

LEGISLATIVE REFERENCE BUREAU

Constitutional Amendment Relating to Crime Victims' Rights

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Introduction

The 2019 Wisconsin Legislature adopted on second consideration a proposal to amend the Wisconsin Constitution. The proposal would amend article I, section 9m, to further distinguish rights of victims of crime, authorize victims to assert those rights in court, and afford remedies to violations of those rights. The proposal was introduced as 2019 Senate Joint Resolution 2, which became 2019 Enrolled Joint Resolution 3, and will be considered by Wisconsin voters on April 7, 2020.¹

Legislative passage of a constitutional amendment on second consideration is the second step in the multiyear process of amending the constitution. Under article XII, section 1, of the Wisconsin Constitution, amendments to the constitution must be adopted by two successive legislatures and then ratified by the electorate in a statewide election.² On first consideration, a proposed change to the constitution is offered as a joint resolution in either the assembly or the senate. A joint resolution, unlike a bill, need not be submitted to the governor for approval, but must pass both houses in identical form. The proposal to provide additional rights to crime victims was introduced on first consideration by the 2017 Wisconsin Legislature as 2017 Senate Joint Resolution 53 and published as 2017 Enrolled Joint Resolution 13.³

To proceed with second consideration of the proposal, per the requirements of article XII, section 1, of the Wisconsin Constitution, the 2019 legislature adopted a joint resolution containing the identical proposed changes to the constitution that were approved by the 2017 legislature. A joint resolution offered on second consideration also specifies the wording of the ballot question that will be presented to voters and sets the statewide election date on which the ballot question will be submitted to the people for ratification. The ballot question established under 2019 Enrolled Joint Resolution 3 reads:

Question 1: Additional rights of crime victims. Shall section 9m of article I 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?

The statewide election date on which the referendum will be presented to the electorate is the first Tuesday in April 2020, or April 7, 2020. If a majority of the electorate votes to ratify the proposal, the constitution will be amended.

1. Both the senate and assembly adopted the proposal on May 15, 2019.

2. Every Wisconsin legislature convenes in January of each odd-numbered year and adjourns in January of the next succeeding odd-numbered year.

3. The senate adopted the proposal on November 7, 2017; the assembly adopted the proposal on November 9, 2017.

Background

In recent years, various states have considered adoption of constitutional amendments providing for crime victims' rights. Broadly speaking, Americans have paid increasing attention to this issue from the early 1970s onward. During that decade, rising crime rates prompted concerns that an overburdened justice system alienated and retraumatized victims rather than encourage their cooperation with law enforcement and the courts. These concerns were particularly strong among women's rights and civil rights advocates, who viewed women and poor, minority populations as particularly vulnerable. By the late 1970s, advocates looked to legislatures to authorize and fund newly established victims' services by law.⁴

Wisconsin became the first state to pass a crime victims' rights bill in 1980 as 1979 Chapter (Act) 219. This legislation created Wis. Stat. ch. 950, which concerns the rights of victims and witnesses of crime and includes a basic bill of rights for victims and witnesses under section 950.04. As created in the 1979 act, those rights include, for example, the right "to be informed . . . of the final disposition of the case," the right "to receive protection from harm and threats of harm arising out of their cooperation with law enforcement," and the right "to be entitled to a speedy disposition of the case in which they are involved . . . to minimize the length of time they must endure the stress of their responsibilities in connection with the matter." The legislation also encouraged counties to provide victims' and witnesses' services, allocated funds for the reimbursement of those county services, and instructed local and state agencies to cooperate in enforcing victims' rights. Later, 1983 Wisconsin Act 197 created new provisions relating to services for child victims and witnesses.

By that time, President Ronald Reagan had established the President's Task Force on Victims of Crime (April 1982), and Congress passed the Victim and Witness Protection Act (October 1982), which aimed "to enhance and protect the necessary role of crime victims" and "to provide a model for legislation for State and local governments."⁵ Later that year, members of Reagan's task force concluded that the criminal justice system had "overlooked" victims of crimes and treated them with "institutionalized disinterest." The task force ultimately recommended that state and federal lawmakers pass laws creating protections for victims of crime, including some of the following recommendations: keep victims' addresses private, allow courts more leeway to deny bail, make victim impact statements a required part of sentencing, provide restitution under more circumstances,

4. See, for example, Marlene Young and John Stein, "The History of the Crime Victims' Movement in the United States," *Office for Victims of Crime Oral History Project* (Washington, D.C.: U.S. Department of Justice, 2004), <https://ncjrs.gov>; Shirley S. Abrahamson, "Redefining Roles: The Victims' Rights Movement," *Utah Law Review* 1985, no. 3 (1985), 517-67.

5. Public Law 97-291, 97th Congress, published October 12, 1982.

and allow public attendance at certain parole hearings.⁶ On the heels of these recommendations, Congress also passed the Victims of Crime Act (1984), which created a fund to support victims' services across the country.⁷ Additionally, activists launched a nationwide effort to amend state constitutions to provide for victims' rights.⁸

Wisconsin legislators first proposed to provide for victims' rights in the state constitution during the 1989 legislative session. Although neither Senate Joint Resolution 94 nor Assembly Joint Resolution 138 passed, they formed the basis of joint resolutions relating to victims' rights passed in later sessions.⁹ During the same session, Attorney General Donald J. Hanaway appointed a special 15-member task force directed to "work with victim advocacy groups, criminal justice system professionals and the general public to provide information about the needs of crime victims and develop legislation to implement the constitutional amendment."¹⁰

Following these developments, legislators considered and passed 1991 Senate Joint Resolution 41 on first consideration, and subsequently considered and passed 1993 Senate Joint Resolution 3 on second consideration. Both resolutions succeeded with overwhelming majorities in each house, and in April 1993, Wisconsin voters ratified the crime victims' rights constitutional amendment. These actions created article I, section 9m, of the Wisconsin Constitution, which directed the state to treat crime victims with "fairness, dignity and respect for their privacy," codified their protections and privileges as already provided by law, and directed the legislature to provide remedies for violations of this section.¹¹

Wisconsin legislators continued to address the issue in subsequent sessions by proposing statutory changes, primarily to chapter 950. For example, 1997 Wisconsin Act 181 expanded the definition of "crime victim," created the Crime Victim Rights Board, reorganized and strengthened statutory protections for victims and witnesses, and provided additional enforcement mechanisms.¹²

More recently, lawmakers returned to the issue of victims' rights within the context of a nationwide movement launched under the initiative of Henry T. Nicholas III, a cofounder of the company Broadcom. Nicholas identified problems in the criminal justice system following the 1983 murder of his sister, Marsalee or "Marsy." In the wake

6. President's Task Force on Victims of Crime, Final Report (Washington, D.C.: U.S. Department of Justice Office for Victims of Crime, December 1982), ii, vi, 16–18, <https://ojp.gov>.

7. "About OVC: Crime Victims Fund," U.S. Department of Justice Office for Victims of Crime, accessed May 16, 2019, <https://ovc.gov>.

8. Young and Stein, "History of the Crime Victims' Movement."

9. Gary Watchke, "Constitutional Amendments and Advisory Referenda to be Considered by Wisconsin Voters April 6, 1993," Wisconsin Briefs 93-4 (Madison, WI: Legislative Reference Bureau, March 1993).

10. Press Release, Wisconsin Department of Justice (June 4, 1990) (Theobald Legislative Library State Documents).

11. Watchke, "Constitutional Amendments and Advisory Referenda."

12. Daniel F. Ritsche, "Rights of Crime Victims and Witnesses," Legislative Briefs 98-3 (Madison, WI: Legislative Reference Bureau, May 1998).

of this personal tragedy, he and his family members felt that neither law enforcement nor the courts kept them informed about the progress of the case, including the defendant's release on bail. Nicholas led a campaign for more comprehensive victims' rights in California, where voters approved a state constitutional amendment in 2008. Since then, Nicholas has led efforts to pass similar constitutional amendments—generally known as “Marsy’s Law”—in other states.¹³

Wisconsin’s proposed constitutional amendment

As passed by the Wisconsin Legislature, the current proposed constitutional amendment would amend article I, section 9m, to entitle crime victims to the following rights in Wisconsin:

- To be treated with dignity, respect, courtesy, sensitivity, and fairness.
- To privacy.
- To proceedings free from unreasonable delay.
- To timely disposition of the case, free from unreasonable delay.
- Upon request, to attend all proceedings involving the case.
- To reasonable protection from the accused throughout the criminal and juvenile justice process.
- Upon request, to reasonable and timely notification of proceedings.
- Upon request, to confer with the attorney for the government.
- Upon request, to be heard in any proceeding during which a right of the victim is implicated, including release, plea, sentencing, disposition, parole, revocation, expungement, or pardon.
- To have information pertaining to the economic, physical, and psychological effect upon the victim of the offense submitted to the authority with jurisdiction over the case and to have that information considered by that authority.
- Upon request, to timely notice of any release or escape of the accused or death of the accused if the accused is in custody or on supervision at the time of death.
- To refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused.
- To full restitution from any person who has been ordered to pay restitution to the victim and to be provided with assistance collecting restitution.
- To compensation as provided by law.
- Upon request, to reasonable and timely information about the status of the investigation and the outcome of the case.
- To timely notice about all rights granted under this constitutional amendment and all other rights, privileges, or protections of the victim provided by law, including how such rights, privileges, or protections are enforced.

13. For more information, see “[About Marsy’s Law](https://marsylaw.us),” Marsy’s Law for All, accessed May 16, 2019, <https://marsylaw.us>.

Additionally, the amendment would define “victim,”¹⁴ authorize such a person to enforce his or her rights in any circuit court or before any other authority of competent jurisdiction, and direct the courts to act promptly with respect to such an action and to afford a remedy for the violation of any right of the victim.¹⁵

At a public hearing in June 2017, groups and individuals who supported the proposed constitutional amendment argued that it provides a better balance between the rights of victims and the rights of defendants. Those opposed to the amendment raised concerns about implementation of victims’ rights and possible conflicts with defendants’ constitutional rights.¹⁶ Lawmakers revived this debate on the floor of their respective houses on May 15, 2019. For example, Senator Van Wanggaard argued that the amendment would “protect equal, legal rights [of] victims in the criminal justice process.” By contrast, Senator Fred Risser remarked that the proposed amendment would be less substantive in practice than statutory changes.¹⁷

Following the Wisconsin Legislature’s adoption of the proposal on second consideration, the Wisconsin Justice Initiative joined others, including Senator Risser, in filing a lawsuit in December 2019 to block the question from appearing on ballots, or, barring that, to prevent votes from being tabulated.¹⁸ However, Circuit Judge Frank Remington denied the plaintiffs’ motion in February 2020.¹⁹

Comparison with other states

Every state enumerates victims’ rights in its constitution, statutes, or both. Most states ratified amendments to provide constitutional rights for crime victims during the 1980s and 1990s.²⁰ Several states moved to ratify additional constitutional amendments relating to victims’ rights, or Marsy’s Law, in recent years. Prior to 2018, voters approved versions

14. In 2017 Enrolled Joint Resolution 13, “victim” is defined as (1) a person against whom an act is committed that would constitute a crime if committed by a competent adult; (2) if the person is deceased or physically or emotionally unable to exercise his or her rights, the person’s spouse, parent or legal guardian, sibling, child, person who resided with the deceased at the time of death, or other lawful representative; (3) if the person is a minor, the person’s parent, legal guardian or custodian, or other lawful representative; or (4) if the person is adjudicated incompetent, the person’s legal guardian or other lawful representative. A victim does not include the accused or a person who the court finds would not act in the best interests of a victim who is deceased, incompetent, a minor, or physically or emotionally unable to exercise his or her rights.

15. See the [Wisconsin Legislative Council’s Amendment Memo](#), published November 9, 2017, for further reading.

16. *Legislative Council Hearing Materials for SJR53 on June 15, 2017: Public Hearing on SJR 53 Before the Assembly Comm. On Criminal Justice and Public Safety and the S. Comm. On Judiciary and Public Safety*, 2017 Leg., 2017–18 Sess. In other states, opponents have suggested that Marsy’s Law “[p]lays] on voters’ genuine sympathy for victims in order to pass an expensive tough-on-crime reform.” Kathryne M. Young, “Parole Hearings and Victims’ Rights: Implementation, Ambiguity, and Reform,” *Connecticut Law Review* 49 (2016), 431–98: 470.

17. Phoebe Petrovic, “[Legislature Approves Crime Victim Rights Measure Known As Marsy’s Law](#),” *Wisconsin Public Radio*, May 15, 2019, <https://wpr.org>.

18. Summons and Complaint, Wisconsin Justice Initiative, Inc. et al. v. Wisconsin Elections Commission et al., No. 2019-CV-003485, Wis. Cir. Ct. Dane Cty. (2020).

19. Patrick Marley, “[Marsy’s Law question that strengthens the rights of crime victims will remain on April 7 ballot](#),” *Milwaukee Journal Sentinel*, February 7, 2020, <https://jsonline.com>.

20. Jill J. Karofsky, “Wisconsin’s History and the Crime Victims Rights Movement.” (Wisconsin Department of Justice, Office of Crime Victim Services, PowerPoint, November 2016).

of Marsy's Law in six states: California (2008), Illinois (2014), North Dakota (2016), South Dakota (2016), Montana (2016), and Ohio (2017). In 2018, six additional states approved similar ballot measures: Florida, Georgia, Kentucky, Nevada, North Carolina, and Oklahoma.²¹

Generally, partisan politics have not raised barriers to these constitutional amendments; however, court challenges have renewed debates about the amendments' scope and enforcement. In Montana, the state supreme court struck down Marsy's Law as unconstitutional, concluding that it "made substantive and unrelated changes to the Montana Constitution that required the issues to be voted on separately, instead of . . . as a whole."²² On similar grounds, the Pennsylvania Supreme Court affirmed a lower court decision against the proposed amendment just days before voters cast ballots on the measure in November 2019. (Those ballots remain uncertified as of February 19, 2020, pending further court decisions on the measure's constitutionality.²³) In Kentucky, plaintiffs challenging Marsy's Law argued that the ballot question was vaguely worded to prompt yes votes from uninformed voters.²⁴ The state supreme court ruled in their favor and struck down the amendment in June 2019.²⁵ Elsewhere, courts have faced challenges relating to the definition of victimhood.²⁶ The North Dakota Supreme Court, for example, heard arguments in a conflict over which party could appropriately claim itself as a victim before the law—a man injured during an assault or the health insurer that covered the injured man's medical costs.²⁷ In May 2019, the court decided in favor of the health insurer, ordering the man convicted of assault to pay restitution to Blue Cross Blue Shield. That said, the justices did not clarify how future courts should interpret the word "victim."²⁸

21. For a summary of ballot measures, see "[Marsy's Law crime victim rights](https://ballotpedia.org)," *Ballotpedia*, accessed May 21, 2019, <https://ballotpedia.org>. Although press reports indicate that Pennsylvania voters approved a victims' rights amendment in November 2019, those votes remain uncertified as of February 19, 2020. Patricia Madej and Anna Orso, "[Marsy's Law got wide support in Pa., even though it won't count yet, and Philly voters approved borrowing \\$185M for buildings](https://www.inquirer.com)," *Philadelphia Inquirer*, November 6, 2019, <https://inquirer.com>.

22. Whitney Bermes, "[Montana Supreme Court strikes down Marsy's Law](https://www.bozemandailychronicle.com)," *Bozeman Daily Chronicle*, November 1, 2017, <https://bozemandailychronicle.com>. See also, Edward O'Brien, "[Montana Supreme Court Declares 'Marsy's Law' Unconstitutional](https://www.mtpr.org)," *Montana Public Radio*, November 1, 2017, <https://mtpr.org>.

23. Elizabeth Hardison, "[Judge blocks Pennsylvania elections officials from tallying Nov. 5 votes on Marsy's Law](https://www.penncapital-star.com)," *Pennsylvania Capital-Star*, October 30, 2019, <https://penncapital-star.com>; Madej and Orso, "[Marsy's Law got wide support in Pa.](https://www.inquirer.com)"

24. Ryland Barton, "[Kentucky Supreme Court Hears Arguments Over Marsy's Law Ballot Language](https://www.wfpl.org)," *Kentucky Public Radio*, February 8, 2019, <https://wfpl.org>.

25. Andrew Wolfson, "[Kentucky Supreme Court says Marsy's Law, the crime victim's amendment, is invalid](https://www.courier-journal.com)," *Louisville Courier Journal*, June 13, 2019, <https://courier-journal.com>.

26. For a discussion of the term "victim" and its supposed ambiguities within the context of Marsy's Law generally, see Geoffrey Sant, "'Victimless Crime' Takes on a New Meaning: Did California's Victims' Rights Amendment Eliminate the Right to Be Recognized as a Victim?" *Journal of Legislation* 39 (2012): 43–68.

27. Jack Dura, "[North Dakota Supreme Court to hear arguments over Marsy's Law victim](https://www.bismarcktribune.com)," *Bismarck Tribune*, April 15, 2019, <https://bismarcktribune.com>.

28. Jack Dura, "[North Dakota Supreme Court ruling offers little for Marsy's Law victim definition](https://www.bismarcktribune.com)," *Bismarck Tribune*, May 20, 2019. For a brief description of two other cases heard by the North Dakota Supreme Court relating to restitution under Marsy's Law, see David J. Hogue and Mark A. Friese, "[Fixing the Marsy's Law Mess](https://www.joomag.com)," *The Gavel* 65 (Fall 2018): 8–9, <https://view.joomag.com>.

In at least one state, legislators have revisited Marsy’s Law to investigate and address problems relating to its implementation. South Dakota legislators ultimately pursued a second ballot initiative to revise constitutional language with the aim of reversing unforeseen consequences, such as increased jail time and paperwork. On the other hand, enforcement in other states—like California, where Marsy’s Law was approved over a decade ago—has not posed substantial challenges for law enforcement agencies or the courts.²⁹ ■

29. Sophie Quinton, “Marsy’s Law’ Protections for Crime Victims Sound Great, but Could Cause Problems,” PEW, October 12, 2018, <https://pewtrusts.org>. Marsy’s Law has had measurable effects on the California criminal justice system. For example, one study found that parole deferral periods are not only significantly longer than before, but also that deferral decisions are made inconsistently, largely due to “sloppy” implementation of the law. David R. Friedman and Jackie M. Robinson, “Rebutting the Presumption: An Empirical Analysis of Parole Deferrals under Marsy’s Law,” *Stanford Law Review* 66 (2014), 173–215: 208. Other scholars note that inmates serve longer terms of incarceration on average, and costs per inmate have increased as well. For a synopsis, see Ryan S. Appleby, “Proposition 9, Marsy’s Law: An Ill-Suited Ballot Initiative and the (Predictably) Unsatisfactory Results,” *California Law Review* 86 (2013), 321–64: 361. Subsequent legislation relating to victims’ rights—the Public Safety Realignment Act of 2011—introduced additional inconsistencies. Jessica Spencer and Joan Petersilia, “Voices from the Field: California Victims’ Rights in a Post-Realignment World,” *Federal Sentencing Reporter* 25 (April 2013), 226–32.