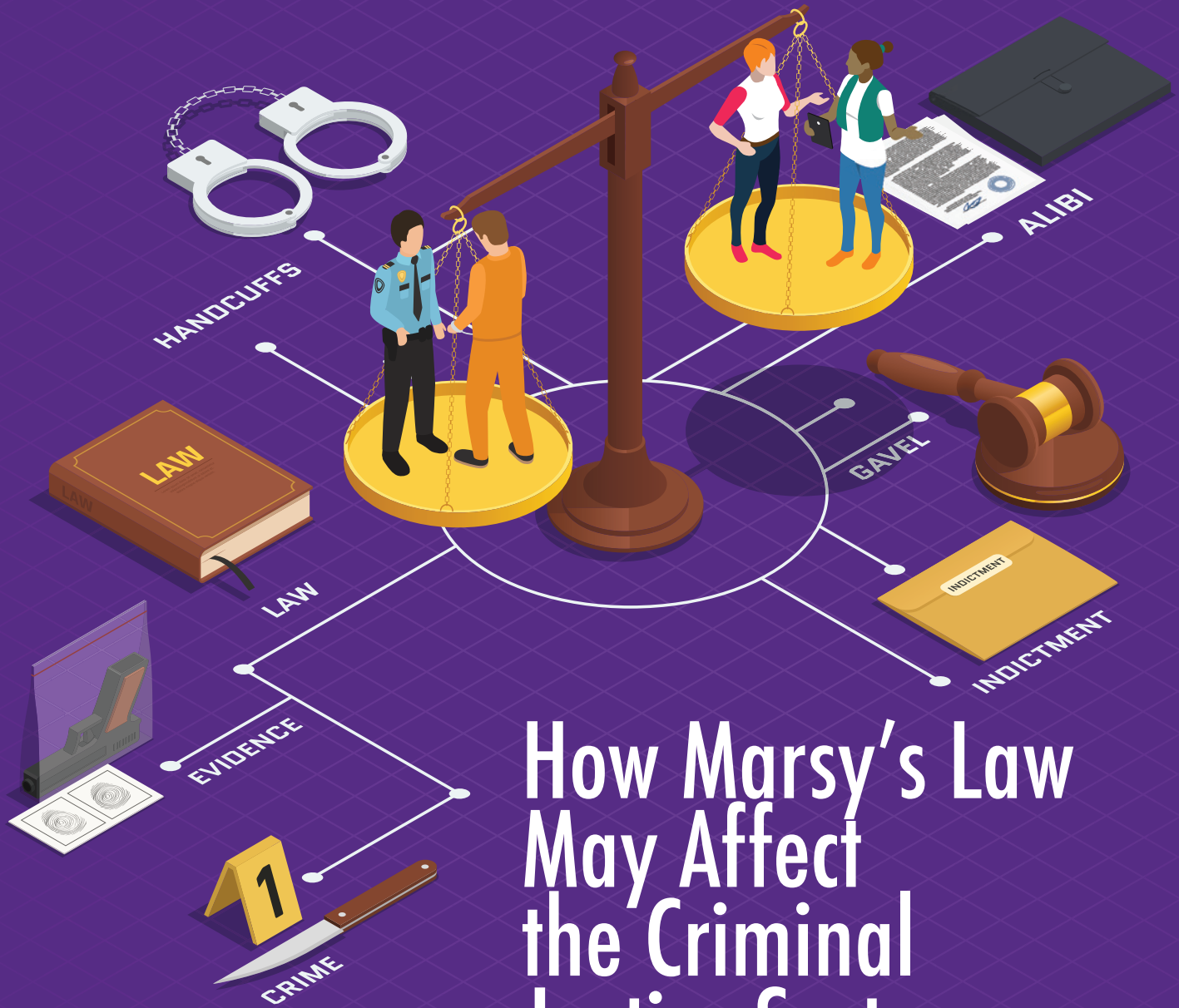


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## How Marsy's Law May Affect the Criminal Justice System

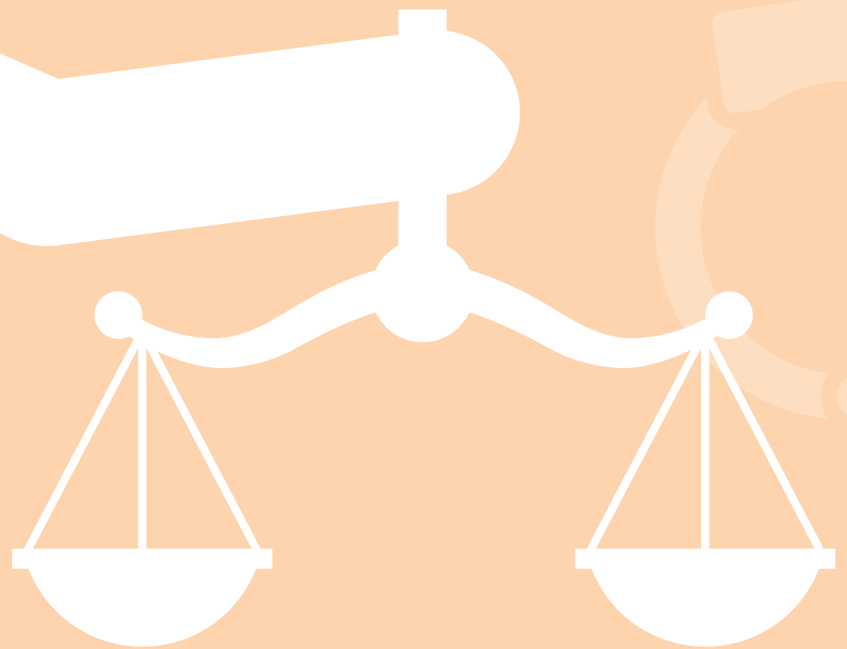
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# How Marsy's Law May Affect the Criminal Justice System

By Judge Frank Forchione



On Nov. 8, Ohio voters overwhelmingly passed Issue 1, titled Marsy's Law, which added additional protections for crime victims to those previously outlined in the state constitution in 1994. Under those prior provisions, victims were granted rights such as reasonable notice and respect for their role in criminal proceedings. Later, state legislators passed supporting laws to protect victims, such as the right to be notified when the accused is arrested or released from incarceration, or the right to provide contact information to the prosecutor and investigator overseeing the case. Marsy's Law is part of a national effort to enhance protection for crime victims. Versions have already been passed in California, Illinois, Montana, North Dakota and South Dakota.

Over the past 23 years, it has been clear to many that the 1994 amendment has not provided the results originally intended. Victims felt their rights were neither strong enough nor enforceable. Prosecutors forgot or failed to notify them of hearings, victims were unaware the accused was being released or had violated court orders, and others felt they had no voice in sentencing. Supporters pointed out that although the accused acquired numerous rights within the constitution, like the right to a speedy trial, to bail, to counsel, to confront witnesses, to not incriminate themselves, and to be free of cruel and unusual punishment, the victims were not furnished similar options that would balance the scale. Most will agree that Marsy's Law now provides compassionate language with the intent of treating victims with dignity and respect. Marsy's Law is based on four core needs: safety, healing, justice and restitution. The amendment to the Ohio Constitution that was approved now guarantees the following:

1. To fair and respectful treatment for the victim's safety, dignity and privacy.
2. Upon request, to notice of, and the right to be present at, all proceedings involving the criminal or delinquent conduct against the victim.
3. To be heard in any public proceeding involving release, plea, sentencing, disposition or parole in which the victim's rights are implicated.
4. To reasonable protection from the accused or person acting on behalf of the accused.
5. Upon request, to reasonable notice of any release or escape of the accused.
6. To refuse discovery requests made by the accused, except as authorized by Article I, Section 10 of the Ohio Constitution.
7. The full and timely restitution from the criminal or juvenile offender.
8. To proceedings without unreasonable delay and a prompt conclusion of the case.
9. Upon request, to confer with the government's attorney.
10. To written notice of all rights in the Amendment.

### How Will This Work?

It is anticipated that when law enforcement officers make initial contact with a victim, they will provide a pocket sized "Marsy's" card that lists a summary of a victim's new rights under the law. It could be something similar to the "Miranda cards" presented to accused offenders that outline their Fifth Amendment rights. Officers would be required to inquire whether the victim wants to invoke Marsy's Law rights; the decision should be included in the officer's paperwork. One issue that remains unclear is whether victims must actually verbally elect to adopt these new

rights to be protected by them. Since Marsy's Law is now a constitutional right, it would appear the government needs to protect it, whether a victim asks for that protection or not.

### Who Is the Victim?

One of the biggest questions that the new law presents is who is the victim? Under the amendment, "victim" is designed as "a person against whom the criminal offense or delinquent act is committed, or who is directly and proximately harmed by the offense or act, but does not include, the accused or a person the court finds would not act in the best interests of the deceased, incompetent, minor, or incapacitated victim." This law broadens the definition, which now would include family members, guardians, or others with a relationship to the victim. This ambiguous description could also extend the branch of victims to larger corporations, insurance companies and other nonhuman entities.

For example, if a defendant goes into a service station and shoots an individual, and fires other shots that cause damage which requires the owner of the service station to file an insurance claim, are both the corporation and insurance company now considered a victim? Many are concerned that this unbridled expansion of "victim" could make the notification process overburdensome, leading to conflicts with the accused's right to a speedy trial and delays in presenting the case, all to the detriment of the victim(s).

### Where Do the Requirements to Notify End?

The Amendment mandates that victims have the right to "reasonable and timely notice" and "to be heard in public proceedings," especially involving "release, plea, sentencing, disposition, or parole...." Some believe this will create an administrative quagmire which will clog the courts. For instance, in most cases, bond is usually set for an

accused immediately after their first appearance with counsel. Under the new law, prosecutors, law enforcement and court officials would have to track down all victims before the judge could even consider bond. This would hamper the efforts of pre-trial release programs or signature bonds until a victim can be located. Meanwhile, the accused will sit in jail until all proper victims can be identified, notified, and given reasonable opportunity to attend the bond hearings. This procedure would remain in effect for other individuals who have been charged, incarcerated and waiting for their own bond hearing.

### Is Victim's Right to Not Participate a Challenge to the Sixth Amendment?

The law now allows victims to refuse to participate in "an interview, deposition, or other discovery requests made by the accused, or any person on behalf of the accused." Defendants are alarmed by this obstacle and argue it is in conflict with the accused's rights to due process under the Sixth Amendment rights to confront an accuser. Defense attorneys claim this language could allow victims to withhold critical information, such as a portion of a diary, a Facebook post or a relevant medical diagnosis. They contend if the accused is denied this information, it creates immediate grounds for appeal. This could drag out the case even longer, defeating the purpose of the amendment.

### What Is the Role of the Victim's Attorney?

Victims now have the right to have "an attorney" or "lawful representative" to assert their rights and "petition the Court of Appeals" for additional relief. However, the law is silent as to the role of the "victim's attorney." Is the attorney permitted to sit separately at trial or join the prosecutor? Also, should this attorney be allowed by the court to give his or her own opening and closing arguments? Will the attorney be allowed the opportunity to conduct his or her own examination of witnesses? Is the



attorney authorized to offer his or her own views as to recommendations on sentencing, oppose the prosecutor's plea offer, appeal a judge's decisions on probation or treatment for addiction? If the attorney disagrees with any of these decisions, can he or she be immediately appealed?

A major concern is who pays for the attorney? If they are required to pay the costs themselves, doesn't that traumatize victims even more? Also, does Marsy's Law give the victim a right to a state appointed attorney? The amendment is silent on that point. However, those accused of crimes are explicitly entitled to "effective assistance of counsel" under the Sixth Amendment of the constitution. Remember, the court is required to appoint indigent defendants counsel. At some point, an attorney will argue that victims should receive the same treatment.

### How Do We Pay for the Law?

The implementation of the new law will more than likely create additional financial burdens to already strapped county commissioners, prosecutor's offices, sheriffs and perhaps the courts themselves. All the members of the criminal justice system will be ordered to provide the support and response necessary to uphold and defend these changes. With such vague definition of

"victim," law enforcement officers and prosecutors will have to widely expand their notification procedures.

In addition, "Marsy's cards" will need to be printed. Victims' rights' advocates, first responders and prosecutors would need to distribute these cards, which is a critical component of notifying the victim about these rights. There will be new costs for administrative assistants to research addresses of victims and provide immediate notification. Finally, updated computer software will need to be purchased to keep up with the new requirements. If it is concluded tax-funded counsel would be required for victims, the costs could skyrocket!

### How Do We Enforce Marsy's Law?

One obvious flaw is that the new law does not address the problem of enforcement, nor does it create a cause of action for damages or compensation against the state or a political subdivision if the government violates the law. So, what does a victim do if the government is not complying? If they attempt to file a lawsuit for damages, the amendment lends no support.

This leads to another dilemma: Law enforcement officers, prosecutors and judges all enjoy immunity for their actions performed in the scope of their duty. Thus, the state retains its traditional sovereign immunity. In turn, it would appear that the only remedies available are two-fold:

(1) if the right is about to be violated—it must have stopped—in most instances by filing a motion with the court; and

(2) proceedings and hearings would have to be redone, presuming double jeopardy does not apply. One wonders how effective compliance can be without some enforcement provisions for liability specified in the amendment. The best option for frustrated victims may be to request a hearing before an appeals court.

### Conclusion

Equal rights for the victims is the central theme of Marsy's Law. It only ensures that victims have the same rights as the accused—nothing more, nothing less. The amendment guarantees that victims have a say and that their rights are clear, enforceable and permanent. Yet opponents will argue victims should not be given the same considerations as the accused. They argue that the new law tramples the accused's constitutional rights which are already granted and will cause unnecessary delays. After all, it is the accused who faces a loss of liberty.

Nevertheless, there are still many questions left unanswered as to how the law will be implemented and enforced. It may actually trigger further litigation to sort it all out. At this point we are all a bit unsure about how Marsy's Law will affect the criminal justice system—except that victim's rights will be more sufficiently protected.

### Author Bio



Judge Forchione is currently serving his second term in the Stark County Court of Common Pleas. He is a graduate of the University of Akron School of Law. He is the president of the

Stark County Community Corrections Board and chair of the Stop Heroin from Killing Committee.