answer is that tort law is not solely compensatory. It also has expressive and declaratory dimensions. Nominal damages and declaratory judgments already function as instruments by which the law marks the violation of a right even when large compensation is unavailable or inappropriate. The point here would be similar: not to intensify conflict, but to state with doctrinal clarity that certain institutional breaches are legal wrongs even if the law chooses to respond modestly.

These objections therefore support caution, but not conceptual denial. They explain why legal systems may prefer not to adopt such a doctrine. They do not prove that tort theory forbids it.

VII. Comparative Implications

A comparative view sharpens the claim. In the United States, England, and Israel, marriage remains institutionally recognized. In all three systems, the law acknowledges in other domains that breach-based liability can exist without measurable loss. And in all three systems, adultery still fails to generate an independent modern tort remedy.

That convergence is significant, but its meaning must be read carefully. It does not show that tort law contains a built-in bar against relational civil wrongs. It shows that multiple legal systems have made a similar policy decision: to stop short of civilly enforcing marital loyalty.

Once described in those terms, the doctrinal landscape looks very different. The question becomes not “Why can’t tort law do this?” but “Why have legal systems chosen not to do it?” That is a healthier question, because it demands explicit normative justification rather than conceptual mystification.

The answer may well be that liberalism requires restraint. But if so, the restraint should be defended honestly as a judgment about privacy, pluralism, equality, and the limits of adjudication—not smuggled in under the false claim that tort law is structurally incapable of seeing such a wrong.

Conclusion

Adultery is useful precisely because it sits at the edge of modern tort theory. It is widely perceived as a profound betrayal, yet it is almost entirely excluded from independent civil recognition. That exclusion is often treated as natural because tort law is assumed to be exclusively about measurable harm.

This Essay has argued otherwise. Tort and adjacent private-law doctrines already recognize breach-based liability in multiple settings. Rights may be vindicated through nominal damages. Loyalty may be protected through disgorgement.

Possession may be guarded without proof of loss. The law therefore cannot plausibly claim that measurable injury is always the indispensable threshold of civil wrong.

Marriage, meanwhile, remains a legally structured institution across liberal legal systems. It is not merely a private emotional understanding. It generates formal rights, obligations, and consequences. Among those obligations, loyalty occupies a central institutional place even when legal systems decline to enforce it through tort.

The absence of an adultery tort should therefore be understood for what it is: not a conceptual necessity, but a normative choice. Legal systems may decide that the costs of adjudicating intimate breach are too high, that privacy concerns are too serious, or that symbolic restraint better serves liberal commitments. Those may be sound reasons. But they are reasons of policy, not reasons of doctrine.

The concept of **Relational Civil Wrong** makes that clearer. It identifies a narrow category in which the breach of an institutional duty may justify limited civil recognition even absent measurable economic harm. Whether adultery should ever fall within that category remains open. The point is more modest, but also more important: tort law is not blind to such wrongs because it must be. It is blind because legal systems have chosen, at least for now, not to see them.

That distinction deserves to be made explicit. Once it is, the debate over adultery and civil liability can proceed on the right terrain—not whether doctrine makes recognition impossible, but whether liberal private law should continue to treat one of the clearest forms of institutional betrayal as legally invisible.