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DEAN JOHN EDWARD CRIBBET: THE ILLINOIS PROPHET OF PROPERTY LAW[†]

DAVID A. MYERS^{*}

John Edward Cribbet was one of the finest teachers of property that I will ever know.¹ I met Dean Cribbet in the fall of 1973, in Property Section C, to be exact. I was one name on a long list of names on a roster from a long list of rosters that Dean Cribbet used to call on students. Little did I know that this collection of rosters would become a social network before the idea of social networks became cool. It was the list of people whose lives would be touched by this extraordinary teacher.

Dean Cribbet's prominence as a teacher, scholar, and casebook author went far beyond the four walls of the Illinois School of Law. Yet, I do believe there was something quintessentially Midwestern about Dean Cribbet. We all know the conventional Midwestern characteristics: polite, self-confident, humble, skeptical, fair, sensible, stoic, plainspoken, and full of integrity.² He was all of these and yet

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^{*} Professor of Law, Valparaiso University. This Article is adapted from a speech delivered at the joint program of the Sections on Agricultural Law and Property Law at the 2011 Annual Meeting of the American Association of Law Schools, Wednesday, January 5, 2011. The program was entitled *Changing Conceptions of Water in the Law*. Professor Kali Murray, Chair of the Section on Property Law, and I, Chair of the Agricultural Law Section, conceived of the program as a tribute to Chancellor, Dean, and Professor John E. Cribbet (President of AALS 1979).

1. Charles Gromley, professor of law at Valparaiso University from 1960 to 1992, was the other.

2. In an essay entitled *Being Midwestern*, Dan Guillory describes his impressions of Illinois:

The orderliness of things is palpable—not merely the mathematical precision of fields, the angularity of barns and outbuildings, or the neatly platted grids of typical Midwestern towns. There is a reassuring sobriety and decency in human relations, a sense of moderation and social optimism that sustains even the smallest transactions and accounts for generosity on a heroic scale, especially during natural disasters like the great flood of 1993. *There is a kind of social gyroscope that keeps things upright. . . .* Ray Bial, a friend and distinguished Midwestern author-photographer, once shared with me his belief that the essence of the Midwestern personality is moderation. Outsiders may understandably mistake that quality as evidence of

something more.

I believe that, beyond family and friends, three concepts were important to this extraordinary educator: (1) place matters; (2) stories matter; and (3) change matters. It may seem as no surprise that a person who teaches property and becomes known as one of the foremost scholars in the field would think that place matters. John Cribbet was born, raised, educated, and earned his living within a fifty-mile radius of Champaign, Illinois. He went off to war in World War II, entering as a private and leaving as a major,³ and he spent two sabbaticals in England and one in Scandinavia. He received many offers to teach at other places, most notably at the University of Michigan, but he turned them down to stay at Illinois. Loyalty and friendship were not only virtues to him but the way by which one lived his life. Moreover, he thought that how one lives should be connected to one's place by contributing to and being an integral part of one's community. No one can say that about the University of Illinois like Dean Cribbet could.

The second concept important to this Midwesterner was that stories matter. He used stories to break down barriers to understanding, to explain a point, and to enrich our lives.⁴ Abraham Lincoln was one of his heroes and the subject of many of his stories. As his daughter, Carol Cribbet-Bell, wrote to me,

Growing up our father would use every opportunity to encourage my sister and I through story (his own personal experiences and those of history) and through the examples of his heroes. In those wonderful stories his love for the land and people of Illinois shone through. Although he was offered many positions in other parts of the country he could never imagine himself connected to another place [as] permanently as he was

apathy or inertia. But the cultural evidence shows otherwise. This same region became the cradle for Frank Lloyd Wright's revolutionary Prairie Style of architecture as well as the Chicago Renaissance, including the University of Chicago, the Art Institute, *Poetry: A Magazine of Verse*, the poetry of Vachel Lindsay, Edgar Lee Masters, and Carl Sandburg—and the novels of Sherwood Anderson and Theodore Dreiser.

Dan Guillory, *Being Midwestern*, in *IN THE MIDDLE OF THE MIDDLE WEST: LITERARY NONFICTION FROM THE HEARTLAND* 191, 193 (Becky Bradway ed., 2003) (emphasis added).

3. See Charles E. Curran, Jr., *John E. Cribbet, as Seen by a Fellow Officer During World War II*, 1978 U. ILL. L.F. 6, 6–7 (1978) (highlighting Dean Cribbet's impressive military service).

4. DVD: John E. Cribbet 1918–2009 (Karis Morrall, UI-7, ed., 2009), available at <http://vimeo.com/5580650>.

connected to the prairies, seasons, and people of his home state. His love of place was transferred to his children who all have a deep and abiding sense of their own places as well as a great appreciation for our Illinois roots and heritage. Dad also never missed an opportunity to share a story or vignette about Abraham Lincoln and the example that his life offered us. We were gifted books about Abraham Lincoln well into our twenties with inscriptions by our father to remind us never to lose hope in the future and to honor the belief in the goodness of man.⁵

Literary writer Becky Bradway once said about President Lincoln: “He had a visionary sense of his place in the context of history, and in this he reflects the strangest of all Illinois characteristics: visionary optimism meshed with bottom-line practicality.”⁶ The very same could be said of John Edward Cribbet.

Lastly, and quite important for his scholarship, was the fact that change matters. The influence for his thinking that property is always changing is attributable to writers who came before him, such as Professors Rudolf von Jhering and Francis S. Philbrick. The latter, in his seminal work, *Changing Conceptions of Property in Law*,⁷ seemed to provide the particular inspiration for Dean Cribbet and his overall approach to the law of property.

Dean Cribbet wrote eloquently on the changing concepts of property.⁸ Like Jacob Bronowski in *The Ascent of Man*, Cribbet had the “gift for sentences minted with precision.”⁹ While the words we use in

5. E-mail from Carol Cribbet-Bell to David Myers (Dec. 17, 2010, 16:31 CST) (on file with author).

6. Becky Bradway, *Illinois*, in THE AMERICAN MIDWEST: AN INTERPRETIVE ENCYCLOPEDIA 6, 8 (Richard Sisson et al. eds., 2007).

7. See generally Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938).

8. See generally JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY (3d ed. 1989) (treatise on property law); JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS (9th ed. 2008); John E. Cribbet, *Changing Concepts in the Law of Land Use*, 50 IOWA L. REV. 245 (1965) (reviewing the evolution of land use from Blackstone to the 1960s) John E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1 (discussing property law as a changing concept within the contexts of individual and public use); John E. Cribbet, *Some Reflections on the Law of Land—A View from Scandinavia*, 62 NW. U. L. REV. 277 (1967) (property law discussion influenced by conversations had while on sabbatical in Scandinavia).

9. Tim Radford, *The Ascent of Man by Jacob Bronowski—Review*, GUARDIAN.CO.UK (Apr. 15, 2011), <http://www.guardian.co.uk/science/2011/apr/15/ascent-man-jacob-bronowski-review> (highlighting that Jacob Bronowski has been described as having “a gift for sentences

property (for example, fee simple absolute) may seem focused and unbending, Cribbet argued that the law of property has been constantly changing to adapt itself to new and different social pressures.¹⁰ When he wrote an article for the *Iowa Law Review* in 1965—titled, *Changing Concepts in the Law of Land Use*¹¹—he talked first about the “conventional” wisdom of property as a *laissez-faire* institution that provided a natural, inalienable right, individualistic and central to the economy of the New World.¹² He worked through the idea of property from Blackstone to modern times with astute, sometimes uncommon, observations about the interplay between the intellectual and the common understanding of this concept. Dean Cribbet asserted that Blackstone has often been misinterpreted,¹³ and argued that John Locke, Adam Smith, and Jeremy Bentham framed the theoretical basis for property rights as they took shape on American soil.¹⁴ But historical and demographic factors also played a part: “Property rights, as both natural and individual, fitted America like a glove.”¹⁵ Land was cheap, new land always seemed available, and these and other forces outside the law strengthened the view of property as mostly a private right.

This absolute notion of property, however, ironically contained within itself a source of limitation. As Cribbet phrased it, “The seeds of a new concept were contained in the fruits of the old.”¹⁶ Individuals began to realize that property rights had to be relative to the rights of others. Cribbet quoted the following insight from Professor Morris Cohen’s essay on *Property and Sovereignty*:

To permit anyone to do absolutely what he likes with his property in creating noise, smells, or danger of fire, would be to

minted with precision”).

10. John E. Cribbet, *Property in the Twenty-First Century*, 39 OHIO ST. L.J. 671, 671 (1978) (“[W]hile “property rights” under American law enjoy a reputation for permanence, they are in fact more highly relative and more sensitive to changing economic factors and social opinion than most other legal concepts.” (quoting ROSS D. NETHERTON, CONTROL OF HIGHWAY ACCESS 80 (1963))).

11. Cribbet, *Changing Concepts in the Law of Land Use*, *supra* note 8.

12. *Id.* at 247–51.

13. *Id.* at 247. For a discussion on interpreting Blackstone’s definition of property, see generally Carol M. Rose, *Canons of Property Talk, or, Blackstone’s Anxiety*, 108 YALE L.J. 601 (1998).

14. Cribbet, *Changing Concepts in the Law of Land Use*, *supra* note 8, at 247–50.

15. *Id.* at 251.

16. *Id.* at 254.

make property in general valueless. To be really effective, therefore, the right of property must be supported by restrictions or positive duties on the part of the owners, enforced by the state as much as the right to exclude others which is the essence of property.¹⁷

Others began to see that this new concept “favored the adjustment of property rights to the new social conditions.”¹⁸ As America changed, so did our views on property. The new century began and the frontier closed. The newer and interdependent nature of land use in general brought about property “concepts in transition.”¹⁹ Dean Cribbet takes us briskly through the story of how early comprehensive zoning laws gave way to more ambitious efforts, such as flexible zoning, aesthetic zoning, “floating” zones, subdivision regulations, open space controls, and even urban renewal legislation.²⁰ Americans understood and recognized that there must be a social context to property in order to make the individual concept meaningful.

Dean Cribbet talked about the future of land use regulation in America.²¹ His forecasting at the time was spot on. The courts recognized, at first in small, but later in larger degrees, the social aspects of the institution of property. The next twenty-five years were perhaps the most important in terms of changing concepts about the scope of the police power,²² the development of new concepts (like planned unit developments²³ and condominium associations²⁴), and the sanctioning of an entire landmark preservation movement.²⁵

17. *Id.* (quoting Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 21 (1927)).

18. *Id.* at 255.

19. *Id.* at 254–72.

20. *Id.* at 255–72.

21. *Id.* at 272–77.

22. *See, e.g.*, *Wilson v. Cnty. of McHenry*, 416 N.E.2d 426, 429–32 (Ill. 1981); *Just v. Marinette Cnty.*, 56 Wis. 2d 7, 15–26, 201 N.W.2d 761, 767–72 (1972).

23. *See generally* Symposium, *Planned Unit Development*, 114 U. PA. L. REV. 3 (1965) (discussing the planned unit development phenomena from interrelated professional perspectives).

24. *See generally* Donna S. Bennett, *Condominium Homeownership in the United States: A Selected Annotated Bibliography of Legal Sources*, 103 LAW LIBR. J. 249 (2011) (exploring and evaluating articles on condominiums); John E. Cribbet, *Condominium—Home Ownership for Megalopolis*, 61 MICH. L. REV. 1207 (1963) (exploring and evaluating individual ownership in a multifamily structure).

25. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1977).

When Dean Cribbet asked how far this change can or should go, he referred to a speech by a “leading” young planner who thought about the future and concluded that the magnitude of the task of land use planning calls for “a new set of Federalist Papers, a dialogue by politically sophisticated men who will explore the subtle kinds of intergovernmental relationships into which our urban problems are pushing us.”²⁶ Dean Cribbet was much more practical:

[W]e should keep all possible decisions at the local level and utilize the metropolitan area or region only when absolutely necessary. We should avoid the English concept of centralized control because it does not fit our society or our needs. As we modify the rigid line-drawing of Euclidian zoning, we must develop new techniques which will enable the owner to ascertain with some certainty what the permissible land uses will be. The private owner, no less than the public, needs to plan for the future. Finally, we must develop an administrative expertise which will give property owners some of the same confidence in planning commissions and boards of adjustment that they now feel in the courts. Until that can be done we should continue a high degree of judicial surveillance over all of the tools of land-use control.²⁷

Though the winds of change were stirring, this Midwesterner remained calm. He recognized the need for property to adapt to the changing forces both within and outside of the law. But he had a certain optimism, combined with a perceptive eye on the manner in which property could change and yet continue to be the glue that holds the country together.

In a subsequent survey of changing concepts in the law of property, Dean Cribbet questioned whether we need a universal definition of property, reasoning as follows: “Legal definitions are derived from what courts and legislatures do. The *search* for an evolving definition is what is important, not the definition itself.”²⁸ In this article, Dean Cribbet

26. Cribbet, *Changing Concepts in the Law of Land Use*, *supra* note 8, at 273 (quoting William A. Doebele, Jr., *Key Issues in Land Use Control*, 1963 PLANNING 5, 10).

27. *Id.* at 277.

28. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, *supra* note 8, at 41–42. Compare *id.*, with Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129 (1998). In the latter, Professor Rose discusses changing concepts of property in the contexts of

reviewed changes in the law of landlord–tenant, vendor–purchaser, nuisance and air and solar rights, eminent domain and the police power, and water law and environmental rights.²⁹ With particular reference to water law, Dean Cribbet stated that when a resource “is in abundant supply, the laws relating to its allocation and use are likely to be simple; [but] as the resource becomes scarce, society’s stake greatly increases, and the laws tend to become complex.”³⁰ “Water, like land, is a closed system,” Dean Cribbet wrote.³¹ He continued:

The world now has all of this resource that it is ever likely to possess. The issue is the wise use of the resource for the benefit of humanity. Even modern technology cannot create new water but it can make the present supply more recoverable and more usable. At the same time, law should provide a more equitable allocation of available water. Commentators have explored the rival doctrines of water law—riparian rights and prior appropriation—in detail. The important point is that all water rights doctrines are increasingly responsive to the public interest.³²

Dean Cribbet examined the case of *National Audubon Society v.*

cyberspace and environmental management, including water use. In doing so, she stakes out guideposts for future property concepts, rather than providing a precise definition:

[T]he conventional economic story suggests that we may predict alterations in property—and specifically, more refined property—under certain conditions. The first condition is that social interest increases in some subject, so that we gain greater benefits if we use property to manage conflict and encourage investment. The second condition concerns costs: we should expect to see more refined property where technological or administrative advances make it cheaper for us to organize property regimes. But the third condition is cultural and to some degree political: we may also expect to see some changes in property simply from taking notice of unconventional forms of property, or property among previously under-acknowledged persons and groups—which sometimes amounts to the same thing.

Id. at 143. On the last point raised by Professor Rose, see Kapua Sproat, *Seeking Wai Through Kanawai: The Quest for Water and Justice for Hawaii Streams and Communities*, 95 MARQ. L. REV. 129.

29. See Cribbet, *Concepts in Transition: A Search for a New Definition of Property*, *supra* note 8, at 1–41.

30. See *id.* at 3, 23 & n.120.

31. *Id.* at 23.

32. *Id.* (citations omitted). Dean Cribbet added, “The controversy over water allocation will only increase as the population shifts from areas where water is more or less plentiful to those sections of the nation where water is already in short supply.” *Id.* at 23 n.120.

Superior Court,³³ and cited the public trust doctrine³⁴ as proof of the fact that all water rights doctrines are in a state of constant transition, by concluding as follows:

Thus the public trust doctrine symbolizes the changing concept of property. When courts view water rights only as private property rights, allocation of scarce water supplies may or may not be equitable among individual water users. For water allocation to be equitable for society as a whole, the courts and legislatures must consider public interests. Both legislation and judicial opinions now tend to recognize that the public interest is an important new dimension of water rights.³⁵

In summary, although Dean Cribbet recognized some backing and filling in this trend toward property rights being increasingly responsive to the public interest since 1965, he ultimately concluded that the balance had shifted still from an excessive emphasis on individual rights toward a greater dominance of the social interests.³⁶

Nevertheless, I believe he felt it was of utmost importance to understand the dynamics of the concepts in transition and indeed the universal aspects of the institution of property that would remain constant. Two visualizations are key. The first is the dynamic nature of

33. (*Mono Lake*), 658 P.2d 709 (Cal. 1983).

34. Under the public trust doctrine, the state owns “all of its navigable waterways and the lands lying beneath them ‘as trustee of a public trust for the benefit of the people.’” *Id.* at 718 (quoting *Colberg, Inc. v. State ex rel. Dep’t Pub. Works*, 432 P.2d 3, 8 (Cal. 1967)). “It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.” *Id.* at 724.

35. Cribbet, *Concepts in Transition: A Search for a New Definition of Property*, *supra* note 8, at 24. See generally Eric T. Freyfogle, *The Evolution of Property Rights: California Water Law as a Case Study*, in PROPERTY LAW & LEGAL EDUCATION, ESSAYS IN HONOR OF JOHN E. CRIBBET 73 (Peter Hay & Michael H. Hoeflich eds., 1988) (containing a primer on surface water law rights written in the tradition of Dean Cribbet). Professor Freyfogle aptly captures Dean Cribbet’s overarching idea:

His theme has been that private property arises, not from God, not from natural law or from the inexorable forces of history, but from the people, and that private ownership will retain its status and strength only so long as, and to the extent, the people see fit to respect it.

Id. at 74.

36. See generally Cribbet, *Concepts in Transition: A Search for a New Definition of Property*, *supra* note 8, at 41–42.

the change—precisely how politics, sociology, economics, and behavioral psychology can affect the law in action and in the courts, both trial and appellate. The second is the repercussion of each change on other variables, like social and cultural transformations. How could Dean Cribbet have known in 1965, for example, that the so-called “property rights” movement would push back the effort to find public aspects of private property and at the same time keep in some sort of equilibrium the changes he predicted?

The answer, I think, goes back to one of the constants he discovered in the writings of Francis Philbrick and others on the eternal tension of various philosophies affecting property law. In the 1986 survey, Dean Cribbet referred to this tension as the “balance between ‘individualism and dominance of the social interest.’”³⁷ But to further appreciate this tension, one must revisit his first article on changing property concepts, published in 1965. In that article, Dean Cribbet began his discussion by including the following quote from Professor Philbrick:

Manifestly we need a modernized philosophy of property. No mere philosophy of words or aspirations, however. In that respect the contrast between Mill and Comte—one looking to individualism to save society, the other to society to save the individual—is precisely the same as that which existed between Aristotle and Plato. The first tenet of an adequate philosophy must be that property is the creature and dependent of law, including, of course, our constitutions—surely no radical doctrine! On one hand, private property, though admitting that it can only exist by virtue of public protection, pleads payment of taxes as the whole price of that protection, and beyond that claims immunity from all social obligations. On the other hand, the thought of the world for two generations has been tending toward collective Utopias.³⁸

This is the key to the moderating tensions between any changes in the concepts of property and water rights. The tension that Professor Philbrick and Dean Cribbet recognized—between those looking to individualism to save society and those looking to society to save the individual—has existed between philosophers and lawyers for hundreds

37. *Id.* at 42 (quoting *State v. Shack*, 277 A.2d 369, 373 (1971)).

38. Cribbet, *Changing Concepts in the Law of Land Use*, *supra* note 8, at 245 (quoting Philbrick, *supra* note 7, at 728–29).

of years. This, perhaps, is the “social gyroscope that keeps things upright”³⁹ in the law of property.

Dean Cribbet’s article inspired us to use it as a template for this symposium: *Changing Conceptions of Water in the Law*. We chose water law as a topic because we believe it is at a tipping point for significant change due to the growing importance, complexity, and scarcity of the resource.⁴⁰ Dean Cribbet believed the same about land use law in 1965. His research then, and later, focused on how the institution of property, including the law of water rights, is in an almost constant state of transition, and on how lawyers must understand this in order to work their craft in this area of the law. Therefore, in this symposium, we will focus first on past concepts of water law and concepts now in transition—specifically in water governance and management. We will then focus on concepts for the future. We hope our prophecies can hold up as well.

POSTSCRIPT

When I entered law teaching, Dean Cribbet gave me three bits of advice. First, he said, be a good teacher because that is what they are paying you to do. Second, carve out a niche for yourself. Third, go to the AALS meetings every year. Dean Cribbet was active in the AALS

39. Guillory, *supra* note 2, at 193.

40. See David Bailey, *Milwaukee, Chicago Areas May Face Water Shortages: Report*, REUTERS, Feb. 7, 2011, available at <http://www.reuters.com/article/2011/02/07/us-greatlakes-water-idUSTRE7164X520110207> (“Water levels in Chicago and Milwaukee could drop by an additional 100 feet over the next 30 years due to increased demand from pumping of groundwater that has already reduced groundwater levels as much as 1,000 feet, the report found.”); Ambrose Evans-Pritchard, *Water Crisis to Be Biggest World Risk*, THE TELEGRAPH (June 5, 2008), <http://www.telegraph.co.uk/finance/newsbysector/utilities/2791116/Water-crisis-to-be-biggest-world-risk.html> (“A catastrophic water shortage could prove an even bigger threat to mankind this century than soaring food prices and the relentless exhaustion of energy reserves, according to a panel of global experts at the Goldman Sachs ‘Top Five Risks’ conference.”); Paul Wenger, *Farmers Still Struggling Despite Wise Water Use*, SAN JOSE MERCURY NEWS, July 29, 2011, at 12A. Wenger writes,

With farmers already operating at high efficiency and unable to pass along their higher costs, many have no choice but to reduce production. Thousands of acres of avocado trees have been cut back to their stumps or removed altogether. Some San Diego County farmers have reduced or eliminated production of strawberries and fresh vegetables. Others wonder whether agriculture in the county is approaching the tipping point, where farming in one of the nation’s key production zones starts to become unsustainable.

Wenger, *supra*.

and served as President in 1979. But he told me two specific reasons for attending these meetings. First, that is where you will hear the rumors of how schools get better. Second, he said, it will give you a chance to rub elbows with the giants in the field and the rising stars of tomorrow. In this project, I did just that, with the 2011 Annual Meeting's distinguished presenters: Barton "Buzz" Thomson from Stanford Law School; Joseph Dellapenna from Villanova Law School; Noah Hall from Wayne State; Shelley Saxer from Pepperdine University School of Law; Sandra Zellmer from Nebraska College of Law; J. Gordon Hylton from Marquette University School of Law; Asmara Tekle from Texas Southern University, Thurgood Marshall School of Law; and Kapua Sproat from University of Hawaii at Manoa, William S. Richardson School of Law.