

Assembly Bill No. 3070

Passed the Assembly August 31, 2020

Chief Clerk of the Assembly

Passed the Senate August 31, 2020

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2020, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to add, repeal, and add Section 231.7 of the Code of Civil Procedure, relating to juries.

LEGISLATIVE COUNSEL'S DIGEST

AB 3070, Weber. Juries: peremptory challenges.

Existing law provides for the exclusion of a prospective juror from a trial jury by peremptory challenge. Existing law prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of the sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation of the prospective juror, or on similar grounds.

This bill would, for all jury trials in which jury selection begins on or after January 1, 2022, prohibit a party from using a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups. The bill would allow a party, or the trial court on its own motion, to object to the use of a peremptory challenge based on these criteria. Upon objection, the bill would require the party exercising the challenge to state the reasons the peremptory challenge has been exercised. The bill would require the court to evaluate the reasons given, as specified, and, if the court grants the objection, would authorize the court to take certain actions, including, but not limited to, starting a new jury selection, declaring a mistrial at the request of the objecting party, seating the challenged juror, or providing another remedy as the court deems appropriate. The bill would subject the denial of an objection to de novo review by an appellate court, as specified. The bill would, until January 1, 2026, specify that its provisions do not apply to civil cases.

The people of the State of California do enact as follows:

SECTION 1. (a) It is the intent of the Legislature to put into place an effective procedure for eliminating the unfair exclusion of potential jurors based on race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, through the exercise of peremptory challenges.

(b) The Legislature finds that peremptory challenges are frequently used in criminal cases to exclude potential jurors from serving based on their race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that exclusion from jury service has disproportionately harmed African Americans, Latinos, and other people of color. The Legislature further finds that the existing procedure for determining whether a peremptory challenge was exercised on the basis of a legally impermissible reason has failed to eliminate that discrimination. In particular, the Legislature finds that requiring proof of intentional bias renders the procedure ineffective and that many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes about those groups or otherwise based on unlawful discrimination. Therefore, this legislation designates several justifications as presumptively invalid and provides a remedy for both conscious and unconscious bias in the use of peremptory challenges.

(c) It is the intent of the Legislature that this act be broadly construed to further the purpose of eliminating the use of group stereotypes and discrimination, whether based on conscious or unconscious bias, in the exercise of peremptory challenges.

SEC. 2. Section 231.7 is added to the Code of Civil Procedure, to read:

231.7. (a) A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.

(b) A party, or the trial court on its own motion, may object to the improper use of a peremptory challenge under subdivision (a). After the objection is made, any further discussion shall be

conducted outside the presence of the panel. The objection shall be made before the jury is impaneled, unless information becomes known that could not have reasonably been known before the jury was impaneled.

(c) Notwithstanding Section 226, upon objection to the exercise of a peremptory challenge pursuant to this section, the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised.

(d) (1) The court shall evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. The court shall consider only the reasons actually given and shall not speculate on, or assume the existence of, other possible justifications for the use of the peremptory challenge. If the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be sustained. The court need not find purposeful discrimination to sustain the objection. The court shall explain the reasons for its ruling on the record. A motion brought under this section shall also be deemed a sufficient presentation of claims asserting the discriminatory exclusion of jurors in violation of the United States and California Constitutions.

(2) (A) For purposes of this section, an objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.

(B) For purposes of this section, a “substantial likelihood” means more than a mere possibility but less than a standard of more likely than not.

(C) For purposes of this section, “unconscious bias” includes implicit and institutional biases.

(3) In making its determination, the circumstances the court may consider include, but are not limited to, any of the following:

(A) Whether any of the following circumstances exist:

(i) The objecting party is a member of the same perceived cognizable group as the challenged juror.

(ii) The alleged victim is not a member of that perceived cognizable group.

(iii) Witnesses or the parties are not members of that perceived cognizable group.

(B) Whether race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, bear on the facts of the case to be tried.

(C) The number and types of questions posed to the prospective juror, including, but not limited to, any the following:

(i) Consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the concerns later stated by the party as the reason for the peremptory challenge pursuant to subdivision (c).

(ii) Whether the party exercising the peremptory challenge engaged in cursory questioning of the challenged potential juror.

(iii) Whether the party exercising the peremptory challenge asked different questions of the potential juror against whom the peremptory challenge was used in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic or whether the party phrased those questions differently.

(D) Whether other prospective jurors, who are not members of the same cognizable group as the challenged prospective juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge by that party.

(E) Whether a reason might be disproportionately associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups.

(F) Whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

(G) Whether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under *Batson v. Kentucky* (1986) 476 U.S. 79, *People v. Wheeler* (1978) 22 Cal.3d 258, Section 231.5, or this section.

(e) A peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory

challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case:

(1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.

(2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.

(3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.

(4) A prospective juror's neighborhood.

(5) Having a child outside of marriage.

(6) Receiving state benefits.

(7) Not being a native English speaker.

(8) The ability to speak another language.

(9) Dress, attire, or personal appearance.

(10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a).

(11) Lack of employment or underemployment of the prospective juror or prospective juror's family member.

(12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).

(13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.

(f) For purposes of subdivision (e), the term "clear and convincing" refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated to the prospective juror's

cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.

(g) (1) The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:

(A) The prospective juror was inattentive, or staring or failing to make eye contact.

(B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.

(C) The prospective juror provided unintelligent or confused answers.

(2) The reasons set forth in paragraph (1) are presumptively invalid unless the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or the observations of counsel for the objecting party. Even with that confirmation, the counsel offering the reason shall explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried.

(h) Upon a court granting an objection to the improper exercise of a peremptory challenge, the court shall do one or more of the following:

(1) Quash the jury venire and start jury selection anew. This remedy shall be provided if requested by the objecting party.

(2) If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the defendant.

(3) Seat the challenged juror.

(4) Provide the objecting party additional challenges.

(5) Provide another remedy as the court deems appropriate.

(i) This section applies in all jury trials in which jury selection begins on or after January 1, 2022.

(j) The denial of an objection made under this section shall be reviewed by the appellate court de novo, with the trial court's express factual findings reviewed for substantial evidence. The

appellate court shall not impute to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given under subdivision (c) and shall not speculate as to or consider reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court. Should the appellate court determine that the objection was erroneously denied, that error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

(k) This section shall not apply to civil cases.

(l) It is the intent of the Legislature that enactment of this section shall not, in purpose or effect, lower the standard for judging challenges for cause or expand use of challenges for cause.

(m) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(n) This section shall remain in effect only until January 1, 2026, and as of that date is repealed.

SEC. 3. Section 231.7 is added to the Code of Civil Procedure, to read:

231.7. (a) A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.

(b) A party, or the trial court on its own motion, may object to the improper use of a peremptory challenge under subdivision (a). After the objection is made, any further discussion shall be conducted outside the presence of the panel. The objection shall be made before the jury is impaneled, unless information becomes known that could not have reasonably been known before the jury was impaneled.

(c) Notwithstanding Section 226, upon objection to the exercise of a peremptory challenge pursuant to this section, the party

exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised.

(d) (1) The court shall evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. The court shall consider only the reasons actually given and shall not speculate on, or assume the existence of, other possible justifications for the use of the peremptory challenge. If the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be sustained. The court need not find purposeful discrimination to sustain the objection. The court shall explain the reasons for its ruling on the record. A motion brought under this section shall also be deemed a sufficient presentation of claims asserting the discriminatory exclusion of jurors in violation of the United States and California Constitutions.

(2) (A) For purposes of this section, an objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.

(B) For purposes of this section, a “substantial likelihood” means more than a mere possibility but less than a standard of more likely than not.

(C) For purposes of this section, “unconscious bias” includes implicit and institutional biases.

(3) In making its determination, the circumstances the court may consider include, but are not limited to, any of the following:

(A) Whether any of the following circumstances exist:

(i) The objecting party is a member of the same perceived cognizable group as the challenged juror.

(ii) The alleged victim is not a member of that perceived cognizable group.

(iii) Witnesses or the parties are not members of that perceived cognizable group.

(B) Whether race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, bear on the facts of the case to be tried.

(C) The number and types of questions posed to the prospective juror, including, but not limited to, any the following:

(i) Consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the concerns later stated by the party as the reason for the peremptory challenge pursuant to subdivision (c).

(ii) Whether the party exercising the peremptory challenge engaged in cursory questioning of the challenged potential juror.

(iii) Whether the party exercising the peremptory challenge asked different questions of the potential juror against whom the peremptory challenge was used in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic or whether the party phrased those questions differently.

(D) Whether other prospective jurors, who are not members of the same cognizable group as the challenged prospective juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge by that party.

(E) Whether a reason might be disproportionately associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups.

(F) Whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

(G) Whether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under *Batson v. Kentucky* (1986) 476 U.S. 79, *People v. Wheeler* (1978) 22 Cal.3d 258, Section 231.5, or this section.

(e) A peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that the reasons

articulated bear on the prospective juror’s ability to be fair and impartial in the case:

(1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.

(2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.

(3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.

(4) A prospective juror’s neighborhood.

(5) Having a child outside of marriage.

(6) Receiving state benefits.

(7) Not being a native English speaker.

(8) The ability to speak another language.

(9) Dress, attire, or personal appearance.

(10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a).

(11) Lack of employment or underemployment of the prospective juror or prospective juror’s family member.

(12) A prospective juror’s apparent friendliness with another prospective juror of the same group as listed in subdivision (a).

(13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.

(f) For purposes of subdivision (e), the term “clear and convincing” refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated to the prospective juror’s cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are

instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.

(g) (1) The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:

(A) The prospective juror was inattentive, or staring or failing to make eye contact.

(B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.

(C) The prospective juror provided unintelligent or confused answers.

(2) The reasons set forth in paragraph (1) are presumptively invalid unless the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or the observations of counsel for the objecting party. Even with that confirmation, the counsel offering the reason shall explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried.

(h) Upon a court granting an objection to the improper exercise of a peremptory challenge, the court shall do one or more of the following:

(1) Quash the jury venire and start jury selection anew. This remedy shall be provided if requested by the objecting party.

(2) If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the defendant.

(3) Seat the challenged juror.

(4) Provide the objecting party additional challenges.

(5) Provide another remedy as the court deems appropriate.

(i) This section applies in all jury trials in which jury selection begins on or after January 1, 2022.

(j) The denial of an objection made under this section shall be reviewed by the appellate court de novo, with the trial court's express factual findings reviewed for substantial evidence. The appellate court shall not impute to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given under subdivision (c) and shall not speculate as to or consider reasons that were not given

to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court. Should the appellate court determine that the objection was erroneously denied, that error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

(k) It is the intent of the Legislature that enactment of this section shall not, in purpose or effect, lower the standard for judging challenges for cause or expand use of challenges for cause.

(l) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(m) This section shall become operative January 1, 2026.

Approved _____, 2020

Governor