

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**

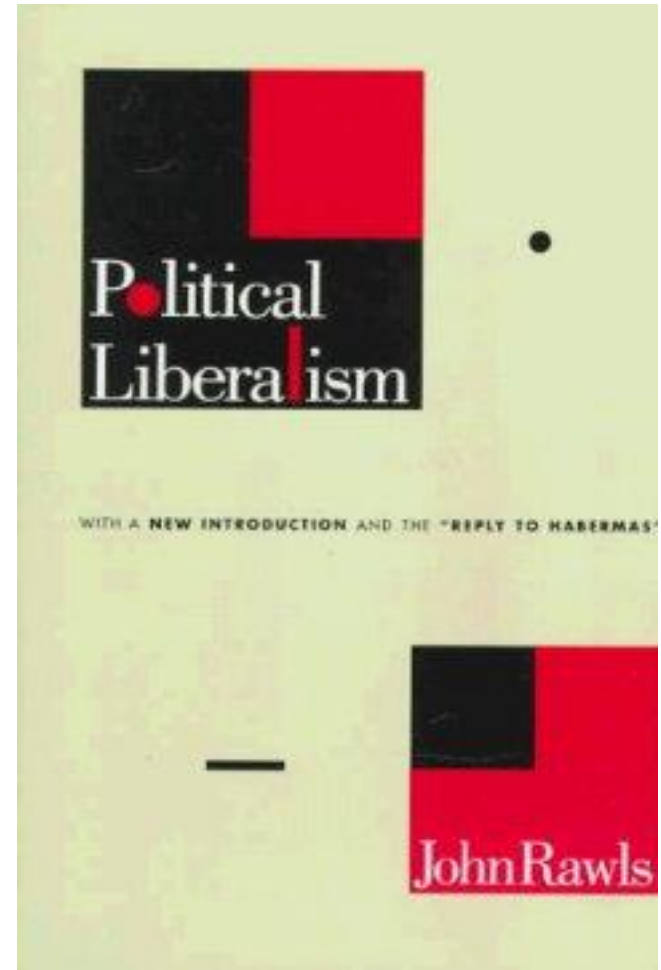
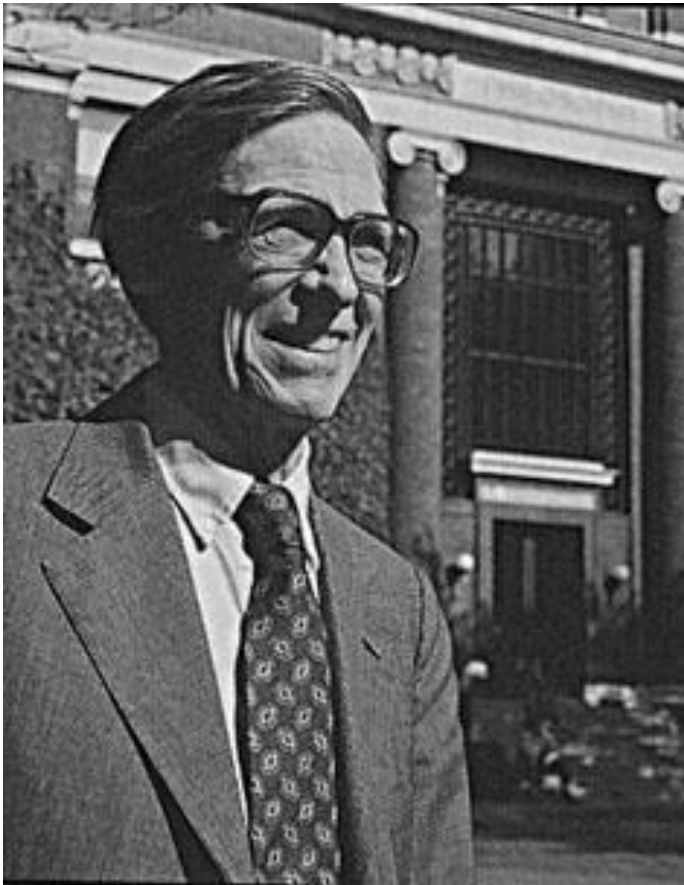
Utilitarian Foundations

- **“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**

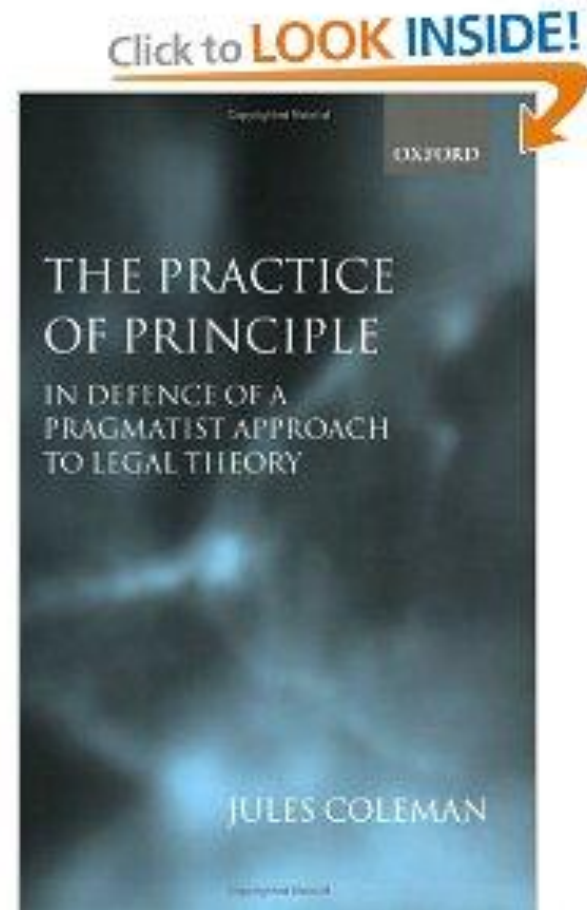
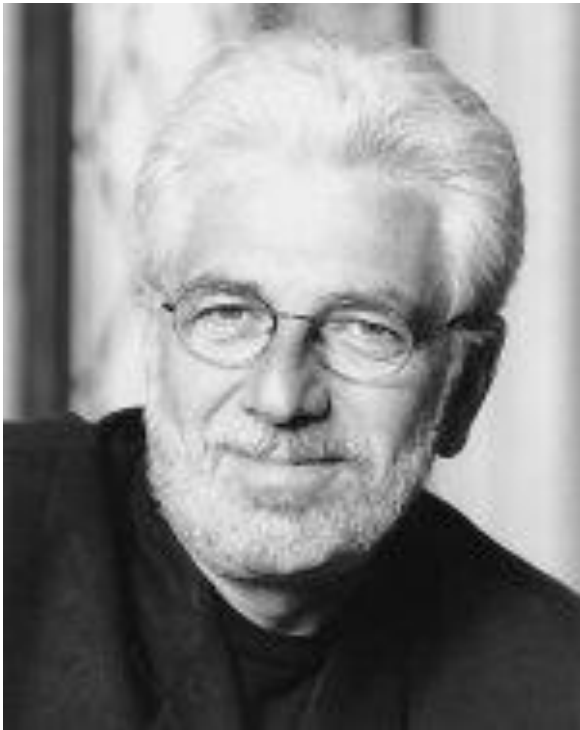
“Room at the bottom”

- **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

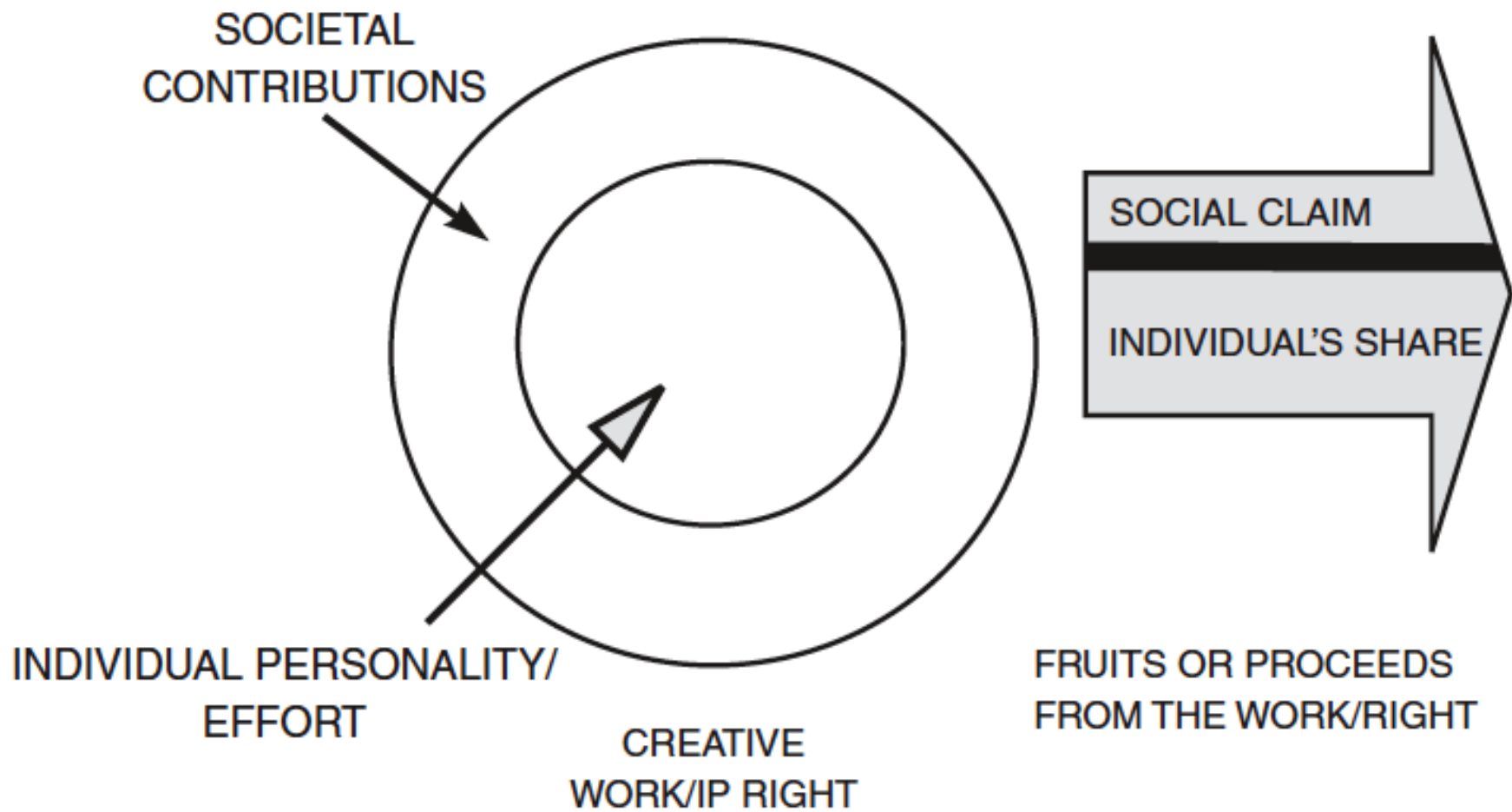
- **Principle 1: Political liberty and human rights**
 - Weak support for private property
 - There is a case for IP rights here
- **Principle 2: The “difference” principle**
 - IP can be defended on the grounds that it helps the poorest members of society enough to justify the redistribution in the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

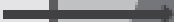
- **This principle is embodied in many IP doctrines**
 - **Patent scope, substantial similarity, utility, enablement, injunctions, damages, etc., etc.**



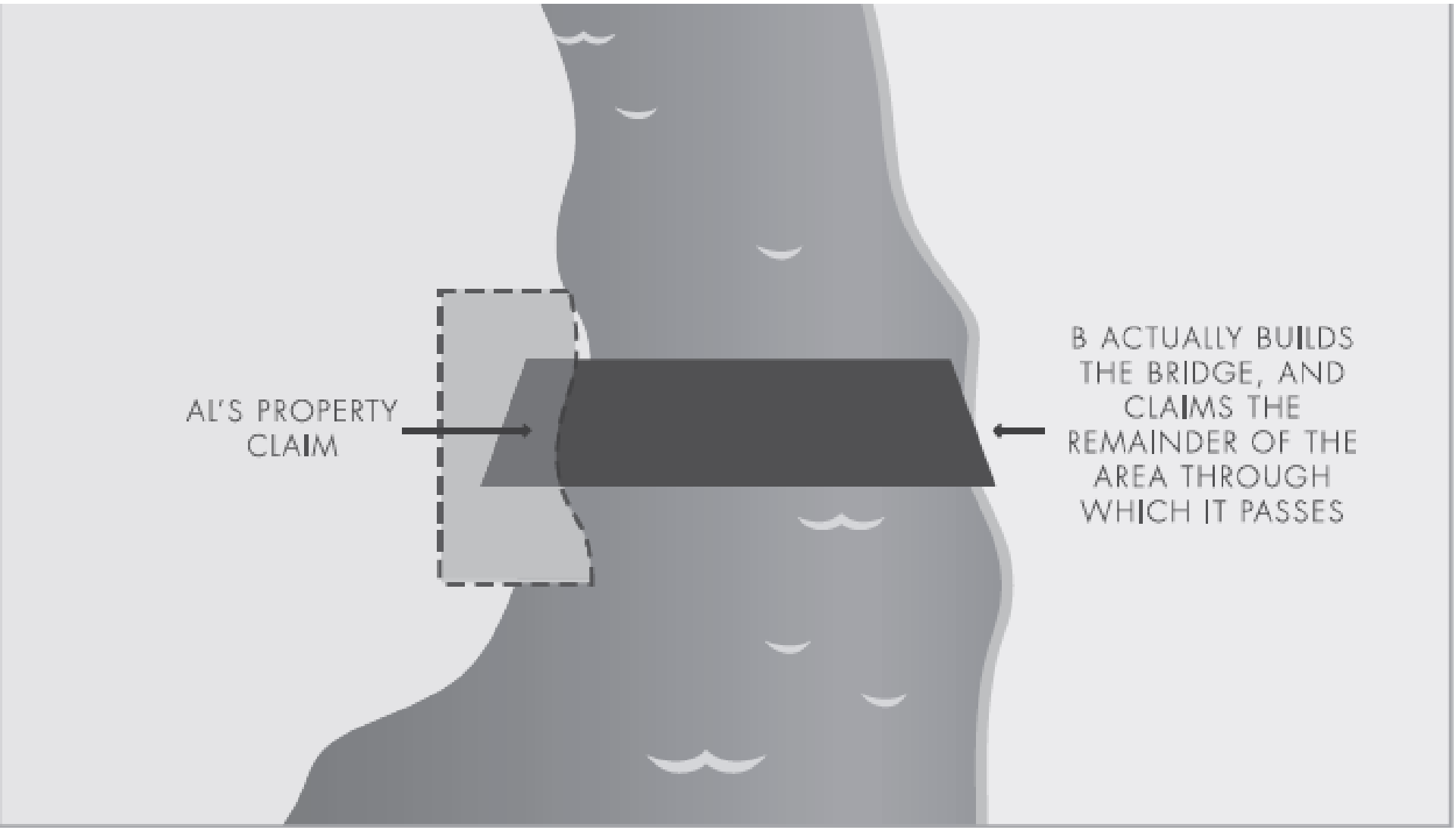
PEOPLE ARE
CONCENTRATED
HERE

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



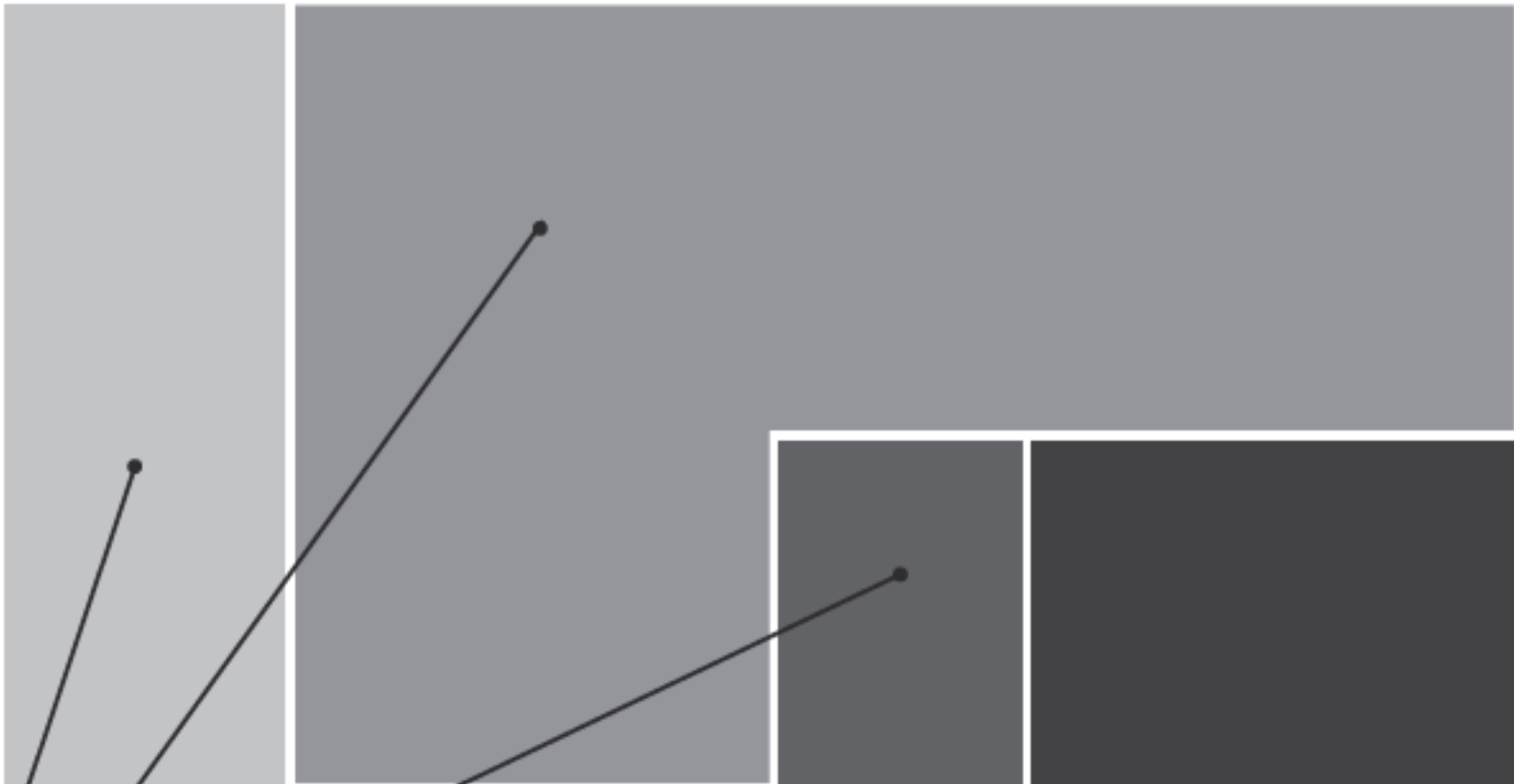
AL'S PROPERTY CLAIM: 5%



AL'S CLAIM OF PROFIT: 40%



TRADITIONAL RIGHTS CONFIGURATION

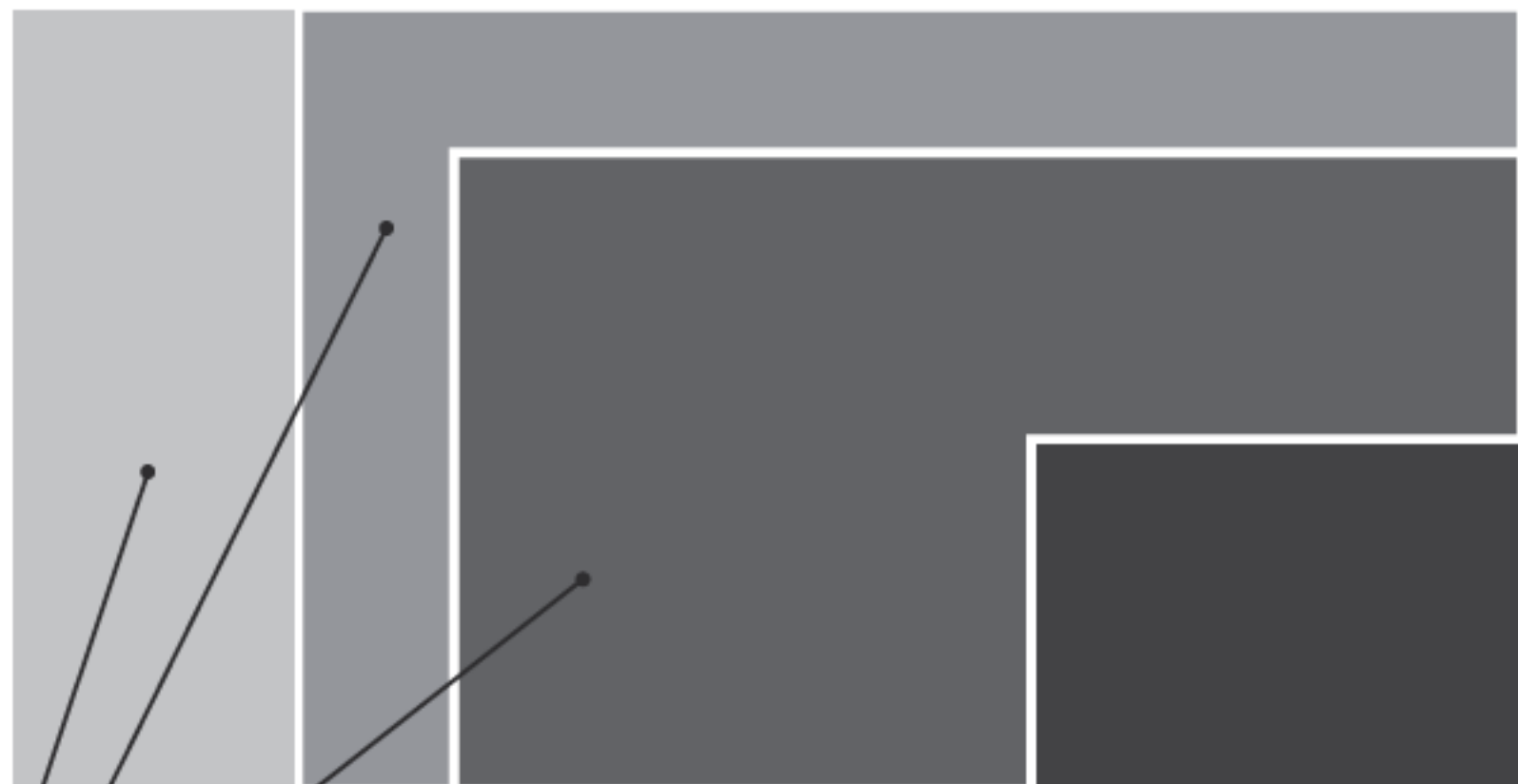


FORMAL LEGAL RIGHTS

FORMAL LEGAL RIGHTS

USERS' EFFECTIVE,
DE FACTO RIGHTS

DIGITAL ERA RIGHTS CONFIGURATION



FORMAL LEGAL RIGHTS

USERS' EFFECTIVE,
DE FACTO RIGHTS