

# **Justifying Intellectual Property**

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# Topics

- **Quick Tour of the Book**
- **Main Themes**
- **2 Ideas I want to emphasize: (1) “proPERTIZING labor”; and (2) importance of waiver**

# Book structure

- **Part I: Foundations**
- **Part II: Principles**
- **Part III: Topics/Applications**

SPECIFIC  
PRACTICES

DOCTRINES  
RULES  
INSTITUTIONS

MIDLEVEL  
PRINCIPLES

EFFICIENCY  
NONREMOVAL  
PROPORTIONALITY  
DIGNITY

NORMATIVE  
FOUNDATIONS

KANT  
LOCKE  
HEGEL/SMITH

# Foundations

- **Utilitarianism: net welfare**
- **Deontological/nonconsequentialist**

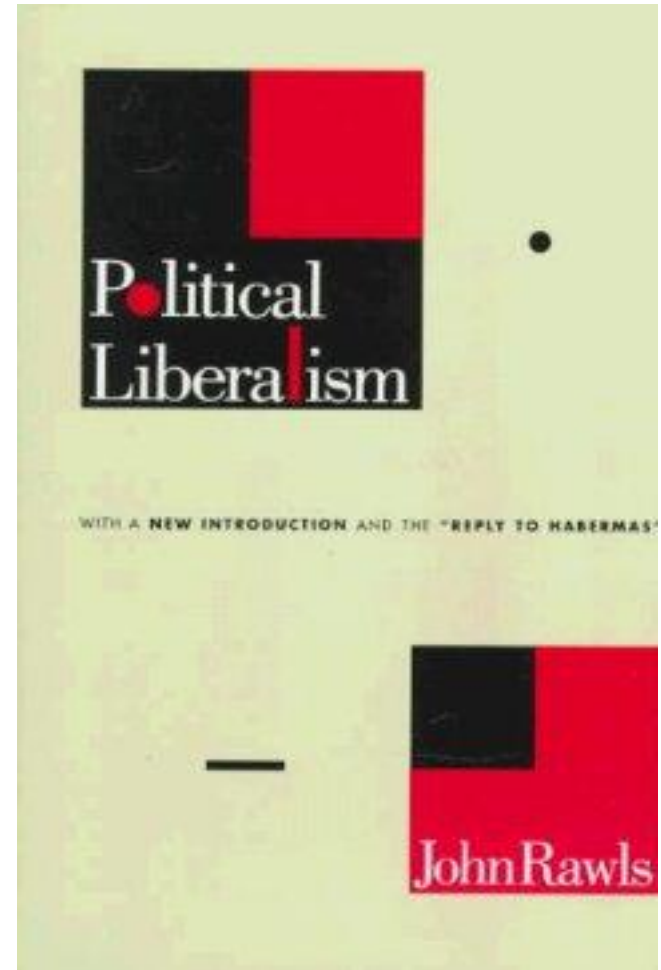
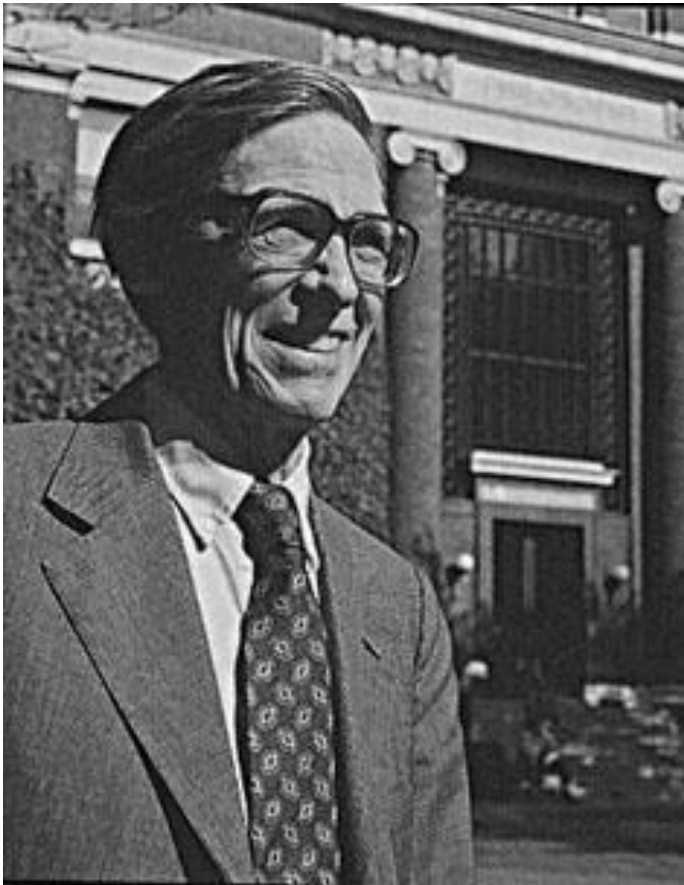
# Utilitarian Foundations

- **“The god that failed” – difficult to make a lock-solid case for IP on these grounds**
- **Does not mean an abandonment of efficiency as an important principle in IP law**
  - **Ultimate ends vs. efficient means to those ends**

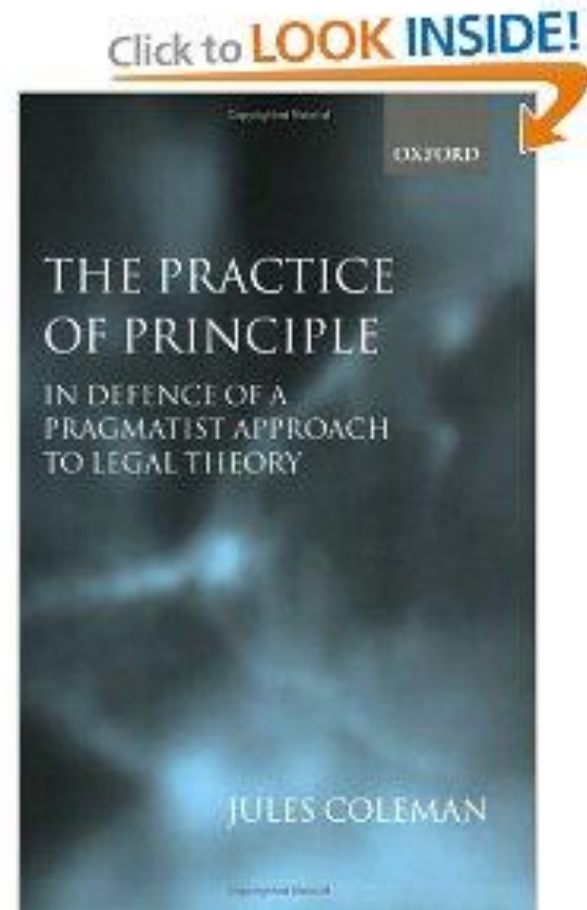
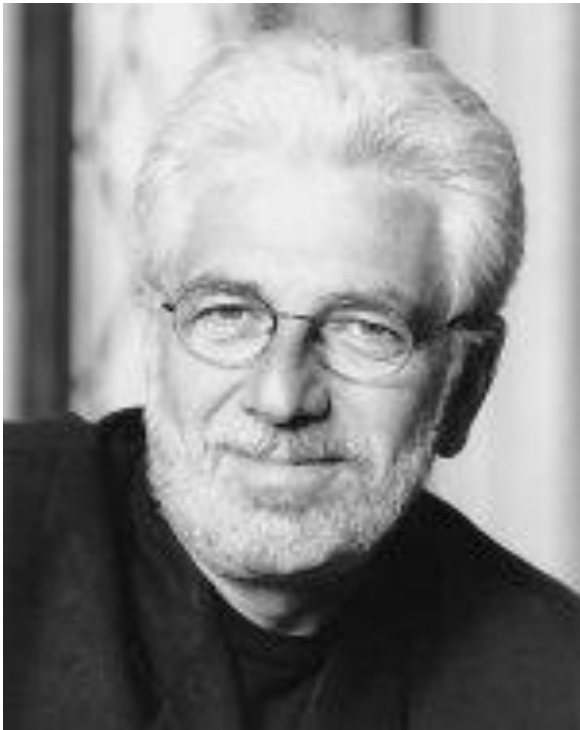
# **“Room at the bottom”**

- **Foundational pluralism**
- **Ultimate normative commitments will vary from scholar to scholar, person to person**

# Midlevel principles as “shared public reason”



# Midlevel principles



# My foundation figures

- **Locke**
- **Kant**
- **Rawls**

# Locke

- **Appropriation**
- **Provisos**
- **Highly relevant to IP**
- **On not drinking Nozick's tomato juice**  
• • •

# Kant

- **Complex concept of “possession”**
- **Individual autonomy and ownership**
- **Property calls the state into being**
- **Universal Principle of Right**

# Rawls

- **Is private property fair?**
- **IP and the original position**
- **Distributive justice: systemic level, level of individual IP right**

# Rawls' 2 Principles & IP

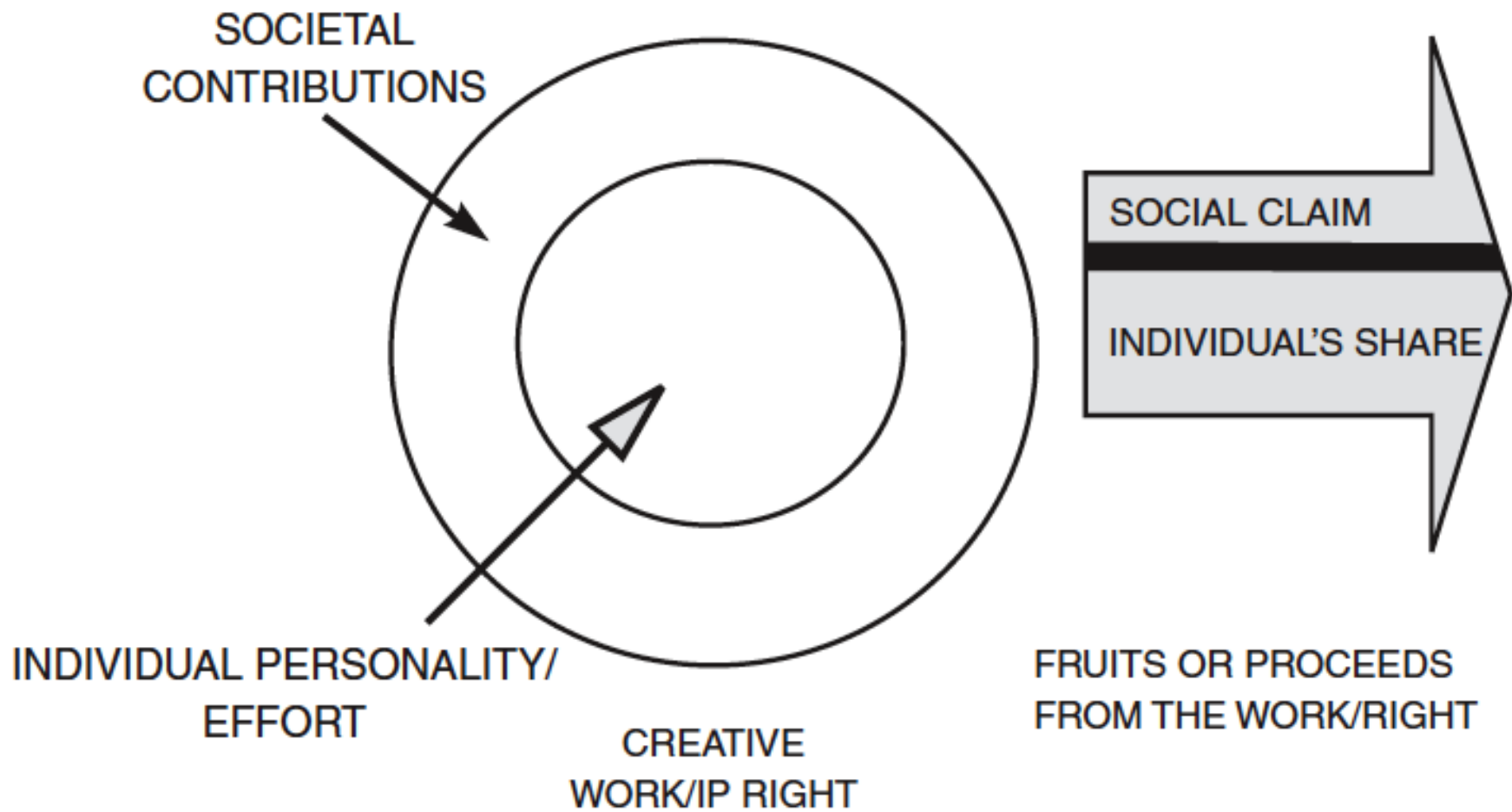
- **Principle 1: Political liberty and human rights**
  - Weak support for private property
  - There is a case for IP rights here
- **Principle 2: The “difference” principle**
  - IP can be defended on the grounds that it helps the poorest members of society enough to justify the redistribution in the direction of “creatives”

# Fairness at the level of individual IP Rights

- **Three stages:**
  - **Grant**
  - **Deployment**
  - **Proceeds (taxation)**

# Core and periphery

- **“Deserving core” of property: the ineluctable individual claim-right**
- **“The periphery”**: represent’s society’s contribution to each work; justifies redistributive claims on IP-protected works



# Mid-Level principles

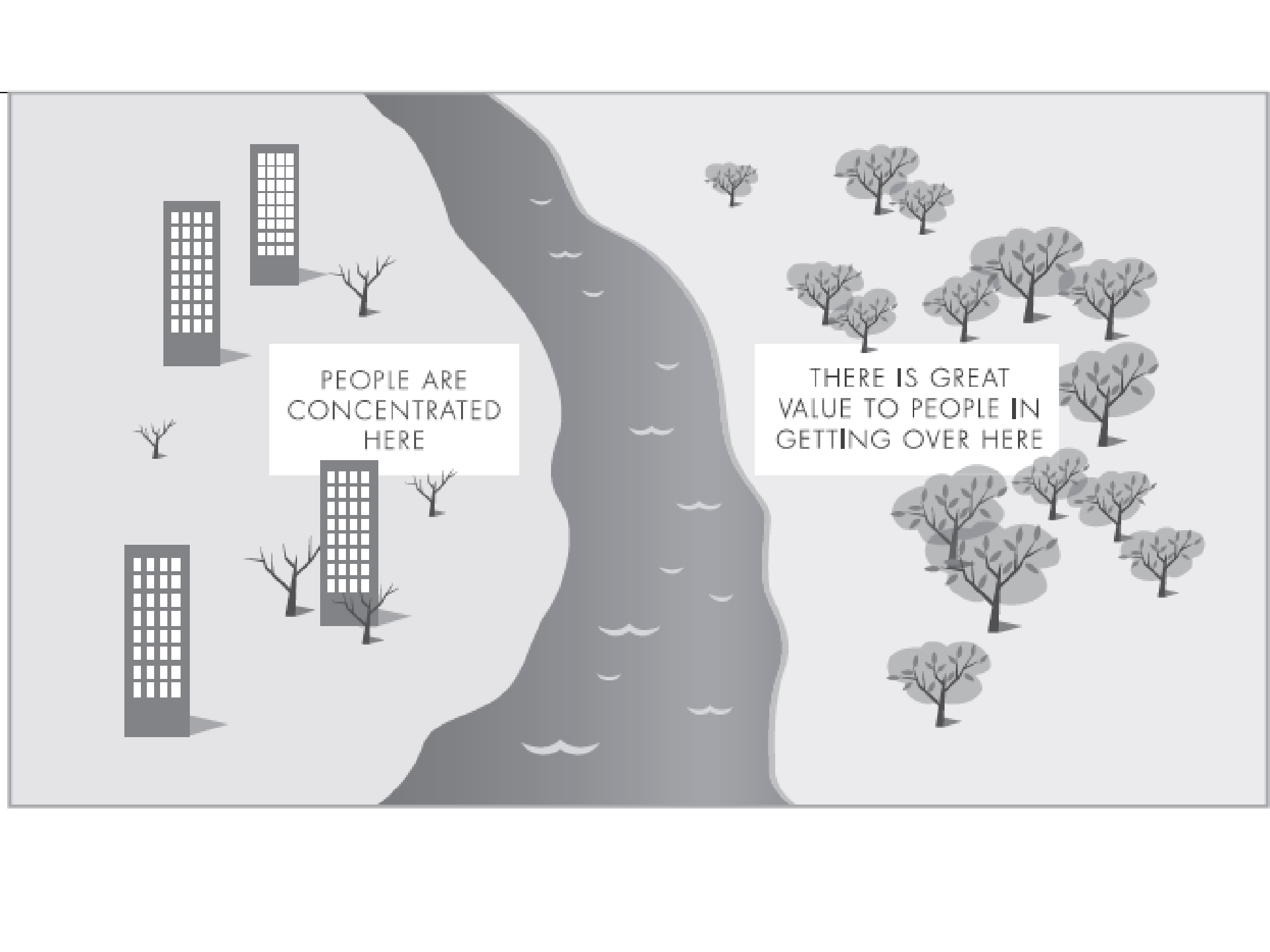
- **Independent of foundational principles, but more expansive than doctrines or cases**
- **A shared policy space or vocabulary for discourse**

# Principles of IP Law

- **Proportionality**
- **Efficiency**
- **Nonremoval/Public domain**
- **Dignity**

# **Example: proportionality**

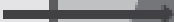
- **This principle is embodied in many IP doctrines**
  - **Patent scope, substantial similarity, utility, enablement, injunctions, damages, etc., etc.**



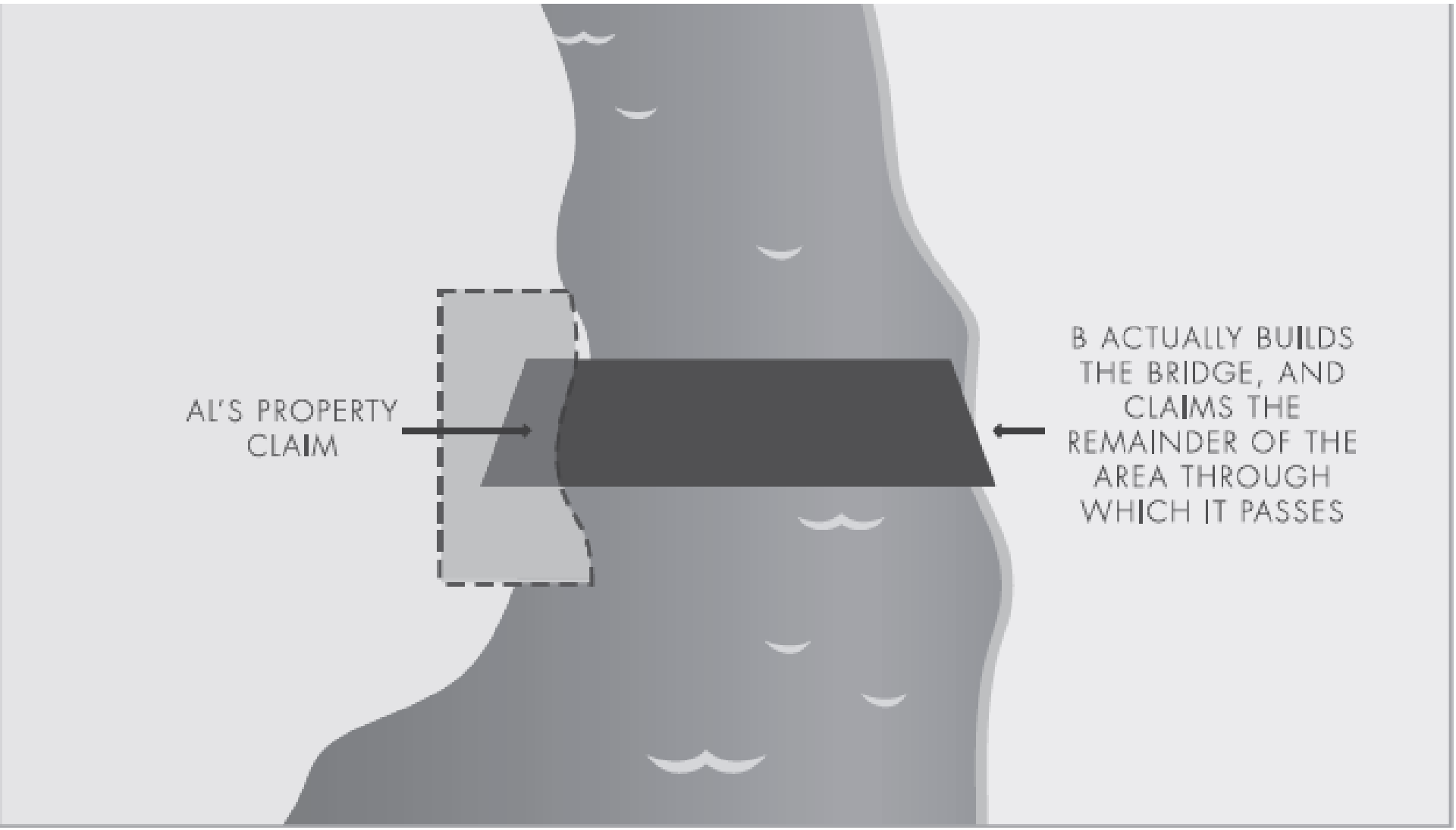
PEOPLE ARE  
CONCENTRATED  
HERE

THERE IS GREAT  
VALUE TO PEOPLE IN  
GETTING OVER HERE

AL'S PROPERTY CLAIM



B ACTUALLY BUILDS THE BRIDGE, AND CLAIMS THE REMAINDER OF THE AREA THROUGH WHICH IT PASSES



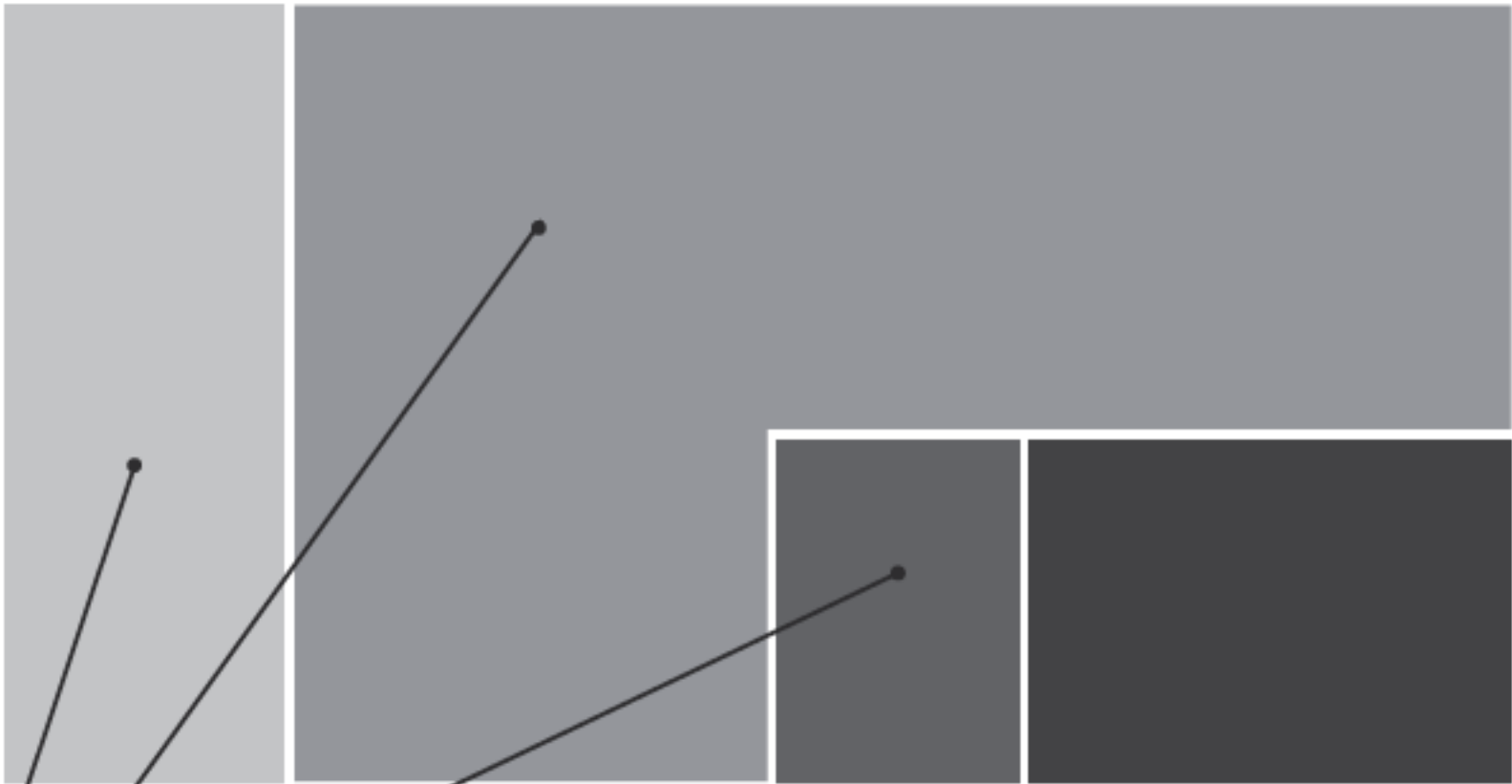
AL'S PROPERTY CLAIM: 5%



AL'S CLAIM OF PROFIT: 40%



# TRADITIONAL RIGHTS CONFIGURATION

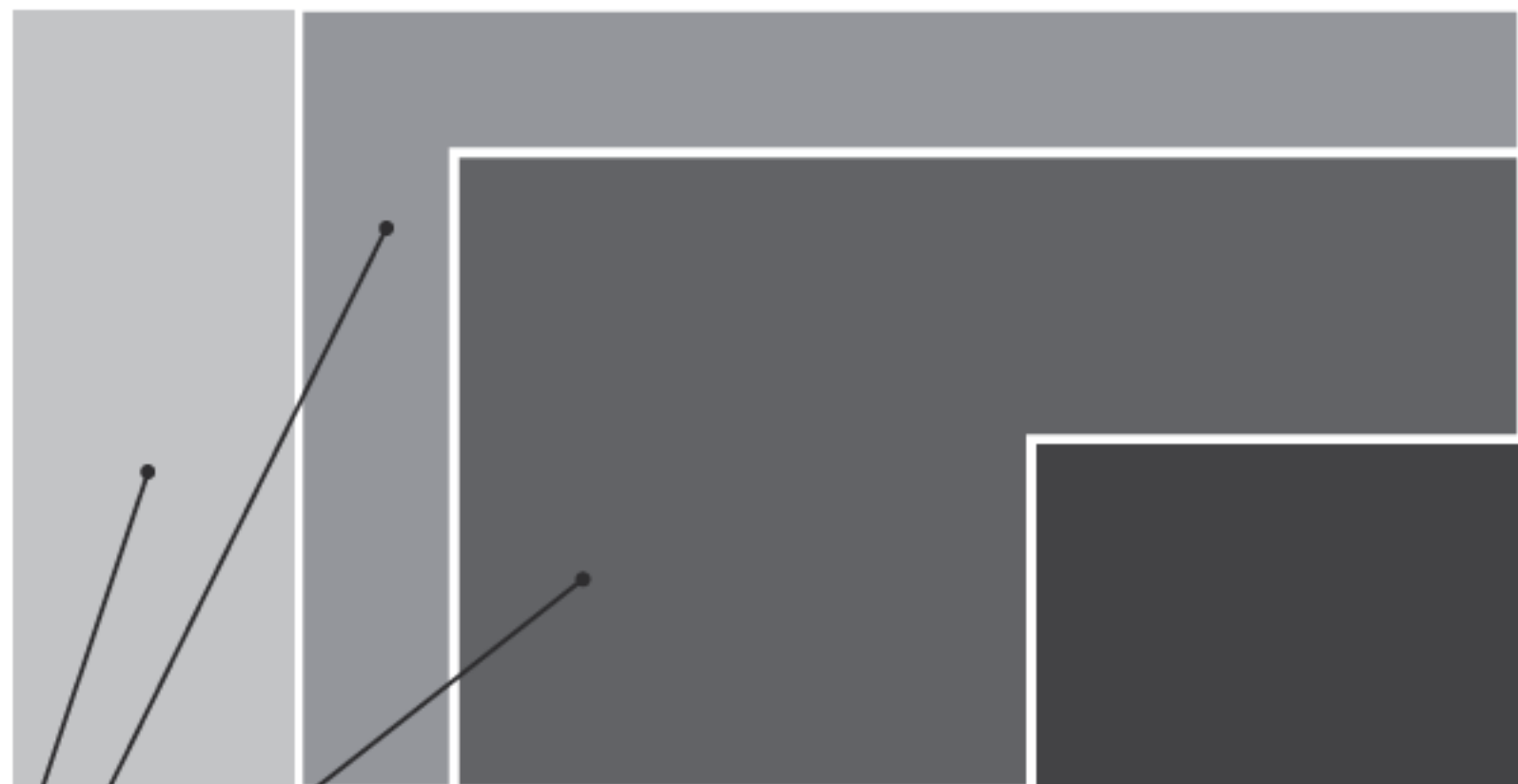


FORMAL LEGAL RIGHTS

FORMAL LEGAL RIGHTS

USERS' EFFECTIVE,  
DE FACTO RIGHTS

# DIGITAL ERA RIGHTS CONFIGURATION



USERS' EFFECTIVE,  
DE FACTO RIGHTS

FORMAL LEGAL RIGHTS