Property and Practical Reason makes a moral argument for common law property institutions and norms. It challenges the prevailing dichotomy between individual rights and state interests and the related assumption that owners’ reasons for action and the good of communities must conflict.

One can understand competing intuitions about private property rights by considering how private property enables owners and their collaborators to exercise practical reason, thereby becoming practically reasonable agents of deliberation and choice who promote various aspects of the common good. The plural and mediated domains of property ownership, though imperfect, have moral benefits for all members of the community. They enable communities and institutions of private ordering to pursue plural and incommensurable good ends while specifying the boundaries of property rights consistent with basic moral requirements.

Adam J. Macleod is an associate professor at the Thomas Goode Jones School of Law, Faulkner University, USA. He wrote this book while a visiting fellow at Princeton University in the James Madison Program in American Ideals and Institutions. His work has been published in the United States, United Kingdom, and Australia. He served as law clerk to justices of the Massachusetts Appeals Court and a judge of the United States District Court, practiced law in Boston, and has held an appointment as a Deputy Attorney General of Alabama.
PROPERTY AND PRACTICAL REASON

ADAM J. MACLEOD
To Katie, who has shared my many plans of action with grace and love
CONTENTS

Acknowledgments page x

Introduction 1
The moral case for private property 1
Definitions 5
Practical reasonableness in mediated dominion 6
An outline of the argument 8

1 Practical reason and private law 12
The importance of private property 12
Conflicting intuitions about private property 13
Practical reason and property law 20

2 The architecture of property 37
Mediated dominion 37
The core of property 39
Common law institutions shaping property 49
Specifying the shape of mediated dominion 56

3 The possibility of private property 64
Property for all? 64
Waldron’s Proudhon strategy 65
State-enforced actual ownership is neither sufficient nor necessary for liberty 70
Inequality and the least well-off 87
CONTENTS

4 Property from the inside 91
  Beyond property as politics 91
  Property and perfectionism 92
  Freedom: pre-moral exercises of practical reason 97
  Mediated dominion supplies the necessary conditions 107
  Conclusion 121

5 Property and charity 122
  Property norms and human motivations 122
  Explaining charity 123
  Charity and practical reason 128
  Charity’s treatment in private law 132

6 Abuse of rights 146
  The need for limits 146
  Abuse of rights in the common law 148
  A political theory of abuse of rights 153
  Moral categories 160
  Abusive exercises of rights 163
  Sketching a doctrine of abuse of rights 171

7 The nature of property rights 173
  Rights and their limits 173
  The normative force of rights 176
  Property rights as rights 184
  Two-term right statements 188
  The dangers of abstraction 196

8 The contours of property rights 197
  The nature of property norms 197
CONTENTS

The moral foundations of legal norms 198
Property norms and practical reason 204

9 Settling property rights in law 216

Specifying rights 216
Individualist and collectivist accounts 219
Private ordering: specifying rights for the common good 233

Bibliography 242
Index 254
ACKNOWLEDGMENTS

I began and completed this project while teaching at Faulkner University, Jones School of Law. I did most of the writing during a year-long visiting fellowship at the James Madison Program in American Ideals and Institutions at Princeton University. Both Faulkner Law and the James Madison Program provided essential support. I am grateful for the helpful comments of those who read drafts of various chapters – Paul Carrese, Eric Claeys, Jonathan Den Hartog, Matthew Franck, Robert George, Richard Izquierdo, Daniel Mark, Ted McAllister, Bradley Miller, Chaim Saiman, David Tubbs, Grégoire Webber, Bradford Wilson, three anonymous reviewers secured by Cambridge University Press, and twelve undergraduate fellows of the James Madison Program. The work also benefited from conversations with generous scholars and friends who helped me develop and hone the ideas, especially Mitchell Crusto, Jeffrey Hammond, Jeffrey Jones, Robert McFarland, J. Stanley McQuade, Jeremy Rabkin, Charles Rhodes, James Stoner, and Matthew Vega. Ned Swanner has provided indispensable research assistance throughout this project and my time at Faulkner Law. I also enjoyed expert assistance from research librarians Gigi Panagotacos at Faulkner and David Hollander at Princeton. I thank Finola O’Sullivan, Richard Woodham, and their team at CUP for their professionalism. Finally, I am grateful for mentors and teachers who have encouraged me to think critically about the relationship between morality and law, especially Timothy Sherratt, Charles Rice, Gerard Bradley, Christopher Armstrong, Lewis Babcock, Neil Gorsuch, and the late Benjamin Kaplan.