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‘Marsy’s Law’ Challenges Highlight Conflicts with Other Constitutional Rights

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Starting with California in 2008, a dozen states have adopted the bundle of state constitutional amendments known as “Marsy’s Law,” promoted as giving crime victims important new legal rights. Civil libertarians have warned from the start that the package curtails the legitimate rights of criminal defendants and the interests of a free and vigorous press. Legal challenges now pending before state high courts in Wisconsin and Florida suggest they’re right.

The Marsy’s Law campaign is the brainchild of tech billionaire Henry Nicholas, who took up the cause following the murder of his sister. The packages typically include rights for crime victims to be notified of, attend, and sometimes speak at legal processes involving a defendant; rights not to be publicly identified in ways that could expose them to harassment or retaliation; and rights to refuse interviews or depositions taken at the request of the accused.

One threshold problem appears from the start: these laws designate some persons as victims at a point when no court has yet found that the defendant or anyone else has committed a crime against them. Yet not all claims of victimization pan out.

Voters in Florida and Wisconsin, like those in many other states, approved Marsy’s Law constitutional amendments by wide margins in 2018 and 2020, respectively. In a **challenge argued in September** before the Wisconsin Supreme Court, plaintiffs said the ballot description of the measure was incomplete and misleading and that the package enacted into law consisted of numerous disparate measures notwithstanding Wisconsin’s rule requiring a ballot measure to address only one subject. State high courts in Pennsylvania and Montana **have** struck **down** Marsy’s Law enactments as in breach of their states’ single-subject rules.

The Wisconsin ballot language **read as follows**:

Question 1: "Additional rights of crime victims. Shall section 9m of article 1 of the constitution, which gives certain rights to crime victims, be amended to give crime victims additional rights, to require that the rights of crime victims be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact, and to allow crime victims to enforce their rights in court?"

According to the plaintiffs' brief, this wording did not inform voters that it was rolling back rights of the accused or changing them in any way. On a hasty reading, in fact, voters might conclude the opposite.

The process dispute here points to an important disagreement on substance. Marsy's Law proponents regularly argue that the laws don't weaken the rights of criminal defendants. But there's little doubt that the Wisconsin package does exactly that. For example, it "limits discovery available to defendants by allowing victims [t]o refuse an interview, deposition, or other discovery request," argues a brief from the ACLU of Wisconsin. A brief from public defenders says it's "common for documents to be more heavily redacted or not disclosed in the name of 'Marsy's Law'" and that "the accused's diminished discovery rights have been narrowed further with the amendment."

In addition, the ACLU argues, a provision granting victims the right to attend all proceedings does so by deleting a previous qualifying phrase recognizing their right to attend "unless the trial court finds sequestration is necessary to a fair trial for the defendant."

Note also the description's curious language about how the measure creates rights for victims "while leaving the federal constitutional rights of the accused intact." That seeming concession of course is no real concession at all since a state has no power to curtail federal constitutional rights. As the public defenders' brief notes, "this provision simply states what is already required."

It gets worse. The package in fact *removed* from the language of a **previous victims'-rights enactment** stating that nothing in it "shall limit any right of the accused which may be provided by law." It's hard to avoid the conclusion that Wisconsin drafters of the package knew they were curtailing valuable state-level rights of the accused.

The **Florida case**, argued in December, arises from one of the law's most bizarre effects and highlights another set of rights it may undermine: by asserting victim status, police in some Marsy's Law states **regularly** block the release of their names after violent encounters with the public. A police union sued to prevent Tallahassee from releasing the names of two officers involved in fatal shootings, citing the law's ban on disclosure of "information or records that could be used to locate or harass the victim or the victim's family." The city did not plan to charge the officers with wrongdoing but wanted to reassure the public through openness that its department had acted properly in the encounters.

But using Marsy's Law this way may conflict with Florida's Sunshine Amendment, a constitutional provision guaranteeing strong rights of public access to government records. The trial court **ruled** that it couldn't harmonize the use of Marsy's Law as a shield in instances of

alleged misconduct with Floridians' right to "hold government accountable by inspecting state records." An intermediate appellate court, ruling for the officers and reversing the trial court, however, found no such problem. It ruled that the public records provisions yield when other constitutional provisions exempt records from disclosure.

Whatever the outcome of the Wisconsin and Florida cases, advocates and policymakers should be on notice that Marsy's Law generates outcomes that are hard to defend in principle.

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