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Special Feature:

APPORTIONING LIABILITY IN MARYLAND TORT CASES: TIME TO END CONTRIBUTORY NEGLIGENCE AND JOINT AND SEVERAL LIABILITY

DONALD G. GIFFORD* & CHRISTOPHER J. ROBINETTE**

INTRODUCTION

Our tale begins in 1847, "[a] long time ago in a galaxy" not so far away.[1] Most African Americans in Maryland were held in bondage. Women had neither the right to vote nor the right to own property. The invention of the automobile would not occur for another fifty years and the Industrial Revolution had yet to transform the economy of Maryland. Accordingly, the number of accidental injuries was extremely tiny when compared to their incidence today.[2] Legal actions seeking compensation for negligently inflicted injuries were few and far between. In that year, Maryland's highest court, not its legislature, decided for the first time that contributory neg-

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1. STAR WARS (Lucasfilm Ltd. 1977).
2. *See infra* notes 161–163 and accompanying text.

ligence—the victim's own careless conduct that contributes to his (a woman could not then bring a legal action) injury—totally bars his recovery when the tortfeasor's negligent conduct is also a cause of the injury, even if the tortfeasor's wrongdoing is much more culpable than that of the victim.[3]

Fast forward to July 9, 2013. In *Coleman v. Soccer Ass'n of Columbia*,[4] six of the seven judges of the Court of Appeals of Maryland acknowledged that they regard comparative fault—a doctrine that would apportion responsibility for plaintiff's damages between the victim and the tortfeasor according to their respective degrees of fault—as both "'more equitable'" and "'more socially'" desirable than the continuance of the rule of contributory negligence.[5] Everyone on the court agreed that it has the constitutional authority to change the common law and that the court ordinarily should overturn precedent when the overruling is justified by "'changed conditions.'"[6] The court refused, however, to throw the doctrine of contributory negligence into the dustbin of history.[7] Instead, it deferred to the Maryland General Assembly.

Meanwhile, a short distance up the street, the General Assembly has been paralyzed by the standoff between two of Annapolis's most powerful groups of lobbyists: on one hand, those representing business and insurance interests and, on the other hand, those representing plaintiffs' trial counsel. Business lobbyists, in the face of substantial empirical evidence to the contrary,[8] annually parrot the prediction that adoption of comparative fault would destroy Maryland's economy and cost tens of thousands of jobs.[9] Representatives of Maryland's business and insurance communities argue

3. *See* Irwin v. Sprigg, 6 Gill 200, 204–05 (Md. 1847) (adopting, for the first time, contributory negligence as a total bar to recovery under Maryland law).

4. 432 Md. 679, 69 A.3d 1149 (2013).

5. The quoted phrases appear in the opinion of Judge Green, joined by three other judges, concurring in the decision. *Id.* at 739, 69 A.3d at 1185 (Greene, J., concurring) (quoting Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973)). In his dissenting opinion, Judge Harrell, joined by Chief Judge Bell, states that if the rule of contributory negligence "'was ever viable, certainly it no longer comports to present day morality and concepts of fundamental fairness.'" *Id*. at 709, 69 A.3d at 1166–67 (Harrell, J., dissenting) (quoting Hilen v. Hays, 673 S.W.2d 713, 718 (Ky. 1984)). Judge Harrell further concludes that "[c]ontributory negligence is no longer justified, has been discarded by nearly every other jurisdiction, and is manifestly unjust." *Id*. at 715, 69 A.3d at 1170.

6. *Id.* at 689, 69 A.3d at 1155 (opinion of the court) (quoting Harrison v. Montgomery Cnty. Bd. of Educ., 295 Md. 442, 459, 456 A.2d 894, 903 (1983)).

7. *See infra* text accompanying notes 40–44.

8. *See infra* text accompanying notes 231–233.

9. Brief of the Maryland Chamber of Commerce and the Maryland Tort Reform Coalition as Amici Curiae in Support of Appellees at 20 , Coleman v. Soccer Ass'n of Columbia, 432 Md. 679, 69 A.3d 1149 (2013) (No. 9), 2012 MD App. Ct. Briefs 49 [hereinafter *Chamber of Commerce Brief*] (citing non-peer-reviewed study prepared for Chamber of Commerce showing that pure comparative negligence would decrease job growth by two percent over four years).

that Maryland must retain the rule of contributory negligence because, in so many other regards, the tax and litigation climate in Maryland is more anti-business than it is in other states.[10] Further, these advocates claim that the neighboring states of Virginia, North Carolina, and the District of Columbia are most often the jurisdictions in competition with Maryland in attracting businesses. These jurisdictions comprise three-quarters of the trivial number of jurisdictions that, like Maryland, continue to apply contributory negligence.[11] These same lobbyists conveniently ignore the fact that Delaware, ranked by the U.S. Chamber of Commerce as the nation's most business-friendly state, is also a comparative fault state.[12]

At the same time, at least a few of the most politically potent plaintiffs' lawyers in the state choose not to push comparative fault reform too aggressively because such a path would likely lead to a broader reform emphasizing "liability according to fault," precisely the set of reforms we propose here.[13] Plaintiffs' attorneys who practice in areas such as asbestos litigation fear reform of the current "all or nothing" rule of joint and several liability,[14] and those who practice in areas where plaintiffs are unlikely to be at fault, such as medical malpractice, are, at best, ambivalent about comparative fault if it is coupled with reform of joint and several liability.

In this Article, we present the Maryland General Assembly with a comprehensive, balanced proposal for apportioning liability according to fault in Maryland tort cases. We begin with a recommendation that Maryland adopt comparative fault.[15] This is not a radical suggestion. Forty-six

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10. *See, e.g.*, Richard P. Clinch & Matthew Kachura, *Maryland Business Climate Survey 2011, Annual Report*, THE JACOB FRANCE INST. 1, http://www.jacob-france-institute.org/wp-content/uploads/2012/01/BCS-2011-Annual.pdf (last visited Feb. 25, 2014) (reporting that a plurality of Maryland businesses surveyed indicated that the state's business climate was "anti-business" or "business unfriendly" and citing taxes as "the greatest disadvantage to doing business in the state"); *State Lawsuit Climates: Maryland*, U.S. CHAMBER OF COMMERCE INST. FOR LEGAL REFORM, http://www.instituteforlegalreform.com/states/maryland (last visited Feb. 25, 2014) (ranking Maryland thirty-third among fifty states in the fairness and reasonableness of its lawsuit climate in 2012). The neighboring state of Delaware, a comparative negligence jurisdiction, ranked first in the fairness of its litigation environment, also in 2012. *State Lawsuit Climates: Delaware*, U.S. CHAMBER OF COMMERCE INST. FOR LEGAL REFORM, http://www.instituteforlegalreform.com/states/delaware (last visited Feb. 25, 2014) [hereinafter *Delaware*, U.S. CHAMBER OF COMMERCE].

11. *Chamber of Commerce Brief*, *supra* note 9, at 4 (arguing that change to comparative negligence would "make Maryland less competitive with neighboring jurisdictions—Virginia, North Carolina, and the District of Columbia—all of which apply contributory negligence").

12. *See Delaware*, U.S. CHAMBER OF COMMERCE, *supra* note 10.

13. *See infra* notes 237–267, 360–364, 376–385 and accompanying text.

14. *See* Richard L. Cupp, Jr., *Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, 31 PEPP. L. REV. 203, 209 (2003) (describing importance of joint and several liability to plaintiffs' lawyers in asbestos cases).

15. *See infra* notes 237–302 and accompanying text.

of the fifty states have adopted comparative fault.[16] We outline the advantages of both "pure" comparative fault and a variant, known as "modified" comparative fault, which denies any recovery to the victim (plaintiff) when the plaintiff is more at fault than the defendant.[17] Obviously the change from contributory to comparative fault is one that many in the plaintiffs' bar would applaud.

We also argue, however, that the principle of "liability according to fault" that underlies comparative fault favors two changes in Maryland law that will benefit at least some Maryland businesses. First, we recommend replacing the traditional doctrine of joint and several liability, which provides that a defendant, including a "deep pocket" defendant whose degree of fault is small, is held responsible for all the damages originally allocated to an often far more culpable co-defendant, who turns out to be judgment proof or immune from liability and is therefore unable to pay.[18] We recommend that the co-defendant's unpaid share be reallocated among the remaining parties based on their respective degrees of fault.[19] Second, we believe that Maryland should do away with its statute that provides that evidence of seat belt nonuse is inadmissible;[20] yet another example of Maryland's current "all or nothing" approach to apportioning liability, because it does not allow a jury to consider the plaintiff's unsafe conduct in failing to secure her or his seat belt when apportioning liability. The proposed legislation would be prospective, applying only to cases involving claims arising after the effective date specified by the General Assembly.

In Part I, we analyze the decision of the Court of Appeals in *Coleman* and its invitation to the Maryland General Assembly to act. Part II describes the advantages and disadvantages of a change from contributory negligence (as a total bar to recovery) to comparative fault. In particular, we review the empirical literature addressing the effects of such a change on claims frequency, claims severity, liability insurance premiums, and the economic health of states making the change.[21] We conclude that the Maryland business community's rhetoric about the catastrophic effects of the enactment of comparative fault is exaggerated.[22] In Part II, we also consider the relative merits of the two variants of comparative fault—pure compara-

16. Coleman v. Soccer Ass'n of Columbia, 432 Md. 679, 712, 69 A.3d 1149, 1169 (2013) (Harrell, J., dissenting) ("Today, the number of states applying comparative negligence is forty-six, and not one jurisdiction adopting it has since retreated and re-adopted contributory negligence.").

17. *See infra* notes 237–302 and accompanying text.

18. *See infra* notes 311–324 and accompanying text.

19. *See infra* notes 360–364 and accompanying text.

20. *See infra* notes 376–385 and accompanying text.

21. *See infra* notes 184–187, 197–238 and accompanying text.

22. *See infra* text accompanying note 184.

tive fault and modified comparative fault.[23] In Part III, we consider issues related to the adoption of comparative fault, such as the ongoing status of the defense of assumption of risk and the doctrine of last clear chance. Finally, in Part IV, we apply the same principle of apportioning liability according to fault to both the reform of joint and several liability and the repeal of Maryland's statute that precludes admission of evidence regarding a plaintiff's nonuse of a seat belt.[24]

I. THE INVITATION TO ACT: *COLEMAN V. SOCCER ASS'N OF COLUMBIA*

Our objective in this Article is to present a comprehensive, balanced approach that calls for Maryland courts to allocate damages resulting from negligence according to the respective degrees of fault of the parties, including the plaintiff, the defendant, and any co-defendants, as well as to those who tortiously contributed to the harm but are not joined as parties. No one contends that the Maryland General Assembly lacks the authority to change the common law, assuming, of course, that the statutory modification is constitutional.[25] Further, the legislature, unlike the court, is able to address the role fault plays in apportioning damages among the parties in a comprehensive fashion. Related issues arise in deciding to what extent the plaintiff's fault should eliminate or reduce his right to recover (contributory negligence or comparative fault), allocating which portion of the judgment each joint tortfeasor owes to the plaintiff (joint and several liability or one of its alternatives), and determining how much one joint tortfeasor owes to another under any particular variant of contribution among tortfeasors.

We strongly believe, however, that the Court of Appeals itself should have made the change to comparative fault. First, we explain why we believe that the Court of Appeals erred in its reasoning in *Coleman*.[26] We then highlight both the court's invitation to the Maryland General Assembly to act and explain why we believe that the legislature should act in light of the court's unwillingness to do so.

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23. *See infra* notes 237–267 and accompanying text. The authors respectfully disagree with one another about how this issue should be resolved. Professor Robinette prefers pure comparative fault; Professor Gifford prefers modified comparative fault.

24. *See also* MD. CODE ANN., TRANSP. § 22-412.3(h)(2) (West 2013).

25. *See* Coleman v. Soccer Ass'n of Columbia, 432 Md. 679, 689, 69 A.3d 1149, 1155 (2013) (quoting Harrison v. Montgomery Cnty. Bd. of Educ., 295 Md. 442, 459, 456 A.2d 894, 903 (1983)) (acknowledging that "'the General Assembly . . . is expressly empowered to revise the common law of Maryland by legislative enactment'").

26. *See infra* Part A.

A. Coleman v. Soccer Ass'n of Columbia: *The Case*

When the Court of Appeals agreed to hear *Coleman*,[27] many lawyers and judges believed the court would at long last leave the tiny group of jurisdictions that continue to hold that contributory negligence constitutes a total bar to recovery.[28] Chief Judge Robert M. Bell was retiring, and it was well known that he favored the adoption of comparative fault.[29] To many, the facts in *Coleman* were "plaintiff-friendly," suggesting that the Court of Appeals had accepted certiorari in this particular case in order to add another important accomplishment to Chief Judge Bell's already impressive legacy.[30] A year later, we know better. Chief Judge Bell was one of only two judges on the court to dissent to the outcome in *Coleman*.[31] More important, despite the fact that a jury found that the Soccer Association of Columbia was negligent and that its negligence was a necessary, proximate cause of the plaintiff's injuries, James Kyle Coleman's resort to the common law was unsuccessful.[32]

During a soccer practice with a team of young players, Coleman, a volunteer assistant coach, kicked the ball into the goal. As he retrieved the ball, he instinctively celebrated by jumping up and grabbing the crossbar of the goal.[33] The goal was not anchored to the ground. Coleman fell backwards, causing the crossbar to crash onto his face, resulting in "multiple severe facial fractures which required surgery and the placing of three titanium plates in his face."[34]

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27. Coleman v. Soccer Ass'n of Columbia, *cert. granted*, 425 Md. 396, 41 A.3d 570 (2012) (No. 2011-568).

28. William A. Goldberg, *Maryland High Court Declines to Declare the 'Dinosaur' of Contributory Negligence Extinct*, LERCH, EARLY & BREWER (July 31, 2013), http://www.lerchearly.com/publications/857-maryland-high-court-declines-declare-dinosaur-contributory-negligence (noting that the plaintiff was supported by numerous amici briefs in urging the Court of Appeals "to abolish the contributory negligence doctrine and replace it with a form of comparative negligence").

29. Ann E. Marimow, *Maryland's High Court Considers Rewriting Rules for Assessing Fault*, WASH. POST, Sept. 10, 2012, http://articles.washingtonpost.com/2012-09-10/local/35495479_1_soccer-association-soccer-club-court-system.

30. *See* Tony McConkey, *Maryland Court of Appeals Decisions to Have Real Impact*, DELEGATE TONY MCCONKEY'S OFFICIAL BLOG (Aug. 23, 2013), http://www.leg33.com/maryland-court-of-appeals/ ("Chief Bell has long been an opponent of the contributory negligence doctrine and his retirement figured prominently in speculation that the law was about to be overturned. . . . [T]he acceptance by the Court [of Appeals] of a contributory negligence case was seen as Chief Bell's attempt to put an end to the controversial 300+ year old law as his crowning achievement on his way out the door . . . .").

31. Coleman v. Soccer Ass'n of Columbia, 432 Md. 679, 695, 69 A.3d 1149, 1158 (2013) (Harrell, J., dissenting). Chief Justice Robert Bell joined Justice Harrell in his dissent. *Id.*

32. *Id.* at 684–85, 69 A.3d at 1152 (opinion of the court).

33. *Id.* at 683, 69 A.3d at 1151.

34. *Id.*

Coleman sued the Soccer Association. At trial, the coach, who had invited Coleman to be an assistant coach, testified that he had not inspected the goal where the accident occurred to ensure that it was properly anchored.[35] Other witnesses testified that it was common for those participating in soccer to hang from the crossbar of the goal.[36] The jury found the Soccer Association negligent, but it also found that the plaintiff was contributorily negligent.[37] The trial court judge quite properly applied Maryland law as it existed and denied Coleman any recovery.[38] Before the case could be briefed and argued in the Court of Special Appeals (the intermediate appellate court), the Court of Appeals (the highest appellate court) accepted certiorari to consider the sole issue of whether contributory negligence should continue to be a total bar to recovery.[39]

The Court of Appeals held "we decline to abrogate Maryland's long-established common law principle of contributory negligence."[40] Judge Eldridge's opinion for the court relies heavily on the fact that "the General Assembly has continually considered and failed to pass bills that would abolish or modify the contributory negligence standard," thus providing "a clear indication of legislative policy at the present time."[41] Judge Eldridge also recounts the various other reasons given by the court's opinion three decades earlier in *Harrison v. Montgomery County Board of Education*,[42] in which the court refused to abrogate contributory negligence, including the principle of *stare decisis*[43] and the complexities involved in the implementation of comparative fault and its effect on related areas of law such as joint and several liability.[44]

Judge Greene wrote a concurring opinion joined by three other judges of the seven-member court, reiterating Judge Eldridge's conclusion that it is up to the legislature to change the common law on the issue of contributory negligence.[45] Perhaps Judge Greene wrote the opinion to express his per-

35. *Id.*

36. *Id.*

37. *Id.* at 684, 69 A.3d at 1152.

38. *Id.* at 684–85, 69 A.3d at 1152.

39. Coleman v. Soccer Ass'n of Columbia, *cert. granted*, 425 Md. 396, 41 A.3d 570 (2012) (No. 2011-568).

40. *Coleman*, 432 Md. at 685, 69 A.3d at 1152.

41. *Id.* at 693, 69 A.3d at 1157.

42. 295 Md. 442, 444, 456 A.2d 894, 902–03 (1983).

43. *Coleman*, 432 Md. at 687–90, 69 A.3d at 1154–55*; see also infra* notes 76–95.

44. *Coleman*, 432 Md. at 688, 69 A.3d at 1154*; see also infra* notes 124–131 and 239–364 (addressing issues of implementation and collateral consequences).

45. *Coleman*, 432 Md. at 738–39, 69 A.3d at 1185 (Greene, J., concurring) (stating that "we should defer to the General Assembly . . . [to avoid] cast[ing] ourselves as a Court attempting to impose our will upon the General Assembly").

sonal view that "[he] would prefer a system of comparative negligence,"[46] and the other three judges may have added their name to the concurrence for the same reason.[47] In Part I.E, we examine the reasoning of the court's opinion and the concurring opinion in greater detail.

Judge Harrell, in his dissenting opinion, expressed his intense disdain for the doctrine of contributory negligence:

> Paleontologists and geologists inform us that Earth's Cretaceous period (including in what is present day Maryland) ended approximately 65 million years ago with an asteroid striking Earth (the Cretaceous-Paleogene Extinction Event), wiping-out, in a relatively short period of geologic time, most plant and animal species, including dinosaurs. As to the last premise, they are wrong. A dinosaur roams yet the landscape of Maryland (and Virginia, Alabama, North Carolina and the District of Columbia), feeding on the claims of persons injured by the negligence of another, but who contributed proximately in some way to the occasion of his or her injuries, however slight their culpability. The name of that dinosaur is the doctrine of contributory negligence. With the force of a modern asteroid strike, this Court should render, in the present case, this dinosaur extinct. It chooses not to do so. Accordingly, I dissent.[48]

Judge Harrell systematically dismantles the court's purported justifications for failing to act.[49] In large part, his reasoning mirrors our own analysis presented in Part I.E.

B. The Basics of Contributory Negligence and Comparative Fault

Under Maryland's doctrine of contributory negligence, even if the jury believes that the defendant's negligence is far more culpable (or contributed far more to the injury) than the victim's own contributory negligence, that is, the plaintiff's failure to use reasonable care to protect herself or himself, the plaintiff still recovers nothing.[50] The alternative to contributory negligence as a total bar to recovery is known as comparative fault or, sometimes, comparative negligence or comparative responsibility.

There are two basic forms of comparative fault: "pure" and "modified." Under the pure form of comparative fault, the jury is asked to compare the defendant's negligence that was a cause of the plaintiff's injuries

46. *Id.* at 739, 69 A.3d at 1185.
47. *Id.* at 740, 69 A.3d at 1186.
48. *Id.* at 695–96, 69 A.3d at 1158 (Harrell, J., dissenting).
49. *Id.* at 703–24, 69 A.3d at 1163–76.
50. *Coleman*, 432 Md. at 696, 69 A.3d at 1159.

with the plaintiff's own contributory negligence, and to quantify the comparison by attributing a percentage of fault to each party.[51] The plaintiff's recovery is then determined by multiplying the total amount of her or his damages by the defendant's percentage of fault. For example, if the jury finds that the plaintiff is ten percent at fault and the defendant is ninety percent at fault, the plaintiff receives ninety percent of the total damages. In contrast, the outcome for the plaintiff under a contributory negligence rule would be to recover nothing.

Most courts adopting comparative fault endorse the variant known as pure comparative fault that operates as described above.[52] More often than not, however, it is the legislature that adopts comparative fault, and all or virtually all legislatures adopting comparative fault have opted for the "modified" version.[53] Under modified comparative fault, a plaintiff who is more at fault than the defendant (most modified comparative fault jurisdictions), or equally at fault as the defendant (a small minority of such jurisdictions), recovers nothing.[54] Otherwise, as in a pure comparative fault state, the plaintiff's recovery is reduced by the percentage of fault attributable to the plaintiff.

Perhaps the most basic question under any comparative fault regime is exactly what it is that the court is asking the jury to compare. Is the apportionment to be made by comparing the respective levels of culpability of plaintiff and defendant? Or, by comparing the extent to which each party's fault contributed to the plaintiff's injury? Many statutes[55] and some judicial opinions[56] suggest that the jury should consider only the plaintiff's and defendants' respective degrees of fault. Other judicial opinions hold that courts should only consider the respective contribution of the parties to the harm (causation).[57] The growing trend, however, is for juries to consider

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51. *Id.* at 699 n.4, 69 A.3d at 1161 n.4; *see also id.* at 724–25, 69 A.3d at 1176 (quoting 4 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 22.15 (3d ed. 2006)).

52. When the legislature either initially adopts comparative negligence or steps in after the court initially adopts comparative negligence, it usually enacts a system of modified comparative negligence. *See* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE 64, 81 (5th ed. 2010).

53. *Id.*

54. Coleman v. Soccer Ass'n of Columbia, 432 Md. 679, 699 n.4, 724, 69 A.3d 1149, 1161 n.4, 1176 (2013) (Harrell, J., dissenting); HARPER, JAMES & GRAY, *supra* note 51, §22.15.

55. *See, e.g.*, HARPER, JAMES & GRAY, *supra* note 51, § 22.16 (comparing the negligence statutes in states such as Wisconsin, Mississippi, Maine, Oregon, and Delaware).

56. *See, e.g.*, Wassell v. Adams, 865 F.2d 849, 854 (7th Cir. 1989) (Posner, J.) ("[T]he required comparison is between the respective costs to the plaintiff and to the defendant of avoiding the injury."); State v. Kaatz, 572 P.2d 775, 782 (Alaska 1977) ("What is to be compared is negligence—conduct, fault, culpability—not causation, either physical or legal.").

57. *See, e.g.*, Miller v. Am. President Lines, Ltd., 989 F.2d 1450, 1459 (6th Cir. 1993) (noting that for purposes of comparative contribution in a maritime personal injury action, "we adopt a comparative causation approach to apportioning damages between tortfeasors"); Moffitt v. Car-

both factors. For example, the *Restatement (Third) of Torts: Apportionment of Liability* provides that in assigning percentages of liability to the plaintiff and to each defendant, the fact finder should consider both "the nature of the person's risk-creating conduct" and "the strength of the causal connection between the person's risk-creating conduct and the harm."[58]

C. The Coleman *Court's Own Preference for Comparative Fault*

The opinion of the court and the concurring opinions in *Coleman* are curious in any number of regards. Nowhere do they present any substantive argument that the continued application of contributory negligence yields more just, fair, or efficient judicial decisions than would a change to comparative fault. Judge Eldridge's opinion makes absolutely no attempt to rebut the substantive arguments that he explicitly acknowledges exist in favor of abrogating contributory negligence:

> They argue contributory negligence is an antiquated doctrine, that it has been roundly criticized by academic legal scholars, and that it has been rejected in a majority of our sister states. It is also pointed out that contributory negligence works an inherent unfairness by barring plaintiffs from any recovery, even when it is proven, in a particular case, that a defendant's negligence was primarily responsible for the act or omission which resulted in a plaintiff's injuries. It is said that contributory negligence provides harsh justice to those who may have acted negligently, in minor ways, to contribute to their injuries, and that it absolves those defendants from liability who can find any minor negligence in the plaintiffs' behavior.[59]

Even more blatantly, Judge Greene, concurring in an opinion joined by three of his colleagues (thus constituting a majority of the seven-member court), wrote, "I am willing to concede that a system premised on comparative negligence for apportioning fault appears to be a more equitable system

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roll, 640 A.2d 169, 175 (Del. 1994) (interpreting Delaware's comparative negligence statute to apportion liability "on the basis of the extent of each actor's contribution to the injurious result, i.e. proximate causation").

58. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 8 (2000). According to the co-reporter for this restatement, the "causal relation referred to in this provision refers to how closely the harm that occurs falls within the risk created by the party's negligence," that is, scope of liability, rather than to any aspect of cause in fact. Telephone interview with Michael D. Green, Co-reporter, Restatement (Third) of Torts: Apportionment of Liability (Oct. 10, 2013). Similarly, the Uniform Comparative Fault Act provides that "[i]n determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed." UNIF. COMPARATIVE FAULT ACT § 2(b), 12 U.L.A. 135 (1977).

59. Coleman v. Soccer Ass'n of Columbia, 432 Md. 679, 691, 69 A.3d 1149, 1156 (2013).

of determining liability and a more socially desirable method of loss distribution."[60] These four concurring judges, combined with the two dissenting judges,[61] constituted a super-majority of the court that found that comparative fault is "more equitable" and "more socially desirable" than contributory negligence.

Further, the court explicitly accepted the idea that the original purpose of the creation of contributory negligence during the first half of the nineteenth century in Maryland and elsewhere was to protect emerging industries and a new form of transportation, railroads, from juries that "had the potential to stifle newly developing industry"[62] and "wreak financial disaster upon that burgeoning" railroad industry.[63] Obviously, these justifications no longer apply in the twenty-first century.

D. Judicial Authority to Overturn Contributory Negligence

The Court of Appeals also acknowledged that it "has the authority to change the common law rule of contributory negligence."[64] Judge Greene's concurring opinion echoes this reality: "[T]here is no dispute about whether this Court has the authority to change the common law."[65] In the same vein, Judge Eldridge, writing for the court, noted that *stare decisis* should not be construed to inhibit the court "from changing or modifying a common law rule by judicial decision [when] . . . the rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people."[66] The court's opinion continues: "This Court has repeatedly said that the common law is not static; its life and heart is its dynamism—its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems."[67] Further, the court acknowledged that "because contributory negligence is a court-created principle, and has not been embodied in Maryland statutes, this Court possesses the authority to change the principle."[68]

Then the court punted, abdicating its judicial duty in the process. To recap the reasoning of the judges, the court's opinion implicitly suggests that it recognizes that contributory negligence is an unfair, antiquated policy

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60. *Id.* at 738, 69 A.3d at 1185 (Greene, J., concurring) (internal quotation marks omitted).

61. *Id.* at 696, 69 A.3d at 1184–85 (Harrell, J., dissenting) (calling contributory negligence an "'all-or-nothing'" doctrine of judicial "'Big Bang'" origin (citing Butterfield v. Forrester, [1809] 103 Eng. Rep. 926 (K.B.))). Chief Justice Bell joined in this opinion. *Id.* at 738, 69 A.3d at 1184.

62. *Id.* at 686, 69 A.3d at 1153 (opinion of the court) (internal quotation marks omitted).

63. *Id.* at n.5 (citations omitted) (internal quotation marks omitted).

64. *Id.* at 684, 69 A.3d at 1152.

65. *Id.* at 738, 69 A.3d at 1184 (Greene, J., concurring).

66. *Id.* at 689, 69 A.3d at 1155 (opinion of the court) (internal quotation marks omitted).

67. *Id.* at 692, 69 A.3d at 1156 (citations and internal quotation marks omitted).

68. *Id.* at 691, 69 A.3d at 1156.

with its roots and justifications lying in a long-past era that no longer applies. The concurring opinion openly states that the rule is neither "equitable" nor "socially desirable."[69] The judges recognized that it is within their authority as common law judges to adopt comparative fault.[70] The court, however, ultimately decided to apply the law of contributory negligence in *Coleman* and to future cases.[71]

E. Evaluating the Court's Own Justifications for Deferring to the Legislature

In and of itself, the widespread judicial and legislative adoption of comparative fault suggests a discordant anomaly. How is it that Maryland, usually perceived to be one of the nation's most progressive states,[72] is one of only four states that retains a doctrine regarded as traditional, conservative, anti-consumer, and even antiquated?

Why then did the court fail to overturn the common law doctrine of contributory negligence as a total bar to recovery and replace it with comparative fault? In the following sections, we examine the validity of each of the justifications offered by the court. Ultimately, the opinion for the court relied heavily on the proposition that "[t]he General Assembly's repeated failure to pass legislation abrogating the defense of contributory negligence is very strong evidence that the legislative policy in Maryland is to retain the principle of contributory negligence."[73] As we explain in Section 2 of this Part, legislative inaction in failing to overturn common law decisions of the Court of Appeals cannot appropriately be construed as legislative approval of the status quo—a proposition that the Court of Appeals itself has repeatedly recognized.[74]

1. Stare Decisis

The basic law of torts—governing, among other things, whether or not the victim of a personal injury is able to recover from the party who caused the injury—is determined by judge-made or common law, except when the

69. *Id.* at 739, 69 A.3d at 1185 (Greene, J., concurring) (internal quotation marks omitted).

70. *Id.* at 692, 69 A.3d at 1156–57 (opinion of the court) (noting various cases in which the Court of Appeals has had "the ability to modify common law").

71. *Id.* at 691–95, 69 A.3d at 1156–58.

72. Editorial, *Blue Maryland Gets More Liberal*, BALT. SUN, Dec. 27, 2013, http://articles.baltimoresun.com/2013-12-27/news/bs-ed-year-in-review-20131219_1_maryland-politics-voters-governor-o-malley ("Maryland has long been a heavily Democratic state, but 2013 may have cemented its status as a truly liberal one.").

73. *Coleman*, 432 Md. at 694, 69 A.3d at 1158.

74. *See infra* Part I.E.2.

legislature acts affirmatively.[75] Henry Hart and Albert Sacks, in their classic text, *The Legal Process: Basic Problems in the Making and Application of Law*, which presents a traditional and conservative perspective on the appropriate boundaries between the legislative and judicial functions, state:

> The body of decisional law announced by the courts . . . tends always to be the initial and continues to be the underlying body of law governing the society. Legislatures and administrative agencies tend always to make law by way not of original solution of social problems, but by alteration of the solutions first laid down by the courts.[76]

In this regard, American law differs from that of most other countries, such as China, France, or Russia, where the law governing personal injury claims is statutory, enacted by the legislature, albeit often in very broadly-articulated terms.[77]

The legitimacy of the common law differs from that which gives authority to statutes enacted by legislatures and regulations and rulings of administrative agencies. Judicial rulings are not meant to be a reflection of the will of the electorate.[78] Instead, the legitimacy of judicial lawmaking rests on the idea that judges begin their reasoning process with a presumption that they will follow precedents in earlier cases on similar facts.[79] Even in the 1890s, however, at a time when the law of negligence dominated the legal landscape, Oliver Wendell Holmes, Jr., later a Supreme Court Justice and regarded as perhaps the key figure in defining the traditional law of negligence, wrote the following:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished

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75. *See* DAN B. DOBBS, THE LAW OF TORTS 1 (2000) ("Tort law is predominantly common law. That is, judges rather than legislatures usually define what counts as a tort and how compensation is to be measured.").

76. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 164 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

77. *See* JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, THE CIVIL LAW TRADITION 24–25 (3d ed. 2007) (stating that "the accepted theory of sources of law in the civil law tradition recognizes only statutes, regulations, and custom as sources of law," hence a judge "cannot turn to . . . prior judicial decisions for the law").

78. *See* Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 692 (1980).

79. *See* United States v. Drummond, 354 F.2d 132, 143 (2d Cir. 1965) ("The genius of the common law lies in the process of reasoned elaboration from past precedent . . . ."); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1107 (1997) (explaining that the requirement that common law courts' decisions be tied to precedents or "explicit text . . . provides legitimacy to judge-made rules").

> long since, and the rule simply persists from blind imitation of the past.[80]

Few American judges, lawyers, and legal scholars in the late-twentieth and twenty-first centuries subscribe to the views of legal formalism or "mechanical jurisprudence" that often prevailed during the late-nineteenth and early-twentieth centuries, when the common law was sometimes conceived of as nothing more than rules deduced from precedents applied syllogistically to the facts of the present case.[81] For example, as early as 1936, U.S. Supreme Court Justice Harlan Stone stated, "[T]he law itself is something better than its bad precedents . . . the bad precedent must on occasion yield to the better reason."[82] He specifically suggested that courts are justified in overruling precedents because "[s]cience, invention and industrial expansion have done more than all else to change the habits of life of the people . . . since the Civil War . . . than occurred in the three centuries which followed the discovery of America."[83] Judge Learned Hand, a conservative and one of the most respected judges of the mid-twentieth century, similarly concluded that while the judge "must preserve his authority by cloaking himself in the majesty of an overshadowing past . . . he must discover some composition with the dominant trends of his time."[84] Even Sir Edward Coke, perhaps the most important writer on the topic of the common law as it developed in England, wrote as early as the sixteenth century that precedents should be overruled when the results of such precedents lead to "inconvenience."[85]

The common law evolves as societal norms and relevant aspects of society change, such as, in the case of negligence law, the types and sources of tortious harms. Precedents establish the starting point of the common law process, but only the starting point. The Court of Appeals has repeatedly acknowledged this through the decades as it altered the precedents that previously governed recovery (or more typically, prevented recovery) for tortious injury.[86] In the past, the court explicitly stated, "Because of the in-

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80. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

81. WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 32 (1994) (characterizing formalism).

82. Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 8 (1936).

83. *Id.* at 11.

84. Learned Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361, 361 (1939).

85. ROSCOE POUND, THE FUTURE OF THE COMMON LAW 125 (1937) (noting Coke had declared "inconvenience in the results of a rule established by precedent is strong argument to prove that the precedent itself is contrary to the law").

86. Lusby v. Lusby, 283 Md. 334, 334, 390 A.2d 77, 77 (1978) (abolishing the defense of interspousal immunity in the case of outrageous intentional torts); Phipps v. Gen. Motors Corp., 278 Md. 337, 350, 363 A.2d 955, 963 (1976) (adopting strict liability as expressed in § 402A of the Restatement (2d) of Torts); Mackubin v. Curtiss-Wright Corp., 190 Md. 52, 56, 57 A.2d 318, 321 (1948) (relaxing the privity requirement in third-party beneficiary cases).

herent dynamism of the common law, we have consistently held that it is subject to judicial modification in the light of modern circumstances or increased knowledge."[87] The court also explicitly has cited "the guidance of a significant majority of other states"[88] as a justification for overturning precedents.

Along with the authority of the Court of Appeals to establish the common law, and to change it when circumstances warrant modification, comes judicial obligation. When a litigant presents a court with a claim of right, the court is obligated to rule on the claim assuming that the court has jurisdiction over it.[89] In this regard, the court is fundamentally different from a legislature, which establishes new law only when it wants to do so and can always decide not to address an issue. A court cannot decide that an issue is too difficult or too controversial upon which to rule. It must decide the litigant's claim. Even if the court wrote, as it did in *Coleman*, that it is up to the legislature to make any change in the law, in doing so the court reaffirmed that the law *status quo ante* governed both the case before it and others in the future. A common law court cannot pass the buck. Indeed, the Court of Appeals of Maryland has repeatedly stated that "it is *our duty* to determine the common law as it exists in this State."[90]

The role of the court in establishing the law in a field such as torts, where the common law predominates, is *very* different from the role of the court in evaluating a claim that a statute or executive action is unconstitutional. In the latter instance, the proper role of the court is to defer to the legislature unless there is no rational justification for the statutory enactment or executive action, except where the claim involves either a suspect class or a fundamental right.[91] In short, in cases raising constitutional challenges, the legislature or the executive has the primary responsibility for declaring what the law is and the court acts only in highly unusual circumstances. When it comes to the common law, however, the courts have the

87. Ireland v. State, 310 Md. 328, 331, 529 A.2d 365, 366 (1987).

88. B&K Rentals and Sales Co. v. Universal Leaf Tobacco Co., 324 Md. 147, 158, 596 A.2d 640, 645 (1991).

89. HART & SACKS, *supra* note 76, at 373 (implicitly arguing that it is "a postulate of a free society that a tribunal" is obligated to find grounds to decide the case before it); *see also* Fred C. Zacharias, *The Politics of Torts*, 95 YALE L.J. 698, 714–15 (1986) (arguing that while "[l]awmakers and regulators . . . often ignore conditions requiring redress . . . [j]udges presented with actual controversies, in contrast, have a duty to decide").

90. *E.g.*, Ass'n of Indep. Taxi Operators v. Yellow Cab Co., 198 Md. 181, 204, 82 A.2d 106, 117 (1951) (emphasis added).

91. *See, e.g.*, DRD Pool Serv. v. Freed, 416 Md. 46, 67, 5 A.3d 45, 57 (2010) (explaining that "[t]he rational basis test is highly deferential" and "presumes a statute is constitutional and should be struck down only if the reviewing court concludes that the Legislature enacted the statute irrationally or interferes with a fundamental right").

responsibility—indeed, the obligation and the duty—to establish the law unless and until the legislature acts.

Judge Eldridge's opinion in *Coleman* recognizes that "changed conditions" justify a court in overturning a precedent, thereby changing the common law.[92] This acknowledgement echoes the words of Supreme Court Justice Benjamin Cardozo, who once wrote: "[I]f the *mores* of their day are no longer those of ours, [judges] ought not to tie, in helpless submission, the hands of their successors."[93]

Since Maryland first adopted contributory negligence in 1847,[94] the universe of accidental injuries in Maryland has changed beyond recognition. These "changed conditions" easily surpass the threshold that the Court of Appeals itself established for overturning a precedent and should compel the Maryland General Assembly to act in the face of the court's judicial abdication. We discuss these changes in the next Part.[95]

2. Legislative Inaction

The Court of Appeals correctly noted that the legislature could change the common law of contributory negligence if it were inclined to do so.[96] The Maryland legislature, however, has never codified the judge-made law of contributory negligence.[97] The petitioners in *Coleman* were not asking the court to declare unconstitutional a statute establishing contributory negligence as a total bar to recovery, but rather asking the court to fulfill its responsibility to declare the common law, taking into account changed conditions.[98] As such, there simply is no legislative policy or public policy declared by the legislature in the state of Maryland to which the court has any reason to defer.

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92. Coleman v. Soccer Ass'n of Columbia, 432 Md. 679, 689, 69 A.3d 1149, 1155 (2013).

93. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 152 (1921); *see also, e.g.*, United States v. Reliable Transfer Co., 421 U.S. 397, 403 (1975) (overruling common law precedent because "subsequent history and experience have conspicuously eroded the rule's foundations").

94. Irwin v. Sprigg, 6 Gill 200, 204–05 (Md. 1847).

95. *See infra* Part II.A.2.

96. *See supra* text accompanying note 25.

97. *Coleman*, 432 Md. at 702, 69 A.3d at 1162 ("In the absence of codification by the Legislature, the defense of contributory negligence remains a dependent of the common law, and as such, is within the province of its parent, this Court, to abrogate or modify that to which it gave birth and nurtured.").

98. *Id.* at 691, 69 A.3d at 1156 (opinion of the court) ("Petitioner correctly contends that, because contributory negligence is a court-created principle, and has not been embodied in Maryland statutes, this Court possesses the authority to change the principle.").

In recent years, the Maryland General Assembly has considered legislative proposals to adopt comparative fault on a number of occasions.[99] There, proposals have failed to receive an affirmative recommendation from either or both of the judiciary committees of the two houses of the legislature.[100] The *Coleman* court erroneously concluded that the legislature's failure to impose comparative fault thus establishes that contributory negligence reflects the "legislative policy" or the "public policy" of the state.[101] The legislature's failure to act, however, does not necessarily indicate its opposition to a proposed piece of legislation.[102] Leading constitutional law scholar Laurence Tribe further explains:

> When the array of powers held by the executive, the judiciary, or the states with respect to a given matter can be transformed only by congressional approval or disapproval, then it is essential that such approval or disapproval take the form of legislation made through [the formal constitutional procedures for passing laws.[103]

The issue posed in *Coleman*, of course, could have been resolved by the court instead of by the legislature, so reading legislative inaction as barring the court from changing the existing common law was even more inappropriate. In *Goldstein v. State*,[104] the Court of Appeals itself took the same approach:

> Maryland generally adheres to the majority view on legislative inaction, which is that ordinarily the fact that a bill on a specific subject fails of passage in the General Assembly is a rather weak reed upon which to lean in ascertaining legislative intent. Thus, the mere fact that the General Assembly has declined to adopt a

99. *See id.* at 693 n.6, 69 A.3d at 1157 n.6 (listing several unfavorable House and Committee reports on legislative proposals to adopt comparative negligence legislation).

100. *Id.*

101. *Id.* at 694–95, 69 A.3d at 1158 (internal quotation marks omitted).

102. *See* HART & SACKS, *supra* note 76, at 1358–60 (identifying twelve reasons, other than opposition to the merits of the proposal, why "legislators may have either for opposing a bill or simply withholding the votes necessary for its forward progress" and indicating the existence of additional reasons); *see also, e.g.*, Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 322 (2005) (arguing, in part, that "'congressional acquiescence'—the belief that congressional inaction . . . reflects congressional acquiescence . . . is misguided"); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69–70, 90–94 (1988) (pointing out inconsistencies in interpretations of legislative inaction in Supreme Court cases and positing that such inaction, as a demonstration of "the actual collective will or desire of the enacting legislature . . . should rarely be given much, or any, weight"); Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 186–94 (1989) (criticizing the theory of deliberate legislative inaction on several grounds, including congressional ignorance of judge-made law, failure of bills to pass or be introduced, interpretational ambiguity, and irrelevance).

103. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 205 (3d ed. 2000).

104. 339 Md. 563, 664 A.2d 375 (1995).

> particular proposal does not preclude this Court from incorporating the substance of that proposal into the common law . . .
>
> Courts have traditionally been reluctant to infer legislative intent from legislative inaction when there are several possible reasons for defeat.[105]

In *Coleman*, the court made no attempt to distinguish *Goldstein*.

It is far easier to kill a legislative proposal than it is to enact it. From the founding of our Republic,[106] Congress and state legislatures have operated with "veto gates" or "negative legislative checkpoints"[107] designed to protect minorities from the tyranny of the majority.[108] As Professor and Associate Dean Maxwell Stearns of the University of Maryland Francis King Carey School of Law observes, "[t]he very mechanisms designed to protect against majority tyranny by making legislation more difficult to procure serve as venues for special interest influence."[109]

Enacting comparative fault legislation requires the Maryland General Assembly to undertake a difficult process that usually requires action by two houses of the legislature, the signature of the governor, and the time and energy required to accomplish these steps during an often crowded and busy legislative session. Adding to the legislature's challenge is the fact that sometimes (even in Maryland at points during the past 170 years), the governor and the majority in each legislative chamber are not of the same political party. Stearns observes that "[t]hese junctures make it easier to block than to pass legislation because success at every focal point is required for passage whereas failing at only one is sufficient for defeat."[110] Legislative inaction is not a declaration that the legislature approves the existing common law.[111]

During the mid-1990s, one of us (Gifford) attended committee hearings of the Maryland General Assembly considering replacing contributory negligence with comparative fault. Legislators who voted against such reform legislation often explained their votes by saying "this is a matter for the courts to decide."

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105. *Id.* at 569–70, 664 A.2d at 378 (citations and internal quotation marks omitted).

106. *See* THE FEDERALIST NO. 10, at 125 (James Madison) (Isaac Kramnick ed., 1987) ("To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.").

107. Maxwell L. Stearns, *Direct (Anti-)Democracy*, 80 GEO. WASH. L. REV. 311, 316 (2012) (internal quotation marks omitted).

108. *Id.* at 315–16.

109. *Id.* at 316.

110. *Id.* at 336.

111. *See supra* text accompanying note 105.

Further, if the court is deriving the legislative policy or public policy of the state from the General Assembly's failure to enact proposed legislation adopting comparative fault, what significance should be given to the fact that the legislature also has repeatedly failed to codify the doctrine of contributory negligence?[112] The court's failure to even mention this legislative inaction is totally at odds with its conclusion that legislative inaction establishes the public policy of the state.[113] The court cannot have it both ways.

Finally, what is the precedential value of the holding in *Coleman*? If the court's opinion means that it will not change the common law when the legislature repeatedly has failed to do so, the implications are staggering. Each legislative session, the Maryland General Assembly considers many bills designed to change one specific aspect or another of the judge-made common law of Maryland. Often such tort reform proposals are recycled year after year. If the Court of Appeals were to apply *Coleman* as precedent, it would refuse to consider the merits of litigants' arguments whenever the legislature has repeatedly refused to change the law. Obviously, if that occurs, the common law of torts in Maryland is no longer on life support. It is truly dead.

What is worse is that *Coleman* results in a perverse incentive for special interest lobbyists to encourage members of the General Assembly to introduce legislation opposed to the interests of the lobbyists' clients under circumstances in which passage of the legislation is highly unlikely, in order to establish a record that the legislature has repeatedly failed to overturn the common law *status quo ante*. If *Coleman* is to be treated as a precedent, a legislative record finessed by special interest lobbyists would bar the Court of Appeals from changing the common law.

3. The Prevalence of Legislative Adoption of Comparative Fault

The court's opinion in *Coleman* repeatedly points out that most other states adopted comparative fault through legislation.[114] Most of these states, however, had done so by 1983.[115] When the Court of Appeals last considered a possible change from contributory negligence to comparative fault, in most jurisdictions comparative fault was still a recent develop-

112. *See, e.g.*, H.B. 1156, 2013 Reg. Sess. (Md. 2013).

113. *See supra* text accompanying note 101.

114. Coleman v. Soccer Ass'n of Columbia, 432 Md. 679, 689, 69 A.3d 1149, 1154 (2013). The court fails to acknowledge that in at least some states, the legislative enactments were in fact legislative modifications of earlier judicial decisions adopting comparative fault. *E.g.*, IOWA CODE ANN. §§ 668.1 *et seq.* (West 2013), *superseding* Goetzman v. Wichern, 327 N.W. 2d 742, 744 (Iowa 1982).

115. *Coleman*, 432 Md. at 688, 69 A.3d at 1154 (reporting "that, as of 1983, of the thirty-nine states that had adopted comparative negligence, thirty-one had done so by statute").

ment.[116] Now it is three decades later. For the reasons stated earlier, the Maryland General Assembly has not enacted comparative fault.[117] The court read this legislative inactivity as "a clear indication of legislative policy" in favor of "the contributory negligence doctrine."[118] To us, it appears more likely that the legislature would prefer not to make a politically charged decision.

During the past generation, the Court of Appeals and the General Assembly have given one another an extremely wide berth when it comes to matters of tort law. Maryland avoided the often intense inter-branch turf battles between state legislatures and state supreme courts that many other states experienced during battles over tort reform. A number of other state legislatures passed "tort reform" statutes changing the common law, only to have state supreme courts declare such legislation unconstitutional.[119] In extreme cases, these turf wars degenerated into public name-calling.[120] In contrast, in Maryland, the Court of Appeals never pushed the common law too hard or too fast in a plaintiff-oriented direction. In turn, the General Assembly enacted tort reform statutes less frequently than other state legislatures and deferred to the Court of Appeals on tort law. Finally, the Court of Appeals rarely declared tort reform statutes to be unconstitutional.

In apparently following this same approach in refusing to discard contributory negligence, however, the Court of Appeals exceeded the limits of judicial deference and passed the threshold of judicial abdication. Again, the court was not being asked to declare a statute enacting contributory negligence to be unconstitutional.[121] Rather, the court was developing the common law of torts, a task committed in the first instance to the court, not the legislature.[122] On the merits of the social desirability and equity of the proposed change, six of the seven members of the court found comparative

116. SCHWARTZ, *supra* note 52, § 1.01 (reporting that only seven states had adopted comparative negligence before 1960 and only six more by 1970).

117. *Coleman*, 432 Md. at 690, 69 A.3d at 1155.

118. *Id.* at 693, 69 A.3d at 1157.

119. *E.g.*, State *ex rel*. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1071–72, 1111 (Ohio 1999) (holding unconstitutional an Ohio tort reform initiative and describing a decade-long "power struggle . . . waged by powerful and capable interests on both sides of the issue, [which] has created turbulence among our coordinate branches of government").

120. *See, e.g.*, Editorial, *Ohio Supreme Court: Tort Retorts: A Petty, Insulting Ruling*, CINCINNATI ENQUIRER, Aug. 22, 1999, at D2 (calling the ruling "an insult to the General Assembly"); Editorial, *Role Reversal: High Court Again Tries Hand at Lawmaking*, COLUMBUS DISPATCH, Aug. 18, 1999, at 10A (calling the court "a legislative bulldozer, upending whatever law conflicts with the ideological bent of the majority, legal and constitutional principles be damned").

121. *Coleman*, 432 Md. at 691, 69 A.3d at 1156.

122. *See supra* Part I.

fault to be the preferred approach.[123] As common law judges, it was their duty to honor their own convictions.

4. *Concerns About Details of Implementation and Collateral Consequences*

Both the court's opinion and Judge Greene's concurring opinion also express concerns about the details of the implementation and the collateral consequences of the adoption of comparative fault—such as whether to adopt pure or modified comparative fault; how it would apply in the case of multiple tortfeasors; and whether its adoption would affect the ancillary issues of joint and several liability, contribution, assumption of risk, and last clear chance.[124] Ironically, however, as Judge Harrell pointed out, most states adopting comparative fault legislatively have not done so through the enactment of comprehensive legislation.[125] Instead, most legislatures "have enacted short-form statutes that leave most doctrinal issues to be shaped and developed by the courts."[126]

Somehow other state supreme courts, while identifying the same issues, have concluded that the courts are able to work out such issues as the years go by.[127] A generation after adopting the principle of comparative fault, the judicial systems of these states have operated smoothly, without descending into chaos or confusion.[128] Perhaps the members of the court are not aware that these specific issues are among those typically addressed today in first semester Torts classes. Of course, the legislature may want to get involved in the specifics of implementation if it thinks the courts are getting things wrong, but this does not excuse the court from walking away from the important transcendent issue of whether or not contributory negligence should be replaced with comparative fault. Indeed, Professor Fred C.

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123. *See supra* Part I.C.

124. *Coleman*, 432 Md. at 687–88, 69 A.3d at 1154; *see also id.* at 738–40, 69 A.3d at 1185–86 (Greene, J., concurring).

125. *Id.* at 722–23, 69 A.3d at 1175 (Harrell, J., dissenting).

126. *Id.*

127. *See, e.g.*, Li v. Yellow Cab Co., 532 P.2d 1226, 1241 (Cal. 1975) (stating that these issues have "not diminished our conviction that the time for a revision of the means for dealing with contributory fault in this state is long past due and that it lies within the province of this court to initiate the needed change by our decision in this case"); Hoffman v. Jones, 280 So. 2d 431, 439–40 (Fla. 1973) ("We feel the trial judges of this State are capable of applying this comparative negligence rule without our setting guidelines in anticipation of expected problems.").

128. *See, e.g.*, Parsons v. Crown Disposal Co., 936 P.2d 70, 85 (Cal. 1997) ("Using *Li* [*v. Yellow Cab Co.*] as our guidepost, we proceeded . . . to determine which category of assumption of risk cases should be merged into the comparative fault system and which category should not."); Joseph v. Quest, 414 So. 2d 1063, 1064 (Fla. 1982) ("In *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), we established the rule of comparative negligence in this state and held that liability should be equitably apportioned on the basis of fault.").

Zacharias argues that a court performs an important political function when it prompts such a legislative response:

> A new rule temporarily imposes liability upon a politically well-represented group. In response, the group is expected to activate legislative or administrative attention to the social problem underlying the cases in which the rule applies. In the long run, the legislature or executive agency will provide a solution and make the determination of who should bear the accident costs, and how.
>
> . . . .
>
> Such litigation thus signals a continuing, widespread need for relief. It highlights an underlying social condition that may ultimately require legislative, rather than judicial, solutions. But the signal reaches only judges. Imposing liability upon politically well-represented groups in turn is judges' sole effective means to forward the message for legislative consideration.[129]

Further, an opposite outcome in *Coleman* would not have required the court to address the issues about which Judge Greene is concerned—issues not presented by the case—at this time. As the Florida Supreme Court stated when it adopted comparative fault forty years ago in *Hoffman v. Jones*,[130] "[I]t is not the proper function of this Court to decide unripe issues, without the benefit of adequate briefing, not involving an actual controversy, and unrelated to a specific factual situation."[131] When such issues would be posed to the Court of Appeals, the court would be able to draw upon decades of experience from the courts and legislatures in forty-five other states. The wheel would not need to be reinvented. At the same time, we acknowledge the institutional advantages of having the legislature comprehensively address how liability should be apportioned according to fault across a range of intertwined issues. It is to that task that we turn to in the remainder of this Article.

In summary, we disagree strongly with the unwillingness of the Court of Appeals to overturn contributory negligence as a complete bar to recovery and replace it with comparative fault. The court's decision is not well grounded and rests almost entirely on the past unwillingness of the Maryland General Assembly to enact comparative fault reform.[132] Given the outcome in *Coleman* and the advantages of a comprehensive approach, however, we now join the court in urging the legislature to act in a way that

129. Zacharias, *supra* note 89, at 725–26.

130. 280 So. 2d 431 (Fla. 1973).

131. *Id.* at 439.

132. Coleman v. Soccer Ass'n of Columbia, 432 Md. 679, 693–95, 69 A.3d 1149, 1157–58 (2013).

produces a framework for allocating damages arising from tortious harms that is both more equitable and more socially desirable.

II. CONTRIBUTORY NEGLIGENCE VERSUS COMPARATIVE FAULT ON THE MERITS

A. Positive Arguments for Comparative Fault

At one time, every American jurisdiction followed the rule of contributory negligence, by which the plaintiff is barred from recovery if her negligence contributed, in even a slight manner, to her injuries.[133] As late as the mid-1960s, only seven states had adopted some form of the alternative rule of comparative fault.[134] Over the next two decades, the landscape changed dramatically; by 1985, forty-four states had switched from contributory negligence to comparative fault.[135] Currently forty-six states operate under a comparative negligence rule, leaving contributory negligence the rule in only Maryland, Virginia, North Carolina, Alabama, and the District of Columbia.[136] What reasons support such an overwhelming movement away from contributory negligence?

1. Fairness

The very basic problem with contributory negligence is that it does not properly apportion responsibility for injuries. A negligence regime makes fault the basis for apportioning responsibility for unintentional injuries.[137] Yet, other options are available. Fault could be irrelevant to responsibility for unintentional injuries. A jurisdiction could adopt a system of no liability, in which a loss remains where it falls even if caused by fault. Alternatively, a jurisdiction could create a rule of strict liability, by which an injurer would be held responsible even in the absence of fault.[138] In certain limited contexts, jurisdictions have selected these options by the use of no

133. Christopher J. Robinette & Paul G. Sherland, *Contributory or Comparative: Which is the Optimal Negligence Rule?*, 24 N. ILL. U. L. REV. 41, 41 (2003).

134. *Id.* at 42–43.

135. *Id.* at 43.

136. *Id.* at 44–45 n.27. South Carolina adopted comparative negligence in 1991, see *Nelson v. Concrete Supply Co.*, 399 S.E.2d 783, 784 (S.C. 1991), and Tennessee did so in 1992, see *McIntyre v. Balentine*, 833 S.W.2d 52, 53 (Tenn. 1992).

137. This is at least true formally. *See* Christopher J. Robinette, *Two Roads Diverge for Civil Recourse Theory*, 88 IND. L.J. 543, 543 (2013) (arguing that the importance of fault in automobile accidents is reduced or eliminated in many cases due to a reliance on routinized procedures).

138. For a brief history of the role of fault in tort law, see KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 48–53 (3d ed. 2007).

duty rules or immunities on one hand,[139] or by adopting strict liability that does not require fault, such as liability for manufacturing defects in products liability cases, on the other hand. In general, however, jurisdictions have opted for a liability regime based on negligence; people are responsible for injuries they cause if they are at fault. In Maryland, as in other American jurisdictions, negligence is the default rule for treatment of unintentional injuries.

Contributory negligence is inconsistent with apportioning responsibility based on fault. Any fault on plaintiff's part erases all responsibility for fault by defendants. As an example, consider a person driving through an intersection who briefly glances down to adjust her radio. At the same time, another driver, drunk, runs a red light and injures the first driver. The vast majority of fault in this case belongs to the driver who ran through a stop light, yet the slight amount of fault by the injured driver is sufficient to prevent recovery under a contributory negligence rule. The injured driver is forced to bear the entire loss resulting from the negligence of both parties. She must pay all economic losses and she must accept noneconomic losses in the form of pain and suffering. The driver who ran the red light is relieved of all responsibility despite overwhelming fault in causing the injuries.

Such improper allocation is most troubling in extreme cases, but is also problematic in cases where fault is more evenly balanced. Assume instead of glancing at the radio, the driver made a turn into the intersection without looking, where she is hit by the driver running a red light. Now the injured driver's fault is greater, perhaps in the thirty percent to forty percent range. The imbalance is not as great, but why should the driver who ran a red light be absolved of responsibility for her fault? The injured driver is going to pay for her share of fault in the form of the injury suffered. Under a negligence rule, the driver who ran the red light should be responsible for her share of fault as well.

In an article in the late 1970s, the late Professor Gary Schwartz also concluded that contributory negligence is inconsistent with a negligence regime:

> If this idea of fairness thus calls on tort law to take some account of the plaintiff's contributory negligence in ascertaining the liability of a negligent defendant, the question arises of what appropriate form the legal doctrine should assume. As presented, the fairness idea is entirely satisfied by a liability-dividing rule like comparative negligence. . . . There is nothing in [the] logic

139. *See, e.g.*, Tinsley v. Washington Metro. Area Transit Auth., 429 Md. 217, 55 A.3d 663 (2012) (governmental immunity); Muthukumarana v. Montgomery Cnty., 370 Md. 447, 805 A.2d 372 (2002) (no duty).

> [of the contributory negligence idea] that would be impaired or compromised were it deployed in support of a liability-reducing rule rather than a liability-denying rule. Moreover, as we have seen, the rule of negligence liability itself has a satisfactory moral basis, one that is based on our disapproval of antisocial or egotistical conduct. To negate altogether a plaintiff's lawsuit against a negligent defendant would be to allow the fairness idea associated with the contributory negligence defense to extinguish the moral idea that predicates negligence liability.[140]

For contributory negligence to be legitimate, there would have to be some reason why an injurer's fault is so much less significant than an injured victim's fault that any amount of victim's fault eliminates the importance of an injurer's fault. No serious argument to this effect has been offered. In fact, arguably sometimes an injurer's fault is more blameworthy than an injured victim's fault. In other words, not only does the contributory negligence rule ignore the *amount* of fault between the injurer and the injured, it can also ignore the *quality* of such fault. An injurer's carelessness toward other people is arguably more blameworthy than an injured victim's carelessness in risking her own safety. Carelessness toward others is the antisocial or egotistical conduct of which Professor Schwartz spoke. A person is risking harm *to other people* by her conduct; she is prioritizing her convenience over the safety of others.[141] By contrast, carelessness for one's own safety is not egotistical or antisocial; the consequences of carelessness toward oneself will be felt personally and not externalized.[142] Of course, some conduct that is carelessness for one's own safety is also carelessness toward others.[143] In those instances, even if the quality of the fault is not different, the *amount* of fault between injurer and injured is still ignored.

To place the issue in the parlance of tort theory, contributory negligence is inconsistent with corrective justice.[144] The essence of corrective justice is that a party who wrongfully injures another must correct the wrong to restore the moral balance between the parties.[145] Injurers cannot literally correct the wrong by healing the injury; liability is therefore imposed as a substitute for the previous bodily health and autonomy.[146] Under contributory negligence, an injurer can be relieved of the burden of correct-

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140. Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 725 (1978).

141. *Id.*

142. *Id.* at 722–23.

143. *Id.* at 723.

144. Robinette & Sherland, *supra* note 133, at 47–50.

145. ABRAHAM, *supra* note 138, at 15.

146. *Id.* at 14.

ing her moral wrong.[147] If the injured victim is at all responsible for causing her own injury, the injurer bears no responsibility to correct her wrong.[148] This can leave a moral imbalance in place, in violation of corrective justice.[149] The greater the moral imbalance left in place by the paucity of the victim's fault, the more troubling is contributory negligence.

We also predict that the adoption of comparative fault will increase consistency in the handling of plaintiffs' cases among Maryland counties, as well as among juries in any particular county. More than fifty years ago when contributory negligence reigned, Lewis Powell—later an Associate Justice of the U.S. Supreme Court—opined that independent American juries already applied a form of comparative fault in practice.[150] In many cases where the juries believe that plaintiffs were contributorily negligent, they nevertheless find in the plaintiffs' favor but reduce the verdicts to account for the plaintiffs' fault.[151] Even more important, given that well over ninety percent of all negligence cases settle,[152] is the reality that defendants and their insurance carriers typically make settlement offers even when they believe that plaintiffs are contributorily negligent, but discount the settlement offers by their estimates of the probability that the jury will find contributory negligence and therefore render a verdict for the defendant. Assuming that many juries ignore the strict rule of law that a plaintiff who is contributorily negligent should recover nothing,[153] the application of the doctrine is likely to be widely inconsistent. For example, Maryland attorneys informally report that jury verdicts in Baltimore City are often more pro-plaintiff than those in adjoining counties such as Harford or Howard Counties.[154] It is very likely that at least some juries in Baltimore City are more likely implicitly to nullify the rule of contributory negligence than those in Howard or Harford County. Would a Baltimore jury have found Coleman's actions to have been contributorily negligent? The doctrine of contributory negligence as a total bar to recovery, considered harsh and unfair by many ju-

147. Robinette & Sherland, *supra* note 133, at 48.

148. *Id.*

149. Contributory negligence is not necessarily inconsistent with civil recourse theory, an alternative theory of tort as individualized justice. According to civil recourse theory's authors, Professors John Goldberg and Ben Zipursky, civil recourse theory does not require comparative over contributory negligence, but can explain the switch as a feature of tort law. John C. P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette*, 88 IND. L.J. 569, 577 n.30 (2013).

150. Lewis F. Powell, Jr., *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A. J. 1005, 1006 (1957).

151. *Id.*

152. *Id.* at 1007.

153. *Id.* at 1006.

154. *Cf.* Geressy v. Digital Equip. Corp., 980 F. Supp. 640, 656–67 (E.D.N.Y. 1997) (noting that "[s]tate verdicts vary widely . . . depending on the county in which the case is tried").

ries,[155] undermines the rule of equal justice under law as well as respect for the rule of law.

2. *Changed Conditions*

Conditions have changed dramatically since jurisdictions across the United States adopted contributory negligence, and Maryland provides an excellent example. The Court of Appeals, in *Irwin v. Sprigg*,[156] adopted contributory negligence in 1847, a doctrine the court has ritualistically reaffirmed as precedent since that time.[157]

The most relevant changes since 1847 are those that relate to accidental injury. In 1850, the population of Maryland was 583,034.[158] Even though the first railroads were built in the preceding decades, the industrial revolution had yet to transform Maryland; it remained largely an agrarian, tobacco-growing state.[159] In short, Maryland had yet to experience what legal historian John Fabian Witt described as "the great waves of industrialization in the American economy [that] have always been . . . a central interpretive tool in explaining changes in the nineteenth- and twentieth-century law of torts."[160] Obviously, the automobile—the largest single source of negligence cases in modern-day Maryland, once described by federal circuit court of appeals Judge Guido Calabresi as an evil deity who demanded 55,000 lives every year in exchange for providing amazing powers of individual transportation[161]—would not be invented for another half-century.[162] Although statistics indicating the numbers of accidental injuries and deaths caused by negligence in Maryland in 1847 are not available, it is noteworthy that in 1870 only thirteen personal injury claims were filed in New York

155. Powell, *supra* note 150, at 1006.

156. 6 Gill 200 (Md. 1847).

157. *See* Harrison v. Montgomery Cnty. Bd. of Educ., 295 Md. 442, 451, 456 A.2d 894, 898 (1983) (observing that "Maryland has steadfastly adhered to the doctrine since its adoption in 1847").

158. RESIDENT POPULATION AND APPORTIONMENT OF THE U.S. HOUSE OF REPRESENTATIVES, MARYLAND, U.S. CENSUS BUREAU, http://www.census.gov/dmd/www/resapport/states/maryland.pdf (last visited Feb. 26, 2014).

159. Frances C. Robb, *The Enduring Textile Industry in Mid-Maryland*, *in* MID-MARYLAND HISTORY: CONFLICT, GROWTH AND CHANGE, 103, 103 (Barbara MacDonald Powell & Michael Powell eds., 2008) (recognizing that while small textile mills could be found throughout Maryland in the nineteenth century, agriculture was still the central focus of Maryland's economy).

160. John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 693–94 (2001).

161. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 1 (1985).

162. JOHN E. ROLPH ET AL., AUTOMOBILE ACCIDENT COMPENSATION 1 (RAND Inst. for Civil Just. 1985) (recognizing that "the invention and widespread use of the automobile in the early twentieth century" revolutionized American travel and ushered in a host of accidents, tort litigation, and tort reform).

City, a number that would increase more than thirty-fold within forty years.[163]

Today, a high percentage of damages resulting from negligence actions are paid for by liability insurance. In the 1840s, except for maritime insurance, there was no liability insurance[164]—any judgment against defendants would be paid from their own pockets.

In modern times, Maryland courts, as well as those of other jurisdictions, recognize both loss minimization (deterrence) and loss distribution (compensation) as legitimate goals of tort law.[165] Notwithstanding (or if you prefer, legitimizing) the objections of the Tea Party, both loss minimization and loss distribution at the hands of the other branches of government dramatically increased during the twentieth century in ways unimaginable in 1847. Regulation of goods and services by federal agencies such as the Food and Drug Administration and the Environmental Protection Agency, as well as by state agencies, are integral components of the American economic structure.[166] We spread losses of old age and misfortune through governmental programs such as social security, Medicare, and Medicaid, as well as through private health insurance. The pervasiveness of both government regulation and insurance programs—and, to a greater or lesser extent, the public's acceptance of these roles of government—presents a very different world from that of 1847.

3. Compensation

As noted, Maryland courts accept compensation or loss distribution as a goal of tort law. Comparative fault provides compensation to injured victims more effectively than contributory negligence.[167] Comparative fault allows injured victims to recover compensation for injuries in many cases where contributory negligence would deny it. By contrast, there is no case in which contributory negligence would allow compensation to an injured victim but comparative fault would deny it. Therefore, in terms of loss-spreading, comparative fault is unquestionably the preferable doctrine.

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163. Witt, *supra* note 160, at 759.

164. David A. Fischer & Robert H. Jerry, II, *Teaching Torts Without Insurance: A Second-Best Solution*, 45 ST. LOUIS U. L.J. 857, 860–61 (2001) (identifying 1886 as the date of the first liability insurance policy in the United States).

165. *See* Phipps v. Gen. Motors Corp., 278 Md. 337, 343, 363 A.2d 955, 958 (1976) (justifying strict liability "because it shifts the risk of loss to those better able financially to bear the loss" and "that a consumer relies upon the seller in expecting that a product is safe").

166. *See* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2073 (1990) (noting that the "regulatory controls protecting interests such as environmental quality, nondiscrimination, safe work places, and fair trade practices" are prominent forms of social and economic regulation).

167. Robinette & Sherland, *supra* note 133, at 50–51.

B. Counterarguments and Responses

There are strong arguments that, when combined with its status as a miniscule minority rule, leave the proponent of contributory negligence with a heavy burden of proof. The fairness argument is particularly powerful. As Professor Kenneth Abraham states, "in my view the appeal of comparative negligence to the ordinary individual's sense of fairness is sufficiently great to render this factor alone virtually dispositive on the issue."[168] In the face of these arguments, proponents of contributory negligence raise two common counterarguments against comparative fault: (1) it will undermine personal responsibility, and (2) it will cause adverse economic effects.

1. Personal Responsibility

In one sense, the argument based on personal responsibility has it backwards. After all, it is contributory, not comparative, negligence that allows a person to escape responsibility for her actions. As long as an injured victim can be proved the slightest bit responsible for her own injury, an injurer's responsibility, even if it is overwhelming, is negated. Moreover, injured victims are not allowed to evade responsibility under a comparative fault regime. The injured victim must accept responsibility for her own portion of fault in the form of the injury suffered. If the injured victim is thirty percent responsible for her injury, she must accept that amount of the economic and noneconomic damages from the injury.

Proponents of contributory negligence also ascribe an alternative meaning to the argument from personal responsibility. They argue that if comparative fault is enacted, accidents will increase because potential victims will be less careful for their own safety. This claim is a familiar one, but it does not appear to be supported by evidence. When scholars discuss the "efficiency" of contributory negligence and comparative fault, they are referring to both inducing care and minimizing costs,[169] which can make it difficult to discuss the two elements in isolation. The theoretical literature on efficiency, however, has gone through four phases: (1) contributory negligence is more efficient; (2) under perfect information, the rules are equivalent; (3) comparative fault is more efficient; and (4) skepticism about a global decision regarding which rule is preferred.[170] Thus, the current gist

168. ABRAHAM, *supra* note 138, at 176 ("The contributory negligence rule that completely barred recovery from a negligent injurer because the victim was also negligent, without regard to the degree of negligence, was and is highly objectionable to most people's sense of fairness.").

169. TORT LAW AND ECONOMICS 46 (Michael Faure ed., 2009).

170. *Id.*

of the theoretical literature on the issues of accident prevention and costs is that neither rule offers a global advantage.

When the focus is narrowed to accident prevention, the results appear the same. The debate essentially follows the phases for overall efficiency.[171] The theoretical debate tends to be just that; very rarely is empirical data used to support either contributory or comparative fault.[172] The occasional use of empirical data tested a previously constructed theoretical model of incentives instead of actual behavior.[173] Yet, as Professor Gary Schwartz stated, "[W]hat does it mean to say that legal rules 'create incentives' for efficient conduct if there is no evidence that they in fact bring that conduct about?"[174]

To determine the effects of contributory negligence versus comparative fault, if any, on actual behavior, one of the authors of this article (Robinette) and a statistician co-author analyzed automobile accident data compiled by the Insurance Research Council.[175] Bodily injury and property damage claims were analyzed as indicators of the behavior of the jurisdictions' populations.[176] Analyzing the most recent data available (from 1998), the authors determined that there was no statistically significant difference in bodily injury or property damage claims behavior between contributory negligence and comparative fault jurisdictions.[177] Because the sample size for the contributory negligence jurisdictions was so small in 1998, the authors also analyzed data from 1980.[178] The 1980 data expanded

171. *See* Robinette & Sherland, *supra* note 133, at 51–54.

172. *See, e.g.*, TORT LAW AND ECONOMICS, *supra* note 169, at 74 ("There is very little empirical analysis of the performance of these rules with respect to real-world behavior.").

173. *See* Michelle J. White, *An Empirical Test of the Comparative and Contributory Negligence Rules in Accident Law*, 20 RAND J. ECON. 308, 328 (1989) (concluding that contributory negligence offers superior incentives for care than does comparative negligence).

174. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 379 n.9 (1994) (quoting WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 312 (1987)).

175. Robinette & Sherland, *supra* note 133, at 54 n.61. The data came from TRENDS IN AUTO INJURY CLAIMS (2000), published by the Insurance Research Council. Automobile accidents were used because, unlike other categories of torts, data indicative of such accidents were available. *Id.* Moreover, automobile accidents are the largest category of torts. *Id.; see also* Thomas H. Cohen, *Tort Bench and Jury Trials in State Courts, 2005*, BUREAU OF JUST. STATISTICS BULL. (U.S. Dep't of Just., D.C.), Nov. 2009, at 1, *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2132 (discussing tort cases concluded by a bench or jury trial in national sample of jurisdictions in 2005). In addition, "unlike some significant categories of torts such as medical malpractice, the issue of contributory versus comparative negligence is widely relevant" to automobile accidents. Robinette & Sherland, *supra* note 133, at 54 n.61.

176. Robinette & Sherland, *supra* note 133, at 55.

177. *Id.* at 59.

178. *Id.*

the sample size of contributory negligence jurisdictions to fourteen.[179] Despite the more robust sample, there was still no statistically significant difference in either bodily injury or property damage claims behavior between contributory negligence and comparative fault jurisdictions.[180]

Perhaps there is no difference in accident claims because the weaker incentives for care placed on potential injured victims in comparative fault jurisdictions are offset by greater incentives for care on potential injurers.[181] Perhaps it is the case that the rule has no effect because the average person does not know about it and it does not affect her behavior. Regardless, there is no convincing evidence that either contributory negligence or comparative fault is superior from the perspective of safety.

Outside of the automobile context, there is even less likelihood that switching to comparative fault would decrease safety. In other types of tort cases, businesses are more likely to be defendants. The level of precaution adopted by a business is more likely to be a conscious and deliberate choice than is the conduct of individual plaintiffs found to be contributorily negligent.

2. Adverse Economic Effects

The preferred argument by proponents of contributory negligence is that moving to comparative fault will have significant adverse effects on Maryland's economy. More claims will be filed (because plaintiffs' lawyers will accept clients who are at fault) and trials will be more costly (because more time will be spent on apportioning fault). More claims will be paid (because some plaintiffs are no longer barred from recovery). The combined effect of these factors will lead to an increase in liability insurance premiums. The increase in premiums, plus the increase in payments by companies that self-insure, will lead to substantial economic contraction (fewer jobs) in Maryland.

We expect more claims to be filed and more claims to be paid under a comparative fault regime. In fact, an increase in injured victims recovering due compensation is the goal of switching to comparative fault. We also acknowledge the possibility that liability insurance premiums may rise under comparative fault. Proponents of contributory negligence, however, have failed to meet their burden of proof not only that there will be liability insurance premium increases, but that such increases will be substantial.

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179. *Id.* at 56.

180. *Id.* at 59.

181. *See, e.g.*, ABRAHAM, *supra* note 138, at 176. In the automobile accident context, because, ex ante, a driver could be either an injured victim or injurer, the change in incentives would be changes that affected each driver personally instead of shifting incentives from one person to another.

Moreover, proponents of contributory negligence have failed to meet their burden of proof that the Maryland economy will suffer from a switch to comparative fault.

Proponents of contributory negligence have assumed a difficult task in proving such matters. Recall that the current state of the theoretical literature on the efficiency of contributory negligence versus comparative fault is that "skepticism prevails about deciding which rule is preferred."[182] According to a recent article on comparative fault, the economic efficiency merits of the two rules "have been wrestled with for decades, with no conclusive result."[183] In 2004, the Department of Legislative Services prepared a report for the Maryland General Assembly, to which one of the authors of this article (Gifford) contributed, that concluded "it is impossible to state with any certainty the direct and indirect consequences of changing to a comparative negligence system."[184] This becomes clear when considering the factors affecting each of the parts of the argument advanced by proponents of contributory negligence.[185]

a. Administrative Costs

Part of the argument that comparative fault will create adverse economic effects is that claims frequency will increase and, as a result, cases will take longer to process; in short, that the costs of administering the tort system will increase.[186] We acknowledge that more claims will be filed. We do not foresee, however, a flood of additional claims such that the tort system will be difficult to administer. Juries already selectively apply comparative fault under the table,[187] and plaintiffs' lawyers are aware of it. The

182. TORT LAW AND ECONOMICS, *supra* note 169, at 46; *see also supra* text accompanying notes 169–170.

183. Eli K. Best & John J. Donohue III, *Jury Nullification in Modified Comparative Negligence Regimes*, 79 U. CHI. L. REV. 945, 974 n.92 (2012).

184. DEP'T OF LEGIS. SERVS., OFFICE OF POLICY ANALYSIS NEGLIGENCE SYSTEMS: CONTRIBUTORY NEGLIGENCE, COMPARATIVE FAULT, AND JOINT AND SEVERAL LIABILITY 23 (2013) [hereinafter DLS, NEGLIGENCE SYSTEMS].

185. *See infra* Parts II.B.2.a–d.

186. *See* Jef De Mot, *Comparative Versus Contributory Negligence: A Comparison of the Litigation Expenditures*, 33 INT'L REV. L. & ECON. 54, 55 (2012) (identifying a study that found that comparative negligence "generate[d] higher litigation and administrative costs than the traditional negligence rules because the courts must decide on the degree of negligence by both parties and not just whether the parties were negligent").

187. *See, e.g.*, H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 124–133 (2d ed. 1980) (recognizing that states with formal contributory negligence schemes may, for all practical purposes, be ones of comparative negligence); Daniel Kessler, *Fault, Settlement, and Negligence Law*, 26 RAND J. ECON. 296, 297, 309 (1995) (supporting the proposition with empirical data); Cornelius J. Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689, 726–28 (1960) ("[D]espite the legal bar of contributory negligence, comparative negligence is in fact practiced in all states, by

RAND Corporation, using Maryland-specific data, forecast that tort claims filed in Maryland would increase by only approximately six percent in the event of a switch to comparative fault.[188] In comparison, factors other than changes in substantive rules, such as the degree of urbanization or population density and the unemployment rate, have a far greater impact.[189]

It is unlikely that the resources spent by defense counsel and plaintiff's counsel to attribute most of the fault to the other party would be any greater than those currently expended as the parties fight over whether the plaintiff was contributorily negligent. There is a reduced incentive for defendants to prove plaintiffs at fault in a comparative fault system, so the increase in resources expended to determine the percentage of fault may be offset by reduced resources devoted to proving plaintiffs' fault.[190] One factor that might affect the length of trials is the ability of plaintiff fault to truncate the case by the judge ruling as a matter of law that no reasonable jury could find for the plaintiff. It is not only juries that are responsible for applying comparative fault under the table—judges have done so as well. As a leading casebook notes: "Surely the most modern technique for ameliorating the perceived harshness of . . . contributory negligence . . . was the increased frequency with which courts found that reasonable persons could differ over the characterization of the plaintiff's conduct—so that a jury question was presented."[191]

The administrative costs issue was studied in the aftermath of Arkansas's switch to comparative fault. The study was conducted to determine whether there were any "discernible changes in local courts' workload; what the changes were; and whether they helped or hindered the courts in disposing of personal injury cases."[192] The study concluded that "[t]he new rule . . . did not appreciably affect the length of trials; [but it] increased potential litigation; promoted before-trial settlements; and made damages harder to determine. But the net tendency was not to tip the balance markedly in either direction."[193] Thus, "forecasts of putative effects upon

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insurance adjusters, defense and plaintiffs' attorneys, juries, and even judges." (citations omitted)).

188. ROLPH ET AL., *supra* note 162, at 28.

189. Han-Duck Lee, Mark J. Browne & Joan T. Schmit, *How Does Joint and Several Tort Reform Affect the Rate of Tort Filings? Evidence from the State Courts*, 61 J. RISK & INS. 295, 308–09 (1994). This study, incidentally, was paid for by the pro-defendant tort reform group, the American Tort Reform Association. *Id.* at 301.

190. Mot, *supra* note 186. Moreover, resources devoted to applying exceptions to contributory negligence, such as last clear chance, will no longer be necessary.

191. MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, TORT LAW AND ALTERNATIVES 437 (9th ed. 2011).

192. Maurice Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89, 89–90 (1959).

193. *Id.* at 108.

clogged dockets and delayed trials are not constructive arguments for either side. Legislatures facing the issue should confine themselves to the substantive pros or cons of the contending principles and should rule out arguments tied to problems of court administration."[194] Citing this "careful study," Victor Schwartz, the leading commentator on comparative fault and, on most issues, the nation's leading proponent of tort reform, states that the contention that comparative fault would create a greater flood of litigation or discourage settlement has been refuted.[195]

b. Liability Payments

A second part of the argument is that there will be a substantial increase in liability payments under comparative fault. We again acknowledge the possibility of modest increases in aggregate loss payments after a switch to comparative fault, probably more if the switch is to pure comparative fault than if it is to modified comparative fault. As with the administrative costs issue, and for one of the same reasons, the best available evidence suggests that the increase in aggregate paid losses would not be substantial. Once again, the starting point is that juries already apply comparative fault under the table.[196] Many of the cases that would receive payment pursuant to comparative fault are already receiving payment despite the formal bar of contributory negligence.[197] Thus, the increase in the amount of new payments will not be as great as some expect.

Moreover, the adoption of comparative fault may actually decrease payments in some cases. Juries applying comparative fault under the table do not formally reduce the amount of a plaintiff's recovery based on her percentage of negligence. Although some juries may informally reduce the award based on a plaintiff's negligence, there is evidence that others do not. An Illinois *defense* lawyer made a study of approximately four thousand cases in the two years before and after Illinois switched to comparative fault and found that the total amount of money awarded only slightly increased, indicating that plaintiffs who prevailed obtained somewhat lower recoveries.[198] The same RAND study that predicted an increase in claims by six percent in Maryland if the state adopted comparative fault also found that negligent plaintiffs already recovering would average an offsetting twenty

194. *Id.*

195. SCHWARTZ, *supra* note 52, at 478.

196. *See supra* text accompanying note 187.

197. This does not mean, however, that switching to comparative negligence is pointless. In many ways, it is all the more cruel when juries unpredictably apply the formal law and prevent an injured victim from recovering. We have both personally experienced instances in which juries applied contributory negligence despite their misgivings about its injustice.

198. James G. McConnell, *Damages About the Same Under Comparative Negligence*, CHICAGO DAILY L. BULL., Mar. 18, 1986.

percent decrease in the amount recovered.[199] A different RAND study noted that a decline in median tort awards in 1980s Cook County, Illinois, was perhaps attributable to the advent of comparative fault; more plaintiffs were winning awards, but the awards were somewhat smaller because of a reduction for plaintiffs' negligence.[200] In the same vein, those plaintiffs who recovered pursuant to the last clear chance exception[201] received all of their damages despite their fault in causing their injuries. Under comparative fault, those payments would be reduced to account for the injured victim's percentage of fault.

Finally, it is also possible that any increase in payments caused by the switch to comparative fault will be offset by further changes in joint and several liability and the seat-belt defense that we recommend in Part IV of this Article.

c. Insurance Premiums

The potential increase in insurance premiums is the adverse economic effects argument that receives the most emphasis. We acknowledge the possibility that insurance premiums may rise if comparative fault is adopted, but it is unlikely that any increases would be substantial. The author of the earliest study on the issue, a "painstaking survey,"[202] concluded that the effects on insurance premiums of switching to comparative fault were "not observable."[203]

Other studies find minimal effects on insurance rates from switching to comparative fault. In 1981, the North Carolina Legislative Research Commission prepared a study for the General Assembly, which was considering legislation on the issue[204]:

> [T]he Committee sent a questionnaire to the State Insurance Commissioners of the 35 states that had by statute or court decision adopted comparative negligence. . . .

199. ROLPH ET. AL., *supra* note 162, at 28.

200. DEBORAH R. HENSLER ET AL., TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 14–15 (RAND Inst. for Civil Just. 1987).

201. In a contributory negligence jurisdiction, the doctrine of last clear chance allows the plaintiff to recover, despite her contributory negligence in some circumstances, when the defendant had the last clear chance to avoid the injury and negligently failed to take advantage of that chance. *See* RESTATEMENT (SECOND) OF TORTS §§ 479–480 (1965); *see also infra* notes 299–300.

202. SCHWARTZ, *supra* note 52, § 22.01[e] (referring to Professor Cornelius Peck's survey).

203. Peck, *supra*, note 187, at 709.

204. Steven Gardner, *Contributory Negligence, Comparative Negligence, and* Stare Decisis *in North Carolina*, 18 CAMPBELL L. REV. 1, 54–55 (1996) (citing N.C. LEGISLATIVE RESEARCH COMM'N, LAWS OF EVIDENCE AND COMPARATIVE NEGLIGENCE (1981)).

> Twenty-four states responded. . . . Only one state, Alaska, indicated a significant increase—estimated at 5%—in insurance premiums resulting from the adoption of comparative negligence. Two states, Minnesota and Rhode Island, stated that no increase had resulted. Fifteen states responded that the actual increase in premiums as a result of comparative negligence could not be determined. The Commissioner or his representative in ten of these states—Mississippi, Utah, Idaho, South Dakota, Maine, Oregon, Wyoming, Colorado, Wisconsin, and Montana—was of the opinion that comparative negligence had no impact on insurance costs. In five of these states—Hawaii, California, North Dakota, Nevada, and Oklahoma—it was felt that a slight increase in insurance premiums had resulted. Six states—Georgia, Arkansas, Connecticut, Kansas, Michigan, and Vermont—indicated that they had no data upon which to base an estimate or opinion.[205]

The Commission concluded that it could not "find any strong evidence to support the contention that insurance rates would increase substantially as the result of adoption of a comparative negligence [fault] system in North Carolina."[206]

Victor Schwartz opined that the effect on insurance premiums of switching from contributory to comparative fault has been "minimal."[207] Citing the North Carolina study,[208] the initial "painstaking survey" on insurance premiums,[209] and the study on administrative costs,[210] Schwartz stated that contentions that insurance rates would hit "extraordinary heights" had been "refute[d]."[211] He noted that this was because "insurance adjusters, juries, and sometimes even courts" are already practicing comparative fault *under the table*.[212] Moreover, exceptions to contributory negligence, such as last clear chance, force defendants to pay the entire judgment, whereas comparative fault will reduce the amount of some payments.[213]

Against this evidence, proponents of contributory negligence frequently cite three studies that purport to show substantial increases to insurance premiums caused by switching to comparative fault. Professor Joseph Johnson completed studies for the North Carolina General Assembly in the

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205. N.C. LEGISLATIVE RESEARCH COMM'N, LAWS OF EVIDENCE AND COMPARATIVE NEGLIGENCE 14–15 (1981).

206. *Id.* at 18.

207. SCHWARTZ, *supra* note 52, § 22.01[e].

208. Gardner, *supra* note 204.

209. *See* Peck, *supra* note 187.

210. *See* Rosenberg, *supra* note 192.

211. SCHWARTZ, *supra* note 52, § 22.01[e].

212. *Id.* (citations omitted).

213. *Id.*

1980s as it was considering whether to adopt comparative fault,[214] and he compared insurance premiums in Delaware and Maryland after Delaware switched to comparative fault.[215] Professor Johnson also prepared a later study with Professors Daniel Winkler and George Flanigan.[216]

The first two studies by Professor Johnson have been roundly criticized. These studies were provided to state legislatures instead of published in law reviews or peer review journals.[217] The Maryland Court of Appeals Rules Committee issued a Standing Committee Report in 2011 finding that "[m]ost of the studies have been roundly criticized for being academically sloppy or incomplete."[218] A later version of the North Carolina study was critiqued in an article by Steven Gardner.[219] He stated the study suffered from three methodological flaws. First, the study compares premium data between states. The National Association of Insurance Commissioners ("NAIC") warns this can be "misleading" because automobile insurance "is not homogenous across states."[220] As a result, NAIC explained that a state's "'average premium will be relatively higher if policyholders in that state tend to purchase higher limits [of coverage] or insure more expensive cars.'"[221] The second flaw is that "even if premium data could be compared between states, the [study] ignore[s] many variables that [could] contribute to premium costs."[222] NAIC lists a number of variables that impact premiums, seventeen at the time Gardner wrote.[223] The third, related, flaw is that

214. DLS, NEGLIGENCE SYSTEMS, *supra* note 184, at 24 (citing Joseph E. Johnson & Associates, Inc., *An Investigation of the Relative Costs of Comparative v. Contributory Negligence Standards* (1983) (unpublished)) (finding, based on 1981 figures, that a switch to comparative negligence would increase expenditures for all liability insurance premiums in North Carolina an additional $137,484,000 (if modified comparative fault were adopted) or $285,822,000 (if pure comparative fault were adopted)).

215. *Id.* at 24–25 (citing Joseph E. Johnson, *An Analysis of the Relative Cost of the Adoption of Comparative Negligence—A Paired State Study: Delaware and Maryland* (1989) (unpublished)) (reporting that from 1980 through 1983, during the time when both states retained contributory negligence, the combined bodily injury/property damage/PIP (Personal Injury Protection) premiums increased in Delaware by 8.18% and in Maryland by 10.02%; however, from 1984 through 1988, after Delaware switched to comparative fault, but Maryland retained contributory negligence, Delaware premiums increased 17.09% and Maryland premiums increased 9.02%).

216. Daniel T. Winkler et al., *Cost Effects of Comparative Negligence: Tort Reform in Reverse*, 44 CPCU J. 114 (1991).

217. DLS, NEGLIGENCE SYSTEMS, *supra* note 184, at 26.

218. STANDING COMM. ON RULES OF PRACTICE AND PROCEDURE, MD. CT. APP., SPEC. REPORT TO THE CT. APP. ON ASPECTS OF CONTRIBUTORY NEGLIGENCE AND COMPARATIVE FAULT 32 (2011).

219. Gardner, *supra* note 204, at 50–54.

220. *Id.* at 50 (internal quotation marks omitted).

221. *Id.* at 50 (citing NAT'L ASS'N OF INSURANCE COMM'RS, STATE AVERAGE EXPENDITURES & PREMIUMS FOR PERSONAL AUTOMOBILE INSURANCE IN 1993 6 (1995)).

222. *Id.* at 51.

223. *Id.*

the study's methodology attributes any difference between the average premium rates of contributory and comparative fault states to the single variable of the type of negligence system the state uses.[224] To demonstrate the weakness of the methodology, Gardner noted that New York's insurance premiums were twice North Carolina's when both states used a contributory negligence rule.[225] Obviously, the vast difference in premiums was due to factors beyond the choice of negligence regime. Gardner's criticisms apply to the Delaware/Maryland study as well, as noted by the Department of Legislative Services in its 2004 report.[226]

In a third study, Professor Johnson and his co-authors purport to control for population density, fatality rate per registered vehicle (which they claim is a proxy for the effects of road conditions, driver education programs, drunk driver enforcement, and other safety-related aspects), and the presence of no-fault automobile insurance.[227] Nevertheless, the NAIC cautions regarding the use of cross-state comparisons[228] apply here as well. While accounting for a handful of variables among states, this third study ignores others, such as ones related to the level of insurance regulation, the competitiveness of the state's automobile insurance market, and income. Consider just one of these examples. Consumers in states with higher per capita incomes probably purchase higher insurance limits and insure more expensive automobiles, both driving up loss costs. There is also no control for the effect of tort reforms other than the choice between contributory negligence and comparative fault. For example, pro-tort reform advocates claim that caps on noneconomic damages lower loss costs in automobile accidents; Maryland has such a cap, but other states do not.[229] Despite the absence of these controls, Johnson and his co-authors report that the difference from the study's base year for loss costs on bodily injury and property damage is three percent greater in modified and five percent greater in pure comparative fault jurisdictions; these are not alarming increases, even if

224. *Id.*

225. *Id.* at 52. In addition, Gardner cites two experts who also criticize Professor Johnson's methodology. *Id.* at 53. First, Professor J. Finley Lee opined that "[s]ignificant conceptual problems are encountered in reaching conclusions such as those posed" and he noted nine "potentially important variables" that the study omitted. *Id.* (internal quotation marks omitted). He also stated that several of the larger states "influence the data to a disproportionate extent." *Id.* (internal quotation marks omitted). Second, Professor Bernard L. Webb stated that the study "has been subjected to substantial criticism on technical grounds." *Id.* (internal quotation marks omitted). Professor Webb also stated "it is apparent that interstate comparisons [, upon which the Studies solely rely,] are not reliable indicators of the cost effects of various negligence standards." *Id.* (internal quotation marks omitted).

226. DLS, NEGLIGENCE SYSTEMS, *supra* note 184, at 24–25.

227. Winkler et al., *supra* note 216, at 120 n.6.

228. *See supra* text accompanying notes 220–224.

229. MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b) (LexisNexis 2013).

true.[230] This study, Johnson's third attempt in research sponsored by those opposed to comparative fault, reaches conclusions that are inconsistent with the majority of studies described above.

Due to the inherent fairness of comparative fault within a fault-based civil justice system, opponents of reform in Maryland have the burden of proving that a change to comparative fault would produce significant increases in liability insurance premiums. The available empirical evidence, fairly evaluated, is inconsistent. Even if loss payments by automobile liability insurance carriers were to increase, much of the benefit would inure to carriers who provide first-party insurance to automobile accident victims. The victim would recover some of her property damages from the negligent driver's liability insurance, thus reducing her recovery from her own collision carrier. Further, her health insurance provider, whether a private insurer or the state (through Medicaid) would be subrogated to her claims against the negligent driver and his liability carrier, reducing their net outlays as a result of the accident (though increasing transaction costs).

d. Economic Contraction

The final step in the adverse economic effects argument is that adopting comparative fault will create significant economic contraction, and Maryland will lose jobs. There is no convincing evidence for this proposition. Proponents of contributory negligence rely on a study prepared by the Regional Economic Studies Institute at Towson State University in 1997.[231] Among other things, the study concludes, "Maryland would lose approximately 20,800 jobs over a four-year period after switching to modified" comparative fault or 42,000 jobs over a four-year period after switching to pure comparative fault.[232] The study, however, was unpublished, not peer reviewed, and was prepared for the Maryland Chamber of Commerce, an organization opposed to comparative fault.[233]

Choice of law rules will play a role in the economic consequences to Maryland of switching to comparative fault. The traditional choice of law rule in tort cases, including in Maryland, is known as *lex loci delicti*, loosely translated to mean the place of the wrong.[234] Many other jurisdictions have rejected *lex loci delicti* and employ a flexible "significant relationship to the occurrence" approach based on the *Restatement (Second) of Conflicts*

230. Winkler et al., *supra* note 216, at 121 tbl.4.

231. DLS, NEGLIGENCE SYSTEMS, *supra* note 184, at 251 (citing Reg'l Econ. Studies Inst., *Estimated Economic Impact of Comparative Negligence* (March 5, 1997) (unpublished)).

232. *Id.*

233. *Id.*

234. Proctor v. WMATA, 412 Md. 691, 726, 990 A.2d 1048, 1068 (2010).

of Laws.[235] On the one hand, if a Maryland business manufactures, sells, or distributes products nationwide that cause injury to a victim in another state, there is a good chance that state will apply its own laws, the vast majority of which include comparative fault instead of Maryland's law of contributory negligence.[236] Simply because a business is located in Maryland does not mean that Maryland law applies when it causes harm. On the other hand, if a manufacturer from another state, say Pennsylvania, causes harm in Maryland to a Maryland consumer, Maryland's courts would apply Maryland law and a Pennsylvania court might do so as well. Accordingly, in some cases, Maryland's rule of contributory negligence subsidizes the business activities of competitors to Maryland firms.

One of us (Gifford) has heard business representatives argue that contributory negligence is a necessary counterweight to Maryland's anti-business regulatory, tax, and liability climates. For the reasons stated above, this seems implausible. But, even if it is true, the state should alter other policies that make the state noncompetitive. Surely the state can find a better way to stay competitive than to do so on the backs of injured victims, particularly those who suffer catastrophic injuries.

In concluding the discussion of contributory versus comparative fault on the merits, it is worth noting that even the author of one of the studies used to support contributory negligence stated: "The qualitative arguments in favor of comparative negligence [] are compelling."[237] We, again, acknowledge the possibility that insurance premiums may rise modestly with a switch to comparative fault. We submit that the increased premiums, to the extent they would exist, would be worth the extra protection for Maryland's citizens. By now, the states moving to comparative fault "all have enough experience to know that the new standard does not bring about 'disaster' or 'chaos.'"[238] Perhaps the most significant factor in the debate should be that forty-six states have switched from contributory negligence to comparative fault and not one of them has switched back. Even assuming, *arguendo*, that increases in costs and insurance premiums may occur as a result of switching to comparative fault, no state that has made the change found such increases to be significant enough to outweigh the benefits of comparative fault.

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235. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145 (1971). *See, e.g.*, Travelers Indem Co. v. Lake, 594 A.2d 38, 46–47 (Del. 1991); Griffith v. United Air Lines, Inc., 203 A.2d 796, 802–03 (Pa. 1964).

236. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145 cmt. d (1971).

237. Winkler et al., *supra* note 216, at 122.

238. Michael G. Shanley, *Comparative Negligence and Jury Behavior* 13 (RAND Graduate Institute, Paper No. P-7057-RGI, 1985), *available at* www.rand.org/content/dam/rand/pubs/papers/2008/P7057.pdf.

C. Pure or Modified?: Point and Counterpoint Between the Co-Authors

When switching to comparative fault, one of the primary issues is whether to adopt a pure or modified version. We find ourselves disagreeing. One of us (Robinette) supports pure comparative fault, and the other (Gifford) supports modified comparative fault. Regardless, we are in agreement that either version would be superior to contributory negligence, and we would support the legislature in adopting either pure or modified comparative fault.

1. In Favor of Pure Comparative Fault (Robinette)

Professor Robinette prefers pure comparative fault primarily because he believes a pure version most equitably apportions responsibility for injuries. Pure comparative fault allocates responsibility between the parties according to their fault in causing the injuries. Neither party is allowed to avoid any of their responsibility for the injuries by the architecture of the negligence system itself. An injured victim (or her first-party insurer) will always bear her portion of responsibility for injuries because she suffered them. There is no relieving the victim of responsibility for her injuries. She will pay the economic losses and suffer the noneconomic losses for at least her share of the injuries under any of the negligence systems. The only question is whether the system in place relieves the injurer of her responsibility for the victim's injuries. As seen, contributory negligence relieves an injurer of her portion of responsibility for injuries, even if the injurer's portion is overwhelming. Modified comparative fault is better, but it still relieves an injurer of her portion of responsibility if it is greater than the victim's (or equal to the victim's in several states).

Again in the language of tort theory, pure comparative fault is superior to modified comparative fault in achieving corrective justice. Recall that the essence of corrective justice is that a party who wrongs (injures) another must correct the wrong to restore the moral balance between them.[239] Pursuant to the modified version, injurers may be relieved of the responsibility of correcting their wrongs. If an injurer is less negligent than an injured victim (or even as negligent in several states), the injurer does not have to correct her wrong. Therefore, modified comparative fault permits moral imbalances to remain in place in violation of corrective justice.

One of the arguments advanced against the pure version is that a plaintiff should not recover if she is more culpable than the defendant. As Professor Arthur Best notes, however, framing the issue in terms of recovery

239. *Id.*

"invites a logical error."[240] Because "recovery" only applies to plaintiffs, any rule expressed in those terms will ignore the question of how it applies to defendants.[241] If more neutral language is used, it becomes clearer that the fault of plaintiffs and defendants is treated quite differently.[242] Best continues, "Characterized more generally, the idea that one whose conduct caused more than half of an injury *should recover no damages* is equivalent to the idea that a party who is more than half at fault for an injury *should bear all the cost* of that injury."[243] The shift in language "exposes the imbalance in the modified comparative negligence approach to the question of what loss should be shifted when a party is more than 50% negligent."[244] When a plaintiff is over half at fault, she bears the entire loss, but when a defendant is over half at fault, she only bears her proper portion of responsibility.[245] Once again, there is no argument advanced as to why a plaintiff's fault is worse than a defendant's fault so as to justify the disparate treatment.

Combined with the disparate treatment of plaintiffs and defendants, modified comparative fault treats similarly situated people very differently based on which side of the "break-point" the jury deems them to fall.[246] This is true of both parties. As Professor Gary Schwartz stated:

> [O]ne becomes very uncomfortable with the fairness implications of [the] 'break-point' feature—the feature that allows the entire liability to turn on a slight difference in the assessed negligence of the parties. To distinguish in an all-or-nothing way between the party, whether plaintiff or defendant, who is deemed forty-five percent negligent and the party who is deemed fifty-five percent negligent is substantially unfair—especially when the relevant judgments are imprecisely and unpredictably rendered after the event by an ad hoc lay jury.[247]

In addition to fairness in apportionment of responsibility, pure comparative fault also spreads losses better than does modified.[248] In any case in which an injured victim is more negligent than the defendant (or as negligent in several states), the injured victim can receive compensation from the injurer under pure comparative, but not modified comparative, negli-

240. Arthur Best, *Impediments to Reasonable Tort Reform: Lessons from the Adoption of Comparative Negligence*, 40 IND. L. REV. 1, 12 (2007).

241. *Id.*

242. *Id.* at 12–13.

243. *Id.*

244. *Id.* at 13.

245. *Id.* at 10.

246. Robinette & Sherland, *supra* note 133, at 50 (internal quotation marks omitted).

247. *Id.* (quoting Schwartz, *supra* note 140, at 727).

248. *Id.*

gence.[249] Moreover, adopting modified comparative fault forces a legislature to make a number of other decisions that complicates the negligence system. When adopting modified comparative fault, the legislature must choose where to set the break-point: forty-nine percent[250] or fifty percent.[251] A legislature must also consider whether the fault of the defendants should be aggregated or considered separately[252] and whether to let the jury know the consequences of findings of negligence for each party (sunshine rule) or not (blindfold rule).[253] Pure comparative fault does not require any of these complications.

2. In Favor of Modified Comparative Fault (Gifford)

Professor Gifford, like Robinette, favors either pure or modified comparative fault if the alternative is contributory negligence as a total bar to recovery. He does, however, identify two reasons for adopting modified rather than pure comparative fault. Recall that under modified comparative fault, if the jury's allocation of fault to the plaintiff is fifty percent or less, the plaintiff's recovery is reduced by the percentage of fault allocated to her or him multiplied by the amount of total damages.[254] In short, if the plaintiff's degree of fault is equal to or less than 50%, modified comparative fault functions the same as pure comparative fault. If the plaintiff's percentage of fault exceeds 50%, however, the plaintiff will recover nothing, just as he or she would under contributory negligence.[255]

Gifford recognizes that pure comparative fault offers at least a couple of advantages over modified comparative fault. First, because the business or insured personal defendant is almost always better able to distribute losses widely, the principle of loss distribution argues in favor of pure comparative fault. When many insured parties each suffer a tiny loss reflected in premium increases or each consumer of goods or services pays a very small additional premium for their purchases, economists tell us that the perceived loss to those who pay and the disruption to the economy are less

249. *Id.* at 51.

250. *Id.* at 45.

251. *Id.* It may also consider 83.7%. *See* William E. Westerbeke, *In Praise of Arbitrariness: The Proposed 83.7% Rule of Modified Comparative Fault*, 59 U. KAN. L. REV. 991, 995 (2011) (exploring "the appropriateness of either 49% or 50% as the only cutoff points at which comparative fault allocation ends").

252. Westerbeke, *supra* note 251, at 1029–32.

253. *Id.* at 1026–29.

254. Best, *supra* note 240, at 8.

255. *Id.* at 7–8. In a small number of jurisdictions, if the jury finds the plaintiff and the defendant to have been equally at fault, the plaintiff recovers nothing. *See, e.g.*, Bradley v. Appalachian Power Co., 256 S.E.2d 879, 884 n.12 (W. Va. 1979).

than if a few victims suffer much larger losses.[256] There are two responses to the loss distribution argument. First, tort liability—unlike workers' compensation benefits, other no-fault systems, or the proceeds of health or medical insurance policies—always requires something more than loss distribution to justify liability. Further, today's widespread prevalence of first party insurance—particularly with the pending advent of national health insurance—means that victims frequently are able to distribute at least as many economic losses through first-party insurance and with much lower transaction costs than through liability payments from tortfeasors or their insurers.

The second purported advantage of pure comparative fault is that slight differences in how the jury allocates fault to the parties may result in the victim recovering substantial damages or nothing at all. For example, if the plaintiff suffers $1,000,000 in damages and the jury allocates 49.9% of the fault to the plaintiff, the plaintiff will recover $501,000. If the jury allocates 50.1% of the fault to the plaintiff, the plaintiff then recovers nothing. This objection to modified comparative fault can be minimized, if not eliminated, however, by informing the jury of the consequences of its allocations of fault to the parties.[257] Obviously, this approach again enables jury nullification, which we have criticized earlier,[258] but only in the handful of cases where the jury's determination of the plaintiff's degree of fault is reasonably close to the statutorily determined line for distinguishing reduced liability from nonliability.

Many believe that the biggest advantage of the modified version of comparative fault is the role it plays in screening cases and reducing the increase in the number of claims resulting from the abrogation of contributory negligence as a total bar to recovery and the adoption of comparative fault. The attorney deciding whether to file a claim may decline to do so if she believes it is likely that the jury would find the plaintiff to be more at fault than the defendant. Once the parties complete the discovery process, if the undisputed facts suggest that the plaintiff is more at fault than the defendant(s), the court may grant a summary judgment.[259] Finally, if the trial court judge believes after the submission of evidence that no reasonable jury could find that the defendant was as much or more at fault than the plain-

256. Best, *supra* note 240, at 7–8.

257. *See* SCHWARTZ, *supra* note 52, § 3.05(b)(1). *Compare* Seppi v. Betty, 579 P.2d 683, 690–91 (Idaho 1978) (stating that the jury should ordinarily be told of consequences of its allocation of fault), *with* McGowan v. Story, 234 N.W.2d 325, 329–30 (Wis. 1975) (stating that the jury should not be told of consequences).

258. *See supra* text accompanying notes 150–155.

259. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. §7, reporters' note cmt. a (2000) ("Modified comparative responsibility . . . provide[s] trial courts with a basis for summary judgment in relatively weak cases.").

tiff, the judge may grant a directed verdict. Admittedly, the modified approach to comparative negligence is a crude tool to use in winnowing those cases that are to be heard by a jury.

Many legislators believe, as a principle of justice, that when the conduct of a contributorily negligent plaintiff is more at fault than that of the combined defendants, the plaintiff should not recover.[260] Accordingly, those legislatures decline to adopt pure comparative fault.[261] This issue appears most vividly in the case in which the plaintiff is the more at-fault party but also suffers the greater amount of damages, and the parties are not insured.[262] If the defendant in such a case is also injured but to a lesser extent than the plaintiff, and the defendant counterclaims for her injuries against the plaintiff who was also negligent, the more at-fault party (the plaintiff) will realize a net recovery at the expense of the less at-fault party (the defendant).[263]

These reasons help explain why thirty-three states have adopted modified comparative fault, but only twelve have adopted pure comparative fault.[264] Modified comparative fault is a political compromise that often has enabled legislatures to agree to adopt a form of comparative fault, but it is also a compromise justified by real-world experience with comparative fault.[265] It reduces both claims frequency and the number of cases heard by the jury by screening out those where the plaintiff is clearly more at fault than the defendant(s) and eliminates the possibility of the more at-fault plaintiff recovering.

III. RESOLVING ANCILLARY ISSUES

One of the perceived benefits of the legislature adopting comparative fault is the ability to address related issues comprehensively, though most legislatures have neglected to do so. The most frequently discussed ancillary issues are: treatment of multiple tortfeasors under a modified compara-

260. *See, e.g.*, ME. REV. STAT. ANN. tit. 14, § 156 (2003).

261. *See* SCHWARTZ, *supra* note 52, § 3.02. After two states' highest court had adopted pure comparative negligence, the legislature enacted a modified comparative negligence statute. *Id.* § 3.02 n.21 (referencing "735 ILCS 5/2-1116, effective Nov. 25, 1986," and "IOWA CODE ANN. ch 668, effective July 1, 1984").

262. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 9 cmt. a (2000) (discussing and providing illustrations of "exception[s] for liability insurance").

263. *Id.* Of course, even under pure comparative fault, the party whose conduct is most culpable bears the larger share of responsibility for *all* the damages resulting from the accident, including those he or she sustains as a victim of the accident. *Id.* § 9 cmt. a, illus. 1.

264. Robinette & Sherland, *supra* note 133, at 44; *see also* Coleman v. Soccer Ass'n of Columbia, 432 Md. 679, 727 n.24, 69 A.3d 1149, 1178 n.24 (Harrell, J., dissenting) ("South Dakota, although considered to be a comparative fault jurisdiction, applies neither a pure nor modified system. Instead, it applies a slight negligence standard.").

265. Best, *supra* note 240, at 13–15.

tive fault analysis; whether to compare a plaintiff's negligence against a defendant's intentional, reckless, willful and wanton, or grossly negligent conduct; and the effect of adopting comparative fault on the doctrines of assumption of risk and last clear chance.[266]

A. Treatment of Multiple Tortfeasors

The modified version of comparative fault poses another basic issue. In a case involving multiple tortfeasors, should the comparison of the degrees of fault of the parties be between the plaintiff and each defendant individually, or between the degree of fault of the plaintiff and the combined degrees of fault of all defendants?[267] An overwhelming number of jurisdictions compare the plaintiff's degree of fault with the aggregated degrees of fault of the combined defendants.[268] We endorse this approach. If the comparison is made between the plaintiff and each individual defendant,

266. We decline to enter the thicket of whether comparative fault should be applied to strict products liability and other strict liability claims, an issue that probably justifies an article in and of itself. The Maryland Chamber of Commerce asserts: "In Maryland, we also have a rule of 'strict liability' for the manufacturers of certain products—anything from power mowers to lipstick. Under strict liability, the jury is not allowed to consider any offsetting negligence of the plaintiff. None." Kathy Snyder, *Maryland Should Be Careful About Upending Its Liability Law*, BALT. SUN, Oct. 15, 2012, http://articles.baltimoresun.com/2012-10-15/news/bs-ed-liability-20121015_1_comparative-fault-contributory-negligence-liability-law (noting that Snyder is the president and CEO of the Maryland Chamber of Commerce).

Snyder's statement is arguably misleading. Maryland has adopted, as a defense to strict products liability, what the RESTATEMENT (SECOND) OF TORTS refers to as "contributory negligence," but the Maryland courts call "assumption of risk." Phipps v. Gen. Motors Corp., 278 Md. 337, 346, 363 A.2d 955, 960 (1976) (specifically adopting defense based on Comment n to RESTATEMENT (SECOND) OF TORTS § 402(A) (1965)). Comment n is specifically labeled in the RESTATEMENT (SECOND) as "contributory negligence." RESTATEMENT (SECOND) OF TORTS § 402(A) cmt. n. (1965). In fact, this defense applies when plaintiff's conduct satisfies the requirements of both traditional contributory negligence, that is, the plaintiff's conduct is "unreasonabl[e]," and assumption of risk, that is, the plaintiff "voluntarily and unreasonably proceeding to encounter a known danger." *Id.*

Maryland also recognizes product misuse to a defense in products liability actions. *See* Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581, 596, 495 A.2d 348, 355 (1984) (holding that there is no liability when a product is "misuse[d]" in a manner that is not reasonably foreseeable).

Together, these defenses of "assumption of risk" and "misuse" in products cases capture the same conduct on the part of the plaintiff that in most jurisdictions traditionally barred recovery in products litigation under the label of "contributory negligence." More recently, some states adopting comparative fault have allowed the plaintiff's recovery to be reduced but not barred by the plaintiff's unreasonable failure to discover a product risk, which does not bar liability under Maryland law. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 17 cmt. d (1998) (reporting that many courts now reject the older rule "that when the plaintiff's negligence consists solely in the failure to discover the defect in the product, no reduction of damages [on the basis of apportionment of responsibility] is warranted").

267. *See* HARPER, JAMES & GRAY, *supra* note 51, §22.16; Brian P. Dunigan & Jerry J. Phillips, *Comparative Fault in Tennessee: Where Are We Going, and Why Are We in This Handbasket?*, 67 TENN. L. REV. 765, 797–800 (2000).

268. *Id.* at 797 n.188.

then a plaintiff found to be forty percent at fault would be able to recover sixty percent of damages if only one defendant is involved, but nothing if two equally culpable defendants are held liable. The more defendants that are joined in the action, the more egregious the problem becomes. If the plaintiff is found to be only twenty percent at fault, and five defendants are joined and each is found to be sixteen percent at fault, the plaintiff recovers nothing. This creates an enormous incentive for an initially sued defendant to attempt to add as many co-defendants as possible. Further, comparing plaintiff's fault to that of the combined defendants creates greater incentives for defendants to settle cases before they go to trial. Most significantly, aggregating the fault of defendants is most consistent with allocating responsibility according to fault. Without aggregation, a defendant is likely to be relieved of her responsibility for her fault more often than pursuant to an aggregation rule.

Multiple tortfeasors create yet another issue: whether responsibility should be apportioned only among parties to the lawsuit or whether "absent" tortfeasors should be included as well. There are many reasons a potential defendant may not be present when the factfinder apportions responsibility. The potential defendant may be bankrupt, immune, unknown, beyond the court's jurisdiction, or have already settled with the plaintiff. We believe that considering the fault of all entities that contributed to the accident when responsibility is apportioned is the rule most consistent with the theme of apportioning responsibility based on fault. Removing a potential tortfeasor from consideration can seriously alter a factfinder's view of the relative responsibility of remaining parties. Consideration of all potential tortfeasors allows the factfinder a more comprehensive understanding of how the injuries occurred.[269] Moreover, considering the fault of nonparties is not necessarily favorable to either side. On the one hand, if a modified comparative fault rule is adopted, consideration of the fault of nonparties may allow the factfinder to understand that a plaintiff's responsibility was below the cutoff threshold. On the other hand, from the defense perspective, including the responsibility of nonparties may reduce the percentage of damages each defendant is responsible to pay.

B. Comparing Plaintiff's Negligence Against Defendant's Intentional, Reckless, Willful and Wanton, or Grossly Negligent Conduct

During the contributory negligence era, many states adopted the "greater-degree-of-blame exception"; pursuant to the exception, contributo-

269. Cheri D. Green & Michael K. Graves, *Allocation of Fault: Joint Tortfeasors in Court and the Ones Who Should Be*, 63 MISS. L.J. 647, 656 (1994) (likening jury consideration of only the defendants in court to "judg[ing] a forest by observing just one tree").

ry negligence was not a bar to the plaintiff's recovery if the defendant's fault was greater by degree.[270] If a defendant was grossly negligent, reckless, willful and wanton, or had engaged in intentional misconduct, the plaintiff was not barred from recovery by her own negligence, and, in fact, her recovery was not reduced by her own misconduct. This exception was another attempt to mitigate the harshness of contributory negligence. When, however, a comparative responsibility analysis is performed with the goal of apportioning responsibility based upon fault, it makes sense to compare a plaintiff's negligence with, say, a defendant's reckless conduct. If, indeed, the defendant's conduct is so much worse than the plaintiff's, the apportionment of responsibility will so indicate. The vast majority of jurisdictions allow the comparison between a lesser and a greater degree of fault.[271] Though, of course, there is no need to categorize degrees of fault if they are all included in the analysis.

An exception exists if the defendant has engaged in intentional misconduct. The argument is that intentional misconduct is different in kind from negligent or even reckless behavior and should not be compared with it.[272] Most of the comparative fault statutes and most of the cases on the subject are in accord.[273] We endorse the general rule: if a person acts with intent to harm another,[274] that person should be responsible for the full extent of the damages caused, even if the selected victim is "gullible or foolish."[275] Moreover, this rule is consistent with extant intentional tort jurisprudence, in which a victim's negligence is not a defense to an intentional tort.

C. Effect on Assumption of Risk

Assumption of risk is a phrase with multiple meanings that often obscures more than it clarifies. In Maryland, assumption of risk, as a defense to a plaintiff's claim for negligence, can mean one of three things: the "express consent perspective," "the duty perspective," or the "misconduct defense perspective."[276] Assumption of risk is also categorized as express or

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270. ABRAHAM, *supra* note 138, at 147.

271. FRANKLIN, RABIN, & GREEN, *supra* note 191, at 446.

272. *Id.*

273. SCHWARTZ, *supra* note 52, § 5.02.

274. We recognize there are torts referred to as intentional torts, such as informed consent, that do not require intent to harm, but only require intent to make contact. These torts should not be excepted from a comparative negligence analysis.

275. Florenzano v. Olson, 387 N.W.2d 168, 176 n.7 (Minn. 1986).

276. Crews v. Hollenbach, 126 Md. App. 609, 627, 730 A.2d 742, 752 (1999) (internal quotation marks omitted); *see also* Miller v. Michalek, 13 Md. App. 16, 23, 281 A.2d 117, 121 n.5 (1971) (citing PROSSER ON TORTS, § 67 (3d ed. 1964)) (articulating the three categories of assumption of risk).

implied, with implied further categorized as primary ("duty perspective") or secondary ("misconduct defense perspective").[277] Switching to comparative fault should only affect the "misconduct defense perspective"; express assumption of risk and assumption of risk as part of a duty analysis should remain unaltered.

1. Express Assumption of Risk

Express assumption of risk occurs when a plaintiff, in advance, provides "express consent to relieve the defendant of an obligation toward him, and to take his chance of injury from a known risk arising from what the defendant is to do or leave undone."[278] This variation of assumption of risk overlaps with contract law and the express consent is usually provided in writing. Such consents, often referred to as waivers, are familiar to many consumers in health club membership contracts, skiing tickets, and many other types of contracts. Because of its contractual nature, express assumption of risk should not be affected by an alteration in the tort doctrine of contributory negligence.[279] Thus, even comparative fault jurisdictions abrogating assumption of risk as a complete bar to recovery continue to hold that express assumption of risk, so long as it is enforceable, is an absolute defense in cases of negligence.[280]

2. Assumption of Risk as Duty (Implied Primary)

Pursuant to the duty perspective, "the plaintiff voluntarily enters into some relationship with the defendant, with the knowledge that the defendant will not protect him against one or more future risks that may arise from the relation. He may then be regarded as tacitly or *impliedly* consenting to the negligence."[281] Because this is part of the already existing duty analy-

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277. Kelly v. McCarrick, 155 Md. App. 82, 94, 841 A.2d 869, 876 n.6 (2004) (categorizing primary and secondary implied assumption of risk); ABRAHAM, *supra* note 138, at 183.

278. *Crews*, 126 Md. App. at 627, 730 A.2d at 752 (internal quotation marks omitted).

279. *See, e.g.*, Salinas v. Vierstra, 695 P.2d 369, 375 (Idaho 1985) (distinguishing "consent" from "assumption of risk").

280. Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 508 S.E.2d 565, 570 n.2 (S.C. 1998) (providing a string citation of jurisdictions retaining express assumption of risk).

281. *Crews*, 126 Md. App. at 627, 730 A.2d at 752 (internal quotation marks omitted). The court then clarified the concept by explaining that"[i]n its primary sense the plaintiff's assumption of a risk is only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk." *Id.* at 753 (emphasis omitted) (citing Flowers v. Sting Security, Inc., 62 Md. App. 116, 135, 488 A.2d 523 (1985), aff'd, 308 Md. 432, 520 A.2d 361 (1987) (quoting 2 F. Harper & F. James, The Law of Torts § 21.1, at 1162 (1956))). The gist of implied primary assumption of the risk is that a defendant simply has no duty to take reasonable care. For example, under the traditional common law, if a spectator at a ball park sat in an unscreened section and was struck by a foul ball, many courts held that because this risk was one "inherent in and incident to the game," the operator of the ballpark did not owe a duty to the patron to protect her or him from the natural

sis, we believe it only adds confusion to the law to rename the concept.[282] Regardless, switching to comparative fault will have no effect on this type of assumption of risk either. Contributory negligence is a defense to a claim of negligence and only becomes relevant after a plaintiff has proved her *prima facie* case. Implied primary assumption of risk is part of the duty analysis, which is part of the plaintiff's *prima facie* case. As such, this form of assumption of the risk is "subsumed in the principle of negligence itself."[283] The alteration of a defense should not affect the *prima facie* negligence case.

3. Assumption of Risk as Misconduct (Implied Secondary)

The final type of assumption of risk, implied secondary, is established when a defendant proves: (1) the plaintiff had knowledge of the risk of danger; (2) the plaintiff appreciated that risk; and (3) the plaintiff voluntarily encountered the risk of danger.[284] In determining whether implied secondary assumption of risk should be retained as a complete bar to recovery, it is necessary to determine its relationship to contributory negligence. On the one hand, if implied secondary assumption of risk can be best analogized to contributory negligence, it makes sense to subsume it as part of the comparative fault analysis. On the other hand, if implied secondary assumption of risk can be more closely analogized to another concept—consent is usually the proffered alternative[285]—then implied secondary assumption of risk should be retained as an absolute bar to recovery, just as consent is an absolute bar to an intentional tort.[286]

In Maryland, implied secondary assumption of risk and contributory negligence are distinct defenses.[287] The "two defenses completely overlap and should be presented as one defense when the risk allegedly assumed is unreasonable."[288] The overlap occurs because the assumption of an unreasonable risk is, itself, unreasonable behavior.[289] Thus, Maryland law al-

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risks of the game. Brown v. S.F. Ball Club, Inc., 222 P.2d 19, 20 (Cal. 1950). Assumption of the risk prevented liability even if the particular victim was unaware of the risk.

282. *See id.* at 21 (noting that by providing a screened section the baseball club had "fully discharged its duty towards" the plaintiff).

283. Blackburn v. Dorta, 348 So.2d 287, 291 (Fla. 1977).

284. ADM P'ship v. Martin, 348 Md. 84, 90–91, 702 A.2d 730, 734 (1997).

285. SCHWARTZ, *supra* note 52, § 9.01[a].

286. *See id.* § 9.05[b] (stating that "[p]robably the strongest argument for retention of assumption of risk as a complete defense is" the argument that contributory negligence is about fault and assumption of risk is more like consent).

287. S&S Oil, Inc. v. Jackson, 428 Md. 621, 631, 53 A.3d 1125, 1131 (2012).

288. *Id.*

289. *Id.*

ready recognizes substantial overlap between the two defenses.[290] The only portion of implied secondary assumption of risk that is not identical to contributory negligence is the knowing assumption of a reasonable risk: "the facts may warrant conflicting results under the theories, for example, '[a] plaintiff who proceeds reasonably, and with caution, after voluntarily accepting a risk, not unreasonable in itself, may not be guilty of contributory negligence, but may have assumed the risk.'"[291]

Moreover, the analogy to consent, as Schwartz notes, is "usually fictional."[292] True consent occurs when "the plaintiff manifests his agreement to the actual invasion of his interest in person or property."[293] By contrast, "when the plaintiff assumes a risk, he volunteers to be subject to a *possible* injury. This is a giant step away from consent when viewed from the perspective of whether the plaintiff has *actually* agreed to hold the defendant harmless for the risk."[294] Therefore, Maryland law acknowledges the kinship between contributory negligence and implied secondary assumption of the risk, and the alternative analogy is "usually fictional."[295]

Furthermore, and most importantly, retaining implied secondary assumption of risk as a complete defense could seriously undermine the comparative fault policy of apportioning responsibility based on fault.[296] The fact that a plaintiff voluntarily assumed a risk does not negate a defendant's fault. Retaining assumption of risk as an absolute bar could prevent a plaintiff from recovery even if her conduct was reasonable. Such a result bypasses the core comparative fault goal of assessing the relative fault of the plaintiff and defendant(s).[297] For this reason, the vast majority of states adopting comparative fault have also abolished assumption of risk as an absolute bar to recovery.[298]

D. Effect on Last Clear Chance

Last clear chance is an exception to contributory negligence by which a contributorily negligent plaintiff can still recover from a negligent defendant if the plaintiff makes "'a showing of something new or sequential, which affords the defendant a fresh opportunity (of which he fails to avail

290. *Id.*

291. Thomas v. Panco Mgmt. of Md., LLC, 423 Md. 387, 419, 31 A.3d 583, 603 (2011) (quoting Schroyer v. McNeal, 323 Md. 275, 281, 592 A.2d 1119, 1123 (1991)).

292. SCHWARTZ, *supra* note 52, § 9.01[a].

293. *Id.* § 9.05[c].

294. *Id.*

295. *Id.* § 9.01[a].

296. *Id.*

297. Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 598 S.E.2d 565, 573 (S.C. 1998).

298. *Id.* at 569.

himself) to avert the consequences of his original negligence.'"[299] The crux of the exception is the phrase "fresh opportunity," for the defendant must have a chance to avoid the injury after the plaintiff's act put her in peril.[300]

If comparative fault becomes the law of Maryland, last clear chance should be abrogated for two reasons. First, last clear chance was adopted as a means to mitigate the harshness of contributory negligence.[301] If contributory negligence is replaced, there will be no harshness left to mitigate. Second, the effect of last clear chance is to provide a plaintiff with full damages, in spite of plaintiff's negligence in causing her injuries.[302] Full recovery under these circumstances is inconsistent with apportioning responsibility based on fault. Of course, a jury should take into consideration whether a defendant had a chance to avert the injuries that was both last and clear. That consideration, however, should be performed in the context of a comparative fault analysis and not as a way to provide a plaintiff full damages when she is partially at fault.

IV. WHAT'S GOOD FOR THE GOOSE . . . : MODIFICATION OF JOINT AND SEVERAL LIABILITY AND THE ADMISSION OF SEAT BELT NONUSE

In Part II, we proposed allocating damages between the plaintiff and the defendant according to the parties' respective degrees of culpability, a change that would favor plaintiffs. In this Part, we apply the same principle of apportioning liability according to fault to both the current doctrine of joint and several liability[303] and the Maryland statute that prevents defendants from introducing evidence of the nonuse of seat belts.[304] These changes would benefit defendants.

A. Replacing Joint and Several Liability with Reapportionment of Unpaid Shares

In this section, we consider five alternative approaches to the issue of how the liability of multiple, independent tortfeasors, each of whose conduct is necessary to produce the victim's indivisible harm, should be handled when the court cannot require one or more of the tortfeasors to pay its fair share because the tortfeasor is judgment-proof, immune from liability, or beyond the jurisdiction of the court. We begin by rejecting the two ex-

299. Liscombe v. Potomac Edison Co., 303 Md. 619, 638, 495 A.2d 838, 847 (1985) (quoting Sanner v. Guard, 236 Md. 271, 276, 203 A.2d 885, 888 (1964)).

300. Wooldridge v. Price, 184 Md. App. 451, 462, 966 A.2d 955, 961 (2009).

301. Coleman v. Soccer Ass'n of Columbia, 432 Md. 679, 734, 69 A.3d 1149, 1182 (2013) (Harrell, J., dissenting); ABRAHAM, *supra* note 138, at 147.

302. SCHWARTZ, *supra* note 52, §7.02.

303. *See infra* notes 343–349, 360–364 and accompanying text.

304. *See infra* notes 376–385 and accompanying text.

treme, polar opposite approaches, the plaintiff-friendly rule of joint and several liability[305] and the defendant-friendly rule of several liability.[306] We then consider three "compromise" approaches—treating economic and non-economic damages differently,[307] providing for joint and several liability only when a particular defendant's share of liability exceeds a specified threshold,[308] and reallocating the absent or judgment-proof tortfeasor's unpaid share among the remaining parties according to their respective shares of fault.[309] We conclude that the last alternative is the one most consistent with a tort system allocating liability according to fault.[310]

B. Joint and Several Liability: Maryland's Current Approach

Under the traditional Anglo-American doctrine of joint and several liability, each of two or more independent tortfeasors who contributes concurrently to the plaintiff's indivisible harm is subject to liability for the entire harm.[311] The plaintiff has the choice of collecting the entire judgment from one defendant, the entire judgment from another defendant, or recovering portions of the judgment from various defendants, as long as the plaintiff's entire recovery does not exceed the amount of the judgment.[312] Once a jurisdiction such as Maryland adopts contribution among tortfeasors[313] that enables a defendant who pays more than its fair share[314] to sue the other co-defendants for contribution, the most important consequence of joint and several liability is that if one of the defendants found liable is without assets and insurance or otherwise judgment-proof, beyond the jurisdiction of the court or immune from liability, the loss will fall on the co-defendants and not on the plaintiff.

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305. *See infra* Part IV.B.

306. *See infra* Part IV.C.

307. *See infra* Part IV.C.1.

308. *See infra* Part IV.C.2

309. *See infra* Part IV.C.3.

310. *See infra* Part IV.D.

311. *See* Consumer Prot. Div. v. Morgan, 387 Md. 125, 178–79, 874 A.2d 919, 950 (2005) (stating "[w]e have long recognized that when tortfeasors act independently and their acts combine to cause a single harm, the tortfeasors are jointly and severally liable"); HARPER, JAMES & GRAY, *supra* note 51, § 10.1.

312. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 10 (2000) ("When . . . some persons are jointly and severally liable to an injured person, the injured person may sue for and recover the full amount of recoverable damages from any jointly and severally liable person.").

313. *See infra* notes 365–367.

314. Each defendant's "fair share" is determined on either a pro rata basis (division into equal shares) or a proportionate basis (according to each defendant's level of culpability). *See infra* text accompanying notes 365–370.

Traditionally, joint and several liability for concurrent tortfeasors was justified on two grounds. In the ancient régime when all jurisdictions treated contributory negligence as a total bar to recovery, if the more culpable but less resource-rich and insured defendant was unable to pay, the question of who should pay for the accident came down to a choice between a plaintiff who was without fault and a co-defendant whose negligence had been found to be a necessary cause of the plaintiff's harm.[315] In these circumstances, it made sense to hold the solvent defendant liable for the unpaid share of the co-defendant. Once some form of comparative fault is adopted, however, the choice as to who should pay for the unpaid defendant's share often is between a negligent co-defendant and a contributorily negligent plaintiff. It was sometimes said that a plaintiff should be fully compensated, but remember that under the old system, the plaintiff who had been contributorily negligent would not be compensated at all.

The second traditional justification for joint and several liability was that the courts did not trust juries to make comparisons between the degrees of culpability of the defendants.[316] If comparative fault is adopted, however, juries already will be making similar comparisons in allocating fault between the defendant and the plaintiff.

The third argument in favor of joint and several liability is that the party paying the unpaid shares of the co-defendants is usually a business or a well-insured defendant. As a result, the defendant paying more than its fair share is in a position to distribute losses widely either through insurance or by using its own resources generated from selling its products or services.[317]

The doctrine of joint and several liability often means that in an accident caused by two defendants—a more egregiously culpable defendant with few if any assets and little or no insurance, and a less culpable, "deep pocket" defendant—the less culpable defendant ends up paying the vast bulk of the plaintiff's damages.[318] For example, in the colorful case of *Walt*

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315. *See* Paul Bargren, *Joint and Several Liability: Protection for Plaintiffs*, 1994 WIS. L. REV. 453, 455–56 (1994) (discussing the history of joint and several liability); Gregory C. Sisk, *Comparative Fault and Common Sense*, 30 GONZ. L. REV. 29, 31 (1994) (examining plaintiffs' complete bar from recovery under a contributory negligence scheme); Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEM. ST. U. L. REV. 45, 72 (1992) (examining joint and several liability in the context of contributory negligence). *See also generally* William L. Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 422 (1937) (presenting differing interpretations of joint liability for concurrent defendants).

316. *Cf.* DLS, NEGLIGENCE SYSTEMS, *supra* note 184, at 11 (noting that courts' distrust of juries to apportion liability has been a justification for contributory negligence).

317. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 27–28 (1970) (discussing the reduction of societal costs of accidents).

318. Daniel Carvell et al., *Accidental Death and the Rule of Joint and Several Liability*, 43 RAND J. ECON. 51, 51 (2012).

Disney World Co. v. Wood,[319] the plaintiff was injured at Walt Disney World when the car she was driving in the Grand Prix ride was rammed by another vehicle driven by her fiancé, Daniel Wood.[320] The jury found that both Daniel Wood and Walt Disney World had been negligent, but that the plaintiff, Aloysia Wood, was also contributorily negligent. It attributed eighty-five percent of the fault to Daniel, fourteen percent to Aloysia, and one percent to Walt Disney World.[321] Prior to trial, however, Daniel and Aloysia were married,[322] making Daniel immune from liability because of interspousal immunity. Accordingly, after reducing the damages by fourteen percent, Aloysia's degree of fault, under Florida's doctrine of pure comparative fault, the jury held Walt Disney World liable for eighty-six percent of the damages.[323] In other words, even though the jury found that Aloysia's conduct was fourteen times as egregious as that of Walt Disney World, she was able to recover eighty-six percent of her damages from the corporation. *Walt Disney World* is but one example, admittedly an extreme one, of how joint and several liability leads to liability of "deep pocket" defendants that many regard as unjust. Often deep-pocket defendants include defendants whose conduct appears to be rather trivial when compared with that of the more culpable defendant whose negligence more directly leads to the plaintiff's harm.

Since the early 1980s, at least two-thirds of all American jurisdictions have either abrogated joint and several liability entirely or significantly modified it.[324]

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319. 515 So.2d 198 (Fla. 1987), *superseded by statute as recognized in* Fabre v. Marin, 623 So.2d 1182 (Fla. 1993).

320. *Id.* at 199.

321. *Id.*

322. *Id.* at 199 n.1.

323. *Id.* at 199.

324. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 17 reporters' note cmt. a, tbl. (1999) [hereinafter RESTATEMENT TABLE CLASSIFYING JURISDICTIONS AS JOINT AND SEVERAL, SEVERAL, OR HYBRID LIABILITY] (listing Alabama, Arkansas, Delaware, D.C., Maine, Maryland, Massachusetts, Minnesota, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, and West Virginia as states still employing joint and several liability). Since the publication of RESTATEMENT (THIRD), Arkansas, Pennsylvania, South Carolina, South Dakota and West Virginia have adopted statutes abolishing or modifying joint and several liability. *See* ARK. CODE ANN. § 16-55-201 (2005) (imposing several but not joint liability); 42 PA. STAT. ANN. § 7102(a.1)(1) (West 2013) (imposing liability proportional to fault); S.C. CODE ANN. § 15-38-15 (2012) (noting joint and several liability does not apply where defendant contributed less than fifty percent of the total fault); S.D. CODIFIED LAWS § 15-8-15.1 (2004) (limiting liability of a defendant less than fifty percent at fault); W. VA. CODE ANN. § 55-7-24 (LexisNexis 2008) (limiting liability of a defendant less than thirty percent at fault).

C. Proportionate or Several Liability

Business groups and insurance companies generally claim that the appropriate approach to assigning liability to joint tortfeasors is the one known as "several" or proportionate liability. Under several (proportionate) liability, each defendant should pay only that portion of damages that parallels what the jury determines is its proportionate share of fault when compared with that of the other actors whose tortious conduct contributed to the harm.[325] For example, assume the jury finds that the plaintiff (*P*) has sustained $100,000 of damages and allocates sixty percent of the fault to the first defendant (*D1*), ten percent of the fault to the second defendant (*D2*), and thirty percent of the fault to *P*. If both defendants are insured or solvent, argue proponents of business and insurance interests, then *D1* should pay $60,000, *D2* should pay $10,000, and *P* should absorb $30,000 in uncompensated losses because of *P*'s own fault. If *D1* is uninsured and judgment-proof, immune from liability, or beyond the jurisdiction of the court, however, then under a several (proportionate) fault system, *P* will recover only $10,000 from *D2*. About the same number of jurisdictions follow the proportionate or several liability method of allocating financial responsibility for damages as follow the joint and several liability method.[326]

The argument that the fairest approach is that each co-defendant should pay only its proportionate share of damages that represents its degree of fault is erroneous. To return to our last example, it is true that *D2* is paying only the percentage of damages it superficially appears that the initial allocation of damages suggests it should pay. Under this logic, however, at the same time, the contributorily negligent plaintiff should be responsible for only $30,000 (30% x $100,000) of its own losses. Instead, under the several liability approach, it is being left uncompensated for $90,000 (90% x $100,000). In short, proportionate liability is unfair to the plaintiff in exactly the same way that joint and several liability is unfair to the more solvent defendant.

The issue of how to handle absent tortfeasors arises again in several liability or in any of the "compromise" approaches described below that incorporate at least some aspects of several liability,[327] just as it does in allocating fault between the plaintiff and defendants in the comparative fault determination. For the reasons stated previously,[328] we conclude that absent

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325. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B18 (2000).

326. *See* RESTATEMENT TABLE CLASSIFYING JURISDICTIONS AS JOINT AND SEVERAL, SEVERAL, OR HYBRID LIABILITY, *supra* note 324 (identifying Alaska, Arizona, Colorado, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Nevada, New Mexico, North Dakota, Tennessee, Utah, Vermont and Wyoming as several liability jurisdictions).

327. *See infra* text accompanying notes 329–349.

328. *See supra* Part III.A.

tortfeasors should be assigned percentages of fault when considering the percentage of fault to be assigned to each co-defendant.

Both joint and several liability and several (proportionate) liability are all-or-nothing propositions unfairly allocating responsibility for harm solely to either the plaintiff or the co-defendant. We now turn to alternative approaches to allocating damages among the parties that are compromises. These compromises allocate damages in some way other than an all-or-nothing approach.

1. Compromise 1: Treating Economic and Noneconomic Damages Differently

The first of these compromises provides that the co-defendants are jointly and severally liable for economic damages, but only severally or proportionately liable for noneconomic damages.[329] Economic damages include medical and rehabilitation costs, past and future wage loss, property damage, and similar "out-of-pocket" expenses.[330] Noneconomic damages include other damages awarded for intangible harms such as pain and suffering, disfigurement, emotional distress, and damages for loss of society, companionship, and consortium in the case of the injury or death of a family member.[331]

The differing treatment of the two type of damages suggests that economic damages are more genuine or perhaps more important than noneconomic damages. This same distinction occurs elsewhere in the law governing damages for accidental harms. For example, Maryland's Workers' Compensation System awards only economic damages—and in limited amounts—for workplace injuries.[332] In a similar vein, a Maryland statute caps recovery for noneconomic damages but not economic damages.[333]

There are several justifications for providing joint and several liability for economic damages, but only proportionate liability for noneconomic damages. First, in those cases in which the economic costs of the accident threaten the solvency of the victim (plaintiff), joint and several liability for economic damages reduces the plaintiff's risk of insolvency.[334] Second, this alternative presumably is easier to administer than the other compro-

329. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § E18 (2000); *see, e.g.*, NEB. REV. STAT. § 25-21,185.10 (2008) (limiting noneconomic damages to several liability).

330. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § E18 cmt. c (2000).

331. *Id.*

332. *See* MD. CODE ANN., LAB. & EMPL. § 9-621(a) (West 2008)(awarding compensation based off of the covered employee's weekly wage).

333. MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b)(1) (West 2013).

334. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § E18 cmt. d (2000).

mises described below.[335] It should be comparatively easy for the jury to determine separate amounts for economic and noneconomic damages. Finally, this approach makes it likely that under subrogation agreements between plaintiffs and their first-party insurers, usually health insurers or, in the cases of patients covered by Medicaid, the state, these insurers will be reimbursed fully for their expenditures resulting from plaintiffs' tortious injuries.[336]

At the same time, giving greater priority to economic damages does raise other concerns. For one, it disadvantages those, particularly children, the elderly, and the poor, who typically recover less economic damages because damages for lost income are either nonexistent or substantially lower than for more affluent adults.[337] Further, economic damage awards tend to be higher for men than for women, whose incomes often lag behind those of comparably credentialed and experienced men.[338] These groups would be comparatively disadvantaged by any reform that retains joint and several liability for economic damages, but only several liability for noneconomic damages.

In addition, some injuries may be extremely traumatic and result in enormous emotional or physical pain, and yet may not result in substantial medical bills and loss of income that are proportionate to the amount of noneconomic damages experienced by the victim. Consider the young woman whose exposure to a dangerously defective drug causes her to lose her ability to bear children. She has not lost any income and her medical bills may be limited, but few would contest the assertion that she has experienced a significant harm and should be entitled to recover significant damages.

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335. *Id.* (noting that the hybrid system can be administered more efficiently than certain reallocation systems).

336. *Id.* § B19 cmt. l (noting that it is appropriate to return excess compensation when the plaintiff collects both full-tort damages and workers' compensation payments).

337. *See* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1280 (2004) (noting that these groups are disproportionately disadvantaged by caps on noneconomic damages); *see also* Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation*, 63 FORDHAM L. REV. 73, 75 (1994) (noting that use of race-based and sex-based economic data to calculate damage awards reduces the amount awarded for women and African Americans).

338. *See* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 159 (2010) (discussing how "historical patterns of wage discrimination in the labor market are replicated in tort awards" due to the fact that gender-tables only compare women to other women); Chamallas, *supra* note 337, at 75 (noting that discrimination in setting pay rates influences valuations in the calculation of personal injury awards).

2. *Compromise 2: Joint and Several Only When Defendant's Fault Exceeds Statutory Threshold*

The legislative compromise that most specifically targets the concern that a deep-pocket defendant whose fault is minor should not be forced to pay the bulk of the damages is one that imposes joint and several liability only if the defendant's degree of fault exceeds a statutorily defined threshold, such as twenty percent or fifty percent, but otherwise imposes only proportionate liability.[339] As of 2000, ten states had adopted this approach.[340] If the threshold is set at greater than fifty percent, the threshold approach also has the advantage of paralleling the logic of modified comparative fault under which the defendant is liable only if its degree of fault exceeds that of the plaintiff.[341]

An often voiced criticism of the "threshold" approach is that any number chosen is arbitrary—simply a political compromise. There is no principled way to defend holding a defendant who is ten percent at fault or fifty percent at fault in comparison with multiple other parties jointly and severally liable, but holding a defendant who is nine percent at fault or forty-nine percent at fault only severally liable. Line-drawing, however, is inevitable any time that the law treats two groups of cases differently and the same concern arises with modified comparative fault. The "arbitrariness" concern could be ameliorated somewhat by informing the jury, when the judge provides instructions as to the law governing the case, of the consequences of the jury's findings of the percentages of fault attributed to each party. Obviously, this solution in turn risks the possibility that the jury may game the system by choosing percentages that yield the outcome it regards as most fair and appropriate.

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339. *See* RESTATEMENT (THIRD) OF TORTS: REAPPORTIONMENT OF LIAB. § D18 (2000) (applying joint and several liability if the percentage of comparable responsibility assigned to a defendant is in excess of the legal threshold); 2 THE AMERICAN LAW INSTITUTE, REP. STUDY, ENTER. RESPONSIBILITY FOR PERSONAL INJURY 151 n.28 (1991) (suggesting that a threshold for joint and several liability is an appropriate solution to prevent a defendant whose fault is minor in comparison with that of other parties from being held jointly and severally liable).

340. *See* RESTATEMENT TABLE CLASSIFYING JURISDICTIONS AS JOINT AND SEVERAL, SEVERAL, OR HYBRID LIABILITY, *supra* note 324 (providing a table listing the ten "Threshold Jurisdictions" as Hawaii, Illinois, Iowa, Montana, New Hampshire, New Jersey, New York, Ohio, Texas, and Wisconsin); *see, e.g.*, MO. ANN. STAT. § 537.067 (West 2008) (establishing threshold at fifty-one percent); MONT. CODE ANN. § 27-1-703 (West 2013) (establishing threshold at fifty percent); TEX. CIV. PRAC. & REM. CODE ANN. § 33.013 (West 2008) (establishing threshold at fifty percent, but only if plaintiff is not contributorily negligent); N.J. STAT. ANN. § 2A:15–5.3 (West 2000) (establishing threshold at sixty percent).

341. *See supra* notes 255–265 and accompanying text.

3. Compromise 3: Reallocation of Liability for Unpaid Shares

The last major compromise alternative is the one we find most principled. Let us return to the hypothetical we discussed earlier. As stated previously, the jury found that the plaintiff (*P*) sustained $100,000 of damages and allocated sixty percent of the fault to the first defendant (*D1*), ten percent of the fault to the second defendant (*D2*), and thirty percent of the fault to the plaintiff. *D1*, however, is uninsured and judgment-proof, immune from liability, or beyond the jurisdiction of the court. Recall that under joint and several liability, in a comparative fault jurisdiction, *P* would recover $70,000 from *D2*, the ten percent at-fault defendant. On the one hand, this appears unfair because even though the jury found *P*'s own contributory negligence to be three times as culpable as that of *D2*, *P* is absorbing only thirty percent of the damages while *D2* is paying seventy percent. On the other hand, in a proportionate or several liability jurisdiction, *D2* will pay only $10,000 and *P*, who is thirty percent at fault, is not being compensated for ninety percent of her damages. Similarly under the "threshold" approach, assuming that the threshold is greater than ten percent, *P* again is left holding the bag for ninety percent of the damages.

There is a more principled approach—the reallocation method. The reallocation method re-assesses the uncollectible portion of a judgment against a particular co-defendant to all other parties, including the plaintiff. When *D1* cannot pay the $60,000 share that it should pay because of insolvency or immunity, the logical way to handle it is to reallocate *D1*'s share between *P* and *D2*. With *D1* out of the picture (at least in terms of collection), the share should be allocated to *P* and *D2* according to their respective degrees of fault. *P*'s original allocation of fault was thirty percent and *D2*'s was ten percent. *P* is three times as much at fault as *D2*, and logically *P* should be responsible for three-quarters or seventy-five percent of *D1*'s share and *D2* should be liable for one-quarter or twenty-five percent of *D1*'s share. *D2*, therefore, is liable for twenty-five percent of $60,000—that is, $15,000—as well as the share originally allocated to it of $10,000. Hence, *D2* is liable for a total of $25,000. If, however, *P* is free from contributory negligence, the co-defendants remain jointly and severally liable.

Both the Uniform Comparative Fault Act[342] and the *Restatement of Torts*[343] endorse one variant of the reallocation method and many scholars approve of it,[344] but fewer than a dozen jurisdictions follow it.[345] In addi-

342. UNIF. COMPARATIVE FAULT ACT § 2(d), 12 U.L.A. 135, 137 (2008) (noting that reallocation avoids unfairness).

343. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § C21 cmt. a (2000) (describing the reallocation method as the "fairest means of handling this problem").

344. *See, e.g.*, Scott C. Hecht, *Tort Reform Revisited: An Alternative to Missouri's Comparative Fault Settlement System*, 62 UMKC L. REV. 247, 276 (1993); Michael K. Steenson, *Joint and*

tion, courts have applied proportional reallocation of unpaid shares in decisions under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[346]

Upon first hearing the details of the reallocation approach, many intuitively find it to be too complex. In actuality, however, all it requires the jury to do is establish the total damages and each party's respective degree of fault—exactly the same functions for which it is responsible under a proportionate liability system,[347] often the preferred approach of business and insurance interests. The trial judge, not the jury, completes the mathematical calculations, and we are confident that counsel will be happy to assist in these calculations.

The Restatement (Third) reallocation approach impliedly begins with the assumption that initially the plaintiff can collect from any of the co-defendants as if the liability of the co-defendants is joint and several.[348] If a defendant who has paid more than its proportionate share of liability sues a co-defendant for contribution and is unable to collect, however, then reallocation kicks in.[349] Within a reasonable amount of time of the original judgment, the Restatement provision requires the defendant to move the court to reallocate the co-defendant's unpaid share.[350] The difficulty with the Restatement reallocation approach is that it mostly likely yields the same outcome as joint and several liability coupled with contribution. Literally applied, it suggests that a defendant who has paid a disproportionate amount of the judgment would be able to reallocate the unpaid defendant's

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Several Liability in Minnesota: The 2003 Approach, 30 WM. MITCHELL L. REV. 845, 853 (2004); Dunigan & Phillips, *supra* note 267, at 900 (concluding that adoption of reallocation method would "bring[] fairness to the law").

345. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-572 h(g)(1) (West 2013) (applying reapportionment to economic and noneconomic losses); MINN. STAT. ANN. § 604.02, subd. 1–2 (West 2010) (providing for proportionate liability unless defendant's share of fault is greater than fifty percent and providing for reallocation of proportional shares if such share is uncollectible); N.H. REV. STAT. ANN. §507:7-e(III) (LexisNexis 2009) (providing for reallocation under specified circumstances); OR. REV. STAT. § 31.610(3) (West 2011) (providing for reallocation with specified exceptions); W. VA. CODE ANN. § 55-7-24(c)(1) (2008) (providing for reallocation with specified exceptions).

346. 42 U.S.C. §§ 9601-9675 (2006). *See, e.g.*, Town of New Windsor v. Tesa Tuck, Inc., 919 F. Supp. 662, 681 (S.D.N.Y. 1996) (stating that courts may use provisions of CERCLA to reallocate "orphan shares" among solvent responsible parties (internal quotation marks omitted)); Charter Twp. of Oshtemo v. Am. Cyanamid Co., 898 F. Supp. 506, 509 (W.D. Mich. 1995) (providing that plaintiff and all defendants may be assigned shares in reallocation).

347. *See supra* text accompanying notes 325–326.

348. RESTATEMENT (THIRD) OF TORTS: REAPPORTIONMENT OF LIAB. § C21 reporters' note to cmt. k (2000).

349. *See id.* § C21 cmt. b (granting co-defendants the right to move for reallocation); UNIF. COMPARATIVE FAULT ACT § 2(d), 12 U.L.A. 135 (2008) (same); OR. REV. STAT. § 31.610(3) (2011) (same).

350. RESTATEMENT (THIRD) OF TORTS: REAPPORTIONMENT OF LIAB. § C21 cmt. d (2000).

share by collecting proportionately from all remaining parties—including the plaintiff. We believe that forcing the plaintiff to repay a portion of the judgment that has already been paid to him would always be awkward and, in most cases, unrealistic.

As an alternative, we recommend several (proportionate) liability, not joint and several liability, as the default allocation of liability before reallocation. The plaintiff would bear the burden of proving that a co-defendant's share cannot be paid because of insolvency, immunity, or lack of jurisdiction. At first glance, such an approach appears to be unfair to the plaintiff because the liability owed to him might not be resolved for an entire year and the expense and other burdens of reallocating shares would be on the plaintiff. In most cases, this burden is more theoretical than real. The ability of an insured defendant to pay a judgment within policy limits would be readily ascertainable at the time of the initial trial, as would the solvency of most corporate and other business defendants. Together these defendants represent the vast bulk of defendants in tort actions. In the unusual case in which this is not true, plaintiff and his counsel would have plenty of incentive to establish the inability to collect on the co-defendant's share as quickly as possible because this would pave the way for reallocation. In other cases, the facts necessary to establish that a co-defendant's share would be unpaid because of her immunity or the trial court's lack of jurisdiction over her usually would be apparent at trial.

C. Empirical Analysis of the Effects of Changing from Joint and Several Liability

Empirical studies suggest that the effects of reforms to the traditional doctrine of joint and several liability are unclear. In one study, insurance professors Han-Duck Lee, Mark J. Browne, and Joan T. Schmit hypothesized that the enactment of various alternatives to joint and several liability in nineteen states during the mid- to late-1980s would reduce the number of defendants joined in litigation because joint and several liability "encourage[s] litigation against multiple defendants in hopes of finding a deep pocket."[351] They also reported that an earlier survey of risk managers found that those surveyed "ranked modification of joint and several liability as second in importance among 58 legislative and regulatory risk management issues."[352] Despite this, the authors found only "weak evidence that state laws modifying joint and several liability rules have reduced claim filings."[353] In another study that evaluated the effects of joint and several lia-

351. Lee, Browne & Schmit, *supra* note at 189, 298–99.
352. *Id.* at 296.
353. *Id.* at 309.

bility reform as well as other tort reform measures, W. Kip Viscusi and Patricia Born found that although insurance company profitability increased following the tort reforms of the mid-1980s, this same effect was observed in states that did not enact tort reforms and cautioned that these effects should not be attributed to tort liability reforms.[354]

In yet another study, economists at Princeton and Columbia studied how abolition of joint and several liability in thirty-four states affected the safety precautions taken by potential tortfeasors.[355] Somewhat surprisingly, the authors found that replacing joint and several liability with one of the alternatives outlined above tends to cause potential tortfeasors to be more—not less—careful, and to reduce the incidence of accidental death resulting from tortious activity.[356] The authors' explanation for the finding is that when deep-pocket defendants are no longer held jointly and severally liable, they have an incentive to bring into court co-defendants whose actions contributed to the accident even if these co-defendants are uninsured and judgment-proof.[357] By bringing these other co-defendants before the jury, the solvent defendant hopes to reduce the percentage of fault the jury attributes to it.[358] This prospect, according to the authors, leads these judgment-proof defendants to exercise greater care to avoid the inconvenience of being sued even if they will not be held financially responsible.[359] We are skeptical that most co-defendants who are judgment-proof are likely to be sophisticated enough to anticipate that the likelihood of their being joined as co-defendants will vary depending on the rule governing liability for jointly caused harm. Still there appears to be no evidence that altering the traditional rule of joint and several liability adversely affects safety.

D. Our Recommendation Regarding the Liability of Joint Tortfeasors

Often state legislative resolutions of how to divide damages among multiple parties combine elements of more than one of the five alternatives listed above in any of a seemingly infinite variety of carefully negotiated legislative compromises.[360] Probably dozens of variations of how to handle the problem have been adopted by the fifty-one different jurisdictions.

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354. W. Kip Viscusi & Patricia Born, *The General-Liability Reform Experiments and the Distribution of Insurance-Market Outcomes*, 13 J. BUS. & ECON. STAT. 183, 187–88 (1995).

355. Carvell et al., *supra* note 318, at 52.

356. *Id.* at 53, 74.

357. *Id.* at 52.

358. *Id.*

359. *Id.*

360. *See, e.g.*, IOWA CODE ANN. § 668.4 (West 2013) (providing that joint and several liability does not apply when a defendant is found to be less than fifty percent at fault); OR. REV. STAT. § 31.610(3) (2009) (combining reapportionment approach with exceptions involving both speci-

We strongly recommend against adoption of either of the "all-or-nothing" approaches, neither of which allocate liability according to fault. To recap, joint and several liability, at least when the plaintiff is also found to be contributorily negligent, unfairly advantages the plaintiff. In the same way, several liability unfairly advantages the defendants. Each of the other options, which we have called the "compromise" approaches—treating economic and noneconomic damages differently, allowing for joint and several liability only when the defendant's share of fault exceeds a statutorily designated threshold, or the reallocation approach—presents its own difficulties.[361]

We prefer the alternative that reallocates the liability of the defendant whose share is unpaid because of her insolvency or immunity to the remaining parties, including both the plaintiff and the remaining co-defendants.[362] In principle, it clearly is the best alternative, though it does pose logistical challenges. It most closely hews to handling the allocation of fiscal responsibility in negligence cases in a matter that attributes liability according to levels of fault. Trial courts capably handle reapportionment of liability shares in at least some instances in other jurisdictions.[363]

By all accounts, Maryland judges should be at least as cognitively competent as their brothers and sisters in other states.[364] We acknowledge that many attorneys, and presumably their clients as well, however, often dislike the approach because it leaves open the liability of the parties for an extended period after the initial judgment. If, for this reason, the legislature prefers another approach, we would recommend either of the two other compromise approaches, the statutory threshold approach or the approach handling economic and noneconomic damages differently, the respective advantages and disadvantages of each we previously considered. If the legislature were to opt for the choice of establishing a statutory line dividing when a defendant's liability would be joint and several instead of merely several (proportionate), we would recommend a threshold of approximately fifteen to twenty percent—admittedly an arbitrary choice, but one we believe to be a fair threshold—which would prevent joint and several liability

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fied percentages of fault and comparison of fault percentages of party seeking reallocation and party from whom it is sought).

361. *See supra* Part IV.C.1–3.

362. *See supra* text accompanying notes 342–350.

363. *See supra* text accompanying note 345.

364. Even the U.S. Chamber of Commerce ranks Maryland judges thirty-third among the fifty states in terms of judicial competence. U.S. CHAMBER INST. FOR LEGAL REFORM, 2012 STATE LIAB. SYS. SURVEY, LAWSUIT CLIMATE: RANKING THE STATES 22 (2012), http://www.uschamber.com/sites/default/files/reports/lr_FinalWeb_PDF.pdf (last visited Feb. 26, 2014). Sixteen of the seventeen states that are ranked below Maryland have adopted comparative fault. *See* RESTATEMENT TABLE CLASSIFYING JURISDICTIONS AS JOINT AND SEVERAL, SEVERAL, OR HYBRID LIABILITY, *supra* note 324.

for "deep pocket" defendants whose fault is disproportionately low, but enable plaintiffs to collect all their damages (except those proportionate to their own fault) in other instances in which the co-defendant's negligence was substantial compared with that of the other parties whose fault contributed to the plaintiff's harm.

E. Contribution Among Tortfeasors

Under current Maryland law, a joint tortfeasor who "has by payment discharged the common liability or has paid more than a *pro rata* share of the common liability" is entitled to recover "contribution" from the other tortfeasors.[365] In most other jurisdictions, the right of contribution exists when one defendant has paid more than its *proportionate* share determined by its degree of fault[366] in comparison with those of other tortfeasors. In Maryland, however, the "pro rata" statutory language has been interpreted to mean "an equal share of the common liability, rather than a share based on an individual's proportion of fault."[367]

If Maryland continues to employ joint and several liability as it does now, or at least provide for joint and several liability in limited circumstances, that is, in the case or economic damages[368] or when a particular defendant's degree of fault exceeds the statutorily created threshold,[369] then contribution would continue to play a role. In accordance, however, with our recommendation that in negligence actions damages should be allocated according to the degrees of fault of the parties, we would recommend that Maryland replace the provision of its somewhat unusual contribution statute specifying that co-defendants share liability on a "pro rata" basis with the more typical provision that they share liability on a "proportionate" basis. Today, contribution statutes in the overwhelming majority of jurisdictions use the term "proportionately" or at least interpret "pro rata" to mean proportionately.[370] Basing contribution on pro rata instead of proportionate shares may be one more reflection of the Maryland General Assembly's

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365. MD. CODE ANN., CTS. & JUD. PROC. § 3-1402(b) (West 2013) (emphasis added).

366. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 23(b) (2000) (providing for contribution to a person who has paid more than his "comparative share of responsibility"); SCHWARTZ, *supra* note 52, at 359 ("Many states have provided . . . for the application of pure comparative negligence in questions of contribution among tortfeasors."). The Illinois statute provides for contribution on a pro rata basis, see 740 ILL. COMP. STAT. ANN. 100/2 (WEST 2010), but then proceeds to define "pro rata" as proportionate. *Id.* at 100/3.

367. Coleman v. Soccer Ass'n of Columbia, 432 Md. 679, 733, 69 A.3d 1149, 1181 (2013) (Harrell, J., dissenting); *see also, e.g.*, COLO. REV. STAT. ANN. § 13-50.5-102 (2) (West 2005) (providing for contribution when a co-defendant has paid more than its pro rata share).

368. *See supra* text accompanying notes 329–338.

369. *See supra* text accompanying notes 339–341.

370. *See supra* note 366 and accompanying text.

and/or the Court of Appeals' distrust of the cognitive capability of jurors. We believe, based on a comparison of both median levels of educational achievement in Maryland[371] and the performance of state students on nationwide tests[372] with those in other states, that Maryland jurors are perfectly competent to quantify the respective degrees of fault of the parties in percentage terms.

If, on the other hand, the General Assembly adopts either several (proportionate) liability[373] or the reallocation approach that we recommend,[374] then the need for a contribution action in negligence actions involving joint tortfeasors disappears in most cases.[375] In jurisdictions employing several liability, the jury already will have established each defendant's share of liability without the need for a contribution action. Similarly, under the reapportionment approach, the jury's original allocations of liability, later adjusted by the judge to reflect the reapportionment of unpaid shares, avoid the need for contribution as a separate process.

F. Inadmissibility of Seat Belt Nonuse

Maryland employs yet another "all-or-nothing" approach in refusing to apportion damages according to fault. The Maryland statute requiring automobile drivers and their passengers to use seat belts includes a provision that evidence of the failure to use a seat belt is not admissible on the issue of contributory negligence.[376] The legislative history suggests that the General Assembly passed the compulsory seat belt use statute reluctantly in order to comply with a federal regulation pressuring states to enact seat belt mandates.[377] No doubt plaintiffs' trial lawyers lobbied for the inadmissibility provision.

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371. More Maryland residents than residents of all the United States have earned a high school diploma (88.2% compared with 85.3%), a bachelor's degree (35.7% compared with 27.9%), and an advanced degree (16.0% compared with 10.3%). U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, TABLE 233. EDUCATIONAL ATTAINMENT BY STATE: 1990 to 2009 (2012), http://www.census.gov/compendia/statab/2012/tables/12s0233.pdf (last visited Feb. 26, 2014).

372. Maryland students test better than the nationwide average on nationwide standardized tests. NAT'L CTR. FOR EDUC. STATISTICS, STATE PROFILES, http://nces.ed.gov/nationsreportcard/states/ (last visited Feb. 26, 2014).

373. *See supra* text accompanying notes 325–326.

374. *See supra* text accompanying notes 342–350.

375. If neither the plaintiff nor the defendant chooses to join other potentially liable tortfeasors in the legal action and the defendant loses, however, the defendant might later sue other tortfeasors for contribution. *See supra* text accompanying notes 365–370.

376. MD. CODE ANN., TRANSP. § 22-412.3(h)(1) (West 2012).

377. According to an opinion of the Maryland Attorney General, "When it enacted the mandatory seat belt use legislation, the General Assembly apparently was acting, at least in part, in response to a condition set forth in a federal regulation." Taxicab Drivers Not Required to Wear Seat Belts, 85 Op. Att'y Gen. 206, 211 n.12 (2000); *see also* 49 Fed. Reg. 28, 962 (July 17, 1984)

In most other jurisdictions today, evidence of the nonuse of seat belts is admissible to reduce the plaintiff's recovery in a negligence action, usually as evidence of comparative fault,[378] but sometimes under the doctrine of avoidable consequences that provides that plaintiffs owe a duty of reasonable care to minimize the extent of injuries to themselves.[379] Even though the failure to use a seat belt does not contribute to causing the accident itself (a necessary precondition for the application of the current doctrine of contributory negligence), the failure to use a seat belt often causes an enhanced injury that is a foreseeable consequence of the failure to use a seat best,[380] just as an unsafe automobile design foreseeably enhances injuries resulting from a collision in "crashworthiness" cases.[381]

It is sometimes claimed that requiring motorists to use seat belts grants the negligent driver of the other vehicle causing the accident an undeserved windfall.[382] Yet this logic is tautological. The Arizona Supreme Court reasoned, "[A]lthough some tortfeasors may pay less than they otherwise *would*, they will not pay less than they *should*."[383]

Allowing the jury to consider evidence of seat belt nonuse obviously does add a modest amount of complexity to the jury's calculation of the plaintiff's degree of fault under comparative fault. The jury would be required to decide the extent to which the seat belt nonuse enhanced the plaintiff's injury, and then determine the respective shares of liability of the parties for that portion of the injury by determining the percentages of fault of the plaintiff for failure to wear the seat belt (and any other comparative fault on the plaintiff's part) against the defendant's proportion of comparative fault. Again, we believe that Maryland jurors are up to the task, just as jurors in other states are. As with all other aspects of the jury's findings, if

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(providing that federal standards requiring passive restraints in automobiles would continue in effect unless at least two-thirds of nation's population enacted mandatory seat belt legislation).

378. *See, e.g.*, Law v. Superior Court, 755 P.2d 1135, 1137–39 (Ariz. 1988) (discussing the evolution of the "seat belt defense").

379. *See, e.g.*, Spier v. Barker, 323 N.E.2d 164, 168–69 (N.Y. 1974) (approving instruction that allowed the jury to consider plaintiff's failure to use seat belt in determining amount of damages).

380. *See Law*, 755 P.2d at 1140 (stating that for "every person . . . motor vehicle accidents . . . are not only foreseeable but virtually certain to occur sooner or later").

381. *See, e.g.*, Volkswagen of America, Inc. v. Young, 272 Md. 201, 216, 321 A.2d 737, 745 (1974) ("In sum, 'traditional rules of negligence' lead to the conclusion that an automobile manufacturer is liable for a defect in design which the manufacturer could have reasonably foreseen would cause or enhance injuries on impact, which is not patent or obvious to the user, and which in fact leads to or enhances the injuries in an automobile collision.").

382. *See* RESTATEMENT (THIRD) OF TORTS: REAPPORTIONMENT OF LIAB. § 3 reporters' note cmt. b (noting "[s]ome courts used to forgive a plaintiff of *pre-accident* negligence that merely aggravated the injury . . . [because otherwise] counting the conduct would constitute a windfall for the defendant").

383. *Law*, 755 P.2d at 1144.

the jury's finding is clearly wrong, the trial judge can enter judgment notwithstanding the verdict[384] or order a new trial.[385]

IV. CONCLUSION

The Maryland General Assembly will not find comprehensive reform of the role of fault in the state's tort system to be easy. For decades, lobbyists representing businesses and insurers have promised dire economic consequences if Maryland replaces contributory negligence with comparative fault. Even though this has not occurred in the other states that have adopted comparative fault, the frequent repetition of this argument has led many state policymakers to give it credence. Not all the fault lies with businesses and insurance companies, however. Just as vociferously as their defense counterparts, lobbyists for plaintiffs' trial lawyers contend that any alternative to joint and several liability would wreak enormous injustice. They also managed to convince the General Assembly to pass a statute providing that seat belt nonuse is inadmissible in automobile accident actions at a time when mandatory seat belt laws were quite controversial. Nearly three decades later, that statutory provision continues in effect, even though today five-year-old children know to fasten a seat belt.

In *Coleman*, the Court of Appeals defaulted in its constitutional obligations as Maryland's highest common law court. It handed the political hot potato of contributory negligence, which it had created, back to the General Assembly, despite the court's advantage in being somewhat insulated from the powerful political forces that block common sense reform of these issues.

What we have outlined in this Article is a balanced, principled approach to reform of Maryland's negligence law, law supposedly based on attributing damages according to fault. We begin with the replacement of contributory negligence with comparative fault, in either pure or modified form, a change that plaintiff's counsel will cheer and businesses and insurance companies will claim is catastrophic.

We go on to incorporate the same principle of allocating damages according to degrees of fault—and doing away with Maryland's past habit of deciding such things on an all-or-nothing basis—by recommending pro-defendant changes. We recommend replacing joint and several liability with a statute that calls for allocating damages among co-defendants and other parties contributing to the harm according to their respective degrees of fault. Importantly, we recommend that where a particular co-defendant's share of liability cannot be paid because of insolvency or the defendant's

384. MD. CODE ANN., MD. RULES § 2-532(e) (2013).
385. *Id.*

immunity, that share should be reallocated among the remaining defendants and the plaintiff according to their respective degrees of fault. Several or proportionate liability, that is, dumping the entire unpaid liability into the lap of the plaintiff, is the polar opposite of—and no more principled than—the current law of joint and several liability.

Finally, we identify the same fatal flaw of employing an all-or-nothing approach in not allocating damages according to fault in Maryland's seat belt statute that provides that evidence of the nonuse of seat belts is inadmissible in personal injury actions. Perhaps the statute did not appear to be so ridiculous a decade or so after seat belt use became common. Today's law students, however, are shocked when they learn of the statute, as they should be.

The balanced approach we have outlined appears to be a compromise. In fact, it probably will make none of the special interest groups happy. Each aspect of our proposal rests on the principle that in a liability system such as Maryland's that fundamentally rests on negligence or fault-based liability in most instances, when each of several multiple parties are at fault and their actions contribute to an injury, damages should be allocated among them in accord with their respective degrees of fault. Each of these proposals is well within the norms of the law governing accidental injury elsewhere in the United States. In contrast, each aspect of current Maryland law on these issues reflects a decidedly minority approach, and Maryland's current law governing contributory negligence, without serious dispute, can accurately be categorized as aberrant.

Sometimes, principled legislation can form the basis for legislative compromise. Let's hope that it happens here. If not, the General Assembly will be at fault and responsible for *all* the resulting damages that will befall both future victims of accidents and Maryland businesses as well.