

## AB 3070 (Weber) Proposed Amendments

### 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 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, 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 such group.

(b) A party, or the trial court on its own motion, may object to the improper use of a peremptory challenge under subdivision (a) to raise the issue of improper bias based on race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation. 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 sworn, unless new information becomes known that could not have reasonably been known before the jury was impaneled is discovered.

(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/weigh 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 objective observer could objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation 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 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) For purposes of this section, an objective observer objectively reasonable person is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California. For purposes of this section, a 'substantial likelihood' requires more than a mere possibility but less than a standard of preponderance of the evidence.

**Commented [AB1]:** Allows judges perception of race, reducing need to ask prospective jurors about their race.

**Commented [AB2]:** Allows judges to raise issue on their own

**Commented [AB3]:** Clarifies conditions for raising objection after the jury is sworn.

**Commented [AB4]:** Sets "substantial likelihood" as statewide standard. Standard defined in (2) below.

**Commented [AB5]:** Provides for 3 different kinds of biases

**Commented [AB6]:** Defines "substantial likelihood" as lower than preponderance of the evidence.

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

(A) ~~Whether the objecting party is a member of the same identified group as the challenged juror, and, if so, whether the alleged victim or opposing party is not a member of that identified group.~~ Whether (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; or (iii) witnesses or the parties are not members of that perceived cognizable group.

**Commented [AB7]:** Expands methods for comparative juror analysis.

(B) Whether ~~issues concerning~~ race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation ~~play a part in the facts of the case to be tried are facts that may be a factor in the case.~~

**Commented [AB8]:** Allows consideration of race that may be a factor in case, even if not raised as an issue.

(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 ~~challenged~~-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.~~

**Commented [AB9]:** Allows analysis of questions asked of different prospective jurors

(D) Whether other prospective jurors, who are not members of the same ~~protected~~-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.

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

(G) Whether the party has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, in the present case or in past cases, ~~including whether the party who made the challenge has a history of prior violations of *Batson v. Kentucky* (1986) 476 U.S. 79, *People v. Wheeler* (1978) 22 Cal.3d 258, Civil Code of Procedure section 231.5, or this section.~~

**Commented [AB10]:** Allows consideration of past violations of laws against racial discrimination

(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 the rationale is unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation ~~and the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case~~

**Commented [AB11]:** Overcoming presumption requires a showing of effect on prospective juror's ability to be fair.

(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 ~~historically associated with members of groups listed in subdivision (b).~~

**Commented [AB12]:** Eliminates need for judges to know what dress is "historically associated" with race.

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

(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 (b).

~~(13) The prospective juror was inattentive or staring or failing to make eye contact.~~  
~~(14) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.~~

~~(15) The prospective juror provided unintelligent or confused answers.~~  
(16) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same protected 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.

**Commented [AB13]:** Moved into subdivision (f) below.

**Commented [AB14]:** Allows comparative juror analysis without need for other juror to be exactly the same.

(f) 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. These reasons 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, and the party offering the reason can justify why the asserted demeanor, behavior, or manner in which the prospective juror answered questions is relevant to the case to be tried.  
~~If a party intends to strike a juror for one of the reasons listed in paragraph (13), (14), or (15) of subdivision (e), the party shall provide reasonable notice to the court and the other parties so the behavior can be verified in a timely manner. A lack of finding by the judge verifying the behavior shall invalidate the given reason for the peremptory challenge.~~

**Commented [AB15]:** Finds that certain behavioral objections have a history with improper discrimination, but may be allowed if court can confirm the behavior and counsel shows why the behavior is relevant to the case.

**Commented [AB16]:** Addressed above.

(g) 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. Seat the challenged juror or jurors.~~
- ~~(2) If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the objecting party. After the jury has been impaneled in a criminal case, this remedy is available only to the defendant. Declare a mistrial at the request of the objecting party.~~
- ~~(3) Seat the challenged juror.~~
- ~~(4) Provide the objecting party additional challenges.~~
- ~~(5) Provide another remedy as the court deems appropriate and is acceptable to the objecting party.~~

**Commented [AB17]:** Expands available remedies for improper exercise of peremptory challenge.

(h) This section applies in all jury trials in which jury selection has not been completed as of January 1, 2021.  
(i) The denial of an objection made under this section shall be reviewed by the appellate court de novo, except that the trial court's express factual findings shall be 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) of this section 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 protected group as the challenged juror. 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.

**Commented [AB18]:** Allows express factual findings to be reviewed for substantial evidence and bars appellate court speculation.

~~(j) Nothing in this section shall apply in civil cases.~~

**Commented [AB19]:** Limits application to criminal, not civil cases.