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Notes and Comments

Justice for All (The Wrong Reasons): The Flaws and Fallout of *Berman v. Sitrin*

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INTRODUCTION

"Just as 'bad facts make bad law,'"[1] it is also true that "tragic facts make bad law."[2] This maxim was unfortunately illustrated perfectly by the recent Rhode Island Supreme Court decision in *Berman v. Sitrin*.[3] *Berman* involved a young man on his honeymoon in Newport, Rhode Island, who was rendered a quadriplegic after falling approximately twenty-nine feet when the ground upon which he was standing suddenly gave way beneath his feet.[4] This tragic fall occurred while the young couple

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1. Doggett v. U.S., 505 U.S. 647, 659 (1992) (Thomas, J., dissenting); Haig v. Agee, 453 U.S. 280, 319 (1981) (Brennan, J., dissenting).

2. Wyeth v. Levine, 129 S.Ct. 1187, 1217 (2009) (Alito, J., dissenting).

3. 991 A.2d 1038, 1056 (R.I. 2010) (Suttell, C.J., dissenting) ("[i]f ever there was a case to which one could apply the ancient maxim 'Dura lex sed lex' ('The law is hard but it is the law'), it surely would be this case.").

4. *Id.* at 1042.

was walking on the Cliff Walk, a famed Newport tourist attraction that runs along the Atlantic coast.[5] The young man brought a negligence suit against the City of Newport and the City claimed immunity under the Rhode Island Recreational Use Statute (RUS),[6] which provides limited liability to landowners that make their land available to the public for recreational purposes.[7] Before the Court decided *Berman*, two general suppositions regarding the RUS and its 1996 amendment[8] seemed to hold true. First, the RUS would often operate to prevent a severely injured individual from being compensated for his or her injuries by a municipal or state landowner, even in a tragic factual scenario. Second, the Court would faithfully interpret and apply the RUS, even though it made no secret of its disdain for that statute. The validity of both of these assumptions was seriously compromised by the Court's decision in *Berman*. To the surprise of the Rhode Island legal community – and two Justices – the Court, relying heavily on the particular factual circumstances of the case, determined that one of the exceptions to the limited liability provisions of the RUS applied to deny the City's claimed RUS defense.[9]

This Note argues that the Rhode Island Supreme Court's results-based reasoning in *Berman* was contrary to the plain language of the RUS and well-established precedent. In addition, the decision will lead to undesirable results contrary to the legislative intent behind the RUS. The proper method of rectifying the unjust results that are often reached as a result of limiting the liability of state and municipal landowners under the RUS is legislative amendment of the RUS, not strained interpretation of the statute by the Rhode Island Supreme Court. Part I of this Note discusses the passage of the RUS and the Court's pre-*Berman* precedent on this statute. Part II sets forth the majority, concurring, and dissenting opinions in the *Berman* case. Part III argues that the *Berman* majority's interpretation and application of the RUS is fundamentally flawed. Part IV explains the likely negative implications that will stem from the

5. *Id.* at 1041-42.
6. R.I. GEN. LAWS §§ 32-6-1 to -6 (1994).
7. *Berman*, 991 A.2d at 1042-43.
8. 1996 R.I. Pub. Laws 1228.
9. *See Berman*, 991 A.2d at 1053.

Berman decision. Finally, Part V suggests that legislative amendment is the only legitimate method of fixing the problems with the RUS as it is currently enacted.

I. HAVE FUN AT YOUR OWN RISK: THE STATE OF LANDOWNER LIABILITY LAW PRIOR TO *BERMAN*

A. The Recreational Use Statute

In 1978, the Rhode Island General Assembly passed sections 32-6-1 to 32-6-7 of the Rhode Island General Laws,[10] commonly referred to as the Recreational Use Statute. The RUS's stated purpose is "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability to persons entering thereon for those purposes."[11] To effectuate this purpose the RUS provides, in pertinent part, that:

> [A]n owner of land who either directly or indirectly invites or permits without charge any person to use that property for recreational purposes does not thereby:
>
> (1) Extend any assurance that the premises are safe for any purpose;
>
> (2) Confer upon that person the legal status of an invitee or licensee to whom a duty of care is owed; nor
>
> (3) Assume responsibility for or incur liability for any injury to any person or property caused by an act of [sic] omission of that person.[12]

Originally, the term "owner" as used in the RUS was defined as

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10. R.I. GEN. LAWS §§ 32-6-1 to -7 (1994). Section 32-6-7 of the Rhode Island General Laws was subsequently repealed by 1996 R.I. Pub. Laws 1229.

11. R.I. GEN. LAWS § 32-6-1 (1994). The term "recreational purposes" is defined elsewhere in the RUS to include numerous activities such as "hunting, fishing, swimming, boating, camping, picnicking, hiking, horseback riding, bicycling, pleasure driving, nature study, water skiing, water sports, viewing or enjoying historical, archaeological, scenic or scientific sites, and all other recreational purposes contemplated by this chapter[.]" *Id.* § 6-2(4).

12. *Id.* § 32-6-3.

"the possessor of a fee interest, tenant, lessee, occupant, or person in control of the premises."[13] However, in 1996 the General Assembly amended the definition of "owner" as used in the RUS to include the state and municipalities.[14] The RUS qualifies its limitation on liability by stating, in relevant part, that:

> Nothing in this chapter limits in any way any liability which, but for this chapter, otherwise exists:
>
> (1) For the willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity after discovering the user's peril[.][15]

The phrase "after discovering the user's peril" as used in the RUS mirrors language from the Rhode Island Supreme Court's articulation of the duty owed by a landowner to a trespasser. In *Boday v. N.Y., New Haven & Hartford R.R. Co.*,[16] the Court stated that "[i]t is the generally accepted rule that a [landowner] owes no duty to a trespasser or bare licensee on its premises except after discovering his peril[.]"[17] The Court in *Zoubra v. N.Y., New Haven & Hartford R.R. Co.*[18] made clear that actual discovery of a particular trespasser in a position of peril is necessary to trigger a duty: "the law does not impose upon the [landowner] any duty toward the plaintiff as a trespasser or bare licensee unless [the landowner] has first discovered [the trespasser] in a position of

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13. 1978 R.I. Pub. Laws 1288-89.

14. 1996 R.I. Pub. Laws 1229. The definition of "owner" now reads: "'[o]wner' means the private owner possessor of a fee interest, or tenant, lessee, occupant, or person in control of the premises including the state and municipalities[.]" R.I. GEN. LAWS § 32-6-2(3) (Supp. 2010).

15. *Id.* § 32-6-5(a)(1). The RUS also contains one other exception to its limitation on liability. The RUS does not operate to immunize an owner:

> (2) [f]or any injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof; except that in the case of land leased to the state or a subdivision thereof, any consideration received by the owner for that lease shall not be deemed a "charge" within the meaning of this section.

Id. § 32-6-5(a)(2).

16. 165 A. 448 (R.I. 1933).

17. *Id.* at 448. The *Boday* Court also made clear that the mere fact that members of the public frequently came upon a particular portion of the premises where the plaintiff was injured did not change this general rule. *Id.* at 449.

18. 150 A.2d 643 (R.I. 1959).

danger."[19] The Court followed this rule without variation until 1975, when it abandoned the traditional land entrant classifications of invitee, licensee, and trespasser in favor of a rule requiring a landowner to use "reasonable care for the safety of all persons reasonably expected to be on upon his premises."[20] Just three years later, the General Assembly enacted the RUS containing the "after discovering the user's peril" language and the Court explained in *Tantimonico v. Allendale Mut. Ins. Co.*[21] that "the obvious intention of the Legislature [in enacting the RUS] was to treat those who use private property for recreational purposes as though they were trespassers."[22]

B. Decidedly Unenthusiastic: The Court's Interpretation of the Recreational Use Statute

From the 2000 decision in *Cain v. Johnson*[23] right up until the 2010 decision in *Berman v. Sitrin*,[24] three overarching principles were revealed in the Rhode Island Supreme Court's RUS jurisprudence.[25] First, the Court has repeatedly recognized that the intention of the General Assembly in enacting the RUS was to treat those using private property for recreational purposes as trespassers, meaning that no duty on the part of the landowner arises *"until after the trespasser has been discovered in a position of peril."*[26] Second, the Court has consistently held that the language of the RUS is unambiguous.[27] Third, and most

19. *Id.* at 645. Earlier in the same opinion, the Court noted that the landowner "owed [the plaintiff] no duty except not to willfully or wantonly injure her after *actually* discovering her peril." *Id.* at 644-45 (emphasis added).

20. Mariorenzi v. DiPonte, Inc., 333 A.2d 127, 133 (R.I. 1975).

21. 637 A.2d 1056 (R.I. 1994).

22. *Id.* at 1060.

23. 755 A.2d 156 (R.I. 2000).

24. 991 A.2d 1038 (R.I. 2010).

25. Despite the fact that the General Assembly passed the RUS in 1978, the Court did not interpret the statute in any depth until the last decade.

26. *Cain*, 755 A.2d at 162, 164; *see also* Morales v. Town of Johnston, 895 A.2d 721, 730 (R.I. 2006) (discussing the "clear intent of the recreational use statute"); Hanley v. State, 837 A.2d 707, 713 (R.I. 2003) (quoting *Tantimonico*, 637 A.2d at 1060) (explaining "obvious intention of the Legislature" in enacting RUS).

27. Labedz v. State, 919 A.2d 415, 417 (R.I. 2007); Cruz v. City of Providence, 908 A.2d 405, 407 (R.I. 2006); Lacey v. Reitsma, 899 A.2d 455, 457-58 (R.I. 2006); *Hanley*, 837 A.2d at 712.

important, the Court has repeatedly expressed its dissatisfaction about what it perceives as the unjust results that often occur under the RUS framework. In fact, on numerous occasions the Court has implored the General Assembly to remove the state and municipalities from the definition of "owner" under the RUS.[28] A brief discussion of the Court's RUS precedent follows.

Although not decided under the RUS framework,[29] *Cain* established that the RUS is a legislative codification of the Court's common law trespasser rule.[30] Having facts strikingly similar to those in *Berman*,[31] *Cain* involved a tragic injury occurring on the Cliff Walk in Newport, Rhode Island.[32] On August 6, 1991 at approximately 2 a.m., Cain and two friends were walking on the portion of the Cliff Walk near Salve Regina University when Cain stepped off of the paved walk onto a grassy area.[33] While Cain was standing on this grassy area, the ground beneath his feet gave way suddenly and he fell to his death.[34] In the subsequent wrongful death action brought against the City of Newport, the State of Rhode Island, and Salve Regina University, "the motion justice granted summary judgment in favor of all defendants."[35]

On appeal, the Rhode Island Supreme Court held Cain was a trespasser and that "a landowner owes no duty to a trespasser unless the trespasser first is discovered in a position of peril."[36] The Court rejected the plaintiff's contention that a duty of reasonable care should be imposed where the landowner knows or should know that trespassers constantly intrude upon the land, explaining "[t]his theory, which turns on a landowner's knowledge of the use of his land by trespassers . . . has not been accepted by this Court."[37] Pointing out that under the plaintiff's proposed rule

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28. *See Labedz*, 919 A.2d at 417; Smiler v. Napolitano, 911 A.2d 1035, 1042 (R.I. 2006); *Cruz*, 908 A.2d at 407 n.2; *Lacey*, 899 A.2d at 458.

29. *Cain*, 755 A.2d at 164. The Court did not decide this case under RUS because the injury, which occurred in 1991, preceded the 1996 amendment that extended the RUS's limitation on liability to lands owned or controlled by the state or municipalities. *Id.* at 173 (Goldberg, J., dissenting in part).

30. *Id.* at 164.

31. *See infra* Part II.A.

32. *Cain*, 755 A.2d at 158.

33. *Id.* at 158.

34. *Id.*

35. *Id.*

36. *Id.* at 159, 161.

37. *Id.* at 160-61.

the distinction between a discovered and undiscovered trespasser would be "irrelevant," the Court reiterated that "the law does not impose upon a landowner any duty toward a trespasser unless [the landowner] has first discovered [the trespasser] in a position of peril, even though there was an allegation that the [landowner] knew or should have known about the presence of people on the [land]."[38]

Although the Court decided *Cain* under the common law trespasser rule and not under the RUS, the Court explained that the result would be the same under the RUS: "[e]ven under the statute, a landowner owes no duty to a trespasser unless the trespasser is first discovered in a position of peril."[39] The limitation on landowner liability contained in the RUS the Court held, "is simply a legislative codification of the common law that is enunciated in our cases."[40] Because Cain was not actually discovered in a position of peril prior to his fatal fall, the Court affirmed the motion justice's grant of summary judgment for all defendants.[41]

Dissenting, Justice Goldberg disagreed with the Court's conclusion that Cain was a trespasser, finding instead that he was an implied licensee by virtue of his being a tourist visitor to the Cliff Walk.[42] More importantly, Justice Goldberg chronicled the City of Newport's persistent failure to improve safety on the Cliff Walk despite extensive evidence of the latent dangers that the walk posed to visitors. For instance, in 1987, a Salve Regina University student fell from the Cliff Walk to his death.[43] Despite promises allegedly made to the student's family that a fence would be erected in that particular area of the Cliff Walk, no such action was taken.[44] In addition, the President of Salve Regina University implored the City both before and after the student's

38. *Cain*, 755 A.2d at 161.
39. *Id.* at 164.
40. *Id.*
41. *Id.* In fact, despite evidence that the City of Newport knew of the latent dangers that the Cliff Walk posed to unsuspecting visitors, the Court nevertheless concluded that "[a]bsolutely no evidence has been presented to suggest that the defendants or any of them were aware of [Cain's] position of peril." *Id.*
42. *Id.* at 169-70 (Goldberg, J., concurring in part and dissenting in part).
43. *Id.* at 166.
44. *Cain*, 755 A.2d. at 166-67.

death to erect a fence along the Cliff Walk where erosion had significantly weakened the land on the ocean side of the walk.[45] The City took no action in response.[46]

Finally, despite a 1989 report by the National Park Service that indicated that the Cliff Walk was in "desperate need of improvement from a public-safety standpoint," describing a near-fatal fall from the Cliff Walk in 1988, the City did not install a fence or take any other safety measures.[47] Based on this history, Justice Goldberg concluded that the State and the City of Newport had "actual notice of the potential for loss of life posed by this particular area of the Cliff Walk and did nothing to forestall this calamity."[48] Accordingly, Justice Goldberg would have vacated the motion justice's grant of summary judgment for the State and the City of Newport.[49]

Three years after its decision in *Cain*, the Court was asked to interpret the 1996 amendment to the RUS in *Hanley v. State*.[50] There, the plaintiff injured her arm and shoulder when she caught her foot on the edge of an asphalt road and fell to the ground while she was walking in a state park in Narragansett, Rhode Island.[51] At trial, a motion justice entered summary judgment in favor of the State on the grounds that the RUS barred suit against the State.[52] Following the plaintiff's appeal, the Court addressed the question of whether the RUS extends immunity to state-owned public parks as a matter of first impression.[53] The Court first announced some of its general principles of statutory interpretation, explaining that the Court's "ultimate goal is to give effect to the purpose of the act as intended by the Legislature"[54] and "'that when the language of a statute is clear and

45. *Id.* at 167.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 174. Justice Goldberg concluded that summary judgment in favor of Salve Regina University was appropriate because the University had no duty to maintain or repair the Cliff Walk and it neither owned nor controlled the walk. *Id.* at 172-73.
50. 837 A.2d 707, 710 (R.I. 2003).
51. *Id.* at 709.
52. *Id.* at 710.
53. *Id.* at 710-11.
54. *Id.* at 711 (quoting Oliveira v. Lombardi, 794 A.2d 453, 457 (R.I. 2002)) (internal quotations omitted).

unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.'"[55] Applying these principles, the Court first concluded that the language of the 1996 amendment was "unambiguous."[56] Reiterating that "'the obvious intention of the Legislature [in enacting the RUS] was to treat those who use private property for recreational purposes as though they were trespassers,'" the Court unanimously affirmed the motion justice's grant of summary judgment in favor of the State.[57]

Three years later, in *Lacey v. Reitsma*,[58] the Court revealed the first glimpse of its frustration in being constrained to reach unjust results under the RUS framework.[59] *Lacey* involved a negligence action brought against the State by parents of a nine-year-old boy, R.J., who had suffered severe injuries in a state park in Newport, Rhode Island.[60] R.J. was riding his bicycle in a part of the park that bordered a twenty-foot cliff, which allegedly had no protective device to prevent people from falling.[61] When his bicycle veered off the cliff, R.J. fell to the rocks below.[62] The motion justice granted the State's motion for summary judgment, concluding that the State was shielded from liability by the RUS.[63]

On appeal, a unanimous Supreme Court "reluctantly" affirmed.[64] The Court noted that the plaintiffs had "pointed to no evidence that these defendants discovered young R.J. in a position of peril and then failed to warn him against the potentially dangerous condition."[65] While emphasizing that the Court's "empathy for that young man [R.J.] is very great," the Court held that the "unambiguous language of the Recreational Use Statute and the equally unambiguous nature of the relevant precedent"

55. *Id.* at 711-12 (quoting *Oliveira*, 794 A.2d at 457).
56. *Hanley*, 837 A.2d at 712.
57. *Id.* at 713-14 (quoting Tantimonico v. Allendale Mut. Ins. Co., 637 A.2d 1056, 1060 (R.I. 1994)).
58. 899 A.2d 455 (R.I. 2006).
59. *See id.* at 458.
60. *Id.* at 456.
61. *Id.*
62. *Id.*
63. *Id.* at 456-57.
64. *Lacey*, 899 A.2d at 458-59.
65. *Id.* at 458.

compelled the Court to reach its conclusion that summary judgment for the State was appropriate under the RUS.[66]

Before concluding the opinion, the *Lacey* Court offered the first of what would become a series of pleas with the General Assembly to amend the RUS to exclude the state and municipalities from the definition of "owner":

> While we are cognizant of the fact that our judicial role is to interpret and apply statutes and not to legislate, it is our view that it is entirely appropriate for us to suggest that the General Assembly (whose role it is to legislate) focus upon the result in this case. Perhaps the time has come for the General Assembly to revisit the provisions of the Recreational Use Statute, especially where *public* parks and *public* recreational areas are concerned. We wish respectfully, but forcefully, to state that we find it troubling (to say the least) to be confronted with a legal regime whereby the users of state and municipal recreational sites must be classified for tort law purposes "as though they were trespassers." The existing Recreational Use Statute requires that such users be so classified, whereas we are of the view that people who use public recreational facilities should not be classified as trespassers.[67]

In *Cruz v. City of Providence*,[68] the Court again expressed its dissatisfaction with the provisions of the RUS that limit the liability of state and municipal landowners.[69] In that case, two boys were riding a bicycle (one pedaling the bike, one sitting on the handlebars) in a public park owned by the City of Providence

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66. *Id.*

67. *Id.* (quoting Hanley v. State, 837 A.2d 707, 713 (R.I. 2003)) (emphasis in original) (internal citations omitted). In the same term as *Lacey*, the Court decided Morales v. Town of Johnston, which involved the claims of a high school soccer player who was injured during a high school game. 895 A.2d 721, 724 (R.I. 2006). Although the Court determined that the RUS was inapplicable to student athletes "participating in an organized sport on a designated athletic field," in a unanimous opinion authored by Justice Goldberg, the Court reaffirmed that "[t]he clear intent of the recreational use statute is to shield landowners against liability to those who come upon the owner's land for recreation" by treating them as trespassers. *Id.* at 730.

68. 908 A.2d 405 (R.I. 2006).

69. *Id.* at 407 n.2.

when the boys ran into a chain that blocked a walkway.[70] The boys could not see the chain because it allegedly blended in with a chain link fence behind it.[71] Both boys suffered injuries as a result of running into the chain and falling off the bicycle.[72] In the boys' negligence action against the City of Providence, the motion justice granted the City's motion for summary judgment on the basis that the RUS shielded the City from liability.[73] The Court, in an opinion authored by Justice Flaherty, stated that given "the unambiguous language of the Recreational Use Statute" and the "clear and unequivocal" RUS precedent, the grant of summary judgment must be affirmed in accordance with "the principle of *stare decisis*."[74] Nevertheless, the Court added in a footnote: "[w]e reiterate now the difficulty we expressed in *Lacey* . . . about a statute that classifies public park visitors as trespassers for tort law purposes, and we again suggest that the General Assembly review that statute."[75]

In the same term as *Cruz*, the Court was asked to determine whether the RUS violated the Rhode Island Constitution in *Smiler v. Napolitano*.[76] One of the plaintiffs, Irina Smiler ("Irina"), was attacked by a swarm of bees while she was walking near a park bench in a public park owned and operated by the City of Providence.[77] In attempting to run from the bees, Irina tripped and fell.[78] Irina filed suit against the City of Providence, alleging negligence, and the motion justice granted the City's motion for summary judgment on the ground that the RUS shielded it from liability.[79]

On appeal, Irina contended that the Recreational Use Statute was in violation of Article I, section 5 of the Rhode Island Constitution[80] because the RUS shields a landowner from liability

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70. *Id.* at 405-06.
71. *Id.* at 406.
72. *Id.*
73. *Id.*
74. *Id.* at 407.
75. *Id.* at 407 n.2.
76. 911 A.2d 1035, 1037 (R.I. 2006).
77. *Id.*
78. *Id.*
79. *Id.* at 1037-38.
80. Article I, section 5 of the Rhode Island Constitution provides that:

Every person within this state ought to find a certain remedy, by

in almost all circumstances and the willful or malicious exception that the RUS contains[81] is "overly prohibitive and logically impossible to invoke."[82] Noting at the outset that legislative enactments are presumed constitutional and that the Court's "role is to interpret and apply statutes and not to legislate," the Court unanimously rejected Irina's constitutional challenge to the RUS stating that the "plaintiffs incorrectly read the statute to mean that the city's duty would have arisen only after the bees began attacking Irina."[83] The Court explained "[i]t would be absurd to conclude that the Legislature would require a landowner to sit idly by and wait until peril arose before a duty to warn the individual attached" and further explained that, in this case, "the city's duty would arise at the point when a city employee discovered that Irina was approaching an area where there was a known risk of bees."[84] Therefore, the Court held that the RUS is constitutional and affirmed the motion justice's grant of summary judgment in favor of the defendants.[85] Once more, the Court expressed its dissatisfaction with the result it was constrained to reach:

> Before concluding, we reiterate our concern with the troubling results ensuing from the current statutory scheme. In *Lacey*, we expressed our concerns about classifying users of state and municipal-owned recreational property as trespassers, and we continue to do so today. We find it particularly difficult to hold the state or a municipality harmless for injuries occurring on

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having recourse to the laws, for all injuries or wrongs which may be received in one's person, property, or character. Every person ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conformably to the laws.

R.I. CONST. art. I, § 5.

81. Section 32-6-5 of the Rhode Island General Laws provides, in pertinent part, that "(a) [n]othing in this chapter limits in any way any liability which, but for this chapter, otherwise exists: (1) [f]or the willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity after discovering the user's peril[.]" R.I. GEN. LAWS § 32-6-5(a)(1) (1994); *see supra* notes 15-22 and accompanying text.

82. *Smiler*, 911 A.2d at 1039.

83. *Id.* at 1038, 1041.

84. *Id.*

85. *Id.* at 1041-42.

> public property to which our citizens are invited, particularly when the state and its municipalities are presumptively better able to bear the burden of damages than are most users of recreational facilities. We are additionally concerned about the protection of this state's citizens, given that the statutory scheme does nothing to motivate governmental landowners to make their properties safe.
>
> For these reasons, and yet again, we urge the legislature to revisit the Recreational Use Statute so that we are not again constrained to reach such a troubling result.[86]

The final Rhode Island Supreme Court case interpreting the RUS prior to *Berman v. Sitrin* was *Labedz v. State*,[87] decided in 2007. In *Labedz*, while walking along a concrete path at a state-owned beach, the plaintiff tripped on an uneven surface and fell, fracturing her wrist.[88] In the ensuing negligence action brought against the State, the hearing justice granted the State's motion for summary judgment on RUS grounds.[89] On appeal, the Court held that, based on the "unambiguous language" of the RUS and "this Court's clear and unequivocal precedent," the grant of summary judgment in favor of the State needed to be affirmed.[90] For the final time, the Court echoed its familiar plea to the General Assembly:

> We would note that our own point of view vis-à-vis the governmental immunity aspect of the Recreational Use Statute has been decidedly unenthusiastic. For example, in *Lacey* . . . although we held that the state was entitled to immunity under the Recreational Use Statute, we expressed concern about the troubling result that we felt obliged to reach by virtue of our reading of the Recreational Use Statute, and we urged the General Assembly to revisit the provisions of that statute concerning state and municipal immunity. In each of the

86. *Id.* at 1042 (internal citations omitted).
87. 919 A.2d 415 (R.I. 2007).
88. *Id.* at 416.
89. *Id.*
90. *Id.* at 417.

> cases that followed *Lacey*, we reiterated both our concern about the real-world results that the subject provision of the Recreational Use Statute required us to reach and our suggestion that the General Assembly revisit the provisions of the statute. We take this opportunity once again to urge the General Assembly to review the statute.[91]

C. Is Anybody Listening? The 2009 Proposed Amendment

Although the Court's oft-repeated suggestion that the General Assembly revisit certain provisions of the RUS has gone unheeded thus far, the Court's pleas have not entirely fallen on deaf ears. On March 11, 2009, Rhode Island Representatives Charlene M. Lima, Edwin R. Pacheco, Kenneth Carter, and Robert B. Jacquard introduced a bill in the General Assembly that would have changed the definition of "owner" in the Recreational Use Statute "to exclude the state and municipalities for the purposes of liability limitations relating to public use of private lands."[92] The bill was referred to the House Judiciary Committee[93] where, on April 28, 2009, it was recommended that the "measure be held for further study."[94] In any event, the amendment was not passed and, at the time of this writing, the definition of "owner" in the Recreational Use Statute still includes the state and municipalities,[95] as it has since the 1996 amendment. Against this backdrop of legislative inaction and increasing judicial frustration with the RUS, the Rhode Island Supreme Court decided the pivotal case of *Berman v. Sitrin*[96] in 2010.

II. THE SEA CHANGE: *BERMAN V. SITRIN*

A. Background

The *Berman* case involved undeniably tragic facts. On

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91. *Id.* at 417 (internal citations omitted).
92. H.B. 5971, 2009 Jan. Sess. (R.I. 2009).
93. *Id.*
94. 2009 H. Numerical B. Status Rep. 5900-6199 (R.I. 2009), http://www.rilin.state.ri.us/billstatus09/h5900-6199.pdf.
95. R.I. GEN. LAWS § 32-6-2(3) (Supp. 2010).
96. 991 A.2d 1038 (R.I. 2010).

August 17, 2000, newlyweds Simcha and Sarah Berman stopped in Newport, Rhode Island while on their honeymoon.[97] After taking a tour of the Breakers, a historic mansion located in the City, the couple decided to walk along the Cliff Walk, a major tourist attraction that "runs along 18,000 feet of Newport's shoreline, high above the rocky Atlantic coast[.]"[98] The walk, a public easement over private land, is owned by numerous individuals and entities, but the City "has assumed authority and exercises control over the Cliff Walk, both by regulation and maintenance."[99] While on the Cliff Walk, Simcha and Sarah noticed what they termed a "'beaten path'" which ostensibly led to the water.[100] Simcha left the Cliff Walk and proceeded down this path when the ground suddenly "gave way" beneath his feet.[101] The resulting twenty-nine foot fall to the rocks below left Simcha with a severe spinal cord injury that rendered him, at just twenty-three years old, a quadriplegic.[102]

In 2003, Simcha and Sarah filed suit in Newport County Superior Court against the City, the State of Rhode Island ("State"), and The Preservation Society of Newport ("Society") (collectively "the defendants"), alleging that the defendants failed to "properly inspect, maintain, and repair the Cliff Walk" and "failed to guard or warn against" known defects of the Cliff Walk.[103] The defendants moved for summary judgment on the ground that the RUS immunized them from liability and the motion justice granted summary judgment for the City and the Society.[104] Simcha and Sarah subsequently appealed.[105]

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97. *Id.* at 1042.
98. *Id.* at 1041-42.
99. *Id.*
100. *Id.* at 1042.
101. *Id.*
102. *Berman*, 991 A.2d at 1042. Sometime after this tragic event, Simcha and Sarah were divorced. *Id.* at n.5.
103. *Id.* at 1042.
104. *Id.* at 1042-43.
105. *Id.* at 1043. As the motion justice denied the State's motion for summary judgment, the State was not party to the appeal. *Id.* at 1042. Furthermore, this Note is concerned only with the Court's opinion in this case as it pertains to the City. As such, the remainder of this discussion will focus on that part of the Court's opinion only.

B. The Majority Opinion

In an opinion written by Justice Goldberg, the Rhode Island Supreme Court vacated the motion justice's grant of summary judgment in favor of the City.[106] After setting out the limited liability provisions of the RUS,[107] the Court remarked that "the Legislature declared that all people who use this state's public recreational resources are classified as trespassers."[108] The Court then explained that the crucial provision of the RUS at issue in this case was the exception that reads "(a) *[n]othing* in this chapter limits *in any way* liability which, but for this chapter, otherwise exists: (1) [f]or the willful or malicious failure to guard or to warn against a dangerous condition, use, structure, or activity after discovering the user's peril[.]"[109] The Court noted that this exception essentially provides a two-part test: (1) whether the landowner "engaged in a willful or malicious failure to warn or guard against a known danger" (2) "after discovering the user's peril."[110] Acknowledging that the second part of this test was "the more troublesome phrase,"[111] the majority proceeded to analyze the language of this exception. Before doing so, however, the Court set forth some of its relevant principles of statutory interpretation. The Court explained, "when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings."[112] The Court qualified its statement of the plain meaning rule by adding that "this Court will not interpret a statute literally when doing so would lead to an absurd result, or one that is at odds with legislative intent."[113]

The City, relying on the Court's established precedent, contended that the exception at issue would not be triggered

106. *Id.* at 1041.
107. R.I. GEN. LAWS § 32-6-3 (1994). *See supra* note 12 and accompanying text for the language of the liability limiting provisions of the RUS.
108. *Berman*, 991 A.2d at 1044 & n.7 ("under the RUS as it stands today, everyone who uses public recreational facilities is classified as a trespasser.").
109. *Id.* at 1044.
110. *Id.* at 1049.
111. *Id.*
112. *Id.* at 1043.
113. *Id.* at 1049.

unless a City employee actually saw a person about to approach a danger and failed to warn that person.[114] Conceding that the City's contention "may be a plausible argument based on our previous cases," the Court nevertheless held that the City's "argument must fail in the face of the facts and the instrumentality at issue in this case."[115] Characterizing the City's argument as being "based on an overly narrow reading of the statutory language," the Court concluded that "such a reading would lead to an absurd and blatantly unjust result."[116] In reaching its conclusion, the Court placed great emphasis on the fact that the City knew of the dangers posed by the Cliff Walk and failed to do anything to remedy the problems. Mentioning several of the facts contained in Justice Goldberg's dissenting opinion in *Cain v. Johnson*,[117] the Court explained that the City was aware of "latent defects in the structure of the Cliff Walk that are not obvious to the occasional visitor" and nevertheless failed to take any safety measures "even in the face of several fatal or near fatal incidents."[118] Based on the Cliff Walk's history, the Court reasoned that "the [C]ity had actual or constructive knowledge of the perilous circumstances, and, having been afforded a reasonable amount of time to eliminate the dangerous condition, failed to do so."[119] The majority then concluded that "[t]his failure places the members of the public whom the [C]ity invites to visit the Cliff Walk in a position of peril."[120]

The *Berman* majority also distinguished the Court's prior decisions in *Smiler v. Napolitano*[121] and *Lacey v. Reitsma*[122] on

114. *Berman*, 991 A.2d at 1048.
115. *Id.* at 1048-49.
116. *Id.* at 1050.
117. 755 A.2d 156, 166-67 (R.I. 2000). Specifically, the *Berman* majority recounted the death of the Salve Regina University student who fell from the Cliff Walk in 1987, the letter-writing efforts of the then-President of Salve Regina University, and the 1989 National Park Service report, all of which were included in Justice Goldberg's dissent in *Cain*. *See Berman*, 991 A.2d at 1050. For a more detailed discussion of these facts, *see supra* notes 43-48 and accompanying text.
118. *Berman*, 991 A.2d at 1049.
119. *Id.* at 1050.
120. *Id.*
121. 911 A.2d 1035, 1042 (R.I. 2006). For a discussion of the *Smiler* case, *see supra* notes 76-86 and accompanying text.
122. 899 A.2d 455, 458-59 (R.I. 2006). For a discussion of the *Lacey* case,

the basis of the number of prior incidents occurring on the Cliff Walk. The *Berman* Court contrasted a "single injury in a given location," presented by the facts of both *Smiler* and *Lacey*, with "evidence that the governmental entity knew of the danger and then failed to take any action to guard against it, such that additional tragic injuries continued to occur," presented by the facts of *Berman*.[123] To drive the point home, the Court noted that "[i]t is because of the multiple incidents of death and grievous injury that we conclude that the [C]ity may not successfully defend this claim based on an assertion that it had no specific knowledge of Simcha or any peril confronting him."[124] The Court therefore concluded that, given the throngs of tourists who visit the Cliff Walk each year:

> the [C]ity had an affirmative duty to take reasonable steps to warn and shield unsuspecting visitors . . . against these known and grave dangers in some reasonable manner. To construe the RUS otherwise, would not only lead to an absurd result, but it would also render the exception nugatory.[125]

In closing its analysis of the "after discovering the user's peril" language of the RUS, the Court explained that interpreting this language to require actual discovery of a particular person "would serve as a disincentive to the state and its subdivisions to make necessary safety repairs to publicly owned and taxpayer-financed recreational facilities, or to warn the unsuspecting and innocent members of the public of known dangerous conditions."[126]

Touching briefly on the first part ("willful or malicious failure to guard or warn against a dangerous condition") of the exception's two-part test, the Court held that, under the facts of this case, "a fact-finder reasonably could find that after learning about the Cliff

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see supra notes 58-67 and accompanying text.

123. *Berman*, 991 A.2d at 1051.

124. *Id.* Later in the opinion, the Court noted that "[w]e emphasize that it is the number of serious injuries flowing from a known risk that brings us to this conclusion today." *Id.*

125. *Id.*

126. *Id.* Elsewhere in the Court's opinion, the majority states that "[w]e are not persuaded that the Legislature intended the RUS to serve as an invitation to ignore known hazards while profiting from this major tourist attraction where such danger is present. We simply decline to attribute such intent to the Legislature." *Id.* at 1053.

Walk's instability . . . the [C]ity voluntarily and intentionally failed to guard against the dangerous condition, knowing that there existed a strong likelihood that a visitor to the Cliff Walk would suffer serious injury or death."[127] Such a finding, the Court explained, would support a conclusion that the first part of the test was satisfied here.[128]

C. The Concurring Opinion

Although "completely concur[ring]" in the majority opinion,[129] Justice Flaherty wrote separately to emphasize two points. Justice Flaherty began by stating that affirming the motion justice's grant of summary judgment in favor of the City on these facts "would require this Court to embrace a conclusion that the landowner, saturated with knowledge that some feature of his land presents a clear and present danger to completely innocent users, simply could adopt a 'see no evil, hear no evil, speak no evil,' attitude" and be held immune from liability.[130] To conclude that this is what the General Assembly intended in enacting the RUS, Justice Flaherty reasoned, "would be beyond absurd."[131] Finally, Justice Flaherty noted that such a holding "would provide an incentive to landowners to be callous and altogether irresponsible with respect to the safety of people entering upon their land."[132]

D. The Dissenting Opinion

Differing sharply from the majority, Chief Justice Suttell, joined by Justice Robinson, dissented and concluded that "general knowledge that recreational property has some dangerous element is not enough to give rise to a duty under the statute."[133] The dissent asserted that the majority's analysis "cannot be squared with the language of the statute or with our settled jurisprudence."[134] Reiterating the "after discovering the user's

127. *Id.* at 1052.
128. *Id.* at 1053.
129. *Berman*, 991 A.2d at 1053-54 (Flaherty, J., concurring).
130. *Id.* at 1054.
131. *Id.*
132. *Id.*
133. *Id.* at 1055 (Suttell, C.J., concurring in part and dissenting in part).
134. *Id.* at 1054. The dissent further explained that the majority's analysis

peril" language of section 32-6-5 of the Rhode Island General Laws[135] is "'simply a legislative codification of the common law'" trespasser rule, the dissent explained that the well settled duty to refrain from willful or malicious conduct "'arises only after a trespasser is discovered in a position of danger.'"[136] The dissent emphasized that knowledge of a dangerous condition and/or knowledge of the use of property by others is insufficient to trigger the duty: "'the law does not impose upon a landowner any duty toward a trespasser unless it has first discovered *him* or *her* in a position of peril, even though there was an allegation that the [landowner] knew or should have known of the presence of people on the [land].'"[137] Noting the majority in *Cain v. Johnson*[138] rejected the "beaten path" exception to the trespasser rule,[139] the dissent pointed out "'this Court has steadfastly held that a landowner owes a trespasser no duty until he or she is *actually discovered* in a position of peril.'"[140] If these principles were correctly applied, the dissent reasoned, "a duty on the part of the [C]ity would have arisen only if an employee of the [C]ity had discovered [Simcha] approaching an area where there was a known risk of danger and, thereafter, that employee willfully or maliciously failed to guard or warn him against the danger."[141]

After explaining how the majority improperly interpreted the unambiguous language of the RUS and the Court's clear RUS precedent,[142] the dissent turned to the majority's argument that the RUS incentivizes a public landowner to not take necessary safety measures. The dissent candidly agreed with the majority on this point, explaining that the City's failure to take any action to improve safety on the Cliff Walk despite numerous incidents of

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was "at odds with the unambiguous" and "clear statutory language and clear precedent." *Id.* at 1055-56.

135. R.I. GEN. LAWS § 32-6-5(a)(1) (1994).

136. *Berman*, 991 A.2d at 1054 (Suttell, C.J., concurring in part and dissenting in part) (quoting Cain v. Johnson, 755 A.2d 156, 160, 164 (R.I. 2000)).

137. *Id.* at 1055 (quoting *Cain*, 755 A.2d at 161).

138. 755 A.2d 156 (R.I. 2000).

139. For a discussion of the "beaten path" exception and its rejection by the *Cain* majority, *see supra* notes 37-38 and accompanying text.

140. *Berman*, 991 A.2d at 1055 (Suttell, C.J., concurring in part and dissenting in part) (emphasis added) (quoting *Cain*, 755 A.2d at 161).

141. *Id.*

142. *Id.* at 1055-56.

injury "is likely because the RUS not only protects the [C]ity from liability but also acts as a disincentive for the [C]ity to implement any safety measures whatsoever."[143] However, the dissent rejected the notion that strained interpretation of the RUS was the solution to this problem. Further, the Court has "on several occasions exhorted the General Assembly to revisit the provisions of the RUS,"[144] and '[i]t is not for this Court to assume a legislative function when the General Assembly chooses to remain silent.'"[145]

The Court, the dissent cautioned, "must decline 'to substitute [its] will for that of a body democratically elected by the citizens of this state.'"[146] Poignantly, the dissent concluded that "'[t]he remedy for a harsh law is not in interpretation, but in amendment or repeal.'"[147] In the final sentence of his dissent, Chief Justice Suttell concluded by sounding a familiar refrain, "once again urg[ing] the General Assembly to address the scope of the [RUS]."[148]

III. WHAT WENT WRONG?

It is clear that the majority's opinion was influenced by the tragic facts with which the Court was presented and its desire to allow the plaintiffs' claims to go forward is almost laudable. Nevertheless, the majority opinion in *Berman* is fundamentally flawed for three reasons. First, the majority, in ignoring the legislative intent behind the RUS, failed to faithfully follow the very standard for statutory interpretation that it enunciated. More importantly, the majority's interpretation of the RUS cannot be reconciled with either the clear and unambiguous language of the statute or the Court's established precedent. Finally, and of

143. *Id.* at 1055.
144. *Id.* at 1055.
145. *Id.* at 1056 (quoting DeSantis v. Prelle, 891 A.2d 873, 881 (R.I. 2006)).
146. *Berman*, 991 A.2d at 1056 (quoting *DeSantis*, 891 A.2d at 881).
147. *Id.* (alteration in original) (quoting State v. Duggan, 6 A. 787, 788 (R.I. 1886)). In a footnote, the dissent added "[t]his Court is not 'entitled to write into the statute certain provisions of policy which the [L]egislature might have provided but has seen fit to omit . . . if a change in that respect is desirable, it is for the [L]egislature and not for the [C]ourt.'" *Id.* at 1056 n.17 (alterations in original) (quoting Simeone v. Charron, 762 A.2d 442, 448 (R.I. 2000)) (internal quotations and ellipses omitted).
148. *Id.* at 1056.

utmost importance to our system of state governance, by erroneously construing the statute to reach the result that it wanted, the majority failed to perform its judicial role and improperly assumed a legislative function.[149] While the dissent mentioned some of these flaws, its treatment of them was rather superficial and conciliatory. Therefore, the remainder of Part III seeks to further develop the problems with the majority's reasoning.

A. The Majority Failed to Properly Follow Its Own Standard

The majority in *Berman* critically erred by failing to let the legislative intent behind the RUS guide its analysis and interpretation of the "after discovering the user's peril" language. After stating the plain meaning rule of statutory interpretation, the *Berman* majority added that "this Court will not interpret a statute literally when doing so would lead to an absurd result, *or one that is at odds with legislative intent.*"[150] Additionally, the Court noted that its "obligation is to ascertain the legislative intent behind the enactment and give effect to that intent."[151] However, apart from mentioning at the very beginning of its analysis that the General Assembly's intent in enacting the RUS "was 'to treat those who use private property for recreational purposes as though they were trespassers,'"[152] the majority eschewed any further discussion of legislative intent and focused all of its efforts on avoiding what it perceived as an absurd result.[153]

149. *See DeSantis*, 891 A.2d at 881 (discussing how a court should refrain from undertaking a legislative function when the General Assembly remains silent); *see also* Part III.C, *infra* notes 191-207 and accompanying text.

150. *Berman*, 991 A.2d at 1049 (emphasis added).

151. *Id.* at 1043.

152. *Id.* (quoting Tantimonico v. Allendale Mut. Ins. Co., 637 A.2d 1056, 1060 (R.I. 1994)).

153. *See id.* at 1049 ("applying the term ['after discovering the user's peril'] literally is *unreasonable*"); *id.* at 1050 (City's argument that "after discovering the user's peril" language requires actual discovery of a particular user before duty arises was rejected because "such a reading [of the RUS] would lead to an *absurd and blatantly unjust result.*") (emphasis added); *id.* at 1051 ("[t]o construe the RUS otherwise would not only lead to an *absurd result*, but it would also render the exception nugatory.") (emphasis added); *id.* at 1053 (City's interpretation of RUS "is not only *absurd, but unjust.*") (emphasis added).

Indeed, when the majority did mention the intent of the legislature elsewhere in its opinion, it was merely to bolster its conclusion that interpreting the RUS to immunize the City on these facts would be absurd. For example, after explaining that an interpretation of the RUS contrary to its interpretation would be "absurd" and "unjust," the Court declared "[w]e are not persuaded that the Legislature intended the RUS to serve as an invitation to ignore known hazards while profiting from this major tourist attraction where such danger is present. We simply decline to attribute such intent to the Legislature."[154] This self-serving formulation of legislative intent – "the Legislature must not have intended this" – fails to fulfill the Court's stated obligation to "ascertain the legislative *intent behind the enactment*"[155] of a statute. The majority critically erred by focusing on what it perceived to be an absurd result (and on what the Legislature did *not* intend) instead of focusing on what exactly the Legislature intended in enacting the RUS and letting *this* intention guide its analysis.[156] Justice Flaherty, for his part, committed the same error in his concurring opinion.[157]

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154. *Id.* at 1053. In a similar vein, the Court explained, "we cannot conclude that when the Legislature extended the protection of the RUS to the states and municipalities, it intended to relieve the [C]ity from any responsibility whatsoever to the many tourists who visit the Cliff Walk." *Id.* at 1051.

155. *Id.* at 1043 (emphasis added).

156. In the majority's defense, the standard it was purporting to apply is disjunctive in nature: "this Court will not interpret a statute literally when doing so would lead to an absurd result, *or* one that is at odds with legislative intent." *Berman*, 991 A.2d at 1049 (emphasis added). Based on this disjunctive nature, one may argue that the majority did not err in applying this standard because it at least focused on one of the prongs (the absurd result prong). However, this argument overlooks the Court's stated obligation in interpreting all statutes: "to ascertain the legislative intent behind the enactment and to give effect to that intent." *Id.* at 1043. Therefore, even if focusing solely on avoiding a perceived unjust result is considered to be a permissible application of its articulated standard, the Court's unwillingness to give effect to the General Assembly's intent behind the enactment of the RUS cannot be squared with its stated obligation. Thus, the Court's refusal to let the legislative intent behind the RUS (to treat those who use land for recreational use as trespassers under the Court's established trespasser jurisprudence) guide its analysis was a critical error.

157. *See id.* at 1054. After discussing the "see no evil, hear no evil, speak no evil attitude" that would be adopted if the RUS immunized the City on these facts, Justice Flaherty remarked, "I cannot begin to conceive that the

The Court's error in applying its stated standard directly led it to its incorrect conclusion. By interpreting the statute with such a singular purpose – *viz.*, to avoid an absurd result – the majority opinion paid lip service to the legislative intent behind the enactment of the RUS. Prior to *Berman*, the Court has repeatedly maintained that "the *obvious* intention of the Legislature [in enacting the RUS] was to treat those who use private property for recreational purposes as though they were trespassers."[158] As it is "obvious" that the Legislature intended to treat those who use the land of others for recreational purposes as trespassers, it follows that interpretation of and analysis under the RUS must mirror the common law's trespasser rule analysis. Indeed, the Court has previously held in *Cain v. Johnson*[159] that the RUS "is simply a legislative codification of the common law [trespasser rule] that is enunciated in our cases."[160] However, as discussed below, the majority failed to conduct its analysis in a manner consistent with the Court's trespasser precedent, both under the common law and under the RUS. Had the majority allowed the intention of the General Assembly to guide its analysis, the Court would not have made the critical error of equating discovery of a condition with discovery of a particular trespasser.[161] Instead, by focusing solely on avoiding an absurd result, the majority reached a decision squarely at odds with the legislative intent behind the RUS.

B. The Majority Failed to Follow the Plain Language of the RUS and the Court's Established Precedent

Even more problematic than its failure to faithfully follow its articulated standard, the *Berman* majority's interpretation of the

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General Assembly had any such intent; to conclude otherwise would be beyond absurd." *Id.*

158. Tantimonico v. Allendale Mut. Ins. Co., 637 A.2d 1056, 1060 (R.I. 1994) (emphasis added); *see* Hanley v. State, 837 A.2d 707, 713 (R.I. 2003); Cain v. Johnson, 755 A.2d 156, 173 (R.I. 2000) (Goldberg, J., dissenting). Note that *Tantimonico* predated the 1996 amendment to the RUS, which included the state and municipalities in the definition of "owner." *See* 1996 R.I. Pub. Laws 1229. This may explain why "private" modifies "property" in the language quoted in the text above. *See Tantimonico*, 637 A.2d at 1060.

159. 755 A.2d 156 (R.I. 2000).

160. *Id.* at 164.

161. *See* Part III.B, *infra* notes 162-90 and accompanying text.

RUS cannot be reconciled with either the unambiguous language of the RUS or the Court's established precedent. In *Berman*, the Court attempted to justify its conclusion that the City could not claim immunity under the RUS by emphasizing that the City had extensive knowledge of the dangers posed by the Cliff Walk. After discussing in detail the evidence of the "latent defects" of the Cliff Walk and concluding that the City had "actual or constructive knowledge" of the dangers yet failed to take any action, the Court "emphasize[d] that it is the number of serious injuries flowing from a known risk that brings us to this conclusion today."[162] Moreover, the majority distinguished this case from *Smiler v. Napolitano*[163] and *Lacey v. Reitsma*[164] by pointing out that the Court in those cases was presented with no evidence that of the landowner's prior knowledge of the dangerous condition.[165] Specifically, the *Berman* majority honed in on particular language of the *Smiler* opinion and characterized the holding of *Smiler* in a unique way to give its own conclusion more support:

> In *Smiler* . . . we declared that "[i]t would be absurd to conclude that the Legislature would require a landowner to sit idly by and wait until peril arose before a duty to warn the individual attached." . . . We held that the RUS was a bar to liability because Providence did not know of the presence of the bees and thus had not yet discovered the plaintiff's peril.[166]

Finally, and quite remarkably, the *Berman* majority maintained that the City's knowledge of the dangerous condition and its corresponding failure to take any action to rectify the problem "place[d] the members of the public whom the [C]ity invites to visit the Cliff Walk in a position of peril."[167]

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162. *Berman*, 991 A.2d at 1049-51. Elsewhere in the opinion the Court again added, "[i]t is because of the multiple incidents of death and grievous injury that we conclude that the [C]ity may not successfully defend this claim based on an assertion that it had no specific knowledge of Simcha or any peril confronting him." *Id.* at 1051.

163. 911 A.2d 1035 (R.I. 2006). For a discussion of the *Smiler* case, *see supra* notes 76-86 and accompanying text.

164. 899 A.2d 455 (R.I. 2006). For a discussion of the *Lacey* case, *see supra* notes 58-67 and accompanying text.

165. *Berman*, 991 A.2d at 1051.

166. *Id.* (quoting *Smiler*, 911 A.2d at 1037-38, 1041).

167. *Id.* at 1050 (emphasis added).

The majority was surely wrong on this score. Prior to its decision in *Berman*, the Court has made it abundantly clear that *actual* discovery of a *particular* trespasser in a position of peril is the prerequisite necessary to trigger the duty to refrain from willful or malicious conduct; mere knowledge or discovery of a danger, without discovery of a particular trespasser about to encounter that danger, is insufficient to trigger this duty.[168] Until *Berman,* interpretation of and analysis under the RUS has proceeded in a manner consistent with this well-established rule. The Court has repeatedly declared hat the language of the RUS is clear and "unambiguous"[169] and has referred to its relevant precedent as "clear and unequivocal."[170] The RUS does not suggest that knowledge of a dangerous condition, without discovery of the user of the land, has any relevance whatsoever in the RUS inquiry.[171] Additionally, from its decision in *Cain* until its decision in *Berman*, the Court has consistently affirmed grants of summary judgment in favor of municipal landowners because the plaintiff in each case was unable to adduce evidence that the landowner actually discovered the plaintiff in a position of peril.[172]

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168. *See id.* at 1054-55 (Suttell, C.J., dissenting); *Smiler*, 911 A.2d at 1039, 1041; *Lacey*, 899 A.2d at 458; Hanley v. State, 837 A.2d 707, 713 (R.I. 2003); Cain v. Johnson, 755 A.2d 156, 160, 161, 162, 164 (R.I. 2000); Wolf v. Nat'l R.R. Passenger Corp., 697 A.2d 1082, 1086 (R.I. 1997); Zoubra v. N.Y., New Haven & Hartford R.R. Co., 150 A.2d 643, 644-45 (R.I. 1959); Boday v. N.Y., New Haven & Hartford R.R. Co., 165 A. 448, 448-49 (R.I. 1933).

169. *Berman*, 991 A.2d at 1055 (Suttell, C.J., dissenting); Labedz v. State, 919 A.2d 415, 417 (R.I. 2007); Cruz v. City of Providence, 908 A.2d 405, 407 (R.I. 2006); *Lacey*, 899 A.2d at 457-58; *Hanley*, 837 A.2d at 712; *see Smiler*, 911 A.2d at 1041 ("we do not believe the statute is ambiguous").

170. *Labedz*, 919 A.2d at 417; *Cruz*, 908 A.2d at 407; *see Berman*, 991 A.2d at 1055 (Suttell, C.J., dissenting) (referring to the Court's RUS precedent as "settled"); *Lacey*, 899 A.2d at 458 (referring to "unambiguous nature of the relevant precedent").

171. If anything, the RUS seems to suggest just the opposite: "an owner of land who either directly or indirectly invites or permits without charge any person to use that property for recreational purposes does not thereby: (1) [e]xtend *any* assurance that the premises are safe for *any* purpose." R.I. GEN. LAWS § 32-6-3 (1994) (emphasis added).

172. *See Smiler*, 911 A.2d at 1041 ("[i]t is clear to this Court that the city's duty would arise *at the point when* a city employee *discovered* that *Irina* was approaching an area where there was a known risk of bees") (emphasis added); *Lacey*, 899 A.2d at 458 (affirming the grant of summary judgment because plaintiffs "pointed to no evidence that these defendants *discovered*

In each of these preceding cases, the Court placed no emphasis on any knowledge of a dangerous condition that the landowner may have had. Indeed, the majority in *Cain* expressly declined to do so despite ample evidence suggesting that the City had extensive knowledge of the dangers posed by the Cliff Walk.[173] In sum, under both the RUS and the common law, actual discovery of a trespasser is required to trigger the duty and, as the dissent in *Berman* aptly stated, "general knowledge that recreational property has some dangerous element is not enough to give rise to a duty under the statute."[174]

Viewed in light of this background, the *Berman* majority's effort to distinguish *Smiler v. Napolitano*[175] and *Lacey v. Reitsma*[176] is wholly unconvincing. The majority emphasized that "[i]n both of the aforementioned cases [*Smiler* and *Lacey*], there was no evidence that the governmental entity knew of the danger and then failed to take any action to guard against it, such that additional tragic injuries continued to occur."[177] While this may be true, *Cain* and its progeny make clear it is the actual discovery of the particular person in a position of peril – and not the knowledge or discovery of a dangerous condition on the property – that triggers the duty to refrain from willful or malicious conduct.[178]

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young R.J. in a position of peril *and then* failed to warn him against the potentially dangerous condition.") (emphasis added); *Hanley*, 837 A.2d at 713 (affirming the grant of summary judgment because plaintiffs did not "demonstrate any genuine issue of material fact that, 'after discovering the user's peril[,]' the state willfully or maliciously failed to 'guard or warn against a dangerous condition, use, structure, or activity[.]'") (alterations in original); *Cain*, 755 A.2d at 164 ("[a]bsolutely no evidence has been presented to suggest that the defendants or any of them were aware of the decedent's position of peril.").

173. *Cain*, 755 A.2d at 160-61 (rejecting the "beaten path exception" and stating that "this Court has steadfastly held that a landowner owes a trespasser no duty until he or she is *actually discovered* in a position of peril.") (emphasis added). *See Berman*, 991 A.2d at 1055 (Suttell, C.J. dissenting) (quoting this passage from *Cain*).

174. 991 A.2d at 1055.

175. 911 A.2d 1035 (R.I. 2006). For a discussion of the *Smiler* case, *see supra* notes 76-86 and accompanying text.

176. 899 A.2d 455 (R.I. 2006). For a discussion of the *Lacey* case, *see supra* notes 58-67 and accompanying text.

177. *Berman*, 991 A.2d at 1051.

178. *See supra* notes 168-74 and accompanying text.

In fact, the Court maintained in both *Smiler* and *Lacey* it was affirming the grants of summary judgment in favor of the municipal landowners because there was no evidence that each particular plaintiff had actually been discovered in a position of peril.[179] Therefore, the majority's characterization of the *Smiler* holding – "[w]e held that the RUS was a bar to liability because Providence did not know of the presence of the bees and thus had not yet discovered the plaintiff's peril"[180] – was most certainly incorrect. While knowledge or discovery of a dangerous condition may be a necessary component of discovering a particular person in a position of peril, it is meaningless unless coupled with the other necessary component – actual discovery of a particular person about to encounter that known/discovered danger.

The *Berman* Court's error was magnified by its conclusion that the City's failure to eliminate the dangerous condition "place[d] the members of the public whom the [C]ity invites to visit the Cliff Walk in a position of peril."[181] This statement is glaringly inconsistent with the language of the RUS and the Court's precedent. Section 32-6-5 of the Rhode Island General Laws provides, in pertinent part, that the RUS does not relieve a landowner's liability "[f]or the willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity *after discovering the user's peril*[.]"[182] As interpreted by the Court on numerous occasions and as mentioned in Part I of this Note,[183] the phrase "after discovering the user's peril" "is simply a legislative codification of the common law [trespasser rule] as enunciated in [the Court's] cases."[184] This trespasser rule requires actual discovery of a particular person in a position of peril. Equating actual discovery of a *particular person* in a

179. *See Smiler*, 911 A.2d at 1041 ("[i]t is clear to this Court that the city's duty would arise *at the point when* a city employee *discovered* that *Irina* was approaching an area where there was a known risk of bees.") (emphasis added); *Lacey*, 899 A.2d at 458 (affirming the grant of summary judgment because plaintiffs "pointed to no evidence that these defendants *discovered young R.J.* in a position of peril *and then* failed to warn him against the potentially dangerous condition.") (emphases added).

180. *Berman*, 991 A.2d at 1051.

181. *Id.* at 1050 (emphasis added).

182. R.I. GEN. LAWS § 32-6-5(a)(1) (1994) (emphasis added).

183. *See supra* notes 15-22 and accompanying text.

184. Cain v. Johnson, 755 A.2d 156, 164 (R.I. 2000).

position of peril with a failure to remedy known dangers which places *members of the public* (both present and future) in a position of peril finds no support in Rhode Island law.[185]

Finally, the *Berman* majority erred by relying on two cases interpreting recreational use statutes of other states to bolster its conclusion that knowledge of a dangerous condition, coupled with the failure to take any remedial action with respect of that condition, may be sufficient evidence of a willful or malicious failure to guard or warn against a dangerous condition.[186] The Court cited to passages from decisions of the Georgia Court of Appeals and the United States Court of Appeals for the Seventh Circuit which indicated that such a combination of knowledge and inaction would likely constitute willful or malicious conduct under the recreational use statutes being interpreted.[187] However, the recreational use statutes interpreted in those cases – Georgia's Recreational Property Act[188] and the Illinois Recreational Use of Land and Water Areas Act,[189] respectively – do not contain the critical "after discovering the user's peril" language that the Rhode Island RUS contains.[190]

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185. It is also important to note that the phrase at issue in *Berman* was "after discovering *the* user's peril" and not "after discovering *a* user's peril." The former, more constrained formulation of this phrase supports the conclusion that the duty to refrain from willful or malicious conduct, once it arises, is owed to a particular user and not a class of users.

186. *See Berman*, 991 A.2d at 1052-53.

187. *Id.* at 1052 (citing Quick v. Stone Mountain Mem'l Assoc., 420 S.E.2d 36, 38 (Ga. Ct. App. 1992)); *id.* at 1052-53 (citing Cacia v. Norfolk & W. Ry. Co., 290 F.3d 914, 915, 917, 920 (7th Cir. 2002)).

188. GA. CODE ANN. §§ 51-3-20 to -26 (2000).

189. 745 ILL. COMP. STAT. ANN. 65/1 to 65/7 (LexisNexis 2008).

190. *See* R.I. GEN. LAWS § 32-6-5(a)(1) (1994) (containing "after discovering the user's peril" language); GA. CODE ANN. § 51-3-25 (2000) (not containing such language); 745 ILL. COMP. STAT. ANN.65/6 (LexisNexis 2008) (not containing such language). In fact, the "after discovering the user's peril language" contained in the Rhode Island RUS is rather unique; of the fifty states that have recreational use statutes, only Rhode Island's statute contains such language. For other recreational use statutes not containing this language, *see, e.g.*, CONN. GEN. STAT. ANN. § 52-557h (West 2005); ME. REV. STAT. ANN. tit. 14, § 159-A(4) (2003 & Supp. 2010); MASS. GEN. LAWS ANN. ch. 21, § 17C(a) (West 2010); N.H. REV. STAT. ANN. § 508:14 (LexisNexis 2009); N.J. STAT. ANN. §§ 2A:42A-4 (West 2010); N.J. STAT. ANN. § 2A:42A-7 (West 2010); N.Y. GEN. OBLIG. LAW § 9-103(2) (McKinney 2010); VT. STAT. ANN. tit. 12, § 5793(a) (2002). For the complete list of recreational use statutes of the 50 states, *see* Elizabeth R. Springsteen & Rusty W. Rumley,

Although the *Berman* majority may have correctly decided the City's conduct would amount to a willful or malicious failure to guard or warn against a dangerous condition, this inquiry should never have been undertaken because the prerequisite necessary to trigger the duty to refrain from such conduct – *viz.*, the actual discovering of a particular person in a position of peril – was not satisfied. Therefore, the Court improperly cited to cases from other jurisdictions with significantly different recreational use statutes in an effort to bolster its conclusion that the Rhode Island RUS should not be applied to immunize the City from liability on the facts of this case.

Thus, the Court's failure to follow its own well-established precedent and to apply the plain and unambiguous language of the RUS led the Court to a conclusion which, although admirable for its attempt to right a serious wrong, cannot be squared with the prior RUS framework.

C. The Majority Failed to Properly Perform Its Judicial Role

Finally, the most problematic flaw in *Berman*, and one that undermines Rhode Island's system of state governance, is the majority's willingness to overstep the bounds of its proper judicial role and to assume a legislative function. The Rhode Island Constitution explicitly provides for the principle of separation of powers in Article V, which states that "[t]he powers of the government shall be distributed into three separate and distinct departments: the legislative, executive and judicial."[191] To effectuate this separation, the Constitution further provides, in pertinent part, "[t]he legislative power, under this Constitution, shall be vested in two houses, the one to be called the senate, the other the house of representatives; and both together the general assembly[,]"[192] and "[t]he judicial power of this state shall be

States' Recreational Use Statutes, NAT'L AGRIC. LAW CTR., http://www.nationalaglawcenter.org/assets/recreationaluse/index.html. The District of Columbia does not have a recreational use statute. *See* Tom Baker & Hania Masud, *Summary of Legal Rules Governing Liability for Recreational Use of School Facilities*, PUB. HEALTH LAW & POLICY, April 2010, http://www.lombardilaw.com/library/Liability_Recreational_Use_Facilities_CHART_FINAL_ 20100416.pdf.

191. R.I. CONST. art. V.

192. *Id.* art. VI, § 2.

vested in one supreme court, and in such inferior courts as the general assembly may, from time to time, ordain and establish."[193] The Rhode Island Supreme Court has consistently recognized the importance of this constitutional separation of powers. In *DeSantis v. Prelle*,[194] for example, the Court unanimously stated:

> It is not for this Court to assume a legislative function when the General Assembly chooses to remain silent . . . ("[T]he function of adjusting remedies to rights is a legislative responsibility rather than a judicial task * * *.") To do otherwise, even if based on sound policy and the best of intentions, would be to substitute our will for that of a body democratically elected by the citizens of this state and to overplay our proper role in the theater of Rhode Island government.[195]

Along the same lines, in *Simeone v. Charron*[196] a unanimous Court explained "[t]his Court, however, is not 'entitled to write into [a] statute certain provisions of policy which the legislature might have provided but has seen fit to omit . . . If a change in that respect is desirable, it is for the legislature and not for the court."[197] Likewise, the Court in *Lacey v. Reitsma*[198] noted, "[w]e are cognizant of the fact that our judicial role is to interpret and apply statutes and not to legislate[.]"[199]

The need for proper separation of powers is particularly acute where, as here in the RUS context, there is tension between the branches of government. The Court has made no secret of its dislike of the RUS; in fact, on numerous occasions, the Court has exhorted the General Assembly to reconsider the wisdom of extending the RUS's protection to state and municipal

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193. *Id.* art. X, § 1.

194. 891 A.2d 873 (R.I. 2006).

195. *Id.* at 881 (internal citations omitted). *See* Berman v. Sitrin, 991 A.2d at 1056 (Suttell, C.J., dissenting).

196. 762 A.2d 442 (R.I. 2000).

197. *Id.* at 448 (quoting Elder v. Elder, 120 A.2d 815, 820 (R.I. 1956)); *see Berman*, 991 A.2d at 1056 n.17 (Suttell, C.J., dissenting) (quoting this language).

198. 899 A.2d 455 (R.I. 2006).

199. *Id.* at 458; *see* Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting this language from *Lacey*).

landowners.[200] Despite these numerous pleas, the General Assembly made no change to the RUS. Frustrated with the General Assembly's failure to act, perhaps justifiably so, the *Berman* majority took matters into its own hands. While the Court's frustration may have been justified, its action was not. As the Court stated in *Tantimonico v. Allendale Mut. Ins. Co.*[201] with respect to the RUS, "[t]he Legislature appears to have made a judgment that the social benefits of resurrecting the common-law classification [of trespasser] at least for this purpose outweighed the costs to recreational users."[202] Even if seemingly unwise, this policy judgment, once made by a democratically elected Legislature, may not be cast aside by the Court, regardless of how strongly the Justices may disagree with the General Assembly's judgment.[203] However, the *Berman* majority, by interpreting the RUS in a manner irreconcilable with the plain and unambiguous language of the RUS and the Court's well-established RUS precedent, assumed a legislative function by writing another exception into the RUS. After the Court's opinion, section 32-6-5 of the Rhode Island General Laws[204] essentially needs to be read as follows:

> [n]othing in this chapter limits in any way liability which, but for this chapter,
>
> otherwise exists:
>
> (1) [f]or the willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity after discovering the user's peril *or after discovering the dangerous condition, use, structure or activity.*[205]

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200. Labedz v. State, 919 A.2d 415, 417 (R.I. 2007); *Smiler*, 911 A.2d at 1042; Cruz v. City of Providence, 908 A.2d 405, 407 n.2 (R.I. 2006); *Lacey*, 899 A.2d at 458. For a discussion of these specific exhortations, *see supra* Part II.B.

201. 637 A.2d 1056 (R.I. 1994).

202. *Id.* at 1060-61; *see* Cain v. Johnson, 755 A.2d 156, 173 (Goldberg, J., dissenting in part) (quoting this language).

203. *See* DeSantis v. Prelle, 891 A.2d 873, 881 (R.I. 2006); Simeone v. Charron, 762 A.2d 442, 448 (R.I. 2000).

204. R.I. GEN. LAWS § 32-6-5(a)(1) (1994).

205. R.I. GEN. LAWS § 32-6-5(a)(1) (1994) (italicized phrase is the author's own). It should be noted that the phrase "after discovering the user's peril," as used in the RUS, could conceivably be read to refer to the dangerous

Regrettably, in interpreting the RUS in this way, the Court failed to heed its own wise proviso that its "judicial role is to interpret and apply statutes and *not to legislate*[.]"[206] As Chief Justice Suttell aptly stated in his dissent in *Berman*, "'[t]he remedy for a harsh law is not in interpretation, but in amendment or repeal.'"[207]

IV. THE AFTERMATH

Although it is difficult to accurately predict the fallout from the Court's decision in *Berman*, three potential scenarios seem possible. All three scenarios contravene the legislative intent behind the RUS, at least to some degree. First, state and municipal landowners may improve safety by remedying any perceived dangerous conditions at no cost to land entrants. Second, governmental landowners may charge the public a fee for access to the land in order to offset the costs of remedying any dangerous conditions. Finally, and most troubling, state and municipal landowners may simply bar public access to lands that were once held open for recreational use in order to shield themselves from liability. Even if any of these repercussions would have some social benefits, because each represents such a significant change from prior landowner liability law in Rhode Island, it is the General Assembly and not the Court that should make any such policy decision.

A. Improve Safety at No Charge

State and municipal landowners may respond to *Berman* by doing exactly what the *Berman* majority wants them to do – remedy a dangerous condition on the land once knowledge of that

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condition ("user's *peril*") rather than a particular person. However, as far as the author knows, this argument has never been made. This is probably because the Court decided that this phrase tracks the Court's own common law terminology for the trespasser rule. *See* Cain v. Johnson, 755 A.2d 156, 164 (R.I. 2000); *Tantimonico*, 637 A.2d at 1060-61. Because of this early interpretation, one must construe the phrase as referring to discovery of a person and not discovery of a dangerous condition. *See supra* notes 15-22 and accompanying text and notes 168-74 and accompanying text.

206. Lacey v. Reitsma, 899 A.2d 455, 458 (R.I. 2006) (emphasis added); *see* Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting this language).

207. Berman v. Sitrin, 991 A.2d 1038, 1056 (R.I. 2010) (quoting State v. Duggan, 6 A. 787, 788 (R.I. 1886)) (alteration in original).

condition is acquired, while still making the land free and available to the public for recreational purposes.[208] These remedial measures could take several different forms, depending on the nature of the dangerous condition at issue and of the property on which the dangerous condition is situated. Taking the Cliff Walk as a familiar example, the City could have posted warning signs admonishing those on the Cliff Walk to not venture off the paved walk[209] or erected a fence or wall along the Cliff Walk barring access to points off of the Cliff Walk that were susceptible to erosion.[210]

In other instances, it may be possible for the landowner to remedy the dangerous condition himself. At first glance, this does not seem like a negative repercussion of *Berman*; indeed, one may think state and municipal landowners should take it upon themselves to ensure that property used by the public remains safe. However, as a matter of economic reality, it is more likely that governmental landowners will charge some type of fee to the public to offset the cost of any safety improvements. Additionally, the duty of a landowner to keep his premises safe for use by others

208. *See id.* at 1050 ("[T]he evidence produced in this case demonstrates that the [C]ity had actual or constructive knowledge of the perilous circumstances, and, having been afforded a reasonable amount of time to eliminate the dangerous condition, failed to do so. This failure places the members of the public whom the [C]ity invites to visit the Cliff Walk in a position of peril."); *id.* at 1051 ("[T]he governmental entity knew of the danger and then failed to take any action to guard against it, such that additional tragic injuries continued to occur."); *see also* Cain v. Johnson, 755 A.2d 156, 167 (R.I. 2000) (Goldberg, J., dissenting in part) (after reviewing the same evidence that would later be presented in the *Berman* opinion, Justice Goldberg lamented, "[T]hese defendants [including the City] had actual knowledge of the potential for loss of life posed by this particular area of the Cliff Walk and did nothing to forestall this calamity.").

209. *See Berman*, 991 A.2d at 1042 ("The plaintiffs allege that there were no signs warning of the Cliff Walk's potential hazards at either The Breakers or the Shepard Avenue entrance" where Simcha and Sarah entered the Cliff Walk.).

210. *See Cain*, 755 A.2d at 168 (Goldberg, J., dissenting in part) ("Perhaps the saddest part of this tragedy that resulted in the death of this young man is that following Cain's death, then-Governor Bruce Sundlun ordered immediate action and initiated the installation of a fence for the area. We have been informed that the cost of this repair was $11,960. The meager cost of this repair of this preventative measure is a shocking circumstance that in my opinion justifies a trial in this case on the issue of reckless indifference to the safety of Michael Cain.").

for recreational purposes was clearly not intended by the RUS. If such a duty is to be imposed, it should be imposed by the General Assembly through amendment or repeal of the RUS.

From a purely economic standpoint, it seems unlikely that state and municipal landowners will remedy dangerous conditions without attempting to offset the costs of whatever remedial measures are undertaken. Perhaps one of the main reasons governmental landowners hold certain lands open to the public at no charge is the promise of limited liability under the RUS regime.[211] If such landowners are now faced with the threat of liability for dangerous conditions on the land, that incentive for holding land open to the public for recreational purposes is substantially diminished, if not completely vitiated.

Furthermore, imposing a duty on the state and municipalities to remedy dangerous conditions on land made available to the public for recreational purposes is surely contrary to the legislative intent behind the RUS. The stated purpose of the RUS "is to *encourage* owners of land to make land and water areas available to the public for recreational purposes *by limiting their liability* to persons entering thereon for those purposes."[212] Far from imposing on a landowner a duty to make land safe for entrants using it for recreational purposes, the RUS provides that "an owner of land who either directly or indirectly invites or permits without charge any person to use that property for recreational purposes does not thereby: (1) [e]xtend *any* assurance that the premises are safe for *any* purpose[.][213] Moreover, the RUS goes on to add that "[n]othing in this chapter shall be

211. *See* Sandra M. Renwand, Note, *Beyond* Commonwealth v. Auresto: *Which Property is Protected by the Recreation Use of Land & Water Act?*, 49 U. PITT. L. REV. 261, 275-76 (1987); Sean D. White, Note, *Governmental Liability for Recreational Uses of Land:* Bronsen v. Dawes County, 87 NEB. L. REV. 569, 582-85 (2008) (suggesting that public landowners need some motivation to hold their land open to the public and that the limitation of liability provided by recreational use statutes is an effective motivation for this purpose). Also, the Rhode Island General Assembly certainly thought that limiting liability of landowners would be an inducement to hold one's land open. *See* R.I. GEN. LAWS § 32-6-1 (1994) ("The purpose of this chapter is to *encourage* owners of land to make land and water areas available to the public for recreational purposes *by limiting their liability* to persons entering thereon for those purposes.") (emphasis added).

212. *Id.* § 32-6-1 (emphasis added).

213. *Id.* § 32-6-3 (emphasis added).

construed to: (1) [c]reate a duty of care or ground of liability for an injury to persons or property[.]"[214]

Forcing landowners to choose whether to remedy known dangerous conditions on their land or face liability for failure to do so in the event that recreational users are injured thereon is tantamount to imposing a duty on landowners to make their lands safe for recreational users – a duty clearly not imposed by the RUS. While one may question the wisdom of the General Assembly's policy judgment – as the Court itself has done on numerous occasions[215] – that policy judgment, once made, must be revisited solely by the General Assembly or not at all.[216]

B. Improve Safety and Offset Costs With Fee for Access

If state and municipal landowners do decide to remedy any dangerous conditions that exist on their properties, it seems more likely that the landowners will charge a fee for access rather than gratuitously undertaking safety efforts at no charge. Charging a fee for access would help to offset the costs of any of the measures taken, even if those costs are relatively small. In addition, charging a fee for public access could also serve as a means of offsetting any potential litigation costs from the increased litigation that is likely to arise under the post-*Berman* RUS regime. If governmental landowners were to charge a fee, it would be problematic for two reasons.

First, if this scenario were to transpire, an even larger burden

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214. *Id.* § 32-6-6.

215. *See* Labedz v. State, 919 A.2d 415, 417 (R.I. 2007); Smiler v. Napolitano, 911 A.2d 1035, 1042 (R.I. 2006); Cruz v. City of Providence, 908 A.2d 405, 407 n.2 (R.I. 2006); Lacey v. Reitsma, 899 A.2d 455, 458 (R.I. 2006).

216. *See* Berman v. Sitrin, 991 A.2d 1038, 1056 & n. 17 (R.I. 2010) (Suttell, C.J., dissenting); DeSantis v. Prelle, 891 A.2d 873, 881 (R.I. 2006) ("It is not for this Court to assume a legislative function when the General Assembly chooses to remain silent . . . To do otherwise, even if based on sound policy and the best of intentions, would be to substitute our will for that of a body democratically elected by the citizens of this state and to overplay our proper role in the theater of Rhode Island government.") (internal citations and parenthetical phrases omitted); Simeone v. Charron, 762 A.2d 442, 448 (R.I. 2000) ("This Court, however, is not 'entitled to write into the statute certain provisions of policy which the legislature might have provided but has seen fit to omit * * *. * * * If a change in that respect is desirable, it is for the legislature and not for the Court.'") (quoting Elder v. Elder, 120 A.2d 815, 820 (R.I. 1956)).

would be placed on the state's judicial system. If a landowner were to charge a fee for public access to land, the RUS provisions would not apply.[217] In such a case, the fee-paying entrant would no longer be classified as a trespasser and, under Rhode Island law, the landowner would owe the entrant a duty of reasonable care under the circumstances.[218] As a result, many cases would withstand summary judgment challenges because the determination of what constitutes reasonable care under the circumstances is highly fact-specific. These same cases would likely not have withstood summary judgment under the pre-*Berman* RUS regime because a landowner owed the land entrant no duty unless that land entrant was first discovered in a position of peril.[219] Second, charging fees for access to land would be contrary to the legislative intent behind the RUS. By charging the public a fee for entrance, landowners would arguably be making their land less "available" to recreational users, thereby frustrating the primary purpose of the RUS.[220] Also, if the fee is charged in an effort to offset the costs of increased litigation, the entrance fee could be quite high. Since a fee charging landowner does not have the benefit of the protections provided by the RUS, it seems unlikely that a purely nominal fee will offset liability costs under a reasonable care standard. Therefore, if fees are charged, they will be rather high and this will in turn make land even less free and "available" to the public, further frustrating the primary purpose behind the RUS.

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217. R.I. GEN. LAWS § 32-6-5(a)(2) (1994) ("(a) Nothing in this chapter limits in any way any liability which, but for this chapter, otherwise exists: . . . (2) [f]or *any* injury suffered in *any* case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof[.]") (emphasis added).

218. *See* Kurczy v. St. Joseph Veterans Ass'n, 713 A.2d 766, 772 n.6 (R.I. 1998); Kuzniar v. Keach, 709 A.2d 1050, 1055 & nn.7 & 8 (R.I. 1998); Labrie v. Pace Membership Warehouse, 678 A.2d 867, 868-69 & n.1 (R.I. 1996).

219. *See* R.I. GEN. LAWS § 32-6-5(a)(1) (1994); Smiler v. Napolitano, 911 A.2d 1035, 1041 (R.I. 2006); Lacey v. Reitsma, 899 A.2d 455, 458 & n. 5 (R.I. 2006); Hanley v. State, 837 A.2d 707, 713 (R.I. 2003); Cain v. Johnson, 755 A.2d 156, 161-62, 164 (R.I. 2000).

220. *See* R.I. GEN. LAWS § 32-6-1 (1994) ("The purpose of this chapter is to *encourage* owners of land to make land and water areas *available* to the public for recreational purposes by limiting their liability to persons entering thereon for those purposes[.]") (emphasis added).

C. Barring Access

The third possible implication of the *Berman* decision – state and municipal landowners simply barring public access to land that would have been held open for recreational use under the pre-*Berman* regime – represents the most certain liability-limiting strategy. The RUS would not apply in a situation where a landowner bars access to his or her land (e.g. by posting "no trespassing" signs).[221] At the same time, while this scenario would be the safest of the three for the landowner seeking to limit his liability, this repercussion most frustrates the purpose of the RUS. Certainly, it seems highly unlikely that Newport would bar access to the Cliff Walk, a renowned tourist attraction that brings countless visitors (and their money) to the City each year, simply because of fear of increased liability. Not all land covered by the RUS is of such value to its owners, however. Would a municipal owner of a small pond or hiking trail (which provides no economic benefit to the owner) have the same incentive to continue to allow members of the public to use the premises in the face of liability? For the vast majority of land covered by the RUS, the benefit of holding the property open to the public will not be worth the risk of increased liability. Far from encouraging landowners to make their land available to the public,[222] if this implication materializes, *Berman* can correctly be read as *discouraging* governmental landowners from holding their property open to the public. This result would be plainly inconsistent with the stated purpose of the RUS.

IV. THE LEGITIMATE SOLUTION: LEGISLATIVE AMENDMENT OF THE RUS

Although the *Berman* majority opinion suffers from fundamental flaws in reasoning which could lead to results contrary to the legislative intent behind the RUS, it nevertheless raises two serious, interrelated problems with the RUS as it is currently enacted. First, extending the limited liability provisions

221. Bucki v. Hawkins, 914 A.2d 491, 498 (R.I. 2007) ("In this case, the defendant testified that a 'No Trespassing' sign was posted on her property, a clear indication that she had not opened her land to the public for recreational use.").

222. This is the stated purpose of the RUS. R.I. GEN. LAWS § 32-6-1 (1994).

of the RUS to state and municipal landowners has often led to unjust results.[223] The Court has been faced with multiple cases brought against governmental landowners by unsuspecting individuals who suffered serious injuries on public land.[224] In each case, the RUS, when properly interpreted and applied, operated to bar the individuals' claims.[225] On numerous occasions, the Court has expressed its difficulty in reaching very troubling results based on classifying as trespassers those who use governmental land for recreational purposes.[226] Second, the majority and dissent in *Berman* agreed the RUS provides no incentive for state and municipal landowners to remedy dangerous conditions on their lands after acquiring such knowledge.[227]

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223. *See* Berman v. Sitrin, 991 A.2d 1038, 1044 n.8 (R.I. 2010) (explaining the "unfortunately harsh consequences that flow from classifying those who use public recreational facilities as trespassers."); *id.* at 1050 (explaining that requiring actual discovery of Simcha before the duty arose would lead to a "blatantly unjust result.").

224. *See Berman*, 991 A.2d at 1042 (twenty-three year old man on honeymoon fell from Cliff Walk, suffering "severe spinal cord injury that rendered him a quadriplegic"); Smiler v. Napolitano, 911 A.2d 1035, 1037 (R.I. 2006) (woman attacked by a swarm of bees in a Providence park); Cruz v. City of Providence, 908 A.2d 405, 406 (R.I. 2006) (two young boys suffered serious injuries when the bicycle they were riding ran into a chain that blended in with a chain link fence behind it); Lacey v. Reitsma, 899 A.2d 455, 456 (R.I. 2006) (while riding his bicycle in a public park, nine year old boy rode his bicycle off of a cliff "and fell to the rocks below, sustaining severe and permanent injuries.")

225. *See Smiler*, 911 A.2d at 1042 (affirming summary judgment granted in favor of governmental landowner); *Cruz*, 908 A.2d at 407 (same); *Lacey*, 899 A.2d at 458-59 (same); *see also* Labedz v. State, 919 A.2d 415, 418 (R.I. 2007) (same); Hanley v. State, 837 A.2d 707, 714 (R.I. 2003) (same).

226. *See Labedz*, 919 A.2d at 417; *Smiler*, 911 A.2d at 1042; *Cruz*, 908 A.2d at 407 n.2; *Lacey*, 899 A.2d at 458.

227. *Berman*, 991 A.2d at 1051 (explaining that requiring actual discovery of a particular person "would serve as a disincentive to the state and its subdivisions to make necessary safety repairs to publicly owned and taxpayer-financed recreational facilities, or to warn the unsuspecting and innocent members of the public of known dangerous conditions."); *id.* at 1053 ("We are not persuaded that the Legislature intended the RUS to serve as an invitation to ignore known hazards while profiting from this major tourist attraction where such danger is present."); *id.* at 1054 (Flaherty, J., concurring) ("A contrary holding in this case would provide an incentive to landowners to be callous and altogether irresponsible with respect to the safety of people entering upon their land for simple recreational pleasure, in the face of danger known to the owner, but of which the recreational user is

The Court is not alone in questioning the wisdom of statutes that provide liability protection to governmental landowners who hold their property open to the public for recreational purposes. A fair number of courts and commentators have remarked that extending the provisions of recreational use statutes to states and municipalities appears unjust because a governmental body is in a presumptively better position to compensate for injuries than are individual plaintiffs who suffer injuries on government lands.[228] As the maintenance of many of these lands is funded by general taxes, some authorities argue that an increase in taxes and/or the purchase of liability insurance by the landowners are the most efficient and just methods for ensuring injuries suffered by those using public facilities do not go uncompensated.[229]

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totally unaware."); *id.* at 1055 (Suttell, C.J., dissenting) ("the RUS not only protects the [C]ity from liability but also acts as a disincentive for the [C]ity to implement any safety measures whatsoever."); *see Smiler*, 911 A.2d at 1042 ("We are additionally concerned about the protection of this state's citizens, given that the statutory scheme does nothing to motivate governmental landowners to make their properties safe.").

228. *See* Conway v. Town of Wilton, 680 A.2d 242, 253 (Conn. 1996) (noting that "through taxes, municipalities are able to spread costs among residents and thereby shift the burden of negligence away from the injured citizen. Because municipalities essentially pass on the costs for all recreational facilities or services to the citizenry in the form of taxes, providing them with immunity would be at best anomalous."); Scrapchansky v. Town of Plainfield, 627 A.2d 1329, 1340 (Conn. 1993) (Katz, J., dissenting) (explaining that applying a recreational use statute "to municipalities imposes too high a societal cost and serves no useful or intelligible purpose"); Chapman v. Pinellas Cnty., 423 So. 2d 578, 579-80 (Fla. Dist. Ct. App. 1982) (explaining that a recreational use statute should not be applied to municipalities because "a county, [as opposed to a private landowner], generally maintains its parks from available tax funds" and because a municipality can "protect itself with liability insurance coverage in these instances"); Joan M. O'Brien, Comment, *The Connecticut Recreational Use Statute: Should a Municipality Be Immune From Tort Liability?*, 15 PACE L. REV. 963, 994 (1995) (suggesting that a "municipality would be better able to bear the burden of damages resulting from injury than an individual because "any damage remedies resulting from negligence that are paid by the municipality are spread among the taxpayers."); *see also* Robert A. Williams, Note & Comment, *Tough Choices Regarding Municipal Liability: The Application of the Idaho Recreational Use Statute to Public Lands*-Ambrose v. Buhl Joint School District No. 412, 33 IDAHO L. REV. 185, 212-13 (1996) (suggesting that the "availability and prevalence of insurance for indemnification of tort liability" should be a factor to consider in determining whether a recreational use statute should apply in any given case).

229. *See Conway*, 680 A.2d at 253 (taxes as a cost-spreading device);

More persuasively, some commentators urge that a focus on the reasonable expectations of the public highlights the injustice of providing liability protection to governmental landowners.[230] This argument essentially posits that, because those members of the public who come upon public recreational lands expect the land to be maintained by the municipal or state landowner in a reasonably safe condition, the public justifiably expects to have some recourse in case of injury on such lands; therefore, it is highly unjust to frustrate these expectations after the fact of injury by providing governmental landowners with immunity from liability.[231]

Although criticisms of extending recreational use statutes' protections to state and municipal landowners certainly have some merit, it is nevertheless the prerogative of a democratically elected legislature, and not that of a court, to change the language of a statute.[232] While the Court may have been justifiably frustrated with the General Assembly's persistent failure to take any action to amend the RUS despite the Court's repeated

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Chapman, 423 So. 2d at 579-80 (taxes and insurance as cost-spreading devices); O'Brien, *supra* note 228 at 994 (taxes as a cost-spreading device); *see also* Williams, *supra* note 228 at 212-13.

230. *See* Michael S. Carroll et al., *Recreational User Statutes and Landowner Immunity: A Comparison Study of State Legislation*, 17 J. LEGAL ASPECTS OF SPORT 163, 178 (2007) [hereinafter Carroll] (suggesting that "the public also has a vested interest in holding landowners accountable for negligent acts that lead to injuries of recreational participants"); O'Brien, *supra* note 228 at 994 ("An individual using a [public] playground does so in good faith that it is safe and that no danger exists or harm will result. The public expects that the municipality will take care of its members."); Renwand, *supra* note 211 at 279-80 (suggesting that the "reasonable expectation of recreational users" should be a factor in determining whether to extend protection under a recreational use statute to a particular piece of land); Williams, *supra* note 228 at 212 (explaining that, "regarding public playgrounds and inner-city improved parks, at least, public expectations would probably be more in keeping with a negligence standard."); *see also* McGhee v. Glenns Ferry, 729 P.2d 396, 400 (Idaho 1996) (Bistline, J., dissenting) (suggesting in a tongue-in-cheek manner that, if Idaho's Recreational Use Statute is to be applied to public lands, the posting of notices indicating the state's immunity should be required on all such lands in order to provide members of the public with at least a modicum of protection).

231. *See* Carroll, *supra* note 230 at 178; O'Brien, *supra* note 228 at 994; Renwand, *supra* note 211 at 279-80; Williams, *supra* note 228 at 211-12.

232. *See* DeSantis v. Prelle, 891 A.2d 873, 881 (R.I. 2006); Simeone v. Charron, 762 A.2d 442, 448 (R.I. 2000).

exhortations for the Legislature to do so, the Court was not justified in effecting the much desired change itself. No matter how many times the Court urges the General Assembly to make a change in an unfavorable law and no matter how many times the General Assembly refuses to do so, the Court must remain mindful that its "judicial role is to interpret and apply statutes and not to legislate" and must refrain from substituting its own policy judgments for those of the Legislature.[233] Legislative amendment or repeal of the RUS remains the only legitimate option for changing the application of the RUS to state and municipal landowners.[234]

CONCLUSION

Faced once more with incredibly tragic facts and frustrated with legislative inaction, the Rhode Island Supreme Court in

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233. Lacey v. Reitsma, 899 A.2d 455, 458 (R.I. 2006); *see DeSantis*, 891 A.2d at 881; *Simeone*, 762 A.2d at 448.

234. In addition to amending the RUS to exclude state and municipal landowners from the definition of "owner," the General Assembly should also consider omitting the "after discovering the user's peril" language from the RUS. *See* R.I. GEN. STAT. § 32-6-5(a)(1) (1994). As mentioned earlier in this Note, of the fifty jurisdictions that have recreational use statutes, only Rhode Island's RUS contains the "after discovering the user's peril" phrase. *See supra* note 190. While it is true that the language has particular significance in treating land entrants who use property for recreational purposes as trespassers, the RUS could likely operate just as effectively by providing an exception to the limited liability provisions for "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity . . ." R.I. GEN. STAT. § 32-6-5(a)(1) (1994). When the current exception containing the "after discovering the user's peril" language has been correctly interpreted, it has never operated to take away the RUS's grant of landowner immunity. This is likely because the exception would only operate to forestall immunity under a very specific factual scenario that would rarely, if ever, arise: the landowner would need to discover a particular person in a position of peril and then fail to warn or guard against a dangerous condition, use, structure or activity. *But see* Smiler v. Napolitano, 911 A.2d 1035, 1039 (R.I. 2006) (disagreeing with plaintiffs' contention that the RUS exception containing the "after discovering the user's peril" language "is overly prohibitive and logically impossible to invoke"). In any event, the more problematic provision of the RUS is the one that includes the state and municipalities under the definition of "owner." *See* R.I. GEN. STAT. § 32-6-2(3) (Supp. 2010). Suffice it to say that, while multiple provisions of the RUS may be in need of legislative reexamination, the General Assembly should first rectify the more pressing problem with that statute: the extension of landowner immunity to the state and municipalities.

Berman v. Sitrin engaged in results-based reasoning that was both contrary to the RUS and its own precedent and inimical to the proper separation of governmental powers. While its decision will allow a seriously injured individual to have his day in court, the Court sacrificed sound principles of jurisprudence for zealous advocacy of social policy. Viewed in this light, *Berman* could lead to numerous scenarios not anticipated by the Court that would undoubtedly be contrary to the legislative intent behind the RUS. Although the RUS may be in need of serious changes, the General Assembly is the only appropriate body to make any such change. Although Simcha Berman's injury is undeniably tragic, inflicting an injury to the integrity of the Rhode Island system of government in order to provide individual redress – however admirable this may seem – was unwarranted and ill-advised.