Adultery, Institutional Breach, and the Boundaries of Tort Law

Toward a Theory of Relational Civil Wrong in Comparative Perspective

Introduction

1. The Silenced Problem of Modern Tort Law

Contemporary tort law presents itself as a law of harm. Nearly every introductory text defines a tort as a "civil wrong causing harm," as an injury to a legally protected interest, or as an act or omission giving rise to liability by virtue of injury[1]. Doctrinal, academic, and pedagogical rhetoric alike are grounded in this assumption: civil liability arises where measurable damage can be identified[2].

Yet this description—however intuitive and deeply entrenched—does not exhaust the structure of liability in existing law, nor is it conceptually inevitable. Private law recognizes numerous situations in which the mere breach of a legal duty justifies a remedy, even in the absence of clearly quantifiable loss. Nominal damages, declaratory relief, disgorgement for breach of fiduciary duty, and statutory damages all attest that the focal point is not necessarily the harm, but the breach[3].

The gap between tort law's self-description and its actual structure is rarely addressed directly. It becomes visible only when one examines an injury that does not comfortably fit within the harm-based model. Adultery between spouses provides a particularly sharp example.

Few acts provoke as intense a social reaction as adultery. It is widely perceived as a profound breach of trust, a violation of the core of the marital relationship, and a disruption of familial identity. Yet in most Western legal systems, adultery does not constitute an independent civil wrong[4].

The law recognizes adultery as a relevant fact in divorce proceedings (formerly more than today); it sometimes acknowledges it within religious frameworks; it may occasionally be considered in certain property determinations. But it almost consistently refrains from recognizing it as a breach of civil duty warranting a remedy[5].

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[1] See, e.g., W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 1, at 2–3 (5th ed. 1984).

[2] See Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 6 (Am. L. Inst. 2010).

[3] See, e.g., Uzuegbunam v. Preczewski, 592 U.S. 279 (2021) (nominal damages for constitutional violations); Carey v. Piphus, 435 U.S. 247 (1978); Restatement (Third) of Restitution and Unjust Enrichment § 43 (Am. L. Inst. 2011) (disgorgement for breach of fiduciary duty).

[4] See generally Jane Wangmann, Alienation of Affection: The Tort as a Response to Marital Breakdown, 25 Legal Stud. 279 (2005).

[5] See infra Parts I–III.

Why?

The conventional answer is liberal: the law should not intervene in intimacy; it is not the role of courts to enforce sexual morality; recognizing liability for adultery would encourage vindictive litigation and intrude upon privacy[6].

These responses are not without weight. Yet they rest on a prior assumption: that adultery constitutes, at most, a moral or emotional injury—not a legal one.

This Article seeks to challenge that assumption.

The question is not whether adultery is worthy of moral condemnation.
The question is whether the breach of an institutional commitment that the law itself recognizes may remain entirely devoid of civil significance.

If tort law is grounded in responsibility for breach of duty—and not merely in compensation for damage—then the denial of a cause of action for adultery is not conceptually compelled. It reflects a normative judgment about the appropriate limits of legal intervention in intimate life.

This Article therefore proposes to reconsider the intuitive identification of tort with harm and to introduce a third theoretical category: the Relational Civil Wrong—an institutional relational wrong in which the mere breach of a duty of loyalty arising from a legally recognized relationship may justify limited civil responsibility, even in the absence of measurable harm.

2. Between Harm and Wrong: The Failure of the Dominant Model

Contemporary tort scholarship oscillates among three central theories: economic analysis, corrective justice, and civil recourse theory. Though distinct, all three accept—albeit to varying degrees—the connection between tort and injury[7].

Economic analysis views tort law as a mechanism for deterrence and risk allocation; harm is the central variable in calculating efficiency.[8]

Corrective justice theory, most closely associated with Ernest Weinrib, emphasizes the violation of a right, though it typically refers to injury to a concrete interest[9].

Civil recourse theory highlights the victim's right to call the wrongdoer to account for breach of a legal duty[10].

[6] See, e.g., Hoye v. Hoye, 824 S.E.2d 341 (N.C. Ct. App. 2019) (discussing policy critiques); see also Restatement (Second) of Torts § 683 cmt. b (Am. L. Inst. 1977) (noting controversy surrounding heart balm actions).
[7] See generally Jules L. Coleman, *Risks and Wrongs* (1992); Ernest J. Weinrib, *The Idea of Private Law* (1995); John C.P. Goldberg & Benjamin C. Zipursky, *Recognizing Wrongs* (2020).
[8] See Guido Calabresi, *The Costs of Accidents* (1970).
[9] Weinrib, supra note 7, at 114–44.

[10] Goldberg & Zipursky, supra note 7, at 1–3.

Yet closer examination reveals that none of these theories treats measurable harm as a necessary conceptual precondition of liability. Even for Weinrib, the focus lies in the violation of a right, not in its quantification[11]. Likewise, for Goldberg and Zipursky, the core lies in the breach of a legal duty that grants the victim standing to demand redress from the wrongdoer[12].

American law itself recognizes numerous instances in which breach alone justifies a remedy:

Nominal damages for the violation of constitutional rights, even absent proof of actual harm[13];

Statutory damages in copyright law without proof of actual loss[14];

Disgorgement for breach of fiduciary duty even in the absence of financial loss to the corporation[15];

Certain property torts (such as trespass) that do not require proof of damage as an essential element[16].

All of these examples demonstrate that the damage-based model of tort is not exclusive. It is rhetorically dominant, but it does not exhaust the doctrinal landscape.

Adultery exposes the tension: if breach of fiduciary duty by a corporate director justifies liability even without measurable harm, why should breach of loyalty within marriage—a legally recognized institution—not generate any form of civil responsibility?

The difficulty is not conceptual; it is normative.

3. Marriage as an Institution Generating Duties

Modern law—even in liberal constitutional systems—does not treat marriage as a purely private arrangement. The Supreme Court of the United States has long characterized marriage as a *status*, not merely a contract[17]. As early as *Maynard v. Hill*, the Court described marriage as "something more than a mere contract," emphasizing its institutional and public character[18].

Subsequent jurisprudence repeatedly reaffirmed that marriage is a fundamental constitutional relationship. In *Loving v. Virginia*, the Court held marriage to be a "fundamental freedom[19]." In *Obergefell v. Hodges*, the Court described marriage as a

[11] Weinrib, supra note 7, at 114–20.
[12] Goldberg & Zipursky, supra note 7, at 25–40.
[13] Uzuegbunam, 592 U.S. at 279; Carey, 435 U.S. at 266.
[14] 17 U.S.C. § 504(c).
[15] Restatement (Third) of Restitution and Unjust Enrichment § 43.
[16] See Restatement (Second) of Torts § 158 (Am. L. Inst. 1965).
[17] See Maynard v. Hill, 125 U.S. 190, 210–11 (1888).
[18] Id. at 211 ("Marriage is something more than a mere contract.").

[19] Loving v. Virginia, 388 U.S. 1, 12 (1967).

"keystone of our social order[20]" and emphasized that it confers "a constellation of benefits" defined and regulated by law[21].

These benefits are not merely symbolic. Marriage generates reciprocal legal obligations: duties of support[22], inheritance rights[23], property-sharing regimes[24], parental responsibilities[25], and numerous statutory entitlements conditioned on marital status[26]. The law thus treats marriage as an institutional framework that structures rights and duties in ways unavailable to informal relationships.

In England, the historical understanding of marriage as status likewise persists, even following the liberalization of divorce. The Matrimonial Causes Act 1973 continues to regulate financial relief upon dissolution[27], while the Inheritance (Provision for Family and Dependants) Act 1975 provides statutory protection to surviving spouses[28]. The Divorce, Dissolution and Separation Act 2020 eliminated the requirement to prove fault, including adultery, in order to obtain divorce[29], but it did not transform marriage into a purely private arrangement devoid of institutional structure.

Israel presents an even sharper illustration of marriage as a legally structured institution. Under the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, Jewish marriage and divorce fall within the exclusive jurisdiction of Rabbinical Courts[30]. These courts operate as state tribunals subject to constitutional review[31]. Within that framework, adultery may negate entitlement to the *ketubah*[32], affect maintenance obligations[33], and carry tangible economic consequences adjudicated through formal legal proceedings[34].

Across these three jurisdictions, therefore, marriage is unequivocally recognized as a legally constituted institutional relationship.

The central question is not whether marriage creates duties—it plainly does. The question is whether the duty of loyalty, commonly understood as intrinsic to marriage, is merely moral or instead constitutes an institutional duty that the law acknowledges yet chooses not to enforce through tort.

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[20] Obergefell v. Hodges, 576 U.S. 644, 669 (2015).
[21] Id. at 670.
[22] See Turner v. Safley, 482 U.S. 78, 95–96 (1987) (recognizing mutual obligations of support as incidents of marriage).
[23] See United States v. Windsor, 570 U.S. 744, 772–74 (2013) (recognizing federal benefits tied to marital status).
[24] See, e.g., Cal. Fam. Code § 760 (West 2023).
[25] See Troxel v. Granville, 530 U.S. 57, 65–66 (2000).
[26] See Obergefell, 576 U.S. at 670 (describing the legal rights and responsibilities attached to marriage).
[27] Matrimonial Causes Act 1973, c. 18, §§ 23–25 (U.K.).
[28] Inheritance (Provision for Family and Dependants) Act 1975, c. 63 (U.K.).
[29] Divorce, Dissolution and Separation Act 2020, c. 11, § 1 (U.K.).
[30] Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1952–53) (Isr.).
[31] HCJ 1000/92 Bavli v. Great Rabbinical Court, 48(2) PD 221 (1994) (Isr.).
[32] See, e.g., Rabbinical Court Appeal 8928-64-1 (2008) (Isr.) (denial of *ketubah* where adultery established).
[33] CA 1915/91 Yaakobi v. Yaakobi, 49(3) PD 529 (1995) (Isr.).
[34] See Shachar Lifshitz, Marriage and Cohabitation in Israeli Law, 43 Isr. L. Rev. 472, 480–85 (2010).

This Article argues that the duty is institutional. The fact that adultery may affect legal status, financial rights, or marital consequences within family law demonstrates that fidelity is not treated as a purely private moral aspiration[35].

The structural gap, therefore, is not between duty and no duty; it is between recognition of duty and denial of a civil remedy for its breach.

4. The Liberal Turn and the Abolition of Heart Balm Actions

The historical recognition of civil liability for interference with marriage in Anglo-American law took doctrinal form primarily through the so-called "heart balm" actions, most notably *alienation of affection* and *criminal conversation*[36]. These causes of action allowed a spouse—historically the husband—to recover damages from a third party alleged to have interfered with the marital relationship[37].

Alienation of affection protected the spouse's interest in consortium, understood as the right to companionship, affection, and sexual relations[38]. *Criminal conversation,* by contrast, required proof of sexual intercourse with a married woman and was structured more explicitly around a proprietary conception of marriage[39].

By the early twentieth century, these actions became the subject of sustained criticism. Legislatures in many American states repealed them during the 1930s and 1940s, often through statutes explicitly abolishing "heart balm" claims[40]. The criticisms were familiar: susceptibility to blackmail, evidentiary abuse, vindictive litigation, and incompatibility with evolving understandings of marriage as a partnership of equals rather than a proprietary entitlement[41].

Importantly, the abolition of heart balm actions did not rest on a doctrinal claim that tort law conceptually requires proof of pecuniary loss. Nor did courts declare that interference with marriage could never constitute a legal wrong. Rather, the repeal movement reflected a normative and institutional judgment about the appropriate limits of tort law in regulating intimate relationships[42].

The Restatement (Second) of Torts reflects this transitional posture. While acknowledging the historical existence of alienation of affection, it notes that the action "has been abolished in many states" and recognizes the controversy

[35] See Lifshitz, supra note 34, at 480–85.
[36] See Restatement (Second) of Torts §§ 683–686 (Am. L. Inst. 1977).
[37] Id. § 683 (alienation of affections); id. § 685 (criminal conversation).
[38] Id. § 683 cmt. b.
[39] Id. § 685 cmt. a.
[40] See, e.g., N.Y. Civ. Rights Law § 80-a (McKinney 2023) (abolishing alienation of affections, criminal conversation, and related actions).
[41] See Note, Abolition of Heart Balm Actions in New York, 37 Colum. L. Rev. 1417 (1937).
[42] See id.; see also W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 124, at 918–19 (5th ed. 1984) (discussing policy reasons for abolition).

surrounding it[43]. The Restatement does not ground abolition in a conceptual impossibility within tort theory; instead, it records the legislative policy choice.

Notably, heart balm actions were not abolished uniformly. A small number of jurisdictions—including North Carolina and Mississippi—continue to recognize alienation of affection under state law[44]. North Carolina courts have repeatedly reaffirmed the viability[45] of the tort, articulating its elements as (1) a valid marriage, (2) genuine love and affection, and (3) malicious conduct by the defendant causing the alienation[46].

The continued existence of these actions in certain states is doctrinally significant. If tort law categorically required measurable economic harm as a conceptual predicate for liability, such variation would be structurally impossible. The divergence instead confirms that the abolition of heart balm actions reflects policy judgments rather than a universal doctrinal necessity.

The liberal turn in family law further reinforced this trajectory. The movement toward no-fault divorce—beginning with California's Family Law Act of 1969[47] and eventually spreading nationwide[48]—shifted marital dissolution away from fault attribution. In that climate, retaining tort actions premised on marital interference appeared increasingly inconsistent with the broader institutional philosophy of marriage as a voluntary, dissolvable partnership.

Yet here again, the shift was institutional rather than conceptual. No-fault divorce altered the structure of dissolution; it did not redefine the internal normative expectations embedded within marriage.

The abolition of heart balm actions, therefore, demonstrates something narrower than often assumed. It shows that liberal legal systems chose not to enforce marital loyalty through tort remedies against third parties. It does not demonstrate that the breach of marital loyalty is incapable of constituting a civil wrong within tort theory.

That distinction is central. The historical record reveals policy-driven retrenchment—not conceptual impossibility

5. Harm Theory and the Structure of Modern Tort Doctrine

Modern tort doctrine is frequently presented as resting upon four core elements: duty, breach, causation, and damages[49]. The Restatement (Third) of Torts organizes liability

[43] Restatement (Second) of Torts § 683 cmt. b.
[44] See N.C. Gen. Stat. § 52-13 (2023) (retaining alienation of affection subject to limitations); Fitch v. Valentine, 959 So. 2d 1012 (Miss. 2007).
[45] McCutchen v. McCutchen, 360 N.C. 280, 624 S.E.2d 620 (2006)
[46] See McCutchen v. McCutchen, 624 S.E.2d 620, 623 (N.C. Ct. App. 2006).
[47] 1969 Cal. Stat. 3312 (Family Law Act of 1969).
[48] See Herma Hill Kay, An Appraisal of California's No-Fault Divorce Law, 75 Cal. L. Rev. 291 (1987).
[49] See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 30, at 164–65 (5th ed. 1984).

for physical and emotional harm around these structural components, with "harm" playing a central role in defining actionable injury[50].

At first glance, this architecture appears to support a harm-centered model: absent harm, there is no tort. Yet a closer reading reveals a more nuanced picture. The Restatement (Third) does not define tort exclusively as compensable loss; rather, it frames tort as liability for legally recognized injury, leaving room for doctrines in which the existence of a legally protected interest, rather than quantifiable damage, grounds responsibility[51].

American case law confirms this distinction. The Supreme Court has repeatedly held that nominal damages suffice to redress the violation of certain legal rights even in the absence of compensable injury. In *Carey v. Piphus*, the Court recognized that the denial of procedural due process could warrant nominal damages despite the absence of proof of actual harm[52]. More recently, in *Uzuegbunam v. Preczewski*[53], the Court reaffirmed that a completed violation of a constitutional right supports standing where nominal damages are sought[54].

These cases are not anomalies. They reflect a structural feature of private law: the breach of a legal duty may itself justify judicial recognition, even where compensatory damages are unavailable or minimal[55].

Property law provides another example. Under traditional doctrine, trespass to land does not require proof of actual damage; the unauthorized entry itself constitutes the tort[56]. The protected interest is the right to exclusive possession, and its violation suffices.

Fiduciary law demonstrates the same pattern in an institutional context. A fiduciary who breaches the duty of loyalty may be required to disgorge gains even if the beneficiary cannot demonstrate measurable financial loss[57]. The focus lies not on harm but on breach of institutional obligation[58].

These doctrines complicate the assumption that tort law is conceptually inseparable from measurable injury. Instead, they reveal a dual structure: some torts are harm-based, while others are breach-based.

Theoretical scholarship reinforces this conclusion. Ernest Weinrib's corrective justice account grounds liability in the violation of a correlative right, not in the magnitude of loss[59]. The wrong precedes the damage; the damage reflects the wrong.[60]

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[50] Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 6 (Am. L. Inst. 2010).
[51] Id. § 7 cmt. a (recognizing that liability depends on breach of duty causing legally cognizable harm).
[52] Carey v. Piphus, 435 U.S. 247, 266–67 (1978).
[53] Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021).
[54] Uzuegbunam v. Preczewski, 592 U.S. 279, 286–89 (2021).
[55] See id.; Carey, 435 U.S. at 266.
[56] Restatement (Second) of Torts § 158 (Am. L. Inst. 1965).
[57] Restatement (Third) of Restitution and Unjust Enrichment § 43 (Am. L. Inst. 2011).
[58] See id. § 43 cmt. b (explaining that disgorgement may be required without proof of harm).
[59] Ernest J. Weinrib, *The Idea of Private Law* 114–20 (1995).
[60] Id. at 135–36.

Similarly, civil recourse theory, as articulated by John Goldberg and Benjamin Zipursky, understands tort law as empowering victims to seek redress for the violation of legal duties owed to them[61] The central feature is not economic harm but the relational breach that entitles the plaintiff to call the defendant to account[62].

None of these frameworks requires measurable financial injury as a conceptual prerequisite.

The persistence of harm rhetoric in tort discourse may therefore be understood as a dominant but incomplete narrative—what might be termed a *harm monolith*. The doctrinal landscape is more pluralistic. Tort law already accommodates liability grounded in institutional breach.

The exclusion of adultery from tort law thus cannot be explained by a universal doctrinal requirement of measurable damage. The law recognizes liability without quantifiable harm in constitutional torts, property torts, and fiduciary settings.

The refusal to recognize adultery as actionable must therefore rest on normative considerations concerning intimacy, autonomy, and the institutional limits of civil adjudication—not on an intrinsic structural barrier within tort doctrine itself.

6. Relational Harm Versus Relational Wrong

The central conceptual clarification required at this stage is the distinction between *relational harm* and *relational wrong*.

Relational harm refers to emotional injury, distress, humiliation, or disruption experienced within a relationship. Tort law has traditionally been cautious in recognizing claims grounded solely in such injury, particularly where the harm is diffuse, subjective, or difficult to verify[63].

The development of intentional infliction of emotional distress (IIED), for example, reflects this caution. Liability arises only where conduct is "extreme and outrageous[64]," and courts have repeatedly emphasized the narrow scope of the tort in order to prevent ordinary interpersonal conflict from becoming actionable litigation[65].

Similarly, American courts have been reluctant to expand liability for negligent infliction of emotional distress absent clearly defined limiting principles[66]. These doctrines illustrate a structural judicial concern: emotional harm alone cannot serve as an unbounded gateway to civil liability.

[61] John C.P. Goldberg & Benjamin C. Zipursky, *Recognizing Wrongs* 1–3 (2020).
[62] Id. at 25–40.
[63] See, e.g., Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 546–48 (1994) (discussing judicial limitations on emotional distress claims).
[64] Restatement (Second) of Torts § 46 (Am. L. Inst. 1965).
[65] See Snyder v. Phelps, 562 U.S. 443, 458 (2011) (noting high threshold for IIED liability under First Amendment constraints).
[66] See Gottshall, 512 U.S. at 555–57.

The present proposal does not seek to reclassify adultery as a species of emotional distress. That path would collapse the argument into precisely the floodgates concerns that historically justified abolition of heart balm actions.

Relational wrong is different. It denotes the breach of a duty that arises from a legally recognized institutional relationship. The focus is not on the magnitude of emotional injury but on the violation of a structured obligation embedded within a status relationship.

Private law already distinguishes between injury to feelings and violation of protected relational interests. Defamation law, for instance, protects reputation as a legally recognized interest even where measurable economic loss cannot be demonstrated[67]. The harm lies in the wrongful invasion of a legally protected interest, not merely in subjective emotional distress.

Likewise, privacy torts—including public disclosure of private facts—protect dignitary and relational interests that may not be reducible to economic injury[68]. The Restatement (Second) of Torts explicitly recognizes such invasions as actionable even where pecuniary loss is absent[69].

Fiduciary law provides an even closer structural analogy. A fiduciary's duty of loyalty is not merely an obligation to avoid causing harm; it is a duty to refrain from acting disloyally[70]. The wrong inheres in the disloyal conduct itself. Remedies such as disgorgement are justified not because loss can be measured, but because institutional integrity requires accountability[71].

The proposed category of Relational Civil Wrong aligns with this breach-based structure. It does not treat adultery as actionable because it causes emotional pain. It treats it as potentially actionable because it constitutes the breach of an institutional duty of loyalty embedded in a legally recognized marital status.

This distinction preserves liberal caution. Tort law need not become a forum for adjudicating heartbreak. It need only acknowledge that where the law creates a structured relationship carrying defined obligations, breach of its core duty may have civil significance independent of quantifiable harm.

The difference is subtle but foundational: emotional suffering is not the gravamen; institutional breach is.

7. The Architecture of Relational Civil Wrong

The preceding analysis establishes that tort doctrine is not structurally confined to measurable harm. The remaining question is whether a narrowly defined category of

[67] See Restatement (Second) of Torts § 569 (Am. L. Inst. 1977) (libel actionable without proof of special harm).
[68] See id. §§ 652A–652E.
[69] Id. § 652H (damages for invasion of privacy without proof of special harm).
[70] See Restatement (Third) of Agency § 8.01 (Am. L. Inst. 2006) (duty of loyalty).
[71] See Restatement (Third) of Restitution and Unjust Enrichment § 43 (Am. L. Inst. 2011).

Relational Civil Wrong can be articulated in a manner consistent with existing private law architecture.

The proposed tort would not revive heart balm actions[72], nor would it create liability against third parties. Its scope would be limited to breaches occurring within a legally recognized institutional relationship.

A. Institutional Status as a Threshold Requirement

The first limiting principle is formal status. Tort liability would arise only where the relationship in question constitutes a legally recognized institutional status—such as marriage or registered civil union.

American law has long distinguished between informal cohabitation and formal marriage for purposes of legal obligations[73]. The Supreme Court has repeatedly emphasized that marriage is a status "with attendant rights and responsibilities[74]." That structural distinction provides a principled boundary.

By restricting the tort to legally constituted status relationships, the proposal avoids transforming ordinary romantic relationships into actionable terrain.

B. Existence of an Institutional Duty of Loyalty

Second, the duty breached must be embedded in the institutional structure itself, not derived from subjective expectations.

Marriage has historically entailed reciprocal duties of support and fidelity[75]. Even in the modern no-fault divorce era, courts continue to acknowledge that marital obligations extend beyond mere cohabitation[76].

The relevant question is not whether the state criminalizes adultery—it does not in most jurisdictions—but whether the institution carries legally cognizable expectations of exclusivity or loyalty[77].

Institutional duties are common in private law. Corporate directors owe a duty of loyalty to the corporation[78], and agents owe loyalty to principals[79]. These duties arise from the status relationship itself.

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[72] See Restatement (Second) of Torts §§ 683–686 (Am. L. Inst. 1977).
[73] See, e.g., Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (distinguishing contractual claims between cohabitants from marital status rights).
[74] Obergefell v. Hodges, 576 U.S. 644, 669–70 (2015).
[75] See Maynard v. Hill, 125 U.S. 190, 211 (1888).
[76] See Turner v. Safley, 482 U.S. 78, 95–96 (1987).
[77] See Lawrence v. Texas, 539 U.S. 558, 578 (2003) (invalidating criminal prohibition of private consensual conduct while not addressing civil institutional obligations).
[78] See Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).
[79] Restatement (Third) of Agency § 8.01 (Am. L. Inst. 2006).

The proposed relational wrong operates analogously: it recognizes that certain institutional relationships generate structured obligations whose breach may be legally significant independent of quantifiable harm.

C. Conscious and Material Breach

Third, liability would require a knowing and material breach.

Private law routinely distinguishes between trivial and material breaches[80]. In contract doctrine, only material breach may justify termination or substantial remedy[81]. The same limiting logic would apply here.

A fleeting emotional attachment or ambiguous conduct would not suffice. The breach must implicate the core institutional commitment of exclusivity.

This requirement ensures that the tort does not devolve into litigation over ordinary marital dissatisfaction.

D. Institutional Causation Rather Than Emotional Damage

The proposed tort would not require proof of measurable emotional injury. Instead, it would require demonstration that the breach affected the institutional integrity of the relationship—such as contributing to its dissolution or fundamentally altering its legal structure.

Causation doctrines in tort law already distinguish between factual causation and legally cognizable injury[82]. The proposal does not eliminate causation; it reframes the legally protected interest as institutional integrity rather than emotional tranquility.

E. Limited and Non-Punitive Remedies

Finally, remedies would be strictly limited.

Nominal damages have long served as recognition of legal wrong independent of substantial injury[83]. Declaratory relief similarly provides institutional acknowledgment without compensatory excess[84].

Punitive damages would be categorically unavailable[85]. The purpose of the tort would be recognition and accountability, not punishment.

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[80] See Restatement (Second) of Contracts § 241 (Am. L. Inst. 1981).
[81] Id.
See Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 26 (Am. L.
[82] Inst. 2010).
[83] See Carey v. Piphus, 435 U.S. 247, 266 (1978); Uzuegbunam v. Preczewski, 592 U.S. 279 (2021).
[84] See 28 U.S.C. § 2201 (Declaratory Judgment Act).
[85] See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (constitutional limits on punitive damages).

This remedial structure parallels fiduciary doctrine, where disgorgement reflects breach of loyalty rather than emotional injury[86].

By limiting remedies to symbolic or declaratory relief, the proposal preserves liberal caution while maintaining doctrinal coherence.

Structural Coherence

The architecture of Relational Civil Wrong is therefore anchored in familiar private law elements:

1. Recognized institutional status
2. Embedded institutional duty
3. Conscious and material breach
4. Institutional (not emotional) injury
5. Limited, non-punitive remedy

Each element is drawn from existing doctrinal categories. Nothing in this structure requires expansion of tort theory beyond its established pluralism.

The proposal does not moralize intimacy. It systematizes institutional breach.

8. Constitutional Objections: Autonomy, Lawrence, and Obergefell

Any proposal to recognize civil liability in the context of adultery must confront a constitutional concern: whether such liability would impermissibly intrude upon personal autonomy and intimate liberty.

A. Lawrence and the Limits of Criminal Prohibition

In *Lawrence v. Texas*, the Supreme Court invalidated a criminal statute prohibiting consensual same-sex intimacy, holding that adults are entitled to liberty in private sexual conduct without state criminal sanction[87]. The Court emphasized that the case involved criminal punishment and the stigmatizing force of state prohibition[88].

Importantly, however, *Lawrence* did not hold that private sexual conduct is constitutionally immune from all legal consequences. The Court did not address civil liability, institutional commitments, or voluntarily assumed legal obligations[89]. Its reasoning was directed at the illegitimacy of criminalizing consensual adult intimacy.

The proposed Relational Civil Wrong would not criminalize adultery. It would not prohibit conduct, nor would it subject individuals to penal sanction. It would instead

[86] See Restatement (Third) of Restitution and Unjust Enrichment § 43 (Am. L. Inst. 2011).
[87] Lawrence v. Texas, 539 U.S. 558, 578 (2003).
[88] Id. at 567–75.
[89] Id. at 578.

recognize limited civil accountability arising from breach of a voluntarily assumed institutional status.

The distinction between criminal prohibition and civil accountability is constitutionally significant. The Supreme Court has repeatedly distinguished between state punishment and the enforcement of private obligations[90]. Nothing in *Lawrence* suggests that voluntarily assumed institutional duties are constitutionally insulated from civil consequences.

B. Obergefell and Marriage as Institutional Commitment

In *Obergefell v. Hodges*, the Court held that same-sex couples possess a fundamental right to marry[91]. Crucially, however, the Court did not frame marriage as a purely private contract. It described marriage as an enduring union that embodies "commitment," "fidelity," and "responsibility[92]."

The opinion emphasized that marriage confers both rights and obligations, forming a legally structured relationship recognized by the state[93].

Thus, the constitutional protection of marriage affirms its institutional character. Recognizing that marriage generates structured obligations is not inconsistent with constitutional liberty; it is embedded in the Court's own description of the institution.

The proposed tort does not redefine marriage. It operates within the institutional framework that constitutional jurisprudence already recognizes.

C. Standard of Constitutional Review

Civil tort doctrines typically receive rational basis review unless they burden a fundamental right or target a suspect classification[94]. A narrowly tailored tort recognizing breach of institutional loyalty would neither prohibit intimate conduct nor discriminate on protected grounds.

It would therefore not trigger strict scrutiny. At most, it would require that the state articulate a legitimate interest—such as preserving institutional coherence in legally recognized relationships—and that the doctrine be rationally related to that interest[95].

The Supreme Court has long recognized that states possess broad authority to regulate the incidents of marriage, including its dissolution and legal consequences[96].

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[90] See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (distinguishing between state prohibition and regulatory structures); see also Turner v. Safley, 482 U.S. 78, 95–96 (1987) (recognizing state authority over marital regulation).

[91] Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015).
[92] Id. at 681.
[93] Id. at 669–70.
[94] See Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).
[95] See id.
[96] See Maynard v. Hill, 125 U.S. 190, 211 (1888).

Recognizing limited civil accountability for breach of marital loyalty would fall within that regulatory domain.

D. Autonomy and Voluntary Obligation

The strongest constitutional objection is grounded in autonomy: that individuals possess a liberty interest in altering their intimate lives without state interference.

Yet autonomy in constitutional law has never been understood as immunity from consequences of voluntarily assumed legal commitments. Contract law routinely enforces obligations that individuals freely undertake[97]. Marriage, likewise, is a voluntary legal status entered through formal state recognition.

The proposed tort does not constrain exit from marriage. It does not bar divorce. It does not criminalize extramarital intimacy. It recognizes only that when individuals assume an institutional status carrying structured duties, breach of those duties may have limited civil significance.

The constitutional tradition protects liberty, not insulation from accountability.

9. Normative Synthesis: Toward a Universal Principle of Relational Civil Responsibility

A. What This Article Has Demonstrated

This Article has not argued for the revival of fault-based divorce.
It has not sought to punish adultery.
It has not proposed the restoration of heart balm actions.

Instead, it has identified a structural inconsistency in modern tort theory.

Across three liberal legal systems—the United States, England, and Israel—four propositions simultaneously hold:

1. Marriage is recognized as a legally constituted institutional status[98].
2. The institution carries structured rights and obligations, including reciprocal duties embedded in its legal architecture[99].
3. Tort law, in multiple domains, recognizes liability grounded in breach of duty even absent measurable pecuniary harm[100].
4. Yet adultery generates no independent civil remedy.

[97] See Restatement (Second) of Contracts § 1 (Am. L. Inst. 1981).
[98] See Obergefell v. Hodges, 576 U.S. 644, 669–70 (2015); Maynard v. Hill, 125 U.S. 190, 211 (1888).
[99] See Turner v. Safley, 482 U.S. 78, 95–96 (1987).
[100] See Carey v. Piphus, 435 U.S. 247 (1978); Restatement (Third) of Restitution and Unjust Enrichment § 43 (Am. L. Inst. 2011); Restatement (Second) of Torts § 158 (Am. L. Inst. 1965).

The absence of a tort is therefore not explained by the absence of institutional duty, nor by a universal doctrinal requirement of measurable harm. It reflects a normative policy choice concerning the boundaries of civil adjudication in intimate life.

Recognizing that fact does not mandate reform. It demands conceptual clarity.

B. Dismantling the Harm Monolith

The dominant narrative of tort as harm-compensation is descriptively incomplete.

Nominal damages doctrine demonstrates that violation of legal rights may suffice for judicial redress[101].
Fiduciary doctrine confirms that institutional loyalty may be protected independent of provable loss[102].
Trespass doctrine shows that invasion of a protected interest may be actionable without economic injury[103].

Tort law is thus structurally plural. It contains harm-based wrongs and breach-based wrongs.

The refusal to recognize civil accountability for adultery does not follow from tort structure; it follows from liberal caution about intimacy.

The Article does not criticize that caution. It rejects only the claim that it is conceptually inevitable.

C. The Universal Principle

From the comparative and theoretical analysis emerges a broader normative proposition:

Where a legal system formally recognizes an institutional relationship that generates structured duties of loyalty, the categorical denial of any civil remedy for intentional breach of those duties is not dictated by tort doctrine itself, but represents a policy judgment requiring explicit justification.

This principle is modest in scope.

It does not compel recognition of a tort in every jurisdiction.
It does not require compensatory damages.
It does not mandate moral adjudication.

It requires transparency: if the law declines to attach civil consequence to institutional breach, it should do so as a matter of policy—not under the mistaken belief that tort theory forbids such recognition.

[101] Uzuegbunam v. Preczewski, 592 U.S. 279 (2021).
[102] Restatement (Third) of Restitution and Unjust Enrichment § 43.
[103] Restatement (Second) of Torts § 158.

D. Beyond Adultery

Adultery serves here as an analytic stress test.

If the legal system recognizes breach of loyalty in corporate governance[104], in agency law[105], and in fiduciary administration[106], yet excludes marital loyalty from any civil framework, the distinction must be defended normatively.

Perhaps the defense will prevail. Perhaps liberal autonomy demands categorical exclusion.

But that defense must be argued openly—not attributed to an imagined structural barrier within tort law.

E. Liberal Institutionalism

The proposal advanced here may be described as *liberal institutionalism*:

- Individuals are free to choose whether to enter legally recognized institutions.
- Institutions generate structured obligations.
- Breach of those obligations may justify limited civil recognition.
- Remedies may remain symbolic, declaratory, and non-punitive.

This approach does not resurrect patriarchal models.
It does not criminalize intimacy.
It does not convert courts into moral tribunals.

It acknowledges only that when the state creates or formally recognizes an institution carrying structured duties, breach of its core obligations is not normatively neutral.

F. Final Reflection

Modern law rightly resists moralism.
But resistance to moralism should not become conceptual confusion.

The comparative record shows no doctrinal impossibility.
The theoretical analysis reveals no structural barrier.
The proposed mechanism demonstrates institutional feasibility.

What remains is a normative choice.

The question is not whether adultery is morally wrong.
It is whether breach of an institutional duty of loyalty may constitute a civil wrong—even absent measurable harm—within a liberal legal order.

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[104] Guth v. Loft, Inc., 5 A.2d 503 (Del. 1939).
[105] Restatement (Third) of Agency § 8.01 (Am. L. Inst. 2006).
[106] Id.; see also Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928).

That question is not foreclosed by doctrine.

It remains open.

PART I

The United States: Institutional Retrenchment and Doctrinal Ambivalence

The American legal landscape provides the most revealing laboratory for examining whether adultery may constitute a civil wrong. Nowhere were heart balm actions more fully developed; nowhere were they more forcefully curtailed; and nowhere has tort theory been more systematically articulated in harm-centered terms[107].

This Part proceeds in four stages. First, it maps the doctrinal structure of heart balm actions. Second, it traces their statutory retrenchment. Third, it examines surviving jurisdictions. Fourth, it situates the retrenchment within modern tort structure and no-fault family law.

A. Doctrinal Structure of Heart Balm Actions

The Restatement (Second) of Torts records four related actions historically associated with marital interference: alienation of affections, criminal conversation, seduction, and breach of promise to marry[108]. Of these, alienation of affections and criminal conversation are most directly relevant.

Alienation of affections required proof of (1) a valid marriage, (2) genuine love and affection between spouses, and (3) wrongful and malicious interference by the defendant causing alienation[109]. The protected interest was consortium—understood as companionship, affection, and sexual society[110]. Importantly, the action did not require proof of specific economic loss as an essential element[111].

Criminal conversation, by contrast, was established upon proof of sexual intercourse with a married woman; loss of affection need not be independently shown[112]. The action reflected a proprietary conception of marital exclusivity and was historically gender-asymmetric[113].

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[107] W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 124 (5th ed. 1984); see also John C.P. Goldberg & Benjamin C. Zipursky, The Moral of MacPherson, 146 U. Pa. L. Rev. 1733 (1998).
[108] Restatement (Second) of Torts §§ 683–686 (Am. L. Inst. 1977).
[109] McCutchen v. McCutchen, 360 N.C. 280, 624 S.E.2d 620, 623 (2006).
[110] Restatement (Second) of Torts § 683 cmt. b.
[111] Id.
[112] Restatement (Second) of Torts § 685.
[113] Id. § 685 cmt. a.

These actions demonstrate that American tort law once recognized relational interests within marriage as independently protectable[114]. Whether that recognition was normatively justified is a separate question; doctrinally, it existed.

B. Statutory Retrenchment: The Heart Balm Abolition Movement

Beginning in the 1930s, numerous states enacted "heart balm" statutes abolishing one or more of these causes of action[115]. New York's Civil Rights Law § 80-a, enacted in 1935, is among the most frequently cited examples, abolishing alienation of affections, criminal conversation, and related actions[116]. Similar legislation followed in other jurisdictions during the same era[117].

The legislative debates and contemporaneous scholarship emphasized policy concerns: extortionate litigation, evidentiary abuse, reputational harm, and incompatibility with evolving views of marriage as partnership rather than property[118]. Courts and commentators did not primarily frame abolition as a structural limitation inherent in tort doctrine itself[119].

The Restatement reflects this legislative reality, noting the widespread abolition of alienation of affections in many states[120]. It does not characterize the action as structurally incompatible with tort doctrine; rather, it records its decline as a matter of policy choice.

C. Surviving Jurisdictions: Doctrinal Persistence

Not all states abolished alienation of affections. North Carolina continues to recognize the tort as a matter of common law, subject to statutory limitations[121]. Its elements remain: (1) a valid marriage, (2) genuine love and affection, and (3) malicious conduct causing alienation[122]. Mississippi likewise recognizes the action[123].

North Carolina courts have repeatedly reaffirmed its viability, while emphasizing evidentiary requirements and procedural safeguards[124]. The tort is not treated as an anomaly incompatible with tort structure; it is treated as a state policy choice.

The continued existence of these actions in some jurisdictions has two implications. First, there is no federal constitutional bar to their recognition. Second, there is no universally binding doctrinal principle in tort law that precludes liability for marital interference.

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[114] See id. §§ 683–686.
[115] See Prosser & Keeton, supra note 105, § 124.
[116] N.Y. Civ. Rights Law § 80-a (McKinney).
[117] See N.P. Feinsinger, Legislative Attack on "Heart Balm", 33 Mich. L. Rev. 979 (1935); F.L. Kane, Heart Balm and Public Policy, 4 Fordham L. Rev. 519 (1936).
[118] Id.; Prosser & Keeton, supra note 105, § 124.
[119] Id.
[120] Restatement (Second) of Torts § 683 cmt. b.
[121] N.C. Gen. Stat. § 52-13.
[122] McCutchen, 624 S.E.2d at 623.
[123] Fitch v. Valentine, 959 So. 2d 1012 (Miss. 2007).
[124] McCutchen, 624 S.E.2d at 623.

D. No-Fault Divorce and Institutional Philosophy

The nationwide shift toward no-fault divorce—initiated by California's Family Law Act of 1969[125] and subsequently adopted across jurisdictions[126]—altered the institutional framework of marital dissolution. Fault attribution ceased to be a prerequisite for divorce.

Yet no-fault divorce did not erase marriage's institutional character. It restructured dissolution; it did not dissolve the legal architecture of marriage as status[127].

The retrenchment of heart balm actions must therefore be understood within this broader institutional transition. As family law moved away from fault, tort law followed suit in declining to adjudicate marital blame.

But again, the shift was normative, not structural. Tort doctrine itself continued to recognize breach-based liability in other domains—including disgorgement for breach of fiduciary duty, trespass without proof of actual damage, and constitutional nominal damages[128].

The American landscape thus reveals ambivalence rather than impossibility. The law once protected relational marital interests; later, it chose not to. That choice cannot be reduced to the internal logic of harm doctrine alone.

PART II

Israel: Institutional Recognition of Marital Duty and the Deliberate Refusal of Tort Enforcement

A. Israel as a Structurally Revealing Case

Israel presents a uniquely instructive intermediary model. Unlike the United States, which historically recognized heart-balm torts and later rejected them, and unlike England, which gradually demoralized the institution of marriage within private law, Israeli law maintains an explicit institutional recognition of marital obligations—while simultaneously refusing to translate those obligations into independent tort liability.

The structural tension is therefore sharper. Israeli law does not deny that marriage entails duties. It denies that breach of marital fidelity gives rise to a civil tort remedy.

That distinction is doctrinally and theoretically significant.

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[125] 1969 Cal. Stat. 3312.
[126] See Herma Hill Kay, An Appraisal of California's No-Fault Divorce Law, 75 Cal. L. Rev. 291 (1987).
[127] Maynard v. Hill, 125 U.S. 190, 211 (1888).
[128] Carey v. Piphus, 435 U.S. 247 (1978); Restatement (Third) of Restitution and Unjust Enrichment § 43 (Am. L. Inst. 2011).

B. CA 8489/12 Ploni v. Ploni — The Supreme Court's Boundary-Setting Decision

The leading authority is CA 8489/12 *Ploni v. Ploni* (Isr. Sup. Ct. Oct. 29, 2013)[129]

In that case, a husband brought a negligence claim against a third party who had conducted a consensual extramarital relationship with his wife. The claim was framed under sections 35–36 of the Civil Wrongs Ordinance [New Version], 1968, which codify the general tort of negligence[130].

The Supreme Court rejected the claim. Justice Yitzhak Amit, writing for the Court, held that Israeli tort law does not recognize an independent civil cause of action based on interference with marriage through consensual adultery[131].

Importantly, the Court did not deny that adultery may cause emotional injury. Rather, it concluded that policy considerations negate the imposition of a duty of care in this intimate sphere[132].

The Court further relied on section 62(b) of the Civil Wrongs Ordinance, which provides that relations created by marriage shall not be deemed a "contract" for purposes of liability for inducing breach of contract[133]. This statutory provision reflects a legislative choice not to conceptualize marriage as a contractual relationship enforceable through tort-based interference doctrines[134].

The holding therefore marks a boundary of tort liability, not a denial of marital normativity.

C. Marriage as a Legal Status Under Israeli Law

Under the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, jurisdiction over marriage and divorce of Jews in Israel is vested exclusively in rabbinical courts[135]. These courts function as state judicial bodies exercising statutory authority.

Within this framework, marital fidelity may bear legal consequences under religious law, including implications for ketubah entitlement and spousal maintenance[136].

Thus, while Israeli civil tort law declines to recognize an adultery tort, the legal system as a whole does not treat marital fidelity as normatively irrelevant.

Marriage remains a legally constituted institutional status.

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[129] CA 8489/12 Ploni v. Ploni, Nevo (Oct. 29, 2013) (Isr.)
[130] Civil Wrongs Ordinance [New Version], 1968, §§ 35–36.
[131] CA 8489/12 *Ploni v. Ploni*, ¶¶ 5–6.
[132] Id. ¶ 6.
[133] Civil Wrongs Ordinance [New Version], 1968, § 62(b).
[134] CA 8489/12 *Ploni v. Ploni*, ¶ 5.
[135] Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953.
[136] Id.

D. The Retreat from Fault in Property Distribution

The Law of Spouses (Property Relations), 5733-1973 establishes a deferred community property regime based on equal resource balancing upon dissolution[137].

Israeli Supreme Court jurisprudence has consistently emphasized that marital misconduct, including adultery, does not justify deviation from equal division under the statute[138].

This doctrinal move reflects a broader shift away from fault-based economic consequences in family law. Yet this retreat from fault in property distribution does not eliminate the institutional structure of marriage itself.

It instead represents a normative policy choice regarding financial allocation at dissolution.

E. Israeli Tort Law Is Not Strictly Harm-Exclusive

Israeli private law does not uniformly require proof of measurable economic damage as a condition of civil liability.

Section 7A of the Defamation (Prohibition) Law, 5725-1965 permits statutory damages without proof of actual damage[139].

Similarly, the Protection of Privacy Law, 5741-1981 provides civil remedies for certain violations independent of traditional pecuniary loss[140].

These statutory frameworks demonstrate that Israeli law recognizes breach-based and rights-based civil remedies beyond strictly compensatory harm models.

The refusal to recognize an adultery tort is therefore not compelled by an overarching harm-exclusive doctrine.

F. Structural Conclusion

The Israeli system thus reveals a structurally coherent but normatively selective arrangement:

1. Marriage is legally institutionalized[141].
2. Marital duties retain recognized legal meaning within parts of the legal system[142].
3. Tort law elsewhere permits liability absent quantifiable economic harm[143].

[137] Law of Spouses (Property Relations), 5733-1973.
[138] See, e.g., CA 1915/91 *Yaakobi v. Yaakobi*, 49(3) PD 529 (1995).
[139] Defamation (Prohibition) Law, 5725-1965, § 7A.
[140] Protection of Privacy Law, 5741-1981.

[141] Rabbinical Courts Jurisdiction Law, supra note 133.
[142] Id.
[143] Defamation Law § 7A; Protection of Privacy Law.

4. Yet no independent tort action lies for adultery[144].

The exclusion reflects a policy determination regarding the limits of civil adjudication in intimate relationships.

It does not reflect a doctrinal impossibility within tort theory itself.

PART III

England: De-Moralization of Marriage and the Disappearance of the Tort

A. Criminal Conversation and Its Abolition

English law historically recognized the tort of criminal conversation, which allowed a husband to sue a man who had engaged in sexual intercourse with his wife[145]. The action was premised on a proprietary understanding of marital exclusivity and formed part of a broader structure of fault-based matrimonial litigation[146].

The Matrimonial Causes Act 1857 eliminated the action for criminal conversation as part of its broader restructuring of matrimonial jurisdiction and the secularization of divorce proceedings[147]. which transferred jurisdiction over divorce from ecclesiastical courts to secular courts and restructured matrimonial remedies[148]. The Act eliminated the civil action for criminal conversation as part of a broader institutional reform of marriage law[149].

Importantly, abolition was not framed as a structural limitation within tort doctrine. Rather, it accompanied a shift in the institutional understanding of marriage and the public administration of marital breakdown[150].

The reform reflected dissatisfaction with the proprietary and gender-asymmetric premises of the action, not a general doctrinal principle that relational interference could never constitute a civil wrong.

B. The Persistence of Fault and Its Gradual Erosion

Although criminal conversation was abolished in 1857, English divorce law remained fault-based for much of the twentieth century. Adultery continued to serve as a ground

[144] CA 8489/12 *Ploni v. Ploni*.
[145] See Matrimonial Causes Act 1857, 20 & 21 Vict. c. 85 (Eng.).
[146] See generally Lawrence Stone, *Road to Divorce: England 1530–1987* (1990).
[147] Matrimonial Causes Act 1857, 20 & 21 Vict. c. 85 (U.K.)
[148] Matrimonial Causes Act 1857.
[149] Id.
[150] Id.; see also Stone, supra note 144.

for divorce under subsequent statutory frameworks, including the Matrimonial Causes Act 1973[151].

The conceptual shift away from fault culminated in the Divorce, Dissolution and Separation Act 2020, which introduced a regime of no-fault divorce effective in 2022[152]. Under the current framework, parties need not establish adultery or other misconduct to obtain dissolution; a statement of irretrievable breakdown suffices[153].

This reform marks a decisive institutional move toward de-moralization of marital dissolution. Yet it does not entail that marriage has ceased to be a legally constituted status. English law continues to treat marriage as a formal legal institution generating statutory consequences in property, inheritance, and parental responsibility[154].

The retreat from fault in dissolution does not itself dictate the absence of tort liability. It reflects a policy choice concerning the administration of divorce.

C. English Tort Structure and the Harm Question

Modern English tort law is not uniformly dependent upon proof of quantifiable economic damage as a condition of liability.

Trespass to land, for example, is actionable per se; proof of actual damage is not required[155].

Similarly, breach of confidence and the related tort of misuse of private information may give rise to liability independent of traditional pecuniary loss[156].

English fiduciary law likewise recognizes disgorgement remedies for breach of loyalty without proof of compensable financial harm[157].

These doctrines demonstrate that English private law does not adopt a rigid harm-exclusive model. Liability may attach upon breach of a legally recognized duty even where measurable economic loss is minimal or absent.

The disappearance of criminal conversation therefore cannot be explained solely by an internal doctrinal requirement of measurable harm. It reflects a normative boundary concerning the judicial management of intimate relationships.

D. Status, Contract, and Institutional Restraint

[151] Matrimonial Causes Act 1973, c. 18 (U.K.).
[152] Divorce, Dissolution and Separation Act 2020, c. 11 (U.K.).
[153] Id.
[154] See Matrimonial Causes Act 1973; Administration of Estates Act 1925; Children Act 1989.
[155] See Entick v. Carrington (1765) 19 Howell's State Trials 1029; see also *Clerk & Lindsell on Torts* ¶ 18-01 (latest ed.).
[156] Campbell v. MGN Ltd [2004] UKHL 22; see also *Clerk & Lindsell on Torts* ¶ 28-01.
[157] See Regal (Hastings) Ltd v. Gulliver [1942] UKHL 1; Boardman v. Phipps [1967] 2 AC 46.

English legal theory has long distinguished marriage as a status rather than an ordinary contract[158]. Although modern reforms emphasize autonomy and partnership, marriage remains a formal legal institution created and regulated by statute.

The decision not to recognize a tort of adultery in contemporary English law thus represents institutional restraint rather than doctrinal incapacity. English courts have not declared that relational wrongs are conceptually impossible within tort law; they have declined to extend tort doctrine into the domain of consensual intimate infidelity.

The English experience therefore parallels the American and Israeli patterns: institutional recognition of marriage persists, but tort enforcement of marital fidelity has been deliberately withdrawn.

E. Comparative Implication

Across the three systems examined, a shared structural pattern emerges:

1. Marriage is legally institutionalized[159].
2. Tort law in each system recognizes forms of breach-based liability independent of measurable economic harm[160].
3. Yet none recognizes an independent modern tort for adultery[161].

The convergence suggests not doctrinal impossibility but normative choice.

PART IV

Beyond Harm: Articulating a Category of Relational Civil Wrong

A. The Conceptual Problem: Harm as Gatekeeper

Modern tort discourse—particularly in the United States—often treats harm as the conceptual threshold of liability. Tort is commonly described as a "civil wrong causing injury," structured around duty, breach, causation, and damages[162].

Yet a closer inspection of doctrine reveals that harm is not always the conceptual foundation of liability. In several domains, the law recognizes wrongs independent of measurable economic loss. Trespass is actionable without proof of damage[163]. Nominal damages may be awarded for constitutional violations absent demonstrable

[158] Maynard v. Hill, 125 U.S. 190 (1888) (cited comparatively in Anglo-American jurisprudence).
[159] Matrimonial Causes Act 1973; Rabbinical Courts Jurisdiction Law, supra note 133; Maynard v. Hill, supra note 125.
[160] Carey v. Piphus, supra note 126; Entick v. Carrington, supra note 152.
[161] See Matrimonial Causes Act 1857; CA 8489/12 Ploni v. Ploni, supra note 127.
[162] See Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 6 (Am. L. Inst. 2010).
[163] See Entick v. Carrington (1765) 19 Howell's State Trials 1029.

injury[164]. Fiduciary law authorizes disgorgement without proof of compensable financial harm[165].

The persistence of these doctrines suggests that harm functions as a dominant organizing principle, but not as an exclusive structural requirement.

The problem exposed by adultery is therefore not whether harm exists. Emotional harm plainly exists. The problem is whether breach of a legally recognized institutional duty may be acknowledged as a civil wrong even when compensation is not grounded in quantifiable injury.

B. From Harm to Wrong: Re-Centering Breach

Corrective justice theory grounds liability in the violation of a correlative right[166]. On this account, damage is evidentiary of breach, but the normative core lies in the wrong itself.

Ernest Weinrib's corrective justice theory makes this structure explicit[167]. For Weinrib, tort law is not fundamentally about the maximization of welfare or the management of risk, but about the juridical relationship between two parties whose rights and duties are correlative. The wrong consists in the violation of a right held by the plaintiff, and liability restores the normative equilibrium disturbed by that violation. Harm is evidentiary of the wrong, but it is not its conceptual foundation[168]. The normative force of tort law lies in the breach of a duty owed to another within a structured relational framework.

Weinrib's account rejects instrumentalism and insists that private law must be understood internally, as a system of normative relations rather than a policy tool.[169]

Civil recourse theory similarly emphasizes the plaintiff's authority[170] to call the defendant to account for violation of a legal duty[171]. The central feature is relational accountability, not economic quantification.

Neither framework requires that every actionable wrong be reducible to measurable financial loss. Both permit the recognition of breach-based liability when the legal system identifies a protected relational structure.

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[164] Carey v. Piphus, 435 U.S. 247 (1978).
[165] Restatement (Third) of Restitution and Unjust Enrichment § 43 (Am. L. Inst. 2011).
[166] Ernest J. Weinrib, *The Idea of Private Law* (1995).
[167] Ernest J. Weinrib, *The Idea of Private Law* (1995); Ernest J. Weinrib, Corrective Justice, 77 Iowa L. Rev. 403 (1992).
[168] Ernest J. Weinrib, *The Idea of Private Law* 56–83 (1995); see also Ernest J. Weinrib, Corrective Justice in a Nutshell, 52 U. Toronto L.J. 349 (2002)
[169] See Weinrib, *The Idea of Private Law*, supra, at 5–9.
[170] John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. Pa. L. Rev. 1733 (1998); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 Tex. L. Rev. 917 (2010); Benjamin C. Zipursky, Civil Recourse, Not Corrective Justice, 91 Geo. L.J. 695 (2003).
[171] John C.P. Goldberg & Benjamin C. Zipursky, Civil Recourse, 91 Va. L. Rev. 249 (2005).

If marriage is treated by law as an institutional status generating reciprocal duties, then breach of one of those duties may qualify as a wrong even if compensation remains limited.

C. Distinguishing Relational Harm from Relational Wrong

A critical distinction must be drawn between:

- Relational harm: emotional injury, humiliation, or distress arising from betrayal; and
- Relational wrong: violation of a legally recognized institutional obligation.

The proposal advanced here does not rest upon the intensity of emotional suffering. It rests upon breach of a duty that the legal system itself attributes to a formally constituted status.

Courts have rightly resisted transforming heartbreak into tort. The argument is narrower: when law creates an institutional framework imposing reciprocal obligations, the breach of those obligations is not conceptually neutral.

D. Defining Relational Civil Wrong

A Relational Civil Wrong may be defined as:

A civil wrong arising from the knowing and material breach of an institutional duty inherent in a legally recognized relational status, actionable without the necessity of proving measurable economic harm.

Four limiting elements are essential:

1. **Legally recognized status** – The relationship must be formally constituted by law (e.g., marriage, registered civil union).
2. **Institutional duty** – The obligation must arise from the legal structure of the status itself, not merely subjective expectations.
3. **Knowing and material breach** – The violation must be intentional and substantial, not trivial.
4. **Non-punitive remedy** – Relief must be declaratory or nominal; punitive damages are excluded.

These limitations prevent regression into historical heart-balm models.

E. Structural Compatibility with Liberalism

Recognition of a relational civil wrong does not criminalize adultery. It does not prohibit exit. It does not mandate specific performance of intimacy.

Contract law provides an instructive analogy: breach of contract is not illegal, yet it gives rise to civil accountability[172].

Similarly, recognition of breach of institutional duty within marriage would not compel continued association. It would acknowledge that entry into a legally structured status entails correlative obligations.

Liberal autonomy permits exit. It does not require normative indifference to breach.

F. Comparative Confirmation

The comparative analysis above demonstrates:

- The United States once recognized relational torts and later withdrew them for policy reasons.
- Israel recognizes marital duties institutionally while declining tort enforcement.
- England abolished criminal conversation during institutional reform of marriage law.

In none of these systems was abolition grounded in a doctrinal impossibility within tort theory itself. The withdrawal was normative.

The proposed category therefore operates within existing doctrinal space rather than outside it.

G. Doctrinal Placement

Relational Civil Wrong does not displace harm-based torts. It supplements them.

Tort liability may thus be understood as encompassing three categories:

1. Harm-based liability;
2. Rights-based liability (property or constitutional);
3. Institutional relational liability.

The third category is not moralistic; it is structural. It responds to breach of legally constituted relational duties rather than to emotional injury alone.

PART V

[172] See Restatement (Second) of Contracts § 346 (Am. L. Inst. 1981).

Designing the Mechanism: Elements, Defenses, and Remedies

A. What the Proposed Tort Is Not

Before defining the contours of Relational Civil Wrong, it is necessary to clarify what it is not.

It is not a revival of heart balm actions. It does not create liability against third parties. It does not rest on proprietary claims over a spouse. It does not authorize punitive damages. It does not compensate for generalized emotional distress. And it does not reintroduce fault into property distribution at divorce.

The proposed category is narrower. It concerns institutional accountability for breach of a legally constituted relational duty.

B. Elements of Relational Civil Wrong

To avoid overbreadth and historical regression, four cumulative elements are required.

1. Legally Constituted Status

The relationship must be formally recognized by law as a status generating institutional obligations—such as marriage or a registered civil union[173].

Informal romantic relationships would not suffice. The limitation to legally constituted status prevents expansion into subjective or fluctuating relational expectations.

2. Institutional Duty Inherent in the Status

The duty breached must arise from the legal structure of the status itself, not from individual moral commitments[174].

This distinction separates the proposal from moral regulation. The law already attributes certain obligations to legally recognized statuses. The wrong arises from breach of those institutional obligations.

3. Knowing and Material Breach

The breach must be knowing and substantial. Mere emotional withdrawal or trivial misconduct would not suffice[175].

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[173] See Maynard v. Hill, 125 U.S. 190 (1888).

[174] Id.

[175] Cf. Restatement (Second) of Torts § 8A (defining intent).

Requiring intentional and material violation ensures that the category does not become a vehicle for ordinary marital discord.

4. Institutional Impact

Although proof of measurable economic loss is not required, the breach must meaningfully disrupt the institutional relationship—such as precipitating dissolution or fundamentally undermining the mutual commitment embedded in the status[176].

This requirement prevents symbolic litigation disconnected from relational consequence.

C. Remedies: Accountability Without Punishment

The remedy structure is critical to the legitimacy of the proposal.

1. **Nominal Damages** – The primary remedy would be nominal damages, acknowledging breach without transforming the claim into a vehicle for emotional compensation[177].
2. **Declaratory Relief** – Courts could issue declaratory judgments recognizing institutional breach[178].
3. **Exclusion of Punitive Damages** – Punitive damages would be categorically unavailable[179].
4. **No Emotional Distress Multipliers** – Compensation would not be calibrated to subjective suffering.

The focus is acknowledgment and accountability—not retribution.

D. Defenses

Several defenses are essential to preserve liberal compatibility.

1. **Express or Implied Consent** – Where parties have agreed to a non-exclusive arrangement, no breach occurs.
2. **Mutual Waiver** – Sustained reciprocal conduct may negate claimability.
3. **De Facto Separation** – Where the marital relationship has functionally ceased prior to the conduct at issue, institutional breach may be absent.
4. **Reciprocal Material Breach** – A plaintiff who has materially breached the same institutional duty may be barred under principles analogous to unclean hands[180].

These defenses prevent strategic or retaliatory deployment.

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[176] Cf. McCutchen v. McCutchen, 360 N.C. 280, 624 S.E.2d 620 (2006) (discussing elements of alienation).
[177] Carey v. Piphus, 435 U.S. 247 (1978).
[178] See 28 U.S.C. § 2201 (Declaratory Judgment Act).
[179] Cf. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (constitutional limits on punitive damages).

[180] Cf. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806 (1945) (unclean hands doctrine).

E. Procedural Safeguards

Concerns regarding floodgates and intrusive litigation require procedural calibration.

Courts may:

- Require heightened pleading specificity for institutional breach;
- Dismiss claims at an early stage where allegations amount only to emotional grievance;
- Limit discovery into intimate details absent clear relevance;
- Consolidate claims with dissolution proceedings where appropriate.

Such mechanisms are consistent with judicial management of other sensitive claims, including privacy and defamation actions[181].

F. Constitutional Compatibility

Recognition of relational civil wrong would not criminalize conduct. It would not prohibit exit from marriage. It would not impose compelled intimacy.

Civil accountability for breach of voluntarily assumed institutional obligations does not infringe liberty interests in the same manner as criminal prohibition[182].

The state would not regulate private morality; it would recognize the juridical consequences of breach within a legally constituted status.

G. Doctrinal Placement

Relational Civil Wrong occupies a space distinct from:

- Contract (because marriage is status, not purely contract);
- Fiduciary law (because spouses are not trustees in the strict sense);
- Traditional intentional torts (because emotional harm is not the operative measure).

It is best understood as institutional relational liability—a narrow category grounded in breach rather than harm.

PART VI

Objections and Responses: Patriarchy, Autonomy, and Institutional Liberalism

[181] See Campbell v. MGN Ltd [2004] UKHL 22 (privacy balancing).
[182] Cf. Lawrence v. Texas, 539 U.S. 558 (2003) (distinguishing criminal prohibition from private conduct autonomy).

A. The Feminist Objection: Risk of Proprietary Regression

The strongest historical objection to any tort grounded in adultery arises from the gendered origins of heart balm actions. Criminal conversation and alienation of affections were embedded in a proprietary conception of marriage[183] that treated wives as quasi-property[184].

Modern feminist scholarship has emphasized that such actions reinforced gender asymmetry and facilitated coercive litigation[185].

This history cannot be ignored. Any proposal that resembles heart balm must confront the risk of reintroducing structural inequality.

The proposed Relational Civil Wrong differs in four critical respects:

1. It creates no cause of action against third parties.
2. It is fully gender-neutral in application.
3. It rejects proprietary framing of marital exclusivity.
4. It limits remedies to declaratory or nominal relief.

The normative foundation is institutional reciprocity, not ownership.

Moreover, the alternative—complete civil indifference to institutional breach—does not automatically advance gender equality. Legal recognition of reciprocal duty need not imply patriarchal control[186].

The relevant question is whether the structure of the cause of action reproduces hierarchy. Under the narrow formulation proposed here, it does not.

B. The Liberal Objection: The State Should Not Enforce Sexual Morality

A second objection invokes liberal neutrality: the state should not regulate consensual adult intimacy.[187]

This principle underlies constitutional jurisprudence rejecting criminal sanctions for private sexual conduct.[188]

Yet the proposed tort does not criminalize adultery. It does not prohibit conduct. It does not condition exit from marriage upon fault.

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[183] See Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. Pa. L. Rev. 463, 509–15 (1998); Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction, 93 Colum. L. Rev. 374 (1993); see also Prosser & Keeton on the Law of Torts § 124 (5th ed. 1984) (describing the proprietary and gendered origins of criminal conversation).
[184] See Restatement (Second) of Torts § 685 cmt. a.
[185] See, e.g., N.P. Feinsinger, Legislative Attack on "Heart Balm", 33 Mich. L. Rev. 979 (1935).
[186] Cf. Martha Fineman, The Illusion of Equality (1991).
[187] See John Stuart Mill, On Liberty (1859).
[188] Lawrence v. Texas, 539 U.S. 558 (2003).

Civil accountability for breach of voluntarily assumed institutional obligations differs categorically from penal enforcement of morality. Contract law provides an analogy: breach is not illegal, but it carries civil consequence.[189]

The distinction is between moral condemnation and juridical recognition of breach.

C. The Autonomy Objection: Interference with Exit

It may be argued that imposing civil consequences for adultery burdens the right to exit marriage.

But the proposal does not restrict dissolution. It does not require proof of fault for divorce. It does not impose continuing relational duties post-separation.

It recognizes that the manner in which exit occurs—through knowing breach of institutional commitment—may give rise to symbolic accountability.

Autonomy includes the freedom to exit; it does not include immunity from civil responsibility for breach of status-based obligations voluntarily undertaken.

D. The Floodgates Concern

Courts historically justified heart balm abolition in part by reference to extortionate litigation and evidentiary abuse.[190]

The present proposal addresses those concerns structurally:

- It restricts standing to parties within the institutional status.
- It excludes emotional distress damages.
- It bars punitive recovery.
- It permits early dismissal where allegations fail to demonstrate material breach.

Modern procedural doctrines—pleading standards, summary judgment, protective orders—provide additional safeguards.[191]

The fear of abuse, while historically justified, does not entail categorical impossibility.

E. The Functionalist Objection: No Deterrent Value

A further objection contends that nominal or declaratory remedies would lack deterrent force and therefore serve no purpose.

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[189] Restatement (Second) of Contracts § 346 (Am. L. Inst. 1981).
[190] See Prosser & Keeton, supra note 105, § 124.
[191] See Fed. R. Civ. P. 12(b)(6); 56.

But tort law serves expressive as well as compensatory functions.[192] Judicial recognition of breach communicates institutional normativity even when damages are modest.

The purpose of Relational Civil Wrong is not deterrence alone. It is doctrinal coherence: aligning recognition of institutional duty with acknowledgment of its breach.

F. The Radical Critique: Transformation of Marriage Itself

Some critics argue that contemporary marriage has evolved beyond fidelity as a defining legal feature.

Even so, the legal system continues to treat marriage as a formal status generating consequences in property, inheritance, taxation, and parental responsibility.[193]

If the legislature were to eliminate all institutional duties inherent in marriage, the analysis would differ. So long as marriage remains a legally structured status, the conceptual possibility of breach-based accountability persists.

G. Synthesis

The objections examined—feminist, liberal, autonomy-based, functionalist—raise serious normative concerns. None establishes doctrinal impossibility.

The debate is not about whether tort theory can accommodate relational wrong. It is about whether legal systems should choose to do so.

The distinction is essential.

PART VII

Toward a Universal Principle of Relational Civil Responsibility

A. What This Article Has Established

This Article has not argued for the resurrection of heart balm actions. It has not proposed punitive damages for adultery. It has not sought to reintroduce fault into property division at divorce.

[192] See generally Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021 (1996).
[193] See Maynard v. Hill, 125 U.S. 190 (1888)

What it has demonstrated is narrower but conceptually significant.

Across three liberal legal systems—the United States, Israel, and England—a consistent structural pattern appears:

1. Marriage remains a legally constituted institutional status.[194]
2. Each system recognizes forms of civil liability that do not depend on measurable economic harm.[195]
3. Yet none currently recognizes an independent modern tort for adultery.[196]

The absence of liability is not compelled by a universal doctrinal principle within tort theory. It reflects a policy judgment about the proper limits of judicial involvement in intimate relationships.

Recognizing that distinction is the Article's primary contribution.

B. The Harm Monolith Reconsidered

Modern tort discourse often treats harm as the indispensable threshold of liability. But comparative and doctrinal analysis reveals a more complex structure.

Trespass, nominal constitutional damages, and fiduciary disgorgement demonstrate that breach-based liability persists across legal domains.[197]

The reluctance to recognize adultery as a civil wrong is therefore not evidence that harm is conceptually indispensable. It is evidence that intimate institutional contexts trigger normative caution.

The harm monolith is not doctrinal necessity; it is rhetorical dominance.

C. The Universal Principle

From the comparative inquiry emerges a broader principle:

When a legal system recognizes an institutional status that generates reciprocal duties, the categorical denial of civil accountability for breach of those duties is not conceptually compelled by tort doctrine; it is a normative policy choice requiring justification.

This principle does not mandate adoption of Relational Civil Wrong in any jurisdiction. It demands conceptual clarity.

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[194] See Maynard v. Hill, 125 U.S. 190 (1888); Matrimonial Causes Act 1973 (U.K.); Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953 (Isr.).
[195] Carey v. Piphus, 435 U.S. 247 (1978); Entick v. Carrington (1765) 19 Howell's State Trials 1029; Restatement (Third) of Restitution and Unjust Enrichment § 43 (Am. L. Inst. 2011).
[196] Matrimonial Causes Act 1857 (U.K.); CA 8489/12 Ploni v. Ploni (Isr. Sup. Ct. 2013); see Prosser & Keeton, supra note 105, § 124.
[197] Id.

Legal systems may choose restraint. But they should not treat restraint as doctrinal inevitability.

D. Institutional Liberalism

The proposed framework may be understood as a form of institutional liberalism.

Individuals remain free to enter and exit legal statuses. The state does not criminalize private intimacy. But when individuals voluntarily assume legally structured obligations, breach of those obligations may carry limited civil consequence.

This position navigates between two extremes:

- Moralistic enforcement of sexual conduct; and
- Complete juridical indifference to institutional breach.

It preserves autonomy while affirming that legal institutions are not normatively empty.

E. Beyond Adultery

Although adultery serves as the focal case, the conceptual implications extend further.

Relational Civil Wrong may illuminate other domains in which legally constituted statuses generate reciprocal obligations—registered civil unions, formally recognized domestic partnerships, or other statutory relational frameworks.

The inquiry thus opens a broader question about the architecture of private law: how legal systems reconcile autonomy with institutional meaning.

F. Final Reflection

Modern law is rightly cautious about moralism. But caution need not become conceptual erasure.

Where the state constructs or recognizes institutional statuses, it inevitably attributes normative structure to them. The breach of that structure is not automatically reducible to emotional harm—nor automatically immune from civil recognition.

Comparative doctrine shows that the space for relational accountability exists. Theory shows that no structural barrier forecloses it. The mechanism proposed here demonstrates that such accountability can be crafted narrowly and compatibly with liberal commitments.

Whether any jurisdiction should adopt such a category remains a normative choice. But it is a choice—not a conceptual necessity.

The Right of Publicity:

Between Property, Personality, and the Free Market in the Age of Media and Artificial Intelligence

Shimon Kadosh

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Part I: Introduction – Identity, Value, and Law in the Age of Media

1. The Right of Publicity as a Contemporary Legal Problem

Over the past several decades, modern legal systems have increasingly confronted a growing phenomenon: the systematic commercialization of human identity. Names, voices, likenesses, styles, and public personas have ceased to function merely as expressions of personality or instruments of communication. They have become distinct economic assets operating within a global commercial marketplace. This phenomenon is no longer limited to traditional celebrities. It extends to journalists, creators, influencers, public officials, and even individuals who have become closely associated with a particular format, style, or recurring content structure[1].

Against this background, a foundational legal question emerges: does the legal system possess adequate normative tools to regulate the commercial use of human identity, or is it forced to rely on indirect doctrines ill-suited to the nature of the phenomenon? This Article argues that traditional doctrines—most notably defamation, privacy, and copyright—do not provide a comprehensive response and, at times, generate conceptual and normative distortions[2].

Defamation law addresses injury to reputation, not the commercial exploitation of identity for profit. Privacy law protects intimacy, confidentiality, and personal autonomy, yet struggles to address public, visible, and sometimes even flattering uses that do not injure dignity but instead deprive individuals of economic control over their identity. Copyright law protects original works of authorship, not the individual as such, nor the public persona constructed around that individual, but only defined expressions meeting originality requirements[3].

[1] Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined for a Public World* 1–12 (Harvard Univ. Press 2018).

[2] Eugene Volokh, Freedom of Speech and the Right of Publicity, 40 Hous. L. Rev. 903, 905–08 (2003).

[3] J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 1:3 (2d ed. 2022).

The gap between socio-economic reality and legal doctrine continues to widen. Commercial uses of identity are increasingly sophisticated. They may occur without direct copying, without explicit use of a name, and sometimes without a clear visual depiction. Yet public identifiability remains sharp, and the economic value derived from that identifiability is tangible. In such circumstances, the refusal to recognize an independent right of publicity produces a paradox: a concrete personal and economic interest is exploited, yet no stable and direct cause of action exists[4].

2. The Rise of the Identity Marketplace

The commercialization of human identity is not an incidental byproduct of the digital era. It is a structural feature of the contemporary media economy. Identity has become a brand, and a public persona has become a measurable market asset. Commercial advertising, sponsored content, political branding, entertainment industries, and algorithmic distribution mechanisms increasingly rely on immediate recognizability and the associations a particular individual evokes in the public imagination[5].

Within this marketplace, the line between person and persona is progressively blurred. A public persona is not merely a collection of biographical attributes; it is a composite of imagery, expectations, communicative style, and recurring patterns of appearance, often constructed over time through sustained professional investment. The market seeks to leverage this composite to generate trust, attract audiences, and produce profit—sometimes entirely detached from the individual whose identity is being utilized.

The legal difficulty does not arise from the existence of this market. It arises from the absence of clear legal ground rules. In the absence of recognition of a right of publicity, the marketplace operates in a normative gray zone: on one hand, widespread commercial identity-based strategies; on the other, no coherent framework governing consent, compensation, limits, or responsibility. This uncertainty harms both identity holders and market actors, who operate under prolonged legal indeterminacy[6].

3. Core Thesis and Proposed Framework

The central premise of this Article is that the right of publicity should not be treated as a subsidiary branch of existing doctrines, but rather as an independent right deserving distinct normative recognition. It protects an individual's interest in controlling the commercial use of his or her identity, broadly understood, without transforming every reference to a human figure into a tort and without unduly burdening freedom of speech, artistic expression, or the press[7].

[4] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573–75 (1977).

[5] Stacey L. Dogan & Mark A. Lemley, What the Right of Publicity Can Learn from Trademark Law, 58 Stan. L. Rev. 1161, 1165–68 (2006).

[6] Jennifer E. Rothman, The Right of Publicity: A Critique, 45 U.C. Davis L. Rev. 1343, 1360–66 (2012).

[7] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

Recognition of a right of publicity does not grant a monopoly over ideas, styles, or generalized inspiration. Instead, it draws a principled distinction between legitimate expressive use and commercial exploitation grounded in identifiability. Indeed, this Article contends that the absence of a clear publicity framework may itself threaten free speech by encouraging doctrinal overreach through copyright, trademark, or defamation law[8].

The Parts that follow examine the right of publicity at the conceptual, comparative, and normative levels; analyze its complex relationship with freedom of expression; address its particular relevance in the age of artificial intelligence; and ultimately propose a coherent framework capable of supporting balanced legal regulation in a global media environment.

[8] Eugene Volokh, supra note 2, at 928–35.

Part II: What Is the Right of Publicity? A Conceptual Framework

1. From Injury to Exploitation: A Shift in Perspective

A proper analysis of the right of publicity requires a fundamental conceptual shift in how the law understands the relationship between an individual and his or her public identity. Unlike traditional doctrines—focused on injury to dignity, privacy, or reputation—the right of publicity centers primarily on exploitation: the deliberate use of human identity for the extraction of economic value, even where no humiliation, defamation, or invasion of privacy occurs[9].

This distinction is not merely technical; it is normative. While injury is typically perceived as a deviation from acceptable conduct, commercial exploitation may initially appear legitimate—or even flattering. Legally, however, the central inquiry is not the moral quality of the portrayal, but rather whether the individual has been deprived of control over his or her identity and its conversion into economic value by others. The right of publicity thus responds not to affronts to dignity, but to the loss of economic autonomy in relation to identity[10].

This conceptual starting point explains why many uses of human identity fall outside existing tort frameworks, even when they provoke a clear sense of unfairness. An advertisement that invokes a figure closely associated with a particular individual—without making false factual claims or disclosing private information—may be lawful under defamation and privacy law, yet still deprive the individual of the economic fruits of his or her identity[11].

2. Identity as a Legal Category

To ground the right of publicity, "identity" must be defined as a distinct legal category. In this context, identity is not limited to a name or visual likeness. Rather, it encompasses a constellation of attributes that enable immediate public identification. Identity is a socio-communicative construct, formed and maintained over time, often through deliberate and sustained investment by the individual[12].

Protected identity may include several principal components:

- **Name**—whether personal, professional, or a distinctive alias uniquely associated with a particular individual.
- **Visual likeness**—facial features, physical appearance, or any visual representation enabling recognition.

[9] **Haelan Labs., Inc. v. Topps Chewing Gum, Inc**., 202 F.2d 866, 868 (2d Cir. 1953).
[10] Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined for a Public World* 14–20 (Harvard Univ. Press 2018
[11] **Zacchini v. Scripps-Howard Broad. Co**., 433 U.S. 562, 573–75 (1977).

[12] J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 1:3 (2d ed. 2022).

- **Voice**—distinct vocal characteristics, including tone, cadence, and speech patterns.
- **Style and expressive mannerisms**—consistent communicative behaviors, gestures, phrasing, or recurring expressive traits.
- **Integrated public persona**—the cumulative synthesis of these elements into a single recognizable figure[13].

It should be noted, however, that White has generated substantial academic and judicial criticism for extending the right of publicity beyond traditional indicia of identity. The case therefore illustrates both the potential breadth of the doctrine and the structural concerns associated with overexpansion.

What unites these elements is not absolute uniqueness, but identifiability. The right of publicity does not protect isolated traits as such; it protects the use of those traits when they activate public recognition and are converted into economic value[14].

3. Between Idea and Identity: The Limits of Protection

One of the most common objections to a broad right of publicity concerns the risk of protecting ideas, styles, or genres—domains traditionally excluded from exclusive ownership. However, a precise conceptual distinction separates abstract ideas from concrete identity[15].

An idea, format, or stylistic approach, standing alone, is not protectable. Yet when such elements crystallize over time into a recognizable association with a particular individual, they transcend abstraction and become components of that individual's public identity. The legal protection is not directed at the format itself, but at the commercial use of that format as a mechanism for invoking and exploiting the identity of a specific person[16].

This distinction is essential to prevent overexpansion of the right of publicity. The doctrine does not confer ownership over an interview style, a television genre, or an artistic pattern. Rather, it prevents commercial actors from "free-riding" on public recognition that has coalesced around an identifiable individual, thereby bypassing consent or compensation[17].

4. The Right of Publicity Between Property and Personality

[13] **White v. Samsung Elecs. Am., Inc**., 971 F.2d 1395, 1397–99 (9th Cir. 1992).
[14] **Comedy III Prods., Inc. v. Saderup, Inc**., 25 Cal. 4th 387, 397–404 (2001).
[15] Eugene Volokh, Freedom of Speech and the Right of Publicity, 40 **Hous. L. Rev.** 903, 906–12 (2003).
[16] Stacey L. Dogan & Mark A. Lemley, What the Right of Publicity Can Learn from Trademark Law, 58 **Stan. L. Rev.** 1161, 1169–74 (2006).

[17] Id. at 1175–78.

Theoretically, the right of publicity exists along the spectrum between property rights and personality rights. On the one hand, it protects economic value, is subject to licensing, may be partially transferable, and in some jurisdictions may even descend to heirs. On the other hand, it is rooted in human identity and cannot be entirely severed from the individual[18].

This Article adopts a hybrid conception: the right of publicity should be understood as a personality right with proprietary dimensions. Such a framework preserves its moral foundation while enabling its commercial functionality. It also provides a basis for careful balancing—recognizing the right while imposing clear limits that prevent it from becoming a tool of censorship or creative suppression[19].

A hybrid model further allows for nuanced treatment of complex questions, including postmortem rights, the permissible scope of licensing, and the interaction between publicity rights and broader public interests—most notably, freedom of expression[20].

5. Interim Conclusion: Conceptual Justification for an Independent Right

The foregoing analysis demonstrates that the right of publicity is not an artificial extension of existing doctrines, but a normative response to a distinctive phenomenon: the transformation of human identity into an autonomous commercial resource. Absent recognition of this right, courts are forced to improvise partial solutions—sometimes overprotective, sometimes underprotective[21].

The next Part examines how different legal systems have confronted this phenomenon through property-based, personality-based, and hybrid approaches, and identifies the lessons that can inform the construction of a balanced normative framework.

[18] Jennifer E. Rothman, The Right of Publicity: A Critique, 45 **U.C. Davis L. Rev.** 1343, 1356–63 (2012).
[19] Id. at 1368–72.
[20] Mark A. Lemley & Eugene Volokh, Law, Virtual Reality, and Augmented Reality, 166 **U. Pa. L. Rev.** 1051, 1085–89 (2018).
[21] Rothman, supra note 10, at 1378–84

Part III: The Right of Publicity in Comparative Law – Property, Personality, and Hybrid Models

1. Multiple Approaches, a Single Question

The absence of global consensus regarding the nature of the right of publicity is reflected in the diversity of approaches adopted in comparative law. While certain legal systems frame the right in distinctly proprietary terms, others emphasize its connection to personality-based values, such as human dignity and personal autonomy. In recent years, a third, hybrid approach has emerged, seeking to reconcile these two conceptual worlds[22].

This diversity is not accidental. It stems from a structural tension between competing interests. On the one hand lies recognition of the economic value of human identity and the need to protect it against exploitation. On the other lies concern that expansive recognition of publicity rights could encroach upon freedom of expression, artistic creation, and public discourse. Comparative analysis thus illuminates not only doctrinal solutions, but also the underlying caution and hesitation shaping judicial development[23].

2. The Proprietary Approach: Identity as Economic Asset

Under the proprietary model, the right of publicity is conceptualized as a property-like interest in identity. Public identity is treated as an intangible asset capable of commercialization, licensing, and, in some jurisdictions, transfer or inheritance—akin to other forms of intellectual property. The premise is pragmatic: if the market attributes measurable economic value to identity, the law should provide clear rules to protect that value and facilitate fair and efficient exchange[24].

The principal advantage of this approach lies in predictability. A clearly defined proprietary right enables parties to determine when consent is required, how licensing arrangements may be structured, and what remedies apply in cases of infringement. It also aligns with the economic realities of advertising and media industries, in which identity frequently functions as a central branding instrument[25].

Yet the proprietary approach presents normative challenges. Treating identity as property risks detaching it from its human and social dimensions and may extend

[22] Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined for a Public World* 21–29 (Harvard Univ. Press 2018).
[23] Eugene Volokh, Freedom of Speech and the Right of Publicity, 40 Hous. L. Rev. 903, 909–15 (2003).
[24] J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 1:7 (2d ed. 2022).
[25] Id. § 2:3.

protection to expressive uses not fundamentally commercial in character. Additionally, critics caution that a strong proprietary framing could grant excessive leverage to public figures, enabling them to restrict criticism, satire, or creative expression through property-based claims[26].

The United States Supreme Court's decision in *Zacchini v. Scripps-Howard Broadcasting Co.* provides an early illustration of the proprietary logic underlying this approach. There, the Court upheld a performer's right to recover for the unauthorized broadcast of his entire act. The Court emphasized that the broadcast appropriated the economic value of the performance and held that the First Amendment does not immunize the wholesale appropriation of such value. The decision thus recognized the legitimacy of protecting the economic incentive embedded in performance, rather than articulating a broad, freestanding right in identity as such.

3. The Personality-Based Approach: Identity as an Extension of Human Dignity

In contrast, the personality-based approach underscores the inseparable connection between the individual and his or her identity. Under this conception, the right of publicity is not primarily concerned with economic gain but with autonomy—the right not to be instrumentalized for purposes determined by others[27].

This approach integrates seamlessly into broader personality-rights theories that regard identity as central to human dignity. Even non-defamatory and non-intrusive commercial use may be objectionable because it appropriates the individual as a means to advance external commercial objectives without consent[28].

The principal strength of the personality model lies in its strong normative foundation, guarding against the over-commodification of the person. Its principal weakness, however, lies in implementation. Without acknowledging a proprietary dimension, it becomes difficult to structure licensing regimes, define compensation mechanisms, or articulate clear enforcement standards in complex commercial environments[29].

4. The Hybrid Approach: Balancing Personal and Economic Value

In response to the limitations of the two preceding models, comparative jurisprudence increasingly gravitates toward a hybrid approach that integrates proprietary logic with personality-based grounding. Under this conception, the right of publicity is a personality right with economic attributes—commercially exploitable, yet not fully severable from the individual[30].

[26] Stacey L. Dogan & Mark A. Lemley, What the Right of Publicity Can Learn from TrademarkLaw, 58 Stan. L. Rev. 1161, 1170–76 (2006).
[27] Jennifer E. Rothman, The Right of Publicity: A Critique, 45 U.C. Davis L. Rev. 1343, 1354–58 (2012).
[28] Id. at 1360–66.
[29] Id. at 1370–73.
[30] Rothman, supra note 1, at 44–52.

The hybrid model recognizes the economic value of identity without reducing it to a freely alienable commodity. It supports structured licensing and limited transferability, while emphasizing defined boundaries: the right does not apply to every use, nor does it automatically override core public interests, particularly freedom of expression[31].

The principal virtue of this approach lies in its flexibility. It permits contextual adaptation—across commercial advertising, artistic production, and journalistic reporting—while maintaining a coherent normative core. In the digital and artificial intelligence context, where reproduction and imitation increasingly blur traditional doctrinal lines, such flexibility proves especially valuable[32].

5. Judicial Hesitation: Freedom of Expression as Boundary

Comparative analysis reveals a consistent judicial caution rooted in concerns over freedom of expression. Many legal systems resist broad recognition of publicity rights out of fear that such rights might become instruments for suppressing criticism, parody, or cultural commentary[33].

Yet this concern does not mandate categorical rejection. Rather, it calls for careful doctrinal design. Where publicity rights are confined to genuinely commercial uses and accompanied by well-defined exceptions for journalistic, artistic, and critical expression, the risk of overreach diminishes substantially[34].

Indeed, the absence of a clearly defined publicity framework may amplify expressive uncertainty. In the absence of such a framework, courts may stretch defamation, copyright, or related doctrines to address identity-based disputes, producing broader and less predictable restrictions on speech. Properly structured, the right of publicity may function not as a constraint, but as a moderating doctrinal tool[35].

6. Interim Conclusion: Toward a Balanced Framework

Comparative law presents three principal responses to the right of publicity, each embodying a distinct balance between competing interests. The proprietary model offers certainty but risks overextension. The personality model provides moral coherence but struggles in commercial application. The hybrid approach offers a more flexible and calibrated framework[36].

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[31] Id. at 58–63.

[32] Mark A. Lemley & Eugene Volokh, Law, Virtual Reality, and Augmented Reality, 166 U. Pa. L. Rev. 1051, 1082–90 (2018).

[33] Volokh, supra note 2, at 918–25.

[34] Comedy III Prods., Inc. v. Saderup, Inc., 25 Cal. 4th 387, 397–404 (2001).

[35] Rothman, supra note 6, at 1376–80.

[36] Rothman, supra note 1, at 64–71.

This comparative analysis lays the groundwork for the Article's central claim: it is both possible and desirable to articulate an independent, clearly defined, and carefully bounded right of publicity that protects human identity from commercial exploitation without undermining the core of expressive freedom. The next Part turns to a direct examination of the relationship between publicity rights and freedom of expression and proposes concrete balancing tests.

Part IV: The Right of Publicity and Freedom of Expression

1. The Structural Tension Between Identity Protection and Free Discourse

The right of publicity presents a distinct normative challenge: how can the law protect human identity against commercial exploitation without undermining the core of freedom of expression and artistic creation? Although this tension is not unique to publicity rights, it is particularly acute in this context because the object of protection—human identity—is also one of the primary raw materials of public discourse, culture, and art[37].

Freedom of expression exists to secure the free flow of ideas, criticism, satire, and creative expression. The right of publicity, by contrast, seeks to prevent the use of identity as a commercial resource without consent. Concern over potential conflict between these values has led many legal systems to approach the right cautiously and, at times, to resist broad recognition. Yet caution does not require abandonment. It requires careful delineation of boundaries[38].

2. A Foundational Distinction: Commercial Speech Versus Expressive Speech

A principled balance begins with distinguishing commercial speech from expressive or cultural speech. Commercial speech is characterized primarily by its aim to promote sales, branding, or direct economic gain. Expressive speech, by contrast, seeks to communicate ideas, entertain, critique, or contribute to cultural dialogue—even if disseminated through commercial channels.[39]

The right of publicity is directed principally at uses that are commercial in nature. When human identity functions primarily as a vehicle for selling a product, service, or corporate image—without contributing independent expressive value to public discourse—the case for legal protection strengthens. Conversely, use of identity in journalistic, artistic, or critical contexts may fall within the protection of free expression, even if controversial or discomforting[40].

[37] Eugene Volokh, Freedom of Speech and the Right of Publicity, 40 Hous. L. Rev. 903, 907–12 (2003).
[38] Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined for a Public World* 84–92 (Harvard Univ. Press 2018).
[39] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561–63 (1980).
[40] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 574–75 (1977).

This distinction is not always easy to apply. Nonetheless, it provides a crucial normative anchor: not every public use of identity is commercial, and not every commercial context warrants absolute immunity under the banner of free speech[41].

3. Parody, Inspiration, and Imitation: The Gray Areas

One of the most complex areas of interaction between publicity rights and free expression concerns parody, inspiration, and imitation. Parody is generally regarded as protected speech because it employs identity for purposes of critique, satire, or cultural commentary. However, parody may itself become a commercial instrument, particularly when deployed to promote products or brands[42].

Inspiration, as such, is integral to creative production. Yet when "inspiration" becomes systematic imitation of a recognizable persona—producing immediate public identification and capitalizing upon that recognition for commercial advantage—the legal inquiry shifts. The relevant distinction is not between permissible and impermissible imitation in absolute terms, but between imitation that contributes meaningfully to discourse and imitation that effectively substitutes for the individual as a commercial asset[43].

The central question is therefore not whether a work can be labeled parody or inspiration, but what function the use of identity serves. When identity itself becomes the primary vehicle for economic extraction, freedom of expression cannot operate as an absolute shield[44].

4. Proposed Tests for Normative Balancing

To promote consistent and principled adjudication, this Article proposes a set of cumulative analytical factors designed to distinguish protected expressive use from impermissible commercial exploitation:

- **Purpose of the Use Test** – Is the primary objective commercial promotion, or expressive contribution?
- **Economic Value Derivation Test** – Does the economic value of the use derive principally from association with a specific individual?
- **Public Identifiability Test** – Would a reasonable consumer identify the individual, even absent explicit use of name or likeness?
- **Commercial Substitution Test** – Does the use effectively substitute for a commercial engagement that would otherwise require the individual's consent[45]?

[41] Rothman, supra note 2, at 97–102.
[42] Comedy III Prods., Inc. v. Saderup, Inc., 25 Cal. 4th 387, 397–404 (2001).
[43] White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397–1401 (9th Cir. 1992).
[44] Volokh, supra note 1, at 921–25.
[45] Stacey L. Dogan & Mark A. Lemley, What the Right of Publicity Can Learn from Trademark Law, 58 Stan. L. Rev. 1161, 1176–82 (2006).

These factors are not intended as a mechanical formula. Rather, they guide judicial discretion and reduce uncertainty. They safeguard the substantive core of free expression while preventing its instrumental invocation as a cover for commercial exploitation[46].

5. The Right of Publicity as a Moderating Doctrine

A central claim of this Article is that a properly structured right of publicity need not threaten free expression. To the contrary, in the absence of a tailored publicity framework, courts often expand other doctrines—such as copyright or defamation—to address identity-based harms. Such expansions may generate broader and less predictable speech restrictions because they were not designed to distinguish carefully between expression and exploitation[47].

A defined and limited right of publicity allows courts to address problematic commercial uses directly, without distorting adjacent doctrines. In this sense, the right of publicity may function as a moderating mechanism rather than a suppressive one. It contributes to normative stability and legal clarity—conditions essential to both vibrant discourse and a dynamic cultural marketplace[48].

6. Interim Conclusion: A Tension That Can Be Managed

The tension between the right of publicity and freedom of expression is real but not insurmountable. Through careful conceptual distinctions, structured balancing tests, and well-defined exceptions, it is possible to design a legal framework that protects human identity from commercial exploitation without eroding the core of expressive freedom[49].

The next Part examines a new and intensifying challenge to this equilibrium: the age of artificial intelligence, in which imitation, identification, and identity exploitation increasingly occur without direct copying and without a clearly identifiable human author.

[46] Id. at 1183–87.
[47] Rothman, supra note 2, at 105–11.
[48] Id. at 112–18.
[49] Id. at 120–26.

Part V: The Right of Publicity in the Age of Artificial Intelligence – Identity, Imitation, and the Collapse of Traditional Distinctions

1. Introduction: When Identity Becomes Detached from the Body

Artificial intelligence destabilizes foundational assumptions that have guided intellectual property and personality-rights doctrines for decades. Historically, legal concern arose when there was direct use of a name, likeness, or voice. Today, however, generative systems can produce highly persuasive representations of human identity without directly copying any of these classical elements. Generative algorithms generate outputs that evoke clear public identification by analyzing patterns, tone, stylistic markers, and expressive structures—rather than through literal reproduction[50].

This development severs identity from the body. Identity is no longer tied exclusively to physical presence or vocal performance; it becomes a dataset—capable of replication, manipulation, and mass distribution at industrial scale. This detachment exposes the limits of doctrines built around copying, originality, or direct appropriation and compels reconsideration of how the law should protect human identity in an algorithmic age[51].

2. Imitation Without Copying: A Challenge to Copyright Doctrine

A defining characteristic of contemporary AI systems is their capacity to imitate style, voice, or persona without reproducing any specific protected work. Generative models do not store discrete expressive copies in the conventional sense; they produce outputs based on statistical modeling of recurring expressive features. From the standpoint of copyright law, such outputs often fall outside classical infringement frameworks[52].

This gap produces a normative vacuum. AI-generated outputs may cause substantial economic and personal harm—loss of income, loss of control, reputational dilution—without implicating any identifiable copyrighted work. Reliance solely on copyright doctrine leaves identity vulnerable precisely where the injury is concrete rather than theoretical[53].

[50] Mark A. Lemley & Bryan Casey, Remedies for Robots, 86 U. Chi. L. Rev. 1311, 1316–19 (2019).
[51] Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined for a Public World* 152–59 (Harvard Univ. Press 2018).
[52] Pamela Samuelson, Generative AI and Copyright, 38 Berkeley Tech. L.J. 1, 8–14 (2023).
[53] Rothman, supra note 2, at 160–66.

3. Identity as Data: A Paradigm Shift

The transition from embodied identity to algorithmic representation reflects a deeper paradigm shift. Voice, phrasing, stylistic cadence, and response patterns are disaggregated into quantifiable attributes capable of recombination and synthetic recreation. The economic value lies not in any single output, but in the capacity to generate an endless stream of outputs that evoke recognition of a specific human persona[54].

This development destabilizes the traditional idea-expression dichotomy. When public identification arises through statistical modeling rather than literal copying, protection of discrete "expression" fails to protect the underlying source of economic value. The right of publicity, by contrast, focuses directly on identity as the economic locus, rather than the technical mechanism through which imitation occurs[55].

4. "We Used an Algorithm, Not a Person": The Algorithmic Defense

Commercial actors deploying AI frequently advance a recurring claim: no particular individual was used—only a general-purpose algorithm. Because there is no direct copying and no explicit attribution, the argument continues, no legal restriction should apply[56].

This defense obscures the essential inquiry: from where does the economic value derive? If commercial gain flows from public association with a specific individual—even when achieved through algorithmic means—the exploitation remains identity-based. The law need not choose between technology and humanity; it must examine purpose and effect. The right of publicity, indifferent to the technological method employed, redirects attention to control, consent, and commercial exploitation[57].

5. Circumventing Consent in the Algorithmic Era

In the pre-algorithmic environment, commercial use of identity typically required direct engagement with the individual—photography, recording, or contractual negotiation. AI enables circumvention. A "synthetic substitute" can be generated without requesting consent, paying compensation, or triggering classical infringement doctrines[58].

This circumvention is not incidental; it is structurally incentivized. The more legal doctrine hinges on literal copying, the greater the incentive to develop technologies that imitate without copying. A properly framed right of publicity closes this loophole

[54] Lemley & Casey, supra note 1, at 1324–30.
[55] Rothman, supra note 2, at 168–72.
[56] Rebecca Tushnet, I'm Not a Trademark Lawyer, but…, 99 **Trademark Rep.** 1, 14–18 (2009).
[57] Rothman, supra note 2, at 174–79.
[58] Mark A. Lemley, Our Bizarre System for Proving Copyright Infringement, 57 **J. Copyright Soc'y** 719, 732–36 (2010)..

by focusing not on the mechanism of reproduction, but on the commercial exploitation of identifiable identity[59].

6. Transformative Use and the Dilution of Existing Tests

As discussed in Part IV, the transformative-use doctrine aims to distinguish legitimate creative transformation from commercial exploitation. Yet in the AI context, nearly every output can be described as technically transformative: algorithms alter, recombine, and generate new configurations[60].

This reality requires distinguishing technological transformation from normative transformation. Computational alteration does not necessarily contribute new meaning, commentary, or expressive value. When AI-generated content primarily serves as a commercial substitute for the identified individual, invocation of "transformation" cannot justify immunity under free-expression principles[61].

7. Commercial Responsibility Without a Human Author

AI also complicates attribution of responsibility. In the absence of a clear human author, commercial actors may argue that no legally accountable agent exists. Yet the markets in which AI outputs circulate are not anonymous. Platforms, developers, advertisers, and distributors derive economic benefit from identity-based exploitation[62].

The right of publicity allows responsibility to attach to the entity that economically benefits from the use, even when creative processes are automated or decentralized. It prevents technological architecture from functioning as a liability shield and reinforces a foundational principle: those who profit from exploitation must bear corresponding responsibility[63].

8. Synthetic Identity, Consumer Confusion, and Market Integrity

AI-generated synthetic identities do not harm only the individual; they also risk misleading the public. A reasonable consumer may assume endorsement, authenticity, or affiliation where none exists. While such concerns intersect with consumer-

[59] Rothman, supra note 2, at 180–84.
[60] **Comedy III Prods., Inc. v. Saderup, Inc**., 25 Cal. 4th 387, 404–07 (2001).
[61] Volokh, supra note 1, at 926–31.
[62] Lemley & Casey, supra note 1, at 1336–40.
[63] Rothman, supra note 2, at 186–90.

protection and trademark law, the right of publicity offers a more focused remedy by addressing identity itself as the protected interest[64].

Erosion of authenticity and reputational clarity threatens the integrity of digital cultural markets. Regulation of identity use in the AI era is therefore not solely a matter of personal protection, but of maintaining a functioning and trustworthy[65] marketplace.

9. Future Regulation: From Transparency to Consent

Contemporary regulatory debates often emphasize transparency—labeling synthetic content, disclosing AI use, or watermarking outputs. While important, transparency alone does not prevent exploitation; it merely exposes it[66]

The right of publicity enables a shift from a disclosure model to a consent-and-licensing model. Under such a framework, lawful markets for licensed voice, style, or persona use could develop within defined boundaries. This approach complements, rather than replaces, technological regulation and offers a principled legal foundation for identity governance in the AI era[67].

10. Conclusion: Identity as the Legal Challenge of the Algorithmic Age

Artificial intelligence does not require reinvention of the legal system; it requires precise identification of doctrinal tools capable of bearing new pressures. The right of publicity—independent, limited, and balanced—offers such a tool. It protects human identity as both economic and personal resource, without stifling innovation or distorting adjacent doctrines ill-suited to algorithmic realities[68].

This Part prepares the ground for the next two discussions: the normative lacuna in Israeli law as a case study, and the articulation of a comprehensive global regulatory framework.

[64] Dogan & Lemley, supra note 9, at 1188–92.

[65] Rothman, supra note 2, at 192–96.

[66] EU Artificial Intelligence Act, arts. 52–53 (provisional text 2024).

[67] Id

[68] Rothman, supra note 2, at 198–205.

Part VI: The Israeli Legal Landscape — Regulatory Absence as a Normative Gap and a Comparative Case Study

1. Introduction: A Legal System Without an Express Right of Publicity

Despite the robust development of the right of publicity in comparative law—particularly in the United States—Israeli law has not formally recognized the right of publicity as an independent and distinct legal right. Israeli legislation contains no explicit protection for an individual's control over the commercial use of their identity, and courts have been required to address identity-based commercial exploitation indirectly through existing doctrinal frameworks[69].

This absence does not reflect an explicit normative rejection of the right of publicity. Rather, it is the result of a fragmented historical development in which questions of identity, goodwill, and commercial misappropriation were addressed through legal doctrines designed to protect different interests. In this sense, Israel presents a particularly instructive case study: a sophisticated Western legal system confronting the commercialization of identity without a doctrinal tool specifically designed for that purpose.

2. Indirect Doctrines: Partial Solutions to a Structural Problem

In the absence of a recognized right of publicity, Israeli courts have relied primarily on defamation law, privacy law, trademark principles, and unjust enrichment doctrine to address commercial uses of identity[70].

Each of these doctrines, however, protects a different interest:

- defamation law protects reputation;
- privacy law safeguards intimacy and autonomy;
- trademark law protects source identification;
- unjust enrichment law prevents unfair economic gain[71].

None of these doctrines directly addresses the core issue underlying right-of-publicity claims: the individual's entitlement to control and monetize the commercial value embedded in their public identity.

[69] Michael Birnhack, *Human Rights in the Digital Sphere* 233–240 (2013) (Hebrew).
[70] Daniel Friedmann, *Unjust Enrichment Law*, vol. 1, at 45–52 (2d ed. 1998) (Hebrew).
[71] CA 2790/93, 2811/93 **Robert E. Eisenman v. Elisha Cameron**, 54(3) PD 817, 840 (Isr.).

Accordingly, protection under these doctrines is often contingent, fragmented, and dependent on particular factual configurations. The doctrinal mismatch becomes especially visible when the commercial use of identity is neither defamatory nor privacy-invasive nor factually misleading, but instead relies solely on consumer recognition to generate commercial benefit.

3. Israeli Case Law: Intuitive Recognition Without Doctrinal Consolidation

Israeli case law contains multiple decisions in which courts recognize discomfort with the commercial exploitation of reputation or public identity, yet refrain from articulating a freestanding right of publicity. Courts acknowledge that goodwill and public recognition possess independent economic value, but they have framed relief through non-publicity doctrines.

A significant early example is *Aloniel Ltd. v. Ariel McDonald*[72]. In that case, a commercial advertisement used the image of professional basketball player Ariel McDonald without his consent. The Supreme Court recognized that a well-known athlete's likeness possesses independent commercial value and that its unauthorized commercial use may justify judicial relief. Nevertheless, the Court did not ground its reasoning in a distinct right of publicity. Instead, the decision relied on privacy protection and unjust enrichment principles.

The judgment reflects judicial awareness that public identity constitutes a commercially valuable asset capable of misappropriation. Yet, like subsequent cases, it did not crystallize into a structured publicity doctrine. Relief was granted through expansion of existing doctrines rather than through recognition of a coherent, identity-based entitlement to commercial control.

The more recent *Nestlé v. Espresso Club* litigation illustrates the structural limits of this approach[73]. The dispute concerned an advertising campaign in which a look-alike of a celebrity closely associated with a competing coffee brand appeared in a highly recognizable commercial parody. The plaintiffs did not primarily allege defamation or invasion of privacy. Rather, they argued that the campaign deliberately created associative linkage in consumers' minds and capitalized on the goodwill and public identification connected with the celebrity persona.

The Supreme Court emphasized that the legal inquiry did not turn on mere similarity, but on the overall commercial context and whether the advertisement created a likelihood of misleading the reasonable consumer[74]. Absent proof of actual or probable deception, the claim could not succeed[75].

[72] CA 8483/02 **Aloniel Ltd. v. Ariel McDonald** (Mar. 30, 2004) (Isr.).
[73] CA 3425/17 **Société des Produits Nestlé S.A. v. Espresso Club Ltd.**, 24 (opinion of Hendel, J.) (Isr.).
[74] Id. 27–28.
[75] Id. 51–57.

Significantly, the Court did not frame the issue as one of proprietary control over commercial identity. Instead, it confined the analysis to misleading commercial practices and unfair competition principles.

4. The Appeal in *Nestlé v. Espresso Club*: Clarifying the Gap Without Filling It

On appeal, the Supreme Court reiterated that the mere use of a look-alike—even where public recognition is evident—does not automatically establish liability. The Court required a concrete evidentiary showing of likely consumer deception and applied an objective "reasonable consumer" test[76].

While the Court acknowledged that identity and reputation carry economic value and can be commercially leveraged even without direct use of name or voice, it declined to recognize a general right to control commercial uses of identity. The analysis remained anchored in deception and unfair competition.

The result is doctrinal caution. Courts recognize that something normatively significant is at stake—namely, commercial exploitation of public identity—yet they lack a doctrinal category designed to address it directly. Consequently, judicial outcomes depend heavily on narrow evidentiary thresholds rather than principled identity-based analysis.

In the era of digital replication and AI-generated likenesses, this structural gap becomes more pronounced: as long as no clear deception or statutory violation is demonstrated, identity-based commercial exploitation may evade liability entirely.

5. Practical Consequences: Legal Uncertainty and Dual-Sided Harm

The absence of a distinct right of publicity generates uncertainty for both identity holders and commercial actors. Public figures cannot predict when their commercial persona is legally protected; advertisers cannot clearly determine the boundaries of lawful imitation.

The result is reactive litigation rather than ex ante clarity, and incentives for increasingly sophisticated technological or stylistic circumvention—especially in AI-enabled environments.

The *Espresso Club* litigation thus serves not as an anomaly, but as a symptom of structural incompleteness within Israeli doctrine[77].

6. Israel as a Mirror of a Broader Global Challenge

[76] Id. 61–62.

[77] Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 Stan. L. Rev. 1161, 1185–92 (2006).

Israel's situation is not unique. Other jurisdictions that lack an express right of publicity face similar doctrinal stretching, often expanding trademark or unfair competition doctrines to fill the gap.

Comparative scholarship has noted that failure to articulate a limited but distinct publicity right may inadvertently distort adjacent doctrines and potentially burden free expression more severely[78].

Israel therefore offers a comparative lens demonstrating how regulatory absence does not eliminate the problem of identity commercialization—it merely redistributes it across doctrinal boundaries.

7. Interim Conclusion: From Normative Gap to Structured Proposal

The Israeli legal landscape illustrates the cost of normative hesitation. Courts perceive the economic reality of identity exploitation but lack a doctrinal instrument tailored to address it directly and coherently.

The *McDonald* and *Nestlé* decisions mark important milestones in recognizing the commercial value of identity. Yet they also demonstrate the structural limits of relying exclusively on indirect doctrines.

The analysis thus reinforces the central thesis of this Article: a carefully limited and balanced right of publicity—anchored in commercial misappropriation rather than mere similarity—would provide greater doctrinal clarity, reduce distortion of adjacent doctrines, and enhance both market fairness and expressive stability.

[78] Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined for a Public World* 210–218 (Harvard Univ. Press 2018).

Part VII: A Proposed Balanced Normative Framework for the Right of Publicity

1. From Diagnosis to Regulation

The preceding Parts have identified a persistent normative gap between the socio-economic reality of identity commercialization and the legal tools currently available to regulate it[79]. Comparative law offers partial solutions, yet also demonstrates the risks inherent both in overexpansion of protection and in its complete absence[80].

The Israeli experience—particularly as reflected in *Nestlé v. Espresso Club*—illustrates that, absent a dedicated doctrinal framework, courts are compelled to address identity-based commercial exploitation through legal doctrines not designed for that purpose[81].

Against this background, this Part proposes a structured normative framework for the right of publicity: an independent, limited, and balanced right that directly protects an individual's interest in controlling the commercial use of their identity, while preserving the core of free expression, creative freedom, and technological innovation[82].

2. Foundational Principles of the Proposed Right

The proposed framework rests on five cumulative foundational principles.

A. Normative Independence

The right of publicity should not be treated as a subcategory of privacy, defamation, or copyright. Its core concern is neither dignity-based harm nor authorship, but control over the commercial exploitation of personal identity[83].

Recognizing the right as normatively distinct prevents distortion of adjacent doctrines and allows courts to address identity misappropriation directly rather than indirectly through doctrinal expansion

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[79] Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined for a Public World* 21–29 (Harvard Univ. Press 2018).
[80] Id. at 32–45.
[81] CA 3425/17 **Société des Produits Nestlé S.A. v. Espresso Club Ltd.** (Isr.).
[82] Eugene Volokh, Freedom of Speech and the Right of Publicity, 40 Hous. L. Rev. 903, 907–12 (2003).
[83] Rothman, supra note 1, at 55–62.

B. Functional Rather Than Formal Application

Protection should not depend on the technological mechanism used, but on functional outcome: whether the use activates public identification and converts that identification into economic value.[84]

This principle is essential in the AI context, where imitation may occur without direct copying of name, likeness, or voice.

C. Hybrid Character

The right of publicity should be conceptualized as a personality-based right with proprietary dimensions. It permits licensing and limited transferability, yet remains anchored in the individual and cannot be wholly alienated as a detached commercial asset[85].

This hybrid model reflects insights from both property-oriented and personality-oriented approaches in comparative law.

D. Commercial Substance, Not Commercial Form

The right should apply only to uses that are commercial in substance. Not every expressive or public use of identity—merely because it occurs within a commercial medium—should fall within its scope.

The distinction between commercial speech and fully protected expression remains constitutionally significant[86].

E. Constitutional Subordination and Balancing

The right of publicity must not operate as an automatic trump over freedom of expression. It requires transparent and structured balancing against competing public interests, particularly speech, satire, journalism, and artistic creation.

Comparative jurisprudence demonstrates that carefully cabined publicity protection can coexist with constitutional speech guarantees[87].

3. Defining "Protected Identity"

For the framework to operate coherently, "protected identity" must be defined broadly yet precisely.

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[84] Id. at 145–152.
[85] Stacey L. Dogan & Mark A. Lemley, What the Right of Publicity Can Learn from Trademark Law, 58 **Stan. L. Rev.** 1161, 1176–82 (2006).
[86] **Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,** 447 U.S. 557, 561–63 (1980).
[87] Rothman, supra note 1, at 97–105.

Identity for purposes of the right of publicity should include any characteristic—or combination of characteristics—that enables immediate or near-immediate public recognition of a specific individual[88]. This includes:

- name or widely recognized nickname;
- visual likeness;
- voice or distinctive vocal traits;
- signature gestures or mannerisms;
- consistent communicative style;
- a consolidated public persona.

The right does not protect the characteristic in abstraction, but its use where it activates public recognition and functions as the primary source of commercial value[89].

This distinction prevents the transformation of ideas, genres, or stylistic inspiration into proprietary monopolies.

4. A Four-Step Test for Infringement

To ensure doctrinal restraint and predictability, infringement should require satisfaction of four cumulative elements:

1. **Public Identification** – The use creates identification with a specific individual in the eyes of the reasonable consumer[90].
2. **Commercial Purpose** – The primary purpose of the use is to promote goods, services, branding, or economic gain.
3. **Source of Value** – The economic value derives primarily from the identification itself.
4. **Commercial Substitution** – The use effectively substitutes for a commercial engagement that could have been negotiated with the identified individual[91].

Only where all four conditions are met should liability arise.

This structured test draws inspiration from comparative approaches—particularly California's transformative use jurisprudence—while narrowing application to clear cases of commercial identity substitution[92].

5. Explicit Exceptions and Safeguards

To safeguard free expression, the framework should include explicit exceptions for:

- journalistic reporting;
- documentary use;

[88] **White v. Samsung Elecs. Am., Inc**., 971 F.2d 1395, 1397–1401 (9th Cir. 1992).
[89] Comedy III Prods., Inc. v. Saderup, Inc., 25 Cal. 4th 387, 397–404 (2001).
[90] Id.
[91] **Zacchini v. Scripps-Howard Broad. Co**., 433 U.S. 562, 574–75 (1977)..
[92] Dogan & Lemley, supra note 7, at 1183–87.

- academic or educational use;
- artistic expression;
- parody and satire,

provided that identity itself is not the principal commercial driver of the use[93].

These safeguards ensure that the right of publicity cannot be weaponized to suppress criticism, commentary, or creative reinterpretation[94].

6. Application in the Age of Artificial Intelligence

In the algorithmic era, the proposed framework adopts a central principle: the means are irrelevant; the outcome controls.

If AI-generated content creates public identification with a specific individual and monetizes that identification, the same four-step test applies—even absent direct copying[95].

Liability should attach to the economically benefiting actor—advertiser, distributor, platform, or system operator—thereby preventing technological opacity from functioning as a liability shield.

This functional approach aligns with contemporary scholarship addressing automated systems and responsibility allocation[96].

7. Structural Advantages of the Proposed Framework

The proposed structure offers several systemic benefits:

- It enhances doctrinal clarity and reduces uncertainty.
- It prevents overextension of trademark, privacy, or unjust enrichment doctrines[97].
- It provides predictable guidance to markets.
- It preserves expressive freedom through explicit safeguards.
- It is adaptable to AI-driven identity simulation.

Importantly, it does not expand identity protection into a broad proprietary entitlement over persona, but confines it to clearly defined commercial misappropriation[98].

8. Conclusion: Identity, Markets, and Law in a Global Era

[93] Volokh, supra note 4, at 921–25.
[94] Rothman, supra note 1, at 112–118.
[95] Id. at 210–218.
[96] Id.
[97] Dogan & Lemley, supra note 4, at 1183–87.
[98] Volokh, supra note 4, at 935–40.

Human identity has become a central economic asset within global media markets. The law cannot ignore this transformation. Yet neither can it grant unlimited proprietary dominion over persona.

A carefully delimited, balanced right of publicity—grounded in commercial misappropriation and constrained by structured constitutional balancing—provides a principled middle path. It complements existing rights without distorting them and offers a coherent response to the challenges of the algorithmic age[99].

[99] Rothman, supra note 1, at 230–238.

Part VIII: Conclusion – Identity, Markets, and Law in the Age of Media and Artificial Intelligence

This Article has sought to examine the right of publicity as an independent legal problem—one that transcends the boundaries of traditional doctrines and calls for a distinct normative framework. Its point of departure was the recognition that human identity—in its visual, vocal, stylistic, and personal dimensions—has, over recent decades, become a clearly defined economic resource operating within a global, commercial, and increasingly algorithmic media market. This development is neither marginal nor exceptional; rather, it is a structural feature of the contemporary cultural economy.

The analysis has demonstrated that existing legal tools struggle to address this phenomenon adequately. Defamation law protects reputation but does not engage with non-defamatory identity exploitation. Privacy law safeguards intimacy and autonomy but is not tailored to public uses that may even appear flattering. Copyright law protects original expressions but does not protect the individual as such, their public persona, or the social identification constructed around them. The result is a persistent gap between the tangible economic and personal harm suffered and the legal system's ability to provide direct, coherent, and predictable remedies.

Comparative law illustrates a range of responses to this gap—from broad proprietary recognition, to narrower personality-based approaches, to hybrid frameworks that attempt to balance the economic value of identity with its human dimension. This comparative examination leads to the conclusion that there is no need to choose categorically between property and personality. A hybrid conception offers a more targeted and balanced form of protection. As proposed in this Article, the right of publicity is not intended to transform human identity into a fully commodified asset, but rather to secure a minimal and fair sphere of control over its commercial use.

The Israeli case study—particularly the *Espresso Club* litigation and its appeal—served as a paradigmatic example of the normative lacuna. Israeli jurisprudence effectively recognizes the economic value of public identification and goodwill and expresses discomfort with their commercial exploitation absent consent. Yet it refrains from articulating an independent right of publicity. Consequently, judicial decisions remain dependent on indirect doctrines and case-specific analysis, offering neither market certainty nor systematic protection for public figures. This condition is not unique to Israel; it reflects a broader difficulty in legal systems that have yet to update their doctrinal frameworks to reflect contemporary media realities.

The challenge becomes even more acute in the age of artificial intelligence. Generative technologies enable imitation, identification, and exploitation of human identity without direct use of name, likeness, or voice, and without copying any protected work. In doing so, they expose the limitations of doctrines built upon copying, originality, or identifiable human authorship. In this environment, the

method becomes secondary; the decisive inquiry shifts to outcome: was economic value derived from public identification with a particular individual?

Against this backdrop, this Article proposed a balanced normative framework for the right of publicity, grounded in principles of independence, functional application, hybrid structure, substantive commerciality, and constitutional balancing. The framework seeks to distinguish legitimate expression from commercial exploitation, inspiration from substitutive imitation, and contributions to public discourse from uses designed to circumvent contractual engagement with the identified individual. In doing so, it aims to protect freedom of expression no less than it protects identity.

The central conclusion of this Article is that the right of publicity does not threaten freedom of expression; rather, it is a condition for achieving an appropriate balance in an era in which human identity has become commercial currency. The absence of a dedicated framework does not preserve liberty. Instead, it generates uncertainty, distorts adjacent doctrines in unpredictable ways, and incentivizes technological circumvention. By contrast, cautious and limited recognition of the right of publicity may contribute to a fairer market, a freer discourse, and a more coherent legal system.

In a global media environment where the boundaries between person, persona, and algorithm increasingly blur, the law faces a choice: to continue reacting retrospectively through tools not designed for identity commodification, or to articulate a principled framework that identifies both the locus of value and the locus of harm. This Article argues that a carefully structured right of publicity can serve as such a normative anchor—not as an expansive proprietary entitlement, but as a necessary component of twenty-first century law.

A Tentative Dissolution Agreement at Marriage

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A Process-Based Model for Advance Divorce Planning in American Family Law

Introduction

Family law has long struggled with the uneasy coexistence of private ordering and public policy. This tension is most acute in agreements that anticipate divorce. American law readily enforces premarital contracts allocating property and, in many jurisdictions, spousal support. Yet it resists advance planning for child support and custody on the ground that children's interests cannot be bargained away. This resistance is normatively compelling—but institutionally incomplete. By treating advance planning for children as categorically suspect, the law defers governance to the moment of rupture, when cooperation is least likely and the costs to children are highest.

This Article argues that the prevailing framework rests on a false dichotomy. The choice is not between rigid enforcement of advance agreements and their outright prohibition. A third path—**process-based private ordering**—allows parents to plan responsibly for uncertainty without predetermining outcomes or constraining judicial authority. This Article introduces the **Tentative Dissolution Agreement (TDA)**, an instrument executed at or near the time of marriage that governs decision-making processes rather than results. Properly designed, TDAs reconcile contractual autonomy with non-waivable child-centered public policy and offer a principled method for reducing conflict in modern family law.

The Article makes three core contributions. First, it reframes contractual autonomy in family law as compatible with robust child protection when autonomy is exercised over governance rather than outcomes. Second, it situates this reframing within American federalism, demonstrating how TDAs can operate across diverse state regimes without statutory reform. Third, it provides a practical design framework—complete with safeguards addressing power imbalances and domestic violence—that can guide courts, lawyers, and policymakers.

The Article proceeds as follows. Part I surveys contractual autonomy and its limits in American family law. Part II develops the conceptual foundation of process-based private ordering and introduces the TDA. Part III applies the model to child support and parenting arrangements. Part IV addresses objections grounded in public policy, consent, and safety. Part V examines implementation pathways across representative state regimes. Part VI considers federalism, interstate mobility, and institutional design. The Article concludes by arguing that modest doctrinal recognition of TDAs

can meaningfully reduce conflict while fully preserving the child's right to support and the court's best-interests authority.

I. Contractual Autonomy and Its Limits in American Family Law

American family law has increasingly embraced private ordering as a means of managing the economic consequences of marriage and divorce. Premarital and marital agreements are widely recognized and enforced, subject to familiar safeguards of voluntariness, disclosure, and fairness. These agreements promote predictability and autonomy, enabling couples to allocate property, debt, and, in some jurisdictions, spousal support according to their preferences.

At the same time, child-related matters occupy a distinct doctrinal space. Child support and custody are governed by mandatory standards grounded in public policy. Courts consistently hold that a child's right to support is non-waivable and that custody determinations must reflect the child's best interests at the time of adjudication. As a result, provisions purporting to fix child support amounts or custody arrangements in advance are generally unenforceable.

This bifurcation creates a structural asymmetry. The law encourages advance planning for economic matters, where conflict is often manageable, but discourages it for parenting and child support, where conflict is most damaging. The effect is to postpone the most sensitive decisions to the point of marital breakdown, when cooperation is least likely and strategic behavior most pronounced.

II. Private Ordering Reconsidered: From Outcomes to Process

The resistance to advance planning in child-related matters is commonly framed as a concern about outcome determination. Fixing future child support amounts or custody schedules risks freezing arrangements that may later conflict with a child's needs. This concern is valid—but it does not justify a categorical rejection of all advance planning.

The conceptual error lies in conflating outcomes with governance. **Process-based private ordering** distinguishes between the two. Rather than determining substantive results, parties may agree ex ante on procedures: transparency obligations, adaptive formulas, parenting principles, and dispute-resolution pathways. These commitments organize decision-making without constraining judicial authority.

A. The Tentative Dissolution Agreement

The Tentative Dissolution Agreement operationalizes this distinction. Executed at or near the time of marriage, the TDA anticipates the possibility of dissolution without presuming it. It is "tentative" not because it is legally defective, but because its child-related provisions are expressly subject to judicial review and modification.

The TDA's core features include: (1) enhanced and ongoing financial disclosure; (2) relative formulas rather than fixed sums for child support, tied to applicable guidelines at the time of dissolution; (3) adaptive parenting frameworks emphasizing continuity, cooperation, and the child's evolving needs; and (4) layered dispute-resolution mechanisms designed to reduce litigation.

B. Validity Versus Enforceability

A central premise of the TDA is the distinction between validity and enforceability. The agreement may be valid as a contract between spouses, even if particular provisions are unenforceable on public-policy grounds. Property and spousal-support provisions may be enforceable under state law; child-related provisions function as non-binding frameworks that inform, but do not bind, judicial discretion.

This distinction avoids the false choice between rigid enforcement and wholesale invalidation. It allows courts to draw on the parties' advance planning as a source of information and institutional guidance while retaining full authority to protect the child's interests.

III. Child Support and Parenting as Governance Problems

A. Child Support

Child support is universally treated as a right belonging to the child, not the parents. Uniform acts and state statutes prohibit agreements that adversely affect this right. Accordingly, the TDA avoids fixed amounts, caps, or waivers.

Instead, it focuses on governance: commitments to full disclosure of income and resources, periodic updates, and calculation under state guidelines at the time of dissolution. Supplemental obligations—such as contributions to education or healthcare—may be included, provided they do not substitute for baseline support.

By structuring transparency and adaptation, the TDA reduces information asymmetries and strategic behavior, facilitating accurate guideline application without undermining public policy.

B. Custody and Parenting Time

Custody and parenting time present similar concerns. Advance fixation of schedules is inappropriate, given the child's evolving needs. The TDA therefore articulates principles rather than allocations: stability, continuity of care, shared parental responsibility, and cooperative decision-making.

These principles are paired with procedural mechanisms—such as mediation, parenting coordination, and periodic review—that enable adjustment over time. The result is a framework that supports, rather than constrains, best-interests adjudication.

IV. Public Policy, Power, and the Limits of Consent

A. Power Imbalances and Voluntariness

Critics of advance family agreements emphasize the risk of power imbalances. The TDA addresses this concern through design. Independent counsel or informed waiver, enhanced disclosure, adequate time for review, and documentation of voluntariness are treated as baseline requirements. Importantly, execution at or near marriage—before deep economic dependence has formed—may mitigate, rather than exacerbate, power disparities.

B. Domestic Violence and Safety

Any model premised on cooperation must account for domestic violence. The TDA includes explicit safeguards: alternative dispute-resolution mechanisms are non-mandatory and subject to immediate judicial access where safety is at risk. No procedural commitment may be enforced in a manner that endangers a party or limits access to protective relief.

C. The "Encouragement of Divorce" Objection

Advance planning is often criticized as encouraging divorce. This objection confuses risk management with endorsement. Estate planning does not encourage death; insurance does not encourage disaster. Planning for the possibility of marital dissolution acknowledges uncertainty and seeks to mitigate harm—particularly to children—if separation occurs.

V. State-Law Pathways for Implementation

American federalism enables, rather than impedes, the adoption of TDAs. Because family law is predominantly state-based, the TDA can be calibrated to local doctrine without statutory overhaul.

In **community property jurisdictions** with robust best-interests review, TDAs function as organizational aids that separate enforceable economic provisions from non-binding child-related frameworks. In **equitable distribution states**, TDAs serve as institutional signals informing discretionary analysis. In jurisdictions with **explicit non-waiver statutes**, TDAs align by disclaiming any intent to limit child support while facilitating accurate application of guidelines. In **contract-friendly regimes**, TDAs leverage respect for private ordering while preserving public-policy boundaries.

Across regimes, the TDA's process-based design minimizes the risk of invalidation and maximizes institutional usefulness.

VI. Federalism, Interstate Mobility, and Institutional Design

Interstate mobility complicates family law planning. Agreements fixing child-related outcomes are particularly vulnerable when parties relocate. By contrast, TDAs—focused on process rather than results—are more resilient across jurisdictions. Property provisions may follow permissible choice-of-law rules, while child-related frameworks adapt to forum standards.

From an institutional perspective, TDAs enhance governance by shifting conflict from adversarial litigation to structured cooperation. They reduce judicial burden, promote consistency, and foreground the child's interests through transparency and adaptability.

Conclusion

American family law's skepticism toward advance planning in child-related matters reflects a legitimate commitment to protecting children. But that commitment need not require the rejection of all pre-dissolution agreements. By distinguishing governance over process from determination of outcomes, this Article identifies a path that preserves the child's right to support and the court's best-interests authority while enabling responsible planning under conditions of good faith.

The Tentative Dissolution Agreement does not seek to bind courts or commodify children's interests. It seeks to organize transparency, adaptation, and cooperation—values courts already promote, but too often only after conflict has escalated. Recognizing TDAs as a process-based form of private ordering would neither dilute public policy nor expand enforceability beyond existing limits. It would, however, acknowledge a simple institutional truth: when families plan for uncertainty before crisis, children are better protected.