# INJURED VICTIMS AND ROBBED SPOUSES: RECONCILING TORT AWARDS WITH THE COMMUNITY PROPERTY SYSTEM

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*Community property states have problems with their tort systems because they can harm tort victims or innocent spouses of tortfeasors. States harm tort victims by limiting their recovery to a tortfeasor's separate property only. States harm innocent spouses by allowing tort victims to recover from the community property that the spouses share equally. Furthermore, state courts attempt to characterize torts as either separate property torts or community property torts. The court's characterization dictates the type of property that the victims can recover. At times, courts apply their characterization tests inconsistently, leading to confusing and untenable results. This Note advocates for a bright-line rule that allows a tort victim to recover from the tortfeasor's separate property and then up to half of the community property shared with the tortfeasor's innocent spouse. The new rule would then grant innocent spouses a guaranteed offset at divorce to protect their property interest if the marriage dissolves.*

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## INTRODUCTION

Community property states use three different systems to determine the type of assets available for a tort award: community debt, managerial, and partition.[1] Arizona and Washington, both community debt states, attempt to characterize torts as either community property torts or separate property torts, with asset availability dependent on the characterization.[2] California, a managerial state, requires its courts to characterize the tort but by statute allows the tort victim to recover any property tortfeasors have under their control.[3] Thus, both community and separate property assets are available regardless of whether the tort is characterized as a community or separate property activity. New Mexico, a partition-system state, characterizes the tort and, if a separate property tort, allows the tort victim to recover the tortfeasor's separate property and up to half of the community property assets co-owned by the spouses.[4]

Community property states face two problems when deciding which marital assets to make available to a tort-judgment creditor. First, the characterization tests lead to untenable results as judges apply them in different ways;[5] this problem creates confusing case law that future courts try to apply.[6] Second, these systems violate either the principles of tort law or community property by effectively barring a tort victim's recovery or putting an innocent spouse's community property assets in jeopardy.[7] However, even though any solution trying to reconcile the two systems will not be perfect, creating a bright-line rule will clarify the case law and protect the victim and innocent spouse.[8] The new rule would make the tortfeasor's separate property available first and then, at most, half of the community assets to ensure victim recovery.[9] This approach protects the other half of the community assets by granting the innocent spouse a guaranteed offset if there is a divorce, providing some protection to that spouse's property interest where, in some states, there currently is none.[10]

Part I of this Note provides a general outline on the current state of community property systems as they relate to tort awards in Arizona, Washington, California, and New Mexico.[11] Part II focuses on the problems facing each state's

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1. Smith, *infra* note 19, at 802–06, 811–13; MCCLANAHAN, *infra* note 21, 493.
2. *See infra* Part I.
3. CAL. FAM. CODE §1000 (West 2018).
4. N.M. STAT. ANN. § 40-3-10(A) (2018).
5. *See infra* Part II.
6. *See infra* Part II.
7. *See infra* Part II.
8. *See infra* Part III.
9. *See infra* Part III.
10. *See infra* Part III.
11. *See infra* Part I.

approach, including undisciplined results leading to confusing case law and problems related to violating principles of community property and tort law.[12] The final Part of this Note will discuss how to partially solve these problems by creating a bright-line rule; this rule allows the tort victim to recover the separate property of the tortfeasor and half of the community property but protects the interest of the nontortfeasor spouse by granting an offset in the case of divorce.[13] This rule would apply to all torts.

## I. CURRENT STATE OF COMMUNITY PROPERTY SYSTEMS AND HOW THEY TREAT INTENTIONAL AND NEGLIGENCE TORT JUDGMENTS

### *A. Intentional Torts*

An unmarried man goes to a bar. He drinks too much and commits battery, an intentional tort. The victim decides to sue. The victim obtains a judgment against the tortfeasor's property and collects on that property. However, in community property states, this basic situation changes if the tortfeasor is married: community property statutes and case law impact the victim's ability to recover by restricting the victim's access to the tortfeasor's assets.[14] There is a good reason for this, as in a community property state, all of the tortfeasor's community property is also owned in undivided interest by the tortfeasor's spouse, but the spouse was not involved in the tort that injured the victim.[15] But that can be slim consolation to the victim.

Community property states have two types of property classifications: community property and separate property.[16] Generally, any property a person acquired before marriage is separate property, and property acquired during marriage is community property.[17] Because each person in a community property marriage has an undivided half-interest in the property acquired during marriage, an innocent spouse's property interest can be affected by tortious acts committed by the other spouse.[18] Currently, most community property states handle these situations in one of three ways: with a community debt system, found in Arizona

12. *See infra* Part II.

13. *See infra* Part III.

14. In Schilling v. Embree, 575 P.2d 1262, 1265 (Ariz. Ct. App. 1977), the Arizona Court of Appeals did not allow a battery victim to garnish the wages of a defendant because the battery judgment was viewed as a separate property debt and the wages were classified as community property.

15. *See id.*

16. *Community Property Overview*, FINDLAW, http://family.findlaw.com/divorce/community-property-overview.html (last visited Nov. 10, 2017).

17. *Id.*

18. WILLIAM Q. DEFUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 239–41 (2d ed. 1971).

and Washington;[19] with a managerial debt system, found in California;[20] or with a partition system, found in New Mexico.[21]

An Arizona court considering the situation outlined in the above hypothetical would try to determine if the battery committed by a married tortfeasor had some "benefit to the community."[22] There is some confusion among Arizona courts regarding whether that is the correct legal test, but most courts apply that test.[23] Arizona courts would likely find that this particular case of battery did not benefit the community.[24] Thus, the victim could not recover from community assets because, under the Arizona system, torts that do not directly benefit the community do not become community obligations.[25] This result would allow the victim to only recover from the tortfeasor's separate property.[26] Conversely, if the court found that the tort benefitted the community, the tort victim could obtain up to the entire value of the community property assets to satisfy the judgment.[27]

In Washington, the case law regarding how to characterize a tort is murkier.[28] However, the most recent case law suggests that courts need to work through a two-prong test to determine if the tort is a separate property tort or community property tort.[29] The first prong asks whether the tort was done to benefit the community.[30] If the answer is no, courts apply the second prong, asking if the tort was done while on community business.[31] The latter prong is construed broadly.[32] Applying the first prong of the test would not lead to community liability in our hypothetical example because it is difficult to imagine a bar fight benefitting the community. Thus, the first prong would not be satisfied, and the second prong would be applied. The second prong focuses on the underlying facts leading up to

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19. Erik Paul Smith, Casenote & Comment, *The Uncertainty of Community Property for the Tortious Liabilities of One of the Spouses: Where the Law is Uncertain, There is No Law*, 30 IDAHO L. REV. 799, 802, 806 (2008).

20. *Id.* at 811–13.

21. *See* W.S. MCCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES 493 (1982).

22. Howe v. Haught, 462 P.2d 395, 397 (Ariz. Ct. App. 1969).

23. THOMAS JACOBS, 4 ARIZONA PRACTICE, COMMUNITY PROPERTY LAW § 13.6 (3d ed. 2018) (applying to all tort liability: "this does not require that the very act itself serves a community purpose; it is sufficient if the overall purpose of the undertaking was intended to benefit the community").

24. *See* Schilling v. Embree, 575 P.2d 1262 (Ariz. Ct. App. 1977); Howe v. Haught, 462 P.2d 395 (Ariz. Ct. App. 1969).

25. *See* JACOBS, *supra* note 23, § 13.7 ("Community property is liable for the intentional and negligent torts of either spouse occurring while that spouse is acting for a community purpose or on behalf of the community.").

26. *See id.*

27. *Id.*

28. *See infra* Part II.

29. Clayton v. Wilson, 227 P.3d 278, 280–81 (Wash. 2010) (citing La Framboise v. Schmidt, 254 P.2d 485, 485 (Wash. 1953)).

30. *Id.*

31. *Id.*

32. *Id.* at 281.

the commission of the tort.[33] The court could ask if the tortfeasor was at the bar for recreational purposes or if he was there as part of a business trip.[34] Most likely, people go to the bar for recreational purposes, and a court would make all of the community property available for the tort judgment. However, if the court determined the tort to be a separate property tort, the tort victim could recover from the separate property of the tortfeasor and the tortfeasor's half interest in the community property.[35] By giving the tort victim access to half of the community property, Washington punishes tortfeasor spouses even though they did nothing wrong. However, to compensate for this potential injustice, Washington courts give the innocent spouse an offset if the married couple later divorces.[36]

California's managerial system differs from Arizona's and Washington's community debt systems; this system allows the tort victim to recover from any property the tortfeasor manages and controls.[37] Thus, because each spouse has management and control of the entire community property, the entire community property, as well as any separate property of the tortfeasor, is available to the tort victim.[38] California courts nevertheless try to characterize torts by asking whether the tort was committed during an activity that benefited the community.[39] This characterization only matters in determining which property the victim can recover first because if the tort is characterized as a separate property obligation, the victim recovers the separate property first, and if the judgment is not satisfied, as will often be the case, the victim can collect from the community property.[40] Conversely, if the tort is characterized as a community property tort, the victim recovers first from the community property and then from the tortfeasor's separate property if needed.[41] This system, by providing the victim with access to the largest pool of assets (only the separate property of the innocent spouse is spared), provides the most protection for the victim but puts the innocent spouse's property in peril. Thus, in the battery hypothetical, all of the tortfeasor's separate property and all of the community property would be available, and a California court would then assess whether the tort benefitted the community. If so, all of the community assets are liable first, and then the tortfeasor's separate property assets become available. However, if the court found that the tort did not occur during an activity benefitting the community, the tort victim would recover first from the separate property of the tortfeasor but still have access to all of the community property assets if needed. The California debt

33. *See id.*

34. *See* Moffitt v. Krueger, 120 P.2d 512, 514 (Wash. 1941) (holding the community liable when one spouse allows a friend to drive while intoxicated leading to an automobile accident when they were coming home from a picnic).

35. deElche v. Jacobsen, 622 P.2d 835, 840 (Wash. 1980).

36. *Id.* Courts grant offsets by giving the innocent spouse more of the remaining community property or less of the community debt at the time of divorce. *Id.*

37. CAL. FAM. CODE §1000 (West 2018).

38. *Id.* § 1100(a).

39. *Id.* § 1000(b).

40. *Id.* § 1000(b)(2).

41. *Id.* § 1000(b)(1).

statute does allow the innocent spouse to obtain a property offset at divorce if the community property is taken because of a separate property tort.[42]

New Mexico has a partition system where courts characterize torts by asking if the activity underlying the tort benefitted the community.[43] But similar to the process in California, the characterization only indicates which property satisfies the judgment first.[44] If the tort benefited the community, it is classified as a community debt and courts allow all community property assets for the judgment.[45] However, if the tort is characterized as a separate property tort, similar to the process in Washington, the tort victim can recover from the separate property of the tortfeasor and then up to half of the community property.[46] In theory, the statutory-partition system protects at least half of the innocent spouse's community property from a separate property tort judgment.[47] In the battery hypothetical, if the court held it was a separate property tort, only up to half of the community assets would become available after all of the tortfeasor's separate property was depleted.

### *B. Negligent Torts*

Moving away from intentional torts to negligent torts, consider a woman driving to the grocery store to pick up prescription drugs from the pharmacy. She looks down at her smartphone to check her Twitter feed for just a moment. In that moment, her car runs a red light and slams into another car, severely injuring its occupants. The victims bring a negligence action against the driver, and the jury finds her liable and grants an award that exceeds any liability insurance the tortfeasor and victims have.

Arizona courts apply a different test for negligent torts than for intentional torts.[48] For negligent torts, courts determine if the underlying activity engaged in by the tortfeasor when the tort occurred benefitted the community.[49] This question is similar to the second prong of the Washington test.[50] Applying that test in the driving-negligence example would likely lead to community liability. The tortfeasor went to the store to pick up prescription drugs. Regardless of whether the drugs were for herself, her spouse, or one of their children, they are all members of the marital

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42. *Id.* § 2625.

43. Delph v. Potomac Ins. Co., 620 P.2d 1282, 1285 (N.M. 1980) ("[T]he test to be applied in such cases is an after-the-fact determination of whether the act in which the spouse was engaged at the time of the tort was one which was of actual or potential benefit to the community.").

44. *Compare* N.M. STAT. ANN. § 40-3-10(A) (2018) *with* N.M. STAT. ANN. § 40-3-11(A) (2018).

45. N.M. STAT. ANN. § 40-3-11(A) (2018).

46. *Id.*

47. *See id.*

48. *Compare* Howe v. Haught, 462 P.2d 395, 397 (Ariz. Ct. App. 1969) (asking if the tort benefitted the community) *with* Hays v. Richardson, 386 P.2d 791, 792 (Ariz. 1963) (asking if the underlying act that led to the tort benefited the community).

49. Hays v. Richardson, 386 P.2d 791, 792 (Ariz. 1963); *see also* Selaster v. Simmons, 7 P.2d 258, 259 (Ariz. 1932); Reckart v. Avra Valley Air, 509 P.2d 231, 233 (Ariz. Ct. App. 1973).

50. *See* Clayton v. Wilson, 227 P.3d 278, 280–81 (Wash. 2010).

community; therefore, the act benefitted the community, and the tort award would be a community obligation. Compare this to a result in Arizona if a court applied the intentional-tort test. It would be hard to argue that negligent driving in some way benefitted the community. Applying that test, the community would not be held liable and the victim would only recover from the separate property. Thus, depending on which test the Arizona courts use, the number of community assets subject to the judgment can change from all to none.

Washington courts try to treat all torts the same by implementing the two-prong test discussed above.[51] The court will first ask if the tort itself benefitted the community—i.e., if the negligent driving benefited the community.[52] The answer, similar to the result for an intentional tort such as battery, is likely to be "no" because torts themselves are virtually never designed to further the community. Then the court will ask if the negligence occurred while on community business or some other community activity.[53] Picking up the prescription for a family member would likely be considered a classic community activity, rendering all community assets available to the negligence-tort victim. By using the two-prong test for both types of torts, the Washington courts will achieve similar results every time, leading to community liability.[54]

California's single-characterization test that asks if the tort was done while on a community activity, similar to the Arizona negligence question and the second prong of the Washington test, leads to consistent results: typically that the community assets are liable for the judgment. Again, negligent driving while going to the grocery store will likely lead to community liability because the activity benefits the community.[55] This makes the tort a community tort, and the community property would first be available, and if that's not enough, then the tortfeasor's separate property.[56] Due to the managerial system, if the tort is viewed as a separate property tort, which is unlikely, the community property can still be used to satisfy the judgment if the separate property does not.[57]

New Mexico, like California, only has one test, but the nature of the inquiry (if the activity underlying the tort benefitted the community) is like Arizona's and Washington's.[58] A court will likely find that driving negligently on the way to the pharmacy or grocery store benefits the community because the underlying activity is in furtherance of the community.[59] Thus, the victim could recover from the community assets.[60] Because there is only one test, the results will be consistent, and the victim will be able to obtain compensation from the community property in this

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51. *Id.*
52. *See id.*
53. *Id.*
54. *See id.*
55. *See* CAL. FAM. CODE §1000(b)(2) (West 2018).
56. *Id.*
57. *Id.* §1000(b)(1).
58. Delph v. Potomac Ins. Co., 620 P.2d 1282, 1285 (N.M. 1980).
59. *See* cases cited *supra* note 49.
60. N.M. STAT. ANN. § 40-3-11(A) (2018).

hypothetical. If a court found that the underlying activity was not for a community benefit, then all the separate property of the tortfeasor is primarily available to the victim, and if not enough, up to half of the community assets.[61]

## II. PROBLEMS WITH THE CURRENT COMMUNITY PROPERTY SYSTEMS

Community property states apply their systems with two major flaws. First, characterizing torts can lead to inconsistent results as it is left to the judge to make these determinations. As judges are humans, they can be influenced by "emotional factors" that lead them to make community property assets available for a tort judgment when they should not be.[62] Additionally, as the courts apply these characterization tests, they are forced to differentiate and distinguish cases to achieve a result that is just in their minds, thus muddling the case law. The second problem is that community property states violate tort-law principles and community property principles to one extent or another. They potentially bar the victim recovery by only allowing separate property to be obtained, punish the innocent spouse based on the tortious conduct of the other spouse, or in a partition system, limit tort-victim recovery and partially deprive innocent spouses of their property interest.

### *A. Tort Characterization Leads to Untenable Results*

When judges characterize torts, the result is untenable case law. Furthermore, because the results are untenable, the case law—particularly in Arizona and Washington—is confusing and unclear as to how its respective characterization tests apply to factual situations.

#### *1. Arizona's Characterization Problems*

Arizona courts apply two different legal tests depending on the type of tort that was committed.[63] In the case of negligent and reckless torts, courts try to determine if the underlying activity that led to the tort benefitted the community.[64] In contrast, they do not ask if the negligent act itself benefitted the community.[65] Furthermore, if the spouse was negligent during an activity that was intended by that spouse to benefit the community, Arizona courts tend to classify it as a community tort, regardless if the activity actually benefited the community in a monetary

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61. *Id.* § 40-3-10(A).

62. deElche v. Jacobsen, 622 P.2d 835, 840 (Wash. 1980).

63. It is the plaintiff's responsibility to prove that a tort is a community debt. Garrett v. Shannon, 476 P.2d 538, 540 (Ariz. Ct. App. 1970). Depending on the proof offered, a court will either characterize the tort as a community property tort or a separate property tort. *See* Reckart v. Avra Valley Air, 509 P.2d 231, 232 (Ariz. Ct. App. 1973) (finding the community liable when the defendant testified that he flew airplanes for recreational purposes); Howe v. Haught, 462 P.2d 395, 398 (Ariz. Ct. App. 1969).

64. *See* cases cited *supra* note 49.

65. Hays v. Richardson, 386 P.2d 791, 792 (Ariz. 1963); *see generally* Selaster v. Simmons, 7 P.2d 258, 260 (Ariz. 1932); Reckart v. Avra Valley Air, 509 P.2d 231, 232–33 (Ariz. Ct. App. 1973).

sense.[66] There is confusion as to what tests courts should apply; *Hays v. Richardson*, discussed below, suggests that courts evaluate both the negligent act and the underlying act, thus having two methods to impart community liability.[67] However, other cases only used the underlying-act test to determine liability.[68]

Moreover, Arizona courts have interpreted a wide range of activities to be community errands. *Reckart v. Avra Valley* concluded community assets were available when a spouse damaged property when negligently taxiing an airplane.[69] That court held that recreational activities are in furtherance of the community.[70] Thus, because the tortfeasor spouse was learning to fly for recreational purposes, the court characterized the tort as a community obligation.[71] Furthermore, in *Hays*, the court held the community liable when a spouse drove intoxicated after picking up his family from seeing a live taping of a television show.[72] Generally, courts impart liability to the community if the tortfeasor is on a community errand.[73]

For intentional torts, Arizona courts determine if the tortious act itself benefitted the community and do not consider if the underlying activity benefited the community.[74] Courts have declined to extend community liability to torts such as battery[75] and unlawful arrest[76] because they determined the tort did not benefit the community. However, courts have extended community liability to intentional torts like fraud[77] and slander[78] when they determined the torts were committed for community benefit. Thus, Arizona courts do not categorize intentional torts as separate property torts and negligent torts as community property torts but instead look at the factual circumstances underlying the conduct at issue.[79]

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66. Donato v. Fishburn, 367 P.2d 245, 247 (Ariz. 1961); *Reckart*, 509 P.2d at 233 ("No pecuniary benefit is necessary.").

67. *Hays*, 386 P.2d at 792 ("In negligence cases we will not only inquire into the very act itself but the surrounding circumstances as well to make this determination because rarely does one run a red light or collide with another for the specific purpose of benefiting the community.").

68. *E.g.*, *Selaster*, 7 P.2d at 259; *Reckart*, 509 P.2d at 233.

69. *Reckart*, 509 P.2d at 233.

70. *Id.*

71. *Id.*

72. *Hays*, 386 P.2d at 792.

73. *See Selaster*, 7 P.2d at 259.

74. Selby v. Savard, 655 P.2d 342, 349 (Ariz. 1982) ("In the area of intentional torts, the community is not liable for one spouse's malicious acts unless it is specifically shown that the other spouse consented to the act or that the community benefited from it."); Cadwell v. Cadwell, 616 P.2d 920, 923 (Ariz. Ct. App. 1980); Howe v. Haught, 462 P.2d 395, 397 (Ariz. Ct. App. 1969); Shaw v. Greer, 194 P.2d 430, 434 (Ariz. 1948); McFadden v. Watson, 74 P.2d 1181, 1182 (Ariz. 1938).

75. *Howe*, 462 P.2d at 397.

76. *Shaw*, 194 P.2d at 434.

77. *Cadwell*, 616 P.2d at 923.

78. *McFadden*, 74 P.2d at 1182.

79. *See generally* Garrett v. Shannon, 476 P.2d 538 (Ariz. Ct. App. 1970) (where two men were sued for battery while playing golf; the court entertains the possibility that this particular battery could be a community debt).

However, there is some confusion in Arizona because the *Arizona Practice Series* does not distinguish the two tests pertaining to negligent and intentional torts.[80] Also, in *Garrett v. Shannon*, an Arizona appellate court stated: "the law is settled in Arizona that the community property of both spouses may be liable for an intentional tort committed by one of the spouses where *the intent and purpose of the activity leading to* the commission of the tort was to benefit the community interests."[81] Typically, courts use that test for negligent torts, but not intentional torts.[82] The *Garrett* court would have looked at the activity underlying the tort to determine if community asset were available.[83] In that case, the plaintiff alleged that he was assaulted by the two defendants on a golf course.[84] Because recreation benefits the community, a court applying the negligence test would probably find community liability.[85] However, tracking *Howe v. Haught*, a court applying the intentional-tort test would most likely not require community asset liability.[86] There, two men were involved in a fight, but the court did not hold the community liable because the fight did not benefit the community.[87] Thus, the availability of community assets to a tort victim seems generally to hinge on whether the tort was intentional or negligent. However, in *Howe*, it is unclear which test the court applied because the court stated, "It is true that where a husband commits an assault in the management of or for the benefit of the community, the community is liable."[88] Thus, the court could have applied both tests to find liability.

*2. Washington's Characterization Problems*

Washington's legal test also creates confusion due to conflicting holdings of the two most recent cases.[89] Prior to 1980, victims of community property torts could only recover community property and victims of separate property torts could only collect separate property.[90] However, in 1980, the Washington Supreme Court changed the rule for intentional torts in *deElche v. Jacobsen*.[91] In that case, two

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80. *See* JACOBS, *supra* note 23, § 13.6 (applying to all tort liability: "[T]his does not require that the very act itself serves a community purpose; it is sufficient if the overall purpose of the undertaking was intended to benefit the community").

81. *Garrett*, 476 P.2d at 539 (emphasis added).

82. *See* cases cited *supra* note 49.

83. *Garrett*, 476 P.2d at 539. The court did not characterize the tort because the appeal related to a procedural question. *Id.* However, the appellate court's potential confusion of the characterization test illustrates the difficulties courts have applying the tests.

84. *Id.*

85. This is similar to *Reckart*, where the court held community assets liable when the spouse negligently damaged an airplane during a recreational activity. Reckart v. Avra Valley Air, 509 P.2d 231, 233 (Ariz. Ct. App. 1973).

86. Howe v. Haught, 462 P.2d 395 (Ariz. Ct. App. 1969).

87. *Id.* at 398.

88. *Id.* at 397.

89. *Compare* deElche v. Jacobsen, 622 P.2d 835, 841 (Wash. 1980) *with* Clayton v. Wilson, 227 P.3d 278, 281 (Wash. 2010).

90. *See* Elizabeth Jane Blagg, *Community Property-Washington Allows Separate Tort Recovery from Community Property-Deelche v. Jacobsen, 95 Wn.2d 237, 622 P.2d 835 (1980)*, 57 WASH. L. REV. 211, 214 (1981).

91. 622 P.2d 835, 839–40.

couples were attending a social event on a houseboat.[92] One of the wives decided to leave the party.[93] After she left, the man from the other couple followed her to where she was staying and raped her.[94] Prior to the assault, the tortfeasor and his spouse transmuted their separate property to community property.[95] The effect of the transmutation, which was apparently not done in anticipation of the tort, was to render all of the tortfeasor's formerly separate property assets immune from a separate property tort judgment.[96] The court decided that when a tort is determined to be a separate property tort, instead of limiting the tort victim's recovery to the tortfeasor's separate property only, the tort victim would have access to half of the community property if the separate property is not sufficient to satisfy the judgment.[97] In that case, the couple had no separate property, so the victim could obtain up to half of the community property. Additionally, the court also indicated that if the marriage between the spouses dissolved, an offset in the form of an equitable lien could be given to the nontortfeasor spouse, thus protecting her community property interests.[98]

There were two main reasons the *deElche* court changed the way recovery is approached.[99] First, in situations like the one before it, tort victims were barred from recovery even though the tortfeasors were solvent because they had only community property and no separate property.[100] Second, the majority in *deEleche* noticed that prior decisions were stretching community liability to ensure tort-victim recovery when the liability should have been limited to the tortfeasors and their separate property;[101] the *deElche* majority wanted to limit the extent of when courts were finding community liability[102] and to give a tort victim access to all community assets only for "[t]orts which can *properly* be said to be done in the management of community business, or for the benefit of the community,"[103] but not when based only "upon tenuous considerations of 'benefit' to the community."[104] Furthermore, the court criticized prior cases that stretched community liability too far.[105] The *deElche* majority thought giving the tort victim access to half of the community property would reduce the inclination of lower courts to conclude that a tort was a

92. *Id.* at 836.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 840.
98. *Id.*
99. *See* Blagg, *supra* note 90, at 218.
100. *deElche*, 622 P.2d at 839.
101. *Id.*
102. *See id.* at 839–40.
103. *Id.* at 840 (emphasis added).
104. *See id.* at 839.
105. *Id.* at 838.

community obligation and steer lower courts back toward a separate property characterization where that was actually the case.[106]

However, in *Clayton v. Wilson*, the Washington Supreme Court articulated a two-prong test applicable to all torts that essentially limits the *deElche* holding.[107] To apply the test, courts first ask if the tort benefitted the community.[108] If the answer is yes, the tort is treated as a community obligation.[109] If the tort did not benefit the community, courts ask if the tort was done pursuant to community business.[110] This effectively casts a wide net regarding community liability, almost ensuring that every tort will be classified as a community property tort. In *Clayton*, one spouse repeatedly sexually abused a neighbor child that the married couple had hired to do yard work at their home.[111] The other spouse argued that, per *deElche*, only half of the community property should be subject to judgment because the intentional tort did not benefit the community.[112] The court stated that *deElche* only applied to the first prong of the test, but that was irrelevant because the sexual abuse of the child satisfied the second prong of the test because it was done in furtherance of the community.[113] The court deemed the second prong satisfied because:

> Mr. Wilson used yard work as a means to groom the young boy. The abuse always occurred within the context of yard work, which consisted of community business. Mr. Wilson sexually abused Clayton while overseeing him as an employer, supervisor, landlord, and caretaker. The marital community benefited from Clayton's labor. Mr. Wilson paid Clayton for his work with community funds, and only after he finished abusing Clayton on each occasion.[114]

In finding community liability, the *Clayton* court acknowledged that it applied the second prong broadly.[115] In effect, this holding limits *deElche* to its facts.

*Clayton*, to some extent, borrowed the two-prong test from an older Washington case, *La Framboise v. Schmidt*.[116] That decision found the community liable when a husband sexually abused a child that had been placed in the care of his

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106. *See id.* at 840 ("It may be that some torts which have in the past been classified as community . . . may now be properly considered separate.").

107. Clayton v. Wilson, 227 P.3d 278, 280–81 (Wash. 2010).

108. *Id.* at 280.

109. *See id.*

110. *Id.* at 280–81.

111. *Id.* at 279.

112. *Id.* at 281. It is interesting to note that prior to the trial, the spouses transferred all of their property to the wife's separate property, *id.* at 280, probably to avoid a judgment. The court found the transfer fraudulent, thus making their property keep its original characterization. *Id.* at 284–85. A similar situation and result happened in Arizona. *See* State ex rel. Indus. Comm'n v. Wright, 43 P.3d 203 (Ariz. Ct. App. 2002).

113. *Clayton*, 227 P.3d at 281.

114. *Id.* at 282.

115. *Id.* at 281.

116. La Framboise v. Schmidt, 254 P.2d 485, 486 (Wash. 1953).

marital community.[117] The *La Framboise* court used the tort doctrine of *respondeat superior* to find the community liable.[118] Early Washington case law viewed the community as its own separate legal entity.[119] Thus, similar to when companies are liable for the actions of their employees acting in the scope of their employment, the community was found liable when a community member acts for its benefit or in the scope of community duties.[120] However, Washington case law later rejected the community-entity theory, which the *deElche* court mentioned.[121] Therefore, because there is no entity that the spouses are acting on behalf of, the doctrine of *respondeat superior* does not apply. The *Clayton* majority did not address the rejection of the entity theory but cited a passage from *deElche* that supported the notion that community torts will remain community torts if done while managing community business.[122] However, the *deElche* court specifically criticized *La Framboise*, on which the *Clayton* court relied.[123] Additionally, the rationale from *deElche*—that courts should not stretch community liability to separate torts—conflicts with the *Clayton* holding.[124] The *Clayton* court may have succumbed to "emotional factors or overtones," a concern of the *deElche* court, by making the entire community liable to a child-sex-abuse victim.[125] Finally, under *deElche*, *Clayton* did not need to extend community liability because deeming the tort a separate property tort would still have allowed the tort victim to recover half of the community assets.[126]

Moreover, even if the *deElche* court did leave the second prong of the *La Framboise* test untouched, having the two prongs is redundant and creates confusion. The *deElche* court would not have needed to change any case law but could have found community liability by applying the second prong of the test to the facts. The couples were engaging in a social activity when the rape occurred.[127] Applying the second prong of the test broadly, the assault occurred during a community activity.[128] Both Arizona and Washington have found that recreational activities are community activities and hold the entire community liable for torts related to those activities.[129] By applying the Washington precedent or borrowing

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117. *Id.* at 485.

118. *Id.* at 486.

119. Blagg, *supra* note 90, at 213.

120. *La Framboise*, 254 P.2d at 486.

121. Blagg, *supra* note 90, at 214; deElche v. Jacobsen, 622 P.2d 835, 838–39 (Wash. 1980).

122. Clayton v. Wilson, 227 P.3d 278, 281 (2010) (citing *deElche*, 622 P.2d at 835).

123. *deElche*, 622 P.2d at 838.

124. *See id.* at 839 ("Innocent spouses' interests in community property are made liable upon the most tenuous considerations of 'benefit' by the community in order to allow victims to recover.").

125. *See id.* at 840.

126. *Id.*

127. The court acknowledged that the party on the boat was a community activity. *Id.* at 836.

128. *See id.*

129. Reckart v. Avra Valley Air, 509 P.2d 231, 233 (Ariz. Ct. App. 1973); Moffitt v. Krueger, 120 P.2d 512, 514 (Wash. 1941) (holding the community liable when one spouse

from Arizona, *deElche* could have made the community liable and allowed the tort victim to recover. Moreover, if the *deElche* court wanted to interpret the second prong as broadly as the *Clayton* court had, any criticisms from *deElche* levied at the previous case law would be unwarranted because the second prong would have guaranteed community liability. It is difficult to imagine a factual situation where the first prong of the test would provide liability and the second prong would not. Thus, eliminating the first prong and only applying the second prong would not change the results of applying both prongs. Additionally, it would clarify the confusion the case law has created.

Also, applying the second prong of the Washington test to all torts would increase the number of cases where the community is liable. For example, in *Shaw v. Greer*, an Arizona case, the tort defendants worked for a local police agency when they unlawfully arrested a man in order to prevent him from gaining custody of his child.[130] That court held the action as a separate property tort because the tort did not benefit the community.[131] However, applying the second prong of the Washington test would lead to community liability because the married police officers were generating community wages while at work and committing the tort would be pursuant to community business.[132] Thus, if two spouses go out to a bar together and one of the spouses commits a battery against another patron, because the spouses were together on a recreational outing, the community could be held liable because recreation is a community activity.[133]

*3. California's and New Mexico's Characterization Problems*

California's and New Mexico's systems produce clearer results but still render an innocent spouse's assets available for the victim of the tortious conduct of the other spouse. The results are clearer because instead of asking multiple questions about the torts or having different tests for different torts, they use the Arizona test for negligent torts but apply it to all torts by asking if the tort occurred during an activity that benefited the community.[134] By statute, either half[135] or all of the community assets are made liable for a separate property tort judgment.[136] Thus, characterizing the torts typically only establishes a priority of assets for the tort victim to recover.

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allows a friend to drive the community car while intoxicated, leading to an automobile accident when they were coming home from a picnic).

130. 194 P.2d 430, 430 (Ariz. 1948).

131. *Id.* at 434.

132. Interestingly, the *Shaw* Court did entertain this idea by mentioning a dissenting opinion from a Washington case making that argument. *Id.* at 432–33 (citing Brotton v. Langert, 23 P. 688, 689–91 (Wash. 1890) (Stiles, J., dissenting)).

133. *See, e.g.*, *Reckart*, 509 P.2d at 233; *Moffitt*, 120 P.2d at 512.

134. Delph v. Potomac Ins. Co., 620 P.2d 1282, 1285 (N.M. 1980); CAL. FAM. CODE §1000(b).

135. N.M. STAT. ANN. § 40-3-10(A) (2018).

136. CAL. FAM. CODE §1000(b)(2) (West 2018).

However, even in California where there is only one test, courts still confuse the legal test.[137] In *In re Marriage of Bell*, a tortfeasor spouse settled a civil case from an embezzlement action with her employer.[138] At divorce, the innocent spouse wanted an offset to avoid liability for his wife's tortious conduct.[139] The court analyzed the statutory code noting that the key determination is whether the underlying activity benefitted the community.[140] However, when ruling on the case, the court said, "there was uncontradicted testimony that the community received the benefit of the embezzlement" and did not grant the offset.[141] However, that statement focuses on whether the tort of embezzlement benefitted the community, not if the underlying activity benefitted the community.[142] The court could have easily found that the underlying activity of working for the employer and generating community wages benefitted the community, but because the court attempted to characterize the tort, a different legal test enters into the case law that clerks and judges must sift through. Although the result of applying community liability may be consistent with the statutory code here,[143] applying the narrower test of "did the tort benefit the community" directly could have changed asset liability or whether an offset should have been given. For example, if this had been a battery rather than embezzlement, most likely the court would not have construed it as a community obligation because the battery would not have benefitted the community, and the innocent spouse would have been granted an offset at divorce because community property was used to satisfy a separate property tort obligation.[144] Furthermore, making all community assets available for any tort, regardless of the characterization, punishes innocent spouses for conduct they did not commit.[145]

Thus, Arizona's and Washington's characterization processes lead to undisciplined and untenable results. The *deElche* court specifically criticized other cases that were subject to "emotional factors."[146] Any court that attempts to characterize torts opens itself to this type of criticism. The characterization process does have merits in that each case is treated on its own factual underpinnings. However, judges are human, and some plaintiffs and defendants will simply be more

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137. *In re* Marriage of Bell, 56 Cal. Rptr. 2d 623 (Ct. App. 1996).

138. *Id.* at 629.

139. *See id.*

140. *Id.* at 628–29.

141. *Id.* at 629.

142. *Id.*

143. *See* CAL. FAM. Code §1000(b) (West 2018).

144. *See* WILLIAM W. BASSETT, CALIFORNIA COMMUNITY PROPERTY LAW § 10:59 (2018 ed.) ("Under the referred subdivision (b) of Family Code § 1000, assignment to the sole tortfeasor spouse is proper only where the tort was committed in an activity that was not for the benefit of the community."). By assigning an entire debt to one member of the community, courts effectively give an offset to the other spouse because debts acquired during marriage are to be assigned evenly.

145. *See infra* Part III.

146. deElche v. Jacobsen, 622 P.2d 835, 840 (Wash. 1980) (citing Smith v. Retallick, 293 P.2d 745 (Wash. 1956) (Finley, J., dissenting)).

sympathetic than others. Judges do not want to deny recovery to child-sex-abuse[147] and rape victims,[148] but would not want to protect defendants who tried to fraudulently transmute their property to avoid judgments.[149] Finally, even where systems have clearly defined tests that produce clear results, judges misapply the law because the legal tests are similar, but not the same, and the systems still punish innocent spouses for the conduct of their spouses.[150] However, these types of dilemmas can partially be avoided by creating a bright-line rule that eliminates tort characterization because of its tendency to create unjust results and confusing case law.

### *B. Violations of Community Property and Tort Principles*

When courts characterize torts, the interests of the victim and the innocent spouse are in tension. By favoring one over the other, principles of the community property or tort system are violated. If courts limit recovery to separate property only for intentional torts, like in Arizona, the tort victim will have difficulty recovering if the tortfeasor does not have separate property. However, Washington disfavors nontortfeasor spouses by making their community property interest available for both separate property and community property tort judgments.[151] Additionally, states like California and New Mexico disfavor innocent spouses by allowing community assets to be taken, regardless of the type of tort, based on their statutory codes.[152]

The second prong of the Washington test and Arizona test for negligent torts violates community property principles by allowing a tort victim to recover from community assets, which the nontortfeasor spouse has an undivided interest in.[153] In the community property system, both spouses have an undivided, equal ownership share of all community assets.[154] Most states do allow either spouse to bind the community when it comes to contractual debts.[155] However, a tort debt is not a contractual debt.[156] Tort damages are used to compensate victims and hold the guilty party accountable for improper behavior.[157] Contractual damages are used to compensate people when two parties agree to perform, but one of them does not.[158] Spouses can enter into contracts without the other spouse knowing, but there is often

147. *See* Clayton v. Wilson, 227 P.3d 278 (Wash. 2010); La Framboise v. Schmidt, 254 P.2d 485 (1953).

148. *See deElche*, 622 P.2d at 835.

149. *See Clayton*, 227 P.3d at 279.

150. *See supra* notes 76–84 and 133–141.

151. *Supra* notes 76–84 and 133–141; *deElche*, 622 P.2d at 840.

152. CAL. FAM. CODE §1000(b) (West 2018); N.M. STAT. ANN. § 40-3-10(A) (2018); N.M. STAT. ANN. § 40-3-11(A) (2018).

153. Clayton v. Wilson, 227 P.3d 278, 280–81 (Wash. 2010); Hays v. Richardson, 386 P.2d 791, 792 (Ariz. 1963); *see also* Selaster v. Simmons, 7 P.2d 258, 259 (Ariz. 1932); Reckart v. Avra Valley Air, 509 P.2d 231, 233 (Ariz. Ct. App. 1973).

154. DEFUNIAK & VAUGHN, *supra* note 18, at 239.

155. ARIZ. REV. STAT. ANN. § 25-214 (2018).

156. *See* JACOBS, *supra* note 23, § 13.6.

157. 74 AM. JUR. 2d Torts § 3 (2018).

158. RESTATEMENT (SECOND) OF CONTRACTS § 344 (AM. LAW INST. 1981).

the possibility that the community will benefit from the contract. However, it is unlikely that a spouse would agree or consent to their spouse's tortious conduct, and there is rarely any benefit to the community for one spouse's tortious conduct. For example, it is doubtful that a wife would consent to her husband's drunk driving.[159] Furthermore, making a husband's community assets available for the fraudulent conduct of his wife without any proof of his involvement violates ideals of fairness.[160] Thus, when courts hold the entire community liable for torts that were not committed by both spouses, they strip nontortfeasor spouses of their community property interest. Moreover, the *deElche* solution also violates community property principles by stripping nontortfeasor spouses of their half-interest in the entirety of the community property. However, by providing for an offset in the case of dissolution, *deElche* does attempt to mitigate that harm.[161]

Additionally, California's approach also violates community property principles. California's managerial system benefits the tort victim by allowing the entirety of the community assets to be obtained regardless if the tort is characterized as a separate property tort or a community property tort.[162] Even though a court may have found that the tort was a separate property tort, if the judgment is for a greater amount than what the tortfeasor has in separate property assets, the community assets are liable.[163] However, when a tort is a separate property tort, the California legislature tried to protect the innocent spouse by requiring separate property to be collected first[164] and by giving the innocent spouse an offset at divorce.[165] But married couples do not always have a substantial amount of separate property. This can be due to marrying with very few assets, or to commingling separate property assets with community property assets thus transmuting them into community property assets.[166] Moreover, regarding the offset that California courts give, this protection may mean little in practice. Due to couples having little separate property, a large tort judgment could eliminate a large amount, if not all, of the community assets. For example, say a couple has no separate property, but $500,000 in community assets. The tortfeasor spouse commits a tort and the jury awards damages of $500,000, eliminating all of the community assets. The couple divorces not long afterward. Even if the court awards an offset, there is still no community

159. *See* Hays v. Richardson, 386 P.2d 791 (Ariz. 1963).

160. *See* Cadwell v. Cadwell, 616 P.2d 920 (Ariz. Ct. App. 1980).

161. deElche v. Jacobsen, 622 P.2d 835, 840 (Wash. 1980).

162. CAL. FAM. CODE §1000 (West 2018).

163. *Id.* §1000(b).

164. *Id.*

165. *Id.* § 2625. However, due to problems with characterizing torts, it is unclear exactly how courts will grant this offset. The leading case on the issue is *In re Marriage of Bell*, 56 Cal. Rptr. 2d 623 (Ct. App. 1996). See *supra* notes 114–120 for a discussion of that case.

166. Once community property assets are mixed with separate property assets, states have a presumption that all of the assets are now community. This can be rebutted, but typically requires detailed records that trace the source of the assets. For examples of the problem see, e.g., Grolemund v. Cafferata, 111 P.2d 641, 644–45 (Cal. 1941); Cooper v. Cooper, 635 P.2d 850, 852–53 (Ariz. 1981).

property remaining for the innocent spouse. Thus, the promise of an offset is potentially hollow.

Finally, New Mexico's system also violates community property principles, even though it provides some protection to the victim and innocent spouse. New Mexico's partition system gives the tort victim access to half of the community property in the case of a separate property tort.[167] Again, the innocent spouse potentially loses community property due to the tortious act of the other spouse. Because the community property system gives both spouses a property interest in all of the community assets, making half of the community property available violates those principles.[168] However, this approach may be the only way to partially reconcile the tort and community property systems because, if greater deference is given to the innocent spouse over the tort victim, the tort victim may not be able to recover damages.

Additionally, when Arizona courts limit tort recovery to separate property only, tort principles are violated. Tort law has a few primary purposes: to compensate victims, to hold tortfeasors accountable, and to deter socially unacceptable behavior.[169] The *deElche* court was concerned that tort victims were not being compensated even though the tortfeasor was solvent, but only with community property, and remedied the issue.[170] Arizona courts have not remedied this situation and allow tortfeasors, who are solvent with community assets, to be judgment proof. Because the tortfeasor is protected, none of the goals of the tort law are achieved: victims are not compensated, tortfeasors are not held accountable, and tortfeasors are not deterred. In fact, this situation can incentivize people to commit torts if there are no financial repercussions. For example, if a married person, living in Arizona, has no separate property and commits battery against an individual, the tort would likely not be viewed as benefitting the community. This would leave the tort victim with no effective remedy because the tortfeasor has no separate property. Thus, the tort victim has no recourse for recovery, and the tortfeasor is not held accountable or deterred from committing similar torts in the future.

## III. THE BRIGHT-LINE RULE

By borrowing from the various state systems, a bright-line rule would solve some of the problems created by the characterization tests and reconcile important principles of the tort and community property systems. However, the bright-line rule would still create violations in these systems, respectively. The rule would require that the separate property of a tortfeasor spouse would be always subject to a tort judgment and would be the first pool of assets that the tort victim can recover from. This borrows partially from California, where any property controlled by the

167. N. M. STAT. ANN. § 40-3-10(A) (2018).

168. *See* DEFUNIAK & VAUGHN, *supra* note 18, at 239–41.

169. 74 AM. JUR. 2d Torts § 2 (tort law is designed to hold tortfeasors accountable, compensate victims, and deter future bad behavior, ideally to prevent harm to society); STUART M. SPEISER, ET AL. 1 AMERICAN LAW OF TORTS § 1:3 (Monique C.M. Leady ed., 2018) (tort law is designed to protect society while ensuring the injured get compensated); Warren A. Savey, *Principles of Torts*, 56 HARV. L. REV. 72, 72 (1942).

170. deElche v. Jacobsen, 622 P.2d 835, 838 (Wash. 1980).

tortfeasor is subject to a judgment.[171] However, differing from California where the community property is also under the tortfeasor's control and would thus be subject to the judgment,[172] only half of the community property could be used to satisfy the judgment. This suggestion borrows from New Mexico's partition system that only allows half of the community assets to be used for a tort judgment.[173] Finally, once the court awards a tort judgment, if the couple later divorces, an asset offset in favor of the innocent spouse should be granted, similar to the California and Washington systems. By making clear exactly what assets are available for tort judgments, courts do not need engage in characterization tests that become problematic.[174] Additionally, by making a combination of separate property and, if needed, community property available for a tort judgment, tort victims would have greater ability to recover. Finally, by limiting recovery to half of the community property and granting a postdivorce offset, innocent spouses would suffer less for the conduct of their ex-spouses.

Characterization tests have inconsistent results.[175] The departure from characterization is radical because most states do try to characterize tort awards.[176] These courts try to look at the factual circumstances surrounding the tort when deciding which type of property is subject to a tort judgment.[177] However, these fact-sensitive inquiries are fraught with assumptions and can always be contradicted by other facts not accounted for. For example, consider *Hays v. Richardson*.[178] There, an Arizona court found community liability where a husband drove drunk and crashed his vehicle on his way to pick up his family from a live taping of a television show.[179] The court viewed picking up his family as an action that benefitted the community.[180] The court assessed punitive damages against the community property.[181] Because the court held the tort judgment as a community obligation, the tort victim can recover from the community assets.[182]

However, change the *Hays* facts slightly: what if instead the tortfeasor was heading to a cheap motel to meet with another woman to have an extra-marital affair? Potentially, this could be characterized either way. For example, if the wife did not know about the affair, a court could characterize it as a separate property tort because of the wife's lack of knowledge in what was going on. However, if there was evidence that the wife knew of the affair and consented to it, a court could view it as the husband's recreational activity and make the community assets available.[183]

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171. *See* CAL. FAM. CODE §1000(b) (West 2018).
172. *See id.*
173. N.M. STAT. ANN. 1978, § 40-3-10(A) (2018).
174. *See supra* Section II.A.
175. *See supra* Section II.A.
176. *See supra* Part I.
177. *See supra* notes 60–65.
178. 386 P.2d 791, 792 (Ariz. 1963).
179. *Id.*
180. *Id.*
181. *Id.*
182. JACOBS, *supra* note 23, § 13.7.
183. *See* Reckart v. Avra Valley Air, 509 P.2d 231, 232–33 (Ariz. Ct. App. 1973).

A more interesting fact pattern would have the wife know about the affair but begrudgingly consent to it because she wants to maintain the family unit for the kids. Thus, allowing her husband to sleep with other women could be viewed as a benefit to the community because it is keeping the community unit intact. Based on the emotional nature and variations of the facts, judges could be persuaded to view the tort as a community obligation or as separate property obligation.[184] The volatility in these situations causes unknown results and difficult precedent to reconcile.[185] The bright-line rule ends this dilemma. In all situations regardless of the facts, the victim collects separate property first and community property second.

Additionally, consider the above facts from *Hays* through the wife's perspective. There, the court's ruling strips the innocent spouse's community property interest away from her by finding the tort a community obligation.[186] It penalizes her further by adding punitive damages.[187] The court effectively punished her for the conduct of her husband.[188] There was no indication from the court that she consented to his actions or even that she knew what was going on.[189] This case happened before the era of cell phones, so she probably did not speak to her husband before he began driving to pick up the family.[190] Moreover, if the tortfeasor had any separate property, which it is possible that he does not, it is protected from the judgment because, in Arizona, community obligations can only be satisfied by community property.[191] The new bright-line rule remedies this injustice partially. The tortfeasor's separate property will be the first used to satisfy the judgment. Thus, the tortfeasor individually will be held accountable, jibing with the tort-law principle of holding tortfeasors accountable for their actions.[192] Additionally, by granting the offset at divorce, similar to the process in Washington and California, the innocent spouse is further protected.[193] If the marriage dissolves, potentially all of the remaining community property will be awarded to the innocent spouse. For example, if a jury grants a $100,000 award to a victim, and the community only has $200,000 in assets, then the victim should be able to satisfy the entire judgment against those assets. If the spouses divorce later and only have $100,000 in community assets, by granting the offset the court would award that entire amount to the innocent spouse. Thus, the innocent spouses will maintain their share of the community property if the marriage dissolves.

Nonetheless, if the tort victim recovers from the community property at all, community property principles are still violated.[194] The community property system

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184. *See* deElche v. Jacobsen, 622 P.2d 835, 840 (Wash. 1980).
185. *See supra* notes 103–06.
186. *See Hays*, 386 P.2d at 792.
187. *Id.*
188. *See id.*
189. *See id.*
190. *See id.*
191. *See* JACOBS, *supra* note 23, § 13.7.
192. 74 AM. JUR. 2d Torts § 2 (2018).
193. *See* CAL. FAM. CODE § 2625 (West 2018); *deElche v. Jacobsen*, 622 P.2d 835, 840 (Wash. 1980).
194. *See* DEFUNIAK & VAUGHN, *supra* note 18, at 239–41.

requires that both spouses have a vested half-interest in all of the community property, not an interest in half of the community property.[195] For example, if there are $200,000 in assets, both spouses have an interest in the $200,000 as a whole, not an interest in $100,000 as individuals. The tort victim's recovery from community assets still strips the innocent spouse of a property interest. However, this concession needs to be made if the tort victim is to recover at all.

Moreover, using *Hays* as an example again, the court characterized the tort award as a community obligation and the tort victim recovered.[196] However, changing the facts so that that the husband's drunk driving occurred on the way to an extra-marital affair potentially bars the victim's recovery if the tort is viewed as not taking place on a community activity. In Arizona, if the court treats that situation as a separate property tort, community property could not satisfy the judgment because only separate property could be used.[197] Because most married couples do not have a lot of separate property, due to marrying with little or commingling their assets and changing them to separate property,[198] the tort victim will have no assets available to recover.[199] Thus, the tort principle of compensating tort victims for their injuries would be violated.[200] The bright-line rule removes the characterization test that would bar a victim's recovery in this situation and allows the victim to recover regardless of any underlying activity.

Nonetheless, the bright-line rule still potentially violates tort-law principles.[201] For example, if a jury awards a $200,000 award, but a tortfeasor has no separate property and the community property only has $100,000, the rule limits the tort victim's recovery to $50,000 only.

Also, torts committed by nonwage-generating spouses create additional problems. For example, if the tortfeasor is a nonworking spouse, potentially, the tort victim's ability to recover is eliminated. In Arizona, courts likely would view a nonworking spouse as not generating any community assets and would only allow the tort victim to recover from the assets generated—i.e., nothing.[202] Thus, an

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195. *Id.*

196. Hays v. Richardson, 386 P.2d 791, 792 (Ariz. 1963).

197. *See* JACOBS, *supra* note 23, § 13.7.

198. Kathleen Nemetz, *The Do's and Don'ts of Keeping Assets Separate in Marriage*, NERD WALLET (Mar. 26, 2015), https://www.nerdwallet.com/blog/investing/keeping-assets-separate-in-marriage/ ("Couples often commingle separate and marital property.").

199. *See id.; supra* discussion at notes 18–19.

200. *See* SPEISER, ET AL., *supra* note 169, § 1:3.

201. *See supra* note 169.

202. *See* Hines v. Hines, 707 P.2d 969 (Ariz. Ct. App. 1985). There, a man had divorced his first wife and remarried. *Id.* at 970. In the divorce, he was ordered to pay child support. *Id.* However, in order to avoid paying, he stopped working and his new wife supported him. *See id.* The first wife wanted to obtain a judgment against the new wife's wages to pay for the debt. *Id.* The court held that the first wife was only entitled to the wages of the husband and not the new wife, thus thwarting her recovery because the husband was not generating wages. *See id.* at 971.

incentive would be created for nonasset-generating spouses to commit torts and not face any consequences.

Conversely, a court could try to value a nonworking spouse's contribution to the community to come up with an amount that could be used for a judgment. However, to do so would be difficult due to the different functions that the nonworking spouse does.[203] Additionally, attempting to value a nonworking spouse's contribution to the community leads to odd argument incentives. The marital community will argue that the nonworking spouse is horrible and that the cost of his or her services should be valued low. However, the tort victim will try to increase the value of the nonworking spouse by arguing that the nonworking spouse is the greatest stay-at-home spouse on the planet.[204] Additionally, if a court were to value the nonworking spouse's financial worth and award an amount to the tort victim, community property law principles would still be violated because the innocent spouse is still losing more community property, potentially more tangible community property, like money, than is coming into the community. To avoid these problems, giving up to half of the community property simplifies the calculation and provides some protection to victims by making assets available for recovery.

## CONCLUSION

A new bright-line rule that does not require characterization and gives a tort victim access to a tortfeasor's separate property first and then half of the community property partially reconciles the two systems of torts and community property. The two systems have competing agendas. Both try to protect different people: tort law tries to protect tort victims, whereas community property tries to protect spouses entering into a marital relationship. States have tried to reconcile the systems by characterizing torts into community or separate property obligations. These attempts have led to confusing case law with inconsistent results. The results then violate community property or tort-law principles, typically with one system being favored over the other. The new rule does not perfectly reconcile the systems but creates a system where tort victims will be guaranteed, outside of pure insolvency of a tortfeasor, some type of compensation. It also protects innocent spouses from losing all of their assets due to the tortious actions of their spouses.

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203. *See* Mark P. Cussen, *Insuring Against the Loss of A Homemaker*, INVESTOPEDIA (Jan. 23, 2012), https://www.investopedia.com/articles/pf/08/insure-homemaker.asp (arguing that a nonworking spouse's worth likely falls between $30,000 and $500,000).

204. These arguments are similar to the types of arguments made when trying to value a separate property business at divorce. *See* Cockrill v. Cockrill (II), 676 P.2d 1130 (Ariz. Ct. App. 1983).