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# Article

## “Ubi Jus, Ibi Remedium” - Sed Non Hodie:\*

### Bandoni v. State of Rhode Island, a Ten Year Retrospective.

Marty C. Marran\*\*

#### I. INTRODUCTION

On July 21, 1998 the opinion in *Bandoni v. State of Rhode Island*,<sup>1</sup> was handed down by the Rhode Island Supreme Court. Now, some ten years later, it continues to astound the mind and shock the collective conscience of those deeply concerned not only with the rights of crime victims in Rhode Island, but more importantly, with the Supreme Court's exceedingly myopic view of its own power and function as the protector of the State Constitution and of the sacred rights enumerated therein. That day marked the utter demise of Article I, Section 23 of the Rhode

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\* “Where there is a right, there is a remedy”...but not today.

\*\* *Dedicated to Joseph E. Marran Jr., Esq. (1923-2003) Consummate advocate, father, mentor . . . friend.*

*“[m]astering the lawless science of our law,  
that codeless myriad of precedent,  
that wilderness of single instances”*

*Alfred, Lord Tennyson, AYLMER'S FIELD (1793)*

1. 715 A.2d 580 (R.I. 1998).

Island Constitution, the "Crime Victim's Rights Amendment," enacted a scant twelve years before. In a four-to-one decision the Supreme Court abrogated any and all effective means of enforcing that Amendment, and in so doing it shamefully surrendered its own supreme judicial authority to the State Legislature. That day has now passed into Rhode Island's judicial history, but as the late composer Irving Berlin once musically noted: "The Song Is Ended (But the Melody Lingers On.)."

Only one Justice dissented.<sup>2</sup> He did so most heroically and with an eloquence far surpassing the meager abilities of this writer. At the outset it is urged that the opinion and dissent should be read carefully and in total, that the reader might better appreciate the significance of the opinions and hopefully, the importance of devising a means by which the Crime Victim's Amendment may yet be revived and restored.

This article will begin with a discussion of the first count of the Bandonis' complaint sounding in negligence. Thereafter, discussion will turn to the concept of the constitutional tort, addressing the steps used by the courts in determining whether a law or constitutional provision is "self executing" and the ramifications of such a finding. Next, the corresponding decisions in the Federal forum will be reviewed and examined insofar as they may serve as a guide to the state courts which find themselves confronted with these issues. It will then turn to the Restatement (Second) of Torts, Section 874 A and its provision for the implementation of existing remedies and/or the creation of a new remedy by the courts. Finally, discussion will be had as to the practical means of reinstating crime victims' rights to the status originally intended by the framers.

## II. THE FACTS OF BANDONI<sup>3</sup>

On the evening of August 1, 1992, the Appellant Robert J. Bandoni was operating a motorcycle in the Town of Coventry with his wife, Appellant Lorraine Bandoni, as his passenger when they

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2. *Id.* at 601 (Flanders, J., dissenting).

3. The following facts are provided to allow for an understanding of the factual background and procedural posture of the case. A more detailed factual travel is laid out in the text of the opinion in *Bandoni*, 715 A.2d at 582-83.

were broad-sided by a pick-up truck operated by Robert L. Richardson, Jr.<sup>4</sup> Lorraine Bandoni was fortunately thrown clear and suffered only minor injuries.<sup>5</sup> Robert Bandoni suffered extensive injuries, including a crushed left leg and pelvis.<sup>6</sup> Richardson was arrested at the scene and a chemical test of his breath revealed that he had been operating his vehicle at the time of the accident with a blood alcohol level more than twice the legal limit.<sup>7</sup>

Although Lorraine accompanied Robert in the ambulance, she first gave the investigating officers a brief statement and contact information at the scene of the accident. She later went to the Coventry Police Station and gave a more detailed statement on August 5, 1992.<sup>8</sup> At that time she requested that she and Mr. Bandoni be kept apprised of the case against Richardson.<sup>9</sup> She assured the police officer with whom she spoke of their full cooperation in any further investigation and in the prosecution.<sup>10</sup>

On August 21, 1992, Richardson was arraigned in the Third Division District Court on the charge of driving while intoxicated.<sup>11</sup> Thereafter, on September 23, 1992 at a pretrial conference, Richardson was allowed to plead *nolo contendere* to a reduced charge.<sup>12</sup> He was sentenced to one year's unsupervised probation, and was required to pay a two-hundred fifty dollar contribution to the highway fund and court costs.<sup>13</sup> Neither Robert nor Lorraine ever received notice of the arraignment or pre-trial date, and neither was ever advised as to their rights as the victims of Richardson's crime.<sup>14</sup> In fact, they only learned about the disposition of Richardson's case some thirty days thereafter upon the inquiry of private counsel they had retained to

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4. *Id.* at 582-83.

5. *Id.* at 583.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* The Bandonis' rights as victims are codified in the Rhode Island Constitution. See R.I. CONST. art. I, § 23; see also R.I. GEN. LAWS § 12-28-1 (1956), *et seq.*

bring a civil claim against him.<sup>15</sup>

### III. TRAVEL OF THE CASE

Mr. And Mrs. Bandoni first filed a claim against the Town of Coventry with the Town Council on December 29, 1994, arguing town officials disregarded their constitutional and statutory rights by failing to advise them of their rights as crime victims.<sup>16</sup> Upon rejection of their claim by the town council, they immediately filed their Verified Complaint in the Kent County Superior Court. The Defendants, municipal and state, were duly served and notice of the action was served upon the Attorney General, who entered his appearance on behalf of the State of Rhode Island, its agents, servants and employees; private counsel entered on behalf of the Town of Coventry, its agents, servants and employees.<sup>17</sup> Plaintiffs once amended their Verified Complaint as a matter of right, and the defendants thereafter moved jointly to dismiss, asserting that the Amended Verified Complaint failed to state a claim upon which relief may be granted. The trial justice ordered the dismissal of the Amended Verified Complaint. Thereupon, an appeal was taken to the Supreme Court.

### IV. THE ISSUES PRESENTED IN BANDONI

The Appeal presented two issues to the Rhode Island Supreme Court; issue one presented the question:

Will a negligence action lie against the State of Rhode Island, a municipality and/or the respective agents, servants and employees of each, the latter also in their individual capacities, upon the negligent failure of those defendants, or any of them, to perform the duties set forth in R.I. Const., Art. I, sec 23, Rights of victims of crime, and or General Laws Sec. 9-31-1, *et seq.* Victims' rights, where such negligence results in actual and

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15. *Bandoni*, 715 A.2d at 583.

16. The Bandonis' claim was made in accordance with R.I. GEN. LAWS § 45-15-5.

17. R.I. GEN. LAWS § 42-9-6 provides that the attorney General "shall appear for and defend the . . . legislators, boards, divisions, departments, commissions, commissioners, and officers, in all suits and proceedings which may be brought against them in their official capacity."

measurable damages to the plaintiffs?<sup>18</sup>

while issue two asked whether:

In the absence of any adequate existing civil remedy for the alleged violation of the statutory and/or constitutional rights of individuals identified as the victims of crime, is such a remedy appropriate in furtherance of the purpose of General Laws Sec. 12-28-1, et seq., and/or R.I. Const., Art I, sec 23 and necessary to assure their effectiveness, and will such a right of action as claimed by these plaintiffs, or “constitutional tort,” so-called, now be judicially recognized or created by this Honorable Court in order to provide redress for the deprivation of these rights?<sup>19</sup>

#### A. Issue I - The Negligence Action

It must be acknowledged first that there was no common law right of action against the sovereign,<sup>20</sup> and that such right of action as against the State of Rhode Island and the Town of Coventry arises, if at all, upon the statutory waiver of sovereign immunity contained in General Laws Section 9-31-1, *et seq.* That section provides:

The state of Rhode Island and any political subdivision thereof, including all cities and towns, shall, subject to the period of limitations set forth in § 9-1-25, hereby be liable in all actions of tort in the same manner as a private individual or corporation; provided, however, that any recovery in any such action shall not exceed the monetary limitations thereof set forth in the chapter.<sup>21</sup>

Furthermore, a victim or victims of crime had no individual “rights” under American common law with respect to their active participation in any particular stage of the criminal process; the protection of their interests was entrusted to the judiciary and those charged with the investigation and prosecution of criminal

18. *Bandoni*, 715 A.2d at 583-84.

19. *Id.*

20. See RESTATEMENT (SECOND) OF TORTS § 895B (1979) (providing that a State is not subject to suit without its consent).

21. R.I. GEN. LAWS § 9-31-1 (2002).

offenses.<sup>22</sup> However, the cause of action stated in Count I does not emanate from the Victims' Rights statute; it emanates from the law of negligence.

In *Bandoni* the plaintiffs alleged: (1) that they were at all times relevant thereto the identified victims of a crime; (2) that as the victims of crime they were owed certain and specific duties by the state and municipal defendants under the statutes and the constitution; (3) that the defendants each and all negligently failed to perform these duties; (4) that as a direct and proximate result the plaintiffs were permanently deprived of their statutory and constitutional rights, *inter alia*, to address the District Court prior to the acceptance of the criminal defendant's plea bargain and sentencing as to the impact of his crime against them; and (5) that they were thus injured.<sup>23</sup> In so doing they set forth that which was urged to be an actionable negligence claim:

The Bandonis argue that they have established a *prima facie* case of common law negligence by demonstrating that both the Victim's Bill of Rights legislation and the victims' rights constitutional amendment place affirmative duties on defendants to apprise crime victims of their rights. The Bandonis contend that defendants' inexcusable failure to comply with these duties constitutes a breach requiring monetary damages to compensate them for their injuries. We do not agree. Among the statutory rights allegedly violated were G.L. 1956 §§

"12-28-3. General rights —(a) \*\*\*

To be informed by the prosecuting officer of the right to request that restitution be an element of the final disposition of the case."

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22. While private prosecution, no doubt, flourished in colonial times, by the beginning of the nineteenth century, the concept of public prosecution was firmly established in place in the majority of the states. See Andrew Sidman, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754, 763 (1975) (discussing the development of the American system of public prosecution).

23. Brief of Appellant Bandonis at 1, *Bandoni v. State*, 715 A.2d 580 (R.I. 1998) (No. 95-563).

"12-28-4.1. Right to address court regarding plea negotiation —

(a) Prior to acceptance by the court of a plea negotiation and imposition of sentence upon a defendant who has pleaded *nolo contendere* or guilty to a crime, the victim of the criminal offense shall, upon request, be afforded the opportunity to address the court regarding the impact which the defendant's criminal conduct has had upon the victim."

"12-28-4.3. Pretrial Conferences — Misdemeanors in district court. —

In all misdemeanor cases heard before the district court, the victim of the alleged criminal offense shall be afforded the opportunity to address the court during the pretrial conference \* \* \*. At the pretrial conference, the victim shall be afforded the opportunity to explain the impact which the defendant's criminal conduct has had upon the victim and to comment on the proposed disposition of the case."

"12-28-5.1. Restitution. —

When the court orders a defendant to make financial restitution to the victim of a crime of which the defendant has been convicted or to which the defendant has pleaded guilty or *nolo contendere*, a civil judgment shall automatically be entered by the trial court against the defendant on behalf of the victim for that amount."<sup>24</sup>

The opinion then went on to report that the *Bandonis* had conceded as fact that none of these rights existed at common law; the court also acknowledged that it has "long held . . . that the creation of new causes of action is a legislative function."<sup>25</sup>

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24. *Bandoni*, 715 A.2d at 583-84.

25. *Id.* at 584 (quoting *Accent Store Design, Inc., v. Marathon House*,

Therefore, the opinion concluded, because the General Assembly had failed to provide a remedy, the:

“principles of judicial restraint prevent us from creating a cause of action where a duty to apprise crime victims of their rights did not exist at common law and where our Legislature has neither by express terms nor by implication provided for civil liability . . . (A) cause of action for damages does not lie in negligence(.)”<sup>26</sup>

In answer, one might consider, for instance, that the principles of “restitution” and “right to redress” certainly existed at common law long before the Victim’s Rights statute was enacted. In fact, many of the provisions of that statute are “new” only in instance, and reflect values and principles espoused for centuries in our common law tradition. Count I of the Bandonis’ complaint asked only that these principles be recognized and acted upon by the Court that it might reverse the Rule 12 (b) (6) dismissal of the common-law negligence action and remand the case for trial:

Unlike some other states, in Rhode Island the violation of a statute is not *conclusive* evidence, nor does it create a presumption of a violation of a duty of care or relieve a jury of finding a breach of such a duty. However, in this state a statutory violation can be considered by the fact-finder as evidence of negligence when the plaintiff demonstrates that he or she is a person whom the statute was designed to protect . . . and that the harm that occurred was the kind of harm the statute was designed to prevent.<sup>27</sup>

While judges over the centuries have in their discretion allowed crime victims the opportunity directly to address the court, there is no opinion, decision or dictum, at least none in recent history, from which it could be concluded that crime victims were afforded such opportunities as a matter of *right* at common law. Yet, the reader might look back to the days in England and

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Inc., 674 A.2d 1223, 1226 (R.I. 1996)).

26. *Id.* at 585.

27. *Id.* at 628 (Flanders, J., dissenting) (emphasis added) (internal citations omitted).

Colonial America when it was for the crime victim himself, his family, friends and neighbors to apprehend the perpetrator and bring him to trial before the magistrate and "prosecute" the complaint at a public trial where all had notice and those who wished were in attendance.<sup>28</sup> Also, in cases where an accomplice was found to have assisted somehow in the perpetrator's escape, that accomplice was held to answer as if he was the principal.<sup>29</sup> These traditions may be said to survive in the (albeit modified) form of citizens' arrest,<sup>30</sup> private criminal complaint,<sup>31</sup> and the right to seek "restitution."<sup>32</sup> Where an employee of the state or municipality has negligently or willfully deprived a crime victim of his common law right to seek restitution or otherwise enjoy the opportunity to participate in, or at least witness a proceeding arising out of the offense against him, should not that employee and his principal now be substituted for the perpetrator and held to answer to the victim?

When one examines the common law history, rather than say that these "rights" never existed, it is more correctly stated that the vindication of a crime victim's rights was traditionally entrusted, again, to the judiciary and to the prosecuting authorities rather than to the crime victim himself. Our Rhode Island Supreme Court has held:

(W)here the case is new in principle, the courts have no authority to give a remedy, no matter how great the grievance; but where the case is only new in instance, and the sole question is upon the application of a recognized

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28. See Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 359-365 (1986) (discussing the history of private prosecutions in England); see also WILLIAM BLACKSTONE, 4 COMMENTARIES 5-7, 304-05, 308-12 (1769) (describing the English system of private prosecutions); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 86 (J.P. Mayer & M. Lerner, eds. 1966) (noting that in colonial America, "the officers of the public prosecutor's office are few, and the initiative in prosecutions is not always theirs.").

29. See WILLIAM BLACKSTONE, 4 COMMENTARIES 35 (1769).

30. Rhode Island has codified the common law right to citizens arrest at R.I.G.L. § 12-7-16 (1956).

31. Cronan *ex rel.* State v. Cronan, 774 A.2d 866, 871 (R.I. 2001) ("private misdemeanor prosecutions, initiated by complaints filed by a private citizen, long have been a part of Rhode Island criminal law.")

32. Rhode Island Courts are permitted to require both private and public restitution (community service) pursuant to G.L. § 12-19-32.

principle to a new case, 'it will be just as competent for courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago.'<sup>33</sup>

Further discussion as to the available "defenses" to the Bandonis' complaint would be moot since the case was dismissed under Rule 12(b)(6). Nonetheless, it appears from the facts of this case that none of the common law defenses,<sup>34</sup> the various immunities<sup>35</sup> and the so-called 'public duty doctrine' could successfully be interposed.<sup>36</sup> Moreover, most – if not all – of the 'list of awfuls' recited by the defendants, and by the majority opinion – the prospect of crime victims suing prosecutors, defense lawyers and judges – is no more than a chimera. It was never suggested to the Court that any of the recognized immunities would be cast off in this or any other such action.

## B. Issue II -The Constitutional Tort

In the absence of any adequate existing civil remedy for the alleged violation of the statutory and/or constitutional rights of individuals identified as the victims of crime, is

33. *Henry v. Cherry & Webb*, 73 A. 97, 101 (R.I. 1910) (internal citations omitted).

34. In *Becker v. Beaudoin*, 261 A.2d 896, 896 (R.I. 1970), the Rhode Island Supreme Court abrogated the common law doctrine of municipal immunity.

35. Traditionally, an individual tortiously injured by an agent of the state or one of its political subdivisions was barred from recovery by the doctrine of sovereign immunity. See WILLIAM LLYOD PROSSER & W. PAGE KEETON, *THE LAW OF TORTS*, § 131 at 1032 (5th ed.1984). As our Supreme Court has observed "the rationale for this rule stems from a common-law theory thoroughly rejected by the American people under King George III, namely, that 'The King Can Do No Wrong.' Since 1957 the overwhelming majority of jurisdictions have either limited or repudiated the doctrine of sovereign immunity by court decision or legislative fiat." *Catone v. Medberry*, 555 A.2d 328, 330 (R.I. 1989). Consistent with that trend the Rhode Island General Assembly statutorily abolished the doctrine of sovereign immunity against the state in 1970 with the enactment of the Governmental Tort Liability Act, R.I. Gen Laws § 9-31-1 (1985 Reenactment) (as enacted by P.L. ch. 181, § 2 (1970)).

36. "[T]he public-duty doctrine shields the state and its political subdivisions from tort liability "arising out of discretionary governmental actions that by their nature are not ordinarily performed by private persons." *Houle v. Galloway School Lines, Inc.*, 643 A.2d 822 (R.I. 1994) (quoting *Haley v. Town of Lincoln*, 611 A.2d 845, 849 (R.I. 1992)).

such a remedy appropriate in furtherance of the purpose of General Laws Sec. 12-28-1, et seq., and/or R.I. Const., Art I, sec 23 and necessary to assure their effectiveness, and will such a right of action as claimed by these plaintiffs, or "constitutional tort," so-called, now be judicially recognized or created by this Honorable Court in order to provide redress for the deprivation of these rights?<sup>37</sup>

The traditional common law remedies recited above are roundabout and wholly inadequate to the task of addressing the wrong done to the Bandonis. The state constitution belongs to all Rhode Island citizens, and when any citizen suffers the abridgment of a specified constitutional right as a result of the tortious acts of the sovereign, its agents, servants and employees, that citizen should be entitled to seek redress and to be compensated for the specific injury done him. Where there is no adequate remedy presently recognized, it is incumbent upon the Supreme Court to examine the state constitution, to determine whether or not the constitutional provision in question is self-executing, and if so, to accord recognition to the existence of a direct cause of action thereunder, or "constitutional tort."<sup>38</sup> Moreover, it is always within the sound discretion of the court whether such a direct action is necessary to effectuate the provision and to further its purpose, and then to create such an action.<sup>39</sup> As the United States Supreme Court has stated, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."<sup>40</sup> Likewise "where a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions."<sup>41</sup>The Rhode Island Constitution provides:

A victim of crime shall, as a matter of right, be treated by

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37. Brief of Appellant Bandonis at 1, *Bandoni v. State*, 715 A.2d 580 (R.I. 1998) (No. 95-563).

38. See *Bandoni*, 715 A.2d at 585-86.

39. See RESTATEMENT (SECOND) OF TORTS § 874A (1979).

40. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

41. *Davis v. Burke*, 179 U.S. 399, 403 (1900).

agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process. Such person shall be entitled to receive, from the perpetrator of the crime, financial compensation for any injury or loss caused by the perpetrator of the crime, and shall receive such other compensation as the state may provide. Before sentencing, a victim shall have the right to address the court regarding the impact which the perpetrator's conduct has had upon the victim.<sup>42</sup>

Although the corresponding state statute is more specific and detailed with respect to these victims' rights,<sup>43</sup> it must be remembered that the statute was enacted some three years prior to the adoption of Article 1, Section 23. It cannot be said to be an "enabling act" or legislation specifically designed to implement this constitutional provision. As will be shown, this constitutional amendment was, in fact, drawn by the framers in response to that which they perceived to be an inherent defect in the statute: the lack of an *enforcement* provision. Since the constitutional amendment of 1986, the General Assembly has not amended the Victim's Rights section to provide crime victims a cause of action arising out of the deprivation of their rights, but this fact should not have been determinative of the issue. Where the constitutional provision in question may be found to be self-executing, no action by the legislature is required to give it full force and effect "[t]he absence of legislative enabling statutes cannot be construed to nullify rights provided by the constitution if those rights are sufficiently specified."<sup>44</sup> The first question is whether this provision is self-executing. The Rhode Island Supreme Court has repeatedly addressed the proper approach to constitutional interpretation:

Our task in construing constitutions is to give effect to the intent of the framers. In so doing, we employ the well-established rule of construction that when words in the constitution are free of ambiguity, they must be given their plain, ordinary and usually accepted meaning.

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42. R.I. CONST. art. I, § 23.

43. See R.I. GEN. LAWS §§ 12-28-1 – 12-28-13 (2002).

44. See *Shields v. Gerhart*, 658 A.2d 924, 927 (Vt. 1995).

Every clause of the constitution must given its due force, meaning, and effect, and no word or section can be assumed to have been unnecessarily used or needlessly added . . .

In construing a constitutional provision, this court properly consults extrinsic sources, including the proceedings of constitutional conventions and any legislation related to the constitutional provision that was enacted at or near the time of the adoption of the constitutional amendment. And finally, in our examination of the constitution, we must look to the history of the times and examine the state of affairs as they existed when the constitution was framed and adopted.<sup>45</sup>

The Rhode Island Constitution mandates that “[e]very person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one’s person, property, or character.”<sup>46</sup> However, it is not suggested that this provision is, in and of itself, the source of any new substantive right or cause of action. It has been said in paraphrase of the section that there is no wrong without a remedy, but it is equally true that there can be no actionable wrong unless there is a corresponding right vested otherwise in the party seeking redress. Even if crime victims’ rights were not known at common law, those rights are now clearly established by the Rhode Island Constitution’s Article I, Section 23, that is, until the decision in *Bandoni*.

#### V. THE “TROUBLING RAMIFICATIONS”<sup>47</sup> OF THE DECISION

By means of the Court’s decision in this case the constitutional right of crime victims to address the court before sentencing of the criminal who injured them “regarding the impact which the perpetrator’s conduct has had upon the victim,”

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45. *City of Pawtucket v. Sundlun*, 662 A.2d 40, 45 (R.I. 1995) (internal citations omitted).

46. R.I. CONST. art. I, § 5 (emphasis added).

47. *Bandoni*, 715 A.2d at 602 (Flanders, J., dissenting).

has been judicially emasculated.<sup>48</sup> “As a result, a right that our Constitution declares to be “essential and unquestionable,” has been rendered nonessential and questionable; a right that our Constitution decrees is to be “established, maintained and preserved,” has been disestablished, dismembered and disserved; and a right that our Constitution proclaims to be “of paramount obligation in all . . . judicial . . . proceedings,” has been judicially subordinated to a vision of legislative hegemony over the protection of constitutional rights.”<sup>49</sup>

Article I, Section 5, of the Rhode Island Constitution unequivocally guarantees all persons access to the judicial process no matter what the source of the right to be vindicated.<sup>50</sup> Whereas the law will provide a remedy for every wrong, it cannot be gainsaid that the law will provide a remedy for the abridgment of these crime victims’ constitutional rights. As was stated by the Vermont Supreme Court in its decision to recognize the right of direct action under its state constitution, “(t)o deprive individuals of a means by which to vindicate their constitutional rights would negate the will of the people in ratifying the constitution, and neither this Court nor the Legislature has the power to do so.”<sup>51</sup>

The Vermont Court continued:

In determining whether a constitutional provision is self-executing, most jurisdictions have measured their constitutions against the standard adopted by the United States Supreme Court in *Davis v. Burke*:

“A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected . . . and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law . . .” In short, if complete in itself, it

48. R.I. CONST. art. I, § 23

49. *Bandoni*, 715 A.2d at 602 (Flanders, J., dissenting).

50. See *Kennedy v. Cumberland Engineering Co.*, 471 A.2d 195, 197-201 (R.I. 1984).

51. *Shields v. Gerhart*, 658 A.2d 924, 928 (Vt. 1995).

executes itself."<sup>52</sup>

Further elaborating on this standard, The Vermont Supreme Court emphasized that:

Determining whether a provision supplies a sufficient rule entails application of certain relevant criteria, no one of which is dispositive. First, a self-executing provision should do more than express only general principles; it may describe the right in detail, including the means for its enjoyment and protection. Ordinarily a self-executing provision does not contain a directive to the legislature for further action. The legislative history may be particularly informative as to the provision's intended operation. *Id.* Finally, a decision for or against self-execution must harmonize with the scheme of rights established in the constitution as a whole.<sup>53</sup>

The first sentence of Article I, Section 23 states that "[a] victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process."<sup>54</sup> Applying the first of the aforementioned criteria, it would appear that this sentence is only meant to be a general statement of fundamental principle; it specifies no particular "right" or any means by which it should be enjoyed or protected. Standing alone, this expression does not appear to give rise to that which may be called an "enforceable" or "actionable" right against the state or its agents.

However, Article I, sec.23 must be read as a whole. The remaining two sentences do provide very *specific* rights to the crime victim. These sentences provide that:

"[s]uch person shall be entitled to receive, from the

52. 179 U.S. 399, 403 (1900) (citation omitted). *Cf.* *State v. Sanabria*, 474 A.2d 760, 770-75 (Conn. 1984) (analyzing whether a state constitutional amendment was self-executing); *Clausing v. San Francisco Unified Sch. Dist.*, 271 Cal. Rptr. 72, 79 (Cal. Ct. App. 1990) ("It is true that the constitutional provision protecting the right of privacy . . . is self-executing and supports a cause of action for an injunction."); *Gray v. Bryant*, 125 So.2d 846, 851 (Fla. 1960) ("The fact that the right granted by [a] provision may be supplemented by legislation, further protecting the right or making it available, does not of itself prevent the provision from being self-executing.")

53. *Shields*, 658 A.2d at 928 (internal citations omitted).

54. R.I. CONST. art. I, § 23

perpetrator of the crime, financial compensation for any injury or loss caused by the perpetrator of the crime, and shall receive such other compensation as the state may provide, before sentencing, a victim shall have the right to address the court regarding the impact which the perpetrator's conduct has had upon the victim."<sup>55</sup>

As a whole then, article I, section 23 unequivocally expresses much more than abstract truisms. It sets forth the specific right to receive financial compensation from the perpetrator of the crime. It sets forth the right to such compensation as the state may provide. Most importantly, it sets forth the specific right to address the court regarding the impact which the criminal's conduct has had upon the victim. This amendment contains no direction whatsoever for the General Assembly to act, and the rights that are guaranteed thereby are not dependent on any legislative provision, past, present or future.

Upon examination of the minutes and other records of the 1986 Constitutional Convention it appears that they do offer guidance as to the intended effect of article 1, section 23.<sup>56</sup> There were three resolutions before the Judiciary Committee relative to victim's rights, that which was selected was numbered Resolution 86-00140, which, after debate was sent to the convention and after approval, to the Committee on Style and Drafting in the following form:

All persons within this state who are victims of crime shall, as a matter of right be treated with dignity, respect and sensitivity during all phases of the criminal justice process. Whenever possible, such person shall receive financial compensation for their injuries or losses from the perpetrator of the crime. They shall have the right to address the court regarding the impact which the perpetrator's conduct has had upon the victim. *These rights shall be enforceable by the victims of crime, and they shall have recourse in the law for any denial thereof.*<sup>57</sup>

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55. *Id.*

56. Minutes of the Rhode Island Constitutional Convention of 1986.

57. Report of the Judiciary Committee Relating to Victims of Crime

Chairman Allen J. Wiant reported that, of the three proposals before the Judiciary Committee, Resolution 86-00140 “. . . steers a middle course by enumerating substantial rights for victims of crime, but leaving specific provisions of enforcement to the General Assembly.”<sup>58</sup> That “specific provisions for enforcement” were left to the General Assembly notwithstanding, it is clear that the existence of the victim’s substantive right to enforce this constitutional provision in the courts was not meant to be dependent on any legislative act:

The Committee’s consensus is to be sympathetic to the need for greater protection for victims of crime. The Committee believes enforcement of victim’s present statutory rights is presently inadequate, and that this Convention has the opportunity to remedy the injustices which are occurring under present state law.<sup>59</sup>

*Comparison with Current Statutory Provisions*

“\* \* \* Besides the 14 enumerated (victim’s) rights, the statute contains, as Section 12-28-2, a general statement of legislative purpose. The text of Resolution 86-140 closely parallels this statement of legislative purpose. Like Section 12-28-2, Resolution 86-140 would assure that victims be treated with “dignity, respect and sensitivity during all phases of the criminal justice process;” that victims “receive financial compensation whenever possible;” and that victims have the right to “address the court.” However, 86-140 differs from the victim’s right statute by adding the following language: “These rights shall be enforceable by the victims of crime and they shall have recourse in the law for any denial thereof.”<sup>60</sup>

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Resolution (86-140) 10 (Judiciary Committee Report), in *Journal of the 1986 Constitutional Convention*, Vol. 1, No. 8, at 1-2 (May 29, 1986) (emphasis added) [hereinafter “*Report of the Judiciary Committee*”].

58. *Id.*

59. *Id.* at 4-5.

60. *Id.*

*Committee Conclusions*

The Judiciary Committee concluded that even though the General Assembly has attempted to address problems in the treatment victims receive from the criminal justice system, this effort has been inadequate. The Committee concluded rights for victims should be made constitutional, both to make them more enduring, and to counterbalance the constitutional stature of defendants' rights. The Committee believes that the lack of enforcement provisions in the present statute is a major defect, and it has therefore resolved to mandate enforceability, while leaving the creation of specific provisions or mechanisms to the General Assembly.<sup>61</sup>

The last sentence, which literally declared that these victims' rights shall be "enforceable in the law," somehow disappeared in the Committee on Style and Drafting before it was sent back to the Convention for final approval. It remains unclear exactly though it has been suggested that the Committee on Style and Drafting, which left no notes or record of its deliberations, struck this language "for economy of language" as "unnecessary" and as sounding "too legislative."<sup>62</sup>

Of greatest significance, perhaps, is the document entitled "EXPLANATION By Convention Legal Services" given to the delegates upon the reading of the measure to them for final approval. The final form of this Amendment, as it was submitted to the convention, approved by the delegates and as it now appears in the State Constitution, was accompanied by the following explanation: "[t]his resolution would enumerate basic rights to be afforded victims of crime and renders those rights enforceable. This resolution would take effect upon voter approval."<sup>63</sup>

61. *Id.*

62. Conversation with Kevin Mckenna, 1986 Rhode Island State Constitutional Convention President, in R.I. (April 1, 1996). This author had thoroughly researched all available materials from the 1986 constitutional convention, and had spoken to the Convention President and others in preparation of his brief to the Supreme Court.

63. See Convention Legal Services, *Explanation*, in J. Jackson, compiler, AN INVENTORY OF THE PAPERS OF THE RHODE ISLAND CONSTITUTIONAL

Confronted with this overwhelming evidence as to the framers' actual intent, a majority of the Supreme Court found, nevertheless, that the provision for enforceability was not mandated by the Convention. The Court begins its full discussion of this issue in *Bandoni* by rejecting the notion that the textual alterations were made for economy of language.<sup>64</sup> "First, we have great difficulty agreeing that the Committee on Style and Drafting "altered" the text of Resolution 86-140 but only 'for the economy of language' . . . whatever the reasoning for the committee's changes may have been, the rationale of "economy of language" is not cogently supported."<sup>65</sup> The Court then continued:

[I]t is equally apparent that the deletion of the last sentence expressly providing that crime victims 'shall have recourse in the law' and substituting for it the clause 'such other compensation as the state may provide' is nothing short of a substantive alteration. Thus, it is not only the deletion of the language providing for 'recourse in the law for any denial' of rights that is of moment to our analysis but also the *inclusion* of the language 'and shall receive such other compensation as the *state* may provide.'<sup>66</sup>

Thus, concluded the Court, "[p]ractically speaking, it is impossible for the Bandonis to 'receive such other compensation as the state may provide,' as article 1, section 23, contemplates, because the state itself has not provided for 'such other compensation.'<sup>67</sup>

After reaching its conclusion the majority explained its rationale for failing to consider the convention documents:

[T]he dissent relies on two textually identical secondary sources for the proposition that the framers intended to mandate enforcement "while leaving specific provisions or mechanisms to the determination of the general assembly *and the courts*." However, simply stated, these two sources incorrectly cite to the Constitutional Convention's

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CONVENTION (Providence College 1989).

64. *Bandoni*, 715 A.2d at 591.

65. *Id.*

66. *Id.* (emphasis in original)

67. *Id.*

Judiciary Committee report. Indeed, the report only states its resolve “to *mandate* enforceability while leaving the creation of specific provisions or mechanisms to the General Assembly.” Not once throughout its entire report does the Judiciary Committee ever mention, or even imply, that the creation of specific provisions or mechanisms should also be left to the courts. The record simply does not support this conclusion.<sup>68</sup>

The Court also found unlikely and unpersuasive the idea that the measure was passed “only after the delegates were assured that the style committee’s changes were made only ‘for the economy of language,’” because a “review of the Convention proceedings finds no such ‘assurances,’ promises, or even any inquiry . . . about the modifications . . . .”<sup>69</sup> Relying on the then recent First Circuit Court of Appeals Decision in *State of Rhode Island v. Narragansett Indian Tribe*,<sup>70</sup> the court noted that “even if the delegates did receive explicit assurances as the dissent suggests, statements by individual legislators or framers are not to be given talismanic significance.”<sup>71</sup> As will be shown this conclusion by the court is erroneous as is its suggestion that the state has not provided “such other compensation.” In fact such other compensation is and was provided. Most importantly, funds for this type of compensation are specifically provided for in the violent crimes indemnity fund.<sup>72</sup>

The rationale applied by the majority in order to justify its declaration that the Convention’s mandate of “enforceability” is itself “unenforceable” is dubious at best. The majority decision represents no less than a feat of judicial alchemy whereby precious gold was thereby transformed into worthless lead, with the phrase “judicial restraint” solemnly murmured like a

68. *Id.* (internal citations omitted) (emphasis in original).

69. *Id.* at 591-92 (internal quotations omitted).

70. 19 F.3d 685, 685 (1st Cir. 1994)

71. *Bandoni*, 715 A.2d at 592.

72. See Criminal Injuries Compensation Act of 1972 (P.L.1972, ch. 254, § 1), codified at G.L.1956 chapter 25 of title 12 (amended by Criminal Injuries Compensation Act of 1996 (P.L.1996, ch. 434, § 3), codified at G.L.1956 § 12-25-1.1, §§ 12-25-16 through 12-25-30). The Criminal Injuries Compensation Act of 1972 was superceded by the Criminal Injuries Compensation Act of 1996 (P.L.1996, ch. 434) now codified at § 12-25-16 – 12-25-31.

cabalistic shibboleth to effect the transmutation. The irony of the Court's reliance on *Narragansett Indian Tribe*,<sup>73</sup> as "particularly instructive"<sup>74</sup> is immediately apparent. The decision in *Narragansett Indian Tribe* is itself a travesty whereby, despite the explicit assurances given to the Narragansett tribe that they would retain their sacred and sovereign rights as a tribe, they were, by judicial fiat, excepted from the norm and denied those very rights.<sup>75</sup>

What's more, the decision overlooks the fact that the changes were made by the committee on style and drafting. It had no authority from the convention to alter the substance of any amendment sent to it, ostensibly for 'style and drafting.'<sup>76</sup> While the Judiciary Committee expressed its intention that the creation of "specific provisions or mechanisms" should be left to the General Assembly, it is urged by the Court that this statement reflects nothing more than that committee's acknowledgment of the existence of the Crime Victim's Bill of Rights and its recognition that the General Assembly is better suited to the task of setting out the specific mechanisms for the orderly administration of the system by which victims are notified of their rights, kept informed about the criminal case and brought into court to speak.<sup>77</sup> But the majority's holding that the victim of crime has no actionable claim against the state and/or municipal officials who have abridged these constitutional rights until the General Assembly creates such a claim flies in the face of the framer's obvious intent that such a cause of action should exist by right of the passage of article I, section 23.

It is certainly within the plenary authority of the General

73. 19 F.3d 685, 685 (1st Cir. 1994)

74. *Bandoni*, 715 A.2d at 592.

75. See generally, Nathaniel T. Haskins, Note, *Framing Concurrent Jurisdiction Issues In The Self-Determination Era: Accepting The First Circuit's Analysis But Rejecting Its Application to Preserve Tribal Sovereignty*, 32 AM. INDIAN L. REV. 441, 441 (2007-2008) (arguing that the First Circuit decisions regarding the Narragansett Indian tribe provide a workable framework to analyze concurrent jurisdiction but that the factors should be examined with the aim of preserving tribal sovereignty and self determination).

76. *Bandoni*, 715 A.2d at 624 n.63. (Flanders, J. dissenting).

77. *Id.* ("Not once throughout its entire report does the Judiciary Committee ever mention, or even imply, that the creation of specific provisions or mechanisms should also be left to the courts.")

Assembly to legislate as to the time and place for bringing such actions, and to place reasonable limitations on the victim's right to recover damages against the state; this is also consistent with the intent of the framers that the creation of "specific provisions or mechanisms" should be left to the legislature.<sup>78</sup> However, that the General Assembly has not seen fit to do so does not affect the self-executing nature of Article I, sec. 23 or the right of the victim to bring such an action. As the New Jersey Supreme Court has noted, "Just as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence, and the judicial obligation to protect the fundamental rights of individuals is as old as this country."<sup>79</sup>

In *Phillips v. Youth Development Program, Inc.*, 459 N.E. 2d. 453, 457 (1983), the Supreme Judicial Court of Massachusetts declared that "(A) person whose constitutional rights have been interfered with may be entitled to judicial relief even in the absence of a statute providing a procedural vehicle for obtaining relief."

In Rhode Island our Supreme Court ". . . has long recognized that after the adoption of the State Constitution the powers of the crown and parliament resided in the Legislature, less the power taken therefrom for the federal government and also minus whatever powers were taken from it by the constitution of the State."<sup>80</sup> However, "[u]nlike the Federal Constitution, which contains grants of enumerated powers, the constitution of this state sets forth limitations upon what is otherwise plenary power of the State Legislature."<sup>81</sup> "More specifically," the court has recognized "that the General Assembly possesses 'all of the powers inhering in sovereignty other than those which the constitution textually commits to other branches of our state government, and that those that are not so committed \* \* \* are powers reserved to the General Assembly.' Hence, the General Assembly may exercise any of such powers, subject only to those limitations expressly or

78. *See id.* at n.59.

79. *King v. So. Jersey Nat'l Bank*, 177, 330 A.2d 1, 10 (1974) (citing *Cooper v. Nutley Sun Printing Co.*, 175 A. 2d. 639 (1961))

80. *In re Advisory Opinion to the House of Representatives*, 485 A.2d 550, 553 (R.I. 1984) (quoting *Payne & Butler v. Providence Gas Co.*, 31 R.I. 295, 315, 77 A. 145, 153 (1910)).

81. *Id.*

impliedly found in the Constitution of the United States (and) of the Constitution of the State of Rhode Island.”<sup>82</sup>

The Bandonis’ position may be viewed as consistent with this holding, for certainly, when a constitutional provision is to be construed, it is within the exclusive power of the courts to do so. When a constitutional provision is determined to be self-executing, such a constitutional provision is, or can be said to be an implicit limitation on the power of the General Assembly to interfere with the rights conferred thereunder:

“In America, written constitutions, conferring and dividing the powers of government, and restraining the actions of those in authority, for the time being, have been established as securities of public liberty and private right.

...

It is true, the whole community may modify the rights which persons can have in things, or at their pleasure, abolish them altogether. But when the community allows the right and declares it to exist, that construction is the freest and best which forbids the government to abolish the right, or which restrains the government from depriving a particular citizen of it.”<sup>83</sup>

In having set forth specific rights to be afforded the victims of crime, in having given no direction to the General Assembly, and consistent with the manifest intent of the framers, this constitutional provision, article I, section 23 asserts itself as the supreme law of this state and does, therefore, serve as a solid basis for an aggrieved crime victim’s cause of action.

It is also for the court to examine the text of article I, section 23 in the context of the state constitution as a whole in order to gauge its intended effect.<sup>84</sup> In so doing it can be seen that there are no other provisions in the Rhode Island Constitution relating

82. *Kennedy v. State of Rhode Island*, 654 A.2d 708, 710 (R.I. 1995) (internal citations omitted)

83. *Corum v. University of North Carolina*, 413 S.E.2d 276, 293 (N.C. 1992) (citing *Hoke v. Henderson*, 15 N.C. 1 (1833)).

84. R.I. CONST. art. X, § 2 (“The supreme court shall have final revisory and appellate jurisdiction upon all questions of law and equity. . . .”)

to crime victims' rights. In *Shields v. Gerhart*, 658 A.3d 924 (Vt. 1995), the Vermont Supreme Court determined the following provision of its state constitution to be self-executing "That the people have the right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of governments, and therefore the freedom of the press ought not to be restrained."<sup>85</sup>

In so doing the court held "[o]ur limited experience with Article 13 does not inhibit us from finding it to be self-executing. First, in contrast to Article I, it unequivocally expresses more than general principles alone. It sets forth a single, specific right of the people to make themselves heard, a fundamental characteristic of democratic government."<sup>86</sup> The court reasoned that:

"[s]ince Article 13 establishes a specific free speech right, the absence of a legislative directive supports a conclusion that the provision is self-executing. Indeed, it would make little sense to have the right to speak out on government matters depend on legislative enactment. considering the fundamental nature of citizen input in our republican form of government."<sup>87</sup>

Finally, the court concluded:

"recognizing a self-executing right to free speech and to seek redress for its infringement comports with the general constitutional scheme \* \* \* nowhere else in the Chapter I Declaration of Rights can a general right to comment on the conduct of government be found. Article 13 creates a specific right to free speech that is crucial to the operation of government and vital to the effectuation of other enumerated rights. We hold that the provision is self-executing and that it may serve as the basis for a private cause of action against the state."<sup>88</sup>

The Rhode Island Constitution contains a similar provision in article I, section 21: "[t]he citizens have a right in a peaceable manner to assemble for their common good, and to apply to those

85. VT. CONST. art. 13

86. *Shields v. Gerhart*, 658 A.2d 924, 930 (Vt. 1995).

87. *Id.*

88. *Id.*

invested with the power of government, for redress of grievances, or for other purposes, by petition, address or remonstrance. No law abridging the freedom of speech shall be enacted.”<sup>89</sup>

Certainly, the “victims’ rights” that are set forth in the Rhode Island Constitution, Article 1, sec. 23 are consistent with the right of Rhode Island citizens “to apply to those invested with the powers of government, for redress of grievances,” and comparable to the “right to comment on the conduct of government” found in Vermont’s constitution.

Of particular interest is the decision of the North Carolina Supreme Court in *Corum v. University of North Carolina*, 413 S.E. 2d 276 (N.C. 1992), wherein a university faculty member who was discharged from his position as Dean brought an action for damages against the state university and university officials alleging that his discharge violated his right to free speech under the North Carolina state constitution.<sup>90</sup> Analogizing the plaintiff’s constitutional right to free speech to the state guarantee of just compensation to individuals whose property is taken by condemnation, the Court found the free speech provision to be similarly self-executing:

Our Constitution Article I, section 17 guarantees payment of compensation for property taken by sovereign authority \* \* \* A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing and neither requires any law for its enforcement nor is susceptible of impairment by legislation. And where the Constitution points out no remedy and no statute affords an adequate remedy under a particular fact situation, the common law will furnish the appropriate action for adequate redress of such grievance.

. . .

Having no other remedy, our common law guarantees plaintiff a direct action under the State Constitution for alleged violations of his freedom of speech rights. We

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89. R.I. CONST. art. I, § 21

90. *Corum*, 413 S.E. 2d at 282.

conclude that plaintiff does have a direct cause of action under the State Constitution against defendant Durham in his official capacity for alleged violations of plaintiff's free speech rights.

The authorities in North Carolina are consistent with the decisions of the United States Supreme Court and decisions of other state supreme courts to the effect that officials and employees of the State acting in their official capacity are subject to direct causes of action by plaintiffs whose constitutional rights have been violated.<sup>91</sup>

Like the constitution of North Carolina, our state constitution also provides for the payment of just compensation for the taking of private property.<sup>92</sup> Would anyone dare deny, in the absence of a legislative provision for its enforcement, that this provision would be found reasonably to be self-executing?

Where Article I, Section 23 is consistent with the overall constitutional scheme, and where there is no other constitutional provision dealing with the rights of crime victims, the fourth of the criteria employed by the courts in determining that a constitutional provision is self-executing, and therefore provides the basis for a cause of action, has been satisfied.

It has been observed by one prominent author on the subject of state constitutional rights, that "while most constitutional Declarations of Rights should indeed be considered self-executing . . . it does not necessarily follow that a court must provide the specific remedy of damages, as opposed to injunctive or declaratory relief, although the court retains the power to do so."<sup>93</sup>

91. *Id.* at 289-90 (internal citations and quotations omitted). For cases finding a direct cause of action for plaintiffs who have their rights violated by a state actor, see, e.g., *Bivens v. Six Unknown Agents*, 403 U.S. 388, 388 (1971); *Widgeon v. Eastern Shore Hospital Ctr.*, 479 A. 2d. 921, 921 (Md. 1984); *Philips v. Youth Development Programs, Inc.*, 459 N.E. 2d. 453, 453 (Mass 1983); *Lloyd v. Stone Harbor*, 432 A.2d 572, 572 (N.J 1981); *Bagg v. University of Texas Medical Branch*, 726 S.W. 2d. 582, 582 (Tex. Ct. App. 1987); *Schreiner v. McKenzie Tank Lines & Risk Management Servs., Inc.*, 408 So. 2d. 567, 567 (Fla. Dist. Ct. App. 1982) (*aff'd* by *Schreiner v McKenzie Tank Lines, Inc.* 432 So. 2d. 567, 567 (Fla. 1983)).

92. R.I. CONST. art. 1, § 16.

93. Jennifer Friesen, *STATE CONSTITUTIONAL LAW, LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* 7-14 (1992).

It is recognized that in the case of certain constitutional violations, injunctive or declaratory relief may be an appropriate remedy. The Supreme Court might declare that the defendants are required to "do their duty" to the plaintiffs and to others similarly situated, but such a declaration, with nothing more would be, at best, a salutary gesture. In terms of compelling the defendants' general compliance with the constitution and statute, the Rhode Island Supreme Court has acknowledged that its powers are necessarily limited to something other than the "direct" approach:

(T)he control which the judicial department exercises over the others, is of a restraining and not a compulsory power. But this is only practically and not literally so. We may not enjoin the others from doing an unconstitutional act, but by refusing to give effect to such act, or relieving against it, when properly and judicially applied to for that purpose, we may restrain them. We cannot restrain \* \* \* issuing the bonds of the state contrary to law, but when the question is properly before us, we can declare such bonds void \* \* \* but we have no power to compel either of the other departments of the government to perform any duty which the constitution or the law may impose upon them, no matter how palpable such duty may be, any more than either of those departments may compel us to perform our duties.<sup>94</sup>

In *Bandoni*, once their right to address the court in a meaningful fashion was permanently lost, the only *viable* remedy left was to seek monetary damages; that the majority insisted that the right to other relief had thus been "waived" by the Bandonis evidences its inability or unwillingness to distinguish the forceful and logical advocacy of the Bandonis' counsel for *practical* relief. As was stated by Justice Harlan in his concurring opinion in *Bivens v. Six Unknown Federal Narcotics Agents*, "It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by seeking injunctive relief from any court . . .

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94. Reply of The Supreme Court To A Communication From Certain Members of The House of Representatives in The General Assembly, 191 A. 259, 272 (1937) (citing *Billings v. Bissell*, 19 Ill. 229, 229 (1857)).

for people in Bivens' shoes, it is damages or nothing."<sup>95</sup>

Likewise, money damages were the only adequate remedy for the Bandonis. To allow the Bandonis less would be to render the language of Article I, sec. 23 nugatory and to produce an absurd result; the Rhode Island Supreme Court has consistently refused to interpret provisions of the law in such fashion.<sup>96</sup> To borrow Justice Flanders' apt observation, that the Bandonis' were allowed *no* remedy means:

[T]he Bandonis have now been thrice victimized: first, by the drunk-driving criminal defendant who ran them over leaving Mr. Bandoni with a crushed leg and a fractured pelvis; second, by defendant officials who allegedly failed to provide the Bandonis with their notice and presentencing-hearing rights before the criminal who injured them was let off with a no-jail plea bargain; and third, by a majority of this Court who now say that the Bandonis have no remedy for the defendant officials' violation of their constitutional rights.<sup>97</sup>

## VI. BIVENS ACTION

In *Bivens v. Six Unknown Federal Narcotics Agents*, the United States Supreme Court created a cause of action for damages against federal agents acting under color of their authority for having violated the plaintiff's right to be free from unreasonable search and seizure.<sup>98</sup> Webster Bivens, the plaintiff, alleged that these agents, acting without a warrant and without probable cause, had entered his apartment, had used unreasonable force in effecting his arrest, had searched the apartment and had later interrogated him and subjected him to a visual strip search.<sup>99</sup> He brought an action in the United States District Court for the Eastern District of New York against the agents, seeking recovery for humiliation and mental suffering

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95. *Bivens*, 403 U.S. at 411.

96. See generally *Falstaff Brewing Corp. Re: Narragansett Brewery Fire*, 637 A.2d 1047 (R.I. 1994); *Brennan v. Kirby*, 529 A.2d 633 (R.I. 1987); *Labbadia v. State*, 513 A.2d 18 (R.I. 1986).

97. *Bandoni*, 715 A.2d at 604.

98. *Bivens*, 403 U.S. at 389.

99. *Id.*

resulting from their conduct.<sup>100</sup> The District Court dismissed the complaint on the grounds, *inter alia* that it failed to state facts making out a cause of action upon which relief could be granted, and the Court of Appeals for the Second Circuit affirmed on that basis.<sup>101</sup>

At that point in time, Congress had provided no statutory remedy against federal law enforcement agents for such a violation.<sup>102</sup> The Court held that the Fourth Amendment itself supported the claimed remedy of money damages.<sup>103</sup> The Court reasoned that damages are the "ordinary remedy" for such invasions of personal rights, and that it is irrelevant whether the availability of damages is actually necessary to enforce the Fourth Amendment:

That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty, *See Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); . . . Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But, "it is \* \* \* well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts

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100. *Id.* at 389-90.

101. *Id.* at 397.

102. At the time of the events of which *Bivens* complained, 28 U.S.C. § 2680(h), amended by Pub. L. No. 93-253, § 2, 88 Stat. 50 (1974), expressly disallowed under the Federal Tort Claims Act, 28 U.S.C. § 1346 (b), "(a)ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights." As the law stands now, the United States may be held accountable for "assault battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" committed by its "investigative or law enforcement officers." 28 U.S.C. § 2680(h) (2000) (as amended). Also, both the United States and its individual agents, servants and employees may now be held accountable in an action under the F.T.C.A. "which is brought for a violation of the Constitution [or statutes] of the United States." 28 U.S.C.A. § 2679 (b)(2)(A), (B); see also *Carlson v. Green*, 446 U.S. 14 (1980).

103. *Bivens*, 403 U.S. at 396-97.

may use any available remedy to make good the wrong done." . . . Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment . . . we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.<sup>104</sup>

Where the majority of state supreme courts and the U.S. Supreme Court are willing to embrace their judicial oath of fealty to their respective constitutions, what is it that causes Rhode Island to hesitate?

The Supreme Court also noted two possible exceptions to its general holding in *Bivens*, but found that neither was applicable in the case before it; (1) the presence of "special factors counseling hesitation in the absence of affirmative action by Congress[.]" and (2) the presence of an "explicit congressional declaration" that plaintiff could not recover damages "but must instead be remitted to another remedy, equally effective in the view of Congress."<sup>105</sup>

In *Davis v. Passman*, the Supreme Court applied the *Bivens* rationale to an action to obtain a remedy for the violation of an administrative assistant's Fifth Amendment due process rights against sexual discrimination when she was discharged from employment by a member of Congress<sup>106</sup>:

The court in *Davis* cited several factors in support of its decision. First the court determined that a cause of action for damages was particularly appropriate in the case at hand for two reasons: (1) the plaintiff sought only back pay and, therefore, no complicated issues of valuation and causation would arise; and (2) equitable relief, such as reinstatement, would be unavailing because the defendant Congressman was no longer in office. *Id.* at 245, 99 S.Ct. at 2277. Second, although the fact that the defendant had been a member of Congress was a potential "special [factor] counseling hesitation," that factor was overridden by the principle that all persons, including federal officials, were subject to federal

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104. *Id.* at 395-97.

105. *Id.* at 396, 397.

106. *Davis v. Passman*, 442 U.S. 228, 245-48 (1979).

law. *Id.* at 246, 99 S.Ct. at 2277. Third, the court in *Davis* noted the absence of an express congressional prohibition of a damages action for alleged violations of the [F]ifth [A]mendment's due process guarantee. *Id.* at 246-7, 99 S.Ct. at 2277-78.<sup>107</sup>

In *Carlson v. Green*, the Court held that the availability of damages from the United States government under the Federal Tort Claims Act did not preclude a *Bivens* action against individual prison officials where it was alleged that they had violated the plaintiff's Eighth Amendment protection against cruel and unusual punishment.<sup>108</sup> The Court reasoned that the *Bivens* action against the *individual* federal officials would be a more effective specific deterrent in that situation than the corresponding Federal Tort Claim action against the United States.<sup>109</sup> Thus, with these two decisions a third factor, inadequacy or absence (adequacy or presence) of an alternative remedy fell into the *Bivens* reasoning.

Soon thereafter, however, the Court appears to have placed less emphasis on the "adequacy" of potential alternative remedies. In *Bush v. Lucas*, the Supreme Court declined to allow a federal employee a damages cause of action against his employer for an alleged violation of the employee's First Amendment rights.<sup>110</sup> The Court found that civil services damages were available assuming that "civil service remedies were not as effective as an individual damages remedy and did not fully compensate [Bush] for the harm he suffered."<sup>111</sup> Another factor considered by the court in *Bush*, was that, in the court's estimation, Congress is better suited to create new remedies.<sup>112</sup> Along these same lines, in *Chappel v. Wallace*, the Court refused to allow enlisted military personnel a damages action for alleged violations of their equal protection rights perpetrated by their officers.<sup>113</sup> In so doing, the Court cited several "factors counseling hesitation" such as the

107. Kelley Property Development, Inc. v. Town of Lebanon, 627 A.2d 909, 920-21 (Conn. 1993).

108. *Carlson*, 446 U.S. at 19-23.

109. *Id.* at 21.

110. *Bush v. Lucas*, 462 U.S. 367, 390 (1983).

111. *Id.* at 372.

112. *Id.* at 389.

113. *Chappel v. Wallace*, 462 U.S. 296, 305 (1983).

military's unique discipline-based structure, without making reference, as in the earlier cases, to the adequacy of that alternative remedy.<sup>114</sup>

"Special factors counseling hesitation" were also cited by the Court in *Schweiker v. Chilicky*, 487 U.S. 412, 421-22 (1988), in its decision to deny a *Bivens* damages remedy sought by former Social Security disability benefits recipients against the programs administrators. These recipients claimed that an eligibility reevaluation program that resulted in the termination of their benefits was administered in a way that denied them due process.<sup>115</sup> Though their benefits had been restored *via* the Social Security appeals process, they sought damages for emotional distress and the loss of necessities of life:

The Court explained that the exception to *Bivens* liability where there are "special factors counselling hesitation" included "an appropriate judicial deference to indications that congressional inaction has not been inadvertent."<sup>116</sup> After analyzing the administrative remedies available to recipients, the Court found that the case was indistinguishable from *Bush v. Lucas*. The Court was particularly struck by the fact that Congress was aware of and agreed with the plaintiffs' claims but did not create the remedy they sought:

We agree that suffering months of delay in receiving the income on which one has depended for the very necessities of life cannot be fully remedied by the "belated restoration of back benefits." . . . Congress, however, has addressed the problems created by the state agencies' wrongful termination of disability benefits. Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program... Congress has discharged that responsibility to the extent that it affects the case before us, and we see no legal basis that would

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114. *Id.* at 302-04.

115. *Schweiker*, 487 U.S. at 418.

116. *Id.* at 423 (internal quotations omitted).

allow us to revise its decision."<sup>117</sup>

#### VII. THE RESTATEMENT (SECOND) OF TORTS, SEC. 874 A

*Bivens* and those cases which followed, above-cited, may provide a ready reference point from which to begin an analysis of state constitutional rights, and the holdings therein may prove to be the source of persuasive authority. Nonetheless, it is not contended that federal doctrine can, or should be lifted wholesale and applied to state constitutional tort cases:

[S]tate courts should not borrow or copy federal remedial rules merely for the sake of uniformity, at the expense of independent state policy. State courts enforcing state laws are not in the same position as the Supreme Court when it applies [42 U.S.C.]§ 1983. Obviously, they are not limited by questions of Congressional intent. Second, they are not constrained by the policies of federalism. State judges, unlike federal ones, interpret rights for their own state alone. They need not labor under the cautionary influences, which do affect the Supreme Court, of the need to make nationally uniform rules, which bind the officials of another sovereign.<sup>118</sup>

It should also be recognized that in 1971 the *Bivens* court looked obviously not only to its own precedent, but also to the state courts and the body of precedent there-established which supports the judicial creation of a damages remedy for the deprivation of rights in the absence of legislative action. The common law doctrine is expressed in the Restatement (Second) of Torts, Sec. 874(A) which recites as follows:

When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a

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117. *Shields*, 658 A.2d at 931-2 (quoting *Schweiker*, 487 U.S. at 428-29).

118. *Friesen*, *supra* note 93, at 7-7.

suitable existing tort action or a new cause of action analogous to an existing tort action.<sup>119</sup>

The reporter for the Second Restatement used the words “legislative provision” in Sec. 874 A to describe the duty-creating element of this tort, but, as “comment a” to the section explains, “legislative provision” includes constitutional provisions as well as statutes, ordinances, and administrative agency regulations. As the comment also notes, the legislative branch can establish, modify, or abolish remedies for torts. Section 874 A speaks to the judiciary’s power to do so when the legislature has been silent. Judicial opinions refer to this common law doctrine either as the “implied cause of action” or the “statutory tort.” It is probably more accurate to say that the court “affords” a cause of action for the enforcement of a duty rather than “implies” one.<sup>120</sup>

Finally, it must be remembered that there is no corresponding “victims’ rights” amendment to the United States Constitution; moreover, none of the state cases encountered by the author during his preparation of this article deals specifically with the constitutional rights of a victim of crime. One supposes these rights are no more nor less important or worthy of consideration than other fundamental rights as are set forth in the federal constitution and those of the several states; the analysis employed by the majority in *Bandoni* betrays a peculiar and most unseemly lack of sensitivity to those affected by the criminal acts of others, and summarily relegates this relatively new and important constitutional amendment to the judicial scrap heap. In terms of the Supreme Court’s deference to the General Assembly, one calls to mind the words of Hamlet in the scene where he exhorted his mother, the Queen, to abandon his uncle’s bed: “Assume a virtue, if you have it not. That monster, custom, who all sense doth eat, [o]f habits devil, is angel yet in this[.]”<sup>121</sup>

#### VIII. CONCLUSION

More is the pity that the length of this article is necessarily limited by the spatial constraints inherent to any law review

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119. *Id.* at 7-14 (quoting RESTATEMENT (SECOND) OF TORTS §874A (1979)).

120. *Id.* at 7-15.

121. WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK* ACT 3, SC. 4.

article. Consider that the briefs alone in *Bandoni*, all masterfully and painstakingly written, totaled in excess of two hundred fifty pages, and that the decision and dissent themselves totaled over one hundred ten pages, prompting one beleaguered supreme court clerk charged with preparing photocopies to remark that it appears to be the longest decision in Rhode Island Supreme Court history. However, sheer volume notwithstanding the decision is important, at least to those concerned not only with the plight of crime victims, but in a larger sense with the proper role of the state Supreme Court as the guardian of cherished constitutional rights. This article cannot begin thoroughly to exhaust the myriad issues raised by the parties and addressed by the Court. This writing is not designed to ferment rancor nor, certainly, is it intended to insult the earnest efforts of the parties' counsel or those members of the Supreme Court who presided over the appeal. Rather, it is an appeal to those who love the State Constitution and the precepts of justice and fair play and it is hoped that it might inspire law students, advocates, legislators and judges alike to re-examine this troubling decision.

On May 4, 1776 the colony of Rhode Island and Providence Plantations threw off the yoke of British repression represented by George III. Seventy and some-odd-years later the State of Rhode Island adopted its Constitution. It amazes one to think in this day and age that that which was wrestled from George III is now by judicial custom and tradition periodically handed back to his predecessor, Charles II, by right of his colonial charter, whenever the state constitution appears not to address a given issue. Rhode Island rejected the monarch and the British Parliament, and rightfully so. To hold that such a fractious and generally pernicious body as the General Assembly should retain such imperial, and sometimes oppressive plenary power is itself an insult to that cherished document, the Rhode Island Constitution, and to its framers, past and present.

Presumably, the passage of the Separation of Powers Amendment will go a long way towards preventing problems such as those presented in *Bandoni* by more clearly defining the role of each of Rhode Island's three independent branches of government and also limiting that which has traditionally been called the

plenary power of the general assembly.<sup>122</sup> The full effect of this amendment remains to be seen. However, it is not contended that the separation of powers implies any delegation of new powers to the supreme court; rather it is an exhortation to the court to act with strength and courage in exercising the full extent of those powers that it retained since the adoption of the state constitution.<sup>123</sup>

The only solution proposed by this author is that Article I, Section 23 be revisited and placed back before the electorate unto the restoration of the language so callously stricken by the Committee on Style and Drafting in 1986, i.e., that “(t)hese rights shall be enforceable by the victims of crime, and they shall have recourse in the law for any denial thereof.”<sup>124</sup> In light of the opinion in *Bandoni*, an express provision for monetary damages should be inserted. What’s more the award of damages in such an action should be left solely to the discretion of the judge and jury and be unaffected by any sort of limitation otherwise applicable to tort claims.

One might suggest that the passage of a statute by the general assembly would effectively cure the defects brought to light by this article. Yet such an approach is far too precarious effectively to protect the constitutional rights of Rhode Islands’ citizens. Indeed the framers drafted the *Crime Victims Rights Amendment* specifically to ensure that these rights should be constitutionally protected against the vulgarities and shifting tides of politics.

*Ubi jus, ibi remedium* - where there is a right there is a

122. R.I. CONST. art. 9, § 5 provides:

The governor shall, by and with the advice and consent of the senate, appoint all officers of the state whose appointment is not herein otherwise provided for and all members of any board, commission or other state or quasi-public entity which exercises executive power under the laws of this state; but the general assembly may by law vest the appointment of such inferior officers, as they deem proper, in the governor, or within their respective departments in the other general officers, the judiciary or in the heads of departments.

123. There have, in recent years, been encouraging signs that this is beginning to occur. *See, e.g., In re Request for Advisory Opinion from House of Representatives (Coastal Resources Management Council) 961 A.2d 930, 930 (R.I. 2008)*

124. Report of the Judiciary Committee at 1-2.

remedy. Where “the system” may have failed Robert and Lorraine Bandoni in this instance there is always, as the state motto exclaims, “Hope.” It is only through the efforts of those who practice law, and those who aspire to this noble and wonderful profession, or to the role of legislator or judge, that errors impeding the cause of justice may be identified and corrected, and that the Constitution of the State of Rhode Island may grow with the times consistent with the will and the aspirations of those by whom its provisions have been lovingly enacted and carefully revised over the years.