

# ARTICLES

## “BAD JUROR” LISTS AND THE PROSECUTOR’S DUTY TO DISCLOSE

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*Prosecutors sometimes use what are known as “bad juror” lists to exclude particular citizens from jury service. Not only does this practice interfere with an open and fair jury-selection process, thus implicating a defendant’s right to be tried by a jury of his or her peers, but it also violates potential jurors’ rights to serve in this important capacity. But who is on these lists? And is a prosecutor required to disclose the lists to defense counsel? These questions have largely gone unnoticed by legal analysts.*

*This Article addresses the prosecutor’s duty to disclose bad-juror lists. It reviews the federal Freedom of Information Act, a variety of state open-records acts and their exemptions, the work-product doctrine, the fundamental-fairness doctrine, and the discriminatory use of peremptory challenges (particularly in death-penalty cases). The Article concludes by advancing recommendations for overcoming disclosure exemptions and preserving the integrity of jury selection in the face of the continued use of bad-juror lists.*

*The judicial system in the United States is adversarial. Particularly in criminal cases, when prosecutors, who already hold enormous power, are permitted to put their thumbs on the scale of justice during jury selection, the entire system suffers—the rights of potential jurors, the rights of the defendant, the reliability of the outcome of the proceedings, and the appearance of justice.*

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## INTRODUCTION

The use of “bad juror” lists by prosecutors is a problem that has largely gone unnoticed by legal analysts. In a 2010 case, criminal defense attorney William Ray of Fort Worth, Texas discovered that Tarrant County prosecutors had compiled a so-called bad-juror list.<sup>1</sup> This particular list contained the names of twenty-one jurors whom the district attorney’s office sought to blacklist from all criminal trials in that district.<sup>2</sup> The Tarrant County prosecutors reportedly update the list at the conclusion of every criminal trial so that prosecutors can use the list to aid in future jury selections.<sup>3</sup> Although the Tarrant County prosecutors appear to be using this list to strike jurors during the voir dire process, the prosecutors maintain that nothing on the list “‘would rise to the level of improper exclusion.’”<sup>4</sup>

Despite the prosecutors’ assurances that preparing and maintaining the list was constitutionally permissible, Ray petitioned Texas Attorney General Greg Abbott to force the prosecutors to disclose the list to the public.<sup>5</sup> In response, the prosecutors contested the list’s release, arguing that the list constituted protected work-product because it reflected the prosecutors’ thought processes and had been prepared in anticipation of litigation.<sup>6</sup>

Although the bad-juror-list phenomenon has not widely caught the attention of legal experts, the problem is not unique to Texas. In fact, whether jury records compiled by prosecutors are discoverable has been litigated in several jurisdictions, with conflicting results.<sup>7</sup> These lists

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<sup>1</sup> See Gene Trainor, *Criminal Defense Attorney Wants List of ‘Bad Jurors’ Disclosed to Public*, FORT WORTH STAR-TELEGRAM (July 12, 2010), <http://www.star-telegram.com/2010/07/11/2327705/criminal-defense-attorney-wants.html> (noting that, in 2009, criminal defense attorney William Ray was successful in filing a request with the state that ultimately resulted in the Tarrant County prosecutors’ disclosing a more general list of jurors and their voting records).

<sup>2</sup> See Editorial, *Tension in the Tarrant County Criminal Court*, FORT WORTH STAR-TELEGRAM, July 15, 2010, at A16 (arguing that there is value in making the list available to the public because it would show whether prosecutors engaged in unconstitutional conduct in adding certain jurors’ names to the list).

<sup>3</sup> See *id.*

<sup>4</sup> *Id.* But see *People v. Murtishaw*, 631 P.2d 446, 465 (Cal. 1981) (explaining that to deny defendants access to jury dossiers to which prosecutors have access will give the prosecution a significant advantage in the voir dire process).

<sup>5</sup> See Trainor, *supra* note 1 (reporting that the prosecution opposed the defense attorney’s motion based on the work-product doctrine and argued that attorneys should be able to keep private their mental impressions and subjective thoughts).

<sup>6</sup> *Id.*

<sup>7</sup> Compare *Hamer v. United States*, 259 F.2d 274, e280 (9th Cir. 1958) (holding that jury dossiers do not necessarily violate a defendant’s right to a fair and impartial jury), with *United States v. Kyle*, 469 F.2d 547, 551 (D.C. Cir. 1972) (holding that considerations of general fairness may compel disclosure of jury dossiers).

vary greatly—some include only criminal records of potential jurors;<sup>8</sup> others include informational interviews conducted by law-enforcement officials;<sup>9</sup> others include prosecutors' personal knowledge regarding specific jurors' past voting history<sup>10</sup>—and courts have taken equally varied approaches to the discoverability of these lists. Courts have often cited certain doctrines and statutes in holding that these lists are either exempt from disclosure or that they must be produced. Most commonly, courts have referred to the work-product doctrine, the fundamental-fairness doctrine, state open-records acts, and the federal Freedom of Information Act.<sup>11</sup> Although some courts have applied these statutory and doctrinal precedents to deny public disclosure, exempting bad-juror lists is not only contradictory to the legislative intent behind disclosure exemptions, but it also risks violating a juror's constitutional right to serve.

Part I of this Article examines the relevant doctrinal and statutory settings both in support of and in opposition to the disclosure of the bad-juror lists. This overview considers the exemptions to disclosure provided by both federal and state open-records acts, the governing case law on the work-product doctrine, and the variability in the application of the fundamental-fairness doctrine. Part II analyzes how the legislative intent behind the Freedom of Information Act provides a relevant background against which the state open-records acts can be examined. Part II also evaluates how the application of state open-records acts supports a conclusion that bad-juror lists do not fall under any disclosure exemptions. Part III addresses the validity of the work-product and fundamental-fairness arguments and the potential constitutional issues raised by preventing certain individuals from serving on juries. Finally, Part IV advances recommendations for overcoming disclosure exemptions and preserving the integrity of jury selection in the face of the continued use of bad-juror lists.

## I. BACKGROUND

### A. *An Overview of Federal and State Open-Records Acts*

Open-records acts, which emphasize openness in both state and federal law, ensure that information and documentation maintained by government agencies will be available to the public. These acts are

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<sup>8</sup> See *Tagala v. State*, 812 P.2d 604, 613 (Alaska Ct. App. 1991).

<sup>9</sup> See *Commonwealth v. Smith*, 215 N.E.2d 897, 900–01 (Mass. 1966).

<sup>10</sup> See *People v. Terrell*, No. A125183, 2010 WL 2625579, at \*3 (Cal. Ct. App. June 30, 2010).

<sup>11</sup> Compare *Losavio v. Mayber*, 496 P.2d 1032, 1033 (Colo. 1972) (entertaining the prosecution's argument that the records were exempt from disclosure under the state's open-records act), with *Couser v. State*, 383 A.2d 389, 396 (Md. 1978) (refusing to disclose the prosecution's jury dossier to defense counsel because the defense had not made a sufficient showing of undue prejudice to justify dispensing with the work-product doctrine).

implicated in the prosecutorial use of bad-juror lists because law-enforcement officers often provide prosecutors with information about prospective jurors, such as their criminal history. While many states strictly enforce open-records acts in order to preserve public openness,<sup>12</sup> every open-records act includes exemptions, which prosecutors often cite to avoid the disclosure of documents in the state’s possession.

### 1. Federal Freedom of Information Act

The Freedom of Information Act (FOIA)<sup>13</sup> provides guidance regarding congressional intent behind the implementation of state open-records acts.<sup>14</sup> Pursuant to FOIA, any federal agency that maintains a system of records must disclose those records to any individual upon request, unless the records are protected from disclosure by one of the Act’s nine exemptions.<sup>15</sup>

For nearly a decade prior to FOIA’s enactment, agency officials, lawmakers, and individuals representing public-interest groups debated the sufficiency of the then-current statutory scheme providing for public access to federal agency records.<sup>16</sup> In contrast to the public-disclosure section of the Administrative Procedure Act<sup>17</sup> that existed at the time, FOIA’s purpose was to ensure that every record falling within the confines of the Act and not explicitly exempted from disclosure be made available for public inspection.<sup>18</sup>

Case law interpreting FOIA’s application also suggests that Congress intended that courts broadly construe the Act in favor of individual access to information.<sup>19</sup> In fact, the United States Supreme Court con-

<sup>12</sup> See discussion *infra* Part I.A.2.

<sup>13</sup> 5 U.S.C. § 552 (2006).

<sup>14</sup> See 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5683, at 219 (1992) (noting that many state open-records acts are modeled after the federal Freedom of Information Act and stating that “their [state open-records acts’] history often mirrors that of the F.O.I.A.—that is, with tremendous governmental hostility to the idea of public access to official records”).

<sup>15</sup> See 5 U.S.C. § 552(b)(1)–(9).

<sup>16</sup> See 112 CONG. REC. 13641 (1966) (statement of Rep. John Moss) (explaining the numerous debates that led to the enactment of FOIA).

<sup>17</sup> 5 U.S.C. § 1002 (1964) (current version at 5 U.S.C. § 552 (2006)).

<sup>18</sup> Compare *EPA v. Mink*, 410 U.S. 73, 79 (1973) (bemoaning that, prior to the enactment of FOIA, the public disclosure section of the Administrative Procedure Act fell “far short” of the goals Congress intended for it to achieve), with 112 CONG. REC. 13641 (1966) (statement of Rep. John Moss) (“We must remove every barrier to information about—and understanding of—Government activities consistent with our security . . . .”), and 111 CONG. REC. 2797 (1965) (statement of Sen. Long) (“[O]ur purpose in introducing the [Freedom of Information Act] is . . . that a necessary corollary to the right of a democratic people to participate in governmental affairs is the right to acquire information.”).

<sup>19</sup> See OFFICE OF INFO. POLICY, U.S. DEP’T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE: INTRODUCTION (2004), available at <http://www.justice.gov/oip/introduc.htm> (“The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a

tended that the only way to hold the government accountable for its actions, which is essential in a democracy, is for “information that sheds light on an agency’s performance” to be made available to the general public.<sup>20</sup> Moreover, the Supreme Court has discussed at length the reason for specifically replacing the public-disclosure section of the Administrative Procedure Act with FOIA,<sup>21</sup> noting that Congress found that the original Act fell short of its goal of promoting openness, instead becoming more of a “withholding statute than a disclosure statute.”<sup>22</sup> Therefore, Congress fashioned FOIA with the express purpose of instilling “a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.”<sup>23</sup>

In order to ensure that FOIA was not looked upon as a general “withholding statute,” Congress enacted nine explicit exemptions; if agency information did not fall within one of these exemptions, it was subject to broad disclosure.<sup>24</sup> These exemptions, however, are not mandatory; an agency still has *discretion* to disclose information that falls within any of these exemptions, further emphasizing Congress’s goal of broad disclosure.<sup>25</sup> Pursuant to § 552(b) of FOIA, public disclosure is not required where the records are:

- (1) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy . . . ;
- (2) related solely

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democratic society, needed to check against corruption and to hold the governors accountable to the governed.”) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

<sup>20</sup> *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 795–96 (1989).

<sup>21</sup> *See, e.g., Dep’t of Air Force v. Rose*, 425 U.S. 352, 360–62 (1976); *Mink*, 410 U.S. at 79–80.

<sup>22</sup> *See Rose*, 425 U.S. at 360.

<sup>23</sup> *See id.* at 360–61 (quoting S. REP. NO. 89-813, at 3 (1965)).

<sup>24</sup> *See* 5 U.S.C. § 552(b) (2006). Furthermore, in order to “pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny,” the Act provides that nothing that falls within the purview of the Act should be withheld without a specifically stated exemption. *See Rose*, 425 U.S. at 361 (quoting *Rose v. Dep’t of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)). Congress included each clearly delineated exemption to shield certain types of information from unwarranted invasions of personal or professional privacy. *See* 5 U.S.C. § 552(b). Congress drafted these exemptions more carefully than the original exemptions in the Administrative Procedure Act, however, to ensure a narrower, more specific reach. *See Rose*, 425 U.S. at 363, 370–71 (discussing specifically Exemptions 2 and 6, which deal with “internal personnel rules and practices” and “personnel and medical files and similar files”; however, given the intent of broad disclosure, a narrow interpretation of the exemptions follows).

<sup>25</sup> *See* U.S. Dep’t of Justice, *Discretionary Disclosure and Exemption 4*, FOIA UPDATE, Summer 1985, at 3, available at [http://www.justice.gov/oip/foia\\_updates/Vol\\_VI\\_3/page3.htm](http://www.justice.gov/oip/foia_updates/Vol_VI_3/page3.htm) (noting that federal agencies are allowed to exercise discretion under the Freedom of Information Act when determining “whether to invoke applicable FOIA exemptions” (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (holding that the nine FOIA exemptions are not “mandatory bars to disclosure”))).

to the internal personnel rules and practices of an agency; (3) specifically exempted from disclosure by statute . . . ; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters . . . ; (6) personnel and medical files . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) records or information compiled for law enforcement purposes . . . ; (8) contained in or related to examination, operating, or condition reports prepared by . . . an agency responsible for the regulation or supervision of financial institutions; or (9) geological and geophysical information and data . . . .<sup>26</sup>

The only exemption that is relevant to bad-juror lists is Exemption 7. Not all “records or information compiled for law enforcement purposes” are exempt from disclosure under the Freedom of Information Act.<sup>27</sup> In fact, FOIA provides that these records are exempt from disclosure only

to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention

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<sup>26</sup> 5 U.S.C. § 552(b).

<sup>27</sup> *Id.*

of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.<sup>28</sup>

FOIA does not, however, govern the disclosure of public records that are compiled by state agencies rather than federal agencies.<sup>29</sup> Nevertheless, because the legislative history accompanying state open-records acts is sparse, and states typically model their open-records acts after FOIA, the congressional intent behind the enactment of FOIA provides guidance regarding the scope and purpose of Exemption 7.<sup>30</sup> Indeed, state courts often cite the legislative history of FOIA exemptions when interpreting their own open-records acts.<sup>31</sup>

## 2. State Open-Records Acts

State open-records acts differ drastically from one another in their amenability to the disclosure of public records, particularly when those records fit into the category of “law-enforcement records.” Like FOIA, most state open-records acts provide for an exception to public disclosure where the public records are compiled for law-enforcement purposes.<sup>32</sup> While the conditions that must be satisfied for these exceptions to apply often vary from state to state,<sup>33</sup> the statutes do not typically differ with regard to what types of records constitute law-enforcement records.<sup>34</sup>

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* § 552(a).

<sup>30</sup> *See supra* text accompanying notes 19–23.

<sup>31</sup> *See, e.g.,* *Cnty. of Los Angeles v. Superior Court*, 98 Cal. Rptr. 2d 564, 568 (Cal. Ct. App. 2000); *Daily Gazette Co. v. W. Va. Dev. Office*, 482 S.E.2d 180, 188 (W. Va. 1996).

<sup>32</sup> *See, e.g.,* CONN. GEN. STAT. § 1-210(b)(3) (2007) (exempting from disclosure “[r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime”); IDAHO CODE ANN. § 9-335 (2010) (granting state agencies discretion regarding whether to disclose law-enforcement and similar records).

<sup>33</sup> Although both Connecticut’s and Idaho’s statutes exempt from disclosure records that were compiled for law-enforcement purposes, Connecticut’s statute is much more precise concerning exactly what types of law-enforcement records do not warrant mandatory disclosure. *Compare* CONN. GEN. STAT. § 1-210(b)(3) (2007) (providing that the government is not required to disclose law-enforcement records that constitute: (A) records that would endanger informants or witnesses not otherwise identified; “(B) signed statements of witnesses; (C) information to be used in a prospective law enforcement action if prejudicial to such action; (D) investigatory techniques not otherwise known to the general public”), *with* IDAHO CODE ANN. § 9-335 (2010) (specifying that the government may choose not to disclose records compiled for law-enforcement purposes when those records “(a) Interfere with enforcement proceedings; (b) [d]eprive a person of a right to a fair trial or an impartial adjudication; (c) [c]onstitute an unwarranted invasion of personal privacy; (d) [d]isclose the identity of a confidential source . . . ; (e) [d]isclose investigative techniques and procedures; or (f) [e]ndanger the life or physical safety of law enforcement personnel”).

<sup>34</sup> *See, e.g.,* IDAHO CODE ANN. § 9-337 (2010) (providing that, for purposes of Idaho’s open-records act, “[l]aw enforcement agency’ means any state or local agency given law enforcement powers or which has authority to investigate, enforce, prosecute, or punish violations of state or federal criminal statutes, ordinances, or regulations”).

This section of the Article considers a variety of these state statutes—from Texas, Georgia, Alabama, and Colorado—addressing their similarities and especially their nuanced differences.

a) Texas’s Open Records Act

The general policy statement contained in the Texas Open Records Act indicates that the Act was not only meant to be broadly construed in favor of granting individuals’ requests for information,<sup>35</sup> but also that it was enacted to ensure that individuals have “complete” access to information regarding governmental affairs.<sup>36</sup> Despite this initial statement, the exceptions to disclosure contained in Texas’s Open Records Act are fairly comprehensive and are often broadly construed.<sup>37</sup> Pursuant to this Act, “an internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is exempted from the requirements of [Texas’s Open Records Act]” in the following situations:

- (1) release of the internal record or notation would interfere with law enforcement or prosecution;
- (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or
- (3) the internal record or notation: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.<sup>38</sup>

The statute also provides that the exceptions do not apply to “basic information about an arrested person, an arrest, or a crime.”<sup>39</sup>

The recent litigation over the Tarrant County prosecutors’ bad-juror list provides insight into how this statute is used to prevent government records from being disclosed.<sup>40</sup> After discovering that the Tarrant County prosecutors kept a bad-juror list, defense attorney William Ray

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<sup>35</sup> See TEX. GOV’T CODE ANN. § 552.001(b) (West 2004) (“This chapter shall be liberally construed in favor of granting a request for information.”).

<sup>36</sup> See *id.* § 552.001(a) (explaining that “it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees”).

<sup>37</sup> See *id.* § 552.108(b).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* § 552.108(c).

<sup>40</sup> See Gene Trainor, *Tarrant ‘Bad-Juror List’ Can be Kept Private*, *Texas Attorney General Says*, FORT WORTH STAR-TELEGRAM (Oct. 23, 2010), <http://www.star-telegram.com/2010/10/25/2569909/tarrant-bad-juror-list-can-be.html>.

moved for disclosure of the prosecutors' list.<sup>41</sup> Texas Assistant Attorney General James Morris agreed with the Tarrant County District Attorney that the document should be exempt from disclosure.<sup>42</sup> In agreeing with the District Attorney's Office that "the document contains prosecutors' subjective impressions and is used in preparation for trials," Morris cited a 1983 state open-records decision<sup>43</sup> in which former Texas Attorney General Jim Mattox had refused to mandate disclosure of another district attorney's office's bad-juror list on the ground that the list contained "'subjective opinions and conclusions made by prosecutors regarding the relative desirability from the State's viewpoint of having the affected juror on another case.'"<sup>44</sup> Mattox held in this 1983 decision that allowing public access to these subjective comments would "unduly interfere with law enforcement and crime prevention,"<sup>45</sup> and, as a result, the list was exempt from disclosure under the Texas Open Records Act.<sup>46</sup>

In making this determination, the Attorney General Decision referred to a 1982 Open Records Act Decision in which Texas Attorney General Mark White had refused to require the District Attorney's Office for Bell and Lampasas Counties to disclose its records because to do so would interfere with an ongoing federal investigation.<sup>47</sup> In that 1982 decision, Attorney General White distinguished the case at hand from a 1980 Open Records Decision,<sup>48</sup> in which the police department had concluded its investigation into the victims' deaths, thus mandating disclosure of investigative records because they would not have unduly interfered with effective law enforcement.<sup>49</sup> Although three Open Records Decisions had relied on different provisions of Texas's Open

<sup>41</sup> See *id.* (quoting Forth Worth criminal defense attorney William Ray stating that the Attorney General's refusal to mandate disclosure of the list "'flies in the face of open government and gives prosecutors an advantage'").

<sup>42</sup> Tex. Att'y Gen., Open Records Ltr. Rul. 2010-13557 (Sept. 7, 2010), available at <https://www.oag.state.tx.us/opinions/openrecords/50abbott/orl/2010/pdf/or201013557.pdf>; see Trainor, *supra* note 40.

<sup>43</sup> Tex. Att'y Gen., Open Records Decision No. 369 (Apr. 8, 1983), available at <https://www.oag.state.tx.us/opinions/openrecords/47mattox/ord/1983/pdf/ord19830369.pdf>.

<sup>44</sup> See *id.* (citing section 3(a)(8) of Texas's Open Records Act in holding that "notations which consist of prosecutors' subjective evaluations of former jurors are excepted from disclosure").

<sup>45</sup> See *id.* ("[D]isclosure of prosecutors' subjective comments about former jurors would tend to indicate the state's possible strategy in future prosecutions and, in doing so, would compromise the state's effectiveness in prosecuting criminal matters.").

<sup>46</sup> TEX. GOV'T CODE ANN. § 552.108(a) (West 2011).

<sup>47</sup> See Tex. Att'y Gen., Open Records Decision No. 340 (Dec. 31, 1982), available at <https://www.oag.state.tx.us/opinions/openrecords/46white/ord/1982/pdf/ord19820340.pdf> (refusing to require the District Attorney's Office to disclose its records because of the pendency of the federal investigation).

<sup>48</sup> *Id.* (citing Tex. Att'y Gen., Open Records Decision No. 252 (Sept. 16, 1980), available at <https://www.oag.state.tx.us/opinions/openrecords/46white/ord/1980/pdf/ORD19800252.pdf>).

<sup>49</sup> *Id.* (citing Tex. Att'y Gen., Open Records Decision No. 252).

Records Act in exempting law-enforcement records from disclosure, that all three opinions came out in favor of the prosecution during three different administrations suggests that the Attorney General’s Office has been reluctant to mandate disclosure of these lists.

b) Georgia’s Open Records Act

Although Georgia’s Open Records Act is not as comprehensive as the Texas Open Records Act, the case law regarding Georgia’s Act is more fully developed. Georgia courts typically look to the seminal case of *Hardaway Co. v. Rives* when determining whether information in the prosecution’s possession is exempt from disclosure under the Open Records Act.<sup>50</sup>

In *Hardaway*, the Georgia Supreme Court conducted a step-by-step Open Records Act analysis. Under this analysis, the first question courts must answer is whether the records requested are an agency’s “public records.”<sup>51</sup> If the court is convinced that counsel is requesting information that meets this criterion, then the court determines whether the records are protected from disclosure under section 50-18-72 of Georgia’s Open Records Act or any other statute.<sup>52</sup> This section, which lists statutory exemptions to disclosure, provides that information need not be made available to the public if it consists of:

records compiled for law enforcement or prosecution purposes to the extent that production of such records would disclose the identity of a confidential source, disclose confidential investigative or prosecution material which would endanger the life or physical safety of any person or persons, or disclose the existence of a confidential surveillance or investigation, [or if it consists of] [r]ecords of law enforcement, prosecution, or regulatory agencies in any pending investigation or prosecution of criminal or unlawful activity, other than initial police arrest reports and initial incident reports; provided, how-

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<sup>50</sup> 422 S.E.2d 854, 854–55 (Ga. 1992).

<sup>51</sup> *Id.* at 856 (citing *Napper v. Ga. Television Co.*, 356 S.E.2d 640, 643–44 (Ga. 1987)). See also WAYNE M. PURDOM, *GEORGIA CIVIL DISCOVERY* § 2:4 (6th ed. 2011–12). To determine whether a record is sufficiently public to trigger the application of the Open Records Act, courts look to section 50-18-70 of Georgia’s Open Records Act, which provides:

[T]he term “public record” shall mean all documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, or similar material prepared and maintained or received in the course of the operation of a public office or agency. “Public record” shall also mean such items received or maintained by a private person or entity on behalf of a public office or agency which are not otherwise subject to protection from disclosure . . . .

GA. CODE ANN. § 50-18-70 (2009).

<sup>52</sup> See *Hardaway*, 422 S.E.2d at 856.

ever, that an investigation or prosecution shall no longer be deemed to be pending when all direct litigation involving said investigation and prosecution has become final or otherwise terminated.<sup>53</sup>

If the records are not exempt under these criteria or pursuant to any other statute, the next question is whether the records should be protected by court order to protect an individual's privacy.<sup>54</sup>

Despite the variety of exceptions under this statute, the court in *Hardaway* made clear that, in accordance with legislative intent, these exceptions were to be construed narrowly.<sup>55</sup> The Georgia Supreme Court has stated that one of the purposes of the Act is to “foster confidence in government through openness to the public.”<sup>56</sup> Therefore, unless the language of the statute explicitly exempts a certain type of record from disclosure, the record should be made available to the public.<sup>57</sup>

### c) Alabama's Open Records Act

Alabama's Open Records Act favors public disclosure even more than Georgia's Act. Pursuant to the Alabama Act, “[e]very citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.”<sup>58</sup> The statute exempts certain types of information from disclosure, including “registration and circulation records and information concerning the use of the public, public school or college and university libraries of this state,” as well as

records concerning security plans, procedures, assessments, measures, or systems, and any other records relating to, or having an impact upon, the security or safety of persons, structures, facilities, or other infrastructures, the public disclosure of which could reasonably be ex-

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<sup>53</sup> GA. CODE ANN. § 50-18-72 (Supp. 2011).

<sup>54</sup> See *Hardaway*, 422 S.E.2d at 856; see also Bd. of Regents of the Univ. Sys. of Ga. v. Atlanta Journal, 378 S.E.2d 305 (Ga. 1989); *Napper*, 356 S.E.2d at 644.

<sup>55</sup> See *Hardaway*, 422 S.E.2d at 857 (explaining that Georgia's Open Records Act “directs a narrow construction of its exclusions, exempting ‘only that portion of a public record to which an exclusion is directly applicable’”) (quoting *Bd. of Regents*, 378 S.E.2d at 307); see also *Atlanta v. Corey Entm't, Inc.*, 604 S.E.2d 140, 142 (Ga. 2004) (emphasizing that Georgia public policy “strongly favors open government” and, therefore, “‘any purported statutory exemption from disclosure under the Open Records Act must be narrowly construed’”) (quoting *Hardaway*, 422 S.E.2d at 857).

<sup>56</sup> *Corey Entm't, Inc.*, 604 S.E.2d at 142 (quoting *Athens Observer, Inc. v. Anderson*, 263 S.E.2d 128, 130 (Ga. 1980)).

<sup>57</sup> See *id.* (stating that Georgia's Open Records Act assumes all public records are available for disclosure in the first instance, and the records are exempted from disclosure only if state or federal statute prohibits or specifically exempts the records); *Hardaway*, 422 S.E.2d at 857 (“[W]e conclude that any purported statutory exemption from disclosure under the Open Records Act must be narrowly construed.”).

<sup>58</sup> ALA. CODE § 36-12-40 (2001).

pected to be detrimental to the public safety or welfare, and records the disclosure of which would otherwise be detrimental to the best interests of the public.<sup>59</sup>

Despite Alabama’s broad language suggesting that a record should not be discoverable if its disclosure would be adverse to the public interest, there is one glaring omission from the statute that distinguishes it from its Texas and Georgia counterparts: the Alabama Open Records Act does not specifically exempt records and notations maintained by law-enforcement agencies.<sup>60</sup>

In recent decisions, the Alabama Supreme Court has discussed the implications of the state’s Open Records Act.<sup>61</sup> For example, in *Tennessee Valley Printing Co. v. Health Care Authority of Lauderdale County*, the court underscored the legislature’s intent that the statute be construed liberally and in favor of the public, among other things, by placing the burden of proof on the party refusing disclosure.<sup>62</sup> Because of Alabama’s documented history of promoting openness, Alabama courts strictly construe the exceptions to the Open Records Act to preserve the legislative intent.<sup>63</sup> In the criminal context, the Alabama Supreme Court, in *Allen v. Barksdale*, confirmed not only that the Act should be construed liberally, but also that the “statutory and judicially created exceptions generally protect an individual’s privacy, the integrity of a criminal investigation, public safety and security, or privileged information.”<sup>64</sup> Thus, when determining whether records should be exempted from disclosure, the Alabama courts must balance the interest of the citizen—or attorney—in having access to public records against the privacy of the individuals attempting to block disclosure.<sup>65</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> *See id.*

<sup>61</sup> *See* *Tenn. Valley Printing Co. v. Health Care Auth. of Lauderdale Cnty.*, 61 So. 3d 1027 (Ala. 2010) (detailing the long history of Alabama’s open-records policy, beginning with its open meetings law enacted in 1915, which morphed into the Open Records Act, first enacted in 1923); *Allen v. Barksdale*, 32 So. 3d 1264, 1274 (Ala. 2009).

<sup>62</sup> 61 So. 3d at 1030 (“[T]he party refusing disclosure shall have the burden of proving that the writings or records sought are within an exception and warrant nondisclosure of them.”) (quoting *Chambers v. Birmingham News Co.*, 552 So. 2d 854, 856–57 (Ala. 1989)).

<sup>63</sup> The court in *Allen v. Barksdale* stated the following:

Citizens are entitled to information regarding the affairs of their government. Alabama’s Open Records Act . . . represents a long history of openness. The Open Records Act is remedial and should therefore be construed in favor of the public . . . . The exceptions to the Open Records Act should be strictly construed, because the purpose of the Open Records Act is to permit the examination of public writings and records.

32 So. 3d at 1274.

<sup>64</sup> *Id.*

<sup>65</sup> *See id.* at 1268.

## d) Colorado's Open Records Act

The Colorado Supreme Court's decisions in Colorado Open Records Act<sup>66</sup> cases suggest that the state departs somewhat from the Texas, Georgia, and Alabama approaches in its interpretation of the state's Act. The court emphasizes that whether a document falls within the Open Records Act depends on the purpose that will be furthered by classifying a document as a "public record."<sup>67</sup> The Act defines a "public record" as

all writings made, maintained, or kept by the state, any agency, institution, a nonprofit corporation, . . . or political subdivision of the state . . . and held by any local-government-financed entity for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.<sup>68</sup>

Some police files compiled in bad-juror lists fall within this description of "public records," as the state requires law-enforcement officers to maintain records of names on jury lists.<sup>69</sup> The Act, however, contains an exception for records of investigations or investigatory files "compiled for any other law enforcement purpose . . . ."<sup>70</sup>

In 1972 in *Losavio v. Mayber*, the Colorado Supreme Court found that information collected by law-enforcement officers for use by prosecutors during the voir dire process did not fall within the law-enforcement-purpose exception of the state's Open Records Act.<sup>71</sup> Therefore, the information, once used by prosecutors outside the purpose of law enforcement in compiling the lists, is no longer an "internal matter[ ]" for purposes of the law-enforcement exception.<sup>72</sup>

The holding in *Losavio* is consistent with later Colorado Open Records Act cases, in which the courts have found that the legislature intended that the Act be broadly construed and required that only explicit

<sup>66</sup> In Colorado, the Open Records Act is also referred to as the "Public Records Law," but, for consistency, this Article refers to the law as an Open Records Act.

<sup>67</sup> See *Losavio v. Mayber*, 496 P.2d 1032, 1034 (Colo. 1972) (en banc) ("A record may be a public record for one purpose and not for another.") (citing *Looby v. Lomenzo*, 301 N.Y.S.2d 163 (N.Y. Sup. Ct. 1969); *MacEwan v. Holm*, 359 P.2d 413 (Or. 1961)).

<sup>68</sup> COLO. REV. STAT. ANN. § 24-72-202(6)(a)(I) (West 2011).

<sup>69</sup> See *Losavio*, 496 P.2d at 1033 (explaining that an administrative order requires the chief of police to maintain the actual police files and records of individuals on jury lists).

<sup>70</sup> COLO. REV. STAT. ANN. § 24-72-204(2)(a)(I) (West 2011).

<sup>71</sup> See 496 P.2d at 1034.

<sup>72</sup> See *id.* at 1034 (holding that, once records compiled by police are in the possession of the prosecution, defense attorneys are entitled to obtain the same information pursuant to Colorado Criminal Procedure Rule 16(c)).

exemptions may shield a public record from discovery.<sup>73</sup> Because of this preference toward openness, as in Alabama, the party claiming the exemption carries the burden of proving that the public record falls within one of the stated exceptions.<sup>74</sup> Although Colorado, like the other states previously discussed, created its Open Records Act with the purpose of promoting openness in government, the Colorado Supreme Court has expressly stated that privacy interests of individuals and public officials in their individual capacities may weigh heavily in an analysis of whether a record is “public” in the first place.<sup>75</sup> Thus, the court has emphasized both the importance of the stated definition of a public record in the open-records analysis and the express exceptions to the Open Records Act.<sup>76</sup>

### B. *The Work-Product Doctrine*

Just as prosecutors have relied on the exemption provisions in state open-records acts to resist disclosure of documents, some (such as the Tarrant County District Attorney’s Office<sup>77</sup>) have also argued against disclosure by claiming that jury dossiers consist of protected attorney work-product. When determining whether jury dossiers consist of information that is privileged pursuant to the work-product doctrine, the best

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<sup>73</sup> See *Ritter v. Jones*, 207 P.3d 954, 957 (Colo. App. 2009) (“The General Assembly has declared that it is ‘the public policy of this state that all public records shall be open for inspection by any person at reasonable times, except as . . . provided by law.’”) (quoting COLO. REV. STAT. § 24-72-201 (2001)); *Black v. Sw. Water Conservation Dist.*, 74 P.3d 462, 467 (Colo. App. 2003).

<sup>74</sup> See *Black*, 74 P.3d at 467; *supra* text accompanying note 62.

<sup>75</sup> See *Wick Commc’ns Co. v. Montrose Cnty. Bd. of Cnty. Comm’rs*, 81 P.3d 360, 365 (Colo. 2003) (en banc) (holding that documents created by a public official in his or her private capacity do not fall within the purview of the Colorado Open Records Act).

<sup>76</sup> Like the Colorado Open Records Act, the California Open Records Act recognizes that, while generally “access to information concerning the conduct of people’s business is a fundamental and necessary right of every person in th[e] state,” there are several valid reasons that certain records should not be made public. *Copley Press, Inc. v. Superior Court*, 141 P.3d 288, 293 (Cal. 2006) (citations omitted) (explaining that the Legislature expressly stated that it was “mindful of the right of individuals to privacy”) (internal quotation marks omitted); *Haynie v. Superior Court*, 31 P.3d 760, 761 (Cal. 2001) (noting that the Act recognizes that interests in “privacy, safety, and efficient governmental operation” support the many exceptions to the Open Records Act, listed in 26 subdivisions of the Act). Among the many statutory exceptions, section 6254(f) of the California Open Records Act, which exempts certain records of law-enforcement agencies from discovery, is broadly interpreted. See *Williams v. Superior Court*, 852 P.2d 377, 384–87 (Cal. 1993) (en banc) (thoroughly discussing the exemption for law-enforcement documents and noting that the Act is derived from FOIA). When considering the exceptions to the Open Records Act, California courts must balance the public’s right to open access to information, the government’s interest in confidentiality, and the individual’s right to privacy. *Copley Press*, 141 P.3d at 293.

<sup>77</sup> See Editorial, *supra* note 2 (noting that the prosecution opposed disclosure of the bad-juror list on the ground that the work-product doctrine protects attorneys’ mental impressions).

source of guidance is the 1947 United States Supreme Court case, *Hickman v. Taylor*.<sup>78</sup>

In its discussion of the need to protect documents prepared by attorneys, the *Hickman* Court held the following:

[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel . . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways . . . . Were such materials open to opposing counsel . . . [t]he effect on the legal profession would be demoralizing.<sup>79</sup>

Under *Hickman*, information deemed to be work-product is not discoverable unless the party moving for disclosure makes a “showing of necessity or a demonstration that denial of the material would unduly prejudice the preparation of the case or cause hardship or injustice.”<sup>80</sup> The work-product doctrine of *Hickman*, now codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, specifically applies to all documents prepared by either the prosecutor or his or her representative<sup>81</sup> “in anticipation of litigation.”<sup>82</sup>

In *United States v. Nobles*, the Supreme Court expanded its discussion in *Hickman* by noting that the core justification for refusing discovery of an attorney’s work-product is that it is necessary to protect our adversary system.<sup>83</sup> As the Court stated, “[o]ne of [the realities of the adversary system] is that attorneys often must rely on the assistance of investigators” when preparing documents for trial.<sup>84</sup> Thus, the doctrine necessarily extends to criminal cases, excluding from discovery documents prepared for attorneys by law-enforcement personnel in preparation for trial.<sup>85</sup>

<sup>78</sup> 329 U.S. 495 (1947).

<sup>79</sup> *Id.* at 510–11.

<sup>80</sup> *Id.* at 509.

<sup>81</sup> See *In re Ford Motor Co.*, 110 F.3d 954, 967 (3d Cir. 1997) (noting that the work-product doctrine protects materials prepared by the individual attorney or by an agent of the attorney, as long as the documents were prepared in anticipation of litigation).

<sup>82</sup> FED. R. CIV. P. 26(b)(3).

<sup>83</sup> 422 U.S. 225, 238 (1975).

<sup>84</sup> *Id.*

<sup>85</sup> See *id.* at 237–39 (applying the work-product doctrine to a criminal case and finding that the limitations on discovery in criminal cases extend to documents prepared by law-enforcement personnel); see also FED. R. CRIM. P. 16(a)(2) (“[T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case.”).

### C. *The Fundamental-Fairness Doctrine*

The fundamental-fairness doctrine is yet another doctrine that arguably strives to balance the competing interests of favoring disclosure and protecting privacy. When applying this doctrine to cases in which defense counsel has sought discovery of prosecutorial jury dossiers, state and federal courts have struggled to find consistency.<sup>86</sup> Where the documents held by the prosecution include information readily available to the public, such as prior jury service or convictions, many courts have applied discovery rules narrowly to find that discovery is not required.<sup>87</sup> On the other hand, some courts have found that, where the prosecutor’s failure to disclose information in jury dossiers creates inequity or damage to the defendant, the judge may properly require a prosecutor to disclose the requested information.<sup>88</sup>

Courts may draw an analogy between discovery of witness lists and jury dossiers from the Supreme Court’s holding in *Wardius v. Oregon*.<sup>89</sup> There the Court held that, “in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street.”<sup>90</sup> The Supreme Court thus implied that if a trial court compels discovery of defense documents, it must also compel discovery of prosecution documents.<sup>91</sup> The Court emphasized that the fundamental-fairness doctrine requires courts to level the playing field; for instance, if the defendant must “divulge the details of his own case,” the prosecution cannot expect to circumvent discovery of its own case materials.<sup>92</sup> In order to level the playing field, therefore, fundamental fairness may require discovery of bad-juror lists in certain instances.

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<sup>86</sup> Compare *People v. Terrell*, No. A125183, 2010 WL 2625579, at \*3 (Cal. Ct. App. June 30, 2010) (noting that knowledge of juror’s previous voting history does not provide an advantage; therefore, disclosure of such records is not required), with *State v. Bessenecker*, 404 N.W.2d 134, 138 (Iowa 1987) (explaining that, if the prosecution has access to jurors’ criminal records, the defense should be given the same information).

<sup>87</sup> See, e.g., *Hamer v. United States*, 259 F.2d 274 (9th Cir. 1958); *Britton v. United States*, 350 A.2d 734 (D.C. 1975); *Couser v. State*, 383 A.2d 389 (Md. 1978); *People v. McIntosh*, 376 N.W.2d 653 (Mich. 1985).

<sup>88</sup> See, e.g., *United States v. Kyle*, 469 F.2d 547 (D.C. Cir. 1972); *People v. Murtishaw*, 631 P.2d 446 (Cal. 1981), *overruled on other grounds* by *People v. Boyd*, 700 P.2d 782 (Cal. 1985); *Commonwealth v. Smith*, 215 N.E.2d 897 (Mass. 1966).

<sup>89</sup> 412 U.S. 470 (1973).

<sup>90</sup> *Id.* at 475.

<sup>91</sup> See *id.* (“The State may not insist that trials be run as a ‘search for truth’ so far as defense witnesses are concerned, while maintaining ‘poker game’ secrecy for its own witnesses.”).

<sup>92</sup> See *id.* at 476.

## 1. Discoverability of Prosecutors' Jury Dossiers: The Strict Approach

Courts that have deemed a prosecutor's records undiscoverable due to a defendant's failure to make a sufficient showing of undue prejudice sometimes provide guidance regarding what constitutes a sufficient showing. Defendants have used the fundamental-fairness doctrine to support disclosure of prosecutors' jury dossiers, even if prosecutors claim the dossiers are protected work-product.<sup>93</sup> Some jurisdictions have rejected the argument that denying the defense access to prosecutors' jury dossiers is fundamentally unfair and have held that the state is not required to provide defense counsel with information it has regarding prospective jurors.<sup>94</sup>

This strict approach is typically employed in cases in which the material in the prosecution's possession is available to the general public.<sup>95</sup> In these cases, the courts have refused to grant disclosure of the prosecutors' work-product on the ground that defense attorneys cannot make a sufficient showing of necessity or undue prejudice to justify disclosure.<sup>96</sup> Courts often note two additional justifications for refusing discovery: (1) uncertainty regarding the benefit afforded the defendant as a result of

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<sup>93</sup> See *Losavio v. Mayber*, 496 P.2d 1032, 1035 (Colo. 1972) (en banc) (explaining that, despite the prosecution's argument that juror lists constitute work-product, disclosure is dictated by "[t]he requirements of fundamental fairness and justice").

<sup>94</sup> See *Etheridge v. State*, 903 S.W.2d 1, 7 (Tex. Crim. App. 1994); *Martin v. State*, 577 S.W.2d 490, 491 (Tex. Crim. App. 1979); *Linebarger v. State*, 469 S.W.2d 165 (Tex. Crim. App. 1971); *Enriquez v. State*, 429 S.W.2d 141, 145 (Tex. Crim. App. 1968); see also *People v. Murtishaw*, 631 P.2d 465 (Cal. 1981) (noting that "all California decisions and a majority of decisions from other jurisdictions have held that a trial court did not err in denying a defendant access to prosecution jury records"), *overruled on other grounds by People v. Boyd*, 700 P.2d 782 (Cal. 1985).

<sup>95</sup> See *Couser v. State*, 383 A.2d 389, 396 (Md. 1978) (denying the defendant's request for disclosure and explaining that the dossier the defense sought from the prosecution consisted of "information compiled about jurors from prior voir dire examinations and past voting records, which was essentially in the public domain").

<sup>96</sup> See, e.g., *Murtishaw*, 631 P.2d at 466 (stressing that "in any individual case it is entirely speculative whether denial of access caused any significant harm to the defense"). Other courts have held that a defendant is not entitled to prosecutors' jury dossiers unless he or she can make a showing of prejudice, exceptional circumstances, or other compelling reasons. *State v. Wright*, 344 So. 2d 1014, 1017 (La. 1977); see also *Britton v. United States*, 350 A.2d 734, 735 (D.C. 1976) (explaining that there is no general duty to disclose prosecutors' jury dossiers unless there has been a prior governmental impetus that is likely to affect the juror's service, thus causing hardship to the defendant); *People v. Brawley*, 461 P.2d 361, 371 (Cal. 1969) (noting the lack of case law holding that a defendant has the right to inspect a prosecutor's jury dossier, in the absence of an exceptional showing); *Commonwealth v. Smith*, 215 N.E.2d 897, 900-01 (Mass. 1966) (noting the importance of the fact that the defendant did not argue that he was deprived of a fair trial because of the advantage afforded to the prosecution).

discovery of jury dossiers; and (2) the availability of information in jury dossiers through voir dire questioning of jurors.<sup>97</sup>

In *Hamer v. United States*, for example, the defendant argued that the prosecutor’s refusal to disclose “jury books” showing how members of a jury panel voted on previous juries created “an unequal situation in the selection of the jury.”<sup>98</sup> The U.S. Court of Appeals for the Ninth Circuit held, however, that the prosecutor’s use of the jury books did not per se constitute a denial of the defendant’s right to an impartial jury trial.<sup>99</sup> In reaching this conclusion, the court emphasized that, if the mere fact that the prosecutor is in possession of more information on jurors than the defense attorney necessitated a finding of a constitutional violation, then “no defendant could be prosecuted by a government attorney who had more information about how jurors on that panel had voted, in other cases, than his own counsel had.”<sup>100</sup> The court concluded that “it is up to the individual judge to see that neither attorney has an unfair advantage over the other, whether by use of jury lists or jury books, or any other knowledge or information that exists with respect to a juror’s previous action.”<sup>101</sup>

Expanding on *Hamer*, the Maryland Court of Appeals in *Couser v. State* affirmed the trial judge’s ruling that the information in the prosecutor’s possession was undiscoverable work-product.<sup>102</sup> As in *Hamer*, the defendant in *Couser* argued that, even though the information was privileged work-product, it should still be disclosed because “certain comments in [the jury dossier] should be equally made known to both sides

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<sup>97</sup> *Murtishaw*, 631 P.2d at 465. The Louisiana Supreme Court has emphasized that a defendant’s failure to show both that the prosecutor actually used the list to conduct voir dire and that the lack of disclosure of the list gave an advantage to the prosecution would be so unfair as to warrant a reversal of the defendant’s conviction. See *State v. McGraw*, 366 So. 2d 1278, 1286 (La. 1978) (holding that the trial court did not err in refusing to compel the prosecutor to disclose its record of jurors’ prior voting behaviors).

<sup>98</sup> 259 F.2d 274, 278 (9th Cir. 1958).

<sup>99</sup> See *id.* at 280 (“Whether the United States District Attorney’s staff in any district keeps a ‘jury book’ or not (written or mental), whether it keeps a black-list of the few ‘sympathetic jurors,’ or a white list of the few ‘hanging jurors,’ cannot be considered error per se.”).

<sup>100</sup> *Id.* at 281; see *People v. Terrell*, No. A125183, 2010 WL 2625579, at \*3 (Cal. Ct. App. June 30, 2010) (explaining that a juror’s previous voting history does not necessarily indicate how that juror will vote in a different case, and therefore, knowledge of such voting history does not provide any cognizable advantage). The court in *Hamer* added the following: “Such a proposed rule would break down law enforcement in this country. It cannot be seriously considered. Perfect equality in counsel can never be achieved, any more than there can be two judges, or groups of judges, with precisely similar competence.” 259 F.2d at 281.

<sup>101</sup> *Hamer*, 259 F.2d at 281; see also *Britton*, 350 A.2d at 735 (noting that information regarding a juror’s prior jury service is not information likely to “escape the attention of a reasonably diligent defense counsel”).

<sup>102</sup> See *Couser v. State*, 383 A.2d 389, 396 (Md. 1978) (stating that the court was not in the position to decide whether the prosecutor’s jury dossier constituted work-product and was thus undiscoverable, but ruling that records of jurors’ criminal histories, which are frequently given to the prosecution by the police, would never qualify as work-product).

of the case” and because it would be “helpful in allowing [him] to select a jury as fairly as it is for the State to select a jury.”<sup>103</sup> In holding that the defendant did not have the right to this information, the court emphasized that the defendant “did not allege that he was unable to obtain the same information from other sources, that he would be unduly prejudiced without it in selecting a fair and impartial jury, or even that the prosecutor was actually using the dossier in selecting the jury.”<sup>104</sup> Although the case law is not uniform, these three factors are important in the inquiry about what constitutes a sufficient showing of necessity or undue prejudice to justify the disclosure of work-product.<sup>105</sup>

Further, the Maryland court in *Couser* noted that the general rule of discovery of prospective juror information in the prosecutor’s possession often “[does] not distinguish between public and nonpublic information made available to the prosecutor for jury selection purposes.”<sup>106</sup> The key question is whether the defendant has received a fair and impartial jury in light of all of the circumstances.<sup>107</sup> In *Christoffel v. United States*, for example, the defendant asked for production of a copy of pages that apparently consisted of additional juror information; the trial judge denied the request.<sup>108</sup> On appeal, the court held that the trial judge’s denial did not merit reversal because defense counsel provided no evidence supporting his theory that the additional documents in the prosecution’s possession would have provided some benefit to the defendant.<sup>109</sup> In so holding, the court failed to determine whether the materials in question were readily available to the public.<sup>110</sup> The U.S. Court of Appeals for the First Circuit followed *Christoffel* in *Best v. United States*, holding that defendants in a criminal case do not have a right to inspect prosecution documents regarding prospective jurors.<sup>111</sup> The court noted that the

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<sup>103</sup> *Id.* (internal quotation marks omitted).

<sup>104</sup> *See id.* at 396–97 (emphasizing that the Fourteenth Amendment’s Due Process Clause, as well as Maryland’s Declaration of Rights, granted criminal defendants the right to an impartial jury).

<sup>105</sup> *See supra* text accompanying notes 95–101.

<sup>106</sup> *Couser*, 383 A.2d at 393–94; *see, e.g., Best v. United States*, 184 F.2d 131 (1st Cir. 1950); *Christoffel v. United States*, 171 F.2d 1004 (D.C. Cir. 1948), *rev’d on other grounds*, 338 U.S. 84 (1949).

<sup>107</sup> *Couser*, 383 A.2d at 394.

<sup>108</sup> 171 F.2d at 1006.

<sup>109</sup> *See id.* (“There is no evidence, and counsel did not attempt to introduce any, that the government made any investigation, to say nothing of an improper one, of prospective jurors.”).

<sup>110</sup> *See id.* (declining to compel disclosure of the government’s notes simply because defense counsel did not provide evidence regarding what information was included in the list).

<sup>111</sup> 184 F.2d at 141.

voir dire process provides adequate opportunity to question prospective jurors and that any contrary holding would be “pure speculation.”<sup>112</sup>

Although some courts have followed the strict approach without reference to whether the information in the prosecution’s possession is available to the public, for other courts this distinction is key. In *People v. Stinson*, the Michigan Court of Appeals refused to force a prosecutor to disclose his jury dossier to defense counsel because the information in the dossier was available to the general public.<sup>113</sup> The prosecutor had been in possession of prior voting records of the jurors; in holding that the prosecutor’s dossier was not discoverable, the court emphasized that the defendant was able to obtain this same information on his own.<sup>114</sup> In 1977, the Supreme Court of Michigan, in *People v. McIntosh*, reaffirmed the holding in *Stinson*, concluding that “[d]efendants have no constitutional or statutory right to see jury dossiers compiled by the prosecutor from public records.”<sup>115</sup>

Courts in several jurisdictions, therefore, have found that fundamental fairness does not necessarily require that trial judges mandate disclosure of the prosecution’s jury dossiers or additional information regarding potential jurors. These courts posit that it is speculative whether the defense would gain any benefit from the information in the prosecution’s possession. Moreover, the process of voir dire provides defense counsel with the opportunity to question jurors and obtain the same information. Especially when information is available to the pub-

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<sup>112</sup> *Id.* (noting that the defense must provide evidence that the resulting jury was unfair or impartial to compel reversal of the trial court’s denial of the motion). Other courts have relied on the availability of other means of gathering the information in the prosecution’s jury dossier in finding that discovery of work-product is not required. *See, e.g., State v. Blunt*, 449 So. 2d 128, 130 (La. Ct. App. 1984) (holding that, where the defendant is able to obtain the same information that is in the prosecutor’s possession, such as through public records or voir dire, and where the defendant fails to demonstrate that the prosecutor intends to use the information in conducting voir dire, a sufficient showing to justify the disclosure of work-product has not been met); *Linebarger v. State*, 469 S.W.2d 165, 167 (Tex. Crim. App. 1971) (emphasizing that defense counsel has an opportunity to obtain through voir dire all of the information that was in possession of the government); *see also Armstrong v. State*, 897 S.W.2d 361, 365–66 (Tex. Crim. App. 1995) (en banc) (finding that the prosecution is not obligated to furnish defense with documents and information that are “readily available” through voir dire questioning).

<sup>113</sup> 227 N.W.2d 303, 311 (Mich. Ct. App. 1975) (stressing that the same or similar information was available to the defense counsel for examination).

<sup>114</sup> *See id.* Further to this point, the North Carolina Supreme Court has been presented with a defense request for access to police databases to which the district attorney has access, but did not necessarily use in the present case. *See State v. Smith*, 532 S.E.2d 773, 779–80 (N.C. 2000). The court found that the information in question—potential jurors’ prior conviction—was readily available to the public through alternate means. *See id.* This implies that the dispositive factor was that there were alternative means of obtaining the information, and not whether the information was a benefit to the prosecution or a detriment to the defense. *See id.*

<sup>115</sup> 252 N.W.2d 779, 782 (Mich. 1977).

lic, these courts have found that there is no legal requirement that such information must be handed over to the defense.

## 2. Discoverability of Prosecutors' Jury Dossiers: The Lenient Approach

While the general rule is that there is no duty to disclose jury dossiers, some courts have recognized instances in which disclosure is necessary in the interest of justice. Whatever doubts there may be regarding the benefits gained through discovery of jury dossiers, prosecutors clearly see the use of these lists as an advantage; otherwise, the use of jury investigations and records would not be so prevalent.<sup>116</sup> In order to end the pattern of inequality, therefore, some courts have ruled that trial judges must have discretion to compel discovery of jury dossiers in certain cases.<sup>117</sup>

In *United States v. Kyle*, the U.S. Court of Appeals for the District of Columbia Circuit recognized that there are some circumstances that give rise to a need for disclosure.<sup>118</sup> The prosecutor in *Kyle* had knowledge that "three of the jurors in the case [had served on a jury in another case] which only two days earlier had been 'castigated' by another judge for rendering a verdict of not guilty," and the prosecutor had neglected to disclose this information to defense counsel.<sup>119</sup> Although the court affirmed the defendant's conviction, it held that, "where there has been a prior governmental impetus affecting a juror's prior service, and it is of a nature likely to escape the attention of even reasonably diligent appointed counsel, considerations of basic fairness may generate a duty to disclose."<sup>120</sup>

Another exception to the general rule that prosecutors' jury dossiers are not discoverable arises when law-enforcement agencies provide prosecutors with nonpublic information to aid in the voir dire process. In these cases, courts have typically ruled that this information must be dis-

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<sup>116</sup> See *People v. Murtishaw*, 631 P.2d 446, 465 (Cal. 1981) ("When courts . . . deny defendants who cannot afford similar investigations access to the prosecutor's records, the result is that prosecutors in case after case will have substantially more information concerning prospective jurors than do defense counsel.").

<sup>117</sup> See, e.g., *id.*

<sup>118</sup> See 469 F.2d 547, 551 (D.C. Cir. 1972) ("Ordinarily there would be no basis for a duty to disclose material pertaining to public aspects of a juror's service, . . . but . . . considerations of basic fairness may generate a duty to disclose.").

<sup>119</sup> *Id.* at 548.

<sup>120</sup> See *id.* at 551 (stressing that the information in the prosecutor's possession was available to the public in holding that "[s]o long as matters are in the public domain, it is hard to develop a general theory of disclosure").

closed to defense counsel.<sup>121</sup> In *Commonwealth v. Smith*, for example, the prosecutor asked the police to interview potential jurors and to prepare an investigatory report.<sup>122</sup> The Massachusetts Supreme Judicial Court found no reversible error for failing to disclose the report to defense counsel because the trial judge’s voir dire ensured that the jurors had not been prejudiced;<sup>123</sup> however, the court criticized the practice of using police officers to gather information about prospective jurors when the prosecutors were not making this information equally available to the defense.<sup>124</sup>

In *People v. Murtishaw*,<sup>125</sup> the California Supreme Court did more than just condemn prosecutors’ use of police officers to gather information about prospective jurors. Murtishaw moved for either the prosecution’s records of jurors or funds to hire an investigator of his own to obtain the same information that was in the prosecution’s possession.<sup>126</sup> The trial court denied the motion.<sup>127</sup> The California Supreme Court recognized that case law supported the trial court’s decision.<sup>128</sup> However, the court recognized the “manifest unfairness” that would result if prosecutors could gather information on jurors and use that information to their advantage while the defense lacked the necessary funds to conduct its own investigation.<sup>129</sup> The court reasoned that, even if the defendant would not derive a benefit from the records and could obtain the same information through voir dire, such “doubts cannot justify making the results of the investigation available to one side but not to the other.”<sup>130</sup> In commenting on how this “pattern of inequality reflects on the fairness of the criminal process,” the court held that trial judges in California

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<sup>121</sup> See, e.g., *Commonwealth v. Smith*, 215 N.E.2d 897, 900–01 (Mass. 1966) (explaining that, when prosecutors use police officers to gather information about prospective jurors, this information should be as available to the defense as it is to the prosecution).

<sup>122</sup> *Id.* at 900.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 901 (emphasizing that, although the defendant did not argue that the list deprived him of his right to a fair trial, the public interest in ensuring a fair trial requires that police investigations regarding jurors should be available equally to both sides); see also *Sinclair v. United States*, 279 U.S. 749, 764–65 (1929) (explaining that hiring a detective to follow jurors during a trial fundamentally violates the right of a defendant to a fair and impartial jury and creates a strong possibility of a mistrial).

<sup>125</sup> 631 P.2d 446 (Cal. 1981).

<sup>126</sup> *Id.* at 450.

<sup>127</sup> *Id.*

<sup>128</sup> See *id.* at 465 (explaining that courts have denied defense counsel access to prosecutors’ records where it is unclear whether disclosing these records to the defense would give the defendant an advantage and where the defendant is able to obtain this same information through the voir dire process).

<sup>129</sup> See *id.* (“When courts then deny defendants who cannot afford similar investigations access to the prosecutor’s records, the result is that prosecutors in case after case will have substantially more information concerning prospective jurors than do defense counsel.”).

<sup>130</sup> *Id.*

have the discretion to allow defense counsel to inspect any reports or records that are in the prosecution's possession—regardless of whether those records were obtained through outside investigation.<sup>131</sup> Despite this holding, the court found no reversible error.<sup>132</sup> The defendant did not satisfy the test for prejudice under California law outlined in *People v. Watson*: “[A]ffirmatively appear[ing] to the satisfaction of this court . . . that the accused may well have been substantially injured by the error of which he complains . . . .”<sup>133</sup> Thus, an error is not reversible if “it appears that a different verdict would not otherwise have been probable.”<sup>134</sup>

Yet another example of a court's allowing discovery of prosecution jury lists was set forth by the Colorado Supreme Court in *Losavio v. Mayber*, in which the court considered whether police records of jurors in possession of the prosecution should be made available to the defense.<sup>135</sup> The court emphasized the importance of ensuring that the justice system operates according to principles of fundamental fairness and mandated that the prosecution disclose to defense counsel the information within its possession.<sup>136</sup> The court held that police-department records in possession of the prosecution are not public records as defined by the state's Open Records Act and that the defense is entitled to view such documents in possession of the prosecution.<sup>137</sup> In so holding, the court noted that both district attorneys and public defenders are under an obligation to use any information at their disposal in an ethical and legal manner, and, although there is no basis for an assumption that the district attorney is using the documents in an inappropriate manner, fundamental fairness mandates that the defense be afforded the same information.<sup>138</sup>

Courts have also addressed the question of whether jurors' criminal records should be disclosed to defense counsel once they have been turned over to the prosecution. Jurors' criminal records—or “rap

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<sup>131</sup> *Id.* at 466 (stating that the conviction need not be reversed in the present case because it is “entirely speculative whether denial of access caused any significant harm to the defense”).

<sup>132</sup> *Id.*

<sup>133</sup> 299 P.2d 243, 254 (Cal. 1956) (quoting *People v. Watts*, 247 P. 884, 890 (Cal. 1926)).

<sup>134</sup> *Id.* (quoting *People v. Kelso*, 155 P.2d 819, 822 (Cal. 1945)).

<sup>135</sup> *See* 496 P.2d 1032, 1033–34 (Colo. 1972) (en banc) (explaining that these records do not constitute work-product and holding that, once these records have been given to the prosecution, they are no longer exempt from disclosure under the state's Open Records Act).

<sup>136</sup> *See id.* at 1035 (“We should think that the district attorney's office would have more important matters to handle than to engage in prolonged litigation on an issue the district attorney could have promptly resolved by furnishing the public defenders with the same information which the district attorney had received from the chief of police.”).

<sup>137</sup> *Id.*

<sup>138</sup> *See id.* (“We can perceive far more reason to deny such information to [private entities] than to deny it to defense attorneys ethically charged with defending their clients to the best of their abilities.”).

sheets,” as they are colloquially called—are often turned over to defense counsel when they are in the prosecution’s possession.<sup>139</sup> The rationale behind granting the defense access to jurors’ rap sheets is that the defense has a significant personal stake in the selection of a fair jury, which manifests in defense counsel’s desire to ensure that the prosecution does not have access to any information that gives it an unfair advantage.<sup>140</sup> The Iowa Supreme Court, in *State v. Bessenecker*, recognized that, while a defendant may have several different reasons for wanting access to these lists, he ultimately seeks all of the information that is available to the prosecutor so that he can competently exercise his peremptory challenges.<sup>141</sup>

The cases in this section of the Article demonstrate that there are circumstances in which fundamental fairness may require a prosecutor to grant defense counsel access to information or documents regarding jury information. Although courts have recognized this right, the finding of reversible error in these situations is rare because defense counsel often have little evidence to show that the defendant’s right to a fair and impartial jury was actually violated. The fundamental-fairness doctrine may therefore mandate discovery of jury records, but with limitations imposed at the discretion of the trial judge.

### 3. Discoverability of a Prosecutor’s Jury Records when the Prosecutor Uses These Records to Refresh His or Her Memory on the Witness Stand During a *Batson* Hearing

It has long been understood that the intentional exclusion of jurors on the basis of certain attributes or characteristics violates the Equal Protection Clause of the Fourteenth Amendment.<sup>142</sup> In *Batson v. Kentucky*, the United States Supreme Court held that state actors cannot exercise peremptory challenges in a discriminatory manner.<sup>143</sup> In so holding, the Supreme Court set forth a three-pronged test for determining whether a

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<sup>139</sup> See, e.g., *Tagala v. State*, 812 P.2d 604, 613 (Alaska Ct. App. 1991) (holding that the state should disclose criminal records of jurors, especially where the state intends to use this information during jury selection); *State v. Bessenecker*, 404 N.W.2d 134, 136 (Iowa 1987) (en banc) (explaining that every defendant has a strong interest in ensuring that the impaneled jury is fair).

<sup>140</sup> See *Tagala*, 812 P.2d at 613 (emphasizing that fairness concerns should mandate that defense counsel has equal access to information that the prosecution uses during voir dire).

<sup>141</sup> 404 N.W.2d at 138 (explaining that, because the court must protect the rights of the jurors, the prosecution must obtain a court order to gain access to the rap sheets, and the defense should then be given equal access to that information).

<sup>142</sup> See, e.g., *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231 (2005); *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322 (2003); *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994); *Georgia v. McCollum*, 505 U.S. 42 (1992); *Powers v. Ohio*, 499 U.S. 400 (1991); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).

<sup>143</sup> 476 U.S. 79, 95 (1986).

prosecutor has engaged in impermissibly discriminatory conduct.<sup>144</sup> According to *Batson*, once the defendant has made a sufficient showing of discrimination, the government has the burden of proving that the peremptory challenge was not exercised in a discriminatory manner.<sup>145</sup> The judge must then determine “‘whether counsel is telling the truth in his or her assertion that the challenge is not race-based.’”<sup>146</sup> In this way, the *Batson* analysis is meant to flush out any “implausible or fantastic justifications” that are used as mere pretexts to hide intentional discrimination.<sup>147</sup>

Although *Batson* and its progeny were premised on equal-protection principles,<sup>148</sup> the Supreme Court in *J.E.B. v. Alabama* had the opportunity to rule on the constitutionality of a state actor’s use of peremptory challenges to exclude jurors on the basis of gender.<sup>149</sup> The Court reviewed the state’s use of nine of its ten peremptory challenges to strike males during the voir dire process and extended *Batson* to cover such challenges due to the long history of gender-discrimination.<sup>150</sup> In undertaking its *Batson* analysis, the Court reasoned that the state’s conduct was unconstitutional because discriminating in this manner “serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.”<sup>151</sup> The Court concluded that discrimination in the voir dire process may harm both the individual defendant, who may be prejudiced by the resulting jury, and the individual jurors, who are excluded from the opportunity to take part in the judicial process.<sup>152</sup>

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<sup>144</sup> See *id.* at 96–98 (holding that, to demonstrate that a prosecutor has engaged in the discriminatory use of peremptory challenges, the defendant must establish a prima facie case of discrimination by showing that “he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant’s race” (citation omitted)); see also *Miller-El I*, 537 U.S. at 328–29 (restating the three-pronged test in *Batson*, 476 U.S. at 96–98, as the following: (1) “a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race”; (2) “if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question”; and (3) “in light of the parties’ submissions, the trial court must determine whether the defendant has shown purposeful discrimination”).

<sup>145</sup> See *Batson*, 476 U.S. at 126 (holding that the prosecutor “‘must give a “clear and reasonably specific explanation” of his “legitimate reasons” for exercising the challenges’” (citation omitted)).

<sup>146</sup> *Hayes v. Thaler*, 361 F. App’x 563, 567 (5th Cir. 2010) (quoting *United States v. Bentley-Smith*, 2 F.3d 1368, 1375 (5th Cir. 1993)).

<sup>147</sup> *Miller-El I*, 537 U.S. at 339 (citation omitted) (internal quotation marks omitted).

<sup>148</sup> See *Batson*, 476 U.S. at 95.

<sup>149</sup> See 511 U.S. 127, 129 (1994).

<sup>150</sup> See *id.* at 129, 132–36 (surveying the history of gender-based discrimination throughout the country’s history and holding that state actors’ use of peremptory challenges to intentionally discriminate against jurors on the basis of gender violates the Equal Protection Clause).

<sup>151</sup> *Id.* at 131.

<sup>152</sup> *Id.* at 140.

Systematic exclusion of certain classes of people, even classes that are not based on immutable characteristics, such as economic status, has been held unconstitutional. For example, in *Thiel v. Southern Pacific Co.*, a pre-*Batson* case, the petitioner moved to strike the entire jury panel on the ground that none of the jurors earned a daily wage.<sup>153</sup> There may be practical justifications for excluding potential jurors on the basis of wealth—for example, that individuals earning a daily wage may suffer actual hardship if required to serve on a jury.<sup>154</sup> The Supreme Court, however, held that federal or state law could not justify the exclusion of all individuals who earned a daily wage.<sup>155</sup> The Court emphasized the importance of instilling faith in the jury system and ensuring that the desire to discriminate against persons of low economic and social status is not sanctioned.<sup>156</sup>

In more recent decisions, the Supreme Court has reaffirmed the *Batson* framework. In *Miller-El II*, the Court emphasized that a *Batson* analysis uses a totality of the circumstances approach.<sup>157</sup> Miller-El objected to the prosecution’s striking of ten of eleven black venire persons, claiming that the peremptory challenges were not legitimate as they were based solely on race.<sup>158</sup> The trial judge rejected Miller-El’s challenge, finding no systematic and intentional exclusion of blacks as a matter of policy.<sup>159</sup> On appeal, the Supreme Court noted that ninety-one percent

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<sup>153</sup> See 328 U.S. 217, 219 (1946). The petitioner alleged that the fact that the jury was composed of “mostly business executives” discriminated against the poor—the majority of citizens. *Id.* After the jury returned a verdict in favor of the respondent, the Clerk of the Court and the Jury Commissioner testified that they had deliberately and intentionally excluded all daily-wage earners from jury lists. *Id.* at 221. The result was that fifty percent of the individuals on the jury lists consisted of businessmen and their wives. *Id.* at 222.

<sup>154</sup> See *id.* at 222–23 (finding that wage earners constitute a substantial enough portion of the community that they “cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system”).

<sup>155</sup> *Id.* at 222.

<sup>156</sup> See *id.* at 223–24 (“We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged.”).

<sup>157</sup> 545 U.S. 231 (2005).

<sup>158</sup> See *id.* at 236 (noting that the defendant argued that the prosecution’s peremptory strikes “could not be presumed legitimate, given a history of excluding black members from criminal juries by the Dallas County District Attorney’s office”).

<sup>159</sup> *Id.* at 236–37. The procedural history of this case is complex and extensive. The trial judge decided the case based on *Swain v. Alabama*, 380 U.S. 202 (1965), and its “systematic discrimination” requirement. While the appeal was pending, the Court decided *Batson*, which replaced *Swain*’s requirement with a three-pronged test. See *Miller-El II*, 545 U.S. at 236. After appealing the conviction, again pressing the *Batson* challenge, Miller-El filed a habeas corpus petition, which was also denied. *Id.* at 236–37. The Supreme Court granted certiorari, *Miller-El v. Cockrell*, 534 U.S. 1122 (2002), and reversed the U.S. Court of Appeals for the Fifth Circuit, finding “extensive evidence of purposeful discrimination . . . before and during his trial . . .” See *Miller-El II*, 545 U.S. at 237. The Fifth Circuit again rejected Miller-El’s claim on the merits; the Supreme Court again granted certiorari, *Miller-El v. Dretke*, 542 U.S. 936 (2004), and again reversed. *Miller-El II*, 545 U.S. at 237.

of the eligible black venire members had been struck through peremptory challenges.<sup>160</sup> The Court compared the jurors of all races that had been struck and found that, if these justifications were valid, then the prosecution's reasons for striking several black venire persons were unlikely given that several white jurors should have been struck under the same justifications.<sup>161</sup> After extensive analysis of the prosecution's nondiscriminatory justifications, the Court found that the "strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State."<sup>162</sup> Given the totality of the circumstances, therefore, the prosecution's discriminatory intent established a constitutional violation.<sup>163</sup>

In a subsequent case, *Snyder v. Louisiana*, eighty-five prospective jurors were questioned during voir dire.<sup>164</sup> Of the thirty-five that survived challenges for cause, only five were black.<sup>165</sup> The prosecution eliminated all of the other black jurors with peremptory strikes.<sup>166</sup> The Supreme Court found that the prosecutor's justifications were "highly speculative" at best and that, in light of the circumstances of the voir dire process, the trial court's overruling of the defense's *Batson* challenge was clear error.<sup>167</sup> Additionally, the Court noted that the justifications proffered by the prosecution could not be explored further on remand because the justifications were based on the potential jurors' "nervousness alone."<sup>168</sup>

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<sup>160</sup> *Miller-El II*, 545 U.S. at 241.

<sup>161</sup> *See id.* 241–52 (surveying the prosecution's justifications for several peremptory strikes of black jurors and pointing out that several white jurors could fall under the same justifications, thus providing evidence that these justifications were merely pretextual).

<sup>162</sup> *See id.* at 266.

<sup>163</sup> *See id.*

<sup>164</sup> 552 U.S. 472, 475 (2008).

<sup>165</sup> *Id.* at 476.

<sup>166</sup> *Id.* at 475–76.

<sup>167</sup> *See id.* at 479–82, 486 (providing an overview of the voir dire process in the specific circumstances). Although defense counsel challenged the exclusion of two specific black jurors, the Supreme Court found that the prosecution's justification for one juror's exclusion was not valid and, therefore, it only assessed the challenge with regard to the juror Mr. Brooks. *Id.* at 478 (citing *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) (explaining that "the Constitution forbids striking even a single prospective juror for a discriminatory purpose")). The prosecution proffered two justifications for striking Mr. Brooks: (1) that he looked very nervous throughout the questioning; and (2) that he is a student teacher and would be in a rush to go home quickly. *Id.* The Court assessed these two justifications and found that, in light of the circumstances here—including absence of anything in the record showing that the trial judge credited the claim that Mr. Brooks was nervous, the prosecution's description of both its proffered explanations as "main concern[s]," and the adverse inference noted above—the record did not show that the prosecution would have pre-emptively challenged Mr. Brooks based on his nervousness alone. *Id.* at 485 (citation omitted) (internal quotation marks omitted).

<sup>168</sup> *Id.* at 485.

Although the phenomenon of prosecutors’ utilizing bad-juror lists does not always implicate *Batson*, case law regarding whether these lists are discoverable when prosecutors refer to them either before or during their *Batson* hearings is instructive. Case law establishes that a prosecutor must disclose notes on prospective jurors “when the prosecutor refreshes his or her memory regarding the exercise of peremptory challenges by reviewing those notes before the *Batson* hearing.”<sup>169</sup> Interestingly, the question of whether a state actor must disclose his or her jury dossier to defense counsel when he or she uses this record during a *Batson* hearing has been the subject of much litigation, particularly in Texas.

For example, in *Pondexter v. State*, the Texas Court of Criminal Appeals held in 1996 that a prosecutor’s notes were discoverable only if he actually used them during the *Batson* hearing for the purpose of refreshing his memory.<sup>170</sup> Although *Pondexter* placed a limit on the categorical rule that prosecutors’ jury dossiers are discoverable when they are used in relation to a *Batson* hearing, three years later, in *Franklin v. State*, the court returned to the original meaning of this rule.<sup>171</sup> The court held that a prosecutor is required to turn over his jury dossiers when he or she uses them in relation to a *Batson* hearing, regardless of whether

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<sup>169</sup> See *Franklin v. State*, 986 S.W.2d 349, 355 (Tex. Crim. App. 1999) (recognizing that precedent suggests that a prosecutor must disclose any information he has on prospective jurors when his peremptory challenge strikes are questioned during a *Batson* hearing), *rev’d on other grounds*, 12 S.W.3d 473 (Tex. Crim. App. 2000); see also *Salazar v. State*, 795 S.W.2d 187, 193 (Tex. Crim. App. 1990) (en banc).

<sup>170</sup> 942 S.W.2d 577, 582–84 (Tex. Crim. App. 1997).

<sup>171</sup> See 986 S.W.2d at 355 (“There is no apparent reason . . . to create a new category of evidentiary exclusions solely for the benefit of witnesses during *Batson* hearings.”). Analogously, the Texas Court of Criminal Appeals applied the *Franklin* analysis to find that, if a witness uses a transcript or other document to refresh his or her memory before testifying in a criminal trial, then the document must be provided to the other side. See *Love v. State*, No. 01-08-00941-CR, 2009 WL 3930900, at \*6 (Tex. App. Nov. 19, 2009). Even if the document falls under the work-product privilege, it must be produced when used to refresh a witness’s memory. See *id.* The dispositive factor in determining whether the prosecution was required to turn over the document is whether the document was in fact used “to refresh her memory or relied on . . . for her opinions.” See *id.* at \*7. Such a fact must be proven by the party requesting discovery; this burden is especially high when the document is not included in the record because it is difficult for the court to determine whether its exclusion caused harm to the defendant’s case. See *id.* (holding that, because the defendant neither proved that the document was used to refresh the witness’s memory nor showed that the document’s exclusion was harmful error, the trial court did not abuse its discretion). In an earlier case, the same court applied *Pondexter* to business records not disclosed to the defendant. See *Saldivar v. State*, 980 S.W.2d 475, 497 (Tex. App. 1998). In that case, the defendant requested discovery of business records, both before trial and when a witness for the state testified; the trial court denied both requests. *Id.* at 496–97. The appellate court found no evidence that the witness had actually used the records requested to refresh his memory and, although the defendant pointed to testimony outside the presence of the jury, the records were dispositive proof of the crime; as long as the witness did not use the records to refresh his memory, the trial court did not abuse its discretion. *Id.*

the prosecutor referred to the notes before or during the hearing.<sup>172</sup> The purpose of this rule is that discovery of these documents allows defense counsel to “make a comparison analysis of the prosecution’s peremptory strikes” to determine if the justifications are valid and neutral.<sup>173</sup> Because of the explicit purpose of the rule, the court explained in 2006, in *Brooks v. ArmcCo, Inc.*, that a mere “use” of notes to confirm the truth of the statements made during a hearing does not necessitate discovery of notes.<sup>174</sup> The court found the use “immaterial because the trial court examined the notes in camera and verbally related their contents . . . .”<sup>175</sup> Thus, if defense counsel requests discovery of the prosecution’s jury dossier or notes, the notes should be discoverable as long as they might reveal a misrepresentation or concealment of disparate treatment necessary to establish a *Batson* violation.<sup>176</sup> Where this is not possible, as in *Brooks*, discovery is not required.

The original *Batson* analysis—requiring, as a threshold matter, a prima facie showing that a peremptory challenge was exercised on the basis of race—has been extended to include as discriminatory those challenges that are based on a variety of both mutable and immutable characteristics. The systematic exclusion of an entire class of people—whether based on race, gender, or economic background—has been held by the Supreme Court to be unconstitutional. In so determining, the Court takes into account all of the circumstances surrounding the case and the specific challenges to determine whether the intent of the attorney is discriminatory. Critically, when an attorney uses a jury dossier during a *Batson* hearing, the list is generally discoverable regardless of the attorney’s intent in using the list. Therefore, the use of jury dossiers during *Batson* hearings may override other doctrines that tend to limit discovery, such as the work-product doctrine and the strict approach to the fundamental-fairness doctrine.

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<sup>172</sup> *Franklin*, 986 S.W.2d at 355.

<sup>173</sup> *Salazar*, 795 S.W.2d at 193 (providing for discovery of prosecution notes during a *Batson* hearing because the prosecutor used the notes to refresh his memory regarding his reasons for peremptory strikes).

<sup>174</sup> 194 S.W.3d 661, 666 (Tex. App. 2006) (pointing out that the defense counsel referred to his notes several times during testimony, but that “he was only citing the notes to confirm the truth of his testimony, rather than using the notes to refresh his memory”).

<sup>175</sup> *Id.* (stressing that, even if refusing to compel discovery was an error, in this case the error was harmless).

<sup>176</sup> *See* *Leadon v. State*, 332 S.W.3d 600, 618 (Tex. App. 2010) (explaining that defense counsel failed either to request discovery of the prosecution’s notes or to present evidence that the notes contained some evidence of disparate treatment of jurors; therefore, the court held that the race-neutral explanations were acceptable).

## II. FEDERAL AND STATE FREEDOM OF INFORMATION ACTS

### A. *The Federal Freedom of Information Act Provides a Useful Vehicle for Understanding the Legislative Intent of State Open-Records Acts*

The federal FOIA enacted in 1966, provided a model for the states.<sup>177</sup> By 1973, thirty-eight states had enacted open-records acts.<sup>178</sup> As noted in Part I, the language of FOIA is instructive regarding the breadth and intent of prevalent state open-records acts.<sup>179</sup>

In general, FOIA’s “law-enforcement exemption” recognizes that law-enforcement agencies have a legitimate interest in maintaining the confidentiality of certain documents “to prevent harm to the Government’s case in court.”<sup>180</sup> As a threshold matter, courts must determine whether the document requested comes within the Section 7 exemptions—i.e., whether it was “compiled for law enforcement purposes.”<sup>181</sup> This determination, however, is not always clear. If the document is something that is regularly compiled by law enforcement in preparation for a criminal trial, it likely falls within this exemption. It is arguable, however, that once the bad-juror list is in the hands of the prosecution, it is no longer serving a law-enforcement purpose. According to FOIA, records compiled for law-enforcement purposes are exempt from disclosure *only* if they:

(A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, [or] (D) could reasonably be expected to disclose the identity of a confidential source . . . .<sup>182</sup>

The states that have utilized open-records acts to exempt bad-juror lists from disclosure have focused on their own versions of Exemption 7(A).<sup>183</sup> Further, if prosecutors fail under Exemption 7(A), they might

<sup>177</sup> See, e.g., *Williams v. Superior Court*, 852 P.2d 377, 385 (Cal. 1993) (en banc) (explaining that the California Legislature enacted the state’s Public Records Act to address the same concerns as FOIA); see also *Cnty. of Los Angeles v. Superior Court*, 98 Cal. Rptr. 2d 564, 568 (Cal. Ct. App. 2000) (same).

<sup>178</sup> See WRIGHT & GRAHAM, *supra* note 14, at 219.

<sup>179</sup> See, e.g., *Cnty. of Los Angeles*, 98 Cal. Rptr. 2d at 568 (holding that California’s statute “should receive a parallel construction” to FOIA).

<sup>180</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 227 (1978) (quoting S. REP. NO. 89-813 (1965) (internal quotation marks omitted)).

<sup>181</sup> 5 U.S.C. § 552(b)(7) (2006).

<sup>182</sup> *Id.*

<sup>183</sup> See, e.g., *Tex. Att’y Gen., Open Records Decision No. 369*, at 2 (Apr. 8, 1983), available at <https://www.oag.state.tx.us/opinions/openrecords/47mattox/ord/1983/pdf/ORD19830>

argue that Exemption 7(C) applies. Therefore, the following analysis discusses these two exemptions in greater depth.

Unlike the other subdivisions of Exemption 7, subdivision (A) does not relate to an individual interest, but rather to a general “interference with enforcement proceedings.” The U.S. Court of Appeals for the Third Circuit has applied a two-part test to this exemption.<sup>184</sup> To prevent disclosure, the government must first establish that “a law enforcement proceeding is pending or prospective,” and then must establish that the “release of the information could reasonably be expected to cause some articulable harm.”<sup>185</sup> Jury dossiers are clearly created when a trial is “pending or prospective.” The second part of the test is less obvious. Prosecutors may argue that the release of jury dossiers will harm their effectiveness in the jury-selection process. This is a weak argument, however, since disclosure of the lists would actually augment the jury-selection process by providing both parties with equal information.

In an Exemption 7(A) analysis, courts must also weigh the strong presumption in favor of disclosure under FOIA against the risk of interfering with trial proceedings.<sup>186</sup> Unlike the Supreme Court’s decision in *NLRB v. Robbins Tire & Rubber Co.*, in which compelling the disclosure of witness statements would have resulted in changes to the substantive discovery rules of unfair-labor-practice proceedings and substantial delays in adjudication,<sup>187</sup> the disclosure of jury dossiers would not cause substantive changes in either the criminal trial process or appeals process.<sup>188</sup> The strong presumption in favor of disclosure, therefore, greatly outweighs the disruption of the criminal process.

By contrast, Exemption 7(C) follows a more juror-centric approach, exempting records when they “could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . .”<sup>189</sup> Prosecutors could argue that this exemption applies if the court rejects nondisclosure on the grounds of another exemption. The privacy interests protected in Exemption 7(C) include the interest of preventing disclosure of an individual’s personal matters and “the interest in independence in making

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369.pdf (ruling on whether to force the prosecution to disclose computerized listings, dating from about 1952, of all former jurors in criminal cases and holding that disclosure of the prosecutors’ subjective comments about these jurors would “tend to indicate the state’s possible strategy in future prosecutions, and, in doing so, would compromise the state’s effectiveness in prosecuting criminal matters.”).

<sup>184</sup> See *Manna v. U.S. Dep’t of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995).

<sup>185</sup> *Id.*

<sup>186</sup> See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978).

<sup>187</sup> See *id.* at 237–38.

<sup>188</sup> *But see id.* at 238 (explaining that, in unfair-labor-practice proceedings, unlike normal trial circumstances, denial of a FOIA request is immediately reviewable by the district court, whose decision is then reviewable by the court of appeals).

<sup>189</sup> 5 U.S.C. § 552(b)(7)(C) (2006).

certain kinds of important decisions.’”<sup>190</sup> If there is no measurable privacy interest, then the exemption fails.<sup>191</sup> Even if there is a measurable privacy interest, however, the exemption may still fail if outweighed by a public interest that is both specific and significant.<sup>192</sup> By including this secondary requirement, Congress requires courts to “balance the public interest in disclosure against the interest Congress intended the Exemption to protect.”<sup>193</sup> To trigger this balancing test, the privacy interest in nondisclosure of bad-juror lists need not be significant; rather, it must only be more than *de minimis*.<sup>194</sup>

Although bad-juror lists may include a variety of information, some of which may affect the privacy interests of the prosecutor, prosecutors have an interest in keeping their personal impressions and comments private in order to further the state’s interest in impaneling a desirable jury. Further, individual jurors have an interest in keeping personal facts that are included in the list—e.g., home address, political affiliation, previous voting history—shielded from the public eye.<sup>195</sup> The individual juror’s interests, however, do not necessarily play prominently in this analysis. Because the list is already compiled and disclosed to the prosecutor, the

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<sup>190</sup> U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 762 (1989) (quoting Whalen v. Roe, 429 U.S. 589, 598–600 (1977) (discussing the two privacy interests involved—the personal interest in keeping private a person’s use of specific types of drugs and the more general interest in making important decisions independently, since the statute may affect both patients’ and doctors’ use of specific drugs)).

<sup>191</sup> See Fed. Labor Relations Auth. v. U.S. Dep’t of Veterans Affairs, 958 F.2d 503, 510 (2d Cir. 1992) (explaining that the party opposing disclosure must first show “more than a *de minimis* privacy interest” in order to trigger the balancing test, which requires the requesting party to show a public purpose supporting disclosure). The court has explained that the privacy interest that must be shown for Exemption 7(C) purposes is a minimal one as compared with, for example, Exemption 6, which exempts from disclosure “personnel, medical files, or similar files,” requiring more than a *de minimis* privacy interest. See *id.* at 509; see also 5 U.S.C. § 552(b)(6). The party opposing exemption under Exemption 6 must show that the invasion of privacy is “clearly unwarranted” in order to override the public interest in disclosure. See U.S. Dep’t of State v. Ray, 502 U.S. 164, 172 (1991). The burden of proving the privacy invasion under Exemption 7(C), therefore, is lower than that under Exemption 6. See *id.*

<sup>192</sup> See Associated Press v. U.S. Dep’t of Defense, 554 F.3d 274, 288 (2d Cir. 2009) (citing Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004)).

<sup>193</sup> *Reporters Comm. for Freedom of Press*, 489 U.S. at 776.

<sup>194</sup> See *Fed. Labor Relations Auth.*, 958 F.2d at 510 (“Hence, once a more than *de minimis* privacy interest is implicated the competing interests at stake must be balanced in order to decide whether disclosure is permitted under FOIA.”).

<sup>195</sup> The Supreme Court has established that the individual’s interest in keeping identifying information out of the public eye is covered by FOIA’s discussion of privacy. See *Associated Press*, 554 F.3d at 285 (examining the various privacy interests that fall within the category discussed in Exemption 7(C)); see also *Ray*, 502 U.S. at 176–77 (1991) (explaining that disclosure of unredacted interview summaries, which include personal information linked to interviewees, constitutes more than a *de minimis* invasion of privacy); *Dep’t of Air Force v. Rose*, 425 U.S. 352, 380–81 (1976) (recognizing that former cadets at the United States Air Force Academy have a substantial interest in maintaining confidentiality).

interest in the juror's privacy is de minimis at most. However, the privacy interest of the prosecutor may rise to the level necessary to trigger the balancing test because he or she has an interest in protecting information that may be contained in the bad-juror list, such as the prosecutor's personal notes and information necessary to plead his or her case. Depending on the information included in bad-juror lists, the prosecutor's interest may be strong enough that it must be taken into account when determining if the law-enforcement exemption applies.

Since the prosecutor might arguably have an interest in shielding personal jury lists from the public, courts must balance that interest with the public interest of promoting disclosure.<sup>196</sup> This analysis must be made while keeping in mind that "there is only one relevant [public] interest, namely, 'to open agency action to the light of public scrutiny'";<sup>197</sup> the proffered public interest "'cannot turn on the purposes for which the request for information is made'" or on "'the identity of the requesting party . . . .'"<sup>198</sup> In the case of bad-juror lists, the public interest is substantial. Not only does the individual defendant have an interest in obtaining the information in the prosecutor's bad-juror list during voir dire to ensure that the resulting jury is fair and impartial, but the public also has a general interest in ensuring that prosecutors are choosing juries based on valid justifications rather than discriminatory intentions.<sup>199</sup> The public interest in compelling disclosure also promotes fairness in the entire justice system<sup>200</sup> by ensuring that one side in the adversary process does not have an unfair advantage over the other.

Once courts have established a sufficient public interest in disclosure of bad-juror lists, they must then determine whether this public interest would be served by disclosure of the lists. The Supreme Court held in *National Archives & Records Administration v. Favish* that "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred."<sup>201</sup> In the case of bad-juror lists, therefore, defendants must show that the prosecution used or planned to use information to which the defendant did not have access in such a way that did or would deprive the defendant of the right to a fair and impartial jury. Although this evidence is difficult to establish, the use of these lists by prosecutors

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<sup>196</sup> See *Reporters Comm. for Freedom of Press*, 489 U.S. at 771 (stating that, once a measurable privacy interest is established, the requesting party must provide a public purpose that would warrant an invasion of that interest).

<sup>197</sup> *Associated Press*, 554 F.3d at 285 (quoting *Reporters Comm. for Freedom of Press*, 489 U.S. at 772).

<sup>198</sup> *Id.* (quoting *Reporters Comm. for Freedom of Press*, 489 U.S. at 771).

<sup>199</sup> See *supra* Part I.C.2.

<sup>200</sup> See *supra* Part I.C.

<sup>201</sup> 541 U.S. 157, 174 (2004).

supports the presumption that prosecutors believe some benefit is derived from the information in the lists and that such a benefit is likely to be detrimental to the defendant’s interests.<sup>202</sup> To protect the public interest in a fair adversarial process and the individual defendant’s interest in a fair trial with an impartial jury, courts should thus decline to apply FOIA’s law-enforcement exemption to bad-juror lists.

Although prosecutors may argue that bad-juror lists are exempt under either Exemption 7(A) or 7(C), FOIA’s strong presumption favoring disclosure should foreclose both of these exemptions. Since similar exemptions are included in many state open-records acts, the analysis under FOIA will be influential.<sup>203</sup> Most importantly, analysis of the state acts must begin with the presumption in favor of openness, which similarly forecloses exemption of bad-juror lists under FOIA.

*B. An Analysis of Prevalent State Open-Records Acts Shows that These Statutes Do Not Exempt Bad-Juror Lists from Disclosure*

An analysis of various states’ open-records acts suggests that the legislators did not intend for these acts to shield information of the type included in prosecutors’ jury dossiers from disclosure.<sup>204</sup> For example, Oklahoma’s Open Records Act followed FOIA’s stated need for public openness; it was implemented “to ensure and facilitate the public’s right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power.”<sup>205</sup> Other states that have implemented open-records acts, sometimes called “Right to Know” laws, cite the same goal of ensuring that the public has the right to access these records.<sup>206</sup> Further, the explicit intent of these laws to

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<sup>202</sup> Although not analyzed in the FOIA context, the Supreme Court of California stated in *People v. Murtishaw* that “[w]hatever doubts the courts may have, it is apparent that the prosecutor here believes the advantage he gains from jury investigations and records justifies the expense.” 631 P.2d 446, 465 (Cal. 1981).

<sup>203</sup> See *supra* notes 177–79 and accompanying text.

<sup>204</sup> See N.J. STAT. ANN. § 47:1A-1 (West 2011) (declaring that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State . . . for the protection of the public interest”); OKLA. STAT. ANN. tit. 51, § 24A.2 (West 2011) (providing that “it is the public policy of the State of Oklahoma that the people are vested with the inherent right to know and be fully informed about their government”).

<sup>205</sup> OKLA. STAT. ANN. tit. 51, § 24A.2 (West 2011).

<sup>206</sup> See, e.g., TEX. GOV’T CODE ANN. § 552.001(a) (West 2011) (stating that the legislative intent behind the implementation of Texas’s Open Records Act was to facilitate broad access to public information); see also N.J. STAT. ANN. § 47:1A-1 (West 2011) (stating that exceptions to the Open Records Act should be “construed in favor of the public’s right to access”); *Hardaway Co. v. Rives*, 422 S.E.2d 854, 857 (Ga. 1992) (emphasizing that any statute exempting certain items from disclosure under Georgia’s Open Records Act must be “narrowly construed”); A Message from Terry Mutchler, Executive Director, Penn. Office of Open Records, [http://openrecords.state.pa.us/portal/server.pt/community/open\\_records/4434](http://openrecords.state.pa.us/portal/server.pt/community/open_records/4434) (stating that the Right-to-Know law “fosters accountability, prevents abuses of power and promotes trust in government”).

construe disclosure in favor of the public's right defeats the presumption that they were meant to exempt bad-juror lists.

### 1. Bad-Juror Lists Are Not Exempt from Disclosure Under the First Prong of Texas's Open Records Act

Bearing in mind the Texas Legislature's intent to facilitate broad access to public information when construing its Open Records Acts, a statutory analysis shows that bad-juror lists are readily discoverable.<sup>207</sup> The Texas Open Records Act provides that a record of a law-enforcement agency or prosecutor is exempted from disclosure only in the following circumstances: if its disclosure would interfere with law-enforcement proceedings; if it relates to an investigation from which a conviction was not obtained; or if it was prepared "in anticipation of or in the course of preparing for criminal litigation . . . or [it] reflects the mental impressions or legal reasoning of an attorney representing the state."<sup>208</sup> Based on these provisions, Tarrant County's bad-juror list would not be exempt from disclosure. The main area of focus should be the first prong—whether disclosure would interfere with law-enforcement proceedings. But first, a caveat: one might argue that, because the Act states that it should be liberally construed, the plain meaning of the statute would extend this liberal construction to the exemptions as well. By broadening the scope of the exemptions, the adjudicatory body would effectively limit public access. By this thinking, the Texas Open Records Act would become inherently contradictory and stand alone among other states' open-records acts and FOIA, all of which promote broad access. This broad interpretation of the exemptions would thus erroneously and unfairly deny disclosure of bad-juror lists.

In analyzing the first prong of Texas's Open Records Act<sup>209e</sup>—the "interference with law enforcement" exemption—the primary precedential administrative decision on the question of whether prosecutorial

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<sup>207</sup> See TEX. CODE ANN. § 552.001(a) (West 2011) ("The provisions of this chapter shall be liberally construed . . .").

<sup>208</sup> See *id.* § 552.108(b); see also *supra* notes 35–38 and accompanying text.

<sup>209</sup> Whether the Tarrant County bad-juror list is exempt from disclosure under the second and third prongs of the Texas Open Records Act—concerning the work-product doctrine, TEX. CODE ANN. § 552.108(a) (West 2011)e—is beyond the scope of this portion of the Article, as the Texas Attorney General's Office has addressed only the first prong. The second prong of the Texas Open Records Act was discussed in *Flores v. Fourth Court of Appeals*, in which the Supreme Court of Texas developed a two-pronged analysis of what constitutes information prepared in anticipation of litigation. 777 S.W.2d 38, 40–41 (Tex. 1989). The court determined that, in order to be exempt from discovery, there must be an objective indication that litigation is imminent and that the party opposing discovery must have a good faith belief that litigation would ensue. *Id.* While a prosecutor could argue that future criminal litigation in general is imminent, the court's test relied on the facts surrounding the case. *Id.* Therefore, an interpretation of the Texas Open Record Act's exemption that extends to any future litigation would contravene the Texas Supreme Court's definition of "anticipation of litigation."

materials fall under this exemption is Open Records Decision No. 369, issued by Texas Attorney General Jim Mattox in 1983.<sup>210</sup> When responding to the Tarrant County prosecutor’s argument in 2010 that the District Attorney’s bad-juror list constituted work-product, Texas Assistant Attorney General James Morris agreed in his Open Records Letter Ruling that the list was exempt from disclosure.<sup>211</sup> Instead of relying on the work-product doctrine to prevent disclosure of the list, however, Morris erroneously relied on a sparse administrative history as a foundation for finding the list exempt from disclosure under Texas’s Open Records Act, citing the 1983 decision.<sup>212</sup>

The 1983 decision cited two other Texas Attorney General Open Records Decisions that recognize interference with law-enforcement proceedings as a valid foundation for denying disclosure requests. In 1980, Open Records Decision No. 252 determined that information regarding investigatory techniques from an administratively closed investigation should be disclosed to the public, except where that information may threaten the safety or privacy of witnesses or subject them to intimidation or harassment.<sup>213</sup> In 1982, Open Records Decision No. 340 distinguished the 1980 decision, denying the disclosure of an investigatory file based on the ongoing nature of the investigation.<sup>214</sup> That the investigation was ongoing was material because the Assistant Attorney General who wrote Open Records Decision No. 340 distinguished that case at hand from Open Records Decision No. 252, in which there was no fear that disclosure would unduly interfere with law-enforcement proceedings because the investigation had concluded.<sup>215</sup>

Open Records Decision No. 369, on which Assistant Attorney General Morris’s Open Records Letter Ruling relied, extended this exemption to the effectiveness of state prosecutions.<sup>216</sup> The decision denied disclosure of information regarding former jurors based on the potential

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<sup>210</sup> See Tex. Att’y Gen., Open Records Decision No. 369 (Apr. 8, 1983), available at <https://www.oag.state.tx.us/opinions/openrecords/47mattox/ord/1983/pdf/ORD19830369.pdf>.

<sup>211</sup> See Tex. Att’y Gen., Open Records Ltr. Rul. 2010-13557 (Sept. 7, 2010), available at <https://www.oag.state.tx.us/opinions/openrecords/50abbott/orl/2010/pdf/or201013557.pdf>.

<sup>212</sup> See *id.*

<sup>213</sup> See Tex. Att’y Gen., Open Records Decision No. 252 (Sept. 16, 1980), available at <https://www.oag.state.tx.us/opinions/openrecords/46white/ord/1980/pdf/ORD19800252.pdf> (requiring disclosure of investigative techniques and procedures, but denying disclosure of witness information).

<sup>214</sup> See Tex. Att’y Gen., Open Records Decision No. 340 (Dec. 31, 1982), available at <https://www.oag.state.tx.us/opinions/openrecords/46white/ord/1982/pdf/ord19820340.pdf> (finding that “[p]olice investigations into incidents of death by other than natural causes are rarely closed completely,” whereas in Open Records Decision No. 252 no continuing investigations existed into the deaths of the victims).

<sup>215</sup> See *id.*

<sup>216</sup> See Tex. Att’y Gen., Open Records Decision No. 369 (Apr. 8, 1983), available at <https://www.oag.state.tx.us/opinions/openrecords/47mattox/ord/1983/pdf/ORD19830369.pdf>.

interference with future prosecutions.<sup>217</sup> Decision No. 369 selectively relies on the case *Linebarger v. State* and fails to give credence to the distinction drawn between a closed investigation and an ongoing investigation in the previous open-records decisions.<sup>218</sup> The decision justifies its denial based on *Linebarger*'s holding that the "State has no obligation to furnish counsel for accused with information he has in regard to prospective jurors."<sup>219</sup> However, Decision No. 369 fails to consider that the court in *Linebarger* explicitly noted that the information withheld was readily available to defense counsel on voir dire following the holding.<sup>220</sup>

By selectively relying on *Linebarger* and failing to recognize the factual distinctions in the other administrative decisions, the Texas Attorney General's Office broadened the scope of the Open Record Act's exemption beyond the confines of the Legislature's intent. Moreover, the Decision expanded the scope of ongoing investigations to future investigations, thus broadening the exemption beyond the scope permitted by any other state's legislation.<sup>221</sup> While the Texas Open Records Act itself is inherently contradictory in its broad reading of the exemptions, the decisions of the attorney generals over several administrations to expand the scope of information that is exempted suggests a trend toward protecting prosecutorial interests over those of defense counsel. Thus, the 1983 Open Records Decision lacks consistency with prior decisions, fails to promote public openness, and ignores FOIA's legislative intent to be construed in favor of the public.<sup>222</sup>

This string of Open Records Act Decisions demonstrates the importance of the existence of an ongoing law-enforcement investigation to a court's finding that disclosure of records in the prosecution's possession would interfere with the effective administration of law enforcement. The Tarrant County District Attorney's Office updates its bad-juror list at the conclusion of every criminal trial; all juror information contained in the list, therefore, relates to criminal trials that have already concluded.<sup>223</sup> The case law, coupled with the Texas Legislature's intent to promote public openness, evinces that Assistant Attorney General Morris

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<sup>217</sup> See *id.*

<sup>218</sup> See *Linebarger v. State*, 469 S.W.2d 165 (Tex. Crim. App. 1971).

<sup>219</sup> See *id.* at 167.

<sup>220</sup> See *id.*

<sup>221</sup> See, e.g., GA. CODE ANN. § 50-18-72(a)(4) (Supp. 2011) (exempting only records in pending investigations or prosecutions).

<sup>222</sup> Furthermore, the 2012 Texas Public Information Handbook, issued by the Office of the Attorney General, recognizes that § 552.108 of the Texas Code has the same scope as § 552(b)(7) of FOIA. OFFICE OF THE ATT'Y GEN. OF TEX., 2012 PUBLIC INFORMATION HANDBOOK 96 (2012), available at [https://www.oag.state.tx.us/AG\\_Publications/pdfs/publicinfo\\_hb.pdf](https://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb.pdf); see *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 678 (Tex. 1995) (holding that the scope of the interference-with-law-enforcement exemption is the same as that in FOIA).

<sup>223</sup> See Editorial, *supra* note 2.

incorrectly ruled that the Tarrant County bad-juror list was exempt from disclosure under the Act.

## 2. Bad-Juror Lists Are Not Exempt from Disclosure Under Georgia’s Open Records Act

Like the Texas Act, Georgia’s Open Records Act also contains an “interfering with law enforcement” provision.<sup>224</sup> Unlike the Texas Act, however, the Georgia Act explicitly states that records will not be exempt from disclosure unless the criminal investigation to which they relate is ongoing.<sup>225</sup> While early Texas Open Records Decisions indicate that the first prong of the Texas statute was meant to be satisfied only when a criminal investigation was ongoing at the time disclosure was requested,<sup>226</sup> Georgia’s Open Records Act manifests the same intent but through clear and direct language.<sup>227</sup> Pursuant to the Georgia Act, a public record is exempt from disclosure if it would: (1) disclose the identity of a confidential source; (2) endanger anyone; or (3) disclose a confidential investigation.<sup>228</sup> Further, a public record is exempt from disclosure if it consists of “[r]ecords of law enforcement . . . in any pending investigation or prosecution of criminal or unlawful activity . . . ; provided, however, that an investigation or prosecution shall no longer be deemed to be pending when all direct litigation involving said investigation and prosecution has become final or otherwise terminated . . . .”<sup>229</sup> Since bad-juror lists are compiled at the end of each trial and contain information relating to a closed case, this language ensures that such information would not clear the exemption’s interference threshold.

The Georgia Open Records Act’s exemption of jury-list data provides additional support for rejection of the exemption. Section 50-18-72(a)(4.2) of the Georgia Code limits disclosure of information relating to statewide master jury lists compiled by the Superior Court Clerks of Georgia.<sup>230</sup> Notably, however, the Georgia Legislature provided for judicial discretion, allowing the court to release data in response to “a challenge to the array of the grand or trial jury . . . .”<sup>231</sup> While this dual exception is strictly limited to the Superior Court Clerks, its similarity to

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<sup>224</sup> See GA. CODE ANN. § 50-18-72 (Supp. 2011).

<sup>225</sup> See *id.* § 50-18-72(a)(4).

<sup>226</sup> See, e.g., Tex. Att’y Gen., Open Records Decision No. 340 (Dec. 31, 1982), available at <https://www.oag.state.tx.us/opinions/openrecords/46white/ord/1982/pdf/ord19820340.pdf>.

<sup>227</sup> See GA. CODE ANN. § 50-18-72(a)(4) (Supp. 2011).

<sup>228</sup> *Id.* § 50-18-72(a)(3).

<sup>229</sup> *Id.* § 50-18-72(a)(4).

<sup>230</sup> See *id.* § 50-18-72(a)(4.2) (exempting “[j]ury list data, including, but not limited to, persons’ names, dates of birth, addresses, ages, race, gender, telephone numbers, social security numbers, . . . and other confidential identifying information that is collected . . . for the purpose of establishing and maintaining county jury source lists”).

<sup>231</sup> *Id.*

a *Batson* challenge that could be brought by the defense suggests that the Georgia Legislature authorizes the disclosure of jury information in certain circumstances in order to preserve the integrity of juries. These policy considerations indicate a willingness to broadly construe the legislation in favor of public disclosure.

A statutory analysis of Georgia's Open Records Act demonstrates that the Tarrant County bad-juror list would not be exempt from disclosure in the state of Georgia. Not only would disclosing the list not reveal any confidential information that would jeopardize a law-enforcement investigation, but the information contained in the prosecutor's list also does not concern a pending or ongoing criminal investigation. Similar to the Tarrant County situation, expanding the meaning of "pending" to include future or anticipated investigations would contravene the purpose of the Georgia statute to favor public openness, as evidenced by the flexibility of the exceptions in some cases.<sup>232</sup> Thus, Georgia's Act is more consistent with the goal of ensuring broad access to public information than Texas's malleable language.

### 3. Bad-Juror Lists Are Not Exempt from Disclosure Under Alabama's Open Records Act

Alabama's Open Records Act is even more consistent with ensuring broad access to public records than Georgia's analogous Act.<sup>233</sup> Pursuant to this statute, all information is discoverable unless the information fits into specific categories, none of which relate to law enforcement or prosecution.<sup>234</sup> Although the Alabama Act does not provide for an "interfering with law enforcement" exemption, the Act provides for a much more general counterpart—the exemption of "records the disclosure of which would otherwise be detrimental to the best interests of the public . . . ."<sup>235</sup> While a prosecutor might argue that disclosure of a bad-juror list could interfere with effective prosecution, which might thus be detrimental to the public's interest, this argument is unlikely to survive

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<sup>232</sup> See, e.g., *Atlanta v. Corey Entm't, Inc.*, 604 S.E.2d 140, 142 (Ga. 2004) (quoting *Athens Observer, Inc. v. Anderson*, 263 S.E.2d 128, 130 (Ga. 1980)).

<sup>233</sup> See ALA. CODE § 36-12-40 (West 2011) ("Citizens' rights – Exceptions").

<sup>234</sup> See *id.* This provision exempts from disclosure "registration and circulation records and information concerning the use of the public, public school or college and university libraries of this state," as well as

records concerning security plans, procedures, assessments, measures, or systems, and any other records relating to, or having an impact upon, the security or safety of persons, structures, facilities, or other infrastructures, . . . the public disclosure of which could reasonably be expected to be detrimental to the public safety or welfare, and records the disclosure of which would otherwise be detrimental to the best interests of the public . . . .

*Id.*

<sup>235</sup> *Id.*

scrutiny for two reasons—the wording of the statute and the legislative intent.

First, Alabama’s statute does not reveal an intention to exempt law-enforcement records from disclosure because the legislature excluded plain language exempting this type of discovery while specifically providing exemptions for several other categories of public records.<sup>236</sup> The Alabama courts have explicitly stated that the exemptions must be narrowly construed.<sup>237</sup> Moreover, the language of the Alabama Act serves as a safeguard to prevent exceptions that were not intended to be used by public officials to avoid disclosure of specific information.<sup>238</sup>

Second, to force disclosure of a bad-juror list rather than to shield it from public access would be more in line with the legislative intent accompanying the Alabama Act. In exempting “records the disclosure of which would otherwise be detrimental to the best interests of the public,”<sup>239</sup> the Act shows that the legislature intended that justice be served. Although the Alabama Supreme Court in *Stone* suggested that a balancing must occur between the public’s interest in knowing what their public officers are doing in the discharge of their duties and the public’s interest in having government business carried on without undue interference,<sup>240</sup> only a very broad reading of the best-interests exemption would permit an interference in favor of the prosecution regarding bad-juror lists. As discussed previously, disclosure would not pass muster under an “interference” argument. Therefore, because fairness and the best interests of the public are best served by allowing defense counsel equal access to the information in the prosecution’s possession,<sup>241</sup> the language of Alabama’s statute makes clear that its statute would not apply to the Tarrant County bad-juror list.

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<sup>236</sup> See *id.*

<sup>237</sup> See *Stone v. Consol. Pub. Co.*, 404 So. 2d 678 (Ala. 1981). For an equivalent statement in Georgia, see *Hardaway v. Rives*, 422 S.E.2d 854 (Ga. 1992).

<sup>238</sup> See, e.g., *Stone* at 404 So. 2d at 681 (stating that courts will use a rule of reason to determine whether a public record must be disclosed to avoid abuse of the exceptions to the Alabama Act) (citing *State ex rel. Newsome v. Alarid*, 568 P.2d 1236, 1243 (N.M. 1977) (“We hold that a citizen has a fundamental right to have access to public records. The citizen’s right to know is the rule and secrecy is the exception. Where there is no contrary statute or counter-vailing public policy, the right to inspect public records must be freely allowed.”)).

<sup>239</sup> ALA. CODE § 36-12-40 (West 2011).

<sup>240</sup> See *Stone*, 404 So. 2d at 681.

<sup>241</sup> See Trainor, *supra* note 1 (reporting that the prosecutors who were involved in maintaining the list did not respond to requests from journalists who wanted their comments on the purpose of the list).

#### 4. Bad-Juror Lists Are Not Exempt from Disclosure Under Colorado's Open Records Act

The Tarrant County list would also not be exempt from disclosure under Colorado's Open Records Act due to the statute's broad construction and narrowly defined "law enforcement purpose." Since Colorado courts have given great deference to the definition of "public records" in the Act itself,<sup>242</sup> any writing made and maintained by a district attorney's office would fit squarely within the Act's explicit language. Further, because the district attorney's office falls under a political subdivision of the state involving the receipt of public funds, a jury list would thus be subject to disclosure as a "public record."<sup>243</sup>

The broad construction of the Colorado Open Records Act promoting public openness also supports this conclusion.<sup>244</sup> Since the Colorado Supreme Court in *Losavio v. Mayber* specifically excluded the use of prosecutors' jury lists from the scope of "law enforcement purpose[s],"<sup>245</sup> bad-juror lists would not survive under this exception. While the case referred to information compiled by law enforcement for use by prosecutors during the voir dire process,<sup>246</sup> it would follow that information compiled by prosecutors themselves during trial would similarly fall outside the scope of the exemption. Based on the Colorado legislature's broad definition of "public records" subject to the Open Records Act and the Colorado Supreme Court's narrow construction of the Act's exceptions, Colorado presents a particularly stringent standard of disclosure that would not be overcome by a prosecutor's jury list, like the one in Tarrant County.

The common feature among the various state open-records acts discussed in this Article is that of deference to the public interest in promoting government openness. Both the Georgia Act and the Colorado Act include specific language and narrow exceptions permitting nondisclosure only in cases in which the public's interests would be harmed. The Texas Act also contains specific language promoting openness, and its law-enforcement exception should be narrowly construed to maintain internal consistency and to adhere to early administrative history. Although the language in the Alabama Act's exception is fairly broad, the public's interest is still central to the Act, both in promoting disclosure and in protecting information, and demands a narrow reading. Based on

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<sup>242</sup> See *supra* Part I.A.2(d).

<sup>243</sup> As the primary law-enforcement mechanism of a county or state subdivision, district attorney's offices are subject to state funding regulations. See, e.g., COLO. REV. STAT. ANN. § 20-1-301 (West 2011) (setting compensation and budget for district attorney offices).

<sup>244</sup> See *Ritter v. Jones*, 207 P.3d 954, 957 (Colo. App. 2009).

<sup>245</sup> 496 P.2d 1032, 1034 (Colo. 1972) (en banc).

<sup>246</sup> See *id.* at 1033.

available case law and administrative decisions in these four states, no intention to exclude prosecutorial materials from closed investigations and proceedings under the law-enforcement exception or under Alabama’s broader exception is expressed. Thus, Tarrant County’s bad-juror list would likely not survive as protected information under most state open-records acts that favor public openness.

### III. THE WORK-PRODUCT DOCTRINE IS OVERCOME WITH REGARD TO THE DISCLOSURE OF BAD-JUROR LISTS BECAUSE NOT GRANTING THE DEFENSE ACCESS TO THESE LISTS IS UNJUST

As illustrated through the third prong of the Texas Open Records Act, the work-product doctrine is a principle that prosecutors often cite as justification for why prosecutors should not have to disclose their dossiers.<sup>247</sup> Although there is a presumption against disclosure of an attorney’s work-product, courts have held that it should be disclosed where a defendant can make a “showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of [his] case or cause him any hardship or injustice.”<sup>248</sup> Because of the presumption against disclosure of “material prepared . . . in anticipation of litigation,”<sup>249</sup> the defendant seeking to compel disclosure of jury dossiers carries a high burden to prove that not disclosing will cause hardship or injustice.<sup>250</sup>

#### A. *The Fundamental-Fairness Doctrine Mandates the Disclosure of Bad-Juror Lists*

Due to the work-product doctrine’s strong protection of documents prepared “in anticipation of litigation,” this doctrine favors nondisclosure

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<sup>247</sup> See TEX. GOV’T CODE ANN. § 552.108(a) (West 2011) (providing for an exemption from disclosure if a public record includes the mental impressions of a state attorney).

<sup>248</sup> Hickman v. Taylor, 329 U.S. 495, 509 (1947).

<sup>249</sup> United States v. Rockwell Int’l, 897 F.2d 1255, 1265 (3d Cir. 1990). Although defendants may posit that bad-juror lists are not necessarily “prepared in anticipation of litigation” because the lists may be used by more than one attorney in more than one trial, this argument is specious. The lists are likely prepared for the specific trial because it would not be helpful to include information about jurors who are not on the voir dire panel. Even if the lists are prepared more generally, by compiling information regarding all jurors that the specific office or attorney has encountered, courts have all but foreclosed the idea that documents must be prepared in anticipation of the particular trial to fall within the work-product doctrine. See, e.g., *In re Processed Egg Products Antitrust Litigation*, No. 08-md-2002, 2011 WL 4974269, at \*5 (E.D. Pa. Oct. 19, 2011). As long as the document “was prepared primarily in anticipation of future litigation,” the document will fall within the purview of the work-product doctrine’s protections. *Id.*

<sup>250</sup> See *Processed Egg*, 2011 WL 4974269, at \*5 (stating that the anticipation of litigation need only be objectively reasonable and it need not pertain to the present litigation, thus placing a high burden on the party seeking disclosure and a lower burden on the party seeking nondisclosure).

of the bad-juror lists discussed in this Article. Instead, courts should find categorically that the prosecution's refusal to disclose bad-juror lists causes injustice, which is sufficient to overcome the work-product doctrine's presumption against disclosure. Many courts have taken a strict approach to the fundamental-fairness doctrine, however, and refuse to grant disclosure of the prosecution's work-product<sup>251</sup> if a defendant will have the opportunity to ask the jurors questions on voir dire.<sup>252</sup>

Although courts applying this approach have generally refused to force prosecutors to disclose their jury dossiers on the ground that defendants are able to obtain the same information,<sup>253</sup> it is unclear whether voir dire is an effective avenue for this purpose. In fact, most defendants are unable to obtain the same information through voir dire that the prosecution has in its dossiers.<sup>254</sup> Even wealthy defendants, who, unlike most defendants, are often able to employ many of the same methods used by prosecutors to guide voir dire questioning, cannot account for the experience of prosecutors who are in the courtroom daily and the inherent limitations of the voir dire process.<sup>255</sup> Much of the information contained in these bad-juror lists relates to jurors' voting records from prior criminal trials,<sup>256</sup> and trial judges retain discretion to prevent jurors from being asked about their prior voting records.<sup>257</sup> Courts also sometimes exercise this discretion to bar attorneys from questioning jurors about

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<sup>251</sup> See, e.g., *Couser v. State*, 383 A.2d 389, 389 (Md. 1978) (emphasizing the importance of the defendant's showing of harm to a finding that the prosecution's list should be disclosed).

<sup>252</sup> See, e.g., *Linebarger v. State*, 469 S.W.2d 165, 167 (Tex. Crim. App. 1971) (stating that the unfairness to the defendant can be remedied by a sufficient opportunity to question jurors during voir dire).

<sup>253</sup> See *supra* text accompanying note 112.

<sup>254</sup> See *Redd v. State*, 578 S.W.2d 129, 130–31 (Tex. Crim. App. 1979) (indicating that trial courts can take any precautions they choose to limit the voir dire process).

<sup>255</sup> See Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 559–61 (1975) (stating that wealthy or "political" defendants can employ professionals to advise attorneys on the most effective use of the voir dire process and that the government is often provided juror information on an "informal" basis). Babcock further posits that "all of those who can afford to obtain such information do so is, as the Supreme Court said of the right to counsel, evidence for believing that information about prospective jurors is not a 'luxury' but a 'necessity.'" *Id.* at 561 (citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)). Such knowledge about prospective jurors, therefore, is implicit in the right to counsel. See *id.* Therefore, Babcock argues, the state must be required to turn over information to those who cannot afford the same access. See *id.* at 561–62.

<sup>256</sup> See, e.g., Tex. Att'y Gen., Open Records Decision No. 369 (Apr. 8, 1983), available at <https://www.oag.state.tx.us/opinions/openrecords/47mattox/ord/1983/pdf/ORD19830369.pdf> (noting that the bad-juror list at issue consisted of background information on the jurors and the resulting verdict and sentence from all of the jurors' prior criminal trials).

<sup>257</sup> See, e.g., *Bolden v. State*, 634 S.W.2d 710, 712 (Tex. Crim. App. 1982) (relating the defendant's argument that he was entitled to discover the jurors' prior voting records because, "[s]ince this information was allegedly possessed by the State, . . . his inability to obtain the same deprived him of a fair and impartial trial").

their prior voting records altogether.<sup>258</sup> This discretion, therefore, may ensure that the defendant does not have the ability to obtain some of the information contained in bad-juror lists through voir dire.

In keeping with the discretion invested in trial judges in the voir dire process, appellate courts often defer to the trial judge’s determination, leading to the possibility of further injustice caused by failure to disclose bad-juror lists. In *Redd v. State*, for example, the Texas Court of Criminal Appeals affirmed the trial judge’s decision refusing to allow defense counsel to question prospective jurors about their voting records because some “limitation on voir dire is necessary or many trials would never end.”<sup>259</sup> In *Bolden v. State*, the court again refused to overturn the trial judge’s decision to prohibit the attorneys from asking prospective jurors about their previous verdicts even though this information was in the prosecutor’s possession.<sup>260</sup> Clearly, defendants often do not have reasonable access to the information contained in the prosecutor’s bad-juror lists. Failure to disclose this information should therefore constitute a sufficient finding of injustice to overcome the work-product doctrine.

Moreover, the case law addressing the discoverability of records that the police have supplied to the prosecution provides a useful analogy. In holding that these records are discoverable, courts have ruled that the doctrine of fundamental fairness requires that the defendant be afforded equal access.<sup>261</sup> Courts have even cited this principle where the records in the prosecution’s possession were not comprised entirely of information that the prosecution had obtained from the police.<sup>262</sup> The rationale behind this rule is that, because defendants often lack the funds to hire investigators of their own, it is only fair that they have access to the information that the police department provides to the prosecutor.<sup>263</sup> Thus, some appellate courts, like those in California, Colorado, and

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<sup>258</sup> See, e.g., *id.* (describing a case in which a trial judge exercised his discretion to prevent the attorney from questioning the jurors on voir dire about their previous voting records); see also *Redd*, 578 S.W.2d at 130–31 (upholding for efficiency reasons a trial court’s refusal to allow attorneys to question jurors about their prior voting records).

<sup>259</sup> 578 S.W.2d at 130–31 (stating that the trial judge has the right to determine that a certain question is impermissible, and that the standard for reviewing a trial judge’s discretionary decisions is abuse of discretion).

<sup>260</sup> 634 S.W.2d at 712.

<sup>261</sup> See, e.g., *People v. Aldridge*, 209 N.W.2d 796, 797–801 (Mich. Ct. App. 1973) (indicating that the prosecutor has the responsibility to ensure that justice is served and noting the importance of fairness to attainment of justice).

<sup>262</sup> See, e.g., *id.* (stating that it is the prosecution’s responsibility to ensure that fairness pervades the criminal-justice system). In *Aldridge*, the court explained that fairness is achieved only when a defendant has the opportunity to exercise his peremptory challenges and challenges for cause intelligently. *Id.* at 801–02.

<sup>263</sup> See *People v. Murtishaw*, 631 P.2d 446, 465 (Cal. 1981) (“When courts . . . deny defendants who cannot afford similar investigations access to the prosecutor’s records, the result is that prosecutors in case after case will have substantially more information concerning prospective jurors than do defense counsel.”).

Michigan, have attempted to end the pattern of inequality in the criminal-justice system, which would result without disclosure of bad-juror lists.

Although the actual inequality or unfairness that results when the defendant does not have access to the prosecution's jury dossiers is difficult to prove, some courts have found that the pattern of inequality that could result is strong enough to compel disclosure.<sup>264</sup> Obviously, some prosecutors believe that there is an advantage to using these lists; otherwise, the use of the lists would not be as prevalent as it is today. As previously noted, in order for an appellate court to reverse a trial judge's determination, the trial judge's decision must have injured the defendant in a demonstrable way.<sup>265</sup> But the harm need not be demonstrated in the first instance—i.e., when the trial judge, within his or her discretion, decides to compel discovery of the jury list.<sup>266</sup> Therefore, due to the high burden of proving actual harm from a resulting jury and the clear indication that prosecutors see a benefit in relying on bad-juror lists, trial judges should allow discovery of such lists to ensure that the defendant gains the same benefit as the prosecution.

Some courts, however, ignore the rationale that allowing prosecutors to shield bad-juror lists from defendants creates an inequality in the voir dire process that may further affect the composition of the jury. Their reasoning that it is appropriate to refuse to disclose bad-juror lists on the ground that defense attorneys are entitled to compile similar lists<sup>267</sup> is flawed. Prosecutors, unlike defense attorneys, represent the people; justice and truth-seeking, and not securing a conviction, should be their primary goal.<sup>268</sup> Because of their role in the criminal-justice system, prosecutors should not create obstacles to justice; their refusal to

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<sup>264</sup> See, e.g., *id.*

<sup>265</sup> See *supra* Part I.C.2 (noting that, while several courts have applied a lenient approach to the discoverability of jury dossiers, few have actually reversed a trial courts' decision to not allow discovery).

<sup>266</sup> See, e.g., *Murtishaw*, 631 P.2d at 465 (holding that, although the error in the case was not reversible, fundamental fairness necessitates that trial judges be granted discretion to compel discovery of jury dossiers).

<sup>267</sup> See, e.g., *Hamer v. United States*, 259 F.2d 274, 280 (9th Cir. 1958) (noting that defense attorneys, although perhaps not as enthusiastically, will discuss prospective jurors with each other and arguing that, were those discussions documented, the records would not be turned over to the prosecution).

<sup>268</sup> See *People v. Aldridge*, 209 N.W.2d 796, 799 (Mich. Ct. App. 1973) (noting the importance of giving the defendant equal access to the material in the prosecution's possession and stating that fundamental fairness dictates no less because prosecutors, as representatives of the people, must strive to achieve both fairness and justice). I am reminded of the famous statement by Robert F. Kennedy, Jr.: "It must be our purpose in government . . . to insure that the department over which I preside is more than a Department of Prosecution and is, in fact, the Department of Justice." Robert F. Kennedy, U.S. Attorney General, Address to the Criminal Law Section of the American Bar Association (Aug. 10, 1964).

disclose bad-juror lists is fundamentally unfair for this reason.<sup>269</sup> When prosecutors maintain bad-juror lists and use these lists in the voir dire process, the doctrine of fundamental fairness requires that these lists be disclosed to defense counsel.

*B. To Not Grant Defense Counsel Access to Bad-Juror Lists Violates Every Citizen’s Constitutional Right to Serve on a Jury*

The importance of the voir dire process to the perception of fairness should ensure that bad-juror lists are disclosed to defense counsel when prosecutors actually use them to conduct voir dire. Courts have held that, where a prosecutor uses a bad-juror list to refresh his or her memory either before or during a *Batson* hearing, the list must be disclosed to the defense.<sup>270</sup> The rationale for this categorical rule is that, when a prosecutor admits to using these lists to exercise challenges during voir dire, fundamental fairness requires that the lists be disclosed to protect against unconstitutional uses.<sup>271</sup> Analogously, when a prosecutor actually uses bad-juror lists to exercise peremptory challenges, the desire to ensure that prosecutors are “playing fair” should be even stronger. Failure to disclose these lists contravenes not only fundamental fairness, but also an individual juror’s right to serve on a jury, because without the lists a prosecutor’s discriminatory intent would be difficult to detect.

Although *Batson v. Kentucky* and its progeny have used the three-step test to avoid equal protection violations, the courts have not done enough to protect individual jurors’ constitutional right to serve on a jury. As long as an attorney can fashion a “facially neutral” intent for striking a juror, a peremptory strike is permissible under the *Batson* doctrine.<sup>272</sup> Requiring a facially neutral reason for a peremptory strike thus does not create a substantial obstacle to attorneys’ explicit or implicit biases.<sup>273</sup> Bad-juror lists, however, which may include explicit biases

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<sup>269</sup> See *Aldridge*, 209 N.W.2d at 799 (“The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons.”) (quoting *People v. Davis*, 18 N.W. 362, 363 (Mich. 1884)).

<sup>270</sup> See, e.g., *Franklin v. State*, 12 S.W.3d 473 (Tex. Crim. App. 2000) (reversing conviction for the lower court to perform a harm analysis).

<sup>271</sup> See, e.g., *Salazar v. State*, 795 S.W.2d 187, 193 (Tex. Crim. App. 1990) (agreeing with the defendant that forcing the state to produce its bad-juror list was “both necessary and proper”).

<sup>272</sup> See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986); see also Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012) (arguing that *Batson* does not account for the true intent behind peremptory strikes of jurors by attorneys who are “of a mind to discriminate”).

<sup>273</sup> See Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory*, 29 U. MICH. J.L. REFORM 981, 1006 (1996) (arguing that *Batson*’s test cannot account for attorneys who discriminate unconsciously); Roberts, *supra* note 272, at 842, 844 (explaining that *Batson*’s requirement for a facially neu-

against various mutable and immutable and characteristics, are not accounted for by the *Batson* analysis. Therefore, when bad-juror lists are not disclosed to defense counsel, individual jurors' right to serve on a jury may be violated. The current *Batson* framework does not provide a sufficient vehicle to avoid discrimination since it cannot account for an attorney's intent to discriminate.<sup>274</sup> Such discriminatory intent, however, may be discovered through the disclosure of bad-juror lists.

In Texas, there is speculation that the Tarrant County District Attorney's Office uses its bad-juror list to strike jurors whom prosecutors believe are opposed to the death penalty.<sup>275</sup> The *Batson* framework currently does not account for the possibility of exercising peremptory challenges to strike jurors on the basis of their political views. However, such an extension may be necessary to protect a citizen's right to serve on a jury.<sup>276</sup> Although the Supreme Court's holding in *Batson* involved the systematic exclusion of jurors on the basis of race, the Court has applied similar reasoning to other forms of discrimination based on personal characteristics of potential jurors.<sup>277</sup> Moreover, the Court's more recent decisions regarding discriminatory peremptory challenges have emphasized that the totality-of-the-circumstances approach must be used whenever such challenges are questioned.<sup>278</sup> According to the Court in

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tral reason for a peremptory challenge does not account for an attorney's various implicit biases).

<sup>274</sup> See *Franklin v. State*, 986 S.W.2d 349, 355 (Tex. App. 1999) (stating that precedent suggests that a prosecutor must disclose any information he or she has on prospective jurors when peremptory-challenge strikes are questioned during a *Batson* hearing and the prosecutor uses the information to refresh his or her memory), *rev'd on other grounds*, 12 S.W.3d 473 (Tex. Crim. App. 2000).

<sup>275</sup> See Trainor, *supra* note 1 (speculating as to what questions prosecutors asked jurors that resulted in jurors' names being added to the Tarrant County bad-juror list and wondering whether "they claim[ed] during jury selection that they could consider the death penalty as a possible punishment—but when it came right down to it, flatly refused to do so.").

<sup>276</sup> Although the Tarrant County prosecutors have not admitted to using the list for this purpose, *see id.*, an overview of Texas's historic use of capital punishment lends credence to the speculation. Since 1976, Texas has executed 481 people, *see Death Penalty Info. Ctr., Fact Sheet*, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited Apr. 16, 2012), and of the 140 death row inmates who have been exonerated since then, twelve were convicted in Texas, *see The Innocence List*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Apr. 16, 2012). A recent study states that only "[a] few counties in the United States continue to sentence people to death with any regularity." Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 227 (2012). Tarrant County, Texas is one of them. *See id.* at 232, 238, 239, 281.

<sup>277</sup> *See, e.g., J.E.B. v. Alabama ex rel T. B.*, 511 U.S. 127, 129 (1994) (holding that the use of peremptory challenges to discriminate on the basis of gender violates the Equal Protection Clause); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 222–23 (1946) (holding that the systematic exclusion of jurors who earn a daily wage cannot be justified under either federal or state law).

<sup>278</sup> *See, e.g., Miller-El II*, 545 U.S. 231, 266 (2005) (finding that, after surveying the circumstances surrounding the voir dire questioning and peremptory challenges, the exclusion of black jurors did not correlate with any factor other than the person's race).

*Miller-El II*, the approach must take into account the history of discrimination in the specific jurisdiction.<sup>279</sup> Given the number of people sentenced to death in Texas, there may well be a pattern of exclusion of Texas jurors based on opposition to the death penalty.<sup>280</sup> Furthermore, a general history of discrimination on the basis of political beliefs has existed in this country at different times, as the court in *J.E.B.* discussed with regard to gender discrimination.<sup>281</sup> During the Cold War era, members of the Communist and Socialist parties were excluded from various types of employment.<sup>282</sup> Political discrimination also occurred in the 1960s when state legislatures enacted laws that limited the ability of the National Association for the Advancement of Colored People to assist in litigation aimed at ending racial discrimination.<sup>283</sup> Even if the history of discrimination against political opposition to the death penalty is not evident, therefore, the general history of discrimination on the basis of political affiliation supports extending the *Batson* analysis to political discrimination.

The rationale for the expanded group of characteristics that the prosecution should be barred from citing as a basis for exercising its peremptory challenges is that the systematic exclusion of certain types of people from jury service does violence to the justice system by detracting from the democratic nature of the jury system.<sup>284</sup> Similarly, courts should rule that excluding jurors on the basis of their political views—such as their stance on the death penalty—detracts from the public’s perception of the justice system. It has long been understood that the mere appearance of fairness is as important as ensuring that the system actually operates in a just manner.<sup>285</sup> However, there has been recent criticism of the justice system in light of the exoneration of many individuals who had been

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<sup>279</sup> See *id.* at 236 (considering the history of the Dallas County District Attorney’s discrimination against black potential jurors when determining whether the prosecutor’s nondiscriminatory justifications were valid).

<sup>280</sup> See *supra* note 276 (noting that Texas has had many death-penalty convictions overturned).

<sup>281</sup> See *J.E.B.*, 511 U.S. at 130–37.

<sup>282</sup> See, e.g., *Beilan v. Bd. of Pub. Educ., Sch. Dist. of Phila.*, 357 U.S. 399 (1958) (affirming the removal of a public school teacher who refused to answer whether he was affiliated with the Communist Party).

<sup>283</sup> See, e.g., *NAACP v. Button*, 371 U.S. 415, 429–31 (1963) (indicating that, while not a conventional political party, the NAACP’s basic function is to promote political and policy goals).

<sup>284</sup> See *Thiel v. S. Pac. Co.*, 328 U.S. 217, 222 (1946) (stating that the systematic exclusion of a substantial portion of potential jurors based on a discriminatory intent would harm the trial process).

<sup>285</sup> See *J.E.B.*, 511 U.S. at 161 n.3 (Scalia, J., dissenting) (“Wise observers have long understood that the appearance of justice is as important as its reality. If the system of peremptory strikes affects the actual impartiality of the jury not a bit, but gives litigants a greater belief in that impartiality, it serves a most important function.”).

sentenced to death row.<sup>286</sup> Striking jurors on the basis of their views on the death penalty will only add to this criticism and augment the sense of unfairness that many members of the public already associate with the criminal-justice system. Courts should therefore extend *Batson* to hold that excluding jurors on the basis of their political views—specifically their views on capital punishment—is unconstitutional.

#### IV. RECOMMENDATION

The marked differences among state open-records acts<sup>287</sup> and the variation in states' willingness to disclose work-product upon a showing of fundamental unfairness have led to inconsistency in judicial treatment of bad-juror lists.<sup>288</sup> Whether due to a lack of legislative history or an unwillingness to engage in comprehensive statutory analysis, some states have interpreted these statutes to deny defense counsel access to bad-juror lists by holding that the exception for records that could interfere with law-enforcement proceedings should govern.<sup>289</sup> Furthermore, even where a state's open-records act does not contain such an exemption, some states have refused to disclose the prosecution's bad-juror list because the defendant failed to make a sufficient showing that injustice would result were he or she denied access to the list.<sup>290</sup> By contrast, some courts have recognized that fundamental unfairness results when defendants are denied access to the prosecution's records and have ruled that, where defense counsel does not have the resources to conduct a similar investigation, the prosecution's jury dossier must be disclosed.<sup>291</sup>

To resolve this inconsistency, states should amend their open-records acts to emulate FOIA. In addition, courts should rule that, where a prosecutor uses a bad-juror list to exercise peremptory challenges during voir dire, there is a presumption that the prosecutor is using the list for unconstitutionally discriminatory purposes. Fundamental fairness

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<sup>286</sup> See, e.g., *Innocence List*, *supra* note 276 (indicating that, since 1973, 138 people have been released from death row due to newly discovered evidence of their innocence).

<sup>287</sup> Compare TEX. GOV'T CODE ANN. § 552.001(a) (West 2011) (listing several exceptions for records compiled for law-enforcement purposes), with ALA. CODE§ 36-12-40 (2011) (neglecting to include an exception for public records compiled for law-enforcement needs).

<sup>288</sup> Compare *People v. Aldridge*, 209 N.W.2d 796, 797 (Mich. Ct. App. 1973) (emphasizing the importance of ensuring that the defendant has access to sufficient information from which to exercise his or her challenges intelligently), with *Hamer v. United States*, 259 F.2d 274, 280–81 (9th Cir. 1958) (rejecting the argument that the doctrine of fundamental fairness requires prosecutors to disclose their jury records to defense counsel).

<sup>289</sup> See Tex. Att'y Gen., Open Records Decision No. 369 (Apr. 8, 1983), available at <https://www.oag.state.tx.us/opinions/openrecords/47mattox/ord/1983/pdf/ord19830369.pdf>.

<sup>290</sup> See, e.g., *Hamer*, 259 F.2d at 280–81.

<sup>291</sup> See, e.g., *Aldridge*, 209 N.W.2d at 801; see also *People v. Murtishaw*, 631 P.2d 446, 465 (Cal. 1981) (“When courts . . . deny defendants who cannot afford similar investigations access to the prosecutor's records, the result is that prosecutors in case after case will have substantially more information concerning prospective jurors than do defense counsel.”).

should dictate that the list be disclosed to the defendant. Further, if defense counsel can demonstrate that the prosecution is using the list to strike jurors who are opposed to capital punishment, the prosecutor should be compelled to offer an alternate—and politically neutral—reason for the strike.

#### CONCLUSION

Prosecutors sometimes use “bad juror” lists to exclude particular citizens from jury service. Not only does this practice interfere with an open and fair jury-selection process, thus implicating a defendant’s right to be tried by a jury of his or her peers, but it also violates potential jurors’ rights to serve in this important capacity. But who is on these lists? And is a prosecutor required to disclose the lists themselves?

The ambiguity of states’ open-records laws, coupled with the judicial discretion regarding the level of injustice a defendant must establish to overcome the work-product doctrine, has led to inconsistency in the disclosure of prosecutors’ bad-juror lists. Although the legislative intent behind most state open-records acts follows that of the federal Freedom of Information Act in promoting government transparency, the discretion used by some states to enact numerous exemptions to disclosure and interpret those exemptions broadly contravenes this purpose and thus dilutes public access to information.<sup>292</sup> Texas’s deviation from the narrow construction that other states—such as Georgia, Alabama, and Colorado—have given to exemptions clearly disfavors disclosure of information in prosecutorial matters and conflicts with this purpose of public openness. While this disparity can partially be explained by the selective interpretation of available precedent in Texas, the statute’s ambiguity lends itself to this manipulation. A better approach is for states to model their open-records acts on FOIA to maintain consistency and to preserve the public interest in the freedom of information.

Moreover, states are often too strict in their adherence to the work-product doctrine to shield bad-juror lists from defense counsel. Courts have held that prosecutors’ jury dossiers should be disclosed to defense counsel when the defendant has made a sufficient showing of necessity or injustice.<sup>293</sup> The magnitude of discretion invested with the trial judge, however, makes it difficult to find reversible error solely on the basis of the judge’s failure to accept a defendant’s fundamental-fairness argument to disclose the bad-juror list. In addition, courts have typically mandated

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<sup>292</sup> See OKLA. STAT. ANN. tit. 51, § 24A.1 (West 2011) (indicating the importance of keeping the public well informed); TEX. GOV’T CODE ANN. § 552.001(a) (West 2011) (noting that the exceptions contained in the Texas Open Records Act were meant to be interpreted liberally).

<sup>293</sup> See, e.g., *Couser v. State*, 383 A.2d 389, 396 (Md. 1978).

disclosure of these records only when the police department compiled the records or when the prosecutor used the records to refresh his or her memory in relation to a *Batson v. Kentucky* hearing.<sup>294</sup> Defendants deserve the same treatment when the prosecution compiles its own bad-juror list and subsequently uses the list during the voir dire process.

Further, courts should rule that there is a presumption in favor of public disclosure of prosecutors' bad-juror lists when the prosecutor uses these lists to aid in exercising peremptory challenges during the voir dire process. It is fundamentally unfair for defense counsel to be denied access to this information where the defendant lacks the resources to obtain the same information. To disclose these lists to defense counsel would allow the defendant the same opportunity as the prosecutor to exercise peremptory challenges intelligently. Requiring disclosure of these lists to the defense would also enable the defendant to more appropriately assert *Batson* challenges when it appears that the prosecutor is striking jurors for unconstitutional reasons.

The judicial system in the United States is adversarial. Particularly in criminal cases, when prosecutors, who already hold enormous power,<sup>295</sup> are permitted to put their thumbs on the scale of justice during jury selection, the entire system suffers—the rights of potential jurors, the rights of the defendant, the integrity of the outcome of the proceedings, and the appearance of justice.

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<sup>294</sup> See *Batson v. Kentucky*, 476 U.S. 79, 95 (1986) (indicating that it was a state actor who was exercising peremptory challenges in an unconstitutional manner in holding that race is an impermissible reason on which to base a challenge).

<sup>295</sup> See generally ANGELA J. DAVIS, *Arbitrary Justice: The Power of the American Prosecutor* (2007).