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Comments: The Road to Judicial Abolishment of Contributory Negligence Has Been Paved by Bozman v. Bozman

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THE ROAD TO JUDICIAL ABOLISHMENT OF CONTRIBUTORY NEGLIGENCE HAS BEEN PAVED BY *BOZMAN V. BOZMAN*[1]

I. INTRODUCTION

Despite vast criticism and overwhelming dissent by almost all of the states, Maryland remains one of only five jurisdictions that still recognizes contributory negligence.[2] The Court of Appeals of Maryland justified Maryland's status as a contributory negligence jurisdiction with its decision in *Harrison v. Montgomery County Board of Education* to defer abrogation to the legislature.[3] The legislature's failure to act in the twenty years since this decision has created a need to reexamine judicial abrogation.

The Court of Appeals of Maryland has reserved the abrogation of many common law doctrines for the legislature.[4] Prior to 2003, the court used this justification to preserve the interspousal immunity doctrine in a line of cases beginning in 1952.[5] In *Bozman v. Bozman*,[6] however, the court recognized interspousal immunity's deficiencies and abolished the doctrine.[7] In reexamining its previous deference to the legislature, the Court of Appeals identified the interspousal immunity doctrine as "an antiquated rule of law which, in our view, runs counter to prevailing societal norms and, therefore, has lived out its usefulness."[8]

A similar rationale can be applied to Maryland's contributory negligence doctrine. Contributory negligence is an antiquated doctrine abolished by almost all of the states[9] and common law countries, in-

1. 376 Md. 461, 830 A.2d 450 (2003).
2. *See infra* note 9 and accompanying text.
3. *See* 295 Md. 442, 463, 456 A.2d 894, 905 (1983).
4. *See, e.g.*, State v. Sowell, 353 Md. 713, 728 A.2d 712 (1999) (distinction between principals and accessories); Austin v. Mayor of Baltimore, 286 Md. 51, 415 A.2d 255 (1979) (governmental immunity); Creaser v. Owens, 267 Md. 238, 297 A.2d 235 (1972) (the "boulevard rule"); Howard v. Bishop Byrne Council Home, Inc., 249 Md. 233, 238 A.2d 863 (1968) (charitable immunity); White v. King, 244 Md. 348, 223 A.2d 763 (1966) (*lex loci delicti*).
5. *See generally* Stokes v. Ass'n of Indep. Taxi Operators, Inc., 248 Md. 690, 237 A.2d 762 (1968); Hudson v. Hudson, 226 Md. 521, 174 A.2d 339 (1961); Fernandez v. Fernandez, 214 Md. 519, 135 A.2d 886 (1957); Gregg v. Gregg, 199 Md. 662, 87 A.2d 581 (1952).
6. 376 Md. 461, 830 A.2d 450 (2003).
7. *See id.* at 496, 830 A.2d at 471.
8. *Id.* at 467-68, 830 A.2d at 454.
9. *See* Christopher J. Robinette & Paul G. Sherland, *Contributory or Comparative: Which Is the Optimal Negligence Rule?*, 24 N. ILL. U. L. REV. 41, 44-45 (2003). Alabama, Maryland, North Carolina, Virginia, and the District of Columbia

cluding England, where it originated.[10] Efforts in Maryland to pass a comparative negligence bill in the legislature have failed.[11] It is time to reevaluate the court's role. Judicial action is necessary, and is the next logical step in abolishing contributory negligence in Maryland.

This comment will first examine the origins of contributory and comparative negligence.[12] It will then demonstrate how the ruling in *Bozman* reflects willingness by the Court of Appeals to abrogate antiquated doctrines, the abolition of which it previously deferred to the legislature.[13] Finally, it will suggest a form of comparative negligence for the Court of Appeals of Maryland to adopt.[14]

II. CONTRIBUTORY NEGLIGENCE

A. *The Origins of Contributory Negligence*

The concept of contributory negligence originated in an 1806 English case, *Butterfield v. Forrester*.[15] Butterfield was injured when his horse struck a pole that Forrester had left in the road.[16] Because the jury found that Butterfield had been riding too fast to see and avoid the obstruction, the court denied recovery.[17] Lord Ellenborough stated, "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."[18]

This concept was said to have developed from a judge-perceived need to control plaintiff-minded juries.[19] In addition, courts sought

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remain contributory negligence jurisdictions. *Id.* at 45 n.27, 56. *See also infra* Part III.

10. Placek v. City of Sterling Heights, 275 N.W.2d 511, 515 (Mich. 1979). England replaced contributory negligence with comparative negligence in the Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, ch. 28 (Eng.).
11. *See infra* Part III.C.2.
12. *Infra* Parts II, III.
13. *Infra* Parts IV,V.
14. *Infra* Part VI.
15. 103 Eng. Rep. 926 (K.B. 1809). *See* Harrison v. Montgomery County Bd. of Educ., 295 Md. 442, 449, 456 A.2d 894, 897 (1983).
16. *Butterfield*, 103 Eng. Rep. at 926.
17. *Id.* at 926-27.
18. *Id.*
19. Joseph W. Little, *Eliminating the Fallacies of Comparative Negligence and Proportional Liability*, 41 ALA. L. REV. 13, 20 (1989). One commentator explained the origin of "plaintiff-minded juries":

> When simple disputes between neighbors had formed the bulk of tort litigation, as had been the case in the past, jurors had been able to dispose of such cases easily, fairly, and properly. When, however, big and remote corporate defendants, especially railroads, entered the scene, the average juror, often regarding such defendants to be intruders as well as immensely rich, became plaintiff-minded.

to limit the liability of newly developing industry.[20] Several underlying policies also existed, including "punishment of the negligent plaintiff, encouragement to comply with the community's standard of care, and the alleged inability of juries to measure the amount of damage attributable to the plaintiff's own negligence."[21] After being first recognized in the United States in *Smith v. Smith* in 1824,[22] contributory negligence was later adopted by all of the states and the District of Columbia.[23]

B. Contributory Negligence in Maryland

In 1847, Maryland adopted the doctrine of contributory negligence in *Irwin v. Sprigg*.[24] Then, in 1966, Maryland adopted the Second Restatement of Torts' definition of contributory negligence in *Craig v. Greenbelt Consumer Services, Inc.*[25] It defined contributory negligence as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm."[26] Therefore, if a plaintiff's own negligence contributed to his injuries, he could recover nothing from the defendant.

C. Efforts to Ameliorate the Harshness of Contributory Negligence

Contributory negligence has been highly criticized for its unfairness to plaintiffs, arising from the doctrine's ability to relieve a defendant of liability for even the smallest degree of fault by the plaintiff.[27] States that have judicially abrogated the doctrine have recognized its harsh nature.[28] For example, in *Hoffman v. Jones*,[29] the Supreme

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Ernest A. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 198-99 (1950).

20. *Harrison*, 295 Md. at 450, 456 A.2d at 897. *But see* Steven Gardner, *Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina*, 18 CAMPBELL L. REV. 1, 12 (1996) (arguing that the theory "that a particular court adopted a particular legal doctrine because of the court's unspoken desire to assist the industrial revolution is pure speculation").
21. *Harrison*, 295 Md. at 450, 456 A.2d at 898.
22. 19 Mass. (2 Pick.) 621 (1824).
23. *See* Robinette & Sherland, *supra* note 9, at 41.
24. *See* 6 Gill 200, 205 (Md. 1847).
25. 244 Md. 95, 97, 222 A.2d 836, 837 (1966).
26. *Id.*
27. *See* Harrison v. Montgomery County Bd. of Educ., 295 Md. 442, 465, 456 A.2d 894, 906 (1983) (Davidson, J., dissenting).
28. *See, e.g.*, Kaatz v. State, 540 P.2d 1037, 1049 (Alaska 1975) ("[T]he contributory negligence rule yields unfair results which can no longer be justified."); Scott v. Rizzo, 634 P.2d 1234, 1241 (N.M. 1981) ("The predominant argument for its abandonment rests, of course, upon the undeniable inequity and injustice in casting an entire accidental loss upon a plaintiff whose negligence combined with another's negligence in causing the loss suffered, no matter how trifling plaintiff's negligence might be.").

Court of Florida noted that the underlying principles of the doctrine no longer justify its unfairness to a negligent plaintiff.[30] In her dissent in *Harrison*, Judge Davidson, of the Court of Appeals of Maryland, recognized this unfairness:

> I am not convinced that in Maryland, society's concept of fairness differs in any significant degree from the concept of fairness shared in all of those common law and civil law jurisdictions throughout the world that have abandoned the doctrine of contributory negligence in favor of the doctrine of comparative negligence. I am convinced that in Maryland, as elsewhere, the doctrine of contributory negligence has become unsound under the circumstances of modern life.[31]

Prior to the development of comparative negligence, courts made several efforts to lessen the harshness of contributory negligence. Examples of such ameliorative efforts include the last clear chance doctrine, the safety statute exception, and the greater-degree-of-blame exception.[32] All three exceptions provide recovery for plaintiffs, even if they are contributorily negligent.[33]

In 1868, Maryland adopted the last clear chance doctrine,[34] allowing recovery by a plaintiff, who would otherwise be denied recovery, if the defendant had the last chance to avoid the accident.[35] The Court of Appeals of Maryland denied assertions that the adoption of the last clear chance doctrine "indicate[d] any general dissatisfaction with the contributory negligence doctrine."[36] Most jurisdictions, however, viewed the last clear chance doctrine as a means to lessen the harshness of contributory negligence.[37] Despite the adoption of these

29. 280 So. 2d 431 (Fla. 1973).

30. *Id.* at 436.

31. *Harrison*, 295 Md. at 465-66, 456 A.2d at 906 (Davidson, J., dissenting).

32. Robinette & Sherland, *supra* note 9, at 41.

33. *See id.* at 41-42. The safety statute exception provides recovery "if the defendant's negligence consisted of the breach of a statute specifically designed to protect a class of persons unable to protect themselves against defendant's negligence." *Id.* The greater-degree-of-blame exception provides recovery "if the defendant's conduct was 'intentional' or 'reckless.'" *Id.* at 42. Finally, the last clear chance doctrine applies if the "defendant had the last clear chance to avoid harming the plaintiff." *Id.*

34. N. Cent. Ry. v. State, 29 Md. 420, 436-37 (1868).

35. Edward S. Digges, Jr. & Robert Dale Klein, *Comparative Fault in Maryland: The Time Has Come*, 41 MD. L. REV. 227, 278 (1982).

36. *Harrison*, 295 Md. at 451, 456 A.2d at 898.

37. *See, e.g.*, Berlangieri v. Running Elk Corp., 76 P.3d 1098, 1106 (N.M. 2003) (stating that doctrines such as last clear chance "existed as judicial escape mechanisms to avoid the sometimes harsh results of contributory negligence"); Ratlief v. Yokum, 280 S.E.2d 584, 588 (W.Va. 1981) ("[T]he doctrine of last clear chance was a judicial development to modify the harshness of the contributory negligence rule.").

exceptions, the unfairness of the doctrine prevailed and many states began to seek an alternative measure—comparative negligence.[38]

III. COMPARATIVE NEGLIGENCE

A. *The Origins of the Comparative Negligence Doctrine*

In 1858, Illinois became the first state to experiment with comparative negligence.[39] This experiment failed and Illinois courts returned to contributory negligence twenty-seven years later.[40] In 1981, however, the Supreme Court of Illinois readopted comparative negligence.[41]

In the 1860s, Georgia became the first state to permanently adopt comparative negligence.[42] Using language from previous cases decided by the Supreme Court of Georgia, the state legislature enacted two statutes.[43] One dealt strictly with negligent railroad operations, while the other stated more broadly that a defendant would not be relieved from liability simply because of the plaintiff's negligence.[44]

The first federal acknowledgment of comparative negligence occurred in 1908 when Congress enacted the second Federal Employers' Liability Act (FELA), which eliminated the previous bar to recovery for employees of common carriers whose negligence contributed to the accident.[45] The damages were diminished in proportion to the amount of an employee's negligence.[46] Only six states adopted comparative negligence statutes over the next sixty years.[47] During the late 1960s and 1970s, however, states began to adopt comparative negligence at a more rapid pace.[48] As of 2005, forty-six states have replaced contributory negligence with comparative negligence.[49]

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38. *See infra* Part III.
39. *See* Galena & Chicago Union R.R. v. Jacobs, 20 Ill. 478 (1858).
40. *See* Calumet Iron & Steel Co. v. Martin, 3 N.E. 456 (Ill. 1885); *see also* Alvis v. Ribar, 421 N.E.2d 886, 890 (Ill. 1981).
41. *Alvis*, 421 N.E.2d at 898.
42. Robinette & Sherland, *supra* note 9, at 42-43.
43. *Id. at* 42; *see also* GA. CODE ANN. § 46-8-291 (2004); GA. CODE ANN. § 51-11-7 (2000).
44. Robinette & Sherland, *supra* note 9, at 42-43.
45. Federal Employers' Liability Act, ch. 149, 35 Stat. 66 (codified as amended at 45 U.S.C. §§ 51-60 (2000)); Robinette & Sherland, *supra* note 9, at 43.
46. *See* 45 U.S.C. § 53.
47. *See* Robinette & Sherland, *supra* note 9, at 43. *See* ARK. CODE ANN. § 16-64-122 (Michie Supp. 2003) (originally enacted in 1955); ME. REV. STAT. ANN. tit. 14, § 156 (West 2003) (enacted in 1965); MISS. CODE ANN. § 11-7-15 (1999) (enacted in 1910); NEB. REV. STAT. § 25-21,185 (1995) (enacted in 1913); S.D. CODIFIED LAWS § 20-9-2 (Michie Supp. 2003) (enacted in 1941); WIS. STAT. ANN. § 895.045 (West 1997) (enacted in 1931).
48. *See* Robinette & Sherland, *supra* note 9, at 43.
49. *Id.*

B. Types of Comparative Negligence

There are two main types of comparative negligence: pure and modified. Pure comparative negligence requires each party to pay his or her proportion of the damages.[50] Fourteen states have adopted the pure form.[51] The majority of states that judicially adopted comparative negligence chose the pure form.[52]

Modified comparative negligence exists in the remaining comparative negligence states.[53] There are three approaches to modified comparative negligence: the fifty percent rule, the forty-nine percent rule, and the slight/gross rule.[54] The fifty percent rule, used in twenty-one jurisdictions,[55] allows a plaintiff to recover if his or her negligence was not greater than fifty percent of the plaintiff's and defendant's negligence combined.[56] Similarly, the forty-nine percent rule, followed by

50. *See* Scott v. Rizzo, 634 P.2d 1234, 1242 (N.M. 1981).

51. ALASKA STAT. § 09.17.060 (Michie 2002); ARIZ. REV. STAT. ANN. § 12-2505 (West 2003); CAL. CIV. CODE § 1431.2 (West Supp. 2004); FLA. STAT. ANN. § 768.31 (West Supp. 2004); LA. CIV. CODE ANN. art. 2323 (West 1997); ME. REV. STAT. ANN. tit. 14, § 156 (West 2003); MISS. CODE ANN. § 11-7-15 (1999); N.Y. C.P.L.R. § 1411 (McKinney 1997); R.I. GEN. LAWS § 9-20-4 (1997); WASH. REV. CODE ANN. § 4.22.005 (West 2004); Hilen v. Hays, 673 S.W.2d 713, 719 (Ky. 1984); Placek v. City of Sterling Heights, 275 N.W.2d 511, 519-20 (Mich. 1979); Gustafson v. Benda, 661 S.W.2d 11, 15-16 (Mo. 1983); *Scott*, 634 P.2d at 1242.

52. *Hilen*, 673 S.W.2d at 719. Nine of the twelve states that judicially adopted comparative negligence adopted the pure form. *See* Kaatz v. State, 540 P.2d 1037, 1049 (Alaska 1975); Li v. Yellow Cab Co. of Cal., 532 P.2d 1226, 1243 (Cal. 1975); Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973); Alvis v. Ribar, 421 N.E.2d 886, 898 (Ill. 1981); Goetzman v. Wichern, 327 N.W.2d 742, 754 (Iowa 1982); *Hilen*, 673 S.W.2d at 719; *Placek*, 275 N.W.2d at 519-20; *Gustafson*, 661 S.W.2d at 15-16; *Scott*, 634 P.2d at 1242. The legislatures of Illinois and Iowa, however, have since enacted modified comparative negligence statutes. *See* 735 ILL. COMP. STAT. ANN. 5/2-1116 (West 2003); IOWA CODE ANN. § 668.3 (West 1998).

53. *See* Robinette & Sherland, *supra* note 9, at 43-44.

54. *Id.*

55. CONN. GEN. STAT. ANN. § 52-572h (West Supp. 2004); DEL. CODE ANN. tit. 10, § 8132 (1999); HAW. REV. STAT. § 663-31 (1993); 735 ILL. COMP. STAT. ANN. 5/2-1116 (West 2003); IND. CODE ANN. §§ 34-51-2-5, 34-51-2-6 (Michie 1998); IOWA CODE ANN. § 668.3 (West 1998); MASS. GEN. LAWS ANN. ch. 231, § 85 (West 2000); MINN. STAT. ANN. § 604.01 (West 2000); MONT. CODE ANN. § 27-1-702 (2003); NEV. REV. STAT. ANN. § 41.141 (Michie 2002); N.H. REV. STAT. ANN. § 507:7-d (1997); N.J. STAT. ANN. § 2A:15-5.1 (West 2000); OHIO REV. CODE ANN. § 2307.22 (West 2004); OKLA. STAT. ANN. tit. 23, § 13-14 (West 1987); OR. REV. STAT. § 31.600 (2003); 42 PA. CONS. STAT. ANN. tit. 42, § 7102 (West Supp. 2004); TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001-33.003 (Vernon 1997 & Supp. 2004-2005); VT. STAT. ANN. tit. 12, § 1036 (2002); WIS. STAT. ANN. § 895.045 (West 1997); WYO. STAT. ANN. § 1-1-109 (Michie 2003); Nelson v. Concrete Supply Co., 399 S.E.2d 783, 784 (S.C. 1991).

56. Robinette & Sherland, *supra* note 9, at 44. These laws generally state that a plaintiff may recover if his or her negligence is "not greater than" that of the defendant. *Id.*

ten states,[57] prohibits recovery if the plaintiff was more than forty-nine percent negligent.[58] Under the slight/gross rule, a plaintiff can only recover if he or she is slightly negligent, or if the defendant is grossly negligent relative to plaintiff's negligence.[59] This form is used only in South Dakota.[60]

Michigan created an exception to these forms in adopting a hybrid of pure and modified comparative negligence.[61] Michigan's comparative negligence statute provides that if a party is more than fifty percent negligent, they are entitled to economic damages proportionate to their fault, but are not entitled to noneconomic damages.[62]

C. *Judicial vs. Legislative Adoption*

Of the forty-six comparative negligence states, twelve states judicially adopted comparative negligence.[63] These decisions have occurred even in states in which the courts initially deferred such a change to the legislature.[64] Although legislatures in two of those states subsequently enacted statutes that changed the form of compar-

57. *See* ARK. CODE ANN. § 16-64-122 (Michie Supp. 2003); COLO. REV. STAT. ANN. § 13-21-111 (West 1997); GA. CODE ANN. §§ 51-11-7, 51-12-33 (2000); IDAHO CODE § 6-801 (Michie 1998); KAN. STAT. ANN. §§ 60-258a, 60-258b (1994); NEB. REV. STAT. § 25-21,185.09 (Michie 2003); N.D. CENT. CODE § 32-03.2-02 (1996); UTAH CODE ANN. §§ 78-27-38, 78-27-40 (2002); McIntyre v. Balentine, 833 S.W.2d 52, 57 (Tenn. 1992); Bradley v. Appalachian Power Co., 256 S.E.2d 879, 885 (W. Va. 1979); Robinette & Sherland, *supra* note 9, at 45 n.29.

58. Robinette & Sherland, *supra* note 9, at 44. These laws generally allow a plaintiff to recover if his or her negligence is "not as great as" the defendant's. *Id.*

59. *Id.*

60. *Id. See* S.D. CODIFIED LAWS § 20-9-2 (Michie Supp. 2003).

61. Robinette & Sherland, *supra* note 9, at 45. *See* MICH. COMP. LAWS ANN. §§ 600.2958, 600.2959 (West 2000). Michigan's statute provides:

> In an action based on tort . . . the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based . . . . If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based . . . and noneconomic damages shall not be awarded.

Id. § 600.2959 (West 2000).

62. *See Id.* § 600.2959.

63. *See* Kaatz v. State, 540 P.2d 1037, 1049 (Alaska 1975); Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973); Alvis v. Ribar, 421 N.E.2d 886, 898 (Ill. 1981); Goetzman v. Wichern, 327 N.W.2d 742, 743 (Iowa 1982); Hilen v. Hays, 673 S.W.2d 713, 720 (Ky. 1984); Placek v. City of Sterling Heights, 275 N.W.2d 511, 514 (Mich. 1979); Gustafson v. Benda, 661 S.W.2d 11, 16 (Mo. 1983); Scott v. Rizzo, 634 P.2d 1234, 1236 (N.M. 1981); Nelson v. Concrete Supply Co., 399 S.E.2d 783, 784 (S.C. 1991); McIntyre v. Balentine, 833 S.W.2d 52, 53 (Tenn. 1992); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W.Va. 1979); Li v. Yellow Cab Co. of Cal., 532 P.2d 1226, 1229 (Cal. 1975).

64. *See infra* Part IV.B.2.b.

ative negligence from pure to modified, they agreed with the courts' decision to replace contributory negligence with comparative negligence.[65]

1. The Rationale for Judicial Adoption

The decisions of the judicially acting courts follow similar rationales. Their primary support for judicial action is the judicial origin of contributory negligence.[66] In Tennessee, for example, the court stated, "We recognize that this action could be taken by our General Assembly. However, legislative inaction has never prevented judicial abolition of obsolete common law doctrines, especially those, such as contributory negligence, conceived in the judicial womb."[67]

Other rationales have also been used to support judicial action. The Supreme Court of Michigan examined both the strengths and potential weaknesses of judicial action, in effect summarizing the justification of many of the judicially acting states.[68] The court acknowledged the arguments in favor of legislative action, but provided an equally strong, if not stronger, argument in favor of judicial action.[69] The court stated:

> First is the question which of these two bodies is better equipped to understand the nature and implications of the problem and to make an informed choice from available alternatives. It is fashionable to suppose that the investigatory opportunities of the legislature establish its superior credentials in this respect . . . . *But on the question of contributory negligence, one cannot very well dispute the unique judicial experience and preoccupation* . . . . In a nutshell, this is preeminently lawyer's law.[70]

The Supreme Court of Michigan further supported judicial action in stating that most statutes are too concise, and thus create questions that the courts must later resolve.[71] Courts, unlike legislatures, have

65. *See* 735 ILL. COMP. STAT. ANN. 5/2-1116 (West 2003); IOWA CODE ANN. § 668.3 (West 1998).
66. *See, e.g., Kaatz*, 540 P.2d at 1049 (stating that "increasing [sic] it is perceived that a rule which is judicial in origin can be, and appropriately should be, altered by the institution which was its creator"); *Alvis*, 421 N.E.2d at 895 (citing previous cases that "found that contributory negligence is a judicially created doctrine which can be altered or totally replaced by the court which created it"); *Placek*, 275 N.W.2d at 517 (stating that "when dealing with judge-made law, this Court in the past has not disregarded its corrective responsibility in the proper case").
67. *McIntyre*, 833 S.W.2d at 56.
68. *Placek*, 275 N.W.2d at 517-19.
69. *Id.* at 518.
70. *Id.* (quoting John G. Fleming, *Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CAL. L. REV. 239, 279-80 (1976)).
71. *Id.* (citing Fleming, *supra* note 70, at 281). In recognizing this need for subsequent court action, the Alaska Supreme Court noted:

the ability to foresee these potential issues and can therefore address such questions before they are actually brought before the court.

Although strong arguments exist in favor of legislative action, many courts have both recognized the importance of and supported judicial action. As demonstrated by the twelve courts that have already acted, judicial abrogation is a well-supported course of action in the abolishment of contributory negligence.

2. Maryland's Preference for Legislative Action

Deference to the legislature in Maryland is primarily attributed to public policy:

> [W]e are unable to say that the circumstances of modern life has so changed as to render contributory negligence a vestige of the past, no longer suitable to the needs of the people of Maryland. In the final analysis, whether to abandon the doctrine of contributory negligence in favor of comparative negligence involves fundamental and basic public policy considerations properly to be addressed by the legislature.[72]

Each year between 1996 and 2002, Maryland legislators introduced comparative negligence bills in the House or Senate.[73] The General Assembly has failed to enact any of them. In her dissent in *Harrison*, Judge Davidson pointed out that "[t]his Court has repeatedly held that the Legislature's failure to enact legislation is a 'weak reed upon which to lean' in drawing a positive inference of legislative intent."[74] Instead, there may be other explanations for the legislature's failure

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> Our adoption of this new principle does not, of course, end our judicial tasks in this area. Subsidiary questions and problems concerning the relationship of the new rule to other doctrines of tort law must necessarily be adjudicated in the future. We must, for the most part, await future cases for the further development of law in this field.

Kaatz, 540 P.2d at 1049-50.

72. Harrison v. Montgomery County Bd. of Educ., 295 Md. 442, 463, 456 A.2d 894, 905 (1983).

73. H.D. 836, 1996 Leg., 410th Sess. (Md. 1996) (withdrawn); H.D. 846, 1997 Leg., 411th Sess. (Md. 1997) (receiving an unfavorable report from House Judiciary Committee); S. 618, 1998 Leg., 412th Sess. (Md. 1998) (receiving an unfavorable report from Senate Judicial Proceedings Committee); H.D. 551, 1999 Leg., 413th Sess. (Md. 1999) (receiving an unfavorable report from the House Judiciary Committee); S. 779, 2000 Leg., 414th Sess. (Md. 2000) (receiving an unfavorable report from the Senate Judicial Proceedings Committee); S. 483, 2001 Leg., 415th Sess. (Md. 2001) (receiving an unfavorable report from the Senate Judicial Proceedings Committee); S. 872, 2002 Leg., 416th Sess. (Md. 2002) (no action).

74. *Harrison*, 295 Md. at 466, 456 A.2d at 906 (Davidson, J., dissenting) (citing Auto. Trade Ass'n of Md., Inc. v. Ins. Comm'r of Md., 292 Md. 15, 24, 437 A.2d 199, 203 (1981); Harden v. Mass Transit Admin., 277 Md. 399, 406, 354 A.2d 817, 820-21 (1976)).

to act.[75] For example, Judge Davidson suggested that the legislature's failure to create an effective comparative negligence statute may be the result of insufficient bills.[76] There are many collateral issues associated with the adoption of comparative negligence, and a statute that does not address these issues may be viewed as ineffective.[77] In addition, the legislature may deem doctrinal change more appropriate for the court to evaluate on a case-by-case basis.[78] Judge Davidson emphasized, "[L]egislative inaction here does not constitute an impediment to abrogation of the doctrine of contributory negligence by judicial decision."[79]

IV. TIME FOR A CHANGE

Maryland's reluctance to judicially abolish contributory negligence was specifically articulated in *Harrison v. Montgomery County Board of Education.*[80] According to the Court of Appeals, contributory negligence is a "fundamental principle of Maryland negligence law, one deeply imbedded in the common law of this State."[81] The Court of Appeals of Maryland observed that Maryland case law does not indicate dissatisfaction with contributory negligence, and a societal need to abrogate the doctrine did not exist in Maryland; however, it is almost universally considered antiquated and outdated with respect to modern concepts of tort law. [82]

The doctrine of interspousal immunity is similarly an antiquated common law doctrine, but it was ultimately abrogated by the Court of Appeals of Maryland. An analysis of the court's rationale in *Bozman v. Bozman,* therefore, is useful in demonstrating the court's willingness to judicially abrogate such a common law doctrine when it is no longer deemed useful.

A. The Abrogation of Interspousal Immunity

Interspousal immunity developed out of the concept that a husband and wife were one entity.[83] The Married Women's Act of 1898

75. *Id.* (citing Police Comm'r of Balt. v. Dowling, 281 Md. 412, 420-21, 379 A.2d 1007, 1012 (1977); Hearst Corp. v. State Dep't of Assessments & Taxation, 269 Md. 625, 644, 308 A.2d 679, 689 (1973)).
76. *See id.* at 466, 456 A.2d at 907. Senate Bill 872 of 2002 succinctly stated that contributory negligence may not bar a recovery, that damages are to be "diminished in proportion to the amount of negligence attributed to the plaintiff," and that the effect of the statute is prospective. *See* S. 872, 2002 Leg., 416th Sess. (Md. 2002).
77. *See Harrison,* 295 Md. at 466, 456 A.2d at 907.
78. *Harrison,* 295 Md. at 466, 456 A.2d at 907.
79. *Id.*
80. 295 Md. 442, 456 A.2d 894 (1983).
81. *Id.* at 458, 456 A.2d at 902.
82. *Id.*; *see infra* Part IV.B.1.
83. *See* Boblitz v. Boblitz, 296 Md. 242, 244, 462 A.2d 506, 507 (1983) (stating that "'[b]y marriage, the husband and wife are one person in law . . . .

changed this view by granting married women certain rights independent of their marriage.[84] The Supreme Court explained, however, that this Act did not extend to interspousal immunity, stating that "[t]he statute was not intended to give a right of action as against the husband, but to allow the wife, in her own name, to maintain actions of tort which, at common law, must be brought in the joint names of herself and husband."[85] Those opposed to the abrogation of interspousal immunity argued that abrogation would disrupt the peace and tranquility of marriage and encourage fraudulent claims.[86] Changes in society, however, led the courts to question these justifications. For example, the Court of Appeals of Kentucky stated in *Brown v. Gosser*[87] that "[t]he fear that relaxation of the common law rule will open the door to fraudulent and fictitious claims, especially against insurance companies, has less force than the argument of 'domestic peace and felicity.'"[88]

Maryland also began to question the validity of interspousal immunity. In *Lusby v. Lusby*,[89] the Court of Appeals created a narrow exception to interspousal immunity.[90] This exception was later defined as one that abrogates immunity "whenever the tort committed against the spousal victim is not only intentional, as in assault and battery, but 'outrageous,' as where the errant spouse's conduct transcends common decency and accepted practices."[91]

In 1983, the Court of Appeals took the next step toward the full abrogation of interspousal immunity in *Boblitz v. Boblitz*,[92] holding that the doctrine could not be applied in negligence cases.[93] The court, after examining the rationale of other interspousal immunity states, cited the prevention of an increase in trivial claims and the need for

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Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage."') (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *430).

84. *See* Married Women's Act, 1898 Md. Laws 457 (current version at MD. CODE ANN., FAM. LAW § 4-204 (1999)). The Act provided that "[m]arried women shall have power . . . to sue . . . for torts committed against them, as fully as if they were unmarried." *Id.*
85. Thompson v. Thompson, 218 U.S. 611, 617 (1910).
86. *Boblitz*, 296 Md. at 255-57, 462 A.2d at 512-13.
87. 262 S.W.2d 480 (Ky. 1953).
88. *Id.* at 484. The Supreme Court of Arizona also questioned such arguments:
> The doctrine of interspousal tort immunity cannot be supported by an antiquated and narrow 'unity' doctrine that perpetuates the fiction of female disability if not inferiority. Whatever logic the unity doctrine had in times gone by, it cannot operate today as a reason for supporting the doctrine of interspousal tort immunity.

Fernandez v. Romo, 646 P.2d 878, 881 (Ariz. 1982).
89. 283 Md. 334, 390 A.2d 77 (1978).
90. *Id.* at 357-58, 390 A.2d at 88-89.
91. Linton v. Linton, 46 Md. App. 660, 664, 420 A.2d 1249, 1251 (1980).
92. 296 Md. 242, 462 A.2d 506 (1983).
93. *Id.* at 275, 462 A.2d at 522.

legislative action among the six reasons for retention of the doctrine.[94] After analyzing the rationale of states that have abrogated the doctrine, the court found "no reasonable basis" or "subsisting public policy" justifying abrogation of the doctrine.[95]

In the years following *Boblitz*, the court continued to defer any action regarding full abrogation to the legislature. Twenty years after *Boblitz*, however, the court judicially abolished interspousal immunity in *Bozman v. Bozman*.[96] In reaching this holding, the court considered many factors, including its right to judicially change common law doctrines.[97] Although the court had repeatedly declined to judicially abrogate interspousal immunity, the *Bozman* court determined that the need for change far outweighed any concerns of *stare decisis*.[98]

B. *The Effect of* Bozman v. Bozman *and Its Parallels to Contributory Negligence*

The Court of Appeals of Maryland in *Bozman* found that interspousal immunity was no longer justified by its common law foundation.[99] The court looked to other jurisdictions and secondary authority for support of this conclusion. Only four other states still retained the doctrine.[100] The court recognized the weight of authority against interspousal immunity, stating that "the trend [since *Boblitz*] toward abrogation having continued and the weight of authority having grown larger, we are fortified in that view [in favor of abrogation]."[101] In examining the rationale of *Bozman*, specifically, the abolishment of antiquated common law doctrines, other states' decisions, and secondary authority, one can gain greater insight as to why the court would judicially abrogate a common law doctrine.

1. The Abolishment of Antiquated Common Law Doctrines

As times change and society progresses, courts amend common law doctrines to conform to current situations. Often, these doctrines are

94. *Id.* at 256-57, 462 A.2d at 513. These two reasons are also cited for retaining contributory negligence. Harrison v. Montgomery County Bd. of Educ., 295 Md. 442, 455-56, 456 A.2d 894, 900-01 (1983). The other reasons for retention were "[t]he unity of husband and wife," "[i]nterspousal tort actions will destroy the harmony of the marital relationship," [r]etention of the doctrine will prevent collusive and fraudulent claims," and "[d]ivorce and criminal courts furnish adequate redress." *Id.*

95. *See Boblitz*, 296 Md. at 273, 462 A.2d at 521.

96. 376 Md. 461, 497, 830 A.2d 450, 471 (2003).

97. *Id.* at 483-85, 830 A.2d at 463-64.

98. *Id.* at 493-95, 830 A.2d at 469-70. The court stated that "it is eminently wise of this Court to abrogate a doctrine that is 'a vestige of the past [and] no longer suitable to our people.'" *Id.* at 495, 830 A.2d at 470 (alteration in original) (quoting Respondent's Brief).

99. *Id.* at 488, 830 A.2d at 466.

100. *Id.* at 487, 830 A.2d at 466.

101. *Id.* at 488, 830 A.2d at 466.

abolished because they have become essentially useless. This rationale was articulated by the court in *Bozman* and can also be said of contributory negligence.[102]

In adopting comparative negligence, the Supreme Court of California emphasized the unfairness of the doctrine as it relates to today's society:

> It is unnecessary for us to catalogue the enormous amount of critical comment that has been directed over the years against the 'all-or-nothing' approach of the doctrine of contributory negligence. The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault. Against this have been raised several arguments in justification, but none have proved even remotely adequate to the task. The basic objection to the doctrine—grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability—remains irresistible to reason and all intelligent notions of fairness.[103]

Retaining contributory negligence, therefore, is no longer justified by the policies upon which it was developed. This fundamental unfairness has led forty-six states to abolish this antiquated doctrine.

2. The Influence of Other States' Decisions

In identifying the influence of other states' decisions, the Court of Appeals of Maryland in *Bozman* stated that although not binding, these decisions may be used as persuasive authority.[104]

In *Bozman*, the court analyzed the decisions of other states since its previous decision in *Boblitz*, and noted that the vast majority of states had abrogated the doctrine.[105] Specifically, the court observed that judicial abrogation occurred in nine of the twelve states that recognized interspousal immunity at the time of *Boblitz*.[106] One did so by statute, and the other two abrogated the doctrine in part.[107]

In the contributory negligence context, since *Harrison*, seven additional states changed to comparative negligence.[108] Four of these

102. *Id.* at 467-68, 830 A.2d at 454.
103. Li v. Yellow Cab Co. of Cal., 532 P.2d 1226, 1230-31 (Cal. 1975).
104. *Bozman*, 376 Md. at 490, 830 A.2d at 467.
105. *Id.* at 487, 830 A.2d at 465.
106. *Id.*
107. *Id.*
108. *See* Harrison v. Montgomery County Bd. of Educ., 295 Md. 442, 456 n.10, 456 A.2d 894, 901 n.10 (1983) (listing states that retained contributory negligence at that time); *see also* ARIZ. REV. STAT. ANN. §§ 12-2505, 12-2509 (West 2003) (enacted in 1984); DEL. CODE ANN. tit. 10, § 8132 (1999) (enacted in 1984); IND. CODE ANN. §§ 34-51-2-5, 34-51-2-6 (Michie 1998) (enacted in 1998); Hilen v. Hays, 673 S.W.2d 713, 720 (Ky. 1984); Gustafson v.

states did so judicially,[109] one of which—Missouri—initially deferred action to the legislature.[110]

As with interspousal tort immunity, the decisions of other jurisdictions should be persuasive. It is therefore important to compare the rationales of contributory negligence states with those in which it has been judicially abrogated.

a. Contributory Negligence Jurisdictions

Only Maryland, Alabama, North Carolina, Virginia, and the District of Columbia remain contributory negligence jurisdictions.[111] These jurisdictions recognize the antiquated nature of the doctrine, but continue to apply it in their courts. The Court of Appeals of North Carolina, for example, acknowledged the United States Supreme Court's classification of contributory negligence as "discredited" in their decision to retain the doctrine.[112] Associate Judge Farrell of the District of Columbia Court of Appeals stated in a concurring opinion that "the more I participate in decisions applying the doctrines of negligence, contributory negligence and last clear chance, the more I am persuaded that serious thought should be given to adopting some form of comparative negligence in this jurisdiction."[113]

In Alabama, a state similarly struggling with the decision of whether to abolish contributory negligence, Justice Jones's dissenting opinion expressed many of the problems encountered with such a standard.[114] He recognized that "[j]urors tend to find themselves caught between the judge's instruction on contributory negligence and their own common concepts of the logical link between fault and liability."[115] Therefore, contributory negligence creates two extreme choices for the jury: either to award the plaintiff the damages they sought, or to

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Benda, 661 S.W.2d 11, 15 (Mo. 1983); Nelson v. Concrete Supply Co., 399 S.E.2d 783, 784 (S.C. 1991); McIntyre v. Balentine, 833 S.W.2d 52, 56-57 (Tenn. 1992).

109. *See supra* note 63 and accompanying text.

110. *See Harrison*, 295 Md. at 456, 456 A.2d at 901; *see also Gustafson*, 661 S.W.2d at 15.

111. *See* Robinette & Sherland, *supra* note 9. The Court of Appeals of North Carolina maintains that "[a]lthough forty-six states have abandoned the doctrine of contributory negligence in favor of comparative negligence, contributory negligence continues to be the law of this State until our Supreme Court overrules it or the General Assembly adopts comparative negligence." Alford v. Lowery, 573 S.E.2d 543, 546 (N.C. Ct. App. 2002) (quoting Jones v. Rochelle, 479 S.E.2d 231, 235 (N.C. Ct. App. 1997)).

112. Bosley v. Alexander, 442 S.E.2d 82, 83 (N.C. Ct. App. 1994) (quoting Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953)).

113. District of Columbia v. Huysman, 650 A.2d 1323, 1328 (D.C. 1994) (Farrell, J., concurring).

114. *See* Golden v. McCurry, 392 So. 2d 815, 820-22 (Ala. 1980) (Jones, J., dissenting).

115. *Id.* at 821.

prevent the plaintiff from collecting damages as a result of their negligence, however slight it may be.[116]

The courts of these states, however, refuse to act, most awaiting legislative action. The Supreme Court of Alabama, for example, acknowledged the criticism by both legal scholars and judges who have abolished the doctrine, but maintained that such action is solely for the legislature.[117] This deference to the legislature is often criticized in concurring and dissenting opinions. In a dissenting opinion, Chief Justice Hornsby of the Supreme Court of Alabama recognized that "[j]udicial adoption of the comparative negligence analysis may become necessary due to the continuing legislative inertia on this subject."[118] Judge Farrell of the District of Columbia Court of Appeals addressed similar concerns in stating that "assuming [legislative change] does not take place, then the judges of this court should take a hard look at whether there are not more rational principles by which to resolve these cases in which so often the fault of both parties is obvious to judges as well as juries."[119]

Although these courts share Maryland's reluctance to judicially abrogate the doctrine, forty-six other states, twelve of which judicially abrogated the doctrine, demonstrate that the antiquated nature of contributory negligence far outweighs any concerns relating to judicial action.

b. Judicially Abrogated Jurisdictions

At the time of *Harrison*, eight state supreme courts had judicially adopted comparative negligence.[120] In Florida, the first state to judicially adopt comparative negligence, the court examined its own power to replace contributory negligence. It had been previously suggested that only the legislature held this power.[121] In determining that it could adopt comparative negligence, the court emphasized that contributory negligence is "a judicial creation" and was "specifically

116. *Id.*
117. *Id.* at 817.
118. Campbell v. Ala. Power Co., 567 So. 2d 1222, 1229 (Ala. 1990) (Hornsby, C.J., dissenting) (quoting Cent. Ala. Elec. Coop. v. Tapley, 546 So. 2d 371, 381 n.8 (Ala. 1989)).
119. District of Columbia v. Huysman, 650 A.2d 1323, 1328 (D.C. 1994) (Farrell, J., concurring).
120. *See* Harrison v. Montgomery County Bd. of Educ., 295 Md. 442, 456, 456 A.2d 894, 901 (1983); *see also* Kaatz v. State, 540 P.2d 1037, 1049 (Alaska 1975); Li v. Yellow Cab Co., 532 P.2d 1225, 1243 (Cal. 1975); Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973); Alvis v. Ribar, 421 N.E.2d 886, 898 (Ill. 1981); Goetzman v. Wichern, 327 N.W.2d 742, 754 (Iowa 1982); Placek v. City of Sterling Heights, 275 N.W.2d 511, 519-20 (Mich. 1979); Scott v. Rizzo, 634 P.3d 1234, 1242 (N.M. 1981); Bradley v. Appalachia Power Co., 256 S.E.2d 879, 885 (W. Va. 1979).
121. *Hoffman*, 280 So. 2d at 434.

judicially adopted in Florida."[122] Because the court created contributory negligence, it also had the power to dispose of it.

Since *Harrison*, four additional states have judicially adopted comparative negligence.[123] These decisions have occurred even in states that initially deferred such a change to the legislature. One of these states—Missouri—was cited in *Harrison*, along with Alabama and Delaware, as one that has held "as a matter of policy that any such change should be made by the legislature."[124] Although this was true at the time of *Harrison*, only eight months later the Supreme Court of Missouri judicially adopted comparative negligence.[125]

In *Steinman v. Strobel*,[126] a case deferring abrogation to the legislature, the Supreme Court of Missouri expressed concerns similar to those expressed by Maryland's courts. For example, the court observed that "a change from contributory negligence to comparative negligence encompasses much more than simply allowing plaintiffs who are partially at fault to recover part of their damages."[127] The court explained that such a change included the need to examine other doctrines, such as contribution, indemnity, and joint and several liability.[128] The concurring opinion added that another argument in favor of legislative action is the court's inability to determine the most efficient form of comparative negligence.[129] The concurring opinion further stated, "No area of the law cries out more for a clear policy established by democratically elected representatives."[130]

Despite such strong and definitive language in favor of legislative action, the Supreme Court of Missouri, in *Gustafson v. Benda*,[131] replaced contributory negligence with pure comparative negligence.[132]

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122. *Id.* *See also* Louisville & Nashville R.R. v. Yniestra, 21 Fla. 700 (1886) (judicially adopting contributory negligence).
123. *See* Hilen v. Hays, 673 S.W.2d 713, 719 (Ky. 1984); Gustafson v. Benda, 661 S.W.2d 11, 15-16 (Mo. 1983); Nelson v. Concrete Supply Co., 399 S.E.2d 783, 784 (S.C. 1991); McIntyre v. Balentine, 833 S.W.2d 52, 57 (Tenn. 1992).
124. *Harrison*, 295 Md. at 456, 456 A.2d at 901 (citing Steinman v. Strobel, 589 S.W.2d 293, 294 (Mo. 1979)).
125. *Gustafson*, 661 S.W.2d at 15-16. Alabama remains a contributory negligence state, Robinette & Sherland, *supra* note 9, at 45 n.27, 56, while the Delaware legislature has enacted a comparative negligence statute, DEL. CODE ANN. tit. 10, § 8132 (1999).
126. 589 S.W.2d 293 (Mo. 1979).
127. *Id.* at 294.
128. *Id.*
129. *Id.* (Welliver, J., concurring).
130. *Id.* at 295 (quoting Am. Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 925 (Cal. 1978)). These opinions were followed by dissenting opinions from Chief Justice Bardgett and Judge Donnelly, both of whom favored judicial action, but differed in their opinions of which form of comparative negligence to adopt. *Id.* at 295 (Bardgett, C.J., dissenting); *id.* at 297 (Donnelly, J., dissenting).
131. 661 S.W.2d 11 (1983) (en banc).
132. *Id.* at 15-16.

The court described the change as the logical evolution from the last clear chance doctrine.[133] The majority attributed its decision to a lack of legislative action following *Missouri Pacific Railroad v. Whitehead & Kales Co.*,[134] stating that "[w]e now are past the time when we should have resolved the uncertainty surrounding comparative fault by expanding the application of the doctrine."[135] The dissent, however, maintained that this decision was one for the General Assembly,[136] especially since the abrogation of contributory negligence was not mentioned in the briefs or pleadings of either party.[137] Chief Justice Rendlen emphasized the ramifications of abrogating a doctrine that had been in existence in the state for over 100 years.[138] His concerns included, *inter alia*, a large volume of litigation, including appeals.[139] These concerns were reiterated in Justice Gunns's dissent.[140] Despite these dissenting opinions, the majority's decision has not been overruled, either by the courts or the legislature, to this date.

The twelve judicially adopting states demonstrate the ability of the courts to successfully implement change. This trend began over thirty years ago in Florida and continues to be successful. Its success is most significant in Missouri, a state that had previously deferred such action to the legislature.

3. Secondary Authority

In addition to looking at other jurisdictions, the court in *Bozman* looked to secondary authority. The Court of Appeals found "the trend and, indeed, the great weight of authority, to be to move away from the doctrine [of interspousal immunity] and in favor of changing the common law to abolish it, either fully or partially."[141] In support of its decision, the court noted the position of legal scholars and commentators in favor of abrogation.[142]

A similar trend in authority exists with respect to contributory negligence. Most scholars and commentators are in favor of comparative

133. *Id.* at 13.
134. 566 S.W.2d 466 (Mo. 1978) (abandoning the concept of "active-passive negligence" in favor of "comparative fault" in multiple defendant cases).
135. *Gustafson*, 661 S.W.2d at 15.
136. *See id.* at 29 (Rendlen, C.J., dissenting).
137. *Id.* at 28.
138. *See id.*
139. *See id.* at 29.
140. *See id.* (Gunn, J., dissenting) ("We have pierced and circumvented the revetment so carefully designed to separate, segregate, preserve and distinguish the identities and functions of judicial, legislative and executive branches.").
141. Bozman v. Bozman, 376 Md. 461, 488, 830 A.2d 450, 466 (2003).
142. *See id.* at 483, 830 A.2d at 463 (citing Boblitz v. Boblitz, 296 Md. at 270, 462 A.2d at 519-20 (1983)). *See also* FOWLER V. HARPER & FLEMING JAMES, JR., 1 THE LAW OF TORTS 645-46 (1956); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 862-63 (4th ed. 1971).

negligence. As early as 1950, scholars recognized the harshness of contributory negligence. For example, in *Comparative Negligence on the March,* Ernest A. Turk explained:

> [Contributory negligence] may have had its merits in the early days of the nineteenth century, when infant industry stood in need of judicial help against the ravages which might have been wrought by over-sympathetic juries. In an age where men are pitted against the power and speed of machines, however, the harshness of the doctrine becomes overwhelming.[143]

Similar attitudes concerning these doctrines have been expressed since then, demonstrating the overwhelming agreement among scholars that the outdated doctrine of contributory negligence should be replaced with comparative negligence.[144] As in *Bozman,* such secondary authority should be persuasive in the court's evaluation of these two doctrines.

V. RECOGNIZING THE OBSTACLES

As recognized by the Court of Appeals of Maryland in *Bozman,* the decision to abolish contributory negligence differs from the abolishment of other common law doctrines.[145] The abrogation of contributory negligence involves the adoption of another doctrine that must be adopted in a particular form.[146] The court, however, emphasized its statement in *Boblitz:*

> *[W]e have never construed the doctrine of stare decisis to inhibit us from changing or modifying a common law rule by judicial decision where we find, in light of changed conditions or increased knowledge that the rule has become so unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people.*[147]

Robert A. Leflar, a commentator on the subject, further identified the obstacles created by judicial abrogation, stating that comparative negligence "seems to call for the enactment of a comprehensive statute, with sections and subsections carefully worked out in advance by a

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143. *See* Turk, *supra* note 19, at 201.

144. *See* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE 347 (1st Ed. 1974); *see also* Robert E. Keeton, *Comment on* Maki v. Frelk—*Comparative v. Contributory Negligence: Should the Court or Legislature Decide?,* 21 VAND. L. REV. 906 (1968); William L. Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 508 (1953).

145. *Bozman,* 376 Md. at 492-93, 830 A.2d at 469 (quoting *Boblitz,* 296 Md. at 274, 462 A.2d at 521).

146. *Id.*

147. *Id.* at 493, 830 A.2d at 468 (quoting *Boblitz,* 296 Md. at 274, 462 A.2d at 521-22 (quoting Harrison v. Montgomery County Bd. of Educ., 295 Md. 442, 459, 456 A.2d 894, 903 (1983))).

legislative drafting committee aided by an advisory commission."[148] Nevertheless, the judicially acting courts have made this transition with ease, not concerning themselves with the different forms of comparative negligence. Most of these states have chosen the pure form.[149]

States choosing pure comparative negligence have emphasized the fairness of this form. In support of its decision, the Supreme Court of Michigan stated that the pure form best addresses the fault of both parties.[150] The court continued by observing that "[w]hat pure comparative negligence does is hold a person fully responsible for his or her acts and to the full extent to which they cause injury. That is justice."[151] The Supreme Court of Alaska stated that the pure form "is the simplest to administer and which is best calculated to bring about substantial justice in negligence cases."[152]

A recent law review article examined which doctrine, contributory or comparative negligence, best achieves the goals of the tort system.[153] It examined the three primary policy aspects of torts: deterrence, compensation, and corrective justice.[154] The authors determined that comparative negligence, specifically pure comparative negligence, best addresses these policy issues.[155] The authors defend their theory by stating that the pure form "is superior to modified comparative negligence in achieving tort law's compensation goal" because pure comparative negligence does not preclude a plaintiff from recovery.[156]

The fifty percent and forty-nine percent rules are associated with similar criticism to that of contributory negligence. For example, the Supreme Court of California noted that the "'[fifty] percent' system simply shifts the lottery aspect of the contributory negligence rule to a different ground."[157] In other words, a jury has the opportunity to arbitrarily decide whether one will recover damages. With contributory negligence, the jury will decide whether to assign fault based on whether they think the plaintiff should recover damages. Similarly, in the fifty percent system, a juror distinction between a plaintiff being fifty or fifty-one percent at fault will determine whether they will re-

148. *Id.* at 921. Most states, however, have not adopted such comprehensive statutes. *Id.* at 921-22.
149. *See supra* note 52 and accompanying text.
150. Placek v. City of Sterling Heights, 275 N.W.2d 511, 519 (Mich. 1979) (quoting SCHWARTZ, *supra* note 144, at 347).
151. *Id.* (quoting Kirby v. Larson, 256 N.W.2d 400, 429 (Mich. 1997)).
152. Kaatz v. State, 540 P.2d 1037, 1049 (Alaska 1975).
153. *See* Robinette & Sherland, *supra* note 9, at 45-46.
154. *Id.* at 46.
155. *Id.* at 50, 51, 59.
156. *Id.* at 51.
157. Li v. Yellow Cab Co. of Cal., 532 P.2d 1226, 1242-43 (Cal. 1975) (footnotes omitted) (quoting William L. Prosser, *Comparative Negligence,* 41 CAL. L. REV. 1, 25 (1953)).

cover damages. Both are all or nothing approaches, but to a different degree.

Only three judicially adopting states—South Carolina, Tennessee, and West Virginia—adopted a modified form of comparative negligence.[158] West Virginia was the first judicially abrogated state to choose a form other than pure comparative negligence. The court reasoned that it did not want to allow recovery for a plaintiff who substantially contributed to the damages.[159] Instead, the court adopted the forty-nine percent approach.[160]

In adopting comparative negligence, the courts will have to carefully consider which form to adopt. Maryland's advantage, however, is the long line of case law and legislative history from the other forty-six comparative negligence states.[161] In addition, as demonstrated in Iowa, the legislature can later change the form decided upon by the courts.[162] Although this may create temporary confusion in the judicial system, it allows the legislature recourse if it is not satisfied with the new doctrine's application to public policy.

VI. A PROPOSAL FOR CHANGE

The majority of states that judicially adopted comparative negligence have chosen the pure form.[163] Courts have justified adoption of the pure form because it is more in accord with the fault-based system of torts.[164] The modified form, however, seems to be a better option for Maryland.

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158. *See supra* notes 55, 57 and accompanying text.

159. Bradley v. Appalachian Power Co., 256 S.E.2d 879, 885 (W. Va. 1979).

160. *Id.*

161. Chief Justice Hornsby of the Supreme Court of Alabama, which has not yet adopted comparative negligence, expressed a similar advantage:

> The bench and the bar in each of the jurisdictions adopting the doctrine of comparative negligence have proved themselves able to overcome the problems attendant to change; they have overcome those problems in order to implement a fairer system of justice. Our bench and bar are no less able to overcome those problems. I believe that our system would fairly and effectively resolve any problems arising out of the change to the doctrine of comparative negligence, as they arose.

Williams v. Delta Int'l Mach. Corp., 619 So. 2d 1330, 1334 (Ala. 1993) (Hornsby, C.J., concurring in part, dissenting in part).

162. IOWA CODE ANN. § 668.3 (West 1998) (superseding Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982), by designating a modified form of comparative negligence rather than the pure form).

163. *See supra* note 52 and accompanying text.

164. *See, e.g.*, Li v. Yellow Cab Co. of Cal., 532 P.2d 1226, 1243 (Cal. 1975) (pointing out that "[the fifty percent] rule distorts the very principle it recognizes, i.e., that persons are responsible for their acts to the extent their fault contributes to an injurious result. The partial rule simply lowers, but does not eliminate, the bar of contributory negligence.") (quoting Friedrich K. Juenger, *Brief for Negligence Law Section of the State Bar of Michigan in Support of*

The West Virginia supreme court offered convincing support for the modified form:

> The fundamental justification for the pure comparative negligence rule is its fairness in permitting everyone to recover to the extent he is not at fault. Thus, the eye of the needle is 'no fault,' and we are asked not to think about the larger aspect—the camel representing 'fault.' It is difficult, on theoretical grounds alone, to rationalize a system which permits a party who is [ninety-five] percent at fault to have his day in court as a plaintiff because he is [five] percent fault-free.[165]

In addition to West Virginia, the two states to most recently judicially adopt comparative negligence—South Carolina and Tennessee—chose the modified form.[166] The Supreme Court of Tennessee rejected the pure form of comparative fault because it theoretically allows people to recover even if they substantially contributed to the harm.[167] The court instead adopted the forty-nine percent rule because it "ameliorates the harshness of the common law rule while remaining compatible with a fault-based tort system."[168]

In deciding which form of modified comparative negligence to use, it is important to recognize the significance of choosing a fifty percent versus a forty-nine percent rule. The fifty-percent rule allows for recovery if the plaintiff's negligence is "not greater than" the defendant's negligence, while the forty-nine percent rule allows recovery only if the plaintiff's negligence is "not as great as" the defendant's.[169] This difference is significant because juries commonly find that the parties are equally negligent.[170] In such a case, therefore, recovery would be available only under the fifty-percent rule.

The Court of Appeals of Maryland should adopt the forty-nine percent rule. Adopting this form would ameliorate some of the state's concerns regarding comparative negligence. Since recovery can only occur if the plaintiff's negligence is less than fifty percent of the total negligence, this form would deter frivolous claims and only provide recovery to deserving plaintiffs who are not substantially responsible for the harm.

Comparative Negligence as Amicus Curiae, Parsonson v. Construction Equipment Company, 18 WAYNE L. REV. 3, 50 (1972)).

165. *Bradley,* 256 S.E.2d at 883.
166. *See supra* notes 55, 57 and accompanying text.
167. *See* McIntyre v. Balentine, 833 S.W.2d 52, 57 (Tenn. 1992).
168. *Id.*
169. *See supra* note 56, 58.
170. *See* Prosser, *supra* note 144, at 494; *see also* Heather C. Webb, *Comparative Negligence—*McIntyre v. Balentine*: Tennessee Judicially Adopts the Doctrine of Comparative Negligence,* 23 MEM. ST. U. L. REV. 1, 10 (1992).

VII. CONCLUSION

Chief Judge Gilbert of the Court of Special Appeals of Maryland, citing *Harrison*, appropriately summarized Maryland's position on common law doctrines:

> In light of the revision of the Restatement Second of Contracts and those pronouncements made by the courts of some of our sister states, modification might be considered the "modern trend." That does not mean, however, that Maryland will follow the "modern trend" parade. History demonstrates that, before they join a parade as marchers, Maryland courts want to know where the parade is going.[171]

In the twenty years since the Court of Appeals of Maryland delegated the responsibility of changing the common law to the legislature, the General Assembly has failed to act. A failure to act, however, is not necessarily an indication of legislative disapproval.[172] In addition, as recently demonstrated in *Bozman*, the court's deference to the legislature does not preclude the court from acting. Instead, as with interspousal immunity, the antiquated nature of the doctrine far outweighs any rationale for patiently awaiting legislative action. Comparative negligence is no longer just a "modern trend." It is a necessity.

Maryland now knows where Chief Judge Gilbert's aforementioned "parade" is going. Since Florida's adoption of comparative negligence over thirty years ago, twelve states have judicially adopted the doctrine. All of the states to adopt comparative negligence have done so with ease, even those whose judiciary acted. With this knowledge in hand, it is time for the court to take immediate action and join the parade.

Jennifer J. Karangelen

171. Holloway v. Faw, Casson & Co., 78 Md. App. 205, 252-53, 552 A.2d 1311, 1334 (1989) (Gilbert, C.J., dissenting) (internal citations omitted) (criticizing majority's decision to allow rewriting of restrictive employment contracts).

172. *See supra* Part III.C.2.