

## COMMENT

### **TORTIOUS STANDARD, TORTUROUS RESULTS: IMPROVING THE APPROACH TOWARD CONTRIBUTORY CONDUCT UNDER WISCONSIN'S CRIME VICTIM COMPENSATION STATUTE**

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Each year in Wisconsin, thousands of victims of violent crime apply for state-sponsored compensation under the Crime Victim Compensation (“CVC”) statute, as they are constitutionally entitled to do. However, the CVC statute excludes from compensation any victim whose conduct “substantially contributed” to their injury or death. This standard replicates Wisconsin’s basic test for causation in negligence cases; a crime victim “substantially contributed” to their injury or death if their conduct was a *substantial factor* in causing it.

As this Comment explains, the contributory conduct limitation’s causation analysis is incomplete. In negligence cases, Wisconsin courts look to several public policy factors to limit tortfeasors’ liability, even where their negligent conduct was a substantial factor in bringing about the plaintiffs’ injuries. The CVC statute’s “substantially contributed” standard involves no such public policy inquiry, which leaves the question of legal causation unanswered. Exacerbated by administrative rules that articulate a myriad of forms of contributory conduct for CVC adjudicators to scrutinize—including the victim’s consent, provocation, drug and alcohol consumption, recent criminal history, and incarceration status—the CVC statute’s contributory conduct limitation supplies punishingly broad grounds for dismissing meritorious CVC claims. This tortious standard wreaks torturous results—it fails vulnerable crime victims and the intent of the Wisconsin State Legislature.

This Comment argues that the CVC statute’s “substantially contributed” standard must be changed and offers three improved alternatives. The first proposed approach increases the State’s burden of proof as to the contributory conduct limitation; it would oblige the State to prove that a victim substantially contributed to their injury or death beyond a reasonable doubt. The second proposed approach resembles Wisconsin’s contributory negligence statute. Denying a CVC claim under this approach would require a finding that the victim’s contributory conduct was a greater

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cause of their injury or death than the perpetrator’s criminal conduct. The third proposed approach adopts an adapted version of the first three public policy factors used to determine the scope of liability in negligence cases.

This Comment ultimately advocates for the third, or “public policy factors,” approach. The “public policy factors” approach is optimal because it entails minimal procedural strain, is legally robust, and recaptures the legislative intent of the CVC statute. In essence, this Comment encourages an approach toward contributory conduct that increases victims’ access to the funds they need and deserve.

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*Content Warning: This Comment centers on the State’s interaction with victims of violent crime who request crime victim compensation. The Introduction presents a hypothetical instance of gender-based violent crime as an expository case. One of this Comment’s primary objectives is to demonstrate that emotionally challenging cases like the one portrayed are, at least in part, a consequence of the current legal structure of Wisconsin’s Crime Victim Compensation (“CVC”) statute. Readers are encouraged to understand their emotional responses to this Comment as reflections of the structural issues with the CVC statute and, in turn, the pressing need for change.*

INTRODUCTION

“Can I come in for a nightcap? It’s cold out here!” your date asks. He walked you home after an evening of drinks and trivia at a local bar in Milwaukee’s Riverwest neighborhood—your fifth date together. Most nights, you would be happy to have him stay over. But you can feel the exhaustion building behind your eyelids, and you have an early shift tomorrow.

“Mm, not tonight,” you respond. “Maybe this weekend?”

“Come on,” he insists, grabbing your hand. His grip is more forceful than it is flirtatious.

You twist your arm away, simultaneously annoyed and disappointed. “Don’t be an *asshole*,” you snap, then soften: “I’ll text you tomorrow.” You turn away and take a few steps toward your apartment building’s front door.

“You’re crazy,” he mutters venomously at your back.

You whip back around to face him. “*What* did you just say to me?”

Before you can react, he shoves you, hard. Your arms lurch behind you to try to ease the fall, but you nonetheless feel the back of your head smash against the sidewalk. Then, you feel nothing at all.

The next afternoon, you wake up in the hospital, where you were supposed to be treating patients at that very moment. Your head rings as the doctor describes how he hurt you: a skull fracture; a severe concussion; abrasions all across your hands from trying to catch yourself.

Six weeks after he assaulted you turns out to be a big milestone. Your daily migraines from the concussion and the swelling at the base of your skull have receded, so you have been cleared to return to work. More importantly, your attacker pleads guilty to substantial battery.

You are comforted by the fact that he cannot hurt anyone else like he did you, if only for a little while. However, that comfort only goes so far. You have racked up thousands of dollars in medical bills that won't be covered by your insurance. Your employer granted you two weeks of paid leave, but you are still left with four weeks of lost wages. You may also have to cut your work hours back if your concussion symptoms flare up. In that case, you will definitely struggle to make ends meet. These thoughts ring through your head and pound on your chest for weeks, until you share them with the prosecutor assigned to your attacker's case. She tells you about Wisconsin's Crime Victim Compensation Program and suggests that you file a claim as soon as possible. You spend the following weekend filling out the forms and pulling together the documentation necessary for the application.

Ten months later, you receive notice that the Office of Crime Victim Services has denied your claim. Although you got far worse than you deserved, the decision explains, as a matter of fact and law you "substantially contributed" to your injuries by failing to disengage and verbally provoking your attacker while under the influence of alcohol.<sup>1</sup> Therefore, you are disqualified from compensation. For hours, you read the decision over and over. Not only are you disappointed that you will not receive any help with your growing medical debt or lost wages—you are incredibly ashamed and embarrassed. As you finally lay down in bed, your head begins to throb, like it did almost a year ago. Even though you know better, you cannot help but think: *this is all my fault*.

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This Comment is about Wisconsin's Crime Victim Compensation ("CVC") statute and how it restricts crime victims who "substantially contributed" to their injury or death from compensation.<sup>2</sup> The

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1. This sentence is adapted from a contested CVC case in which the parties disputed whether the claimant "substantially contributed" to his injuries when he "took it upon himself to go upstairs and yell" at disruptively noisy patrons in a bar and suffered severe injuries at the hands of those patrons in the "serious fight" that ensued. *Tye M. Potokar*, No. CV-99-0087, 1999 WL 624580, at \*2 (Wis. Div. Hrg. App. 1999). The presiding Administrative Law Judge concluded that the claimant unquestionably "got far worse than he deserved. However, as a matter of fact and law it is clear that his aggressive actions 'substantially contributed' to the infliction of his injuries. Accordingly, his claim for crime victim compensation was properly denied by the OCVS." *Id.* at \*3.

2. See WIS. STAT. § 949.08(2)(a) (2021-22).

“substantially contributed” standard, as it operates now, echoes Wisconsin’s basic test for causation in negligence cases; a crime victim is considered to have “substantially contributed” to their injury or death if their conduct was a *substantial factor* in causing it.<sup>3</sup> Yet in negligence cases, unlike in CVC claims before the Office of Crime Victim Services (“OCVS”), courts limit the liability of tort defendants by looking to several public policy factors.<sup>4</sup> By failing to consider these factors, the CVC statute’s contributory conduct limitation overlooks a critical facet of Wisconsin’s causation jurisprudence. This gap in the causation analysis results in the dismissal of deserving CVC claims, which in turn forsakes the Wisconsin State Legislature’s (“Legislature”) intention of “provid[ing] sufficient assistance to victims of crime . . . to ease their financial burden and to maintain their dignity.”<sup>5</sup> In light of the particular obstacles and disadvantages faced by CVC claimants<sup>6</sup> and the extensive rights and privileges that the State affords to other aspects of victimhood, the State’s scrutiny of crime victims’ conduct must evolve.

This Comment proceeds in five parts. Part I provides a detailed background of Wisconsin’s Crime Victim Compensation statute and its contributory conduct limitation, including that limitation’s origins in the common law of negligence. Given the contributory conduct limitation’s ties to Wisconsin tort law, Part II confronts the argument that the availability of tort remedies renders unnecessary any changes to the CVC statute. More specifically, civil lawsuits carry several financial and procedural barriers that are not present in CVC claims. Because these barriers make civil lawsuits an unworkable course of action for many crime victims, Wisconsin’s CVC program is essential, and the standard that the CVC statute uses to scrutinize contributory conduct merits careful examination.

Part III highlights the problems with the “substantially contributed” standard. First, this standard frames victimhood in problematic terms, such that achieving victimhood status is unattainable for many CVC claimants. Second, the “substantially contributed” standard neglects a crucial facet of Wisconsin’s common law of causation. In so doing, the contributory conduct limitation provides unforgivingly broad grounds for

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3. See *infra* Section I.D.2.

4. In *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233, 240 (Wis. 1998), the Wisconsin Supreme Court articulated six “public policy factors” to determine the scope of a tortfeasor’s liability. These factors include the foreseeability of the plaintiff’s injury, the extent of the plaintiff’s injury in light of “the culpability of the negligent tortfeasor,” and the risk that allowing recovery would “open the way for fraudulent claims” or have “no sensible or just stopping point.” *Id.*; see *infra* Section III.B.

5. § 949.001.

6. See *infra* Section I.C.

rejecting meritorious CVC claims, which works against the legislative intent of the statute.

With the CVC statute's structural problems in mind, in Part IV this Comment offers three alternative interpretive approaches for the "substantially contributed" standard. The first approach entails a determination that the claimant's contributory conduct substantially caused their injury or death beyond a reasonable doubt. To acknowledge the distinct experiences of and constitutional protections for crime victims, this approach departs from a negligence-based analysis and conceives of contributory conduct in terms of predominant criminal standards. The second interpretive approach defines "substantial" contributory conduct as that which is a greater cause of the victim's injuries than the perpetrator's criminal conduct. This approach mirrors Wisconsin's contributory negligence statute; it operates under the rationale that victims should not be foreclosed from compensation unless they are more at fault than their perpetrator(s). Finally, the third approach attaches an adapted version of the first three public policy factors—those used by Wisconsin courts to limit the scope of liability in negligence cases—to the overarching "substantially contributed" analysis. This "public policy factors" approach aims to clarify the meaning of the word "substantially" within the contributory conduct limitation without upending the existing scheme used to analyze CVC claimants' contributory conduct.

Finally, in Part V, this Comment argues for the "public policy factors" approach: A crime victim should only be considered to have "substantially contributed" to their injury or death if their conduct was a substantial factor in causing it *and* is not excused by the first three of the public policy factors that Wisconsin courts use to limit tort liability. This Comment urges the Wisconsin Department of Justice to engage in rulemaking that will formalize the "public policy factors" approach within Wisconsin's Administrative Code because that approach involves minimal procedural strain, is legally sound, and (re)captures the Legislature's intent concerning the CVC statute. To better "preserve and protect victims' rights to justice and due process,"<sup>7</sup> as Wisconsin's Constitution demands, the State should improve its analysis of CVC claimants' contributory conduct.

#### I. WISCONSIN'S CRIME VICTIM COMPENSATION PROGRAM

The problems with Wisconsin's CVC program can only be resolved with a thorough understanding of the program itself. The following four

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7. Wis. CONST. art. I, § 9m(2).

sections provide the necessary background. Section A outlines the fundamental features of the CVC program: the Legislature's intent in administering it, the parties and injuries to which it applies, how it calculates and limits awards, and the sources of its funding. Section B explains how CVC claims move through the administrative state. Section C surveys the large-scale data of the CVC program, including the number of claims it receives and processes per year, the crimes that most commonly underlie CVC claims, and the demographics of CVC claimants. Most importantly, Section D examines the CVC statute's contributory conduct limitation, focusing on its language, its accompanying provisions in the Wisconsin Administrative Code, and its tort law origins.

### *A. The Fundamental Features*

On both emotional and economic levels, the costs of crime victimization are tremendous.<sup>8</sup> In 1976, the Legislature enacted Chapter 949 of the statutes, "Awards for the Victims of Crimes," to recognize this fact and "to encourage the cooperation of the public in law enforcement and . . . promote the public welfare."<sup>9</sup> The Legislature elaborated on its intent regarding crime victim compensation in 1979,<sup>10</sup> in step with its creation of Wisconsin's Crime Victims Bill of Rights.<sup>11</sup> Wisconsin Statutes section 949.001 declares that the State holds a "moral responsibility to aid innocent victims of violent crime."<sup>12</sup> Underlying this "moral responsibility" is the desire to protect the rights of crime victims "as fully" as those of criminal offenders.<sup>13</sup> In turn, the statute charges the State with "provid[ing] sufficient assistance to victims of crime and their families in order to ease their financial burden and to maintain their

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8. See 2A JAY E. GRENIG & NATHAN A. FISHBACH, WISCONSIN PRACTICE SERIES, METHODS OF PRACTICE § 91:1 (5th ed. 2023). Recently, a Vanderbilt University research team led by Professor Mark A. Cohen estimated that the financial impact of crime in the United States was \$2.6 trillion in 2017 alone. The direct costs to victims and taxpayers that year totaled \$620 billion—a figure greater than the \$590 billion spent on the military and the \$450 billion spent on social welfare programs. See *New Research Examines the Cost of Crime in the U.S., Estimated To Be \$2.6 Trillion in a Single Year*, VAND. UNIV. RSCH. NEWS (Feb. 5, 2021, 11:13 AM), <https://news.vanderbilt.edu/2021/02/05/new-research-examines-the-cost-of-crime-in-the-u-s-estimated-to-be-2-6-trillion-in-a-single-year/> [<https://perma.cc/9MK9-RJLL>].

9. S.B. 139, 1975 Leg., Reg. Sess. (Wis. 1975).

10. See S.B. 345, 1979 Leg., Reg. Sess. (Wis. 1979).

11. The Legislature created the section delineating the legislative intent of the CVC statute just eight days before it published Wisconsin's Crime Victims' Bill of Rights, Ch. 950. See *id.*; A.B. 1043, 1979 Leg., Reg. Sess. (Wis. 1979).

12. WIS. STAT. § 949.001 (2021–22).

13. *Id.*

dignity as they go through a difficult and often traumatic period.”<sup>14</sup> All rules promulgated by the Wisconsin Department of Justice in relation to the Crime Victim Compensation Program must “include procedures to ensure that any limitation of an award is calculated in a fair and equitable manner.”<sup>15</sup> Wisconsin enshrined crime victim compensation, as dictated by Chapter 949 of the statutes, into its constitution in 1993.<sup>16</sup>

Since its inception, the CVC program has exclusively contemplated violent crimes that cause personal injuries.<sup>17</sup> Dependents of deceased victims, family, and household members of homicide victims likewise fall within the purview of the statute.<sup>18</sup> Victims may be compensated for the costs of medical treatment, lost wages, necessary housing accessibility adaptations, caregiving services, property held for evidentiary purposes, and funeral and burial expenses.<sup>19</sup> If the OCVS determines that a CVC claimant incurred qualifying economic losses as “a direct result” of an injury<sup>20</sup> caused by a “compensable act,”<sup>21</sup> it may issue an award regardless of whether the perpetrator of the claimant’s injury or death faces criminal prosecution or conviction.<sup>22</sup> Currently, the program compensates victims up to \$40,000 for the losses they incur within four years of the underlying crime.<sup>23</sup> Compensation awards are reduced by any applicable “collateral deductions,” which include payments from the person who committed the crime (by way of court-ordered restitution), insurance, worker’s compensation, public funds, awards under the Sexual Assault Forensic Examination Program, or third parties who are found liable for the offender’s acts.<sup>24</sup>

In addition to the timing requirements attached to CVC applications, Section 949.08 articulates several limitations on CVC awards. For the purposes of this Comment, the most important of these is that “[n]o award may be ordered if the victim engaged in conduct which substantially contributed to the infliction of the victim’s injury or death or in which the victim could have reasonably foreseen could lead to the injury or death.”<sup>25</sup> CVC claims are also denied if the claimant committed

14. *Id.*

15. § 949.02.

16. *See* Wis. CONST. art. I, § 9m(2)(n) (amended 2020).

17. *See* § 949.03.

18. *See* §§ 949.05(3), 949.06(1m)(b).

19. *See* § 949.06(1); SARAH WYNN, WIS. LEGIS. FISCAL BUREAU, CRIME VICTIM AND WITNESS SERVICES: INFORMATIONAL PAPER 59, at 6 (2019).

20. *See* § 949.06(1).

21. *See* § 949.03.

22. § 949.06(4)(a).

23. § 949.08(1m)(a).

24. *See* § 949.06(3); WYNN, *supra* note 19, at 7.

25. § 949.08(2)(a) (cleaned up).



a crime that contributed to their injury or death,<sup>26</sup> failed to cooperate with appropriate law enforcement agencies,<sup>27</sup> failed to cooperate with the CVC program,<sup>28</sup> or was a passenger in the offender's vehicle (which subsequently crashed, causing injury or death) despite knowing that the offender was under the influence of an intoxicant or controlled substance.<sup>29</sup>

When the OCVS determines that none of the section 949.08 limitations apply and awards a claimant compensation, that compensation comes from three sources. These sources include general purpose revenue (GPR), restitution payments collected from criminal defendants by the State, and an annual grant allotted by the federal Victims of Crime Act (VOCA).<sup>30</sup> With these substantive features in mind, this Comment turns to a procedural overview of Wisconsin's CVC program.

### *B. The Life Cycle of a CVC Claim*

The life cycle of a CVC claim begins as soon as eligible criminal conduct occurs. Generally, a CVC claimant must report the injuring incident or offense to law enforcement within five days of its occurrence.<sup>31</sup> Claimants must then submit their CVC applications, complete with the proper forms and records, within one year of the personal injury or death.<sup>32</sup> Upon receiving an application, the OCVS—the body within the Wisconsin Department of Justice that administers the CVC program—requests and reviews an investigative report from law enforcement.<sup>33</sup> This intake process can take anywhere from 90 to 120 days.<sup>34</sup> Because the outcomes of CVC cases implicate a “substantial interest” of CVC claimants, claimants may request a hearing supervised by an administrative law judge (ALJ).<sup>35</sup>

At the close of the hearing or internal eligibility determination proceedings, the OCVS or ALJ delivers a written decision to the claimant

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26. See § 949.08(2)(b).

27. See § 949.08(2)(d).

28. See § 949.08(2)(f).

29. See § 949.08(2)(e).

30. See WYNN, *supra* note 19, at 7.

31. See § 949.08(1).

32. *Id.*

33. See *Crime Victim Compensation Program – Compensation for Your Losses*, WIS. DEP'T JUST., <https://www.doj.state.wi.us/ocvs/compensation/crime-victim-compensation-program-compensation-your-financial-losses> [https://perma.cc/9JK8-FVVE].

34. See *id.*

35. See WIS. STAT. § 227.42(1) (2021–22); § 949.11.

explaining its findings of fact and conclusions of law.<sup>36</sup> Payment of eligible claims begins “as soon as all necessary information has been submitted and reviewed.”<sup>37</sup> If a claimant receives an adverse decision, they may petition for rehearing<sup>38</sup> or judicial review.<sup>39</sup> Claimants must serve these petitions within twenty days and thirty days after being served the OCVS’s decision, respectively.<sup>40</sup> ALJs carry out judicial review in the circuit court of the county where the petitioner resides.<sup>41</sup> On review, the court defers to the agency’s findings of fact that are substantiated by the record but not to the agency’s interpretation of the law.<sup>42</sup> In the following Section, this Comment presents essential data concerning Wisconsin’s CVC program, including the number of claims involved, the crimes that most commonly underlie those claims, the general amount of assistance it provides, and the demographics of its participants.

### *C. Crime Victim Compensation in Wisconsin: By the Numbers*

Wisconsin’s OCVS handles thousands of CVC claims and disburses millions of dollars in CVC funding annually. Each year between 2018 and 2022, over 2,000 crime victims filed CVC applications with Wisconsin’s OCVS.<sup>43</sup> During that same period, the OCVS approved and paid between 1,100 and 1,500 CVC applications while denying an

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36. See § 227.47(1).

37. *Crime Victim Compensation Program*, *supra* note 33.

38. See § 227.49.

39. See §§ 227.52–.53.

40. See §§ 227.49, .53.

41. See § 227.53(1)(a)(3).

42. See § 227.57.

43. See OFF. FOR VICTIMS OF CRIME, VICTIM COMPENSATION FORMULA GRANT PROGRAM, ANNUAL PERFORMANCE MEASURES REPORT, OCTOBER 01, 2018 – SEPTEMBER 30, 2019, at 1 (2019) [hereinafter VICTIM COMPENSATION 2018–19], <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/vc-fy-19-wisconsin-annual-report-508.pdf> [<https://perma.cc/BR5L-36TW>]; OFF. FOR VICTIMS OF CRIME, VICTIM COMPENSATION FORMULA GRANT PROGRAM, ANNUAL PERFORMANCE MEASURES REPORT, OCTOBER 01, 2019 – SEPTEMBER 30, 2020, at 1 (2020) [hereinafter VICTIM COMPENSATION 2019–20], <https://ovc.ojp.gov/states/vc-fy-2020-wisconsin-annual-report.pdf> [<https://perma.cc/73V8-PC9G>]; OFF. FOR VICTIMS OF CRIME, VICTIM COMPENSATION FORMULA GRANT PROGRAM, ANNUAL PERFORMANCE MEASURES REPORT, OCTOBER 01, 2020 – SEPTEMBER 30, 2021, at 1 (2021) [hereinafter VICTIM COMPENSATION 2020–21], <https://ovc.ojp.gov/states/vc-fy-2021-wisconsin-annual-report.pdf> [<https://perma.cc/7YRF-KYTX>]; OFF. FOR VICTIMS OF CRIME, VICTIM COMPENSATION FORMULA GRANT PROGRAM, ANNUAL PERFORMANCE MEASURES REPORT, OCTOBER 01, 2021 – SEPTEMBER 30, 2022, at 1 (2022) [hereinafter VICTIM COMPENSATION 2021–22], <https://ovc.ojp.gov/states/vc-fy-2022-wisconsin-annual-report.pdf> [<https://perma.cc/RJ6Y-8H4E>].

average of 581 applications per year.<sup>44</sup> On average, it took the OCVS seventy-five days from receipt of an application to render its decision.<sup>45</sup> From 2016 to 2018, the categories of crime that most commonly generated CVC claims were (1) aggravated battery (1,490 claims), (2) sexual assault of an adult (1,152 claims), (3) sexual assault of a minor (956 claims), (4) first- and second-degree homicide (329 claims), and (5) domestic abuse of an adult (241 claims).<sup>46</sup> Together, those five categories made up 78.8% of all CVC claims filed throughout that period.<sup>47</sup> Similarly, between 2018 and 2022, the OCVS awarded the most compensation to victims of (1) assault (\$8,069,443), (2) homicide (\$3,629,480), (3) sexual assault (\$3,573,575), and (4) child sexual abuse (\$876,397).<sup>48</sup> Between 2008 and 2022, the OCVS awarded an average of \$3,718 for approved claims.<sup>49</sup>

Perhaps unsurprisingly,<sup>50</sup> women comprised a large majority—64.2%—of Wisconsin’s CVC claimants from 2018 and 2022.<sup>51</sup> People of color are also disproportionately represented in the CVC program: they are parties in around 40% of CVC claims per year,<sup>52</sup> despite making up

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44. See VICTIM COMPENSATION 2018–19, *supra* note 43, at 2; VICTIM COMPENSATION 2019–20, *supra* note 43, at 2; VICTIM COMPENSATION 2020–21, *supra* note 43, at 2; VICTIM COMPENSATION 2021–22, *supra* note 43, at 2.

45. See VICTIM COMPENSATION 2018–19, *supra* note 43, at 8; VICTIM COMPENSATION 2019–20, *supra* note 43, at 8; VICTIM COMPENSATION 2020–21, *supra* note 43, at 8; VICTIM COMPENSATION 2021–22, *supra* note 43, at 8.

46. See WYNN, *supra* note 19, at 19.

47. See *id.*

48. See VICTIM COMPENSATION 2018–19, *supra* note 43, at 7; VICTIM COMPENSATION 2019–20, *supra* note 43, at 7; VICTIM COMPENSATION 2020–21, *supra* note 43, at 7; VICTIM COMPENSATION 2021–22, *supra* note 43, at 7. In these reports, crimes like battery and domestic abuse are likely subsumed within the “Assault” category.

49. See VICTIM COMPENSATION 2018–19, *supra* note 43, at 7; VICTIM COMPENSATION 2019–20, *supra* note 43, at 7; VICTIM COMPENSATION 2020–21, *supra* note 43, at 7; VICTIM COMPENSATION 2021–22, *supra* note 43, at 7; WYNN, *supra* note 19, at 8.

50. Women and girls experience sexual and domestic violence, which underlie a significant proportion of CVC claims, at exceptionally high rates. See *Victims of Sexual Violence: Statistics, RAPE, ABUSE & INCEST NAT’L NETWORK (RAINN)*, <https://www.rainn.org/statistics/victims-sexual-violence> [https://perma.cc/4ZT8-P4M3].

51. See VICTIM COMPENSATION 2018–19, *supra* note 43, at 1; VICTIM COMPENSATION 2019–20, *supra* note 43, at 1; VICTIM COMPENSATION 2020–21, *supra* note 43, at 1; VICTIM COMPENSATION 2021–22, *supra* note 43, at 1.

52. See VICTIM COMPENSATION 2018–19, *supra* note 43, at 1; VICTIM COMPENSATION 2019–20, *supra* note 43, at 1; VICTIM COMPENSATION 2020–21, *supra* note 43, at 1; VICTIM COMPENSATION 2021–22, *supra* note 43, at 1.

less than 20% of Wisconsin's overall population.<sup>53</sup> The OCVS does not gather data concerning CVC claimants' socioeconomic status. Nonetheless, it is also likely that CVC claimants come from disproportionately poor backgrounds. First, compensation is only available to victims whose crime-related expenses are not covered by "collateral deductions," which include insurance.<sup>54</sup> Uninsured people are disproportionately low income.<sup>55</sup> Furthermore, crime victims who cannot afford to bear the costs of victimization are more inclined to engage in the CVC process than those who can. Victims with more financial resources may choose not to file CVC claims in order to avoid the potential trauma of cooperating with law enforcement or having their conduct scrutinized by state actors.<sup>56</sup>

These statistics paint a concerning portrait of the standard CVC claimant. Most importantly, all CVC claimants have been personally subjected to (or, in the case of homicide, witnessed a family member die as a result of) a violent crime.<sup>57</sup> The physical injuries and financial hardships contemplated by the CVC program represent only a portion of the struggles that crime victims face. Scientists specializing in trauma have determined that crime victimization also frequently impairs victims' parenting, intimate relationships, and occupational and social functioning, as well as their subjective life satisfaction and well-being.<sup>58</sup> Awareness of the impacts of crime victimization is crucial—not only for those who administer the CVC program but also for the legal standards and institutional structures that comprise the program itself.

Demographically, CVC claimants are also more likely than the average Wisconsinite to be socioeconomically disadvantaged women of

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53. See VICTIM COMPENSATION 2018–19, *supra* note 43, at 1; VICTIM COMPENSATION 2019–20, *supra* note 43, at 1; VICTIM COMPENSATION 2020–21, *supra* note 43, at 1; VICTIM COMPENSATION 2021–22, *supra* note 43, at 1; *Quick Facts: Wisconsin*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/WI/PST045222> (last visited Aug. 30, 2024).

54. See WYNN, *supra* note 19, at 7.

55. See KIMÁ JOY TAYLOR, TAYLOR NELSON, EVA H. ALLEN & SOFIA HINOJOSA, URB. INST., *GUIDE TO EQUITY FOR THE UNINSURED* 5 (2024), <https://www.urban.org/sites/default/files/2024-01/Guide%20to%20Equity%20for%20the%20Uninsured.pdf> [<https://perma.cc/7QAC-RGJN>].

56. See Njeri Mathis Rutledge, *Looking a Gift Horse in the Mouth—The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims*, 19 DUKE J. GENDER L. & POL'Y 223, 245 (2011) (explaining that requiring a claimant's "cooperation through trial delegitimizes safety concerns expressed by domestic violence victims and prioritizes the interests of the state above the interests of domestic violence victims").

57. See § WIS. STAT. § 949.03 (2021–22).

58. See Rochelle F. Hanson, Genelle K. Sawyer, Angela M. Begle & Grace S. Hubel, *The Impact of Crime Victimization on Quality of Life*, 23 J. TRAUMATIC STRESS 189, 190–92 (2010).

color.<sup>59</sup> Since minorities face structural barriers and disproportionate discrimination in administrative processes,<sup>60</sup> CVC claimants who identify with one or more marginalized groups find themselves in an extra vulnerable position when they navigate the CVC program. In turn, the effectiveness of the CVC program depends on the extent to which it accounts for the specific socio-legal vulnerabilities of the victims it serves.

#### *D. The Limitation on Crime Victim Compensation for Contributory Conduct*

All CVC programs nationwide limit eligibility for compensation to “innocent” victims, and contributory (mis)conduct is the most frequently cited basis for denying CVC claims.<sup>61</sup> In Wisconsin, the OCVS is prohibited from ordering an award in any case where the victim engaged in conduct that “substantially contributed” to their injury or death.<sup>62</sup> This limitation on crime victim compensation operates at the intersection of administrative, tort, and criminal law; the OCVS, an administrative body, is tasked with applying a standard founded on tort principles to cases that arise from criminal activity. Understanding how these sources of law are interwoven to produce the contributory conduct limitation first demands a close look at the statute’s language and accompanying administrative rules. This Comment then discusses the contributory conduct limitation’s roots in Wisconsin negligence jurisprudence.

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59. See *supra* notes 51–55 and accompanying text.

60. See generally Joy Milligan & Karen Tani, *Seeing Race in Administrative Law: An Interdisciplinary Perspective*, YALE J. ON REGUL.: NOTICE & COMMENT (Sept. 16, 2020), <https://www.yalejreg.com/nc/seeing-race-in-administrative-law-an-interdisciplinary-perspective-by-joy-milligan-and-karen-tani/> [<https://perma.cc/84KC-MKG8>]; Jerry L. Anderson, *Devil in the Details: Structural Racism in Administrative Hearings*, YALE J. ON REGUL.: NOTICE & COMMENT (July 14, 2020), <https://www.yalejreg.com/nc/devil-in-the-details-structural-racism-in-administrative-hearings-by-jerry-l-anderson/> [<https://perma.cc/4TA9-EDPK>].

61. See Rutledge, *supra* note 56, at 240–41. Of the complete and otherwise eligible CVC claims denied between October 1, 2021, and September 30, 2022, in Wisconsin, over fifty-four percent were denied for contributory conduct. See VICTIM COMPENSATION 2018–19, *supra* note 43, at 2; VICTIM COMPENSATION 2019–20, *supra* note 43, at 2; VICTIM COMPENSATION 2020–21, *supra* note 43, at 2; VICTIM COMPENSATION 2021–22, *supra* note 43, at 2.

62. WIS. STAT. § 949.08(2)(a) (2021–22).

### 1. Statutory Language and Guidance

Contributory conduct has always been a basis for reducing or rejecting crime victim compensation awards in Wisconsin.<sup>63</sup> When the Legislature created Chapter 949, it provided that “[i]n determining the amount of an award, the examiner shall determine whether, because of his conduct, the victim of the crime contributed to the infliction of his injury or death, and may reduce the amount of the award or reject the claim altogether, in accordance with such determination.”<sup>64</sup> In other words, a crime victim’s compensation award was reduced in proportion to the extent of their contributory conduct.<sup>65</sup>

Wisconsin’s Legislature amended the CVC statute’s contributory conduct limitation to its current form in 1981.<sup>66</sup> According to section 949.08(2)(a) of the Wisconsin Statutes, the OCVS may not order an award if “the victim engaged in conduct which substantially contributed to the infliction of the victim’s injury or death or in which the victim could have reasonably foreseen could lead to the injury or death.”<sup>67</sup> This standard departs from the original version of the law in two ways. First, the addition of the word “substantially” purportedly raised the magnitude of contributory conduct needed to disqualify CVC claimants from compensation. Second, all findings of “substantial” contributory conduct entailed total preclusion from CVC awards.

No part of Chapter 949 defines the words “substantially contributed.” This term parallels Wisconsin tort law,<sup>68</sup> which is traditionally governed by common law rather than by statute.<sup>69</sup> Therefore, no other state statutes define it either. Section 11.07 of the Wisconsin Department of Justice’s chapter of the Wisconsin Administrative Code is the sole source of guidance for determining whether a CVC claimant engaged in conduct that “substantially contributed” to their own injury or death. But even these administrative rules do not attempt to define the phrase “substantially contributed.” Instead, they implicate intense scrutiny of claimants’ conduct as it relates to the underlying offense. Specifically, when adjudicating CVC claims, the OCVS or other presiding authority:

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63. See S.B. 139, 1975 Leg., Reg. Sess. (Wis. 1975); § 949.08(2)(a).

64. Wis. S.B. 139.

65. See *id.*

66. A.B. 66, 1981 Leg., Reg. Sess. (Wis. 1981).

67. § 949.08(2)(a) (cleaned up).

68. See *infra* Section I.D.2.

69. See *LePoidevin v. Wilson*, 330 N.W.2d 555, 562 (Wis. 1981) (discussing tort claims in the context of common law).

- (a) Shall consider any behavior of the victim that may have directly or indirectly contributed to the victim's injury or death including consent, provocation, verbal utterance, gesture, incitement, prior conduct of the victim and the ability of the victim to have reasonably avoided the incident upon which the claim is based.
- (b) May consider whether the victim was under the influence of an intoxicant or controlled substance at the time of the incident upon which the claim is based; whether the victim has engaged in an ongoing course of criminal conduct within 5 years or less of the date of the incident upon which the claim is based; or whether the incident upon which the claim is based occurred while the victim was incarcerated in a city or county detention facility pending the disposition of criminal charges or, after being convicted of an offense, was serving a sentence of imprisonment.<sup>70</sup>

These rules articulate broad criteria for exclusion from crime victim compensation based on contributory conduct. At the same time, they fail to articulate any threshold for determining when the described types of contributory conduct reach a “substantial” level and entirely ignore the perpetrator's criminal conduct.

## 2. The “Substantially Contributed” Standard's Tort Law Origins

As used in the CVC statute, the phrase “substantially contributed” is analogous to the substantial factor test that Wisconsin courts have adopted for determining causation in negligence cases. In Wisconsin, one's conduct is a cause-in-fact of an injury when it is a *substantial factor* in producing the injury.<sup>71</sup> The term “substantial factor” indicates that the “conduct has such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense.”<sup>72</sup> The conduct in question “need not be the sole factor or the primary factor” giving rise to an injury to be a substantial factor.<sup>73</sup>

*In the Matter of the Crime Victim Compensation Application of Jason R. Brown*<sup>74</sup> illustrates the extent to which CVC adjudicators

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70. Wis. ADMIN. CODE JUS § 11.07(3) (2021).

71. See Wis JI-Civil 1500; *Emer's Camper Corral, LLC v. Alderman*, 2022 WI 46, ¶ 21, 943 N.W.2d 513, 519.

72. *Fischer by Fischer v. Ganju*, 485 N.W.2d 10, 19 (Wis. 1992) (quoting *Clark v. Leisure Vehicles, Inc.*, 292 N.W.2d 630, 635 (Wis. 1980)).

73. *Clark*, 292 N.W.2d at 635.

74. No. CV-96-2164, 1997 WL 910467 (Wis. Div. Hrg. App. 1997).

conceive of the “substantially contributed” standard in terms of the substantial factor test.<sup>75</sup> The claimant, Jason R. Brown, underwent brain surgery after suffering serious injuries when a rival group of teenage boys attacked him and his friends with metal chains and clubs.<sup>76</sup> Days before the assault took place, “bad blood” emerged when Brown sold a small amount of marijuana to an opposing group member who later expressed his disapproval of its quality.<sup>77</sup> In applying the CVC statute’s contributory conduct limitation, the presiding ALJ observed:

The marijuana exchange between Brown and [Brown’s perpetrator] was not the cause of Brown’s injuries. It was however a cause, or a substantial factor, in the events which led to Mr. Brown’s injuries. Under Wisconsin law, the test of “cause” is whether the actor’s action was a ‘substantial factor’ in contributing to the result. The action may be one of several causes; it need not be the sole cause.<sup>78</sup>

On that basis, the ALJ concluded that the OCVS met its “burden of proof of demonstrating that the claimant engaged in conduct which substantially contributed to the infliction of his injuries” and affirmed the denial of Brown’s CVC claim.<sup>79</sup>

The CVC statute’s “substantially contributed” standard also draws conceptual meaning from the common law rule of contributory negligence. Contributory negligence is a defense that bars tort plaintiffs from recovery for the negligence of others when their own negligent conduct is a legal cause of their injury.<sup>80</sup> This rule is rationalized by the idea that tort plaintiffs are accountable for their own carelessness and that tort defendants should only be held liable for injuries caused by *their* negligent conduct. The “substantially contributed” standard found in the CVC statute is similar to common law contributory negligence because it serves to prohibit compensation based on the contributory conduct of the non-offending party. It is further justified by the Legislature’s intent of assisting “*innocent* victims of violent crime.”<sup>81</sup>

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75. *Id.*

76. *Id.* at \*2.

77. *Id.*

78. *Id.* at \*4.

79. *Id.* at \*6.

80. See Steven Gardner, *Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina*, 18 CAMPBELL L. REV. 1, 5 (1996). In Wisconsin, contributory negligence is defined and administered by statute. See WIS. STAT. § 895.045(1) (2021–22).

81. See WIS. STAT. § 949.001 (2021–22) (emphasis added); see also *infra* Section III.A.2.



An essential distinction between the CVC statute's "substantially contributed" standard and its tort law antecedents is the legal context in which each arises. The "substantially contributed" standard is applied by an administrative body to determine the eligibility of violent crime survivors for state-sponsored compensation. In contrast, courts use the substantial factor test to analyze the causation element in negligence cases. The potential pitfalls of applying legal standards that are generally associated with defendants in civil cases to victims of violent crime in administrative cases will be discussed in Section IV.

## II. DESPITE POSSIBLE TORT REMEDIES, A SHIFT IN THE CVC STATUTE'S ANALYSIS OF CONTRIBUTORY CONDUCT IS NEEDED

Considering the contributory conduct limitation's roots in tort law, it is important to acknowledge that civil lawsuits present another means of financial recourse for crime victims.<sup>82</sup> Victims of violent crime may have various causes of action available to them, such as battery, assault, false imprisonment, and intentional infliction of emotional distress.<sup>83</sup> However, tort remedies are not an adequate replacement for CVC funds. Civil actions are often inaccessible or undesirable to crime victims due to financial and procedural barriers.<sup>84</sup>

### A. *Financial Barriers of Tort Remedies*

For crime victims looking to recover from the economic losses brought on by their victimization, various financial constraints inhibit civil lawsuits as the preferred course of action. First, victims must be able to afford an attorney to represent them in their tort action, "and the defendant must have 'deep pockets to pay damages.'"<sup>85</sup> Although the use of contingency fees has increased in recent years, many attorneys who take cases on contingency will only do so if a case involves the opportunity for substantial recovery.<sup>86</sup> Where a defendant lacks significant assets and insurance, recovery against them is not possible,

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82. See SUSAN HERMAN & MICHELLE WAUL, *REPAIRING THE HARM: A NEW VISION FOR CRIME VICTIM COMPENSATION IN AMERICA* 20 (2004).

83. See Rutledge, *supra* note 56, at 261 & n.344.

84. *Id.* at 260–65.

85. *Id.* at 261–62.

86. See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1190–91 (1992) ("[L]awyers usually do not accept a case [on contingency] unless they see an acceptable probability of economic success for themselves in doing so.").

and they are essentially “judgment-proof.”<sup>87</sup> Since the effectiveness of tort remedies depends on perpetrators’ ability to pay damages, and that is not a safe presumption,<sup>88</sup> such remedies cannot adequately address the compensatory needs of all crime victims. In contrast, Wisconsin’s CVC program is free to all claimants,<sup>89</sup> and because the program is funded by a variety of state and federal sources,<sup>90</sup> compensation is available to eligible claimants regardless of the depth of their perpetrators’ pockets.

### *B. Procedural Barriers of Tort Remedies*

Procedural barriers can also diminish the viability of tort actions for victims of violent crime. First, statutes of limitations for intentional torts like assault and battery are typically quite short, and crime victims may not learn that they have a cause of action that exists outside of the criminal legal system until it is too late.<sup>91</sup> Although CVC claimants in Wisconsin must generally apply for compensation “within 1 year after the date of the personal injury or death,” the Wisconsin Department of Justice is allowed to waive that requirement “in the interest of justice.”<sup>92</sup> Furthermore, the Legislature instructs the Department to “actively publicize the crime victim compensation program and promote its use,”<sup>93</sup> such that crime victims who do not possess specialized knowledge of the law are likely to learn about the CVC program before potential common law courses of action.

The fact that crime victims may not know the identity of their perpetrator(s) poses another procedural barrier. In comparison to other sources for financial recovery, CVC programs play a distinctive role when a perpetrator is never found. Whereas crime victims in Wisconsin cannot bring tort actions—and, therefore, cannot win damages—against unknown parties,<sup>94</sup> they may be granted an award through the CVC

87. Rutledge, *supra* note 56, at 261–62, 262 n.346; *see also* Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 137–38 (2001) (explaining lack of insurance as a driving factor in the relative dearth of lawsuits for domestic violence torts).

88. *See* Wriggins, *supra* note 87, at 138 n.76.

89. *See* WIS. ADMIN. CODE JUS §§ 11.02(2), 11.12 (2021) (laying out application requirements and limiting attorney’s fees to ten percent of the amount awarded to the claimant).

90. *See* WYNN, *supra* note 19, at 7.

91. *See* Wriggins, *supra* note 87, at 139; Rutledge, *supra* note 56, at 263. In Wisconsin, the statute of limitations for intentional torts is three years from the date that the cause of action accrues. *See* WIS. STAT. § 893.57 (2021–22).

92. WIS. STAT. § 949.08(1) (2021–22).

93. § 949.001.

94. *See* WIS. STAT. § 801.02 (2021–22) (a civil action only commences “as to any defendant when a summons and a complaint naming the person as defendant are filed with the court”).

program “whether or not any person is prosecuted or convicted of any offense” that underlies their CVC claim.<sup>95</sup>

The duration of civil lawsuits is a final reason why tort actions are not a sufficient remedy for all CVC claimants. On the whole, civil lawsuits take significantly longer to resolve than CVC claims in Wisconsin. A survey of state civil courts conducted by the Bureau of Justice Statisticians found that the average case processing time for tort cases in Milwaukee County was ten months, or around three hundred days.<sup>96</sup> By contrast, it generally takes the OCVS around seventy-five days to adjudicate a CVC case from start to finish.<sup>97</sup> Victims who need immediate assistance with their medical bills, lost wages, and other CVC-eligible expenses will be inclined to seek compensation by the most efficient process possible. Thus, where Wisconsin’s CVC program is compared to tort remedies in terms of access to compensation in the instance of an unknown perpetrator and general efficiency, the importance of the CVC program shines through. Since tort remedies are not a viable option for all crime victims who need compensation, this Comment’s critique of the CVC statute’s contributory conduct limitation is warranted.

### III. THE CURRENT APPROACH TOWARD THE “SUBSTANTIALLY CONTRIBUTED” STANDARD IS FLAWED IN THEORY AND IN PRACTICE

The current approach taken toward the CVC statute’s contributory conduct limitation is flawed in two ways. First, it largely embraces and insists upon an unrealistic form of victimhood. Second, in its present structure, the standard addresses factual causation while neglecting legal causation. In doing so, it encourages intense scrutiny of CVC claimants’ contributory conduct without any formalized consideration of counterbalancing causal factors or policies. As a result of these problems, the contributory conduct limitation provides overly broad grounds for rejecting meritorious CVC claims, thereby upending the legislative intent of the statute. The following sections address each of these arguments in turn.

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95. § 949.06(4)(a).

96. See STEVEN K. SMITH, CAROL J. DEFRAnces, PATRICK A. LANGAN & JOHN GOERDT, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., TORT CASES IN LARGE COUNTIES 8 (1995).

97. See *supra* notes 43–45 and accompanying text.

*A. The “Substantially Contributed” Standard Espouses  
Problematic Notions of Victimhood*

In their 2004 report “propos[ing] a new vision of victim compensation,” crime victim compensation experts Susan Herman and Michelle Waul urged crime victim compensation adjudicators to refrain from scrutinizing contributory conduct unless a claimant is “actually implicated in the crime that led to their claim.”<sup>98</sup> Herman and Waul rationalized eliminating “innocent victim” requirements on the ground that “[i]t is neither fair nor reasonable to divide victims into categories of deserving and undeserving.”<sup>99</sup> Speaking to domestic violence victims’ underutilization of crime victim compensation funds, Njeri Mathis Rutledge similarly observed that “[t]he notion of labeling a victim as innocent or deserving improperly shifts the focus away from the perpetrator’s criminal conduct and resulting hardship and onto the victim’s past indiscretions.”<sup>100</sup>

Because, as a matter of statutory interpretation, the word “innocent” cannot be rendered meaningless within Wisconsin’s CVC statute,<sup>101</sup> this Comment does not reach quite the same conclusion. Nonetheless, the ensuing sections illustrate how the CVC statute espouses problematic notions of “innocent” victimhood. Tracing the “substantially contributed” standard’s historical underpinnings, Section 1 explains how the Legislature originally embraced a misguided view of victimhood when it created the CVC statute. This Comment then discusses the proper meaning of the word “innocent” in terms of text and context and contends that problematic notions of victimhood persist through the administrative rules that accompany the CVC statute’s contributory conduct limitation.

1. Early Notions of Victimhood in the CVC Context

In line with early crime victim compensation programs adopted around the world,<sup>102</sup> Wisconsin’s original CVC statute did not envision as compensable any crime victim who was related to, living with, or in

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98. See HERMAN & WAUL, *supra* note 82, at 59–60.

99. *Id.* at 60.

100. Rutledge, *supra* note 56, at 242.

101. See *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 681 N.W.2d 110, 124 (asserting that statutory language should be read “so that it may be given its full, proper, and intended effect”); *Belding v. Demoulin*, 2014 WI 8, ¶ 17, 843 N.W.2d 373, 377 (“Statutory interpretations that render provisions meaningless should be avoided.”).

102. See Rutledge, *supra* note 56, at 238 (New Zealand was the first country to institute a CVC program and “was also the first to enact legislation to exclude an offender’s relatives or household members from receiving CVC funds”).

a sexual relationship with their perpetrator.<sup>103</sup> Instead of barring compensation for victims who “substantially contributed” to their injury or death, the original statute disqualified any victim who was “the child, parent, brother, sister, or spouse of the offender” and resided “in the same household as the offender.”<sup>104</sup> The statute further excluded any victim who “[w]as at the time of the personal injury or death of the victim maintaining a sexual relationship with [the offender] or with any member of the family of [the offender].”<sup>105</sup>

These provisions advanced an unrealistic conception of victimhood. The majority of violent crimes that occur in the United States are committed by people known to the victim.<sup>106</sup> Moreover, the sexual- and gender-based violent crimes that underlie a significant portion of CVC claims are overwhelmingly perpetrated by those with whom the victim has a close relationship.<sup>107</sup> Effectively, the original iteration of Wisconsin’s CVC statute foreclosed a large portion of its target audience from the constitutional protections, economic assistance, and socio-emotional validation afforded by victimhood.

Rather than embracing the realities of criminal activity and victimization, the Legislature initially opted for a social construction of victimhood justified under theories of fraud prevention and unjust enrichment of the offender.<sup>108</sup> In debunking this presumably legitimate policy goal, the conclusions drawn by President Reagan’s Task Force on Victims of Crime are particularly helpful.<sup>109</sup> On the question of “whether victims who are related to, or are living with, the offender should be excluded from payment eligibility,” the Task Force remarked that:

The states’ desire to minimize fraud is laudable; however, many innocent victims of violence in the home are being

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103. S.B. 139, 1975 Leg., Reg. Sess. (Wis. 1975).

104. *Id.*

105. *Id.*

106. See ERIKA HARRELL, VIOLENT VICTIMIZATION COMMITTED BY STRANGERS, 1993–2010, at 1–2 (2012) (highlighting that “strangers committed about 38 [percent] of nonfatal violent crimes, including rape/sexual assault, robbery, aggravated assault, and simple assault” in 2010).

107. See *Perpetrators of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/perpetrators-sexual-violence> [<https://perma.cc/S4QU-NK9J>].

108. See DANIEL MCGILLIS & PATRICIA SMITH, COMPENSATING VICTIMS OF CRIME: AN ANALYSIS OF AMERICAN PROGRAMS 64–65 (1983) (explaining states’ most common rationales for different limitations on crime victim compensation).

109. See generally LOIS HAIGHT HERRINGTON, GARFIELD BOBO, FRANK CARRINGTON, JAMES P. DAMOS, DORIS D. DOLAN, KENNETH O. EIKENBERRY, ROBERT J. MILLER, PAT ROBERTSON & STANTON E. SAMENOW, PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME 37–56 (1982).

unfairly ignored. . . . A blanket exclusion can be particularly devastating to child victims of intra-family abuse who, as a result, are denied adequate treatment.<sup>110</sup>

In essence, the Task Force cautioned against blanket exclusions based on familial/relationship status or residency because addressing both the number and the acute needs of crime victims belonging to those categories outweighed the government's interest in reducing fraud. Likewise, in their 1983 analysis of American crime victim compensation programs, Daniel McGillis and Patricia Smith described such restrictions as “unenlightened, ignoring the painful realities of the prevalence of family violence in modern society.”<sup>111</sup>

The Legislature repealed the statutory provisions explicitly penalizing people victimized by their family members and sexual partners shortly after the CVC program's inception.<sup>112</sup> However, their vestiges persist. As it is applied today, the CVC statute's contributory conduct limitation continues to espouse an alarmingly narrow view of “innocent”—and therefore legally cognizable—victimhood.

## 2. “Innocent” Victimhood in the Current CVC Statute's Contributory Conduct Limitation

The opening sentence of Wisconsin's CVC statute declares the State's “moral responsibility to aid *innocent* victims of violent crime.”<sup>113</sup> Nowhere in the CVC statute or its accompanying administrative rules is the word “innocent” specifically defined. Therefore, it is helpful to turn to Wisconsin's canons of statutory interpretation. In Wisconsin, “statutory language is interpreted in the context in which it is used” and “not in isolation but as part of a whole.”<sup>114</sup> Since the word “innocent,” as it appears in the CVC statute, is used in an administrative (rather than criminal) legal context, it is best defined as “[s]omeone who has not, in a given situation, committed any harmful act; a person who is blameless in a particular setting.”<sup>115</sup> In CVC cases, the “given situation” and “particular setting” are the instance and location of a claimant's

110. *Id.* at 41.

111. MCGILLIS & SMITH, *supra* note 108, at 64.

112. Compare S.B. 139, 1975 Leg., Reg. Sess. (Wis. 1975), with S.B. 345, 1979 Leg., Reg. Sess. (Wis. 1979) (replacing those relationship- and residency-based limitations with one asserting that “[n]o award may be made to any claimant if the award would unjustly benefit the offender or accomplice”).

113. WIS. STAT. § 949.001 (2021–22) (emphasis added).

114. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 681 N.W.2d 110, 124.

115. *Innocent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

subjection to violent crime. This definition therefore suggests that the only behavior of a victim relevant to the determination of “innocence” is that which is directly related to the underlying criminal event. Because the “substantially contributed” standard articulates broad behavioral bases for assigning blame on crime victims,<sup>116</sup> it plays a pivotal role in determining the features and boundaries of “innocent” victimhood.

The “substantially contributed” standard and its related administrative rules do not give proper shape to “innocent” victimhood within the CVC statute. First, these rules require the OCVS to consider any behavior of the victim, “including consent, provocation, verbal utterance, gesture, incitement, prior conduct of the victim and the ability of the victim to have reasonably avoided the incident” that “may have directly or indirectly contributed to the victim’s injury or death.”<sup>117</sup> Aside from consent, these forms of conduct portray “innocent” victims as those who are seemingly attacked at random; or who have not interacted with their perpetrator(s) at all before the underlying crime occurs. By including indirect contributory conduct, this provision also frames innocent victimhood such that an adjudicator has the discretion to decide whether a connection exists between some conduct by the victim and the violent act that caused their injury or death.

The fact that the administrative rules allow the OCVS to scrutinize CVC claimants’ criminal and social histories is cause for even greater alarm. An adjudicator may consider whether the victim was under the influence of drugs or alcohol, was “engaged in an ongoing course of criminal conduct within 5 years,” or was incarcerated at the time of the underlying incident.<sup>118</sup> Rutledge argues that because a victim’s addiction issues and/or past criminal record “do not negate the victimization experienced,” they should not be grounds for disqualification from CVC funds.<sup>119</sup> By broadening the scope of scrutiny far beyond the incident upon which a CVC claim is based, these considerations also stray from the statute’s use of the word “innocent,” as described above. In turn, section 11.07(3)(b) improperly paints “innocent” crime victims as those possessing socially desirable (drug- and crime-free) backgrounds, even though all victims suffer the acute emotional, physical, and economic costs associated with victimization by violent crime.<sup>120</sup>

Finally, because other limitations on crime victim compensation dispose of many cases where contributory conduct is a potential concern, the argument that the current formulation of the contributory conduct

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116. *See supra* Section I.D.1.

117. WIS. ADMIN. CODE JUS § 11.07(3)(a) (2021).

118. § 11.07(3)(b).

119. Rutledge, *supra* note 56, at 242.

120. *See id.*

limitation is necessary to curb abuse of Wisconsin's CVC program falls flat. The CVC statute deems ineligible any victim who "[c]ommitted a crime which caused or contributed to the victim's injury or death."<sup>121</sup> This limitation can govern any situation in which the claimant's contributory "provocation," "incitement," or "prior conduct" took an unlawful form, such as throwing the first punch in a fight where the claimant was subsequently severely injured. This limitation can also absorb any case of injury or death arising from the victim's engagement in an illicit drug deal or gang-related activity. Likewise, the Wisconsin Department of Justice is statutorily precluded from ordering an award if the victim "[h]as not cooperated with appropriate law enforcement agencies."<sup>122</sup> Since cooperating with law enforcement can involve moments of intense personal scrutiny, such as testifying and being cross-examined before a jury,<sup>123</sup> the cooperation limitation further gatekeeps CVC funds from claimants whose victimization would not likely be viewed as "innocent" under the law. Thus, as it stands now, the contributory conduct limitation and its accompanying administrative rules primarily function to police "innocent" victimhood.

*B. The "Substantially Contributed" Standard Does Not Accurately Apply Wisconsin's Common Law of Causation*

As it operates now, the "substantially contributed" standard also fails to fully embrace Wisconsin's law of causation. In a negligence cause of action, the causation element has two distinct prongs: (1) factual causation and (2) legal causation.<sup>124</sup> Factual causation contemplates how the harm occurred, and is most often determined through the *sine qua non* ("but-for") test or, as in Wisconsin, the substantial factor test.<sup>125</sup> The existence of factual causation is a question of fact reserved for the jury.<sup>126</sup> Legal causation, on the other hand, is a question of law that contemplates the proper scope of the tortfeasor's liability; it is most often described as "proximate cause."<sup>127</sup> With regard to legal causation, Wisconsin courts have abandoned the perplexing term "proximate cause" for a collection

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121. Wis. STAT. § 949.08(2)(b) (2021–22).

122. § 949.08(2)(d).

123. See Rutledge, *supra* note 56, at 244–45.

124. See David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1679–85 (2007).

125. *Id.* at 1680–81; *Emer's Camper Corral, LLC v. Alderman*, 2020 WI 46, ¶ 21, 943 N.W.2d 513, 519.

126. See Wis JI–Civil 1500.

127. See Owen, *supra* note 124, at 1681–82.



of six “public policy factors.”<sup>128</sup> According to these factors, the tortfeasor’s liability will be limited if:

- (1) The injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.<sup>129</sup>

These public policy factors have become a pillar of Wisconsin courts’ causation jurisprudence.<sup>130</sup> Nonetheless, no part of the CVC statute places any temporal or policy-based limits on scrutinizing claimants’ contributory conduct. Therefore, because the contributory conduct limitation takes form in the substantial factor test, the OCVS only has to determine whether a victim’s conduct had “such an effect in producing the harm as to lead” a reasonable person to consider it “a cause, using that word in the popular sense” in order to deny their claim.<sup>131</sup> The administrative rules that accompany the CVC statute only exacerbate this gap. They supply ample bases for concluding that a victim’s conduct was a substantial factor in causing their injury or death while providing no guidance for concluding that a victim’s conduct failed to meet the statute’s “substantially contributed” threshold.<sup>132</sup> As such, the CVC statute’s contributory conduct limitation does not accurately apply the common law of causation in Wisconsin—it leaves behind the crucial element of legal causation.

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128. See *Fandrey ex rel. Connell v. Am. Fam. Mut. Ins. Co.*, 2004 WI 62, ¶ 12, 680 N.W.2d 345, 351–52; Donnie Malchow, *Wisconsin’s Law of Negligence Is Inherently Incompatible with the Restatement—So Why Does the Court Regularly Adopt Restatement Provisions?*, WIS. L. REV. FORWARD, Oct. 2020, at 1, 5–8 (2020), <https://wlr.law.wisc.edu/wp-content/uploads/sites/1263/2020/10/pdf-wisconsin-law-of-negligence.pdf> [<https://perma.cc/48EB-AMWE>].

129. *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233, 240 (Wis. 1998).

130. See *Fandrey*, 2004 WI 62, ¶¶ 6–13, 680 N.W.2d at 350–52.

131. *Fischer by Fischer v. Ganju*, 485 N.W.2d 10, 19 (Wis. 1992) (quoting *Clark v. Leisure Vehicles, Inc.*, 292 N.W.2d 630, 635 (1980)).

132. See WIS. ADMIN. CODE JUS § 11.07(3) (2021).

*C. The “Substantially Contributed” Standard Neglects the Intent of the Legislature by Failing Meritorious CVC Claimants*

The thrust of the two preceding sections is that the contributory conduct limitation provides a punishingly broad foundation for rejecting meritorious claims and thus departs from the CVC statute’s overarching legislative intent. The CVC statute has historically limited compensation to crime victims who conform to problematic, often unrealistic notions of “innocence.”<sup>133</sup> Moreover, due to the contributory conduct limitation’s incomplete causation analysis, a CVC claimant can be disqualified for their contributory conduct under the “substantially contributed” standard, whereas a tort defendant could be shielded from liability for their negligent conduct under Wisconsin’s public policy factors.<sup>134</sup> The unfortunate result of these issues is the unwarranted rejection of meritorious CVC claims.

The Legislature asserts its intent regarding the CVC program with ostensible conviction. In section 949.001, the “legislature finds and declares that the state has a *moral responsibility* to aid innocent victims of violent crime.”<sup>135</sup> To fulfill this responsibility, the Legislature declares its intention that the State “provide sufficient assistance to victims of crime and their families in order to ease their financial burden and to maintain their dignity as they go through a difficult and often traumatic period.”<sup>136</sup> The words “moral responsibility” denote the Legislature’s firm understanding that crime victim compensation is a matter of ethical duty owed to Wisconsin’s crime victims, rather than one of legal or political compulsion. Additionally, by highlighting the financial burden, indignity, and trauma that results from violent crime victimization,<sup>137</sup> the Legislature suggests that any denial of crime victim compensation should be well-founded.

This statutory language indicates the Legislature’s intention to compensate all meritorious CVC claimants. By espousing problematic notions of “deserving” victimhood and ignoring legal causation, the CVC statute’s “substantially contributed” standard contradicts that intention. Therefore, to fulfill the State’s “moral responsibility” to assist victims of violent crime—as the Legislature intends<sup>138</sup>—the analytical approach taken toward the CVC statute’s contributory conduct limitation must change.

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133. *See supra* Section III.A.

134. *See supra* Section III.B.

135. WIS. STAT. § 949.001 (2021–22) (emphasis added).

136. *Id.*

137. *See id.*

138. *Id.*

## IV. THREE ALTERNATIVE INTERPRETIVE APPROACHES

Given the insufficiency of tort remedies and the shortcomings of the CVC statute's "substantially contributed" standard, this Comment offers three alternative approaches for scrutinizing CVC claimants' contributory conduct. The first interpretive approach diverges boldly from the current "substantially contributed" standard. In an attempt to protect the rights of crime victims to the same extent as those of criminal defendants, as the Legislature intends,<sup>139</sup> it demands a finding that the CVC claimant's conduct caused their injury or death beyond a reasonable doubt. The second interpretive approach takes after Wisconsin's contributory negligence statute; a CVC claimant's conduct would have to be deemed a greater cause of their injury or death than the underlying criminal conduct for the claim to be rejected. The third interpretive approach involves amending and adding the first three of the six public policy factors that Wisconsin courts use in negligence cases to the "substantially contributed" analysis. The Wisconsin Department of Justice could adopt any of these proposed approaches by amending the administrative rules that address the CVC statute's contributory conduct limitation.<sup>140</sup>

The following three sections each begin by introducing the mechanics of an alternative approach to the "substantially contributed" standard. Each section then highlights the primary strengths and potential weaknesses of each approach in relation to the contributory conduct limitation's current issues. In offering these alternative approaches, this Comment primarily focuses on the practical implications of each for both CVC adjudicators and claimants.

A. *"Substantially Contributed," Beyond a Reasonable Doubt*

Deviating from both the current "substantially contributed" standard and the other proposed approaches, the first interpretive approach utilizes a classic criminal legal standard—beyond a reasonable doubt—to establish the existence of crime victims' contributory conduct. The "beyond a reasonable doubt" approach is founded on the rationale that CVC cases are not negligence proceedings and thus should not be adjudicated through the exclusive use of negligence standards. Rather, CVC cases are administrative proceedings that emerge as a result of

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139. *See id.* ("[I]t is essential that the rights of the victim of a crime should be as fully protected as the rights of the criminal offender.").

140. *See* WIS. STAT. § 227.11(2)(a) (2021–22) ("Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute . . .").

violent crime and should be adjudicated using appropriately adapted principles of criminal law. This interpretive approach embodies that rationale by burdening the adjudicating authority with proving that the victim engaged in substantially contributory conduct beyond a reasonable doubt. This approach could be implemented by building on the Wisconsin Department of Justice's administrative rules interpreting the CVC statute's contributory conduct limitation:

**Wis. Admin. Code Jus § 11.07 Limitations on awards.** The department may not make an award if the department determines that . . . :

- (3) The victim engaged in conduct which substantially contributed to the victim's injury or death or engaged in conduct which the victim could have reasonably foreseen could lead to injury or death. In determining whether the victim engaged in contributory conduct under this subsection the department:
  - (a) Shall consider . . . .
  - (b) May consider . . . .
  - (c) **Has the burden of establishing that the victim engaged in conduct that substantially contributed to the infliction of the victim's injury or death. Before the department can reject a victim's claim on the grounds of contributory conduct, the department must prove that the victim engaged in such conduct beyond a reasonable doubt.**<sup>141</sup>

The strength of the "beyond a reasonable doubt" interpretive approach is rooted in its devotion to the CVC statute's legislative intent. This approach links "the rights of the victim of a crime" in CVC cases to "the rights of the criminal offender" in criminal cases.<sup>142</sup> Just like the State must prove that a defendant engaged in the criminal activity charged beyond a reasonable doubt to render a conviction, the OCVS would be obliged to prove that a crime victim engaged in conduct that substantially

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141. The bold language indicates language that the Wisconsin Department of Justice could use to effectuate this alternative approach toward contributory conduct. This language is largely adapted from Wis JI-Criminal 140 ("The burden of establishing every fact necessary to constitute guilt is upon the State. Before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty."). It is important to note that this approach would also implicate Wis. ADMIN. CODE JUS § 11.09(3)(f) (2021), under which the Department currently has the "burden of proving by the preponderance of the credible evidence any limitations to an award or any defenses to the claimant's application."

142. See § 949.001.

contributed to the victim's injury or death beyond a reasonable doubt to deny their compensation claim.<sup>143</sup> Thus, the "beyond a reasonable doubt" approach is the only one that accounts for the distinctly criminal context from which CVC cases materialize.

However, the theoretical advantages of the "beyond a reasonable doubt" approach are countered by a slew of serious issues. First, because CVC cases are resolved through administrative processes, the adjudicating authority is its own factfinder. There is no jury to decide whether the Wisconsin Department of Justice met its burden of proving that the victim engaged in disqualifying contributory conduct beyond a reasonable doubt. Thus, this standard begs the question of whether the Department would have to impanel a jury or other third-party factfinder to properly effectuate it.<sup>144</sup> Irrespective of the answer to that question, because this interpretive approach utilizes the highest evidentiary burden known to American common law, implementing it would demand the CVC program to adopt additional new procedures and devote far more resources to each CVC case involving contributory conduct. As such, the "beyond a reasonable doubt" approach would run the risk of significantly slowing the administration of the CVC program, if not completely overwhelming it.

Perhaps most troubling, this approach undermines the sanctity of the "beyond a reasonable doubt" standard within criminal defense law. Utilizing the same burden of proof to judge the contributory conduct of CVC claimants and the criminal conduct of criminal defendants suggests that the parties are confronted by similar risks. This is a plain fallacy. A crime victim's loss of state-sponsored compensation due to their contributory conduct can be a tragic experience, as illustrated by the hypothetical case presented in the Introduction. However, when compared to a criminal defendant who loses their liberty for a substantial period upon (and, if unable to post bail, leading up to) conviction, that tragedy is slight. Ultimately, the logical and practical weaknesses of the "beyond a reasonable doubt" approach frustrate its viability as a solution.

### *B. "Substantially Contributed" as a Greater Cause*

Under the second interpretive approach, a CVC claim could only be denied for contributory conduct if the victim's conduct was deemed a greater cause of their injury or death than the criminal conduct underlying

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143. See Wis II-Criminal 140.

144. Until recently, it seemed undisputed that administrative proceedings do not implicate the Seventh Amendment's right to a jury trial. *But see SEC v. Jarkesy*, 144 S. Ct. 2117, 2127 (2024) (holding that the Seventh Amendment jury-trial right applied to the SEC's civil enforcement action against hedge fund manager George Jarkesy).

their claim. This approach takes after Wisconsin’s contributory negligence statute, which states that “[c]ontributory negligence does not bar recovery in an action . . . if that negligence was not greater than the negligence of the person against whom recovery is sought.”<sup>145</sup> The statute further provides that “any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering.”<sup>146</sup> The “greater cause” approach would be effectuated by incorporating a new provision to the chapter of Wisconsin’s Administrative Code that is dedicated to the Wisconsin Department of Justice’s adjudication of CVC claims.<sup>147</sup> In the CVC context, an administrative rule that models the contributory conduct limitation on Wisconsin’s contributory negligence statute might look like this:

**Wis. Admin. Code Jus § 11.07 Limitations on awards.** The department may not make an award if the department determines that . . . :

- (3) The victim engaged in conduct which substantially contributed to the victim’s injury or death or engaged in conduct which the victim could have reasonably foreseen could lead to injury or death. **A victim engaged in conduct that substantially contributed to their injury or death only if that conduct contributed to the injury or death to a greater extent than did the criminal conduct of the perpetrator. . . .**

By articulating the “substantially contributed” standard in terms of contributory negligence, this interpretive approach analytically aligns crime victims with tort plaintiffs. That is, crime victims are scrutinized in the same way as tort plaintiffs, as opposed to tort defendants. This analytical alignment acknowledges that both crime victims and tort defendants suffer injuries (at least partially) as a result of another’s wrongdoing, and their contributory conduct is inseparable from that wrongdoing. As a result, the “greater cause” approach would salvage

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145. Wis. STAT. § 895.045 (2021–22).

146. *Id.*

147. Another possible implementation technique for this interpretive approach involves defining the term “substantially” in a way that takes after the contributory negligence standard within the actual CVC statute. However, the process of statutory amendment is more onerous than the process of modifying administrative rules. *Compare* Wis. LEGIS. COUNCIL, INFORMATIONAL MEMORANDUM: ADMINISTRATIVE RULEMAKING 11 (2021), *with* Wis. LEGIS. REFERENCE BUREAU, RESEARCH BULL. 14-2: THE LEGISLATIVE PROCESS IN WISCONSIN 47–56 (2014). It is also unlikely that amending the CVC statute itself would be more effective than amending the statute’s accompanying administrative rules, since administrative rules possess “the force of law.” Wis. STAT. § 227.01(13) (2021–22).

CVC cases involving contributory conduct that may have disqualified a CVC claimant under the “substantial factor” test but contributed less to the victim’s injuries than their perpetrator’s criminal conduct.

However, it is important to question whether this is the analytical structure that the Legislature intended for the CVC statute’s contributory conduct limitation. At its core, the “greater cause” approach divorces the term “substantially contributed” from its common law ancestor—the substantial factor test for causation—and redefines it to mean that the victim’s conduct outweighed the perpetrator’s criminal conduct in bringing about the victim’s injury or death. The Legislature added the word “substantially” to the contributory conduct limitation five years after it enacted the CVC statute.<sup>148</sup> Due to the preeminence of the substantial factor test in Wisconsin’s causation jurisprudence<sup>149</sup> and the causation-related context in which the word “substantially” appears in the CVC statute, it is improbable that the Legislature included the word “substantially” for no other reason than to vaguely raise the threshold of contributory conduct necessary to reject a CVC claim. Rather, in creating the “substantially contributed” standard, the Legislature more likely intended that it take after the common law “substantial factor” test.

Another potential weakness of this interpretive approach arises from its demand for more extensive and more precise fact-finding. Currently, the CVC statute’s contributory conduct limitation only formally contemplates the conduct of the victim—whether that conduct “substantially contributed” to the victim’s injury or death. The “greater cause” approach would broaden the adjudicating authority’s inquiry in two ways. First, it would ask the OCVS to assess the degree to which the perpetrator’s criminal conduct caused the victim’s injury or death. Second, it would oblige a careful determination of which party’s conduct caused the victim’s injury or death to a greater extent. To fulfill these obligations, an adjudicating authority would likely have to spend more time reviewing evidence in every CVC case dealing with contributory conduct. Therefore, the likely reduction of unwarranted rejections brought on by the “greater cause” approach might come at the cost of the CVC program’s efficiency. Slowing the CVC program’s ability to adjudicate cases would burden not only the State but also CVC claimants.<sup>150</sup> Delaying the time from application to compensation could

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148. See *supra* notes 63–67 and accompanying text.

149. See Malchow, *supra* note 128, at 4–5.

150. For a thorough argument that introducing new or extra procedures to the administrative state can amplify the problems that such procedures are supposed to address, see Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 345–50 (2019).

devastate CVC claimants' ability to receive needed health care, pay for necessities, or avoid incurring debt.

*C. "Substantially Contributed" as a Substantial Factor, in Light of the First Three Public Policy Factors*

The final alternative interpretive approach would continue to view the "substantially contributed" standard in terms of the substantial factor test, but it would do so in light of an adapted version of the first three public policy factors that Wisconsin courts use to address the element of legal causation in negligence cases. For the purposes of this approach, the fourth through sixth public policy factors would not need to be adapted because they are aimed at tort-specific issues, like protecting negligent tortfeasors from unreasonable or limitless recovery burdens. Such issues do not translate to the CVC context because crime victim compensation is both statutorily capped<sup>151</sup> and discharged through a governmentally sponsored and held fund.<sup>152</sup>

The Wisconsin Department of Justice would implement this approach by adding a third rule to section 11.07(3) of Wisconsin's Administrative Code, which governs its application of the contributory conduct limitation in CVC cases. The new rule would lift the bulk of its language from the common law public policy factors, as articulated in *Miller v. Wal-Mart Stores, Inc.*:<sup>153</sup>

**Wis. Admin. Code Jus § 11.07 Limitations on awards.** The department may not make an award if the department determines that . . . :

- (3) The victim engaged in conduct which substantially contributed to the victim's injury or death or engaged in conduct which the victim could have reasonably foreseen could lead to injury or death. . . . In determining whether the victim **engaged in conduct that substantially contributed to the victim's injury or death** under this subsection the department:
- (a) Shall consider . . . .
  - (b) May consider . . . .
  - (c) Shall not deny an award if (1) the victim's injury or death is too remote from the victim's contributory conduct; (2) the injury inflicted by the perpetrator's criminal conduct is too wholly out of proportion to the

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151. See WIS. STAT. § 949.08(1m)(a) (2021–22).

152. See § 949.07.

153. 580 N.W.2d 233, 240 (Wis. 1998).



culpability of the victim, in light of the victim's contributory conduct; or (3) in retrospect it appears too highly extraordinary that the victim's contributory conduct should have brought about the harm caused by the perpetrator's criminal conduct.

The key strength of this approach is that it accounts for both prongs of Wisconsin's common law of causation. These adapted public policy factors contemplate the foreseeability and extent of the victim's injuries in relation to both their contributory conduct and their perpetrator's criminal conduct. As such, this approach addresses crucial questions about the proper scope of a victim's liability for their contributory conduct that are otherwise ignored by the CVC statute.

Notably, this approach does not resolve a theoretical inconsistency between the "substantially contributed" standard and the causation doctrine from which it emerges. The inconsistency lies in the distinct experiences of the scrutinized parties. In CVC cases, the scrutinized party is the one who has *been injured* by a violent crime. By contrast, in tort cases, the scrutinized party is the one who has allegedly *injured others* through their negligence. Therefore, even with the relief provided by the adapted public policy factors, a test usually reserved for tort defendants would still be applied to crime victims. Both the logic and fairness of this method for scrutinizing contributory conduct are debatable.

However, as explained above, it appears as though this is the analytical structure that the Legislature intended.<sup>154</sup> Since this Comment's objective is to improve the CVC statute's contributory conduct limitation—*not* to completely refashion it—the fact that the "public policy factors" approach retains a structure aligning crime victims with tort defendants does not defeat its validity. On the contrary, this approach is the best, and it is the one that the Wisconsin Department of Justice should adopt.

#### V. THE WISCONSIN DEPARTMENT OF JUSTICE SHOULD ADOPT THE "PUBLIC POLICY FACTORS" INTERPRETIVE APPROACH

Having shared three ways to improve the CVC statute's treatment of contributory conduct, this Comment advocates for the adoption of the "public policy factors" interpretive approach. Under this approach, contributory conduct warrants dismissal of a crime victim's CVC claim only if it was a substantial factor in causing the injury or death and is not

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154. See *supra* Section IV.B.

excused by an adapted version of the first three public policy factors that Wisconsin courts employ to limit tort liability. The Wisconsin Department of Justice should promulgate rules adopting the “public policy factors” approach for several reasons. First, this approach entails minimal implementation difficulty for the Department and the OCVS. Second, this approach fully embraces Wisconsin’s common law of causation, ensuring its legal soundness. Lastly, adopting this approach recaptures the intent of the Legislature regarding the CVC program.

*A. The “Public Policy Factors” Approach Involves  
Minimal Procedural Strain*

Neither adopting nor applying the “public policy factors” approach would place much procedural strain on Wisconsin’s CVC program. Implementing the “public policy factors” approach involves a commonplace process within administrative law: rulemaking. To adopt this approach, the Wisconsin Department of Justice would only have to adjust one of its existing administrative rules.<sup>155</sup> Compared to enacting or amending statutes, engaging in rulemaking is relatively efficient and uncomplicated.<sup>156</sup> Likewise, the Department is no stranger to administrative rulemaking. For example, as of the date of publication the Department was promulgating five different rules.<sup>157</sup> As such, the “public policy factors” approach presents minimal initial implementation difficulty.

Once enacted, the “public policy factors” approach would not be burdensome for the OCVS or other adjudicating authority to apply. Using this approach, the adjudicating authority would still consider the forms of conduct that “may have directly or indirectly contributed to the victim’s injury or death,”<sup>158</sup> as well as the optional inquiries into the victim’s alcohol and drug use, recent criminal history, and incarceration status.<sup>159</sup> In other words, this approach would not change the forms or scope of contributory conduct under consideration. The “public policy factors” approach would, however, change how the adjudicating authority determines that a crime victim’s conduct *substantially* contributed to their injury or death. Because it provides a mechanism for weighing the harm caused by the criminal perpetrator against the

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155. See *supra* Section IV.C.

156. See WIS. LEGIS. COUNCIL, *supra* note 147.

157. See *Active Scope Statements*, WIS. ST. LEGIS., [https://docs.legis.wisconsin.gov/code/scope\\_statements/active?group=agency&visible\\_group=Department%20of%20Justice%20\(Jus\)](https://docs.legis.wisconsin.gov/code/scope_statements/active?group=agency&visible_group=Department%20of%20Justice%20(Jus)).

158. WIS. ADMIN. CODE JUS § 11.07(3)(a) (2021).

159. § 11.07(3)(b).

contributory conduct of the victim where none existed before, the “public policy factors” approach more clearly delineates the threshold for “substantially” contributory conduct. On that basis, adopting that approach would arguably simplify the administration of the CVC statute’s contributory conduct limitation.

*B. The “Public Policy Factors” Approach Is Legally Sound*

On top of its procedural simplicity, the “public policy factors” approach is legally sound because it accounts for both factual and legal causation. As explained above, the current “substantially contributed” standard only addresses factual causation, to the neglect of legal causation.<sup>160</sup> By adapting the first three factors that courts use to determine the proper scope of liability, the “public policy factors” approach successfully incorporates Wisconsin’s established doctrine for determining legal causation in negligence cases into the existing contributory conduct limitation. At the same time, this approach preserves those parts of the inquiry dedicated to factual causation: The OCVS may still consider the victim’s “consent, provocation, verbal utterance,” use of an intoxicant or controlled substance, recent criminal history, incarceration status, and other conduct that “may have directly or indirectly contributed to” their injury or death.<sup>161</sup> In turn, the “public policy factors” approach heeds the entire common law of causation in Wisconsin.<sup>162</sup> By placing equitable bounds around the scrutiny of CVC claimants’ contributory conduct, the approach accords the word “substantially” its proper meaning without rendering the word “innocent” meaningless.

The “public policy factors” approach gains further legitimacy through its alignment with other states, including Michigan and Maryland, that utilize a proximate cause standard to analyze contributory conduct in the CVC context.<sup>163</sup> In *McMillan v. Crime Victims*

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160. See *supra* Section III.B.

161. § 11.07(3)(a)–(b).

162. See *supra* Section III.B.

163. Appellate courts in Michigan, Maryland, North Carolina, and Kansas have adopted such standards. See *McMillan v. Crime Victims Comp. Bd.*, 399 N.W.2d 515, 519 (Mich. Ct. App. 1986); *Marks v. Crim. Injs. Comp. Bd.*, 7 A.3d 665, 686 (Md. Ct. Spec. App. 2010); *Evans v. N.C. Dep’t of Crime Control & Pub. Safety, Div. of Victim & Just. Servs., Crime Victims Comp. Comm’n*, 398 S.E.2d 880, 885 (N.C. Ct. App. 1990); *Fisher v. Kan. Crime Victims Comp. Bd.*, 124 P.3d 74, 84 (Kan. 2005). Wisconsin’s administrative rulemaking process also requires an agency to compare its proposed policy approach to those taken by the federal government, Iowa, Illinois, Michigan, and Minnesota. WIS. STAT. § 227.137(3)(a) (2021–22). This gives credence to other states’—and especially Michigan’s—approaches toward crime victims’ contributory conduct.

*Compensation Board*,<sup>164</sup> the Michigan Court of Appeals rejected the previous “but-for” standard applied to contributory conduct in CVC cases for a proximate cause test of foreseeability.<sup>165</sup> Michigan’s Crime Victims Compensation Board initially denied compensation on the ground that the claimant’s presence in an unlicensed bar constituted “a substantial contribution on his part” to the unprovoked gunshot injuries he sustained later in the evening.<sup>166</sup> Rejecting the board’s “extreme interpretation of the statute,”<sup>167</sup> the appellate court reasoned that “[w]hile it is true that claimant would not have been injured ‘but for’ having gone to” the bar where the shooting took place, “it can be said his presence there was no more the cause of his injury than would his presence on a public street have been the cause if he had been shot . . . on a public street.”<sup>168</sup>

Relying in part on Michigan’s holding in *McMillan*, Maryland’s Court of Special Appeals likewise held in *Marks v. Criminal Injuries Compensation Board*<sup>169</sup> that the causation standard used to determine whether a victim’s conduct contributed to their injuries “is that of proximate cause.”<sup>170</sup> The *Marks* court found that the appellant, a shooting victim, proximately caused his injuries when he had a history of dealing drugs and engaged in a “turf war” with his assailant immediately before being shot.<sup>171</sup> In ratifying its proximate cause standard, the court aimed to strike a balance between “the legislative intent to aid crime victims” and a statutory interpretation that would require “the injured person . . . to have helped pull the trigger or thrust the knife which caused his injury in order to allow the board to reduce or deny an award.”<sup>172</sup>

While Wisconsin’s jurisprudence has abandoned the term “proximate cause,” it developed the public policy factors to serve as a clarified version of that legal concept.<sup>173</sup> Indeed, the first three public policy factors primarily address the foreseeability and extent of the injury in relation to the tortfeasor’s negligence, which is the central inquiry in a proximate cause analysis.<sup>174</sup> Therefore, whether a crime victim

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164. 399 N.W.2d 515 (Mich. Ct. App. 1986).

165. *Id.* at 519.

166. *Id.* at 517–18.

167. *Id.* at 520.

168. *Id.* at 519.

169. 7 A.3d 665 (Md. Ct. Spec. App. 2010).

170. *Id.* at 681–82, 686.

171. *Id.* at 684.

172. *Id.* at 681–82.

173. See Malchow, *supra* note 128, at 4–6 (tracing the development of the public policy factors in Wisconsin’s jurisprudence throughout the twentieth century).

174. See *supra* Section III.B.

proximately caused their injury or death or whether a crime victim substantially contributed to their injury or death in light of the first three (adapted) public policy factors are parallel inquiries. State courts often look to one another when confronted with novel questions of law, including in the context of crime victim compensation.<sup>175</sup> In turn, the fact that several other states use a legal standard similar to the “public policy factors” approach substantiates the legal credibility of that approach.

*C. The “Public Policy Factors” Approach (Re)Captures the Legislature’s Intent*

Most importantly, the Wisconsin Department of Justice should adopt the “public policy factors” approach because it accomplishes the Legislature’s intent to “provide sufficient assistance” to all “innocent victims of violent crime” by way of the CVC program.<sup>176</sup> The “public policy factors” approach advances the legislative intent of the CVC statute by curbing victim blaming and minimizing the number of meritorious CVC claims that are rejected for contributory conduct. In those ways, the positive effect of this approach on Wisconsin’s crime victims would be palpable.

First, the “public policy factors” approach would combat the victim-blaming tendencies that are currently baked into the CVC statute’s treatment of contributory conduct. As discussed in Section I.D.1, the administrative rules that accompany the contributory conduct limitation contemplate an unforgivingly broad scope of contributory conduct without any formal consideration of the perpetrator’s criminal conduct or policy-based boundaries. For that reason, those rules encourage the OCVS and other adjudicating authorities to blame victims for their crime-induced injuries and losses, regardless of whether they intend to do so. The “public policy factors” approach places a check on that inclination by highlighting that victims’ contributory conduct only exists relative to their criminal victimization. Because this approach ensures that CVC claimants are consistently regarded as victims, rather than as their own perpetrators, it helps “maintain [victims’] dignity as they go through a difficult and often traumatic period.”<sup>177</sup>

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175. See *Marks*, 7 A.3d at 681 (“Notwithstanding the absence of Maryland authority on this issue, cases from sister jurisdictions have examined the use of causation analyses in determining whether a claimant’s conduct contributed to his injury. These cases are instructive.”).

176. WIS. STAT. § 949.001 (2021–22). See also *supra* Section III.C for a textual argument that the Legislature’s intent with regard to the CVC program is to “compensate all meritorious CVC claimants.”

177. § 949.001.

Finally, the “public policy factors” approach would recapture the intent of the Legislature by facilitating compensation for more CVC claimants. Just as the common law public policy factors function to limit defendants’ liability in negligence cases, the adapted public policy factors function to limit the instances in which a victim can be held personally liable for their victimization to violent crime. For example, the illustrative case presented in the Introduction would almost certainly prevail under this approach. If the OCVS had considered the adapted public policy factors, it would have likely found the victim’s concussion, skull fracture, and abrasions to be “wholly out of proportion” to the victim cursing at her perpetrator and turning back to confront him after he called her “crazy.”

The benefits of the “public policy factors” approach would also multiply for CVC claimants who do not fit easily into the “innocent victim” paradigm. This might include victims with an ongoing, complicated relationship with their perpetrators, like victims of domestic or intrafamilial violence who periodically fought back against their abuser in self-defense.<sup>178</sup> Victims of sexual assault who initially consented to sexual activity that subsequently turned violent would likewise find relief, as the “public policy factors” approach would oblige the OCVS to consider whether “in retrospect it appears too highly extraordinary” that the victim’s initial consent “should have brought about the harm caused by the perpetrator’s” subsequent violence. Ultimately, the “public policy factors” approach would help the CVC program do what it is meant to do—assist Wisconsinites burdened by violent crime.

#### CONCLUSION

Fairly and equitably compensating crime victims is a matter of societal good and statutory necessity. Rather than facilitating that goal, the contributory conduct limitation found in Wisconsin’s CVC statute currently stands as a barrier to it. Specifically, because the contributory conduct limitation employs problematic notions of victimhood and an incomplete causation analysis, it enables the rejection of deserving CVC claims. In effect, this tortious standard brings torturous results: it fails CVC claimants and the legislative intent of the CVC statute alike.

To improve upon the CVC statute’s contributory conduct limitation, this Comment proposed three alternative approaches for scrutinizing crime victims’ conduct. First, the “beyond a reasonable doubt” approach would preclude the adjudicating authority from denying a CVC claim

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178. See Rutledge, *supra* note 56, at 237–43.

unless the OCVS met its burden of proving that the claimant engaged in disqualifying contributory conduct beyond a reasonable doubt. Second, the “greater cause” approach would define the word “substantially” such that a crime victim would not be disqualified from compensation unless their conduct was a greater cause of their injury or death than was the underlying criminal offense. Third, the “public policy factors” approach would adapt and add the first three public policy factors that Wisconsin courts use to determine legal causation to the “substantially contributed” analysis.

Finally, this Comment urges the Wisconsin Department of Justice to promulgate administrative rules adopting the “public policy factors” approach. This approach enjoys procedural simplicity and legal soundness. All the more, the “public policy factors” approach effectuates the legislative intent of the CVC statute. Utilizing the “public policy factors” approach would afford more victims the compensation that they need and, of equal importance, the validation that they deserve.

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