

Spring 1999

Liberty and Justice: A History of Law and Lawyers in Rhode Island, 1636-1998, by Patrick T. Conley

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Recommended Citation

Friel, Christopher E.; Lordan, Christopher H.; and Heaslip, Sarah K. (1999) "Liberty and Justice: A History of Law and Lawyers in Rhode Island, 1636-1998, by Patrick T. Conley," *Roger Williams University Law Review*: Vol. 4: Iss. 2, Article 6.

Available at: http://docs.rwu.edu/rwu_LR/vol4/iss2/6

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Book Note

Liberty and Justice: A History of Law and Lawyers in Rhode Island, 1636 – 1998. By Patrick T. Conley, Rhode Island Publications Society, 1998. Pp. 526. \$39.95.

Commissioned to celebrate the 100th anniversary of the Rhode Island Bar Association, *Liberty and Justice*, by compiler/author Dr. Patrick T. Conley, is a collection of thirty-one essays covering the history of Rhode Island law, including the individuals who have influenced it and the events which have helped to shape it. The essays, written by various authors, cover a wide spectrum of topics, including crime, law enforcement, business, the role of women, family law, civic and civil rights, admiralty, torts, administrative law and the legal profession itself.

The publication is divided into three Parts, each covering a specific period of Rhode Island history. Part I, entitled "From Colony to State, 1636 – 1790: The Foundations of the Law," traces the developing Rhode Island law from its colonial origins to Rhode Island's ratification of the Federal Constitution and subsequent entry into statehood. Part II, "From Statehood through the Nineteenth Century, 1790 – 1898: The Law as an Instrument of Change," encompasses an era of great legal and economic transformation. During this period, Rhode Island abandoned its common-law system of the eighteenth century in favor of legal formalism, highlighted by the rise of judicial independence. Finally, Part III, "The Modern Era, 1898 – 1998: The Law as a Profession," intended by the compiler to coincide with the founding and subsequent operation of the Rhode Island Bar Association, covers Rhode Island's political and legal history during this period.

PART I: FROM COLONY TO STATE, 1636–1790: THE FOUNDATIONS OF THE LAW

"The Colonial Foundations of Rhode Island's Legal System," an essay by Patrick Conley, is the first piece in Part I of *Liberty and Justice*. While more of a historical, rather than a legal, per-

spective on this period of Rhode Island, the essay provides a helpful insight into the State's legal foundations. Beginning with the landing of Roger Williams on the bank of the Seekonk River in the spring of 1636, Dr. Conley covers Rhode Island's early governmental structure, under first the parliamentary patent of 1644 and later the royal charter of 1663. The notion of separation of powers, according to the author, was present even during this formative era, with most of the power in the hands of the legislature.

Although many of the essays in Part I of *Liberty and Justice* concern some of the more influential individuals of this period, including Roger Williams,¹ Anne Hutchinson² and Stephen Hopkins,³ the essays concerning the formation of the law in Rhode Island would particularly interest the legal historian and modern practitioner. For instance, "Murder of an Indian, 1638: Equal Treatment before the Law," by Glenn W. LaFantasie, recounts an Indian's murder by a group of colonists led by Arthur Peach, and the colonists' subsequent trial. The author describes the legal proceedings brought against these individuals under what could possibly be the earliest use of the felony murder doctrine in America. The trial took place at a time when tensions ran high between the Indians and the colonists. Upon conviction after trial, Peach and his two associates were sentenced to be hanged. Many of the colonists were shocked at what they perceived as an overly harsh sentence, especially since the victim was an Indian. Even Roger Williams expressed dismay at the outcome. However, according to the author, it was Massasoit, sachem of the Wampanoags, who reasoned that "only one man wounded the Indian, 'but all lay in wait two days, and assisted,' therefore all shared in the guilt."⁴ It is this reasoning, first articulated in 1638, which forms the basis for the modern-day felony-murder doctrine.

Catherine Osborne DeCesare's essay entitled "Women and the Legal Culture of Colonial Rhode Island" discusses the distinction

1. See Edwin S. Gaustad, *Roger Williams and His Legacy*, in *Liberty and Justice: A History of Law and Lawyers in Rhode Island, 1636-1998*, at 24 (1998) [hereinafter *Liberty and Justice*].

2. See Richard B. Morris, *Jezebel before the Judges: Anne Hutchinson Tried for Sedition*, in *Liberty and Justice*, *supra* note 1, at 58.

3. See Marguerite Appleton, *Stephen Hopkins: Chief Justice, Governor, and Signer*, in *Liberty and Justice*, *supra* note 1, at 116.

4. Glenn W. LaFantasie, *Murder of an Indian, 1638: Equal Treatment before the Law*, in *Liberty and Justice*, *supra* note 1, at 44.

between the sexes in terms of their respective access to the courts and resulting participation therein. According to the author, women were excluded from participating in the realm of public law. Women could not become members of the legislature, serve as members of the court, sit on a jury, or vote. However, female participation in the realm of private law depended on their marital status and social standing. For example, single or widowed women were afforded substantially the same rights as men. These rights included the ability to sue or be sued, purchase or sell property, enter into contracts and dispose of property by will. Upon marriage, however, a women's legal status changed significantly. Married women were stripped of the above-mentioned rights and thus delegated to a subordinate status.

Additionally, to determine the extent of women's participation in the realm of private law, the author analyzed the available court documentation during this era. DeCesare found that, between 1671 and 1729, women were defendants in fourteen percent of all criminal cases and plaintiffs in ten percent of all civil cases. She also determined that despite the General Assembly's attempts to provide for greater women's rights in the private law context, most notably the 1712 common-law modification allowing wives to handle fiscal matters in the absence of their husbands, the number of wives appearing before the courts did not increase during Rhode Island's early years.

Part I concludes with two essays written by Patrick T. Conley, "First in War, Last in Peace: Rhode Island and the Constitution, 1786 - 1790" and "The Bill of Rights in Rhode Island." These essays describe how Rhode Island's independent character led it to become the first colony to renounce allegiance to King George III of England; this same independent character led Rhode Island to grudgingly approve the Constitution on May 20, 1790. Rhode Island was also one of the foremost proponents of a "bill of rights" to protect it's citizenry from an oppressive government. In fact, shortly after entering the union, Rhode Island adopted its own state version.

Part I of *Liberty and Justice* chronicles Rhode Island's early jurisprudence, development of commercial ties and reluctant entry into the union. Firmly establishing the basis for Rhode Island's fierce independent character, this section lays the colonial foundations for the following two sections which encompass Rhode Is-

land's legal and historical accomplishments under a national constitution.

PART II: FROM STATEHOOD THROUGH THE NINETEENTH CENTURY,
1790–1898: THE LAW AS AN INSTRUMENT OF CHANGE

In Part II of *Liberty and Justice*, Patrick Conley documents Rhode Island's role in the development of American jurisprudence. In his essay entitled "The First Judicial Review of State Legislation: An Analysis of *Champion and Dickason v. Casey* (1792)," Conley asserts that, although later cases have received the credit, *Casey* was in fact the progenitor for the doctrine of judicial review. The case was the first in which a federal court rendered a state statute void. This holding set the stage for the emerging doctrine of judicial review, a crucial element of the American legal system. Dr. Conley suggests that *Casey* was overlooked as the genesis of judicial review for several reasons. First, the decision was never reported. Second, no written opinion was ever filed explaining the court's decision. Third, the case involved a private act; therefore, the general public had no stake in the outcome. Finally, *Casey* was a Rhode Island case; it may have been overlooked simply by virtue of occurring in the union's smallest state. Thus, despite the years spent in obscurity, Conley suggests that the legal community should no longer ignore *Casey's* historical significance.

Part II also depicts the era of legal transformation and political development through biographical essays of prominent Rhode Islanders including William Peck,⁵ Thomas Dorr,⁶ Joseph Angell⁷ and Samuel Ames.⁸ For example, "Attorney Thomas Dorr: Rhode Island's Foremost Political Reformer," by Patrick T. Conley, provides insight to the political climate in Rhode Island from the mid-1820s to the mid-1850s, a period often referred to as the "Age of Egalitarianism." Thomas Dorr, a lawyer, politician and an equal rights leader, drafted the People's Constitution, which sought to promote ideas of political reform such as free suffrage, an in-

5. See Donald W. Wyatt, *William Peck - Rhode Island's First U.S. Marshal*, in *Liberty and Justice*, *supra* note 1, at 212.

6. See Patrick T. Conley, *Attorney Thomas Dorr: Rhode Island's Foremost Political Reformer*, in *Liberty and Justice*, *supra* note 1, at 238.

7. See Sidney S. Rider, *Joseph K. Angell, Law Writer*, in *Liberty and Justice*, *supra* note 1, at 284.

8. See C. Peter McGrath, *Samuel Ames: The Great Chief Justice of Rhode Island*, in *Liberty and Justice*, *supra* note 1, at 302.

dependent judiciary, a powerful executive branch and the secret ballot. This document, Dorr's version of the Lockean doctrine of popular constituent sovereignty, led to his election as the "People's governor" in defiance of the then-existing state government. Dorr was eventually imprisoned and his political popularity declined; however, his reform efforts garnered nationwide attention and inspired widespread support for his causes. Additionally, Dorr contributed to the development of economic and social thought. He spoke and authored legislation against economic privileges and abuses by corporate bodies; pioneered the notion of a free public education as a fundamental right; and championed equal rights for immigrants, women and minorities.

Dr. Conley appropriately follows the profile of Thomas Dorr with an examination of Dorr's legacy in the essay entitled "The Dorr Rebellion and American Constitutional Theory: Popular Constituent Sovereignty, Political Questions, and *Luther v. Borden*." This account of the events leading up to the rebellion reflects how the majority of Rhode Island citizens favored popular constituent sovereignty under the People's constitution. This essay traces the rise of Dorr's movement, the insurrection which occurred as a result of the gubernatorial election and his eventual conviction for treason.

This era in Rhode Island history also marked the beginning of the end for capital punishment. In another article by Patrick T. Conley, "Death Knell for the Death Penalty: The Gordon Murder Trial and Rhode Island's Abolition of Capital Punishment," the author explains how Rhode Island played a leading role in the effort to abolish capital punishment. John Gordon, the son of an Irish immigrant, was tried for the murder of Amasa Sprague, a prominent businessman. According to the author, the evidence presented against Gordon at trial was both circumstantial and conflicting. In the presiding justice's charge to the jury, he referred to the crime as the "most atrocious" crime that had ever come to his attention, stating that it has no parallel in the annals of any one of the United States. Accordingly, after a one hour and fifteen minute deliberation, the jury returned a guilty verdict.

Subsequently, on February 14, 1845, in the state prison's courtyard, John Gordon was hanged. As a consequence, numerous individuals called for an end to the death penalty. This incident drew the attention of some of the nation's most prominent anti-

capital punishment campaigners. However, it took until February of 1852 for the legislature to pass a bill banning capital punishment, making Rhode Island the second state to do so. Despite many attempts, and one short success,⁹ the death penalty has never returned to Rhode Island, thus making John Gordon the last Rhode Islander to be executed.

While this era marked the end of capital punishment, it also marked the beginning of negligence law in Rhode Island. Charles Carroll's essay, entitled "Development of the Law of Negligence in Rhode Island, 1872-1903," explains the formation of this new type of litigation. According to Carroll, the case of *Remington v. Sheldon*¹⁰ marked the first time that the Rhode Island Supreme Court rendered a decision in a tort action based upon negligence. This new development lengthened court dockets and aroused public interest. The large verdicts occasionally returned in such cases accounted for this newfound interest in the law and, significantly, the law suit. Thus, with damages awards providing an influx of cash into the profession, the practice of law itself changed. According to the author, the new lawyer opted for elaborate suites of offices in modern buildings as opposed to the dusty, dingy offices of times gone by. Similarly, courtrooms increased in size to accommodate witnesses, large juries and crowds of individuals who came to observe the trials. Thus, this modernized practice of law ushered in an new era, an era which viewed the law as a profession.

Part II of *Liberty and Justice* encompasses an era of great change and turmoil in Rhode Island. This section depicts the development and eventual refinement of Rhode Island law, thus providing an excellent segue between Rhode Island's historical origins and the current era of legal professionalism.

PART III: THE MODERN ERA, 1898-1998: THE LAW AS A PROFESSION

An essay by Joseph R. Weisberger, Chief Justice of the Rhode Island Supreme Court, introduces this final section of *Liberty and*

9. In 1973, the Rhode Island Legislature enacted a capital punishment statute for certain crimes committed by convicts, however, six years later the supreme court struck down the enactment in the companion cases of *State v. Cline* and *State v. Anthony*. 121 R.I. 299 (1979).

10. 10 R.I. 218 (1872).

Justice. "The Founding of the Superior Court: A New Era in the Rhode Island Judicial System," begins by describing the economic and political developments occurring at the turn of the century. These developments affected the demands placed upon the Rhode Island judicial system, which in 1905 consisted of a supreme court and twelve district courts. Chief Justice Weisberger describes the need to reorganize the judicial system in order to adequately meet the needs of an increasingly commercial society. The essay explains the changes made to Rhode Island's judicial structure by The Court and Practice Act of 1905. Most notably, the Act's passage meant the creation of the superior court, which exercised original jurisdiction over many cases, including actions in equity, previously heard only by the supreme court.

The next essay, "The Bloodless Revolution," by Erwin L. Levine, chronicles the political coup staged by the Democrats in the 1935 General Assembly session. After failing to establish a Democratic majority in the State Senate by a mere two seats, the Democrats covertly organized for a recount of the votes in two districts. This recount led to the subsequent establishment of a Democratic majority in both houses of the General Assembly. However, this Democratic control was, according to the author, a short-lived victory. Although the party may have gained control of the Rhode Island legislature, the strength of this Democratic party was built on a delicate coalition of several ethnic groups. Mr. Levine contends that while the Democrats were able to organize a stunning upset on the opening day of the 1935 General Assembly session, the ensuing demands of patronage effectively canceled out any power the Democrats might have exerted in the General Assembly. Nevertheless, the experience taught politicians valuable lessons concerning the use of patronage, the power of removal and the value of informal deals with the opposition.

No era is defined without the influence of men and women of great import. Accordingly, Donald L. Smith's essay, "Zechariah Chafee, Jr.: A Rhode Island Man," provides a welcome opportunity to learn more about such a member of the Rhode Island legal community. This essay provides a brief biography of Zechariah Chafee, Jr., recounting his academic and personal triumphs. The author has peppered the essay with anecdotes from Chafee's life. For example, while a young man on a visit to California, he was told by a tea leaf reader that he would be rich and famous, would

travel and would marry the girl from Providence he liked the most. In addition, the essay paints a picture of a man whose intellect and convictions place him amongst a long line of distinguished Rhode Islanders admired for their outspokenness and forward thinking.

The next essay, "The Long Count and Its Legacy: Rhode Island Political Realignment, 1956-1964," examines the aftermath of the 1956 gubernatorial election, in which the Democratic candidate, Dennis J. Roberts, was declared the victor over the Republican candidate, Christopher DelSesto. Roberts successfully challenged the validity of absentee ballots submitted in the election, with the Rhode Island Supreme Court invalidating two-thirds of the absentee ballots.¹¹ Matthew J. Smith, the author of the essay, submits that while this ruling did affect political life in Rhode Island, several other factors contributed to Robert's defeat at the polls in his 1958 bid for re-election.

Changing demographics within the state bolstered the Republican party's resurgence in Rhode Island. Elections during this period were conducted in an environment of voter loyalty to candidates of their ethnicity. The Republican party responded to this climate by emphasizing the attributes of their candidates. The Democratic party, however, erroneously counted on the continued support of a mainly Democratic electorate. Increasingly, people of various backgrounds settled in suburban areas, which decreased either party's stronghold over specific towns. In addition, organized labor defected from the Democratic party, thereby contributing further to the strength of the Republican party. In sum, the underlying reasons for the Republican resurgence can be attributed to the Democratic party's failure to respond to changing political and social conditions.

Fernando S. Cunha and Patrick T. Conley co-wrote the next essay, entitled, "State Aid to Rhode Island's Private Schools: A Case Study of *DiCenso v. Robinson*." The *DiCenso* case involved a constitutional challenge to the Salary Supplement Act. Several Catholic schools had closed their doors due to a shortage of qualified teachers. Fearing that a phaseout of all Catholic schools in the state would create a tremendous financial burden on the public school system, Rhode Island legislators passed the Act in order to supplement teacher's salaries in private Catholic schools. The

11. Dennis J. Roberts v. Board of Elections, 85 R.I. 203 (1957).

United States Supreme Court eventually heard the case; the resulting decision was handed down in conjunction with the well-known case of *Lemon v. Kurtzman*. The United States Supreme Court agreed with the Rhode Island District Court, finding the Act unconstitutional because it fostered excessive entanglement and gave significant aid to a religious enterprise in violation of the Establishment Clause.

The second essay, co-authored by Keven McKenna and Patrick T. Conley, describes the Rhode Island Constitutional Conventions of 1964, 1973 and 1986.¹² The authors cite slow movement and the poor image projected during the 1964 convention for the rejection of that convention's product by a 4-1 margin.¹³ The 1973 convention, however, made great strides in changing Rhode Island law, resulting in the ratification of five constitutional amendments.¹⁴ Of particular importance, the convention approved streamlined procedures for amending state laws and for calling regularly scheduled open constitutional conventions. Considering that numerous amendments to the original state constitution had virtually nullified the initial document, the 1986 convention produced the redrafted and revised Rhode Island Constitution.¹⁵ The authors attribute the revision's success to legislators who worked efficiently and delegates dedicated to pronouncing the will of people.

Part III of *Liberty and Justice* closes with "The Rhode Island Bar Association: Its First Century," by Edward P. Smith. Since this book was commissioned to celebrate the 100th anniversary of the Rhode Island Bar Association, it is fitting that it should end with a description of the history of that organization. The Rhode Island Bar is the 24th oldest state bar association; throughout its existence, it has pressed for increased professionalism and expanded services to the public. Originally a volunteer organization, the Bar did not require membership until October of 1973. It was however, the first New England state to have a full-time paid ad-

12. Patrick T. Conley & Keven A. McKenna, *The Rhode Island Constitutional Conventions of 1964, 1973, and 1986: Getting Down to Basic Law*, in *Liberty and Justice*, *supra* note 1, at 448.

13. The 1964 convention sought to ratify a revised version of the Rhode Island Constitution.

14. The 1973 convention considered specific issues, such as legislative pay, lotteries, four-year terms for state officials, suffrage and grand jury reform.

15. The 1986 convention also produced two notable reforms: banning convicted felons from public office and the establishment of an Ethics Commission.

ministrator, thus allowing members of the bar to serve as Rhode Island Bar Association leaders without experiencing financial difficulties.

Since its inception, the Rhode Island Bar has been a model of service to the public. Its services include a statewide lawyer referral system, an open-panel prepaid legal-service program, formal continuing legal education programs and the publication of the *Bar Journal*. Through its services, the Rhode Island Bar Association responds to the changing needs of both society and the legal profession itself. Thus, in doing so, it will continue to provide guidance not only to its members, but also to the members of the public who call upon its resources.

Part III of *Liberty and Justice* chronicles the political and legal developments in Rhode Island over the last one hundred years. In doing so, this section reveals that the political and legal communities continue to respond to and meet the challenges presented by an evolving society and electorate.

CONCLUSION

Liberty and Justice is a noteworthy compilation of essays covering a wide spectrum of Rhode Island's political and legal history. The book provides readers with a unique opportunity to learn about this state's historical foundations, legal development and evolving institutions. As such, *Liberty and Justice* is a valuable text for legal scholars, law students and legal practitioners alike.

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