

AMENDED IN SENATE AUGUST 21, 2020

AMENDED IN SENATE AUGUST 13, 2020

AMENDED IN SENATE JULY 28, 2020

AMENDED IN SENATE JULY 8, 2020

AMENDED IN ASSEMBLY MAY 4, 2020

CALIFORNIA LEGISLATURE—2019–20 REGULAR SESSION

ASSEMBLY BILL

No. 3070

Introduced by Assembly Member Weber
(Principal coauthor: Assembly Member Rendon)
(Coauthors: Assembly Members Bonta, Gipson, Holden,
Mark Stone, Ting, and Wicks)
(Coauthor: Senator Wiener)

February 21, 2020

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

LEGISLATIVE COUNSEL'S DIGEST

AB 3070, as amended, 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~~ *would, until January 1, 2026*, specify that its provisions do not apply to civil cases.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

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

1 SECTION 1. (a) It is the intent of the Legislature to put into
2 place an effective procedure for eliminating the unfair exclusion
3 of potential jurors based on race, ethnicity, gender, gender identity,
4 sexual orientation, national origin, or religious affiliation, or
5 perceived membership in any of those groups, through the exercise
6 of peremptory challenges.
7 (b) The Legislature finds that peremptory challenges are
8 frequently used in criminal cases to exclude potential jurors from
9 serving based on their race, ethnicity, gender, gender identity,
10 sexual orientation, national origin, or religious affiliation, or
11 perceived membership in any of those groups, and that exclusion
12 from jury service has disproportionately harmed African
13 Americans, Latinos, and other people of color. The Legislature
14 further finds that the existing procedure for determining whether
15 a peremptory challenge was exercised on the basis of a legally
16 impermissible reason has failed to eliminate that discrimination.
17 In particular, the Legislature finds that requiring proof of

1 intentional bias renders the procedure ineffective and that many
2 of the reasons routinely advanced to justify the exclusion of jurors
3 from protected groups are in fact associated with stereotypes about
4 those groups or otherwise based on unlawful discrimination.
5 Therefore, this legislation designates several justifications as
6 presumptively invalid and provides a remedy for both conscious
7 and unconscious bias in the use of peremptory challenges.

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

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

14 231.7. (a) A party shall not use a peremptory challenge to
15 remove a prospective juror on the basis of the prospective juror's
16 race, ethnicity, gender, gender identity, sexual orientation, national
17 origin, or religious affiliation, or the perceived membership of the
18 prospective juror in any of those groups.

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

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

30 (d) (1) The court shall evaluate the reasons given to justify the
31 peremptory challenge in light of the totality of the circumstances.
32 The court shall consider only the reasons actually given and shall
33 not speculate on, or assume the existence of, other possible
34 justifications for the use of the peremptory challenge. If the court
35 determines there is a substantial likelihood that an objectively
36 reasonable person would view race, ethnicity, gender, gender
37 identity, sexual orientation, national origin, or religious affiliation,
38 or perceived membership in any of those groups, as a factor in the
39 use of the peremptory challenge, then the objection shall be
40 sustained. The court need not find purposeful discrimination to

1 sustain the objection. The court shall explain the reasons for its
2 ruling on the record. A motion brought under this section shall
3 also be deemed a sufficient presentation of claims asserting the
4 discriminatory exclusion of jurors in violation of the United States
5 and California Constitutions.

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

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

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

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

17 (A) Whether any of the following circumstances exist:

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

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

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

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

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

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

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

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

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

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

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

11 (G) Whether the counsel or counsel's office exercising the
12 challenge has used peremptory challenges disproportionately
13 against a given race, ethnicity, gender, gender identity, sexual
14 orientation, national origin, or religious affiliation, or perceived
15 membership in any of those groups, in the present case or in past
16 cases, including whether the counsel or counsel's office who made
17 the challenge has a history of prior violations under *Batson v.*
18 *Kentucky* (1986) 476 U.S. 79, *People v. Wheeler* (1978) 22 Cal.3d
19 258, Section 231.5, or this section.

20 (e) A peremptory challenge for any of the following reasons is
21 presumed to be invalid unless the party exercising the peremptory
22 challenge can show by clear and convincing evidence that an
23 objectively reasonable person would view the rationale as unrelated
24 to a prospective juror's race, ethnicity, gender, gender identity,
25 sexual orientation, national origin, or religious affiliation, or
26 perceived membership in any of those groups, and that the reasons
27 articulated bear on the prospective juror's ability to be fair and
28 impartial in the case:

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

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

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

36 (4) A prospective juror's neighborhood.

37 (5) Having a child outside of marriage.

38 (6) Receiving state benefits.

39 (7) Not being a native English speaker.

40 (8) The ability to speak another language.

1 (9) Dress, attire, or personal appearance.

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

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

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

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

18 (f) For purposes of subdivision (e), the term "clear and
19 convincing" refers to the degree of certainty the factfinder must
20 have in determining whether the reasons given for the exercise of
21 a peremptory challenge are unrelated to the prospective juror's
22 cognizable group membership, bearing in mind conscious and
23 unconscious bias. To determine that a presumption of invalidity
24 has been overcome, the factfinder shall determine that it is highly
25 probable that the reasons given for the exercise of a peremptory
26 challenge are unrelated to conscious or unconscious bias and are
27 instead specific to the juror and bear on that juror's ability to be
28 fair and impartial in the case.

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

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

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

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

38 (2) The reasons set forth in paragraph (1) are presumptively
39 invalid unless the trial court is able to confirm that the asserted
40 behavior occurred, based on the court's own observations or the

1 observations of counsel for the objecting party. Even with that
2 confirmation, the counsel offering the reason shall explain why
3 the asserted demeanor, behavior, or manner in which the
4 prospective juror answered questions matters to the case to be
5 tried.

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

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

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

14 (3) Seat the challenged juror.

15 (4) Provide the objecting party additional challenges.

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

17 (i) This section applies in all jury trials in which jury selection
18 begins on or after ~~April 1, 2021~~. *January 1, 2022*.

19 (j) The denial of an objection made under this section shall be
20 reviewed by the appellate court de novo, with the trial court's
21 express factual findings reviewed for substantial evidence. The
22 appellate court shall not impute to the trial court any findings,
23 including findings of a prospective juror's demeanor, that the trial
24 court did not expressly state on the record. The reviewing court
25 shall consider only reasons actually given under subdivision (c)
26 and shall not speculate as to or consider reasons that were not given
27 to explain either the party's use of the peremptory challenge or
28 the party's failure to challenge similarly situated jurors who are
29 not members of the same cognizable group as the challenged juror,
30 regardless of whether the moving party made a comparative
31 analysis argument in the trial court. Should the appellate court
32 determine that the objection was erroneously denied, that error
33 shall be deemed prejudicial, the judgment shall be reversed, and
34 the case remanded for a new trial.

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

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

39 (m) *The provisions of this section are severable. If any provision*
40 *of this section or its application is held invalid, that invalidity shall*

1 *not affect other provisions or applications that can be given effect*
2 *without the invalid provision or application.*

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

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

7 *231.7. (a) A party shall not use a peremptory challenge to*
8 *remove a prospective juror on the basis of the prospective juror's*
9 *race, ethnicity, gender, gender identity, sexual orientation, national*
10 *origin, or religious affiliation, or the perceived membership of the*
11 *prospective juror in any of those groups.*

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

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

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

39 *(2) (A) For purposes of this section, an objectively reasonable*
40 *person is aware that unconscious bias, in addition to purposeful*

1 *discrimination, have resulted in the unfair exclusion of potential*
2 *jurors in the State of California.*

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

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

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

10 *(A) Whether any of the following circumstances exist:*

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

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

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

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

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

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

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

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

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

38 *(E) Whether a reason might be disproportionately associated*
39 *with a race, ethnicity, gender, gender identity, sexual orientation,*

1 *national origin, or religious affiliation, or perceived membership*
2 *in any of those groups.*

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

6 *(G) Whether the counsel or counsel's office exercising the*
7 *challenge has used peremptory challenges disproportionately*
8 *against a given race, ethnicity, gender, gender identity, sexual*
9 *orientation, national origin, or religious affiliation, or perceived*
10 *membership in any of those groups, in the present case or in past*
11 *cases, including whether the counsel or counsel's office who made*
12 *the challenge has a history of prior violations under Batson v.*
13 *Kentucky (1986) 476 U.S. 79, People v. Wheeler (1978) 22 Cal.3d*
14 *258, Section 231.5, or this section.*

15 *(e) A peremptory challenge for any of the following reasons is*
16 *presumed to be invalid unless the party exercising the peremptory*
17 *challenge can show by clear and convincing evidence that an*
18 *objectively reasonable person would view the rationale as*
19 *unrelated to a prospective juror's race, ethnicity, gender, gender*
20 *identity, sexual orientation, national origin, or religious affiliation,*
21 *or perceived membership in any of those groups, and that the*
22 *reasons articulated bear on the prospective juror's ability to be*
23 *fair and impartial in the case:*

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

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

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

31 *(4) A prospective juror's neighborhood.*

32 *(5) Having a child outside of marriage.*

33 *(6) Receiving state benefits.*

34 *(7) Not being a native English speaker.*

35 *(8) The ability to speak another language.*

36 *(9) Dress, attire, or personal appearance.*

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

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

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

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

13 (f) *For purposes of subdivision (e), the term "clear and*
14 *convincing" refers to the degree of certainty the factfinder must*
15 *have in determining whether the reasons given for the exercise of*
16 *a peremptory challenge are unrelated to the prospective juror's*
17 *cognizable group membership, bearing in mind conscious and*
18 *unconscious bias. To determine that a presumption of invalidity*
19 *has been overcome, the factfinder shall determine that it is highly*
20 *probable that the reasons given for the exercise of a peremptory*
21 *challenge are unrelated to conscious or unconscious bias and are*
22 *instead specific to the juror and bear on that juror's ability to be*
23 *fair and impartial in the case.*

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

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

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

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

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

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

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

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

9 (3) Seat the challenged juror.

10 (4) Provide the objecting party additional challenges.

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

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

14 (j) The denial of an objection made under this section shall be
15 reviewed by the appellate court de novo, with the trial court's
16 express factual findings reviewed for substantial evidence. The
17 appellate court shall not impute to the trial court any findings,
18 including findings of a prospective juror's demeanor, that the trial
19 court did not expressly state on the record. The reviewing court
20 shall consider only reasons actually given under subdivision (c)
21 and shall not speculate as to or consider reasons that were not
22 given to explain either the party's use of the peremptory challenge
23 or the party's failure to challenge similarly situated jurors who
24 are not members of the same cognizable group as the challenged
25 juror, regardless of whether the moving party made a comparative
26 analysis argument in the trial court. Should the appellate court
27 determine that the objection was erroneously denied, that error
28 shall be deemed prejudicial, the judgment shall be reversed, and
29 the case remanded for a new trial.

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

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

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

O