Maryland Law Review

Volume 78 | Issue 4 Article 11

Perpetuating Injustice: Analyzing the Maryland Court of Appeals's Refusal to Change the Common Law Doctrine of Contributory Negligence

Andrew White

Comment

PERPETUATING INJUSTICE: ANALYZING THE MARYLAND COURT OF APPEALS'S REFUSAL TO CHANGE THE COMMON LAW DOCTRINE OF CONTRIBUTORY NEGLIGENCE

ANDREW WHITE*

> *A dinosaur roams yet the landscape of Maryland . . . 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.*[1]

The modern perception that contributory negligence is a "dinosaur" reflects the fact that it was created in a different era.[2] In 1809, Lord Ellenborough, Chief Judge of the King's Bench, created the doctrine of contributory negligence, simultaneously incorporating it into the common law of England.[3] Under contributory negligence, a plaintiff is completely barred from recovering damages in a negligence suit when he or she fails to use

* J.D. Candidate, 2020, University of Maryland Francis King Carey School of Law. The author wishes to thank the editors of the *Maryland Law Review* for their commitment to developing and publishing student pieces. In particular, the author would like to thank Kara Achilihu, Alexandra Botsaris, Emily Kelsay, Sarah Samaha, Kellyn Wilcox, Jerri Shahverdi, and Issac Schabes for their thoughtful feedback, support, and guidance. The author would also like to thank his faculty advisor, Professor Donald Gifford, for his advice and willingness to share his expertise in the field of tort law. Finally, the author would like to dedicate this comment to Doug, Carole, and Elizabeth White, for their love, patience, and support.

1. Coleman v. Soccer Ass'n, 432 Md. 679, 695, 69 A.3d 1149, 1158 (2013) (Harrell, J., dissenting). Under the doctrine of contributory negligence, "[a] plaintiff cannot recover damages if the plaintiff's negligence is a cause of the injury. The defendant has the burden of proving by a preponderance of the evidence that the plaintiff's negligence was a cause of the plaintiff's injury." MD. STATE BAR ASSOC., MARYLAND CIVIL PATTERN JURY INSTRUCTIONS § 19:10 (5th ed. 2018).

2. *See* DEP'T OF LEGIS. SERVS., MD. GEN. ASSEMBLY, NEGLIGENCE SYSTEMS: CONTRIBUTORY NEGLIGENCE, COMPARATIVE FAULT, & JOINT & SEVERAL LIABILITY 11 (2013) (describing the early eighteenth-century origins of contributory negligence).

3. Butterfield v. Forrester, 11 East 60, 61, 103 Eng. Rep. 926, 927 (K.B. 1809) (announcing the creation of the doctrine of contributory negligence: "One who is injured by an obstruction in a highway against which he fell, cannot maintain an action if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction.").

ordinary care and is an immediate and proximate cause of his or her injury.[4] At first glance this seems fair—negligent plaintiffs are barred from recovery. However, contributory negligence does not account for the proportionate fault of each party. A plaintiff who is only slightly negligent will be completely barred from recovery, even when the defendant is primarily responsible for the accident.[5] A good example is a jaywalker who tries to cross an intersection late at night and is hit by a driver who is speeding, has his headlights off, and runs a red light. Under contributory negligence, the jaywalker is completely barred from recovery because he was negligent in unlawfully crossing the street, even though the speeding driver who ran the red light is arguably more at fault for the accident.

In 1847 the Court of Appeals of Maryland incorporated contributory negligence into the common law of Maryland.[6] At the time, "[c]ontributory negligence was [being] adopted throughout the United States."[7] States adopted contributory negligence for primarily two reasons: (1) to protect "fledgling" industry from "plaintiff-minded" juries and (2) the popular "notion" that "courts should not assist someone who contributes to causing his or her own injuries."[8]

Despite its initial popularity, by the mid-twentieth century, legislators and judges across the country realized that contributory negligence harshly denies recovery to persons who have only slightly contributed to their injuries.[9] Forty-six states, by either judicial enactment or statute, replaced contributory negligence with the doctrine of comparative negligence, which apportions damages according to fault.[10] Even England (the jurisdiction where contributory negligence was created), in 1945, abandoned contributory negligence in favor of comparative fault.[11] Maryland, however, refuses to abandon contributory negligence and today remains one of five jurisdictions in the United States that cling to this universally criticized, judge-made common law rule.[12]

4. Irwin v. Sprigg, 6 Gill 200, 205 (1847).

5. *Id.* at 205 ("[A]lthough the defendant's misconduct may have been the primary cause of the injury complained of . . . the plaintiff cannot recover.").

6. *Id.* at 205 (adopting the doctrine of contributory negligence as the law of Maryland).

7. DEP'T OF LEGIS. SERVS., *supra* note 2, at 11.

8. *Id.*; Coleman v. Soccer Ass'n, 432 Md. 679, 697, 69 A.3d 1149, 1159 (2013) (Harrell, J., dissenting).

9. *See* DEP'T OF LEGIS. SERVS., *supra* note 2, at 3, 13–14.

10. *Id.* at 14. Comparative fault refers to a "system of apportioning damages between negligent parties according to their proportionate shares of fault. Under a comparative fault system, a plaintiff's negligence that contributes to causing the plaintiff's damages will not prevent recovery, but instead only will reduce the amount of damages the plaintiff can recover." *Id.* at 4.

11. Law Reform (Contributory Negligence) Act 1945, c.28.

12. *See* Coleman, 432 Md. at 682, 69 A.3d at 1150 (declining to abandon the common law doctrine of contributory negligence); *see also* DEP'T OF LEGIS. SERVS., *supra* note 2, at 14 ("Cur-

Whose responsibility is it to change an outdated, judge-made common law rule, like the doctrine of contributory negligence? Historically, the courts and the legislature held concurrent power to change the common law[13] and, given the fact that the common law is judge-made, the courts traditionally recognized that it was primarily their duty to change it. As Chief Judge Jeremiah Chase of the Court of Appeals stated in 1821, "Whether particular parts of the common law are applicable to our local circumstances and situation, and our general code of laws and jurisprudence is a question that comes within the province of the courts of justice and is to be decided by them."[14] This attitude prevailed into the twentieth century. In 1951, the Court of Appeals stated, "[I]t is [the court's] duty to determine the common law as it exists in this State."[15] Even as late as 1983, the Court of Appeals asserted its power to change a common law doctrine if the court found that a doctrine, "in light of changed conditions or increased knowledge . . . had become unsound in the circumstances of modern life."[16]

Starting in the early 1980s, however, the Court of Appeals began to create precedent which severely limited the traditional power of the state judiciary to change the common law.[17] Most recently, in *Coleman v. Soccer Ass'n of Columbia*,[18] the Court of Appeals refused to change the common law doctrine of contributory negligence in light of the General Assembly's repeated refusal to do so.[19] The court in *Coleman* viewed the General Assembly's repeated failure to pass legislation aimed at changing the common law doctrine of contributory negligence as "very strong evidence" of legislative intent to retain the doctrine.[20] The court reasoned that it should not change the common law contrary to legislative intent, since a "declaration of the public policy" is "normally the function of the General Assembly" and the General Assembly is "expressly empowered to revise the common law" by Article 5 of the Maryland Declaration of Rights.[21]

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rently, contributory negligence is the law in only five U.S. jurisdictions—Alabama, Maryland, North Carolina, Virginia, and the District of Columbia.").

13. *See* Pope v. State, 284 Md. 309, 341, 396 A.2d 1054, 1073 (1979) (noting that the common law may be changed by "legislative act" or "judicial decision").

14. State v. Buchanan, 5 H. & J. 317, 365–66 (1821). See 1 JON L. WAKELYN, BIRTH OF THE BILL OF RIGHTS: ENCYCLOPEDIA OF THE ANTIFEDERALISTS 42–43 (Greenwood Press 2004) for Jeremiah Chase's impressive resume and role in revolutionary Maryland.

15. Ass'n of Indep. Taxi Operators v. Yellow Cab Co., 198 Md. 181, 204, 82 A.2d 106, 117 (1951).

16. Harrison v. Montgomery Cty. Bd. of Educ., 295 Md. 442, 459, 456 A.2d 894, 903 (1983).

17. *See infra* Part I.

18. 432 Md. 679, 69 A.3d 1149 (2013).

19. *Id.* at 695, 69 A.3d at 1158.

20. *Id.*

21. *Id.* at 689, 69 A.3d at 1155 (quoting Harrison v. Montgomery Cty. Bd. of Educ., 295 Md. 422, 459, 456 A.2d 894, 903 (1983)).

This Comment will argue that the Court of Appeals should not view the General Assembly's refusal to change or modify an outdated common law rule as a roadblock to judicial action. The repeated failure of bills in the General Assembly is a poor indicator of legislative intent.[22] Additionally, the court should not defer to the legislature when it is considering a change to judicially created, common law rule.[23] The Court of Appeals has the power to and should change a common law doctrine that has become "unsound in the circumstances of modern life."[24] Instead of deferring to the legislature, the court should evaluate the original rationale for the common law doctrine and the justifications offered for the doctrine's "existence and continued viability."[25] When a common law doctrine does not withstand this scrutiny, the court should not hesitate to discard it.[26]

This Comment is divided into two Parts. Part I will examine the foundation on which *Coleman* rests and a number of cases that are in contention with the court's holding in *Coleman*.[27] Part II will criticize the court's decision in *Coleman* and argue that the court should change outdated and unjust common law doctrines, like the doctrine of contributory negligence, regardless of legislative inaction.[28]

I. BACKGROUND

In *Coleman v. Soccer Ass'n of Columbia*, the Maryland Court of Appeals held that it should not change a common law doctrine in the face of the General Assembly's repeated refusal to do so.[29] This holding rests on two premises. The first premise is that the common law should not be changed contrary to the intent of the General Assembly.[30] The second premise is that the General Assembly's repeated failure to pass legislation

22. *See infra* Section II.A.

23. *See infra* Section II.B.

24. *Harrison*, 295 Md. at 459, 456 A.2d at 903.

25. Bozman v. Bozman, 376 Md. 461, 487–88, 830 A.2d 450, 466 (2003); *see also* McIntrye v. Balentine, 833 S.W.2d 52, 56 (Tenn. 1992) (noting that "mindless obedience" to stare decisis can "confound the search for truth and foster an attitude of contempt" towards the courts).

26. *See* Arizona v. Gant, 556 U.S. 332, 348 (2009) ("The doctrine of state decisis is of course 'essential to the respect accorded to the judgments of the Court and to the stability of the law,' but it does not compel us to follow a past decision when its rationale no longer withstands 'careful analysis.'" (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003))).

27. *See infra* Part I.

28. *See infra* Part II.

29. *See* Coleman v. Soccer Ass'n, 432 Md. 678, 695, 69 A.3d 1149, 1158 (2013) ("For this Court to change the common law and abrogate the contributory negligence defense in negligence actions, in the face of the General Assembly's repeated refusal to do so, would be totally inconsistent with the court's longstanding jurisprudence.").

30. *See id*. ("[T]he common law should not be changed contrary to the public policy of the State as set forth by the General Assembly." (quoting Ireland v. State, 310 Md. 328, 331, 529 A.2d 365, 366 (1987))).

aimed at changing a common law doctrine is strong evidence of a legislative intent to retain that doctrine.[31] These premises, while supported by the majority of Maryland case law, are inconsistent with a number of Maryland cases.[32] In many of these cases, the Court of Appeals held that the General Assembly's repeated failure to pass legislation was not strong evidence of legislative intent.[33] Additionally, in a number of these cases, the Court of Appeals changed outdated common law doctrines even when the General Assembly refused to act.[34]

This Part will proceed in four Sections. Section A examines the Court of Appeals's traditional duty to change the common law.[35] Section B analyzes how the Court of Appeals, starting in the early 1980s, began to defer to the legislature on common law issues.[36] Section C looks at the Court of Appeals refusal to change the common law doctrine of contributory negligence in *Coleman*.[37] Finally, Section D highlights the cases in which the Court of Appeals changed the common law despite legislative inaction and the cases in which the Court of Appeals viewed legislative inaction as a weak indicator of legislative intent.[38]

A. The Court's Traditional Power to Change the Common Law

In *Coleman*, the Court of Appeals held that it should not change the common law contrary to legislative intent. Traditionally, however, the state judiciary and the legislature held independent and equal power to change the common law.[39] In fact, Judges often stated that changing the common law was primarily the duty of the courts.[40]

For example, in 1821, Chief Judge Jeremiah Chase, in *State v. Buchanan*,[41] noted that the judiciary and the General Assembly held equal power to change the common law.[42] In *Buchanan*, two officers of the Bank

31. *See id.* at 693, 69 A.3d at 1157 (noting that the General Assembly's continual consideration and failure to pass bills attempting to change the doctrine of contributory negligence "is a clear indication of legislative policy at the present time").

32. *See infra* Section I.D.

33. *See infra* Section I.D.

34. *See infra* Section I.D.

35. *See infra* Section I.A.

36. *See infra* Section I.B.

37. *See infra* Section I.C.

38. *See infra* Section I.D.

39. White v. King, 244 Md. 348, 354–55, 223 A.2d 763, 767 (1966).

40. Ass'n of Indep. Taxi Operators v. Yellow Cab Co., 198 Md. 181, 204, 82 A.2d 106, 117 (1951) ("[I]t is [the court's] duty to determine the common law as it exists in this State.").

41. 5 H. & J. 317, 365–66 (1821).

42. *See id.* at 366 (noting the common law "may be abrogated or changed as the general assembly may think most conducive to the general welfare" and that the judiciary has concurrent power to decide whether parts of the common haw have become "obsolete from *non user* or other cause").

of the United States were charged with "conspiracy to cheat, defraud, and impoverish, the Bank of the United States, by appropriating the monies, promissory notes, and funds of the bank" to their own use.[43] Chase found that these facts constituted the English common law offense of conspiracy[44] and that the common law of England, as it was understood at the adoption of the Maryland declaration of rights in 1776, was the law of the Maryland "without restraint or modification."[45] However, Chase noted that the common law could be changed, either by the legislature or the court.[46] Chase explained that common law issues were questions that were to "be decided" by the "courts of justice," but that the legislature held concurrent power to change the common law "so that no great inconvenience" would result from "the power being deposited with the judiciary to decide what the common law is, and its applicability to the circumstances of the state, and what part has become obsolete from non-user or other cause."[47]

This judicial philosophy continued to prevail in the mid- to late twentieth century. In the 1960 decision *White v. King*,[48] the court asserted that both the judiciary and the legislature had the power to change a common law doctrine that had become "unsound in the circumstances of modern life."[49] In *King*, the court was asked whether "Michigan law was applicable to an action by Maryland residents against another Maryland resident for injuries received in an automobile accident [that occurred] in Michigan."[50] The court applied the common law rule of *lex loci delecti*: that when an accident occurs in another state the rights of the parties, even if they are domiciled in Maryland, "are to be determined by the law of the state in which the alleged tort took place."[51] The court found that stare decisis did not bar the court from changing the common law rule of *lex loci delecti* if it was convinced that the rule was "unsound."[52] However, because it found that *lex loci delecti* was not "unjust" the court decided to maintain the status quo and apply the law of Michigan.[53] The court noted that the legislature also had the power to change the rule if it so desired.[54]

43. *Id.* at 367.
44. *Id.*
45. *Id.* at 365.
46. *Id.* at 365–66.
47. *Id.*
48. 244 Md. 348, 223 A.2d 763 (1966).
49. *Id.* at 354, 223 A.2d at 767.
50. *Id.* at 348, 223 A.2d at 763.
51. *Id.* at 351–52, 223 A.2d at 765.
52. *Id.* at 354, 223 A.2d at 767.
53. *Id.* at 355, 223 A.2d at 767.
54. *Id.*

In the 1979 decision, *Pope v. State*,[55] the Court of Appeals continued to acknowledge that the common law could be changed by "judicial decision" or legislative act.[56] In *Pope*, the Court of Appeals held that misprision of a felony was not a "chargeable offense" in Maryland, striking it from Maryland's common law.[57] Under the common law, a person was guilty of misprision of a felony if they knew of a felony and failed to report it.[58] The Court of Appeals held the offense was no longer a part of the common law because of its "origin, the impractical and indiscriminate width of its scope, its other obvious deficiencies, and its long non-use."[59] The court also noted that the legislature had the power to create a statutory offense for misprision of a felony if it so desired.[60]

B. The Court of Appeals Begins to Defer to the Legislature on Common Law Issues

Starting in the early 1980s, however, the court began to view the General Assembly as the more appropriate forum for making changes to the common law and through precedent, diminished the courts traditional power to change the common law by promoting deference to the legislature.[61] In *Condore v. Prince George's County*,[62] the Court of Appeals decided to eliminate the common law doctrine of necessaries rather than expand it to cover married women.[63] While the court noted that both itself and the General Assembly had the power to change the common law,[64] it deemed the General Assembly the more appropriate form for determining if an expan-

55. 284 Md. 309, 396 A.2d 1054 (1979).

56. *Id.* at 341, 396 A.2d at 1073; *see also* Kline v. Ansell, 287 Md. 585, 589–90, 414 A.2d 929, 931 (1980) (noting that the common law may be changed by judicial decision or legislative act). Article 5 of the Maryland Declaration of Rights provides: "That the inhabitants of Maryland are entitled to the Common Law of England . . . subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State." MD. CONST. DECL. OF RTS. art. 5(a)(1).

57. *Pope*, 284 Md. at 352, 396 A.2d at 1078.

58. *Id.* at 334–36, 396 A.2d at 1069–70.

59. *Id.* at 352, 396 A.2d at 1078.

60. *Id.*

61. *See* Felder v. Butler, 292 Md. 174, 183, 438 A.2d 494, 499 (1981) (noting that a "declaration of public policy is normally the function of the legislative branch" and that the court should not "alter a common law rule in the face of indications that to do so would be contrary to the public policy of the state as set by the General Assembly").

62. 289 Md. 516, 425 A.2d 1011 (1981).

63. *Id.* at 532, 425 A.2d at 1019. The common law doctrine of necessities places a legal duty on the husband to supply his wife with "necessaries," including medical care. *Id.* at 520, 425 A.2d at 1013. At common law, the wife had no similar duty to supply her husband with necessaries. *Id.*

64. *See id.* at 530–31, 425 A.2d at 1018 ("Of course, the common law doctrine of necessaries is subject to change by constitutional or legislative enactment; it is also subject to change by judicial decision where the Court finds, with or without regard to the ERA, that the common law rule is a vestige of the past, no longer suitable to the circumstances of our people.").

sion of the common law doctrine was prudent.[65] The court explained: "[W]hat best serves the societal need is, we think, a matter of such fundamental policy that it should be determined by the legislature."[66]

Shortly following *Condore*, the Court of Appeals further limited the power of the court to change the common law in *Felder v. Butler*.[67] In *Felder*, the court was asked to change the common law to recognize a cause of action against sellers of alcohol for injuries "negligently caused by an intoxicated patron to an innocent third party."[68] While the court acknowledged its power to change the common law, it noted that a "declaration of public policy is normally the function of the legislative branch and that the court should not "alter a common law rule in the face of indications that to do so would be contrary to the public policy of the State, as declared by the General Assembly."[69] Since the General Assembly had not yet imposed civil liability upon vendors of alcoholic beverages for the torts of their customers, the court held that it should not either.[70] The court reasoned that it was up to the General Assembly "to determine if the public policy of the State" would favor expanding tort liability to sellers of alcoholic beverages.[71]

Following *Felder*, the Court of Appeals continued to affirm that the common law should not be changed contrary to the intent of the General Assembly.[72] Additionally, the court suggested, in *Harrison v. Montgomery County Board of Education*,[73] that the failure of bills aimed at changing a common law doctrine indicated a legislative intent to maintain the status quo.[74] In *Harrison*, the court was asked to abandon the common law doctrine of contributory negligence and adopt the doctrine of comparative negligence.[75] The court acknowledged that it had the power to change or modi-

65. *Id.* at 532, 425 A.2d at 1019.

66. *Id.*; *see also* Adler v. American Standard, 291 Md. 31, 45, 432 A.2d 464, 472 (1981) (noting that a "declaration of public policy is normally the function of the legislative branch").

67. 292 Md. 174, 438 A.2d 494 (1981).

68. *Id.* at 175, 438 A.2d at 495.

69. *Id.* at 183, 438 A.2d at 499.

70. *Id.* at 184, 438 A.2d at 499.

71. *Id.*

72. *See* Harrison v. Montgomery Cty Bd. of Educ., 295 Md. 442, 460, 456 A.2d 894, 903 (1983) (noting that the Court of Appeals should not change the common law contrary to the intent of the General Assembly); *see also* Kelley v. R.G. Indus., Inc., 304 Md. 124, 140–41, 497 A.2d 1143, 1150–51 (1985) (noting that the common law is "subject to judicial modification" but also recognizing that "common law principles should not be changed contrary to the public policy of the State set forth by the General Assembly"); Ireland v. State, 310 Md. 328, 331, 529 A.2d 365, 366 (1987) (noting that the court can change the common law but it should not be changed contrary to the intent of the General Assembly).

73. 295 Md. 442, 456 A.2d 894 (1983).

74. *Id.* at 462, 456 A.2d at 904.

75. *Id.* at 444, 69 A.3d at 894. Under the doctrine of contributory negligence, an injured plaintiff is completely barred from recovery in a negligence action when he or she fails to "act

fy a common law rule that "has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people."[76] However, the court questioned whether it should change the common law, noting that "public policy is normally the function of the General Assembly" and that the General Assembly is "expressly empowered" to change the common law by Article 5 of the Maryland Declaration of Rights.[77] Therefore, the court decided that it would be "particularly reluctant to alter a common law rule in the face of indications that to do so would be contrary to the public policy of the State," as set by the General Assembly.[78]

To determine the public policy of the state, the *Harrison* court looked to legislative history. The court found that the General Assembly, from 1966 to 1982, rejected "twenty-one bills seeking to replace the contributory negligence doctrine with a comparative fault system."[79] The court said, "Although not conclusive, the legislature's action in rejecting the proposed change [was] indicative of an intention to retain the contributory negligence doctrine."[80] Additionally, the court thought that the adoption of comparative negligence involved "fundamental and basic public policy considerations" best left to the General Assembly.[81] Given these observations, the court decided to leave any change in the established common law doctrine of contributory negligence to the legislature.[82]

Following *Harrison*, the Court of Appeals continued to view the General Assembly's failure to change common law principles as indicative of legislative intent to retain the status quo.[83] For example, in *Halliday v. Sturm*,[84] the court was asked to abandon the common law consumer expectations test and adopt the risk utility test for products liability claims involving handguns.[85] The court determined that the General Assembly's rejection of multiple bills that would have abandoned the common law consumer expectations test and adopted a risk-utility test indicated a legislative intent not to subject gun manufacturers to the risk utility test.[86] Although the common law was at issue, the court decided to "respect th[e] policy choice"

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with the degree of care which a reasonably prudent person would have exercised for his own safety under the same or similar circumstances." *Id.* at 446, 69 A.3d at 895. Under the doctrine of comparative negligence, losses are apportioned "on the basis of fault, with each party bearing the portion of the loss directly attributable to his conduct." *Id.* at 447, 69 A.3d at 896.

76. *Id.* at 459, 69 A.3d at 903.
77. *Id.* at 460, 69 A.3d at 903.
78. *Id.*
79. *Id.* at 462, 69 A.3d at 904.
80. *Id.*
81. *Id.* at 463, 69 A.3d at 905.
82. *Id.*
83. Halliday v. Sturm, Ruger & Co., 368 Md. 186, 209, 297 A.2d 1145, 1159 (2002).
84. 368 Md. 186, 297 A.2d 1145 (2002).
85. *Id.* at 192, 297 A.2d at 1149.
86. *Id.* at 209, 297 A.2d at 1159.

of the General Assembly.[87] Echoing the language of *Harrison*, the court reasoned that "common law principles should not be changed contrary to the public policy of the state set forth by the General Assembly of Maryland."[88]

In other situations, where the common law was not at issue, the Court of Appeals has similarly viewed legislative inaction as indicative of legislative intent. For example, in *Moore v. State*,[89] the Court of Appeals held that "the General Assembly's repeated refusal to enact bills, which would have adopted a party's particular view of the law, is strong evidence of legislative intent."[90] In *Moore*, the court analyzed whether Section 11-207(a)(5) of the Maryland criminal code prohibits a defendant from using a computer to communicate with a person, whom the defendant believes to be a minor, for purposes of engaging in sexual conduct, but who is actually an adult undercover police officer.[91] The court held that Section 11-207(a)(5) did not as there had been six prior unsuccessful attempts in the General Assembly to amend Section 11-207 to "prohibit computer communications with 'someone believed to be a minor' for the purpose of engaging in sexual conduct."[92] The court noted that "legislative inaction is very significant where bills have repeatedly been introduced in the General Assembly to accomplish a particular result, and where the General Assembly has persistently refused to enact such bills."[93]

C. Coleman v. Soccer Ass'n of Columbia

In the 2013 decision, *Coleman v. Soccer Ass'n of Columbia*,[94] the Court of Appeals refused to change a common law doctrine based on the "General Assembly's repeated refusal to do so."[95] *Coleman*, echoing the reasoning from *Harrison*, tied two major premises together.[96] First, relying on *Felder*, the court determined that it should not change the common law contrary to the intent of the General Assembly.[97] Second, relying on *Moore*, the court determined that legislative inaction is indicative of legisla-

87. *Id.*

88. *Id.* at 208, 297 A.2d at 1158–59 (quoting Kelley v. R.G. Indus., Inc., 304 Md. 124, 141, 249 A.2d 1143, 1151 (1985)).

89. 388 Md. 623, 882 A.2d 256 (2005).

90. *Id.* at 641, 882 A.2d at 267. Note that *Moore* involved the interpretation of a statute, not the merits of a common law doctrine.

91. *Id.* at 624–26, 882 A.2d at 257 (citing MD. CODE ANN., CRIM. LAW § 11-207(a)(5)).

92. *Id.* at 635–36, 641–42, 882 A.2d at 264, 267.

93. *Id.* at 641, 882 A.2d at 267.

94. 432 Md. 679, 69 A.3d 1149 (2013).

95. *Id.* at 695, 69 A.3d at 1158.

96. *See id*. at 694–95, 69 A.3d at 1158 (holding that repeated legislative inaction is indicative of legislative intent and that the court should not change the common law contrary to the intent of the General Assembly).

97. *Id.*

tive intent when multiple bills have been introduced to accomplish a particular result and the General Assembly has rejected those bills.[98]

In *Coleman*, the Court of Appeals was asked, as it was in *Harrison*, to abrogate the common law doctrine of contributory negligence and replace it with the doctrine of comparative negligence.[99] The court noted that since *Harrison*, the General Assembly had rejected multiple bills that would have abandoned the doctrine of contributory negligence and replaced it with the doctrine of comparative negligence.[100] The *Coleman* court, citing *Moore*, reasoned that the 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."[101] Since the court held in *Felder* that the common law should not be changed contrary to the intent of the General Assembly, the court decided that abrogating the doctrine of contributory negligence, "in the face of the General Assembly's repeated refusal to do so, would be totally inconsistent with the court's long-standing jurisprudence."[102]

D. Cases in Contention with Coleman

Before moving on to an analysis of *Coleman*, it is important to point out that *Coleman* is inconsistent with a number of Maryland cases which were neither expressly overturned, mentioned, or even distinguished in *Coleman*. First, there are a number of cases in which the Court of Appeals decided to change the common law despite legislative inaction.[103] Additionally, Maryland's jurisprudence is full of cases in which the Court of Appeals has viewed legislative inaction as a weak indicator of legislative intent.[104] The majority in *Coleman* either outright ignored many of these cases or failed to distinguish them in its decision.[105]

1. Cases in Which the Court of Appeals Decided to Change the Common Law When the General Assembly Failed to Do So

Despite the Court of Appeals reluctance in *Coleman* to change the common law contrary to the supposed intent of the General Assembly, in other cases the court altered or abandoned unjust and outdated common law

98. *Id.* at 693, 69 A.3d at 1157 (citing *Moore*, 388 Md. at 641, 882 A.2d at 267).
99. *Id.* at 682, 69 A.3d 1150.
100. *Id.* at 694, 69 A.3d at 1158.
101. *Id.*
102. *Id.* at 695, 69 A.3d at 1158.
103. *See infra* Section I.D.1.
104. *See infra* Section I.D.2.
105. *See generally Coleman*, 432 Md. 679, 69 A.3d 1149 (2013).

rules when the General Assembly failed to act.[106] In these "outlying" cases, the court firmly asserted its authority to change the common law and determined that it is "eminently wise" of the court to change a common law rule that is a "vestige of the past."[107]

In *Lusby v. Lusby*,[108] the Court of Appeals changed the common law interspousal immunity rule despite the General Assembly's refusal to do so.[109] In *Lusby*, the court was asked to change the common law rule that a "married woman cannot maintain an action against her husband for injuries caused by his negligent or tortious act."[110] Prior to *Lusby*, the court declined to change the interspousal tort immunity rule in *Stokes v. Ass'n of Independent Taxi Operators*,[111] determining that "if the rule is to be changed, the Legislature will have to do it."[112] In *Lusby*, however, the court noted that in the ten years since the *Stokes* decision the General Assembly had not "heeded" the court's suggestions that the General Assembly change the rule.[113] The court found a multitude of reasons to abandon the rule: many other jurisdictions had altered the rule,[114] legal commentators nearly unanimously criticized the rule,[115] and there was "no sound public policy" for preventing one spouse from suing another for outrageous conduct.[116] Therefore, despite the General Assembly's refusal to change the rule, the court changed the common law doctrine of spousal immunity to allow a wife to sue her husband for damages resulting from an "outrageous, intentional tort."[117]

After *Lusby*, the Court of Appeals continued to make changes to the common law doctrine of interspousal immunity.[118] In *Boblitz v. Boblitz*,[119] the court abrogated the interspousal immunity rule in negligence cases.[120] The court acknowledged that "for reasons of certainty and stability, changes

106. Bozman v. Bozman, 376 Md. 461, 830 A.2d 450 (2003); Boblitz v. Boblitz, 296 Md. 242, 462 A.2d 506 (1983); Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978).

107. *Bozman*, 376 Md. at 495, 830 A.2d at 470.

108. 283 Md. 334, 390 A.2d 77 (1978).

109. *Id.* at 357–58, 390 A.2d at 88–89.

110. *Id.* at 337, 390 A.2d at 78 (quoting David v. David, 161 Md. 532, 534, 157 A. 755, 756 (1932)).

111. 248 Md. 690, 237 A.2d 762 (1968).

112. *Id.* at 692, 237 A.2d at 763.

113. *Lusby*, 283 Md. at 357, 390 A.2d at 88.

114. *Id.* at 346–48, 390 A.2d at 83–84.

115. *Id.* at 350, 390 A.2d at 84.

116. *Id.* at 357, 390 A.2d at 88.

117. *Id.* at 335, 390 A.2d at 77.

118. *See, e.g.*, Boblitz v. Boblitz, 296 Md. 242, 275, 462 A.2d 506, 522 (1983) (abandoning "the interspousal immunity rule in this State as to cases sounding in negligence").

119. 296 Md. 242, 462 A.2d 506 (1983).

120. *Id.* at 275, 462 A.2d at 522.

in decisional doctrine ordinarily should be left to the Legislature."[121] The court noted, however, that it has the power to change or modify a common law rule by judicial decision when it finds "in light of changed conditions or increased knowledge that the rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people."[122] The court determined that, since the legislature had not spoken on the topic of interspousal immunity, there was not a "legislative barrier to abrogation of this outmoded rule of law."[123] Therefore, the court abrogated the doctrine of interspousal immunity in negligence cases, determining that the rule was "unsound in the circumstances of modern life."[124]

In *Bozman v. Bozman*,[125] the court ultimately abandoned the doctrine of interspousal immunity despite continued legislative inaction.[126] The court noted that stare decisis is not an "inexorable command," requiring unwavering deference to the legislature.[127] The court found that it is "eminently wise" of the court to abrogate a common law doctrine that is "a vestige of the past."[128] Therefore, the court, noting that many other states had already abandoned the rule, completely discarded the interspousal immunity rule.[129]

2. Cases in Which the Court of Appeals Viewed Legislative Inaction as a Weak Indicator of Legislative Intent

While the Court of Appeals found in *Coleman* that legislative inaction is indicative of legislative intent, in a number of other cases the court held

121. *Id.* at 273, 462 A.2d at 521.

122. *Id.* at 274, 462 A.2d at 521–22 (quoting Harrison v. Montgomery Cty. Bd. of Educ., 295 Md. 442, 460, 456 A.2d 894, 903 (1983).

123. *Boblitz*, 296 Md. at 274, 462 A.2d at 522. The court noted that deference to the legislature may be warranted in cases, such as *Harrison*, where the legislature "repeatedly had rejected efforts to achieve legislatively that which [the court] [was] asked to grant judicially." *Id.* at 274, 462 A.2d at 521. While the majority found that there was no such legislative barrier to changing the doctrine of interspousal immunity in *Boblitz*, this finding is factually incorrect. Judge Couch, in his dissent, noted that the legislature had in fact considered the doctrine of interspousal immunity "seven times without enacting any legislation" since 1959. *Id.* at 287, 462 A.2d at 527 (Couch, J., dissenting). Thus, *Boblitz* was actually quite similar to *Harrison* because both involved a potential change to a common law doctrine that had been repeatedly rejected by the General Assembly.

124. *Id.* at 274, 462 A.2d at 522.

125. 376 Md. 461, 830 A.2d 450 (2003).

126. *Id.* at 462, 830 A.2d at 451.

127. *Id.* at 493, 830 A.2d at 469 (first quoting Perry v. State, 357 Md. 37, 96–100, 741 A.2d 1162, 1194–95 (1999); then quoting Planned Parenthood v. Casey, 505 U.S. 883, 854 (1992)).

128. *Id.*

129. *Id.* at 496–97, 830 A.2d at 471.

that legislative inaction is a poor indicator of legislative intent.[130] In these cases, the court was reluctant to draw inferences about legislative intent from legislative inaction "because more than one purpose can be attributed to the defeat of legislation."[131]

In the 1973 decision *Hearst Corp. v. State Department of Assessments & Taxation*,[132] the Court of Appeals was unimpressed by arguments that the General Assembly's failure to act after a court decision constituted "legislative acquiescence" to that decision because there were "alternative rationalizations" for the legislature's failure to act that were "equally palatable."[133] The *Hearst* court buttressed its decision by quoting the Supreme Court's decision in *United States v. Price*:[134] "Such nonaction by Congress [failure to act after an adverse court decision] affords the most dubious foundation for drawing positive inferences."[135]

A few years later in *Harden v. Mass Transit Administration*,[136] the Court of Appeals was equally unimpressed by an argument that the General Assembly's failure to pass bills which would have excluded the Mass Transit Administration ("MTA") from the coverage of "no fault" statutes indicated a legislative intent to require that MTA maintain "no fault" insurance for passengers.[137] The court noted that the failure of the bills was a "weak reed" upon which to draw positive inferences.[138] The court reasoned "[i]t could equally be argued that the General Assembly thought it perfectly plain that MTA was not included within the framework of the statute and, therefore, no amendment was necessary."[139] Following *Harden*, the court, in both *Automobile Trade Ass'n v. Insurance Commissioner* and *Police Commissioner v. Dowling*, found the failure of a bill's passage is a poor indication for understanding legislative intent.[140]

130. Goldstein v. State, 339 Md. 563, 664 A.2d 375 (1995); Harden v. Mass Transit Admin., 277 Md. 399, 354 A.2d 817 (1976); Hearst Corp. v. State Dep't of Assessments & Taxation, 269 Md. 625, 308 A.2d 679 (1973).

131. *Goldstein*, 339 Md. at 570, 664 A.2d at 378.

132. 269 Md. 625, 308 A.2d 679 (1973).

133. *Id.* at 644–45, 308 A.2d at 689.

134. 361 U.S. 304 (1960).

135. *Hearst Corp*., 269 Md. at 644, 308 A.2d at 689 (alteration in original) (quoting United States v. Price, 361 U.S. 304, 311–12 (1960)).

136. 277 Md. 399, 354 A.2d 817 (1976).

137. *Id.* at 401, 406, 354 A.2d at 818, 820–21.

138. *Id.* at 406, 354 A.2d at 820–21.

139. *Id.* at 406, 354 A.2d at 821.

140. Auto. Trade Ass'n v. Ins. Comm'r, 292 Md. 15, 24, 437 A.2d 199, 203 (1981); Police Comm'r v. Dowling, 281 Md. 412, 420–21, 379 A.2d 1007, 1012 (1977) (noting that a party's attempt to draw a favorable inference from the failure of a bill is a weak argument because that bill could have failed for a variety of reasons).

In *Goldstein v. State*,[141] the Court of Appeals continued to view the failure of bills as a "weak reed upon which to lean in ascertaining legislative intent."[142] The court further stated: "[T]he mere fact that the General Assembly has declined to adopt a particular proposal does not preclude this Court from incorporating the substance of that proposal into the common law."[143] In *Goldstein*, the petitioner argued that the rejection of multiple bills that would authorize the use of "laser speed determinations as evidence in legal proceedings" was evidence that the General Assembly concluded that such measures "are not sufficiently reliable to be admissible" in court.[144] The court noted that legislative inaction in this case was ambiguous because "more than one purpose can be attributed to the defeat of the legislation."[145]

Despite the cases mentioned above, contributory negligence remains the law of Maryland because, as explained in *Coleman*, (1) the Court of Appeals believes it should not change the common law contrary to legislative intent and (2) the Court of Appeals views the failure of the legislature to change the common law as a strong indicator of legislative intent to maintain the current state of the law.[146]

II. ANALYSIS

In *Coleman v. Soccer Ass'n of Columbia*, the Court of Appeals held that it should not change the common law doctrine of contributory negligence in the face of the General Assembly's repeated refusal to do so.[147] The court erred for two reasons. First, as examined in Section A, the General Assembly's repeated failure to change a common law doctrine is not strong evidence of a legislative intent to maintain the status quo.[148] Second, as discussed in Section B, the court should not defer to the legislature when it is considering a change to a judicially created common law doctrine.[149] Instead, the court should take action and change a common law doctrine when it finds that the doctrine is "unsound in the circumstances of modern life," as argued in Section C.[150] Finally, the Court of Appeals should aban-

141. 339 Md. 563, 664 A.2d 375 (1995).

142. *Id.* at 569–70, 664 A.2d at 378 (quoting *Auto. Trade Ass'n*, 292 Md. at 24, 437 A.2d at 203).

143. *Id.*

144. *Id.* at 568–69, 664 A.2d at 377.

145. *Id.* at 570, 664 A.2d at 378.

146. Coleman v. Soccer Ass'n, 432 Md. 679, 694–95, 69 A.3d 1149, 1158 (2013).

147. *See id.* at 715, 69 A.3d at 1170 (Harrell, J., dissenting) ("This Court Need Not Defer to Continued Legislative Inaction").

148. *See infra* Section II.A.

149. *See infra* Section II.B.

150. Harrison v. Montgomery Cty. Bd. of Educ., 295 Md. 442, 459, 456 A.2d 894, 903 (1983); *see infra* Section II.C.

don the common law doctrine of contributory negligence, as discussed in Section D.[151]

A. The General Assembly's Repeated Failure to Change a Common Law Doctrine Is Not Strong Evidence of a Legislative Intent to Maintain the Status Quo

In *Coleman*, the Court of Appeals erred when it concluded that the General Assembly's refusal to change an uncodified common law doctrine was strong evidence of a legislative intent to retain that doctrine.[152] Such a conclusion ignores the realities of the legislative process.[153] It is often difficult, if not impossible, to determine the exact reason for the failure of a bill.[154] Additionally, the failure of bills often represent flaws inherent in the legislative process rather than public policy.[155]

1. It Is Nearly Impossible to Draw Accurate Conclusions from the Failure of One or Even Many Bills

Some judges argue that while legislative inaction does not always provide "crystalline revelation," it can be "probative to varying degrees."[156] For example, on the surface it may seem logical for the Court of Appeals to assume that the General Assembly intended to retain the doctrine of contributory negligence, given that multiple bills, which would have abandoned contributory negligence and adopted comparative negligence, failed in the General Assembly. However, drawing such a conclusion about legislative intent from the failure of these bills ignores other potential conclusions that can be logically drawn from the failure of legislation.[157] For example, Justice Scalia argued:

> [I]t [is] impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.[158]

Applying Justice Scalia's framework to the repeated failure of comparative negligence bills in the General Assembly demonstrates that the

151. *See infra* Section II.D.

152. *See* Johnson v. Transp. Agency, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting) ("[O]ne must ignore rudimentary principles of political science to draw any conclusions regarding [legislative] intent from the *failure* to enact legislation.").

153. *See id.*

154. *See infra* Section II.A.1.

155. *See infra* Section II.A.2.

156. *Johnson*, 480 U.S. at 629 n.7.

157. *Id.* at 672 (Scalia, J., dissenting).

158. *Id.*

Coleman court erred when it held that the failure of these bills represented the General Assembly's approval of the doctrine of contributory negligence. It is possible that the failure of these bills represented approval of the doctrine of contributory negligence, but it could also represent a number of other things. First, the General Assembly's failure to act could represent disagreement about how to change the doctrine of contributory negligence. For example, the bills cited by the court in *Coleman* could have failed because the General Assembly could not agree on whether pure comparative fault or modified comparative fault was the better doctrine to adopt.[159] Additionally, the General Assembly may have been unable to agree on how to change other negligence doctrines, such as the doctrine of joint and several liability, which would be affected by the adoption of comparative negligence.[160] Second, legislators could have concluded that changing a judicially created common law doctrine was a job better suited for the Court of Appeals than the General Assembly.[161] For example, in the mid 1990's, some Maryland legislators who voted against replacing comparative negligence with comparative fault explained their vote by asserting that such a change was a "matter for the courts to decide."[162] Third, the failure of the bills could have represented indifference on the part of the General Assembly.[163] In some of the legislative sessions in which these comparative negligence bills were introduced, the General Assembly could have simply had more pressing issues to address and let comparative bills die in committee in order to reserve time to address other issues. Finally, many of the bills could have failed simply due to political cowardice.[164] Legislators could have voted down bills due to fear of political reprisals from powerful Maryland lobby groups that favor retaining the doctrine of contributory negli-

159. *See* DEP'T OF LEGIS. SERVS., *supra* note 2, at 17 (describing the various negligence systems in the fifty states and D.C.). "Under a pure comparative fault system, each party is held responsible for damages in proportion to the party's fault. Regardless of the level of the plaintiff's own negligence, the plaintiff can still recover something from a negligent defendant." *Id.* at 4. In contrast, "[u]nder a modified comparative fault system, each party is held responsible for damages in proportion to his or her own fault, unless the plaintiff's negligence reaches a certain designated percentage of fault." *Id.* at 5.

160. *See id.* at 18–21 (examining how other negligence doctrines are affected by the adoption of comparative negligence).

161. *See* Donald G. Gifford & Christopher J. Robinette, *Apportioning Liability in Maryland Tort Cases: Time to End Contributory Negligence and Joint and Several Liability*, 73 MD. L. REV. 701, 702 (2014) ("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.'").

162. *Id.*

163. *Johnson*, 480 U.S. at 672 (Scalia, J., dissenting).

164. *See id.* (identifying "political cowardice" as a reason why bills fail).

gence.[165] Admittedly, these conclusions are speculative, but no less speculative than the court's conclusion in *Coleman*. In *Coleman*, the Court of Appeals ultimately drew a single inference about the failure of multiple bills without considering any other potential explanations.[166]

Moreover, the *Coleman* court's conclusion that the General Assembly's refusal to change a common law rule is strong evidence of a legislative intent to retain the rule ignores the fact that the General Assembly can codify a common law rule by statute. If the General Assembly truly wanted to retain the doctrine of contributory negligence, it should have passed a bill codifying the doctrine. The General Assembly actually rejected multiple efforts to codify the doctrine of contributory negligence.[167] As pointed out by Professors Donald Gifford and Christopher Robinette, "the [*Coleman*] 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. The court cannot have it both ways."[168]

Given the multitude of potential reasons for legislative inaction, it is difficult, if not impossible, for the court to draw a single conclusion from the failure of one or even many bills.[169] The court may have a stronger argument for drawing a conclusion from legislative inaction when there is clear evidence of precisely why a bill failed. In *Coleman*, however, the court makes a highly speculative conclusion without considering other possibilities.[170]

Despite the Court of Appeals's holding in *Coleman*, the court has recognized on other occasions that it is difficult, if not impossible, to draw a single conclusion from legislative inaction.[171] For example, in *Goldstein*, the Court of Appeals found that legislative inaction is often ambiguous because "more than one purpose can be attributed to the defeat of legislation."[172] Similarly, in *Hearst Corp. v. State Department of Assessments & Taxation* the court held that drawing one conclusion from legislative inaction is flawed when there are "alternative rationalizations" for legislation

165. *See* Gifford & Robinette, *supra* note 161, at 702 (acknowledging the power of business and insurance lobbyists who oppose the adoption of comparative negligence).

166. *See* Coleman v. Soccer Ass'n, 432 Md. 679, 694–95, 69 A.3d 1149, 1158 (2013) (concluding that the "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").

167. *See id.* at 719 (noting the General Assembly's failure to codify the doctrine of contributory negligence); *see also* DEP'T OF LEGIS. SERVS., *supra* note 2, at 41 (describing the failure of bills in 2011 and 2012 which would have codified the doctrine of contributory negligence).

168. *See* Gifford & Robinette, *supra* note 161, at 719.

169. *See Johnson*, 480 U.S. at 671–72 (Scalia, J., dissenting).

170. *See generally Coleman*, 432 Md. at 694–95, 69 A.3d at1158.

171. *See* Gifford & Robinette, *supra* note 161, at 717 ("The legislature's failure to act, however, does not necessarily indicate its opposition to a proposed piece of legislation.").

172. Goldstein v. State, 339 Md. 563, 570, 664 A.2d 375, 378 (1995).

inaction that are "equally palatable."[173] The Supreme Court has similarly acknowledged that "nonaction by Congress affords the most dubious foundation for drawing positive inferences."[174] Each of these decisions reflects an understanding that it often is difficult or impossible to determine why a bill or even multiple bills failed, as each decision recognizes that there are often alternate reason for not passing desirable legislation.

2. The Failure of Bills Often Represents Inherent Flaws in the Legislative Process Rather than Public Policy

The Court of Appeals in *Coleman* inferred public policy from legislative inaction when it concluded that the General Assembly's repeated failure to pass comparative negligence bills was strong evidence of a public policy in Maryland to retain the doctrine of contributory negligence.[175] However, inferring public policy from legislative inaction ignores the flaws inherent in the legislative process.[176] First, the structure of the legislative process makes it "far more likely that something will not happen (inaction) than that it will (action)."[177] Even if a majority of the members of a legislature favor a piece of legislation, the bill can be killed by a hostile committee or hostile party leadership.[178] Second, inferring public policy from legislative inaction is flawed because the legislative process favors small, wealthy, well-defined, and well-organized groups rather than the desires of the "disorganized general public."[179] Legislators often face immense pressure from these small, well-organized groups while facing very little from the unorganized general public.[180] Therefore, legislative inaction often represents the influence of well-organized lobby groups who are able to use their influence to kill legislation in an environment that already favors inaction.[181]

The history of comparative negligence legislation in Maryland provides a good illustration of how the failure of legislation often represents the flaws inherent in the legislative process, particular the ability of a small committee to kill a bill, rather than public policy.[182] Between 1966 and

173. Hearst Corp. v. State Dep't of Assessments & Taxation, 269 Md. 625, 644, 308 A.2d 679, 689 (1973).

174. United States v. Price, 361 U.S. 304, 310–11 (1960).

175. *Coleman*, 432 Md. at 694–95, 69 A.3d at 1158.

176. *See* Gifford & Robinette, *supra* note 161, at 718 ("It is far easier to kill a legislative proposal than it is to enact it.").

177. William N. Eskridge Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 98 (1988).

178. *Id.* at 99.

179. *See id.* at 105.

180. *Id.*

181. *See id.* at 105 ("[E]ven when the legislature does respond, its pattern of response is biased in favor of well-organized (and frequently wholly unrepresentative) groups.").

182. 4 FOWLER V. HARPER ET AL., HARPER, JAMES & GRAY ON TORTS § 22.18 at 495 (3d ed. 2006).

1982, twenty-one bills proposing the adoption of comparative negligence were introduced in the General Assembly.[183] Nineteen died in the House Judiciary Committee.[184] The only two bills that emerged from the House Judiciary Committee passed the House of Delegates by overwhelming margins, one passed by a vote of 114 to 8 and the other passed by a vote of 105 to 12.[185] Both these bills were later killed by the Senate Judiciary Committee.[186] In *Harrison v. Montgomery County Board of Education*, the Court of Appeals refused to abandon the doctrine of contributory negligence, concluding that the failure of these twenty bills was "indicative of an intention to retain the contributory negligence doctrine."[187] Yet, as noted above, the legislative history suggests that the majority of the members of the General Assembly actually favored the change.[188] In the year after *Harrison* was decided, the Maryland Senate passed a comparative negligence bill by a margin of 45 to 1.[189] This bill was defeated, however, in the House Judiciary Committee.[190] Some scholars have gone as far to argue the failure of these bills was more indicative of the "superior ability of insurers' lobbyists to influence a committee or its chairman," than public policy.[191] At the very least though, the failure of comparative negligence bills from 1966 to1984 was less indicative of a public policy favoring contributory negligence and more indicative of the flaws inherent in the legislative process, particularly the ability of a small committee to kill a piece of legislation.[192]

For the above reasons, the Court of Appeals should not draw inferences about legislative intent and public policy from the General Assembly's repeated failure to change an uncodified common law doctrine. It is nearly impossible to draw accurate conclusions from the failure of one or even many bills.[193] Additionally, the failure of legislation often represents flaws in the legislative process, not public policy.[194]

183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* (quoting Harrison v. Montgomery Cty. Bd. of Educ., 295 Md. 442, 462, 456 A.2d 894, 904 (1983)).
188. *See id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *See supra* Section I.A.1.
194. *See supra* Section I.A.2.

B. The Court of Appeals Should Not Defer to the Legislature When It Is Considering a Change to an Uncodified, Judicially Created Common Law Doctrine

In *Coleman*, the Court of Appeals did not contest that it had the power change the common law. Indeed, the court stated that the "principle of stare decisis should not be construed to 'inhibit [this Court] from changing or modifying a common law rule by judicial decision where we find, in light of changed conditions or increased knowledge, that the rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people."[195] The court held, however, that it should not change the common law contrary to the intent of the General Assembly because a "declaration of the public policy of Maryland is normally the function of the General Assembly; that body, by Article 5 of the Maryland Declaration of Rights is expressly empowered to revise the common law of Maryland by legislative enactment."[196]

The Court of Appeals should not defer to the legislature when it is presented with the opportunity to make a change to an outdated common law rule.[197] When the court refuses to take action and change an outdated common law rule, it perpetuates injustices that it has the power to correct, undermining public confidence in the courts and creating a mutual state of inaction with the legislature.[198] Additionally, the Court of Appeals shirks its duty as a common law court when it refuses to change an unjust common law doctrine.[199] Furthermore, the Court of Appeals is an appropriate forum for changing the common law.[200]

1. When the Court Refuses to Change the Common Law, It Perpetuates Injustices It Has the Power to Correct

When a court is asked to overrule a prior decision, "consideration must be given to the doctrine of stare decisis—the policy which entails the reaffirmation of a decisional doctrine of an appellate court, even though if considered for the first time, the Court might reach a different conclusion."[201] Courts like stare decisis because it ensures stable and certain application of

195. Coleman v. Soccer Ass'n, 432 Md. 679, 689, 69 A.3d 1149, 1155 (2013) (alteration in original) (quoting Harrison v. Montgomery Cty. Bd. of Educ., 295 Md. 442, 459, 456 A.2d 894, 903 (1983)).

196. *See id.* (quoting *Harrison*, 295 Md. at 459, 456 A.2d at 903).

197. *See id.* at 715, 69 A.3d at 1170 (Harrell, J., dissenting) (arguing that the Court of Appeals need not defer to continued legislative inaction regarding the doctrine of contributory negligence).

198. *See infra* Section II.B.1.

199. *See infra* Section II.B.2.

200. *See infra* Section II.B.3.

201. *Harrison*, 295 Md. at 458, 456 A.2d at 902 (emphasis omitted).

legal principles.[202] Admittedly, public confidence in the courts largely depends on "uniformity and consistency" in the way the law is interpreted and applied.[203] Those who favor strict adherence to stare decisis see the legislature as the more appropriate branch for changing unjust or outdated laws because the legislature is commonly seen as the body from which public policy emanates.[204] As the Court of Appeals stated in *Harrison*: "[F]or reasons of certainty and stability, changes in decisional doctrine are left to the Legislature."[205]

When it comes to common law doctrines, however, deference to the legislature and mechanical adherence to the doctrine of stare decisis perpetuates injustices that the court should correct. After all, what good is the consistent and uniform application of unjust and outdated rules? Other courts across the country have recognized this problem and noted the necessity for judicial action regarding unjust, judge-created, common law doctrines. For example, in *Alvis v. Ribar*,[206] the Supreme Court of Illinois abandoned the doctrine of contributory negligence, finding that "the need for stability in law must not be allowed to obscure the changing needs of society or to veil the injustice resulting from a doctrine in need of reevaluation."[207] Similarly, in *Hargrove v. Town of Cocoa Beach*,[208] the Florida Supreme Court abandoned a common law rule which immunized municipal corporations against liability by torts committed by police officers, stating, "[T]he courts should be alive to the demands of justice."[209]

Furthermore, when the Court of Appeals refuses to correct injustices created by outdated common law doctrines, it undermines public confidence in the courts. In *McIntyre v. Balentine*,[210] the Supreme Court of Tennessee abandoned the doctrine of contributory negligence, noting that "mindless obedience to stare decisis can confound the search for truth and foster an attitude of contempt" towards the courts.[211] The *Balentine* court affirmed its commitment to justice over consistency and stability, stating, "Justice simply will not permit our continued adherence to a [contributory negligence] rule that, in the face of a judicial determination that other bear primary responsibility, nevertheless completely denies injured litigants recom-

202. Demuth v. Old Town Bank, 37 A. 266, 266 (1897).

203. Hanover v. Ruch, 809 S.W. 893, 898 (Tenn. 1991) (quoting Davis v. Davis, 657 S.W.2d 753, 758 (Tenn. 1983)).

204. *See Harrison*, 295 Md. at 460, 456 A.2d at 903 ("[W]e have always recognized that declaration of the public policy is normally the function of the General Assembly.").

205. *Id.* at 459, 456 A.2d at 902 (quoting Deems v. Western Maryland Ry., 247 Md. 95, 102, 231 A.2d 514 (1966)).

206. 421 N.E.2d 886 (Ill. 1981).

207. *Id.* at 896.

208. 96 So. 2d 130 (Fla. 1957).

209. *Id.* at 132.

210. 833 S.W.2d 52 (Tenn. 1992).

211. *Id.* at 56 (quoting Hanover v. Ruch, 809 S.W.2d 893, 898 (Tenn. 1991)).

pense for their damages."[212] Similarly, in *Hanover v. Ruch*,[213] the Supreme Court of Tennessee recognized, "As a living and breathing thing, the [Court should change the law] when necessary to serve the needs of the people. When this basic purpose of the law is slighted or overlooked, then it loses a high degree of its majesty."[214]

The facts of *Coleman* illustrate the injustice that results from the Court of Appeal's refusal to change an outdated common law doctrine. In 2008, James Coleman, a twenty-year-old volunteer coach, kicked a soccer ball into a soccer goal during a youth soccer practice in Howard County, Maryland.[215] As Coleman passed under the goal's crossbar, "he jumped up and grabbed the crossbar," an act soccer players "commonly" engage in.[216] Tragically, "the goal was not anchored to the ground," causing Coleman to fall "backwards," pulling the goal with him and "drawing the weight of the crossbar onto his face."[217] As a result, Coleman "suffered multiple severe facial fractures which required surgery and the placing of three titanium plates in his face."[218] Coleman filed a lawsuit against the Soccer Association of Columbia and a Howard County jury found the soccer club's negligence in failing to anchor the goal properly caused Coleman's injuries.[219] The jury, however, also found that Coleman acted negligently in hanging from the crossbar.[220] Because of this contributory negligence finding, Coleman was barred from any recovery and had to bear the full costs of his accident.[221] In the ensuing appeal, the Court of Appeals ultimately refused to abandon contributory negligence in favor of comparative fault, allowing the soccer club to escape liability.[222] In *Coleman*, the Court had the power to, and could have adopted comparative negligence, forcing the soccer club to pay its fair share of Coleman's damages. Instead, the court's adherence to stare decisis forced Coleman to bear the full costs of the accident.

Despite the Court of Appeals's refusal to abrogate the common law doctrine of contributory negligence in *Coleman*, it has recognized in other cases that strict adherence to stare decisis and continued deference to the legislature perpetuates injustices that the court should correct. For example, in *Bozman v. Bozman*,[223] the Court of Appeals acknowledged that:

212. *Id.*
213. 809 S.W.2d 893 (Tenn. 1991).
214. *Id.* at 898.
215. Coleman v. Soccer Ass'n, 432 Md. 679, 682, 69 A.3d 1149, 1151 (2013).
216. *Id.* at 683, 69 A.3d at 1151.
217. *Id.*
218. *Id.*
219. *Id.* at 683–84, 69 A.3d at 1151–52.
220. *Id.* at 684, 69 A.3d at 1152.
221. *Id.* at 684–85, 69 A.3d at 1152.
222. *Id.* at 682, 69 A.3d at 1150.
223. 376 Md. 461, 830 A.2d 450 (2003).

> Strict adherence to the doctrine of stare decisis would severely limit a court's ability to decide disputes, even in cases where the applicable guiding law had been decided incorrectly, or, in times of change social circumstance. Under such a strict application of stare decisis, the United States Supreme Court would have to have deferred to Congressional action because it would have been powerless to end segregation in public education [as it did in *Brown v. Board of Education*[224]], with the result that the judicially created doctrine of "separate but equal," [laid down in *Plessy v. Ferguson*[225]] would have continued to be the law.[226]

To be fair, the court in *Coleman* did not dispute the courts ability to change the common law, it only suggested that it should let the legislature do it instead.[227] However, deference to the legislature leads to the same result, the law does not change. In the example mentioned above, if the Court in *Brown* had reaffirmed *Plessy* and deferred to Congress on the issue of segregation, the country would have likely waited longer for congress to end "separate but equal."[228]

Finally, the Court of Appeals refusal to change the common law essentially creates a staring contest where the "court awaits action by the legislature and the legislature awaits guidance from the court."[229] This mutual state of inaction may be why Maryland has not yet abandoned the doctrine of contributory negligence.[230] When a mutual state of inaction exists and causes an outdated and unjust common law doctrine to remain unchanged, the court should act. As the Illinois Supreme Court pointed out in *Alvis*, when the legislature has "failed to act to remedy a gap in the common law that results in injustice, it is the imperative duty of the court to repair that injustice and reform the law to be responsive to the demands of society."[231]

2. In Coleman*, the Court Ignored Its Obligations as a Common Law Court*

By refusing to change outdated and unjust common law doctrines, the Court of Appeals ignores the obligations of a common law court.[232] The

224. 347 U.S. 483 (1954).

225. 163 U.S. 537 (1896).

226. *Bozman*, 376 Md. at 470, 830 A.2d at 494 (citations omitted).

227. *Coleman*, 432 Md. at 689, 69 A.3d at 1154–55.

228. *Bozman*, 376 Md. at 494, 830 A.2d at 470 (quoting *Plessy*, 163 U.S. 537).

229. Alvis v. Ribar, 421 N.E.2d 886, 896 (Ill. 1981).

230. *See* Gifford & Robinette, *supra* note 161, at 702 (noting that both the Court of Appeals and the General Assembly have refused to abandon the doctrine of contributory negligence).

231. *Ribar*, 421 N.E.2d at 896.

232. *See* Donald G. Gifford, *The Death of the Common Law: Judicial Abdication and Contributory Negligence in Maryland*, 73. MD. L. REV. ENDNOTES 1, 11 (2014) ("When it comes to

common law is judge-created and it is primarily the duty of the courts, not the legislature, to change the common law when the "circumstances warrant modification."[233] In his article, *The Death of the Common Law*, Professor Donald Gifford points out, "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.'"[234] In fulfilling this duty, the court must look to past precedents, but it should not mechanically adhere to those precedents.[235] Professor Gifford argues that the common law must evolve with "societal norms" and unjust precedents should be critically evaluated.[236] Professor Gifford quotes Justice Harlan Stone: "[T]he law itself is something better than its bad precedents . . . the bad precedent must on occasion yield to the better reason."[237]

Contemporary academics are not the only ones who believe that it is primarily the duty of the court to change the common law. Maryland's founders also understood that it was primarily the duty of the judiciary to determine whether common law principles should be incorporated into the law of Maryland or abandoned. Jeremiah Chase, the Chief Judge of the Maryland Court of Appeals from 1806 to 1826, a drafter of the Maryland Constitution of 1776, a member of the Continental Congress, a drafter of the Northwest Ordinance, and delegate to the state convention of 1788 to ratify the Federal Constitution, stated simply, "Whether particular parts of the common law are applicable to our local circumstances and situation, and our general code of laws and jurisprudence is a question that comes within the province of the courts of justice and is to be decided by them."[238] Chief Judge Chase also noted that the judiciary had the power to decide what parts of the common law have become "obsolete from *non-user* or other cause."[239] Chief Judge Chase, a drafter of Maryland's Constitution, understood that while the state legislature holds concurrent power to change the common law, the judiciary has the primary duty to answer common law questions and determine which common law principles are applicable to "local circumstances" and which are not.[240] Chief Judge Chase's opinion

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the common law, however, the courts have the responsibility—indeed, the obligation, the duty—to establish the law unless and until the legislature acts.").

233. *See id.* at 10.

234. *See id.* (quoting Ass'n of Indep. Taxi Operators, Inc. v. Yellow Cab Co., 198 Md. 181, 204, 83 A.2d 106, 117 (1951)).

235. *See id.* at 9 (noting that few American judges, lawyers, and legal scholars today subscribe to the views of "legal formalism").

236. *Id.* at 9–10.

237. *Id.* at 9 (alterations in original) (quoting Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 8 (1936)).

238. State v. Buchanan, 5 H. & J. 317, 365–66 (1821); *see* WAKELYN, *supra* note 14, at 42–43 (describing Chief Judge Chase's impressive resume and role in revolutionary Maryland).

239. *Buchanan*, 5 H. & J. at 366.

240. *Id.* at 365–66.

reflects an understanding that the express provision in the Maryland Declaration of Rights which gives the General Assembly to change the common law does not diminish the Court of Appeals's power to change the common law.[241]

Courts in other jurisdictions have also recognized that it is primarily the duty of the judiciary to change the common law. In *Hargrove*, the Florida Supreme Court pointed out the absurdity of a court refusing to change a doctrine that it adopted or created, stating "[w]e can see no necessity for insisting on legislative action in a matter which the courts themselves originated."[242] The Florida Supreme Court further emphasized this point in *Gates v. Foley*,[243] clarifying that "[l]egislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly non-statutory, when we refuse to reconsider an old and unsatisfactory court-made rule."[244] The Maryland Court of Appeals, prior to *Coleman*, recognized that the actions of the legislature do not affect the ability of the court to change the common law. In *Goldstein*, the court stated "the mere fact that the General Assembly has declined to adopt a particular proposal does not preclude this Court from incorporating the substance of that proposal into the common law."[245]

3. The Court Is an Appropriate Forum for Changing the Common Law

In *Coleman*, the Court of Appeals reasoned that changing an outdated common law doctrine, although created by the judiciary, often involves the kind of policy considerations best left to the legislature.[246] In both *Harrison* and *Coleman*, the court determined that abandoning the common law doctrine of contributory negligence and adopting a form of comparative negligence was a "decision [that] would encompass a variety of choices to be made."[247] Not only would a change to comparative negligence have major

241. *See* MD. CONST. DECL. OF RTS. art. 5(a)(1) ("That the inhabitants of Maryland are entitled to the Common Law of England . . . subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State."). *Contra* Harrison v. Montgomery Cty. Bd. of Educ., 295 Md. 442, 460, 456 A.2d 894, 903 (1983) (deferring to the legislature because the General Assembly is "expressly empowered" by "Article 5 of the Maryland Declaration of Rights" to "revise the common law of Maryland by legislative enactment").

242. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957).

243. 247 So. 2d 40 (Fla. 1971).

244. *Id.* at 43.

245. Goldstein v. State, 339 Md. 563, 569–70, 664 A.2d 375, 378 (1995).

246. *See* Coleman v. Soccer Ass'n, 432 Md. 679, 682, 69 A.3d 1149, 1150 (2013) (describing the courts reluctance to abandon the doctrine of contributory negligence in favor of comparative negligence because such change involves "policy considerations" that are better left to the legislative (quoting *Harrison*, 295 Md. at 463, 456 A.2d at 905)).

247. *Id.* at 690, 69 A.3d at 1155.

changes "on other fundamental areas of negligence law,"[248] such as the last clear chance doctrine and the doctrine of joint and several liability,[249] the court would also have to choose between pure comparative negligence or a form modified comparative negligence.[250] Both the *Harrison* and *Coleman* courts concluded that such a decision "'involves major policy considerations' of the sort best left to the General Assembly."[251]

The *Harrison* and *Coleman* courts ignored the fact that the courts are well equipped to deal with the kinds of policy issues implicated by a change to a common law doctrine.[252] The kinds of policy decisions implicated by a change in a common law doctrine involve arguments about fairness and justice that "are characteristically the kinds of arguments that courts consider in fashioning legal doctrine."[253] In addition, other state courts that abandoned contributory negligence were able to resolve most of the collateral issues associated with a switch to comparative negligence. For example, the Tennessee Supreme Court, in *McIntyre*, solved most of the collateral issues associated with a change from contributory to comparative negligence in a single opinion.[254] In less than two pages, the court adopted modified comparative negligence, abandoned the last clear chance doctrine and joint and several liability, resolved statutory issues associated with abandoning contributory negligence, and even set forth suggested jury instructions for Tennessee trial courts to use.[255]

The Court of Appeals is capable of resolving all the collateral issues implicated by a change to common law doctrine, like the doctrine of contributory negligence. However, the court need not simultaneously resolve

248. *Id.* at 688, 69 A.3d at 1154.

249. Under the last clear chance doctrine, "when a defendant is negligent and the plaintiff is contributorily negligence, but the defendant has 'a fresh opportunity (of which he fails to avail himself) to avert the consequences of his original negligence and the plaintiff's contributory negligence,' the defendant will be liable despite the plaintiff's contributory negligence." DEP'T OF LEGIS. SERVS., *supra* note 2, at 4 (quoting Smiley v. Atkinson, 12 Md. App. 543, 553, 280 A.2d 277, 283 (1971)). The last clear chance doctrine was created to mitigate the harshness of contributory negligence and has mostly been abandoned by states who have adopted comparative negligence. *Id.* at 7. Under the doctrine of joint and several liability, "each of two or more defendants who is found liable for a single and indivisible harm to the plaintiff is subject to the plaintiff for the entire harm." *Id.* (quoting H. SCHULMAN ET AL., CASES AND MATERIALS ON THE LAW OF TORTS (4th ed. 2003). Therefore, the plaintiff can collect the entire judgement from one defendant. *Id.*

250. *Coleman*, 432 Md. at 688, 69 A.3d at 1154 (quoting *Harrison*, 295 Md. at 455, 456 A.2d at 900).

251. *Coleman*, 432 Md. at 690, 69 A.3d at 1155 (quoting *Harrison*, 295 Md. at 462, 456 A.2d at 904).

252. *See* Kenneth S. Abraham, *Adopting Comparative Negligence: Some Thoughts for the Late Reformer*, 41 MD. L. REV. 300, 305 (1982) (noting that the common law is "judge-made" and that the courts have the "authority and the competence to modify it").

253. *Id.* at 304.

254. McIntyre v. Balentine, 833 S.W.2d 52, 57–58 (Tenn. 1992).

255. *Id.* at 57–58.

all the issues that may be implicated by a change in a common law doctrine.[256] Even though a change in the common law doctrine of contributory negligence may affect other fundamental issues of negligence law, the court could resolve many of the ancillary issues as they arise on a "case-by-case basis."[257] When legislatures in other states change a common law doctrine by statute, they rarely "develop detailed frameworks for implementing the doctrine and resolving the issues that arise after its adoption."[258]

Critics may argue that it is antidemocratic for the Court of Appeals to change a common law doctrine and that change "should be made by a representative branch of government."[259] However, this argument ignores the relationship between the legislature and the court with regard to the common law. "Unlike judicial resolution of constitutional questions," the Court of Appeals's decision to change a common law doctrine can be "overturned or modified by the legislature."[260] If the legislature finds the court's decision to modify the common law unwise, it still has the power to change it back by statute.[261] If a court's decision to change a common law doctrine is met with public animosity, the legislature still has the ability to remedy it.[262]

Additionally, critics who argue that allowing the court to change the common law is antidemocratic forget the democratic checks on the judges who sit on the Maryland Court of Appeals.[263] Unlike Supreme Court Justices, who are appointed for life, the judges on the Maryland Court of Appeals are subject to potential removal by voters every ten years.[264] Under the Maryland Constitution:

> The continuance in office of a judge of the Court of Appeals is subject to approval or rejection by the registered voters of the appellate judicial circuit from which he was appointed at the next general election following the expiration of one year from the date of the occurrence of the vacancy which he was appointed to fill, and at the general election next occurring every ten years thereafter.[265]

This provision gives citizens the opportunity to directly remove judges on the Court of Appeals whom they are dissatisfied with every ten years.[266]

256. *See* Abraham, *supra* note 252, at 305.
257. *Id.*
258. *Id.* at 306.
259. *Id.* at 304.
260. *Id.* at 306.
261. *Id.*
262. *Id.*
263. *See* MD. CONST. art IV, § 5A(d).
264. *Id.*
265. *Id.*
266. *Id.*

Therefore, any argument that allowing the Court of Appeals to change common law doctrines is antidemocratic is weak, because the judges on the Court of Appeals can be held accountable by voters similar to members of the General Assembly.[267]

For the above reasons, the court should not defer to the legislature when considering a change to an uncodified, judicially created, common law doctrine. When the court defers to the legislature, it perpetuates injustices that it has the power to correct and should correct.[268] Additionally, the court is competent to change common law doctrines and judicial action in such scenarios does not undermine democratic values.[269]

C. The Court Should Take Action and Change a Common Law Doctrine When It Finds the Doctrine Has Become "[U]nsound in the [C]ircumstances of [M]odern [L]ife"[270]

Rather than waiting for the legislature to change outdated and unjust common law doctrines, the Court of Appeals should change the common law when, "in light of changed conditions or increased knowledge," the "rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people."[271] To determine whether a common law doctrine has become "unsound in the circumstances of modern life," the court should evaluate the original rationale for the common law doctrine and the current justifications offered for the rules continued use.[272] In evaluating the original rationale and current justifications for a rule, the court should consider prior cases, cases from other jurisdictions, and the opinions of legal scholars.[273] The court need not follow a prior decision or continue to adhere to a common law doctrine when "its rationale no longer withstands 'careful analysis.'"[274]

In *Bozman*, the Court of Appeals evaluated the common law doctrine of interspousal immunity based on this criteria.[275] The court noted that the original rationale for the doctrine of interspousal immunity was incompatible with modern values because the rule was created based on the presumed legal identity of the husband and wife at common law.[276] The court then

267. *Id.*

268. *See supra* Section II.B.1.

269. *See supra* Section II.B.2.

270. Coleman v. Soccer Ass'n, 432 Md. 679, 689, 69 A.3d 1149, 1155, (quoting Harrison v. Montgomery Cty. Bd. of Educ., 295 Md. 442, 459, 456 A.2d 894, 903 (1983)).

271. *Id.*

272. Bozman v. Bozman, 376 Md. 461, 488, 830 A.2d 450, 466 (2003).

273. *Id.*

274. Arizona v. Gant, 556 U.S. 332, 348 (2009) (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003)).

275. *Bozman*, 376 Md. at 499, 830 A.2d at 466.

276. *Id.* at 470, 830 A.2d at 455.

noted that there was no reasonable contemporary justification for prohibiting a wife from suing her husband in tort.[277] In addition, the court recognized that forty-six other states had abrogated the doctrine of spousal immunity[278] and that legal scholars and commentators almost unanimously favored the abrogation of the doctrine of spousal immunity.[279] Therefore, the court deemed the common law doctrine of interspousal immunity "a vestige of the past, whose time has come and gone" and completely abrogated the rule.[280]

D. The Court of Appeals Should Abandon the Doctrine of Contributory Negligence and Adopt Comparative Fault

In *Coleman*, the court should have evaluated the common law doctrine of contributory negligence the same way the court in *Bozman* evaluated the common law doctrine of interspousal immunity.[281] It should have looked at the original rationale for the rule and current justifications for its continued usage, rather than just punting the issue to the legislature.[282] While the majority in *Coleman* deferred to the legislature, Judge Harrell, in his dissent, offers a thoughtful and rational analysis of contributory negligence.[283] This Section will analyze and add to Judge Harrell's dissent.

1. The Original Rationale for Contributory Negligence

As Judge Harrell points out in his dissent in *Coleman*, there are two primary rationales underlying the creation and adoption of contributory negligence by most of the United States in the eighteenth century. First, contributory negligence was seen by many state judges as necessary in order "to protect the nations' newly-developing industry from liability."[284] The contributory negligence defense was "especially effective" at protecting industry from suits because it allowed judges to dismiss plaintiffs' legal claims "without allowing them to be heard or decided by juries whose natu-

277. *Id.* at 470, 830 A.2d at 456 (citing Boblitz v. Boblitz, 296 Md. 242, 245, 462 A.2d 506, 507 (1983)).

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

279. *Id.* at 483, 830 A.2d at 463.

280. *Id.* at 497, 830 A.2d at 471.

281. *See* Coleman v. Soccer Ass'n, 432 Md. 679, 713–14, 69 A.3d 1149, 1169 (2013) (Harrell, J., dissenting) (noting that *Bozman* demonstrated the authority of the Court of Appeals to modify the common law despite legislative inaction).

282. *See id.* at 682, 69 A.3d at 1150 (majority opinion) (deciding that the Court of Appeals should not adopt comparative negligence because such a switch "involves fundamental and basic public policy considerations properly to be addressed by the legislature").

283. *Id.* at 713–14, 69 A.3d at 1169 (Harrell, J., dissenting).

284. *Id.* at 707, 69 A.3d at 1165.

ral sympathies might have favored the injured consumer or worker at the expense of the corporate or other business defendant."[285]

The Illinois Supreme Court in *Alvis*, noted similar reasons for the nations "swift and universal acceptance" of contributory negligence in the nineteenth century.[286] In particular, the Illinois Supreme Court noted that courts desired to protect the "burgeoning" railroad industry from a public that saw railroads as "harmful entities with deep pockets."[287] The courts were particularly worried about personal injury suits brought by railroad employees against the railroad companies.[288]

Second, many states adopted contributory negligence because of the prevailing sentiment at the time that a plaintiff's failure to account for his own safety nullified any fault that could be attributed to the defendant.[289] The popular idea at the time was that a plaintiff should enter the court with "clean hands" and that the "courts should not assist someone who contributes to causing his or her own injuries."[290]

Judge Harrell correctly points out that these original justifications for contributory negligence do not justify current use of the doctrine.[291] Judge Harrell notes that modern industry is no longer "fledgling or so prone to withering at the prospect of liability" to justify protecting industry from liability in situations where a business is primarily at fault for an accident.[292] In addition, "tilting the scales to favor industry is inconsistent with modern conceptions of justice, which focus instead on proportional responsibility and fundamental fairness."[293]

The Supreme Court of Illinois, in *Alvis*, similarly noted that the eighteenth-century fear that employee lawsuits would damage burgeoning industry is no longer a reason to maintain contributory negligence.[294] Today, most cases brought by an employee against an employer are brought "under the Worker's Compensation Act, under which plaintiff's negligence is not an issue."[295] Similarly, in Maryland, most cases brought by an employee against an employer would fall under the Maryland Workers Compensation

285. *See* DEP'T OF LEGIS. SERVS., *supra* note 2, at 11.

286. Alvis v. Ribar, 421 N.E. 2d 886, 888 (Ill. 1981).

287. *Id.*

288. *Id.* ("Judicial concern was particularly evident in the area of personal injury suits brought by railroad employees against the railroads.").

289. *Coleman*, 432 Md. at 707–08, 69 A.3d at 1165–66 (Harrell, J., dissenting).

290. *Id.* at 697, 69 A.3d at 1159.

291. *Id.* at 707–08, 69 A.3d at 1166 ("Neither of these justifications, however, carry weight in present-day Maryland.").

292. *Id.* at 708, 69 A.3d at 1166.

293. *Id.* at 709, 69 A.3d at 1166.

294. *See* Alvis v. Ribar, 421 N.E.2d 886, 893 (Ill. 1981) ("Certainly, the concern which prompted the adoption of the rule can no longer support its retention.").

295. *Id.*

Act.[296] Thus, judicial concern about employee suits damaging nascent industry is no longer a legitimate justification for maintaining contributory negligence.

Judge Harrell also notes that the second rationale, preventing at fault plaintiffs from recovery, is inconsistent with modern values. Society's modern understanding of justice has moved away from "'all-or-nothing' recovery rules" and towards allocating "the burden of liability among at-fault parties."[297] The doctrine of contributory negligence is at odds with our modern understanding of justice because it completely bars a contributorily negligent plaintiff from recovery, no matter how slight their fault, while allowing the negligent defendant to get off scot-free, even when the defendant is primarily responsible for the injury.[298] In contrast, comparative fault is a just rule that forces defendants to pay their fair share of the cost of an accident. As the Illinois Supreme Court concluded in *Alvis*, "Under a comparative negligence standard, the parties are allowed to recover the proportion of damages not attributable to their own fault. The basic logic and fairness of such apportionment is difficult to dispute."[299]

Perhaps the most striking example of injustice under Maryland's contributory negligence law occurred in *Hensel v. Beckward*.[300] In *Hensel*, the plaintiff, who was driving at nighttime, came to a complete stop at a stop sign and looked both ways twice before proceeding into an "unilluminated intersection."[301] When the plaintiff's vehicle entered the intersection, he was struck by the defendant's vehicle, which was moving at "a fast rate of speed" with "unlit headlights."[302] The Court of Appeals found that the plaintiff, who was "permanently paralyzed from the neck down" as a result of the accident, was completely barred from recovery because he violated the Maryland "boulevard rule," which requires that a driver yield the right of way to other vehicles approaching on a through highway.[303] Because he violated the boulevard rule, the Court of Appeals found that the plaintiff was contributorily negligent as a matter of law and thus barred from recovery.[304]

296. MD. CODE. ANN., LAB. & EMPL. § 9-101 (West 2016).

297. *Coleman*, 432 Md. at 709, 69 A.3d at 1167 (Harrell, J., dissenting) (quoting Guido Calabresi & Jeffrey O. Cooper, *The Monsanto Lecture: New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 869 (1995)).

298. *Id.*

299. *Alvis*, 421 N.E.2d at 893.

300. 273 Md. 426, 330 A.2d 196 (1974).

301. *Id.* at 428, 330 A.2d at 197–98.

302. *Id.* at 428, 330 A.2d at 198.

303. *Id.* at 428–29, 330 A.2d at 198.

304. *Id.*

2. An Evaluation of the Current Justifications for the Continued Use of Contributory Negligence

The current justifications for contributory negligence mostly focus on economic issues, in particular how a switch to comparative fault would affect businesses, insurers, and local governments.[305] In his dissent, Judge Harrell points out that "the array of Amici lined up in support of the continuation of contributory negligence is populated by the entrenched and established business interests who seek to maintain an economic advantage."[306] Businesses, insurers and local governments in Maryland fear that the adoption of comparative fault would broaden their potential tort liability and lead to higher insurance rates and defense costs.[307] As a result, these groups submitted amicus briefs to the Court of Appeals in *Coleman* in order to oppose the potential abandonment of contributory negligence.[308]

These groups threaten economic disaster, claiming a switch to comparative negligence will damage businesses and local governments by broadening their liability and raising insurance premiums.[309] However, this argument overlooks the fact that forty-six states have adopted comparative negligence without disaster.[310] Remarkably no state, since adopting a comparative fault system, has returned to contributory negligence.[311] Additionally, comparative negligence would not have significant economically adverse effects on all businesses in Maryland. It would only significantly affect businesses that negligently injure people. Under a comparative negligence standard, negligently run businesses will pay higher premiums and face more claims due to their own lack of care. Non-negligent, carefully run businesses will avoid liability.[312] A rule that favors non-negligent, carefully run businesses is better than a rule that protects negligent, carelessly run businesses.

Additionally, these concerns about the effects a switch to comparative would have on businesses does not outweigh the inherent unfairness of contributory negligence. Fowler V. Harper, Fleming James, Jr., and Oscar S. Gray put it best in their textbook, *The Law of Torts*:

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305. DEP'T OF LEGIS. SERVS., *see supra* note 2, at 30–31.

306. Coleman v. Soccer Ass'n, 432 Md. 679, 709, 69 A.3d 1149, 1167 (2013) (Harrell, J., dissenting).

307. *See* DEP'T OF LEGIS. SERVS., *supra* note 2, at 30.

308. *Coleman*, 432 Md. at 679–80, 69 A.3d at 1149–50 (noting the amicus briefs submitted by groups representing insurers, businesses, and local governments on behalf of retaining the contributory negligence standard).

309. DEP'T OF LEGIS. SERVS., *supra* note 2, at 30.

310. *Id.* at 14.

311. *Id.* at 30.

312. Interview with Craig A. Rosenstein, Managing Partner, Rensin & Rosenstein, LLP, in Riverdale, Md. (July 27, 2018).

> There is no justification- in either policy or doctrine- for the rule of contributory negligence, except for the feeling that if one person is to be held liable because of fault, then the fault of the victim who seeks to enforce that liability should also be considered. But this notion does not require the all or nothing rule, which would exonerate a very negligent defendant for even the slightest fault of his victim. A more nearly logical corollary of the fault principle would be a rule of comparative or proportional negligence, not the traditional all-or-nothing rule. And almost from the beginning there has been serious dissatisfaction with the Draconian rule sired by a medieval concept of cause out of a heartless laissez faire.[313]

Ultimately, *Coleman* is dissatisfying because the majority avoided the hard work of analyzing whether contributory negligence is a good rule and punted the issue down Rowe Boulevard to the General Assembly. In the future, the court should instead look at the original rationale for the rule and analyze the current justifications for its continued use.

III. CONCLUSION

The Court of Appeals should abandon its current view that the court should not change the common law in the face of the General Assembly's repeated refusal to do so.[314] The repeated failure of bills in the General Assembly is a poor indicator of legislative intent.[315] Moreover, the court should not defer to the legislature when it is considering a change to judicially-created common law rules.[316] The court is an appropriate forum for changing the common law, and the court should prevent injustices that it has the power to correct.[317] When the Court of Appeals gets another chance to evaluate an outdated common law rule, it should evaluate the rational underpinnings of the rule and then take action if the rule is found to be unjust, unfit, and ultimately "unsound in the circumstances of modern life."[318] With regard to the doctrine of contributory negligence in particular, the court should take the first step and abandon a common law rule that is unjust and unfit for Maryland.[319]

313. *See* DEP'T OF LEGIS. SERVS., *supra* note 2, at 29 (alteration omitted) (quoting 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS 286–88 (2d ed. 1986)).

314. *See supra* Part II.

315. *See supra* Section II.A.

316. *See supra* Section II.B.

317. *See supra* Section II.C.

318. Bozman v. Bozman, 376 Md. 461, 488, 830 A.2d 450, 466 (2003); *see supra* Section II.C.

319. *See supra* Section II.D.