

# JUSTICE FOR NONE

## How Mary's Law Undermines the Criminal Legal System



RÁCHAEL A. POWERS, PHD & JACQUELYN BURCKLEY, MA

# Victims' Rights Constitutional Amendments

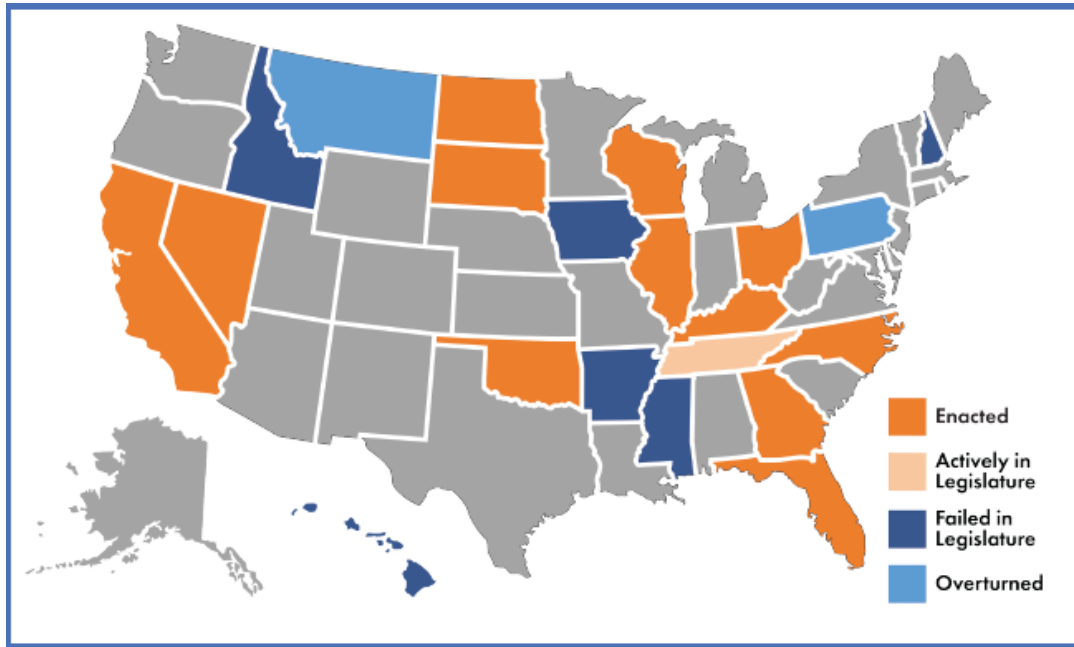
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Victims' rights movement began in the 1960s

Push for victims' rights in statutes and constitutions arose from civil rights movement and in response to ACLU's successes in asserting defendants' rights in court

Most states passed victims' rights constitutional amendments in the 1990s and all states have some form of victims' rights legislation

Marsy's Law aims to “give crime victims meaningful and enforceable constitutional rights equal to the rights of the accused”



STATE	YEAR ON BALLOT	VOTER SUPPORT	STATUS	CAMPAIGN FUNDS
California	2008	53.84%	Enacted	\$5,149,931.00
Illinois	2014	78.45%	Enacted	\$7,101,500.00
South Dakota	2016	59.61%	Enacted	\$2,091,698.15
North Dakota	2016	62.03%	Enacted	\$2,377,803.00
Montana	2016	66.09%	Overturned	\$2,445,925.32
Ohio	2017	82.59%	Enacted	\$10,573,703.62
Oklahoma	2018	78.01%	Enacted	\$4,214,350.00
North Carolina	2018	62.13%	Enacted	\$8,047,000.00
Nevada	2018	61.19%	Enacted	\$9,284,254.19
Kentucky	2018; 2020	63.36%	Overturned; Reenacted	\$5,095,000.00
Georgia	2018	80.96%	Enacted	\$8,730,000.00
Florida	2018	61.61%	Enacted	\$37,252,863.00
Pennsylvania	2019	74.01%	Overturned	\$6,850,000.00
Wisconsin	2020	74.90%	Enacted	\$3,994,782.81

# Extent of Marsy's Law

# Marsy's Law Basic Rights

“Marsy's Law seeks to give crime victims meaningful and enforceable constitutional rights equal to the rights of the accused.”

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The right to notification

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The right to be heard

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The right to privacy

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The right to restitution

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# Opposition to Marsy's Law

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Republican Representative Claire Rouillard was among those who argued the amendment could have unintended consequences for the criminal justice system.

"This CACR is not right for the citizens," said Rouillard. "The words are unclear, the consequences immense."

But there is nothing innocuous about this proposal to rewrite Wisconsin's Constitution to radically restructure the criminal justice system in ways that the longest serving member of the Wisconsin legislature, Madison state Sen. Fred Risser, says, "will eliminate rights under the state constitution and statutes."

Vocal opposition from

- ACLU
- Civil rights groups
- Law enforcement leaders
- Victim advocates
- Legislators

# Methodology

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## Existing Data

Fiscal and policy statements

Media reports

Legal analysis

Cases

Amicus briefs



## New Data

Survey of defense attorneys (n=302)

Focus groups (n=22)

# Sample Characteristics

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## QUANTITATIVE SURVEY

State	F	%
California	60	19.87
Florida	48	15.89
Georgia	18	5.96
Illinois	15	4.97
Kentucky	22	7.28
Nevada	22	7.28
North Carolina	31	10.26
North Dakota	16	5.30
Ohio	27	8.94
Oklahoma	12	3.97
South Dakota	15	4.97
Wisconsin	13	4.30
Other	3	1.00
Total	302	100

## QUALITATIVE FOCUS GROUPS

Three focus groups

22 participants overall

States represented

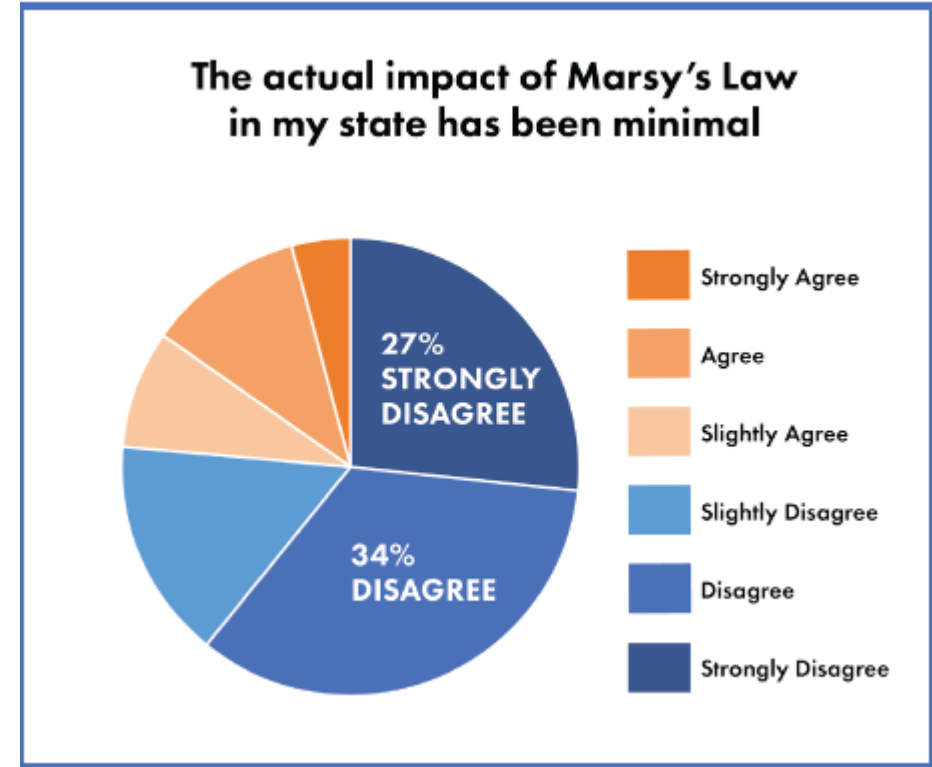
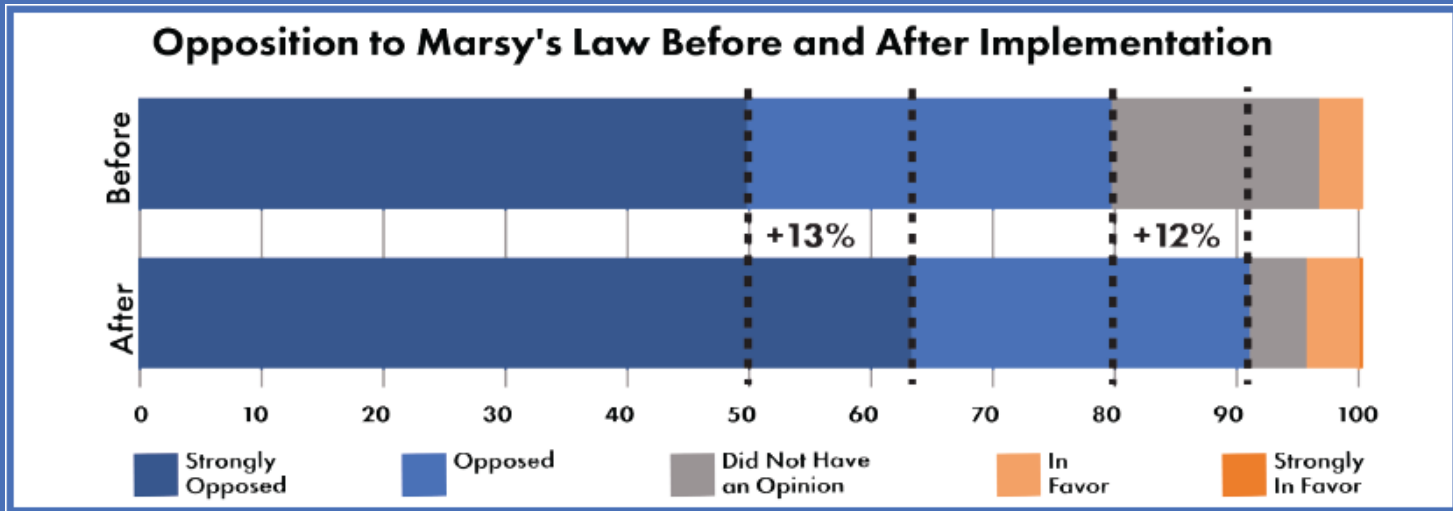
- California, Florida, Georgia, Illinois, Kentucky, Nevada, New Hampshire, North Carolina, Ohio, Wisconsin

Defense attorneys, ACLU representatives, judges, civil rights attorneys and personnel, appellate attorneys, civilian oversight board members

Semi-structured interview protocol, recorded and transcribed

Coded and results validated through feedback with NACDL

# The impact of Marsy's Law





# Marsy's Law and Due Process

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Can victims' and defendants' rights be "balanced?"

- State Policy Director for Marsy's Law for Iowa, "The fallacious reasoning for this misconception typically symbolizes constitutional rights as a pie and argues that for any right a victim is granted, a slice of pie, or right, is taken away from a criminal defendant."

**Victims' rights rhetoric is used to undermine needed criminal justice reform; specifically created a false equivalence between procedural rights for victims and for defendants, and also false equivalence between services for victims and their procedural rights. Marsy's Law, and the rhetoric around victims' rights generally, serves to deprive defendants of rights/reforms while simultaneously preventing more helpful victim services reform from happening.**

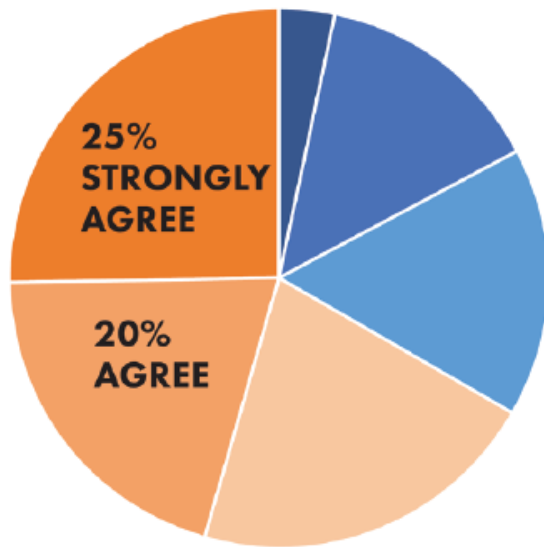
*— Defense Attorney, NV (Survey Participant)*

**Experimentation to find the right balance is such an important thing and as soon as you enshrine something in the state constitution, there is no more conversation between the various organs of government...All of the traditional ways you know to hit that balance get destroyed.**

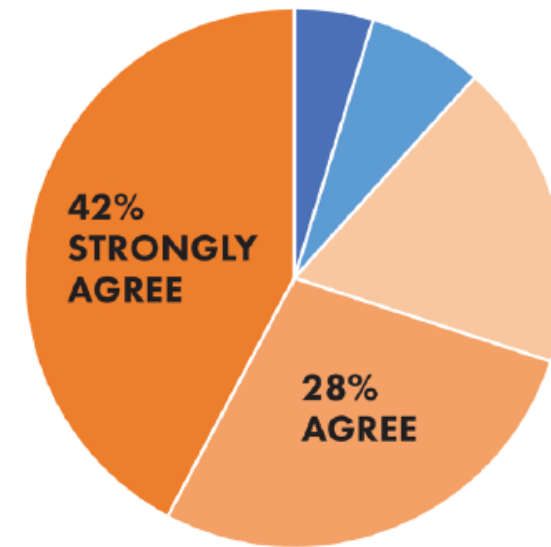
*— Appellate Attorney, OH (Focus Group Participant)*

# Marsy's Law and Due Process

**Marsy's Law has made it more difficult for me to develop an effective defense in my case**



**Marsy's Law increases the potential for wrongful convictions**



# Victims' Right to Notification

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Prior to Marsy's Law, all 50 states had processes that afforded victims the right to be notified of proceedings and/or release

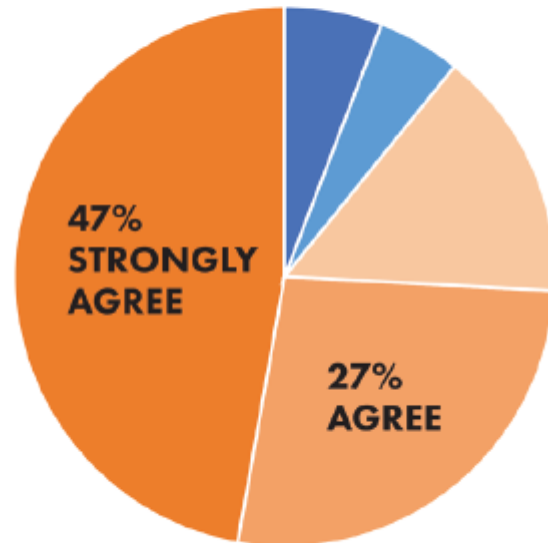
- Purpose of Marsy's Law is to expand this to encompass **all proceedings, for all crimes**, and to enhance the enforcement of this right

“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).”

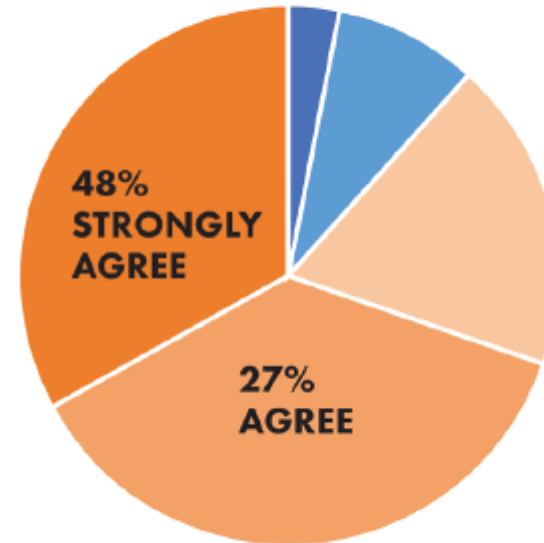
– Frank Forchione, *How Marsy's Law May Affect the Criminal Justice System*, 32 OHIO LAWYER, 2018

# Victim Notification

**Having to notify victims of all proceedings has caused delays in proceedings in my state**



**Marsy's Law has posed problems for pretrial detention, my clients are not released in a timely manner**



# Right to Be Heard

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The right to be heard under Marsy's Law expands to every public proceeding in the case, including bond hearings, plea deals, parole hearings, and other forms of release

## Two forms

1. Victim impact statements
2. Confer with the prosecutor

## Consequences

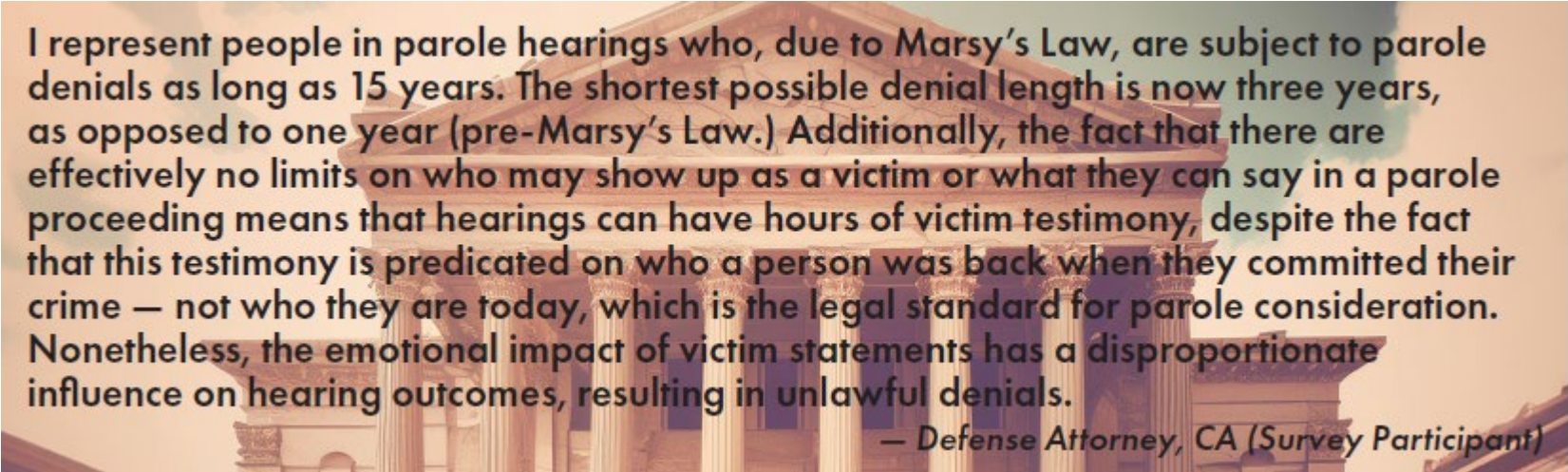
- Sentencing disparities
- Barriers for plea deals and timely disposition of cases

# Right to Be Heard and Potential Disparities

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Victim impact statements have been criticized for creating sentencing disparities

The expansion of proceedings in which the victim has the right to be heard may create disparities at additional points in the system and create cumulative disparities across the system



I represent people in parole hearings who, due to Marsy's Law, are subject to parole denials as long as 15 years. The shortest possible denial length is now three years, as opposed to one year (pre-Marsy's Law.) Additionally, the fact that there are effectively no limits on who may show up as a victim or what they can say in a parole proceeding means that hearings can have hours of victim testimony, despite the fact that this testimony is predicated on who a person was back when they committed their crime — not who they are today, which is the legal standard for parole consideration. Nonetheless, the emotional impact of victim statements has a disproportionate influence on hearing outcomes, resulting in unlawful denials.

— Defense Attorney, CA (Survey Participant)

# Right to Privacy

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Designed to protect the safety of victims and avoid further trauma through criminal justice contact

## Right to refuse discovery

- Consequences
- Undermines due process
- Contributes to the overburdening of the criminal justice system

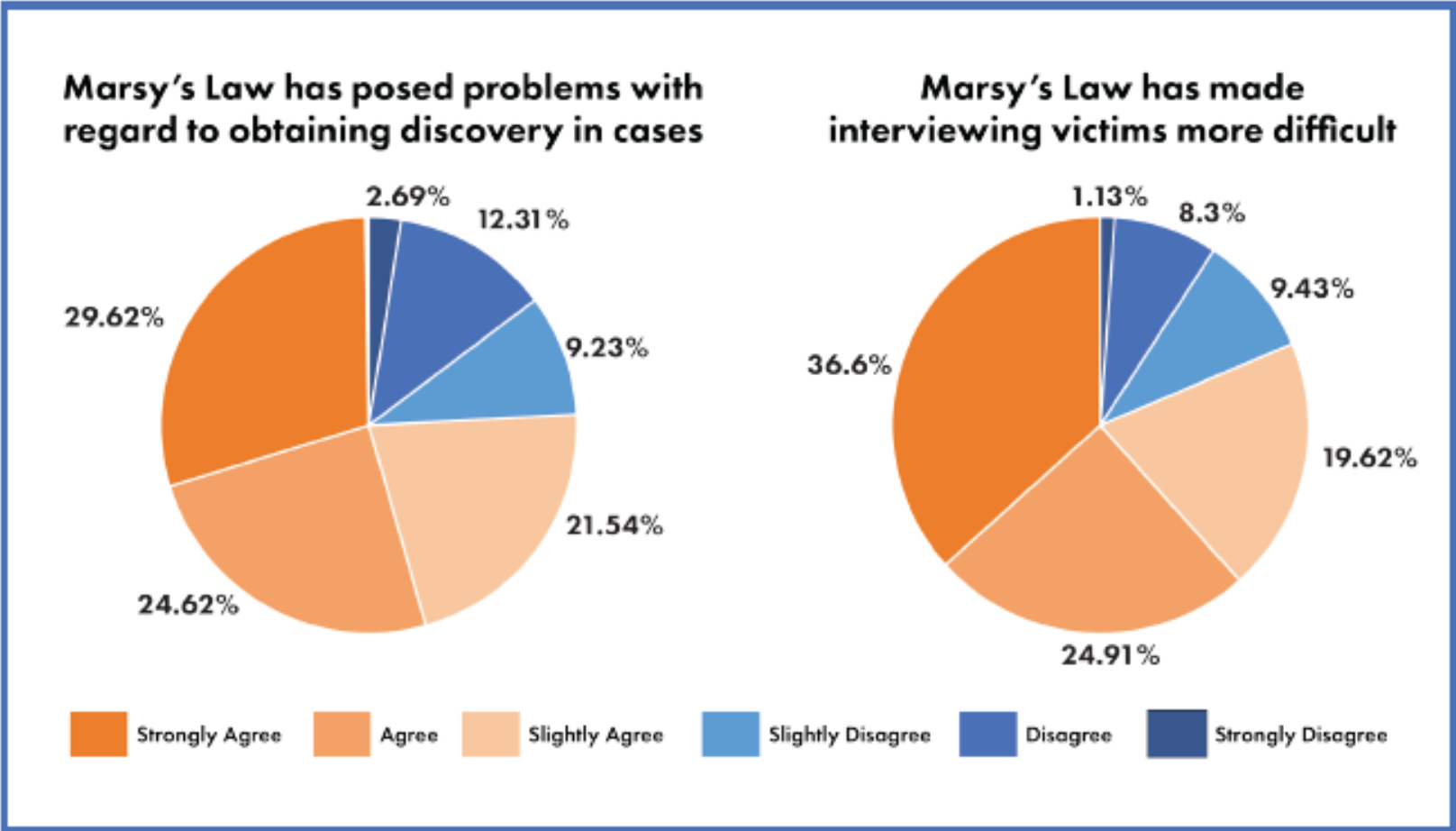
## Right to prevent the disclosure of records

- Consequences
- Barriers to public safety
- Prevents community-based violence prevention

We've all been raised that the court system is basically a 3-legged stool: you've got the judge, you've got the defendant, and you've got the prosecutor. Suddenly we've added this fourth leg, and nobody quite knows what to do with it.

— Public Defender (Ret.), IL (Focus Group Participant)

# Right to Refuse Discovery





# Potential Consequences of Right to Refuse Discovery

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Increase the potential for miscarriages of justice

- “Marsy’s Law would allow a person accusing another person of a crime to withhold evidence. This is a recipe for more wrongful convictions, more innocent people languishing behind bars, and more families needlessly torn apart by the criminal legal system” – Asma Kadri Keeler, ACLU

Increase plea deals to avoid trial

- “...a guilty plea has to be knowing, intelligent, and voluntary, and if you don’t have all the evidence against you, then it can’t be.” – Caroline Donato, Esq.

Delays the appointment of counsel

**This especially has created a dramatic change in prosecutorial culture, at least from this practitioner’s perspective. Florida has long been deemed “The Sunshine State.” In legal circles, this phrase has often been used to describe the robust public records law in place in Florida, and not only the weather. No more is this the case in a criminal prosecution.**

*– Defense Attorney, FL (Legal Analyst)*

# Right to Restitution

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Marsy's Law expands restitution that includes the right to full and timely restitution in every case

## Consequences

- Creates hardships for families of incarcerated individuals
- Increases recidivism due to failure to pay

It makes serving a sentence—which is supposed to be serving your time and equal to paying your debt to society—much much much more difficult in a very punitive way, both for the inmate and for their family and friends who are trying to support them.

— Defense Attorney, NV (Focus Group Participant)

If we start making every exit ramp a toll gate, nobody's going to get off the highway.

— Public Defender (Ret.), IL (Focus Group Participant)

# NACDL Policy Recommendation

“While efforts have been made to revise Marsy’s Law to address some of the concerns, there is no set of discrete and direct policy recommendations that can be provided to mitigate the harms of Marsy’s Law. **Put quite simply, the existence of Marsy’s Law is too damaging to defendants’ due process and the underlying principles of the U.S. legal system.**

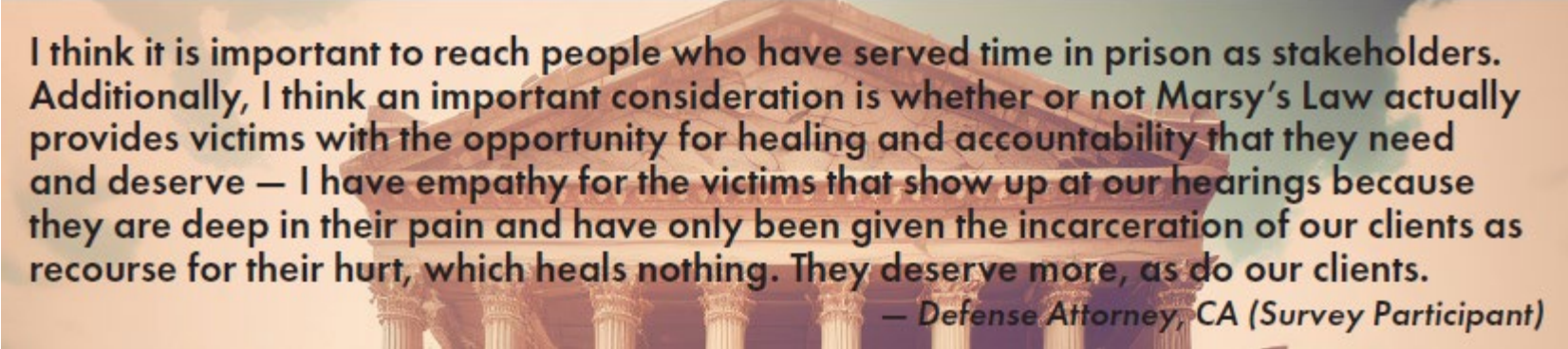
As such, NACDL opposes the adoption of Marsy’s Law, and urges the public and elected officials at all levels of government to oppose Marsy’s Law. States that have already adopted Marsy’s Law should conduct cost analysis to determine the fiscal impact of the provisions.”

## We all agree, Marsy’s Law offers only empty promises

Sen. John Schickel, (R) District 11, Shane Young, Commonwealth Attorney, Heather Gatnarek, ACLU-KY Staff Attorney, Scott Hofstra, United Kentucky Tea Party, and Jan Skavdahl, Northern Kentucky Tea Party

Guest Op-Ed

Mar 8, 2020



I think it is important to reach people who have served time in prison as stakeholders. Additionally, I think an important consideration is whether or not Marsy’s Law actually provides victims with the opportunity for healing and accountability that they need and deserve — I have empathy for the victims that show up at our hearings because they are deep in their pain and have only been given the incarceration of our clients as recourse for their hurt, which heals nothing. They deserve more, as do our clients.

— Defense Attorney, CA (Survey Participant)

The answer to how best serve victims is not Marsy’s Law. It is to engage in community-centered efforts that repair the relationship between citizens and the criminal legal system and support communities’ capacity to build safe and healthy neighborhoods.

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