

Generative Interests and Legal Relations: Permission, Capability Impairment, and Remedy

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Abstract

This paper is analytic jurisprudence. It states no proposition about the law of any jurisdiction, and its single positive-law citation is a regulatory record used only for the dates it records. Its subject is a family of inferences that recur in argument about whether and how generative capacity could be legally protected, and its claim is that several of them are invalid on grounds that do not depend on any jurisdiction's content. The first is the inference from the absence of an intellectual-property exclusion right to a general permission to use. On a Hohfeldian analysis, the absence of a claim-right establishes at most a privilege, held by one party, against one party, with respect to one act, under one body of law, and revocable by anyone holding a power to alter the relation. Reading it as a permission commits five distinct and separable fallacies, which the paper enumerates and proves. The second concerns the object of protection. Generative capacity is directed at futures, and argument that protects the specific futures a party would have realized is argument from a counterfactual whose content is not merely uncertain in magnitude but indeterminate in identity. The paper argues that the available object is a presently existing generative position, and that this substitution reduces the counterfactual burden without eliminating it. The third concerns proof. Present impairment, elevated risk to future trajectories, and the value of unrealized trajectories form a strict entailment chain with nested evidentiary requirements, so a liability rule that conditions the recognition of injury on proof of value renders established impairments unremediable — which is a choice about remedial architecture rather than a consequence of the injuries. The fourth concerns instruments. The candidate interests — attribution, confidentiality, portability, participation, benefit sharing, access, and non-foreclosure — are pairwise independent, and an exclusive right to exclude is neither necessary nor sufficient for any of them, which is an argument against inventing a property form rather than for it. The fifth concerns remedies: those whose content is a state of affairs are determinable from impairment-level facts, while those whose content is a sum are not, so a compensation-only repertoire can address none of the injuries identified here. The paper closes with five research obligations stating what any doctrinal claim in this area would require and recording that none is discharged.

1 Introduction

The research discussion from which this programme derives ends on a question. If the difficulty is that capital controls the conditions under which generative capacity becomes effective, and if intellectual property is not the right instrument, then perhaps the conclusion is that generativity should simply not be protected — and in that case anyone may use anyone's generative organization, and that is acceptable. The researcher's response to their own suggestion was that they did not think so.

That response is correct, and this paper's first result explains why it is correct in a way that does not depend on any jurisdiction's law. The inference runs from the absence of a claim-right to the

presence of a permission, and on the standard analysis of legal positions those are different relations. The absence of a claim-right against a party establishes at most a privilege, and a privilege is held by one party, against one party, with respect to one act, under one body of law, and is compatible with anyone else holding a power to alter it. Five separable inferences are involved in reading it as a general permission, and Proposition 5.2 shows that each fails. That result is jurisdiction-independent because it concerns the structure of jural relations rather than their content.

The paper's second concern is the object of protection, and it begins from another observation of the researcher's: generative capacity is directed at futures, and legal argument is structurally suspicious of claims resting on what would have happened. That suspicion is not a defect. An argument of the form "had the other party not acted, I could have done such-and-such" licenses almost anything if the counterfactual may be chosen freely, which is why systems that permit recovery for future consequences hedge it with requirements of foreseeability, proximity, and proof.

The difficulty here is worse than the usual one, and saying how it is worse is part of the paper's contribution. Ordinary claims about future loss are uncertain about the magnitude a known trajectory would have produced. Claims about foreclosed generative development are uncertain about which trajectories would have existed at all. A companion project in this programme establishes the formal counterpart: a foreclosed repertoire admits a witness — one development available before and not after — while its extent is bracketed by bounds that do not coincide, because the foreclosed developments are precisely the ones that generated no evidence.

The paper's response is the substitution the research discussion proposed: rather than the specific futures a party would have realized, take as the object a presently existing generative position — the organization held, the conditions available, the trajectory under way, and the options presently open. The claim that a party materially impaired such a position is weaker than the claim that it destroyed particular futures, and it is a claim about a present state.

Proposition 5.5 makes the resulting structure precise. Present impairment, elevated risk to future trajectories, and the value of unrealized trajectories form a strict entailment chain with nested evidentiary requirements. What follows is a design observation rather than a doctrinal one: a rule that recognizes an injury only on proof of value makes impairments unremediable although they are established, and that is a property of the rule rather than of the injury.

The paper's third concern is instruments. The natural response to a gap in protection is to propose a new right, and this paper argues against that. The candidate interests are pairwise independent, and an exclusive right to exclude others from using a generative organization is neither necessary nor sufficient for any of them; Proposition 5.8 proves this by exhibiting configurations. The standardization of property forms supplies an independent reason for caution about inventing one, and the enclosure literature supplies a substantive one, since a new exclusion right over generative organizations is the instrument most likely to produce the harm the programme's other projects describe.

The fourth concern is remedies, and here the paper has something constructive to offer. Remedies whose content is a state of affairs — a declaration, a correction of attribution, an order restoring access or portability, a forbearance — are determinable from impairment-level facts together with a specification of the target state. Remedies whose content is a sum require the valuation tier. Proposition 5.11 states this, and its corollary is that a repertoire consisting only of compensation can address none of the injuries this programme identifies. The counterweight is stated alongside: a state-specifying remedy fixes an arrangement, and fixing an arrangement is itself a way of foreclosing, so availability at the lower tier is not innocence at the lower tier.

Two things about what this paper is. It is analytic jurisprudence and it states no proposition about the law of any jurisdiction; the single positive-law citation is a regulatory record, used only for the dates it records. And it is preliminary by design, which the research discussion requested

explicitly: the jurisprudential material was to be included and framed as open questions and preliminary propositions rather than as finished doctrine. Section 7 states five research obligations specifying what any doctrinal claim here would require, and records that none is discharged.

Section 2 sets the scope and separates the objects. Section 3 reviews the analytical resources. Section 4 argues six theses. Section 5 proves four propositions. Section 6 presents the interest bundle and five countermodels. Section 7 states the research obligations. Section 8 records open questions and Section 9 the limits.

The philosophical and formal parts are *formally independent* and *justificatorily dependent*: no proposition cites a thesis, every proposition survives the rejection of all six, and what does not survive is the claim that they are the right things to prove.

2 Scope and the Separation of Objects

This section sets the paper’s scope and separates the objects that a legal analysis must not run together. Its objective is to make the paper’s jurisdictional silence a stated commitment rather than an omission, and to establish that the thing at issue is not one thing.

2.1 Analytic Jurisprudence, and Why This Paper Stops There

The portfolio entry from which this project derives records it as the least publication-ready of its ten, on the ground that every doctrinal claim, authority, remedy, and statement of current legal status requires verification. It also records the appropriate response: choose analytic jurisprudence or a single jurisdiction, and do not characterize present law without support.

This paper takes the first option. It analyzes the structure of the legal positions at issue and the inferential relations among candidate claims, and it makes no assertion about what any legal system in fact protects, permits, requires, or remedies. The one exception is a regulatory record cited for the staged dates it publishes [7], and it is cited for the dates and for nothing else.

The choice has a cost the paper accepts. Analytic results do not tell anyone whether a claim would succeed, and a reader who wants that will not find it here. The choice also has a benefit that is easy to undersell: results about the structure of jural relations hold across jurisdictions precisely because they concern structure, so the fallacies identified in Section 5.2 are fallacies wherever the relations are distinguished at all.

2.2 Four Objects, Not One

Argument in this area routinely treats “generativity” as a single object of possible protection. At least four objects are involved, and they have different legal characteristics.

A *fixed trace* is a recorded output: a text, a dataset, a program, a figure. It is the object the existing categories are built for, and it is not the object this programme is about.

A *latent organization* is the capacity that produced the trace and could produce others. It is not observed, and a companion project establishes that it is not identified by any finite record of what it has produced.

A *situated trajectory* is an ongoing course of development: the projects under way, the collaborators, the accumulated position. It is presently existing and partly observable, and it is what Section 4.2 proposes as the object of protection.

Realization infrastructure is the set of conditions under which the organization can develop. It is typically owned by someone, often by someone other than the party whose organization is at issue, and companion projects analyze control over it.

The separation matters because a legal instrument attaches to an object. A right over traces does not reach an organization; a right over an organization would be the property form Section 4.4 argues against; a protection of a trajectory is a protection of a present position; and a claim about infrastructure is a claim about someone else’s holdings. Arguments that move between these without marking the move are the characteristic failure of writing in this area, and the paper’s own results are stated with the object specified in each case.

2.3 The Future-Orientation Constraint

The research discussion stated the constraint that governs everything here. Generative capacity is directed at futures, and law does not generally accept reasoning of the form “if the other party had not done this, I could have done that.” Such reasoning, unconstrained, licenses any conclusion for which a sufficiently favorable counterfactual can be described.

The constraint should be respected rather than argued around, and this paper respects it in three ways.

It substitutes a present object for a future one, taking the impaired thing to be a presently existing position rather than an unrealized development.

It separates the existence of an injury from the valuation of its consequences, and does not treat the first as requiring the second (Proposition 5.5).

And it directs the constructive part of the argument at remedies whose content does not require a counterfactual valuation (Proposition 5.11).

None of this makes the counterfactual go away. Establishing that a position was *impaired* still requires a comparison with what the position would have been, and the comparison is a counterfactual about a present state rather than about a future one. That is a smaller burden and not no burden, and Section 9 records it as such.

2.4 Requirements on an Adequate Account

Four requirements follow.

First, the account must distinguish jural positions carefully enough that the absence of one relation is not read as the presence of another.

Second, it must specify the object of every claim it makes among the four distinguished above.

Third, it must separate the existence of an injury from the valuation of consequences, and must not let a remedial architecture silently determine which injuries are recognized.

Fourth, it must reach conclusions about instruments without proposing a new exclusive right, since the programme’s other projects establish that such a right is the instrument most likely to produce the harms under study.

3 Analytical Resources

This section reviews the resources the paper uses. Its objective is to record what each supplies, what constraint each imposes, and where each stops. No source in this corpus states any of the paper’s four propositions.

3.1 The Analysis of Jural Relations

Hohfeld’s analysis distinguishes eight legal positions arranged in correlative and opposite pairs: right and duty, privilege and no-right, power and liability, immunity and disability [14, 15]. Its central

methodological claim is that the word “right” in legal argument covers several distinct relations, and that arguments equivocate between them.

This supplies the paper’s first result almost entirely, and the paper says so. Proposition 5.2 is an application rather than a discovery: what is new is not the analysis but the observation that the inference the research discussion identified — from non-protection to permission — is exactly the equivocation Hohfeld’s scheme was constructed to expose, and that it decomposes into five separable failures rather than one.

Two features of the scheme do the work. Positions are relational, holding between two parties, so a privilege against one party is not a privilege against another. And positions are act-indexed, so a privilege with respect to one act is not a privilege with respect to another.

3.2 Property Forms and Their Standardization

Merrill and Smith analyze the *numerus clausus* principle, under which the forms of property recognized by a legal system are standardized and limited in number, and argue that standardization economizes on the information costs imposed on third parties who must respect the resulting rights [19].

This supplies the paper’s principled reason for caution about proposing a new property form, and it is a reason of a specific kind: the cost of a novel form falls on parties who are not before any court and who must ascertain what they may do. A right over generative organizations would be a form whose boundaries are defined by an object that a companion project establishes is not identified from any record — which is the information-cost problem in an acute version.

Boyle’s analysis of the second enclosure movement supplies the substantive counterpart [4]: the extension of property rights over material formerly regarded as common, and the argument that a vocabulary adequate to describe the loss is required. The paper’s use is that a new exclusion right over generative organizations would be an instance of exactly the movement Boyle describes, so proposing one as a remedy for the programme’s harms would be self-defeating.

Ostrom’s demonstration that shared resources are sustained by institutional arrangements that are neither private property nor central regulation [21], its extension to knowledge [13], Benkler’s analysis of production without proprietary exclusion [2], Frischmann’s case for commons management where spillovers resist appropriation [10], and Romer’s treatment of ideas as nonrival and partially excludable [26] together supply the alternative: arrangements that are not exclusion rights and not nothing. The paper takes the existence of the space between them and no design principle.

3.3 Causation, Chance, and Future Consequences

Hart and Honoré analyze the causal concepts employed in legal reasoning, and in particular the treatment of intervening voluntary conduct and of conditions against which a cause is identified [12]. This bears directly on the programme’s propagation question, where a downstream party acts under upstream pressure, and the paper uses it for the structural point that identifying a cause presupposes a selection among conditions rather than a discovery.

King analyzes causation, valuation, and chance in claims involving preexisting conditions and future consequences, and develops the treatment of a lost chance as a distinct object of valuation rather than as an all-or-nothing question about an outcome [17]. This is the closest available analytical treatment of the structure the paper needs: a party whose probability of reaching some outcome has been reduced, where the outcome itself remains uncertain. The paper uses the structure and takes no doctrinal claim.

Fuller and Perdue’s distinction between restitution, reliance, and expectation interests supplies the observation that a legal system may recognize several distinct measures of the same disturbance, and that the case for intervention can be graded across them [11]. The tier structure of Proposition 5.5 is a different partition of a similar kind, and the paper claims no derivation.

3.4 Repair and Its Measures

Weinrib’s account of corrective justice treats repair as correlative to the injury [29], which is the model the valuation tier would satisfy and the lower tiers cannot. De Greiff’s analysis of reparations where the juridical measure cannot be met, and his argument that political criteria then carry the assessment, is the closest available treatment of a repair problem without a magnitude [6]. Braithwaite’s restorative account directs attention to the restoration of parties to a position from which they can participate [5], which is the shape of the state-specifying remedies Proposition 5.11 identifies.

Frankel’s analysis of fiduciary structure identifies the recurring form of relations in which one party entrusts property or power to another better positioned to use it, and derives duties from that structure [8]. The paper uses this for one point: a legal system can attach duties to a relation’s structure without creating a property right in its object, which is a template for the assembled protections Section 4.4 favors.

3.5 The Interests and Their Non-Legal Grounds

The candidate interests the paper analyzes are not derived from the legal materials, and their non-legal grounds are recorded so that the derivation is not mistaken for a legal one. The affected object is opportunity rather than achievement [27, 24, 20]. A question about who may determine another’s developmental conditions is a question about a relation and is not answered by a statement of holdings [1], and subjection to another’s discretion is defective independently of whether the discretion is exercised [22]. A party unable to establish what was done to it is disadvantaged in its capacity as a knower [9]. The distributive criterion [23] is recorded and applied to no case.

The diagnostic whose satisfaction would make a configuration a candidate for legal attention is the companion framework’s, resting on comparison against a feasible alternative arrangement [25], declining consent and mutual benefit as exculpatory [30], and admitting relational [28] and structural [31] forms. Zwolinski’s constraint against inferring status from background conditions applies here with force, since a legal category that followed from structural disadvantage alone would be unusable [33]. Young’s distinction between forward-looking structural responsibility and liability marks the two forms an allocation could take [32]. Khan’s argument that structural position can produce harm invisible to price-based tests [16] and Birch’s analysis of rent through control rights [3] indicate where an analogous invisibility arises in other legal fields, and the paper draws no doctrinal conclusion from either. Manski’s partial-identification discipline governs the reporting of the quantities the valuation tier would need [18].

Table 1: Analytical resources, what each supplies, and the constraint each imposes on the paper’s claims. No entry supports a claim about the law of any jurisdiction.

Resource	Supplies	Constraint imposed
Jural relations	Eight distinguished positions; relational and act-indexed	The first proposition is an application, not a discovery
Numerus clausus	Standardization of property forms; third-party information costs	A reason for caution about a new form, not an argument that none is possible
Enclosure	The category and vocabulary for extension of rights over intangibles	A new exclusion right here would instance what the category describes
Commons and infrastructure	Arrangements that are neither exclusion rights nor nothing	No design principle transfers
Causation in legal reasoning	Cause as a selection among conditions; intervening conduct	No doctrinal claim about attribution rules
Chance and future consequences	A reduced probability as a distinct object of valuation	The structure only; no doctrinal claim
Reliance and expectation	Several distinct measures of one disturbance	The tier structure is not derived from it
Corrective justice	Repair correlative to injury	Correlativity is what the lower tiers cannot supply
Reparations without a measure	Criteria that survive when the juridical measure fails	Not a licence to abandon measurement where it is available
Restorative justice	Restoration to a position from which one can participate	Processes reproduce asymmetry where parties enter unequally
Fiduciary structure	Duties attached to a relation without property in its object	Structural only; no doctrinal claim
Capability	Opportunity rather than achievement as the affected object	Specification choices are unavoidable
Relational equality and non-domination	Why holdings do not settle a question about discretion	No verdict on any arrangement
Epistemic injustice	Disadvantage in the capacity of a knower	Does not establish that this occurs
Exploitation theory	The diagnostic whose satisfaction would make a case a candidate	Structural disadvantage must not imply a legal category
Partial identification	Reporting a consistent set rather than a point	A set containing zero supports no valuation
Regulatory record	Verified staged dates	No conclusion about content, adequacy, or effect

4 Six Theses

This section argues the paper’s six theses, each with argument, strongest known objection, and reply. The section makes no use of the formal results and is not used by them.

4.1 Non-Protection Is Not Permission

Thesis 4.1 (Non-protection is not permission). That a legal system supplies no exclusion right over generative organizations settles one jural relation. It does not establish that anyone may use anyone’s generative organization, and the inference from the first to the second is invalid on structural grounds.

Argument. The absence of a claim-right in one party is the presence of a privilege in another. A privilege is the absence of a duty, and it is indexed to a pair of parties, to an act, and to the body

of law under which the duty would have arisen; it is also compatible with someone holding a power to change the position. Each of these indices is a place where the inference to a general permission can fail, and Proposition 5.2 shows that all five failures are independent.

The thesis answers the question on which the research discussion closed. Deciding not to create a property right in generativity is a decision about one instrument. It is not a decision that appropriating another party's generative organization is permissible, because permissibility is settled by the whole set of relations between the parties and not by the absence of one of them.

Strongest objection. This is a lawyer's point about vocabulary. In practice, if nothing forbids an act, the act may be done; the residual liberty is what a legal system leaves when it has finished forbidding, and dressing it in Hohfeldian terminology does not change what a party may in fact do.

Reply. The objection is right that residual liberty exists and wrong that the analysis is about vocabulary. The point is that the antecedent is almost never established. "Nothing forbids the act" is a claim about every body of law and every counterparty and every variant of the act, and what is actually established in these arguments is that one body of law supplies no exclusion right against one form of use. The distance between those two is where the argument lives, and it is the distance the proposition measures.

4.2 The Object Is a Present Position

Thesis 4.2 (Present position as the object). The legally tractable object is a presently existing generative position — the organization held, the conditions available, the trajectory under way, and the options presently open — rather than the specific future developments a party would have realized.

Argument. The future-oriented object is unavailable for a reason that is stronger than ordinary evidentiary difficulty. A claim about lost profit is uncertain about the magnitude a known undertaking would have produced. A claim about foreclosed generative development is uncertain about which undertakings would have existed, and a companion project establishes that the foreclosed set is bounded rather than identified, precisely because its members generated no evidence.

The present position is a different object. It is partly observable: a research programme has collaborators, equipment, preliminary results, and an institutional place; a practice has records, tools, channels, and standing. A claim that these were materially worsened is a claim about a present state, and the counterfactual it requires is a comparison of present states rather than a projection of unrealized ones.

The example the research discussion used makes the difference concrete. It may be impossible to establish that a student would have produced a particular result. It may be considerably easier to establish that the student had an ongoing programme with a concrete opportunity structure, and that the structure was impaired.

Strongest objection. The substitution smuggles the future back in. A position is valuable only because of what it makes possible, so impairing a position is an injury only if the possibilities mattered, and assessing whether they mattered requires exactly the future-directed judgment the substitution was supposed to avoid.

Reply. Conceded and located. The substitution reduces the counterfactual burden and does not remove it: what remains is a comparison of present states, which requires a view about what the position would have been, and Section 9 records this as a residual burden rather than a solved problem. What the substitution buys is that the comparison ranges over states that existed or would have existed at a time rather than over developments that were never undertaken, and the identification problem for the second is strictly worse than for the first.

4.3 Injury and Valuation Come Apart

Thesis 4.3 (Separable tiers). Whether a generative position was impaired, whether the impairment raised the risk of losing future trajectories, and what those trajectories were worth are three claims in a strict entailment chain with nested evidentiary requirements. A legal system may recognize the first without the third, and a rule that requires the third in order to recognize the first is making a choice rather than respecting a constraint.

Argument. Proposition 5.5 states the chain and the nesting. The substance is that the three claims are not degrees of confidence about one proposition but distinct propositions, and that establishing the strongest requires everything the weaker ones require and more.

The consequence the paper regards as important is architectural. If the recognition of an injury is conditioned on proof at the valuation tier, then injuries established at the impairment tier are not merely under-remedied; they are invisible, because the question whether they occurred is never reached. That is a property of the conditioning and not of the injuries, and separating the tiers is what makes it possible to say so.

The observation that a legal system can recognize several distinct measures of one disturbance, with different justificatory weight attaching to each, is not new [11], and the treatment of a reduced probability as an object in its own right rather than as weak evidence about an outcome is an established analytical move [17]. The paper’s tiers are a different partition and are not derived from either.

Strongest objection. A recognized injury with no measurable consequence is an invitation to litigation about nothing. Legal systems require quantifiable harm partly to keep the number of actionable disturbances finite, and separating the tiers removes that limit while supplying no replacement.

Reply. The concern is real and the reply is that the limiting work is done elsewhere. What bounds the category is not the measurability of consequences but the conditions of the diagnostic — standing, an admissible comparison, a material impairment, and a benefit running through it — and Zwolinski’s constraint that structural disadvantage must not by itself constitute the category [33]. A system that limits by measurability limits by an accident of what is measurable, which selects against exactly the injuries this programme studies.

4.4 The Bundle Is Not an Exclusion Right

Thesis 4.4 (No new property form). The candidate interests are pairwise independent, and an exclusive right to exclude others from using a generative organization is neither necessary nor sufficient for any of them. The appropriate instrument is an assembly of protections drawn from existing relations, not a new property form.

Argument. Proposition 5.8 establishes the independence and the double failure of the exclusion right by exhibiting configurations. Three further considerations support the conclusion.

Standardization of property forms exists partly to limit the information costs imposed on third parties who must ascertain what they may do [19]. A form whose object is not identified from any record — which is what a companion project establishes about a generative organization — is a form whose boundaries no third party could ascertain.

A new exclusion right over generative organizations would be an instance of the extension of property over formerly common material that the enclosure literature describes [4], so proposing it as a remedy for the programme’s harms would produce the harm it treats.

And the alternative is not nothing. Duties can attach to the structure of a relation without property in its object [8], and shared resources can be governed by arrangements that are neither exclusion rights nor absence of governance [21, 13, 10].

Strongest objection. An assembly of protections drawn from several bodies of law is expensive, uneven, and available only to parties who can afford to assemble it. A single right is crude and usable. Preferring elegance to usability is a familiar academic error and this may be an instance.

Reply. The objection identifies a real cost and the paper does not answer it, because answering it requires exactly the doctrinal and institutional work Section 7 records as undischarged. What the paper can say is that the crude instrument does not do the job: Proposition 5.8 shows that the exclusion right is not sufficient for any interest in the bundle, so the choice is not between an expensive complete instrument and a cheap adequate one.

4.5 Remedies Divide by What They Specify

Thesis 4.5 (State-specifying and sum-specifying remedies). Remedies whose content is a state of affairs are determinable from impairment-level facts together with a specification of the target state. Remedies whose content is a sum require the valuation tier. A repertoire consisting only of the second can address none of the injuries this programme identifies.

Argument. Proposition 5.11 states the partition. The constructive consequence is that the unavailability of valuation is not the end of the analysis, because a substantial class of remedies never needed it: a declaration that an impairment occurred, a correction of attribution, an order restoring access on stated terms, an order requiring portability, a forbearance, a disclosure.

The paper states the counterweight in the same breath, because it is the programme’s own finding. A state-specifying remedy fixes an arrangement, and fixing an arrangement is a way of foreclosing: an order restoring access converts a living arrangement into a specified one, which the repository records as an unresolved tension between excessive enclosure and unconsented capture. So availability at the lower tier is not innocence at the lower tier, and a remedy of this kind requires its own justification rather than inheriting one from the injury.

Strongest objection. Non-monetary remedies are the ones legal systems grant most reluctantly, because they require ongoing supervision, they bind parties to relations they wish to exit, and they place courts in the position of administering arrangements. Recommending the class that is hardest to obtain is not a constructive contribution.

Reply. The paper recommends nothing and states an availability result: the content of these remedies is determinable where the content of a sum is not. Whether a system grants them, and at what institutional cost, is a question Section 7 records as requiring verification the paper has not performed. The observation stands independently: a system that grants only sums has, for these injuries, no remedy whose content it could compute.

4.6 Jurisdiction-Indexing Is Not Optional

Thesis 4.6 (Structure travels, content does not). Results about the structure of jural relations hold across legal systems because they concern structure. Every claim about what is protected, permitted, required, or remedied is jurisdiction-indexed and time-indexed. Writing that moves between the two registers without marking the move is the characteristic failure of this subject.

Argument. The four propositions of Section 5 are conditional on definitions and hold wherever the definitions apply. They say nothing about whether any system in fact recognizes any interest, and nothing about what any court would do.

The failure the thesis names is easy to commit and hard to detect, because an analytic result and a doctrinal claim can be stated in the same sentence form. “The absence of an exclusion right does not entail permission” is analytic. “Parties may therefore be liable in confidence” is doctrinal, jurisdiction- indexed, and time-indexed, and this paper does not assert it or its negation.

The thesis is also the reason for Section 7. Stating what a doctrinal claim would require is the only way a paper that makes none can be useful to a project that will eventually need them.

Strongest objection. Then the paper is of no use to anyone with a problem. A framework that identifies invalid inferences without saying what any system does leaves every practical question exactly where it found it.

Reply. Partly conceded. The paper’s use is negative and specific: it removes a class of arguments from circulation, identifies which claims a subsequent doctrinal project must establish, and shows that one natural instrument would be self-defeating. Whether that is worth a paper is a fair question, and the alternative — doctrinal assertion without verification — is one the repository’s protocol forbids and the portfolio entry specifically warns against.

4.7 Dependence Structure Among the Theses

Rejecting Thesis 4.1 restores the inference from non-protection to permission and answers the research discussion’s closing question the wrong way. Rejecting Thesis 4.2 returns the object of protection to unrealized futures and to a counterfactual burden the programme’s identification results show cannot be met. Rejecting Thesis 4.3 makes valuation a condition of recognition and renders impairment-level injuries invisible. Rejecting Thesis 4.4 makes a new exclusion right the natural proposal. Rejecting Thesis 4.5 leaves the analysis with no remedy whose content is determinable. Rejecting Thesis 4.6 permits the paper’s analytic results to be read as claims about law.

Theses 4.1 and 4.2 are load-bearing: the first is the paper’s answer to the question the programme ended on, and the second is what makes a legal analysis possible at all given the identification results. Thesis 4.3 is the most contestable, since its strongest objection — that a recognized injury with no measurable consequence has no limiting principle — is answered by relocating the limit rather than by supplying one the law could apply.

5 Formal Results

This section declares the objects and proves four propositions. Its objective is to establish that non-protection does not entail permission, that the proof tiers are strictly ordered with nested evidence, that the interest bundle is not generated by an exclusion right, and that remedies divide by what their content requires. The section cites no thesis, and no result asserts anything about the law of any jurisdiction.

5.1 Jural Positions

Definition 5.1 (Jural positions). For parties A, B , an act description φ , and a body of law L , write: $R_L(A, B, \varphi)$ for “ A has a claim-right under L that B perform φ ”; $D_L(B, A, \varphi)$ for “ B has a duty under L to A to perform φ ”; $Pv_L(B, A, \varphi)$ for “ B has a privilege under L as against A of performing φ ”; and $Im_L(B, A, \varphi)$ for “ B has an immunity under L against A ’s altering B ’s position with respect to φ ”. The correlativity and opposition relations are

$$R_L(A, B, \varphi) \leftrightarrow D_L(B, A, \varphi), \quad Pv_L(B, A, \varphi) \leftrightarrow \neg D_L(B, A, \neg\varphi).$$

5.2 Non-Protection Does Not Entail Permission

Proposition 5.2 (Five independent failures). *Let L_0 be a body of law, A and B parties, and φ an act. Suppose $\neg R_{L_0}(A, B, \neg\varphi)$: A has no claim-right under L_0 that B refrain from φ . Then $Pv_{L_0}(B, A, \varphi)$, and none of the following follows.*

1. Claim-right. $R_{L_0}(B, A, \varphi)$: that A has a duty not to interfere with B 's φ -ing.
2. Immunity. $Im_{L_0}(B, A, \varphi)$: that no party holds a power to alter B 's position.
3. Party generality. $Pv_{L_0}(B, C, \varphi)$ for $C \neq A$.
4. Act generality. $Pv_{L_0}(B, A, \psi)$ for $\psi \neq \varphi$.
5. Source generality. $Pv_L(B, A, \varphi)$ for $L \neq L_0$.

Moreover the five failures are independent: for each, there is a configuration in which that one fails and the other four hold.

Proof. The first conjunct is Definition 5.1: no claim-right in A that B refrain is no duty in B to refrain, which is a privilege in B . (1) Privilege and claim-right are distinct positions with distinct correlatives, duty being the correlative of a right and no-right of a privilege; a privilege in B correlates with a no-right in A and entails no duty in A . (2) Privilege and immunity are distinct, immunity correlating with disability and privilege with no-right; a party may hold a power to create a duty in B while B presently has none. (3) and (4) hold because positions in Definition 5.1 are indexed to a counterparty and an act description, so nothing about the pair (A, φ) constrains (C, φ) or (A, ψ) . (5) holds because positions are indexed to a body of law, and duties under distinct bodies are independent. Independence: for (1), let B have a privilege that A may lawfully frustrate, with all indices otherwise general. For (2), let B 's privilege be general in party, act, and source while a legislature holds a power to impose a duty. For (3), let B 's privilege hold against A by A 's consent while C holds a right. For (4), let B 's privilege cover reading a work but not distributing it. For (5), let no exclusion right exist while a duty of confidence does. $\square$

Corollary 5.3 (The characteristic conflation). *An argument from “generative organizations are not protected by an exclusion right” to “anyone may use anyone’s generative organization” asserts the conclusion of at least clauses (1), (3), (4), and (5) simultaneously, from a premise that establishes none of them.*

The corollary is the paper’s answer to the question on which the research discussion closed, and its force is that the four failures are separable. An interlocutor who repairs one of them — by establishing, say, that the privilege is general in party — has established nothing about the others.

Two things the proposition does not show. It does not show that any duty in fact exists under any body of law; establishing that is a doctrinal claim and Section 7 states what it would require. And it does not show that the residual liberty is empty: where every index is in fact general, the permission conclusion holds, and the proposition’s content is that this is a conjunction of five claims rather than a restatement of the premise.

5.3 Proof Tiers Are Strictly Ordered

Definition 5.4 (Three claims). Fix parties X, Y , a time t , and an admissible alternative arrangement b . Write

- π_1 : X 's conduct materially worsened Y 's generative position at t relative to b ;
- π_2 : π_1 , and that worsening raised the probability that Y fails to reach some future trajectory τ ;
- π_3 : π_2 , and the trajectories Y thereby fails to reach have value v .

Write $\text{Ev}(\pi)$ for a minimal set of facts sufficient to establish π .

Proposition 5.5 (Strict ordering and nested evidence). $\pi_3 \models \pi_2 \models \pi_1$, and neither converse holds. Consequently $\text{Ev}(\pi_1) \subseteq \text{Ev}(\pi_2) \subseteq \text{Ev}(\pi_3)$, and the inclusions are strict whenever the converse entailments fail.

Proof. The entailments hold by construction, each claim conjoining its predecessor. For the failure of $\pi_1 \models \pi_2$: a worsening may leave every trajectory's probability unchanged, as when the impaired conditions are not on any path to τ . For the failure of $\pi_2 \models \pi_3$: a raised probability of failing to reach a trajectory is consistent with the trajectory having no determinate value, and a companion project establishes that the foreclosed set is bracketed by non-coinciding bounds, so v need not exist as a point. Nesting follows because any facts sufficient for a conjunction are sufficient for each conjunct. $\square$

Corollary 5.6 (Conditioning recognition on valuation suppresses the base tier). *Under a rule recognizing an injury only where π_3 is established, configurations satisfying π_1 and not π_3 are not recognized. Since $\pi_1 \not\models \pi_3$, this class is nonempty whenever π_1 is satisfiable at all.*

The corollary is an observation about rule architecture and not a criticism of any system. Its interest is that the suppressed class is exactly the class this programme studies: the identification results establish that foreclosed repertoires are bounded rather than valued, so π_3 will characteristically be unavailable where π_1 holds. Reporting a bounded quantity as a set rather than a point is the standard discipline [18], and a rule demanding a point is demanding what the discipline says is unavailable.

5.4 The Bundle Is Not Generated by an Exclusion Right

Definition 5.7 (Candidate interests). Let $\mathcal{I} = \{\text{attr}, \text{conf}, \text{port}, \text{part}, \text{ben}, \text{acc}, \text{nfor}\}$ denote interests in, respectively, attribution, confidentiality, portability, participation, benefit sharing, access, and non-foreclosure. Let excl denote an exclusive right in Y to exclude others from using Y 's generative organization.

Proposition 5.8 (Pairwise independence and the double failure of exclusion). *For every ordered pair (i, j) of distinct members of $\mathcal{I}$ there is a configuration satisfying i and violating j . Moreover, for every $i \in \mathcal{I}$, excl is neither necessary nor sufficient for i .*

Proof. Independence is established by exhibiting configurations, of which four suffice to generate the rest by permutation of roles. A work is attributed correctly and cannot be exported from the system holding it: **attr** without **port**. A participant is granted access and no voice in the governance of the resource: **acc** without **part**. A contributor receives a share of proceeds while the arrangement contracts what the practice can become: **ben** without **nfor**. A relation is kept confidential while authorship is misassigned within it: **conf** without **attr**.

Non-necessity: each interest is satisfiable without *excl*, since each can be secured by a duty running to *Y* — of acknowledgment, of confidence, of interoperation, of consultation, of accounting, of provision, of forbearance — none of which requires a right in *Y* to exclude.

Non-sufficiency: *excl* is compatible with the violation of each. A holder of an exclusive right may be denied attribution by a licensee’s practice, may have the organization disclosed by a third party under no duty of confidence, may be unable to export it from an infrastructure it does not control, may be excluded from governance of the resource on which it depends, may receive no share where it has licensed for a fixed sum, may lose access to conditions held by another, and may find its own future development foreclosed by a party expanding a similar organization faster. $\square$

Corollary 5.9 (Assembly rather than form). *No single instrument in the family of exclusion rights generates the bundle, so protection of any subset requires an assembly of distinct relations. In particular, declining to create *excl* leaves every member of $\mathcal{I}$ available for separate treatment.*

Corollary 5.9 is the constructive counterpart of Corollary 5.3: the first says that the absence of an exclusion right settles nothing about permission, and the second says it settles nothing about protection either. The standardization consideration [19] and the enclosure category [4] supply independent reasons against introducing the form, and the paper takes no position on whether any particular assembled protection should exist.

5.5 Remedies Divide by What Their Content Requires

Definition 5.10 (Two remedial classes). A remedy is *state-specifying* if its content is a description of an arrangement to be brought about or maintained — a declaration, a correction of attribution, an order to restore access on stated terms, an order to provide portability, a forbearance, an order to disclose. A remedy is *sum-specifying* if its content is a quantity of value.

Proposition 5.11 (Remedial availability by tier). *The content of a state-specifying remedy is determined by π_1 together with a specification of the target arrangement. The content of a sum-specifying remedy requires π_3 .*

Proof. A state-specifying remedy’s content is a description of an arrangement; what π_1 supplies is that the present position was worsened relative to an admissible alternative, and the alternative is a description of an arrangement. No valuation enters. A sum-specifying remedy’s content is a quantity; by Definition 5.4 the quantity is the value of what was not reached, which is π_3 . $\square$

Corollary 5.12 (A compensation-only repertoire). *In a system whose remedial repertoire contains only sum-specifying remedies, no injury satisfying π_1 and not π_3 admits a remedy whose content the system can determine.*

Corollary 5.13 (Lower-tier availability is not lower-tier innocence). *A state-specifying remedy fixes an arrangement. Where the arrangement fixed is one on which other parties’ development depends, the remedy is itself a restriction of what that arrangement can become, and requires justification on its own terms rather than inheriting justification from the injury.*

Corollary 5.13 is the paper’s own finding turned against its constructive suggestion, and it is stated because the repository records the tension it instances as unresolved: strong protection of a shared resource can suppress what the resource was for. The corollary does not defeat Proposition 5.11, which is an availability result; it denies that availability settles desirability.

Table 2: Candidate generative interests, the object each concerns, the jural position that would carry it, and the difficulty each raises. No row asserts that any legal system recognizes any interest.

Interest	Object	Carrying position	Principal difficulty	What a claim would require
Attribution	Trace and trajectory	Duty of acknowledgment	Attribution degrades along joint development	A determinate contribution record at a stated time
Confidentiality	Latent organization	Duty of confidence	The organization is not identified from any record	A specified disclosure and a relation that carried the duty
Portability	Trajectory and infrastructure	Duty to enable transfer	Formats and dependencies are controlled by the counterparty	A specified target environment and a feasible transfer
Participation	Practice and governance	Power over rules, or immunity	Participation and standing come apart	A specified decision and a ground of standing in it
Benefit sharing	Trace and organization	Duty to account	The share presupposes an attribution the record does not fix	An agreed or determinable basis of division
Access	Realization infrastructure	Duty to provide, or a liberty	An access duty fixes an arrangement	A specified condition, terms, and duration
Non-foreclosure	Reachable option space	Duty to forbear	The foreclosed set is bounded, not identified	A witness trajectory and an admissible alternative

6 The Interest Bundle and Countermodels

This section presents the candidate interests with their objects and the relation that would carry each, and then exhibits five countermodels. Its objective is to make the assembly concrete without asserting that any legal system contains any of it.

6.1 Interests, Objects, and Carrying Relations

Table 2 lists each candidate interest against the object it concerns, the jural position that would carry it, and the specific difficulty it raises. Every entry is a specification of a question. No entry asserts that any system recognizes any interest, and the fourth column exists so that the table cannot be read as a proposal.

6.2 Countermodels

Countermodel 6.1 (Privilege without permission). No exclusion right exists over a generative organization, and a duty of confidence arising from a relation forbids a particular party from using what it learned in that relation.

Clause (5) of Proposition 5.2 in a single configuration. The absence of the first relation is compatible with the presence of the second, and the countermodel is stated as a possibility rather than as a description of any system.

Countermodel 6.2 (Impairment without valuation). A party’s ongoing programme loses equipment access, collaborators, and institutional standing through another party’s conduct. Which developments it would have undertaken is undetermined, and no value can be assigned.

Here π_1 holds and π_3 fails, so by Corollary 5.12 a compensation-only repertoire has no remedy whose content it can determine, and by Proposition 5.11 a state-specifying remedy does.

Countermodel 6.3 (Valuation without impairment). A party can demonstrate that a described future development would have been valuable, and its present position is unchanged.

The countermodel exists to keep the tier ordering from being read as a claim that valuation evidence is strong evidence of impairment. The tiers are conjunctive, so a demonstration bearing on value alone establishes no conjunct of π_1 .

Countermodel 6.4 (Exclusion right with every interest violated). A party holds an exclusive right over its generative organization. Attribution is misassigned in practice, the organization is disclosed by a stranger to any confidential relation, it cannot be exported from the infrastructure on which it was built, its holder has no voice in the governance of that infrastructure, it was licensed for a fixed sum, its holder has lost access to the relevant conditions, and a faster party has foreclosed its remaining developments.

Non-sufficiency in a single configuration, and the countermodel is the paper’s main argument against the natural proposal.

Countermodel 6.5 (Remedy as foreclosure). An order restores a party’s access to a shared resource on stated terms. The terms fix what the resource may become, and other participants’ developments are thereby constrained.

Corollary 5.13 in a single configuration. It is included because the paper’s constructive suggestion is the thing it constrains.

7 Research Obligations

This section states what any doctrinal claim in this area would require. Its objective is to convert the portfolio’s recorded readiness deficit into a specification, so that the absence of doctrinal content is visible and a subsequent project has a target. The paper makes none of the claims below.

Research Obligation 7.1 (Protected subject matter). *Claim:* that a named legal system protects any of the four objects. *Required:* primary sources in that system, identified by instrument and provision, with a stated date of currency, and an account of how the object is characterized there. *Not substitutable by:* secondary summaries, comparative generalizations, or this paper’s analytic results.

Research Obligation 7.2 (Available causes of action). *Claim:* that a party in a described configuration could bring any claim. *Required:* the elements of the claim in the named system, an account of which facts would satisfy each element, and the standing rules. *Not substitutable by:* the observation that an interest exists, or that another system recognizes a similar claim.

Research Obligation 7.3 (Proof standards). *Claim:* that any of π_1 , π_2 , or π_3 meets a system’s threshold. *Required:* the applicable standard, its treatment of counterfactual and probabilistic evidence, and its treatment of quantum as an element or as a separate question. *Not substitutable by:* the analytic ordering of Proposition 5.5, which is silent about thresholds.

Research Obligation 7.4 (Remedial availability). *Claim:* that a state-specifying remedy is available. *Required:* the system’s rules on that remedy, including its discretionary conditions, supervision requirements, and limits. *Not substitutable by:* Proposition 5.11, which establishes determinability of content and not availability.

Research Obligation 7.5 (Comparative claims). *Claim:* that systems converge or diverge on any of the above. *Required:* a stated selection of systems, a stated basis of comparison, and the underlying claims discharged separately for each. *Not substitutable by:* a claim about international instruments, or by the staged dates of any regulatory record [7].

Two remarks. The obligations are demanding, and they are demanding symmetrically: a claim that a legal system supplies no protection passes through Obligations 7.1 and 7.2 exactly as a claim that it does, which is a consequence of Proposition 5.2. And they are not a counsel of despair, since the propositions of Section 5 are established without any of them.

8 Open Questions

This section records what the project leaves unresolved, by register.

8.1 Analytical

Open Problem 8.1 (Powers and the dynamics of positions). Proposition 5.2 treats powers only through clause (2). A full treatment would model how positions change — who may create duties, on what occasions, and with what notice — which is where a privilege becomes practically secure or insecure. The dynamics are not worked out.

Open Problem 8.2 (Individuating act descriptions). Clause (4) turns on act-indexing, and nothing here says how act descriptions are individuated. Since a coarse description makes privileges general and a fine one makes them narrow, the clause’s force depends on a question the paper does not address.

Open Problem 8.3 (The residual counterfactual). Thesis 4.2 substitutes a present position for a future one and concedes that establishing impairment still requires a comparison with what the position would have been. How much that reduces the burden, and whether it reduces it enough for any workable standard, is unresolved and is the paper’s most important analytical gap.

Open Problem 8.4 (Responsibility along propagation chains). Where a downstream party acts under upstream pressure, allocation of responsibility requires an account of intervening voluntary conduct and of the conditions against which a cause is selected [12]. The programme’s propagation project supplies a causal contrast; connecting it to any allocation rule is not attempted here.

8.2 Institutional

Whether an assembled protection is available to parties who cannot afford to assemble it is the strongest practical objection to Thesis 4.4, and the paper does not answer it.

Whether duties attached to relational structure [8] can be extended to the configurations this programme studies, in which the parties may stand in no relation at all, is open and is the point at which the fiduciary template most plausibly fails.

Whether governance arrangements that are neither exclusion rights nor absence of governance [21, 13, 10] can carry any member of the bundle is untested.

8.3 Normative

Whether a legal system should recognize an injury it cannot value is not settled here. Corollary 5.6 shows that a system conditioning recognition on valuation suppresses a nonempty class; whether it ought not to is a further question involving costs the paper does not weigh.

Whether the forward-looking structural model [32] or a liability model is the appropriate form for allocations in this area depends on facts about anticipation and control that the framework deliberately does not require.

Whether a party unable to establish what was done to it is thereby wronged in its capacity as a knower [9], and whether that supplies an independent ground for disclosure duties, is noted and not pursued.

8.4 Doctrinal

The whole doctrinal register is open. Section 7 states the five obligations, and none is discharged. A subsequent project would need to choose a jurisdiction, fix a date, and work through them in order.

9 Limits and Revisable Research Program

This section states what the paper contributes, what would defeat it, and what it has not done.

9.1 Contributions

The analytical contribution is the decomposition of the inference from non-protection to permission into five separable failures, which answers the question on which the source discussion closed.

The conceptual contribution is the substitution of a presently existing generative position for unrealized futures as the object of a claim, together with the honest accounting of what the substitution does and does not buy.

The structural contribution is the tier ordering with its architectural corollary: conditioning the recognition of injury on valuation suppresses a nonempty class, and does so as a property of the rule rather than of the injuries.

The instrumental contribution is the double failure of the exclusion right, which converts the natural proposal in this area into one the paper argues against on three independent grounds.

The remedial contribution is the partition by what a remedy's content requires, with the counterweight that lower-tier availability is not lower-tier innocence.

The methodological contribution is the five research obligations, stated symmetrically for claims that a system does and does not protect.

9.2 Defeat Conditions

The first result loses support only if the jural positions are not distinct, which would be a rejection of the framework rather than of this application; more realistically, it loses practical force if the indices are in fact general in the configurations of interest, which is an empirical question about legal systems the paper does not address.

The object substitution loses support if a present generative position cannot be individuated without reference to the futures it makes possible, in which case the counterfactual burden returns in full.

The tier ordering loses support if π_1 is not satisfiable independently of π_3 — if every material worsening of a position is accompanied by a determinable value — which the programme's identification results make implausible but do not exclude.

The bundle result loses support if the configurations exhibited in Proposition 5.8 are legally impossible rather than merely describable, which is a doctrinal question the paper does not settle.

The remedial partition loses support if state-specifying remedies in fact require valuation to determine their terms, which is plausible for some of them and is not argued either way here.

9.3 Development Status

The portfolio records this project as the least publication-ready of the ten, on the ground that every doctrinal claim, authority, remedy, and statement of current legal status requires verification, and recommends narrowing to analytic jurisprudence or a single jurisdiction.

The narrowing has been performed and the deficit is not discharged so much as excluded from scope. The verified corpus stands at thirty-three entries. No doctrinal claim is made and none of the five research obligations is discharged. The paper is therefore a preliminary analytic contribution with an explicit specification of what a doctrinal successor would require, which is what the source discussion asked for when it requested a jurisprudence part framed as open questions and preliminary propositions.

Three threads deferred from companion projects are carried here and remain unresolved: the jurisprudential form of the claim that originating a resource does not license restructuring others' trajectories; the legal form of restitution where something has been institutionally detached from a participant; and the custodial and fiduciary duties a companion project treats structurally. Section 8 records the first as part of the residual counterfactual problem, the second under attribution, and the third under the institutional questions.

9.4 The Conservative Position

Stated as conservatively as the arguments permit: declining to create an exclusive right over generative organizations settles one jural relation and neither permits use nor leaves the interests unprotectable; the object a claim can practically take is a presently existing position rather than an unrealized future, which reduces a counterfactual burden without removing it; whether an injury occurred and what its consequences were worth are different questions with nested requirements, so a rule that demands the second in order to reach the first suppresses a class it never examines; no exclusion right generates the interests at issue, and each would have to be carried by a distinct relation; and the remedies whose content can be determined at the lower tier are the ones that specify an arrangement rather than a sum, which are also the ones that fix an arrangement and therefore require justification of their own.

None of this states the law of any jurisdiction, and the paper's final commitment is that it should not be read as doing so.

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