

## Leave our Constitution alone

### *It works just fine; 'Marsy's Law' has its flaws*

When our Founding Fathers sat down to write our new nation's Constitution and Bill of Rights, they recognized that we needed protections against governmental abuses that deprived citizens of their freedom. With abuses by the English crown in mind, they crafted bedrock principles to protect us against future governments run amok.

When the government accuses a citizen of a crime, the citizen starts the process with the presumption of innocence. This requires the government to carry the burden of proving that a crime was committed and that the citizen accused committed it. The accused never has to prove her innocence.

The second principle requires the government to prove the guilt of the accused beyond a reasonable doubt. This is the highest evidentiary standard used in the law and is meant to ensure a high degree of certainty in the verdict.

The third principle requires the accused be afforded due process of law. This means the government has to tell the accused what crime has been charged, what evidence it intends to use to prove it and provide a neutral forum to hear that evidence.

Finally, the accused is guaranteed that her case will be tried before a jury of her peers who have to unanimously agree as to her guilt or innocence.

These protections are buttressed by additional requirements preventing governmental invasions of privacy.

by "getting tough on crime." One such effort led to the passage of a victims' rights amendment to our Wisconsin Constitution. It provided "victims" with a set of rights to make sure that they are treated fairly by the criminal justice system. It set up an obvious conflict with the rights afforded to the criminally accused that is still being litigated in criminal cases.

Not to be out done in stripping rights from the accused, our Legislature has recently passed a new set of "victims' rights," known as "Marsy's Law." Because the proposed provisions change the state Constitution, they must be approved by the voters in a statewide referendum this fall.

The Wisconsin Justice Institute (WJI) recently published an analysis of "Marsy's Law" authored by noted criminal defense lawyer Dean Strang.

Strang looked at all 16 provisions of the new law and noted that voters must consider all in an up or down vote, not 16 separate votes. He concludes that while some of the provisions are laudable and workable, some unconstitutionally invade the rights given to the accused and place undue burdens upon law enforcement officers and district attorneys seeking to comply.

While people can be and are harmed by the acts of others, they do not become "victims" in the criminal law sense until the person who caused the harm is convicted by a jury of his peers who unanimously agreed that the government proved his guilt beyond a reasonable doubt. "Marsy's Law" continues the effort to put a finding that one is a "victim" before the accused is tried and convicted.

remedy. Would a delayed trial mean that charges are dismissed or that the accused must be found guilty without a trial? The first would not please the "victim" and the second would not pass constitutional muster.

A third provision allows the "victim" to attend all court proceedings upon request. This will not work as written. It would require the state to provide notice and transportation to all "victims" wanting to attend but unable to afford to and that judges schedule proceedings so that their attendance can happen. For a working, out-of-state "victim," this would mean court hearings at night or on weekends to accommodate schedules.

A fourth requires "victim" access to the attorney for the government upon request. Most district attorney offices have victim-witness coordinators who serve as points of contact with prosecutors. Most DAs do not have the time to meet with "victims" whenever they ask. Again, this provision creates false hopes and is unworkable given current staffing levels.

A fifth requires that a "victim" be allowed to address the court in any proceeding where one of her rights is implicated. This will create chaos in the courtroom as "victims" often disagree with decisions made by prosecutors and sometimes even ask that charges be dismissed or reduced.

Finally, Marsy's law provides that "victims" are entitled to "full" restitution from the person ordered to pay it. What happens when the offender cannot pay due to incarceration or death? This provision would then require state taxpayers to foot the bill.

Before the government can invade your home looking for evidence, it must first obtain a warrant from a judge based upon a credible showing that evidence of a crime is probably located in the place to be searched.

These protections against government over-reach have worked well since our nation was founded. They apply to all and can be invoked by anyone who stands accused.

Because those who commit criminal offenses are not well regarded, some in our legislatures seek to curry favor with those who would dispense with these protections for the “obviously guilty”

Here are some of the problem areas identified in the WJI analysis titled “Marsy’s Flaws.”

One provides a “victim” with a right to privacy. This directly invades the accused’s right to notice of the charges against him, the identity of his accusers and the evidence that will be presented by the government in its effort to convict. This new “right” will create a false sense of hope and expectations for those harmed.

Another right is to have the proceedings be “free from unreasonable delay.” The proposed law does not tell us who gets to decide if a delay is unreasonable, nor does it fashion a

“Marsy’s Law” is not needed to address a real problem. Its passage is meant to appease the “tough on crime” crowd that has led us to be one of the countries with the largest prison population on the planet. Our Constitution was written to protect us all from government overreach. Let’s keep it that way.

*(Waring Fincke is a retired attorney who serves as a guardian for the elderly and disabled for a Sheboygan County non-profit agency.)*



**WARING  
FINCKE**