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Some Skepticism About Criminal Discovery Empiricism

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Abstract

This Response addresses Jenia Turner and Alison Redlich's comparative analysis of criminal discovery practices in two neighboring states, Virginia and North Carolina. Whereas Virginia adheres to the traditional, category-driven approach, North Carolina requires its prosecutors to disclose the contents of their "file," with some notable exceptions.

Open-file discovery has quickly become a fertile source of debate among scholars and practitioners. Turner and Redlich have devised a valuable survey to test theoretical claims commonly asserted by open-file discovery's opponents and supporters. Unsurprisingly, the authors find that disclosure is generally broader in North Carolina (an open-file state) than in Virginia. More notable is the fact that the North Carolina prosecutors who answer the survey seem less opposed to open-file discovery than their Virginia counterparts.

Those who favor the expansion of open-file discovery will find ample cause for celebration in several, but not all, of Turner and Redlich's findings. In this Response, I express my own reservations, which rest partially on standard concerns with survey data, as well as the fact that some of open-file's state level success may rely upon the availability of an entirely different criminal justice system (i.e., the federal system) for complex investigations and prosecutions.

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I. Introduction

As criminal discovery reform proceeds apace, Jenia Iontcheva Turner and Allison Redlich have wisely taken advantage of the opportunity to compare and contrast criminal discovery practices in neighboring states.[1] Their Article reports on a survey they administered to prosecutors and defense lawyers in North Carolina and Virginia. The contrast between the two states' criminal discovery practices could not be more different: North Carolina employs "open file" discovery, whereby prosecutors disclose nearly all of the contents of their file, minus evidence subject to a judicial protective order; Virginia adheres to the more restrictive traditional regime that mandates disclosure of only certain well-defined categories of evidence, plus evidence falling within the confines of the Supreme Court's *Brady* progeny.[2]

Turner and Redlich advance the criminal discovery debate in two ways. First, they focus attention on pre-plea discovery practices, which is highly welcome given the prevalence of guilty pleas throughout our criminal justice system. Second, they employ a survey-based empirical approach that has been largely missing in this debate.[3]

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1. Jenia Iontcheva Turner & Allison Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH & LEE L. REV. 285 (2016).

2. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (obligating prosecution to hand over "evidence favorable to the accused"); *see generally* Giglio v. United States, 405 U.S. 150 (1972) (enlarging *Brady* to include impeachment evidence for witnesses). As Turner and Redlich point out, in states employing the categorical or "closed file" approach, defense attorneys are dependent on prosecutors to determine, in the first instance, what is and is not exculpatory. Turner & Redlich, *supra* note 1, at 300.

3. I am among those who have lodged theoretical concerns with open file

Based on their survey responses, Turner and Redlich find that disclosures do in fact increase under an open-file system, albeit not for all categories of evidence.[4] They also find that open-file's alleged drawbacks—increased threats to witness safety, fabrication of evidence by the defense, and additional cost—do not figure prominently in the answers supplied by the North Carolina prosecutors who answered the survey.[5] Accordingly, most readers—particularly those inclined towards broader discovery reform—will eagerly cite Turner and Redlich's results as grounds for open-file's expansion to other states and to the federal system, which stubbornly adheres to the categorical or "closed-file" approach.[6]

In this Response, I sound a note of skepticism. Surveys allow us to home in on issues deserving closer analysis, and Turner and Redlich's study may prove most useful in illuminating the factors that best predict open-file's success. As the authors themselves point out, what a relatively small sample of surveyed prosecutors and defense attorneys *say* about discovery does not necessarily reflect the actual state of events.[7] Moreover, that open-file systems work as well as they do in North Carolina (or, more accurately, in the specific jurisdictions in which prosecutors answered the survey) tells us little about how well they would work if they became a universal default.

I flesh out a few of these thoughts in detail below and then return to the broader question raised by Turner and Redlich's

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discovery. *See* Miriam H. Baer, *Timing Brady*, 119 COLUMBIA L. REV 1, 56–57 (2015) (analyzing risks to ongoing investigations and witnesses).

4. *See* Turner & Redlich, *supra* note 1, at 294, 296 (noting open-file's limited success with impeachment evidence and evidence possessed by investigating agencies).

5. *See id.* at 296–97, 354–55 (finding that North Carolina prosecutors have not made much effort to evade their discovery obligations and that they appear less concerned than the Virginia prosecutors with the open-file's purported drawbacks).

6. Turner and Redlich identify seventeen states that employ open-file discovery; ten that, along with the federal government, employ the closed-file approach; and another twenty-three whose practices "fall somewhere in the middle." *Id.* at 303–05.

7. *See id.* at 374 (acknowledging that survey tests perception and not actual practices).

study, which is how we can best use empirical data to inform criminal justice reform.

II. The Findings

Turner and Redlich survey prosecutors and defense attorneys throughout North Carolina and Virginia, asking a mix of tailored and open-ended questions regarding discovery practices in their respective states.[8] Unsurprisingly, defense attorneys in North Carolina, an open-file state, report receiving more evidence from prosecutors than their counterparts in Virginia, particularly for certain categories of evidence.[9] The authors highlight three additional findings. First, prosecutors and defense attorneys in both states maintain divergent views of how much evidence they disclose or receive.[10] That is, on average, prosecutors imagine themselves handing over *more* evidence and defense attorneys perceive themselves receiving *less* evidence.[11] Surprisingly, the degree of the variance persists across states, even though the baselines for reported discovery improve for most categories in North Carolina,[12] and North Carolina's defense attorneys are generally happier with their state's discovery system than their

8. *See id.* at 317–22 (describing survey methodology).

9. "We find that statutorily mandated open-file discovery results in broader disclosure of almost all types of evidence . . . ." *Id* at 325; *see also id.* at 323 (summarizing Virginia and North Carolina prosecutors' discovery practices).

10. This may highlight a conceptual difficulty with the survey itself, which asks prosecutors what they disclose and defense attorneys what they receive from prosecutors. "Prosecutors reported on their own behaviors, whereas defenders reported on their experiences with prosecutors." *Id.* at 322. Whereas the prosecutor's answer incorporates the existence or nonexistence of a particular type of evidence (e.g., the prosecutor's knowledge of how often she encounters a particular type of evidence and hands it over), the defense attorney's answer reflects his own experience and any assumptions he holds as to nondisclosure and whether such evidence is truly "present" but nevertheless not disclosed. *See id.* at 324 (setting forth the survey question's language to defense attorneys).

11. "[D]efense attorneys from both [states] stated that they received evidence much less frequently than prosecutors from the respective jurisdiction indicated that they provided such evidence." *Id.* at 327.

12. *See id.* at 328–29 (comparing disclosure practices as perceived by prosecutors and defense attorneys in both states). As the authors later point out, the perception gap narrows in North Carolina, but that narrowing is statistically significant for only a few categories. *Id.* at 385.

Virginia counterparts.[13] Second, the traditional arguments against open-file discovery—that it might threaten the integrity of one or more related cases; undermine witness safety and therefore depress witness cooperation; or significantly burden state prosecutors—are articulated more often by the Virginia prosecutors (who enjoy a closed-file regime but sometimes voluntarily hand over the contents of their file), than the North Carolina prosecutors who actually work within the confines of an open-file regime.[14] Finally, North Carolina prosecutors apparently do not attempt to subvert their obligations by negotiating away discovery rights with discovery waivers.[15]

In sum, although it is no panacea, North Carolina's open-file discovery regime delivers on a number of its promised benefits while also avoiding the worst of its feared drawbacks. If what the authors find is true, one ought to enthusiastically embrace the more generous disclosure regime since it makes defendants and their attorneys *better off* without making any other party to the criminal justice system *worse off*.[16]

III. Reasons for Skepticism

The extent to which survey data should impact criminal justice policy decisions lies beyond the scope of this short response. Nevertheless, even if one accepts surveys as valuable empirical data, one might exhibit particular caution in regard to *this* survey for the following reasons.

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13. *Id.* at 354.

14. *Id.* at 358.

15. *Id.* at 349–50. Then again, even if they did, the negotiation itself would not be anathema if it resulted in benefits to criminal defendants (i.e., lighter sentences for crimes actually committed). In any event, one wonders if waivers are more common throughout larger prosecutors' offices or among prosecutors who pursue more complex cases.

16. Although the authors discuss open-file's presumptive "efficiency," they do not distinguish between stronger and weaker theories of efficiency. A policy is Pareto optimal if it makes one person better off without making anyone else worse off. It satisfies Kaldor-Hicks efficiency if the gains enjoyed by some outweigh the losses suffered by others. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 47 (5th ed. 2008) (describing difference between the two concepts).

A. Selection Bias.

Turner and Redlich duly acknowledge and explore several variants of selection bias, including the relatively small sample size.[17] One wishes, however, that they focused even more time analyzing the differences in responses they received from the wide variety of prosecutor's offices and defense attorneys who received their survey. [18]

In Virginia, the "closed file" state, only 24% of the prosecutors who received the survey began filling it out, and even fewer completed it.[19] (For the sake of clarity, I compare only the initial commencement rate for each group of respondents.) The rate was slightly worse for North Carolina, where only 19% of the prosecutors who received the survey began to answer it.[20] Very few district attorney offices in either state cooperated directly with the researchers, and the ones that did tended to be small and located in rural areas.[21] Accordingly, the prosecutors in *either state* most likely to have intimate knowledge of the witness-related difficulties under an open-file regime (i.e., prosecutors of complex, interconnected cases working out of large offices in urban areas) very likely did not participate in the study at all.[22]

The response from publicly funded defense attorneys—in Virginia only—was notably more robust. Of the Virginia public defenders that Redlich and Turner solicited, nearly 74% began filling out the survey, although far fewer completed it.[23] In other words, Virginia's public defenders began filling out the survey

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17. *See, e.g.*, Turner & Redlich, *supra* note 1 at 327–28 (hypothesizing that the prosecutors who answered the survey may be more inclined towards voluntary disclosure and the defense attorneys who answered may be more frustrated, on average, with the criminal justice system). The authors return to the discussion of selection bias towards the end of the piece. *Id.* at 372–74.

18. Turner and Redlich concede that their sample is "non-representative" insofar as attorneys self-selected to answer the survey. *Id.* at 321.

19. *Id.* at 317.

20. *Id.* at 318.

21. *Id.*

22. The authors contend that they find no correlation between the respondents' caseloads or types of cases prosecuted and the "frequency of discovery." *Id.* at 373. That may be so, but one cannot help but wonder if the overall sample was skewed against such cases, particularly with regard to prosecutors' offices.

23. *Id.* at 318.

three times as often as their adversaries.[24] Meanwhile, in North Carolina, public defense attorneys participated in about the same numbers as their adversaries, with 22.5% of those solicited beginning the survey.[25]

Thus, we have a highly lopsided response rate in the state resisting open-file discovery and a uniformly low response rate in the one that already enjoys it. Surely, the skewed nature of this response says something about how the survey's recipients interpreted the survey's purpose. For example, one might infer that Virginia's publicly employed attorneys perceived the survey as part of a larger reform agenda. This would not have been unreasonable; at the time of the survey's administration, open-file discovery was the subject of "intense debate" in Virginia.[26] Thus, it is at least possible that Virginia's respondents either shaded their answers (consciously or subconsciously) or, more problematic for Turner and Redlich's study, rejected the survey out of hand. If that is the case, the selection bias inherent in the study's results is potentially more complex than the authors already acknowledge. One way to overcome it, if possible, might be to administer the same study in states where discovery reform has been less salient and compare results.

B. Status Quo Bias.

The well-known status quo bias creates additional reason for skepticism. If attorneys perceived the survey as a referendum on the status quo in their particular state, it might have yielded answers—in North Carolina as well as Virginia—that favored the rule actually in place, regardless of the content of that rule.

One of the authors' most notable findings was that North Carolina prosecutors exhibit neutral and even positive views

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24. It would be interesting to know whether the prosecutors or defense attorneys discussed the survey questions or their answers with each other in advance of filling it out.

25. *Id.*

26. *Id.* at 337. Turner and Redlich suggest that because their survey was distributed while debate in Virginia was ongoing, it may have caused Virginia's prosecutors to alter their responses to show strong adherence to the Supreme Court's decision in *Brady v Maryland*. *Id.* But it is equally plausible that the discovery debate skewed responses in many other ways, including the one I raise in the text above.

regarding their state's open-file discovery regime.[27] Open-file discovery has been the rule in North Carolina since 2004.[28] The North Carolina prosecutors who completed the survey had practiced, on average, a little less than 4 years,[29] with an upper and lower bound of 15 and 5 years respectively.[30] Thus, most of the North Carolina prosecutors who answered the survey had either no experience with or only the faintest memory of the previous system.

According to behavioral psychology, individuals generally prefer the status quo for both rational and idiosyncratic reasons.[31] Change ushers in uncertainty and transition costs. It is particularly unnerving to those who are risk averse. For career prosecutors working in a small, local office with a fairly constant case load and relatively predictable plea rate, the costs of changing course loom fairly high, even when the existing rule is technically less prosecutor-friendly than a neighboring state's alternative.[32]

For these reasons, we should not be quite so surprised that the North Carolina prosecutors describe their own state's system in either a neutral or positive light, or seem willing to live with open-file's drawbacks, provided they receive reciprocal discovery

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27. The North Carolina prosecutors advanced more positive comments about open-file discovery than their Virginia counterparts. The comparisons are not "apple to apple" comparisons, as the North Carolina attorneys were discussing a system in existence, whereas the Virginia prosecutors were describing issues associated with either a hypothetical system or problems that had previously arisen when the prosecutor voluntarily handed over her file. *Id.* at 362, 365–69.

28. Turner & Redlich, *supra* note 1, at 305.

29. *Id.* at 320.

30. *Id.* at 319.

31. *See generally* William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision-Making*, 1 J. RISK & UNCERTAINTY 7, 33 (1988) (articulating rational and bias-supported reasons for adhering to status quo).

32. For a technical discussion with regard to judicially created rules, see Robert L. Scharff & Francesco Parisi, *The Role of Status Quo Bias and Bayesian Learning in the Creation of New Legal Rights*, 3 J.L. ECON. & POL'Y 25, 26 (2006). Loss aversion and prospect theory adds an additional gloss: Virginia's prosecutors may fear "losing" a closed file system more than North Carolina's prosecutors would be "willing to pay" politically for abandoning their open-file status quo. *See, e.g.*, Eyal Zamir, *Loss Aversion and the Law*, 65 VAND. L. REV. 829, 835 (2012) (explaining the concept whereby "people attach greater value to things they already have than to things they have yet to acquire").

from the defense.[33] It may well be the case that open-file discovery's opponents have over-emphasized its drawbacks and that most prosecutors can adjust to a broader discovery regime with little or no cost. But it is also plausible that the North Carolina prosecutors who answered the survey are loath to abandon the only system they know.

C. Variation and the "Going Federal" Question.

Finally, the strongest reason for skepticism is what I refer to here as the "going federal" question. Within each state, an entirely separate federal criminal justice system carries on, employing its own practices and procedures.[34] As the authors point out, federal criminal discovery stubbornly adheres to the categorical, closed-file approach.[35] It does not mandate widespread production of inculpatory evidence, other than the defendant's own statements and any recordings or documents the government intends to use in its case in chief.[36] Thus, a crime prosecuted in a federal jurisdiction in North Carolina will involve far less pre-plea discovery than a similar case prosecuted in state court.

Some crimes arise solely within their respective state or federal systems. Federal prosecutors lack jurisdiction over most thefts and vehicular violations, and a local prosecutor ordinarily plays no role in the prosecution of the nation's securities or immigration laws.[37] Notwithstanding these distinctions, there still exist a number of crimes that fall comfortably within either

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33. One ought not to overemphasize this positivity. The North Carolina respondents certainly had *some* negative things to say about open-file discovery. *Id.* at 362–63. Moreover, like their Virginia counterparts, they eagerly pressed for reciprocal defense discovery. *Id.* at 363.

34. *See generally* Baer, *supra* note 3, at 56 (raising question regarding implications of state-level discovery reform for federalization of crimes).

35. Turner & Redlich, *supra* note 1, at 305.

36. *See* Baer, *supra* note 3, at 44 (critiquing Rule 16 of the Federal Rules of Criminal Discovery).

37. There are some notable exceptions. New York State's Martin Act permits state and local prosecutors to pursue securities frauds. For a discussion of how Eliot Spitzer used (or abused) this power, see generally Kulbir Walha & Edward E. Filusch, *Eliot Spitzer: A Crusader Against Corporate Malfeasance or a Politically Ambitious Spotlight Hound? A Case Study of Eliot Spitzer and Marsh & McLennan*, 18 GEO. J. LEGAL ETHICS 1111 (2005).

prosecutor's wheelhouse, such as narcotics trafficking, firearm offenses, and certain robberies.[38] Federal and state authorities can either compete for criminal prosecutions or cooperate by shifting certain types of cases from one jurisdiction to another.[39] Historically, the most notable shifts have been in the direction of federal jurisdiction.[40] Cases that would otherwise be prosecuted in state court "go federal" for any number of reasons, but the most prominent among them have been better resources, government-friendly criminal procedure doctrines, and more severe punishment.[41]

When discovery systems are identical across federal and state jurisdictions, disclosure considerations play no role in the "going federal" determination. When, however, a state adopts a notably generous discovery regime, the calculus—at least theoretically—changes. Cases that local prosecutors would have eagerly prosecuted become more burdensome—at least *on the margin*.[42] If the marginal burden is costly enough, and additional resources are not forthcoming, rational local prosecutors will

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38. "In the United States, various federal and state, criminal and civil enforcement authorities often share overlapping authority over the same conduct." Jay Holtmeier, *Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities*, 84 FORDHAM L. REV. 493, 520 (2015).

39. For an extremely helpful introduction to this "codependent" relationship, see Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 379 (2006).

40. "[W]ith rare exceptions, the courts have acceded to the federal government's authority in this area in the face of federalism-based challenges." Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2245 (2014).

41. *See id.* at 2247

> [F]ederal sentences for gun and drug crimes are in most instances harsher and less malleable than their state counterparts; federal rules of criminal procedure are generally more favorable to prosecutors; and federal prosecutors have vastly more resources to devote to each case, as well as the luxury of choosing which cases they will bring.

Ouziel contends that an additional factor—the federal system's legitimacy—rounds out this list. *See id.* at 2268–78.

42. "For crimes that can be charged interchangeably under federal or state law, prosecutors can proceed in federal court, thereby protecting sensitive information such as the identities of witnesses, cooperating defendants, or connections with ongoing investigations and related cases." Baer, *supra* note 3, at 56.

yield cases to their federal counterparts, through either a formal program or task force, or by way of quiet agreement or custom known primarily to insiders.

One way to determine if this phenomenon exists would be to analyze the United States Sentencing Guidelines, both on a comparative level and longitudinally, with attention paid to the size of the respective United States Attorneys' offices populating each state, the types of cases they pursue and the median offense level assigned to an offender for a given category of crime. This would be no easy undertaking, but it might flesh out some of the concerns raised in this Response.[43]

If the "going federal" phenomenon is real, it creates a conundrum for open-file discovery's proponents. When discovery regimes such as North Carolina's appear to function well, we naturally support their expansion. North Carolina's success, however, may be partially dependent on the presence of a federal escape valve. If this is the case, expansion of open-file at the *state* level may well make some defendants worse off, since some individuals who would have been prosecuted by state authorities now find themselves subject to a harsher and often more powerful sovereign.[44] The reply to this concern might be to universalize open-file across all jurisdictions, state *and* federal. If we go down this road, however, we must acknowledge the strain an open-file system might place on the distinctly different cases that arise almost exclusively within the federal system, such as white-collar frauds, complex organized crime, and terrorism prosecutions.[45]

IV. Why Criminal Discovery Empiricism Matters

To what extent should criminal discovery empiricism inform criminal discovery policy? The question seems like a no-brainer at first. Why theorize a criminal discovery system's costs and

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43. There might be additional value in surveying federal and state prosecutors and defense attorneys in states where the federal discovery rule differs significantly from the state one.

44. *Id.* at 57.

45. Although Turner and Redlich find no correlation between the frequency of discovery and the types of cases involved, it is quite possible their survey failed to capture the offices and/or cases most likely experience discovery issues. Turner & Redlich, *supra* note 1, at 373.

benefits when neighboring states provide such a rich and valuable laboratory for comparison?

But just as theory has its limits, so to does empiricism, in part because the strongest arguments for open-file discovery may be grounded in notions of fairness and not social welfare. If you believe, as a matter of principle, that the information that potentially deprives an individual of his or her freedom should be freely accessible, well in advance of a trial or guilty plea, then it is questionable how bothered you should be by the added costs this imposes on the state. Due process is not cheap.

If, however, you intend to argue that mandatory open-file disclosure improves social welfare by reducing wrongful convictions, eliminating costly litigation, and enabling quicker and more informed plea decisions, then you need an empirical basis with which to back up those claims.[46] This is particularly true if your aim is to convince cost-conscious legislators and the public they serve that open-file discovery is a "win-win" policy, one that leaves crime rates low and disposition rates high.

It is thus a positive development that scholars are investigating the distinctions in discovery practices between different states, as well as the on-the-ground perceptions of criminal defense attorneys and prosecutors. One hopes that Turner and Redlich will continue along this path, perhaps with a focus on different states, different systems, and other sources of data. One hopes as well that other scholars will jump into the fray, utilizing additional empirical methods to measure open-file discovery's effect on criminal justice. Many of us already harbor preliminary intuitions regarding the fairness question. Before we decide the efficiency debate, however, we need to ask many more questions.

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46. *See id.* at 307 (articulating efficiency arguments advanced in favor of open-file discovery).