

Reply to Miriam Baer and Michael Doucette's Reviews of *Two Models of Pre-Plea Discovery in Criminal Cases*

Jenia I. Turner* & Allison D. Redlich**

The comments by Michael Doucette¹ and Miriam Baer² to our recent article about pre-plea discovery in Virginia and North Carolina suggest that our findings have generated interest among practitioners and other scholars. This is encouraging to us. But we take this opportunity to respond to Doucette and Baer for two reasons. First, although our article already addressed in considerable detail the methodological concerns that Doucette and Baer raise, we want to briefly restate that discussion here, to prevent confusion among readers who have not read our original article. Second, we are compelled to respond to several points by Doucette that reflect a misunderstanding of our findings and our arguments and to note several places in which he mischaracterizes those findings and arguments. We conclude by embracing the call for further research by Baer.

As Baer notes, our survey fills an important gap in the literature on criminal discovery, which has largely lacked empirical grounding and has often focused on trial discovery

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1. Doucette labels his piece "Virginia Prosecutors' Response," uses the collective pronoun "we" throughout, and states that his comments are "on behalf of Virginia's prosecutors." See generally Michael R. Doucette, *Virginia Prosecutors' Response to Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. ONLINE 415, 416 (2016). However, he does not explain whether and in what sense his piece represents the views of all Virginia prosecutors and does not explain which other prosecutors, if any, have contributed to his response. Therefore, we attribute his reply to him individually.

2. Miriam H. Baer, *Some Skepticism about Criminal Discovery Empiricism*, 73 WASH. & LEE L. REV. ONLINE 347 (2016).

rather than discovery before a guilty plea.³ While welcoming this empirical approach, Baer raises some concerns about methodology, focusing above all on the response rate to the survey.⁴ Doucette likewise criticizes the response rate, but has other concerns about our methods as well.

We begin with Doucette's first criticism—that we examined *perceptions* of discovery rather than discovery practices directly.⁵ We acknowledged this in our article. Indeed, this was the whole point of our project: rather than engaging in a theoretical discussion of proper discovery practices—an exercise that has been ably accomplished elsewhere—we sought to examine the subjective perceptions of actual practitioners on both sides. We believe this perspective to be important and largely missing from existing scholarship on the issue.⁶ As we explained, “defense attorneys and prosecutors are the key actors in discovery and have first-hand experience with most of its effects. Their views and perceptions therefore offer an indicator of what really happens at this critical stage of the criminal process.”⁷ The reliance on perceptions by those directly engaged in the process being studied is a well-recognized research method of social scientists.⁸ Further, a key objective of our survey was to assess the advantages and disadvantages of open-file discovery practices. In analyzing this question, the reported experience of those who are familiar with such policies (North Carolina) and those who are less so (Virginia) is undoubtedly relevant.

3. *See id.* at 348.

4. *See id.* at 353.

5. Doucette, *supra* note 1, at 416.

6. *See* Baer, *supra* note 2, at 348 (“They [Turner and Redlich] employ a survey-based empirical approach that has been largely missing in this debate.”).

7. Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 315 (2016).

8. Surveys are among the most common research design methods. *See, e.g.*, Fred N. Kerlinger & Howard B. Lee, *FOUNDATIONS OF BEHAVIORAL RESEARCH* 600 (4th ed. 2000)

Survey research is considered to be a branch of social scientific research Its procedures and methods have been developed mostly by psychologists, sociologists, economists, political scientists, and statisticians. . . . The social scientific nature of survey research is revealed by the nature of its variables, which can be classified as sociological facts, opinions, and attitudes.

We are not the only ones to have sought the perspectives of practicing attorneys in evaluating the merits of open-file discovery. For example, the Supreme Court of Virginia itself relied heavily on public comments by prosecutors and defense attorneys when studying the need and desirability of discovery reform in Virginia.⁹ Indeed, as then-President of the Virginia Association of Commonwealth's Attorneys, in 2012, Doucette contributed a public comment to the court, relying for his argument entirely on the perceptions and experiences of himself and other prosecutors.¹⁰ Consideration of such commentary is routine for public decision-making bodies throughout the United States, even when it is gathered and received in far less systematic fashion than were our survey responses.¹¹

Relatedly, Doucette also suggested that using the word “empirical” in our article title was a misnomer, stating that this term “connotes that the scientific method was used.”¹² Doucette conflates these two terms. “Empirical” simply means “based on, concerned with, or verifiable by observation or experience rather than theory or pure logic.”¹³ Our survey most certainly collected

9. See Doucette, *supra* note 1, at 426 (citing order by Supreme Court of Virginia indicating that the Court considered public comments in its consideration of discovery reform proposals); see also SUPREME COURT OF VA., REP. OF THE SPEC. COMM. ON CRIMINAL DISCOVERY RULES TO THE CHIEF JUSTICE & JUSTICES OF THE SUPREME COURT OF VA. xv (Dec. 2, 2014).

10. See Letter from Michael Doucette, President, Va. Ass'n of Commonwealth Att'y, Public Comment Concerning Proposed Rule Change to Wit: Virginia Rule of Court 3A:11 (Discovery and Inspection: Criminal) at 4 (Dec. 12, 2012) (opposing open-file by noting witness safety concerns and pointing as evidence that “[o]ne Virginia prosecutor abandoned his practice of providing a copy of everything in his file to the defense when he learned that copies of the materials thus provided were being passed around at meetings of the Bloods street gang”) (on file with the Washington and Lee Law Review); see also *id.* (asserting, without any evidentiary support, that “[t]he collection, processing and indexing of materials and other related workload increases, which would be required by this version of 3A:11, would significantly impair the productivity and reduce the services provided by any offices”).

11. More questionably, in his response to our article, Doucette effectively substitutes his own anecdotal perceptions of the costs and benefits of open-file for those of hundreds of criminal justice practitioners from Virginia and North Carolina who participated in our study. Doucette, *supra* note 1, at 427–32.

12. *Id.* at 416.

13. Empirical, ENGLISH OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/empirical> (last visited Nov. 16, 2016) (on file with the Washington and Lee Law Review); see also *Empirical*, OXFORD

data (experiences), and it sought information about what is was happening in the real world, in the opinions of the actors closest to the process. It was not based on theory or pure logic. Our title was accurate.

Notably, our article does not simply compare the perceptions of Virginia defense attorneys to those of Virginia prosecutors. Instead, much of it focuses on the comparative experiences of *Virginia* prosecutors and *North Carolina* prosecutors—specifically, the fact that North Carolina prosecutors report a significantly higher rate of pre-plea disclosure of most categories of evidence. Therefore, Doucette’s point that defense counsel may not always know what evidence a prosecutor withholds (an issue we also address in the article) does not undercut the findings of our study.

Next, both Doucette and Baer express a concern that our sample is not representative and that our response rate is low. We addressed this issue directly in our article:

Like most surveys of this nature, our sample is non-representative, as we did not randomly select individuals to participate, and persons self-selected to examine and complete the survey. Although we attempted to reach out broadly to the populations of attorneys in Virginia and North Carolina, our results may not generalize to all attorneys in these states because of the non-representativeness of our sample. Nonetheless, our response rates and our completion rate of 75% are quite comparable to, or exceed, rates from similar surveys.¹⁴

Baer points to the low response rate as an argument for supplementing our survey with more empirical studies, employing different methods and studying additional jurisdictions.¹⁵ But Doucette takes this argument a step further and claims that the low response rate renders our study invalid.¹⁶ While we agree with Baer about the need for further research, we

ENGLISH DICTIONARY (2d ed. 1989) (defining empirical as a study “[t]hat pursues knowledge by means of direct observation, investigation, or experiment (as distinct from deductive reasoning, abstract theorizing, or speculation)”).

14. Turner & Redlich, *supra* note 7, at 321.

15. See Baer, *supra* note 2, at 358 (stating Baer’s hope that others will continue to study open-file’s “effect on criminal justice”).

16. See Doucette, *supra* note 1, at 420.

take issue with Doucette's claim that the low response rate invalidates our findings.

Although one might always wish for a higher response rate, ours was similar to or higher than those obtained in other studies of prosecutors and defense attorneys.¹⁷ Indeed, we believe our survey to be the most comprehensive to date of the perceptions of prosecutors and defense attorneys about discovery issues. There are several reasons for this: 1) the response rate was higher than those of two of the three other discovery-related surveys;¹⁸ 2) our

17. For example, in a study surveying defense attorneys about their choices in guilty plea contexts, Vanessa Edkins had an eleven percent response rate in the first round of surveys sent (national sample) and a fourteen percent response rate in the second round (Florida sample). See Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 LAW & HUM. BEHAV. 413, 417 (2011) (addressing the role of the defense attorney and examining whether disparities in sentence length and incarceration rates between African Americans and Caucasian Americans are in part due to the plea bargains that defense attorneys recommend to these clients to accept). Similarly, Kathy Pezdek and Matthew O'Brien surveyed defense attorneys and prosecutors in California and, in discussing their low response rate, commented that "[a]nyone doing research with practicing attorneys is aware of the difficulty getting them to participate." Kathy Pezdek & Matthew O'Brien, *Plea Bargaining and Appraisals of Eyewitness Evidence by Prosecutors and Defense Attorneys*, 20 PSYCHOL., CRIME & L. 222, 237 (2014).

18. See TEX. CRIM. DEF. LAWYERS ASS'N & MANAGING TO EXCELLENCE CORP., THE COST OF COMPLIANCE: A LOOK AT THE FISCAL IMPACT AND PROCESS CHANGES OF THE MICHAEL MORTON ACT 4 (2015) [hereinafter TCDLA REPORT ON MICHAEL MORTON ACT] (showing participation at around eight percent and using a non-random sample); see also N.Y. CTY. LAWYERS' ASS'N, DISCOVERY IN NEW YORK CRIMINAL COURTS: SURVEY REPORT AND RECOMMENDATIONS 1 (2006) (using a non-random sample and noting that 750 surveys were mailed, and 131 responses were used to write the report, resulting in a seventeen and one half percent response rate, although it is unclear whether this percentage included only completed surveys, or partially-completed surveys as well). An exception to this is the survey conducted by the Federal Judicial Center. Although it was also a non-random sample, it received responses from thirty-one percent of private defense attorneys and forty-seven percent of public defenders, forty-eight percent of active district judges, and ninety-one percent of U.S. Attorney's offices. An important limitation of the survey was that it did not survey individual prosecutors, but collected responses from an office as a whole. Furthermore, it was limited to one jurisdiction—the federal system—and only asked about disclosure of *Brady* evidence pre-trial, rather than about discovery practices more broadly, including pre-plea. LAURAL HOOPER ET AL., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES: FINAL REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES 8 (2011).

survey studied prosecutors as well as defense attorneys, unlike some surveys, which focus on defense attorneys only;¹⁹ and 3) it is the only survey that directly compared the experiences of practitioners in two states with different rules, thereby including a prosecutor-to-prosecutor comparison across states, rather than simply comparing prosecutors to defense attorneys.²⁰

Doucette takes his critique further, claiming that we “*did not attempt* to collect data from a representative sample,”²¹ that we “*made no effort* to make sure [our] sample was representative,”²² and that we “*intended* that respondents to the survey self-select.”²³ These statements are simply false. As one of the 120 Commonwealth Attorneys in Virginia, Mr. Doucette was in the group whom we contacted for participation and advice on conducting our survey.²⁴ We therefore regret to see that he did not appreciate the many efforts we undertook to maximize the size and representativeness of our sample. We contacted several statewide associations with a request to obtain the names and emails of all Virginia and North Carolina prosecutors so that we could directly recruit the population of prosecutors in these states and obtain a random sample. But no association was able or willing to provide us with such a list. It was only then that we turned to the survey method described in the article.

As our article documents, we attempted to reach the broadest possible selection of attorneys and obtain the highest possible response rate. We did so by: 1) keeping our survey relatively

19. See N.Y. CTY. LAWYERS’ ASS’N, *supra* note 18, at 7. Two of the studies did survey both prosecutors and defense attorneys (and judges), but they examined only one jurisdiction—Texas and the federal system, respectively. Moreover, the study of the federal system did not address pre-plea discovery and only asked about disclosure of *Brady* evidence pre-trial. See TCDLA REPORT ON MICHAEL MORTON ACT, *supra* note 18, at iv–v (examining the Texas criminal justice system exclusively); see also HOOPER ET AL., *supra* note 18, at 1–2 (examining views about pretrial *Brady* disclosure in the federal criminal justice system).

20. See HOOPER ET AL., *supra* note 18, at 1–2 (focusing exclusively on the federal jurisdiction); see also N.Y. CTY. LAWYERS’ ASS’N, *supra* note 18, at 7 (studying New York City exclusively); see also TCDLA REPORT ON MICHAEL MORTON ACT, *supra* note 18, at iv–v (focusing exclusively on Texas).

21. Doucette, *supra* note 1, at 417 (emphasis added).

22. *Id.* at 419 (emphasis added).

23. *Id.* at 418 (emphasis added).

24. See Turner & Redlich, *supra* note 7, at 317.

short; 2) keeping the survey confidential; 3) sending repeated reminders to our contacts; and 4) in the case of prosecutors, contacting them in two ways—through statewide associations of prosecutors (who in turn sent our solicitation to prosecutors throughout the state) and through individual chief prosecutors (whom we asked to send our survey to their staff prosecutors).²⁵ We note here that Doucette claims that we “asked elected prosecutors in Virginia . . . to help them identify assistants in their own office who would also participate,” and thereby accuses us of “snowball sampling.”²⁶ This is inaccurate. We did not ask chief prosecutors to selectively identify other assistants in their office to participate, but instead requested that they send the survey to *all* prosecutors in their offices.²⁷

Doucette (but not Baer) also finds fault with our comparative approach. He claims that North Carolina and Virginia are not sufficiently legally alike to be worth comparing.²⁸ Scholars of comparative law are likely to find this criticism startling, as comparative law typically studies legal systems that are much more dissimilar than those of North Carolina and Virginia. More to the point, Doucette’s criticism is unsupported. He mentions several legal differences between Virginia and North Carolina, but fails to describe how any of them have any bearing on discovery practices. For example, he mentions that Virginia has jury sentencing, while North Carolina does not; and that judges in Virginia are appointed, while those in North Carolina are elected.²⁹ He does not explain why either jury sentencing or judicial selection has any direct or significant relationship to discovery practice. In fact, evidence from other states suggests that there is no such relationship. For example Texas has jury sentencing, like Virginia, but it is an open-file state, like North Carolina, undermining Doucette’s implication that jury sentencing somehow stands in the way of open-file.³⁰ The same

25. *Id.* at 316–18.

26. Doucette, *supra* note 1, at 418.

27. Turner & Redlich, *supra* note 7, at 317.

28. *See* Doucette, *supra* note 1, at 420–21.

29. *Id.* at 421.

30. *See* TEX. CODE CRIM. PROC. art. 37.07 (providing defendants with the right to have a jury assess the punishment); *see also id.* art. 39.14 (mandating open-file discovery).

goes for appointed judges—like Virginia, Colorado has appointed judges, yet that state has open-file discovery, suggesting that the appointment of judges does not prevent the flourishing of liberal discovery rules.³¹

We next highlight several places in which Doucette’s response seriously mischaracterizes our methods and findings. Doucette first claims that “the article never tells us what is meant by ‘open file’ discovery.”³² In fact, we do explain our use of this term, both in the survey instrument and in the article. In the survey, we define open-file as “a system under which the defendant has access to the entire prosecutorial file, except for attorney work product and information exempt from disclosure by a protective order.”³³ In the article, we provide further detail, and would here refer the reader to the four-page section II(B), entitled “Beyond the Baseline: Two Models of Discovery in Criminal Cases.”³⁴ There we explain the wide spectrum of disclosure requirements that vary from state to state, and note that we have identified seventeen states that can be understood to follow an “open-file” model.³⁵ As we wrote:

While states that follow this [open-file] model differ somewhat in the scope of information they require to be disclosed, the chief characteristics of their discovery rules are similar. The prosecution is generally required to disclose, at some point after arraignment, either its entire case file (minus work product) or a broad set of evidentiary materials that encompasses nearly everything in the file (minus work product). The key feature of such liberal discovery is that it presumptively requires the disclosure of witness names, witness statements, and police reports.³⁶

Appendix B to our article also contained tables showing the many specific differences among discovery rules in the fifty states, including variations in timing requirements and disclosure of

31. See COLO. CONST. art. VI, §§ 20, 24 (providing for the appointment of judges). *But cf. id.* § 25 (providing for retention elections); see also COLO. R. CRIM. PROC. 16 (mandating open-file discovery).

32. Doucette, *supra* note 1, at 422.

33. Turner & Redlich, *supra* note 7, at 305.

34. *Id.* at 302–06.

35. *Id.*

36. *Id.* at 303.

witness names, witness statements, and police reports.³⁷ In short, our survey and our article did not fail to explain terminology.

Doucette also asserts that we “do not include the survey given to defense attorneys” and we “do not explain that omission.”³⁸ In fact, we explain in the article that “[t]he defense attorney survey (not reproduced here) was largely the same, although the questions were rephrased to ask about what defense attorneys believed to be prosecutors’ practices of disclosure in their jurisdiction.”³⁹ Because the prosecutor and defense surveys were nearly identical, apart from this different phrasing of the questions which acknowledges that defense attorneys *receive*, rather than disclose the evidence we were asking about, it would have been duplicative to include both surveys (each of which was fourteen pages long) in our article.⁴⁰

Next, Doucette inaccurately asserts that “[i]n North Carolina, prosecutors reported significantly lower rates of disclosure than Virginia prosecutors.”⁴¹ It appears that Doucette misunderstood the conclusions of our survey. In fact, the opposite was true: across most categories, North Carolina prosecutors reported *significantly higher* rates of disclosure than their Virginia counterparts.⁴² As we explain in the article, this is true with respect to the pre-plea disclosure of critical items such as co-defendants’ statements, witness names, witness statements, materials related to identification procedures, and police reports.⁴³ Contrary to Doucette’s claim, “[t]he difference is statistically significant when we compare the responses of Virginia and North Carolina *prosecutors* as well as the responses of defense attorneys from each state.”⁴⁴

37. See *id.* Appendix B (displaying the “Table of Select Discovery Rules by Jurisdiction”).

38. Doucette, *supra* note 1, at 416.

39. Turner & Redlich, *supra* note 7, at 316 n.141.

40. *Id.*

41. Doucette, *supra* note 1, at 425.

42. See, e.g., Turner & Redlich, *supra* note 7, Table 2a (showing the statistical difference between North Carolina’s and Virginia’s rates of disclosure as reported by prosecutors in felony cases).

43. *Id.* at 325.

44. *Id.* (emphasis added).

Perhaps this fundamental misunderstanding of our findings contributes to Doucette's claim that we "carry an inherent bias" in favor of defense attorneys.⁴⁵ Doucette bases his claim about our alleged bias—a term he uses repeatedly and, in our view, insupportably—on two key points: 1) our lack of personal law enforcement experience;⁴⁶ and 2) our interpretation of certain responses by Virginia prosecutors, which he claims we characterize as misleading.⁴⁷ Doucette states that because we "are not practicing lawyers and have no experience in law enforcement, [our] apparent bias causes [us] to make . . . biased conclusions that are not based in fact or evidence."⁴⁸ We note here that we are neither prosecutors nor defense attorneys, and therefore, by definition have no professional bias with respect to either. If anything, our lack of a direct stake in the outcome of discovery reform debates makes us more objective than those who are "engaged in the often competitive enterprise of ferreting out crime."⁴⁹ We leave to the reader's judgment whether Doucette's own role as a prosecutor⁵⁰ and past role as head of the Virginia Association of Commonwealth's Attorneys⁵¹ leaves him more or less vulnerable to the kinds of biases of which he accuses us. We do note that our survey suggests that his apparent skepticism about certain aspects of open-file discovery is not shared by most prosecutors in North Carolina, or by most defense attorneys in either state.⁵²

To address Doucette's more specific accusations, nowhere in the article do we suggest that "prosecutors provided misleading

45. Doucette, *supra* note 1, at 424.

46. *Id.* at 425.

47. *See id.* at 424 ("[T]he authors suggest that prosecutors provided misleading responses and therefore discount some of the data collected by their survey.").

48. *Id.* at 425.

49. *See Johnson v. United States*, 333 U.S. 10, 14 (1948) (explaining why, as a rule, a neutral and detached magistrate should review probable cause determinations underlying searches and seizures by law enforcement agents).

50. *See Doucette, supra* note 1, at 415 (describing Michael Doucette's current job as the "Commonwealth's Attorney, City of Lynchburg").

51. Letter from Michael Doucette, President, Va. Ass'n of Commonwealth Att'y, *supra* note 10.

52. Turner & Redlich, *supra* note 7, at 359–72.

responses,”⁵³ and we never “openly dismiss reports from prosecutors as being false.”⁵⁴ Doucette specifically objects to our statement that “consciously or unconsciously, some Virginia prosecutors may have been eager to show that they are disclosing *Brady* material at high rates and that there is no pressing need for reforming the rules.”⁵⁵ This statement does not express disbelief in the prosecutors’ responses. Rather, it develops one of several explanations as to why, with respect to disclosure of certain *Brady* evidence, Virginia prosecutors are reporting similar or somewhat higher rates of disclosure than their North Carolina prosecutors.⁵⁶ Because these responses departed from the overall pattern we found when comparing the pre-plea disclosure rates of North Carolina and Virginia prosecutors,⁵⁷ we put forth several plausible interpretations,⁵⁸ including the one that Doucette perceives as “biased.”⁵⁹ It should hardly be controversial to suggest that one’s views about an issue might have been affected by having entered the fray as an advocate. Given the heavy advocacy by prosecutors against discovery reform through public comments to the Virginia Supreme Court in the year before our study was conducted,⁶⁰ we believe that this is a plausible interpretation of the finding.

Doucette also incorrectly asserts that we “openly dismiss reports from prosecutors [about witness safety concerns] as being false.”⁶¹ In fact, our article quotes in full the two responses by Virginia prosecutors we received that referenced specific cases of witness intimidation or assaults following disclosure of witness-

53. Doucette, *supra* note 1, at 424.

54. *Id.* at 425.

55. *Id.* at 424 (citing Turner & Redlich, *supra* note 7, at 337).

56. *See* Turner & Redlich, *supra* note 7, at Table 3a.

57. *See Id.* Table 2a.

58. *Id.* at 333–38.

59. *See id.* at 424 (“Because the issue was so politically sensitive at the time . . . consciously or unconsciously, some Virginia prosecutors may have been eager to show that they are disclosing *Brady* material at high rates and that there is no pressing need for reforming the rules.”).

60. *See, e.g.*, Virginia Ass’n of Commonwealth’s Attorneys (VACA), Public Comment on the Report of the Special Committee on Criminal Discovery Rules, June 29, 2015 [hereinafter 2015 VACA Letter] (on file with the Washington and Lee Law Review).

61. Doucette, *supra* note 1, at 425.

related information.⁶² Nowhere do we suggest that these reports are untrue or irrelevant. We do note the fact that in North Carolina, prosecutors rarely reference witness intimidation and assaults as a major disadvantage of open-file.⁶³ As we point out, “of the six [North Carolina] prosecutors who identified witness intimidation as a major disadvantage of open-file, only three gave more specific responses” and none of these responses directly stated that open-file *led to* an assault to witnesses.⁶⁴ When we later comment on the risk of witness intimidation, we note that “[a]lthough a number of Virginia prosecutors feared this consequence of open-file *and had even experienced it*, neither North Carolina prosecutors nor North Carolina defense attorneys identified witness safety as a significant concern.”⁶⁵ In short, far from “openly dismiss[ing]” reports from Virginia prosecutors about witness threats, we directly acknowledge them. And while we note that North Carolina practitioners do not perceive witness safety to be a significant risk of open-file discovery, we conclude our article by calling for further empirical study of this question.⁶⁶ It should go without saying that we agree that concerns about witness safety and witness intimidation are always important in our justice system. Indeed, every open-file discovery system of which we are aware, including North Carolina’s, provides for special measures designed to protect witness safety.⁶⁷ In North Carolina, for example, prosecutors do not need to disclose the identity of confidential informants⁶⁸

62. Turner & Redlich, *supra* note 7, at 359.

63. *See id.* (“By contrast, only 10.3% (6 out of 58) of North Carolina prosecutors believed that witness intimidation was a significant disadvantage of open-file discovery.”).

64. One respondent said that he “had one case where retaliation occurred. A ‘snitch’ was able to be identified by the information in the file and he was later beaten up. I don’t know if that outcome would have been any different if I had waited to give discovery out, but I doubt it.” Turner & Redlich, *supra* note 7, at 360 (citing Jenia I. Turner & Allison D. Redlich, *Pre-Plea Discovery Practices: A Survey of North Carolina Prosecutors*, Question No. 19, Respondent No. 62 (2014)).

65. *Id.* at 383 (emphasis added).

66. *See id.* at 384 (“[F]urther empirical study, surveying witnesses themselves, would be the optimal means of assessing the actual effects of open-file on witness intimidation.”).

67. *Id.* at 304.

68. *See* N.C. GEN. STAT. ANN. §§ 15A-904(a1) (West 2011) (providing that

(other than as required under *Brady*) and prosecutors can request that the court issue a protective order to prevent the disclosure of witness information that might jeopardize the witness's safety.⁶⁹

In his thoughts about where discovery reform is heading, Doucette also discusses his own experience serving on the Virginia Supreme Court Special Committee on Criminal Discovery Rules. That Committee recommended “broader and earlier discovery,”⁷⁰ but the Virginia Supreme Court rejected the recommendation, which was opposed by law enforcement groups.⁷¹ Doucette criticizes the Committee for not distinguishing between statute- or rule-based discovery and constitutionally-mandated exculpatory evidence.⁷² He notes that wrongful convictions have occurred only when prosecutors failed to disclose exculpatory evidence.⁷³ From this, he concludes that there is no need to require discovery beyond what *Brady v. Maryland*⁷⁴ already requires.⁷⁵ Here, he ignores two critical points relevant to discovery reform.

prosecutors are “not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law”).

69. See *id.* § 15A-908(a) (“Upon written motion of a party . . . the court may at any time order that discovery or inspection be denied, restricted, or deferred, or may make other appropriate orders.”); see also *id.* § 15-903(a3) (“Names of witnesses shall not be subject to disclosure if the prosecuting attorney certifies in writing and under seal to the court that to do so may subject the witnesses or others to physical or substantial economic harm or coercion, or that there is other particularized, compelling need not to disclose.”).

70. Doucette, *supra* note 1, at 426.

71. See Tom Jackman, *Virginia Decides Not To Change Rules That Withhold Documents From Defense*, WASH. POST (Dec. 12, 2015), https://www.washingtonpost.com/local/public-safety/va-decides-not-to-change-rules-that-withhold-documents-from-defense/2015/12/12/6f76d982-9dc5-11e5-bce4-708fe33e3288_story.html (last visited Dec. 9, 2016) (noting that “Virginia’s prosecutors officially opposed the rule changes” and were relieved when the Virginia Supreme Court declined to adopt them) (on file with the Washington and Lee Law Review).

72. See Doucette, *supra* note 1, at 427 (providing Doucette’s rationale for disagreeing with “the Committee’s conclusion that a new subsection requiring the disclosure of exculpatory evidence should have been added to Rule 3A:11”).

73. *Id.*

74. 372 U.S. 83 (1963).

75. Doucette, *supra* note 1, at 427.

First, *Brady* does not require the discovery of exculpatory evidence before a guilty plea.⁷⁶ Yet the vast majority of convictions today result from guilty pleas.⁷⁷ (That is why our study focused on *pre-plea* discovery.) In other words, consistent with *Brady*, prosecutors may withhold exculpatory evidence, as long as the defendant eventually decides to plead guilty.⁷⁸ While some may respond that a guilty plea indicates actual guilt and that need for exculpatory evidence is therefore irrelevant, we know that about 13% of official exonerations have occurred in cases where defendants pleaded guilty.⁷⁹

Second, Doucette fails to acknowledge the real possibility that prosecutors may not recognize a particular piece of evidence as exculpatory, or that they might take a different view of it than would a defense attorney—possibilities that many scholars and commentators have discussed at length.⁸⁰ Indeed, Doucette's own misinterpretations of our findings give weight to this concern. He reviews the same facts that we did, yet he gave those facts a very different interpretation. Similar divergences in interpretation are to be expected when prosecutors and defense attorneys review the same evidence in a criminal case. To avoid wrongful convictions, it is therefore important to give defense attorneys access even to facts that prosecutors themselves believe are incriminating.

Finally, while Doucette assails our methodology for resting on a non-representative sample, he relies on little more than anecdote to support his own conclusion that open-file discovery is too costly and burdensome for prosecutors.⁸¹ As we discuss in the

76. See *Brady*, 372 U.S. at 87; *United States v. Ruiz*, 536 U.S. 622, 628–32 (2002).

77. See *What Percentage of Felony Convictions Were the Result of a Guilty Plea?*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=qa&iid=405> (last updated Nov. 13, 2016) (last visited Dec. 9, 2016) (attributing 95% felony convictions to guilty pleas) (on file with the Washington and Lee Law Review).

78. See Turner & Redlich, *supra* note 7, at 301, 308, 330 n.188 (discussing cases holding that disclosure of exculpatory information is not required before a guilty plea).

79. See *id.* at 289 n.11 (“According to the National Registry of Exoneration, 210 of the 1575 wrongful convictions involved a guilty plea.”).

80. See *id.* at 300–01 nn.58–62 (reviewing some of the voluminous literature on this topic).

81. See Doucette, *supra* note 1, at 429–31 (describing Doucette's experience on the Virginia Supreme Court Special Committee).

article, seventeen states, including large jurisdictions such as Texas, Florida, and Ohio, have adopted some form of open-file discovery and have managed to deal with the issues of redactions and motions for protective orders.⁸² Since our article was published, another scholar conducted a quantitative study of open-file discovery in Texas and North Carolina and found that open-file in those two states did not lead to a decline in the number of charges filed per arrest or in reduced sentences.⁸³ This finding suggests that open-file is not so burdensome as to interfere with prosecutors' essential duties, contrary to Doucette's anecdote.

In New York, another state that is currently considering discovery reform, a New York State Bar Association task force relied heavily on a comparative study of discovery rules and practices (as well as on comments of practitioners from within New York) and, like Virginia's Committee, recommended liberalizing discovery, while providing for protective orders to ensure witness safety.⁸⁴ This conclusion is broadly consistent with our review of the experiences of Virginia and North Carolina prosecutors and defense attorneys.

To conclude, we wholeheartedly agree with Baer that additional empirical work is necessary to test our findings in different settings and through different methods.⁸⁵ Some scholars have already begun this work,⁸⁶ and more is sure to come. But our results, based on comparing the responses of hundreds of practitioners from Virginia and North Carolina, stem from one of

82. Turner & Redlich, *supra* note 7, at 304.

83. See Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. *1 (forthcoming) (manuscript at 5) (finding "relatively little evidence that defendants fared significantly better in terms of charging, plea bargaining, and sentencing . . . as a result of open-file") (on file with authors).

84. See N.Y. STATE BAR ASS'N, TASK FORCE ON CRIMINAL DISCOVERY, CRIMINAL DISCOVERY REFORM IN NEW YORK STATE 7–8 (2014), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=54572> (summarizing the Task Force's five general recommendations for criminal discovery reform). The New York State Bar House of Delegates approved the report on January 30, 2015. *Id.*

85. See Baer, *supra* note 2, at 358.

86. See, e.g., Grunwald, *supra* note 83 (using aggregate administrative data from North Carolina and Texas criminal cases to compare case processing before and after the adoption of open-file discovery in each of the two states).

the most comprehensive studies of pre-plea discovery practices to date. Our findings point to the same conclusion that both the New York State Bar Association Task Force on Criminal Discovery and the Virginia Supreme Court Special Committee on Criminal Discovery Rules reached. With proper regulation, states can minimize the logistical burdens and witness safety concerns of open-file, while ensuring greater fairness and transparency in the criminal process.