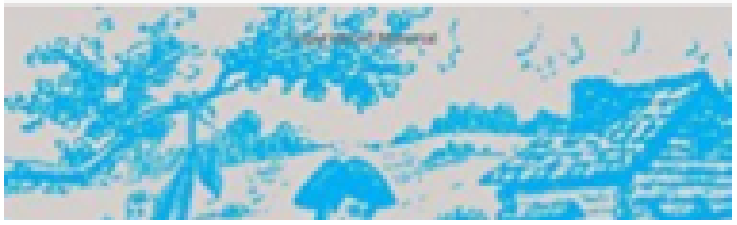
JANUARY 18, 2016 |

Adam J. MacLeod, Common Law, New Natural Law, Property Rights

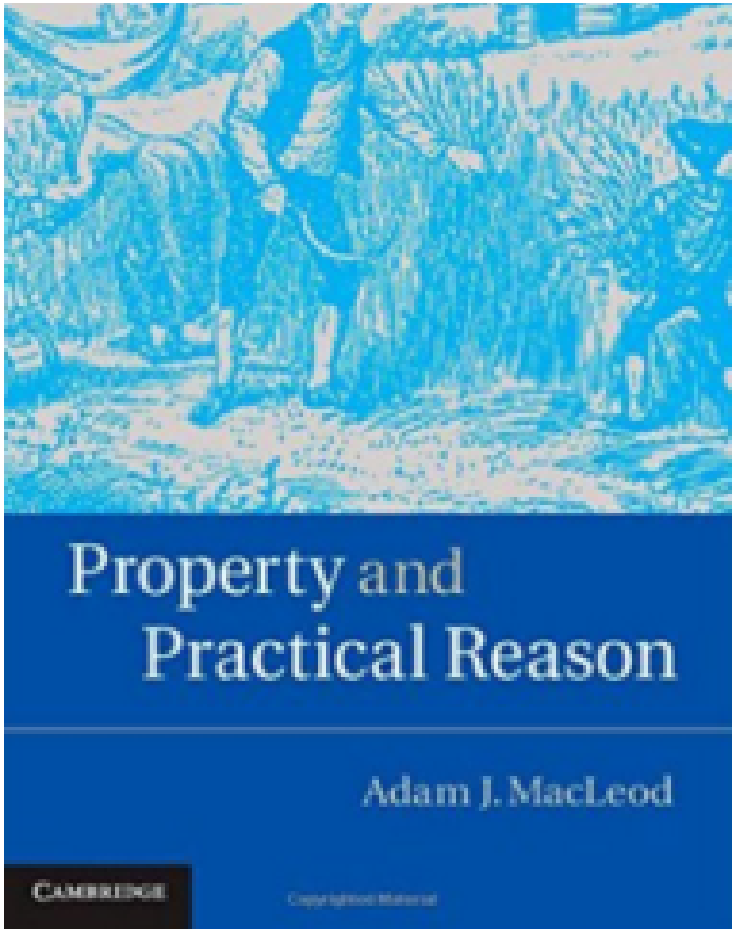
The Moral Case for Property Rights

by ALLEN MENDENHALL | — *1 Comment*



The James Madison Program in American Ideals and Institutions at Princeton University has become a hub of conservative constitutionalism and natural law theory, a forum where mostly likeminded scholars and public intellectuals can come together for

constructive dialogue and critique. Directed by Robert P. George, the McCormick Professor of Jurisprudence at Princeton, the program has hosted established and emerging scholars alike. Adam MacLeod is one of the latter—a figure to watch, a fresh and tempered voice in the increasingly ideological field of jurisprudence and legal theory. During his James Madison fellowship, with the support and advice of his colleagues, MacLeod wrote *Property and Practical Reason*, his first book.



MacLeod frames his normative claims and pleas within the common law context. And he gives us his thesis in his crisp opening sentence: “This book makes a moral case for private property.” He adds that “institutions of private ownership are justified.”

That institutions of private ownership are now jeopardized is upsetting. Before the 18th century, it was simply taken for granted in most Western societies that private property rights incentivized both work and custodianship and served moral ends. Leaders of advanced nations understood that the opportunity to own land or goods motivated people to work; that work, in turn, contributed to the aggregate health of the community; and that, once ownership was attained, owners preserved the fruits of their labor and likewise respected the fruits of others’ labor as having been dutifully earned. There were, of course, violations of these principles in Western societies, which is why the law protected and promoted private ownership.

Even absolute monarchs across Europe centuries ago understood the instinctual drive for personal ownership and, consequently, allowed their subjects to obtain at least qualified possession of land and real property. During the Enlightenment, however, philosophers such as John Locke awakened the Western intellect to the stark reality that private property rights were routinely violated or compromised by monarchs and sovereigns at the expense of morality and at odds with the natural law. Because humans own their bodies, Locke maintained, any object or land they removed or

procured from nature, which God had provided humanity in common, was joined to those people, who, so long as no one else had a legitimate claim to such object or land, could freely enjoy a right of possession exclusive of the common rights of others.

It's surprising that Locke isn't mentioned in MacLeod's defense of reason and private property, since Locke more than any other figure in the Western tradition—let alone the British tradition in which the common law emerged—made the reason-based case for the morality of private property ownership. "God," Locke said, "who hath given the world to men in common, hath also given them *reason* to make use of it to the best advantage of life and convenience." On this score MacLeod echoes Locke without giving him attention.

MacLeod advocates the type of mediated dominion of private ownership that, he says, existed at common law. Under the common law, he argues, dominion was mediated because it was restrained by the normative guides of "practical reasonableness." He does not fully delineate what unmediated dominion looks like. But presumably it has something to do with "many contemporary accounts" that, he claims, "view property as an individual right" and facilitate an "atomization of private property" that's "unnecessary and unhelpful." An example might have polished off this point, since in the opening chapters it's not always obvious to which property arrangement mediated dominion is allegedly superior.

He does, however, supply helpful examples of mediating private institutions under the common law: families and family businesses, religious associations such as churches or synagogues, civic associations, and other such cooperative forms that exercise modest control or otherwise influence a person's claim to outright ownership. For instance, one's community may reasonably insist that my absolute ownership of a weapon does not permit one's use of that weapon to threaten or injure another except in self-defense. It may likewise restrict the profligate use of scarce resources, or the reckless use of intrinsically dangerous resources, to the manifest detriment of one's immediate neighbors.

The author submits that, under the common law, which illustrates constructive administration of property rights, private ownership is never total or unqualified but always subject to reasonable restraint as prescribed by custom and community. He intimates that one thing that makes private ownership reasonable is its promotion of reasonable behavior; the very reasonableness of private property is self-perpetuating. The owner of property who's confident his ownership is legally honored and enforced will pursue future gain; as the number of such owners multiplies the corporate prosperity of society increases.

MacLeod rejects consequentialist arguments for private property and seeks to justify private ownership on the basis of morality. He shows that private ownership is not just optimal by utilitarian standards but is practically reasonable and morally good.

In so arguing, he navigates around two anticipated criticisms: first that his defense of private property and promotion of common law standards and conditions are remedies in search of an illness, and second that beneath his proposed remedy is the sickness he wants to cure.

By discussing the work of Pierre-Joseph Proudhon, Jeremy Waldron, J. E. Penner, and Larissa Katz, among others, MacLeod proves he's not remonstrating against straw men but engaging actual thinkers with real influence on our working perceptions of property rights. The problems he confronts are palpable: regulatory takings, trespass, taxation, riparian-right disputes, adverse possession, and waste, among others.

In depicting mediated dominion as a form of voluntary "plural ownership" that excludes state coercion, moreover, he reassures readers that a common law property regime does not contravene private ordering, despite the fact that the common law dates back to periods when English monarchs retained total and ultimate control of the land within their jurisdiction under the Doctrine of the Crown; forced owners to hold property rights in socage; confiscated property from rivals and dissidents; redistributed property in exchange for loyalty and political favors; and permitted and at times approved of slavery and villainy.

These unreasonable elements of the common law tradition do not square with the case that MacLeod makes for practical reasonableness; yet the common law tradition he invokes is sufficiently flexible and adaptive to modify or eradicate rules that perpetuate unreasonable practices and behaviors. He reminds us, too, that "slavery was for a long time unknown at common law, and its rise in positive law derogated common law rights and duties." In other words, the rise of the English slave trade "is a story of lawmakers first departing from, then returning to, common law norms."

Following if not synthesizing John Finnis and Joseph Raz, MacLeod recommends in the property-law context something akin to perfectionist liberalism and value pluralism. The pluralism championed by MacLeod involves multiplying the options for deliberating agents: the more room there is for rational choice, the more diverse and numerous are the opportunities to exercise human reason. These opportunities may be circumscribed by the morality of the community that is inherent in the rules that reflect basic values. The law is by nature coercive, but it is good to the extent it enables practical reason and

restricts bad behavior, as determined by the net, collaborative efforts of non-state actors. MacLeod calls these combined actors members of “intermediary communities.”

The trope of individualism and community is for MacLeod a framing device for advocating mediated dominion as an incentivizing force for moral action. He skillfully and meticulously affirms that private ownership, which is conditional on the reasonable limitations established by collective norms, is reasonable not only for instrumental purposes (because it works well and facilitates constructive social relations) but also because it is good in itself. Summoning the commentary of Thomas Aquinas, William Blackstone, James Madison, Alexis de Tocqueville, Joseph Story, Hegel, Hayek, Neil MacCormick, Ronald Dworkin, Richard Epstein, and Robert P. George, MacLeod also manages to work in unexpected references to writers who do not immediately spring to mind as jurisprudents: Richard Weaver, Wendell Berry, Charles Murray, John Tomasi, and Milton Friedman. This range demonstrates the importance of property law across disciplines and in broad contexts.

To profit from this book you must, I think, hold in abeyance any assumptions or readymade generalizations you have about the nature and function of private property. You’d benefit as well from a prior familiarity with the field and discourse of property jurisprudence, not to mention the new natural law theories. I make this observation as an outsider myself. If you can’t immediately define terms like “usufruct,” either because you’ve never heard of them or because it’s been too long since you studied for a bar examination, you’ll likely need *Black’s Law Dictionary* and other resources close at hand as you piece through MacLeod’s rationale. Readers in other disciplines might find that the chapters presuppose an awareness of, say, the essentialist debate over whether exclusion or use defines property norms, or might question the meaning and import of “personalist” approaches to private property that emphasize the doctrines of positive liberty and personal autonomy.

Such disciplinary specificity isn’t a bad thing. One hopes, in fact, that it would motivate curious readers to undertake further study and inquiry. Yet specialization limits what a book can accomplish.

MacLeod exhibits a disposition to be philosophical rather than sociological, adopting as he does a neutral, academic tone free of animus and personal pique, arguing from logical deduction rather than concrete data or statistics. Whether this approach redounds to his advantage depends on what he wants to achieve. If he’s writing only for an academic audience of philosophers and political theorists, he’s succeeded admirably, but if his goal is to reach beyond the narrow confines of the academy, spreading his influence as widely as possible, he has fallen short. The prose is accessible to scholars and

advanced graduate students, but the average lawyer will find no practical instruction in the book and might even question the at times challenging syntax and vocabulary that can obscure basic points. If economists ignore the book for its rejection of consequentialist arguments, however, it's to their disadvantage.

No common reader, I'm afraid, will read this book from cover to cover, and that's a pity because the subject is important, especially given the spread of eminent-domain abuse and the general embrace of egalitarianism, redistributivism, and Rawlsian notions of social justice by Americans today. The desire for private ownership is a primordial fact. We need more books and treatises that examine at a fundamental level how and why we alienate, possess, and exchange property. At around $100, *Property and Practical Reason* is prohibitively expensive for curious undergraduates, and also for courses in graduate studies. Moreover, the law schools may well ignore it due to its focus on abstract jurisprudence.

All that said, this book should be read—and will be, by the people who know about and are sympathetic to the work of the James Madison Program. Unfortunately, that's not many people. Not enough, anyway. There's no cottage industry for the philosophy of practical reasonableness. Yet there ought to be, and the reception of MacLeod's work might tell us whether there can be. Those of a philosophical bent will delight not just in the conclusions MacLeod reaches, but in the way he reaches them: framing and reframing his sinuous arguments until his central theses become refrains. This reviewer found it a delightfully industrious, hard-won defense of private property, and well worth the high sticker price.

Allen Mendenhall

Allen Mendenhall is a staff attorney at the Supreme Court of Alabama, an adjunct professor at Faulkner University and Huntingdon College, and author of Literature and Liberty (2014).

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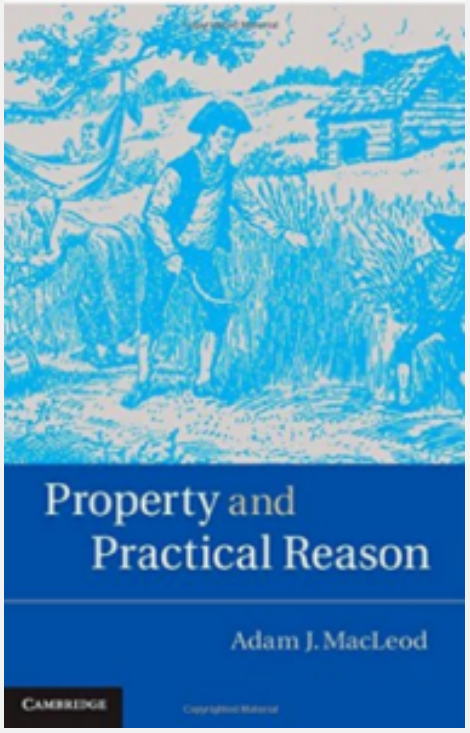

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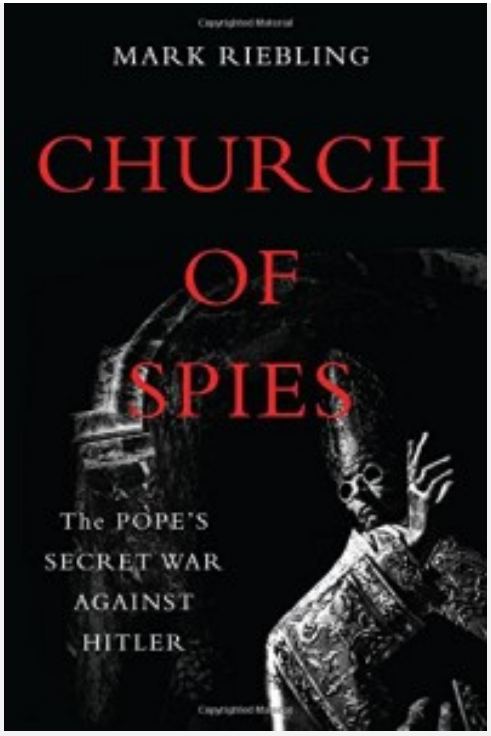

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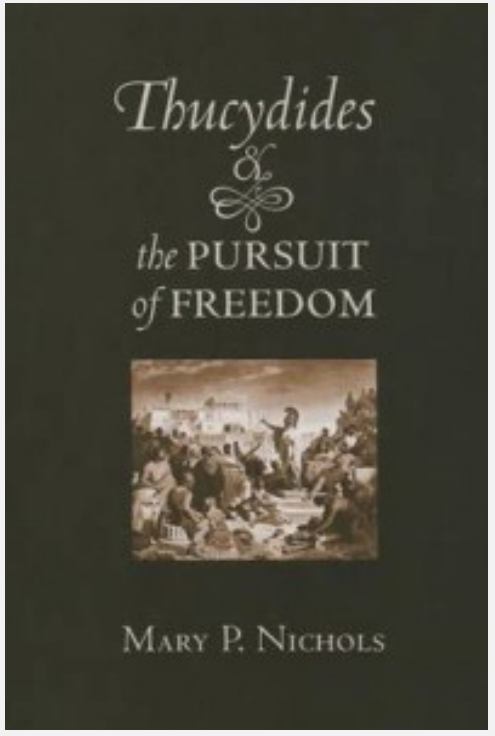

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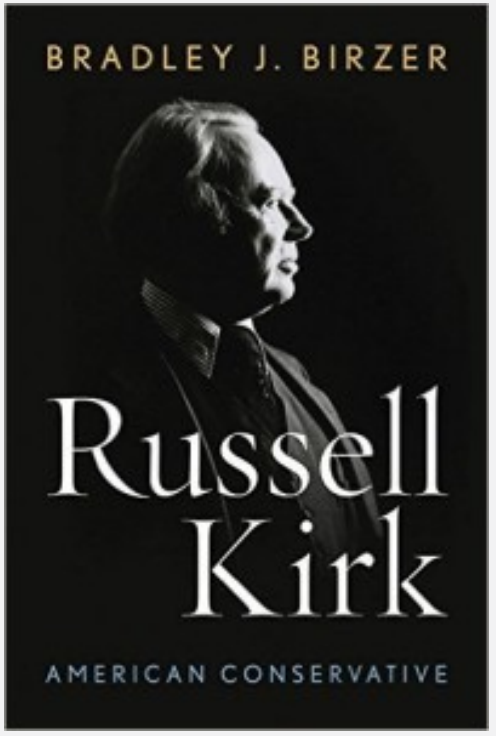

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