Date of Hearing: May 11, 2020

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 3070 (Weber) – As Amended May 4, 2020

SUBJECT: JURIES: PEREMPTORY CHALLENGES

KEY ISSUES:

1) SHOULD COURT PROCEDURES FOR DETERMINING WHETHER PEREMPTORY CHALLENGES HAVE BEEN EXERCISED IN A DISCRIMINATORY MANNER BE ALTERED TO ADDRESS UNCONSCIOUS OR IMPLICIT BIAS?

2) SHOULD PARTIES OBJECTING TO THE USE OF A PEREMPTORY CHALLENGE BE REQUIRED TO MAKE A PRIMA FACIE CASE OF DISCRIMINATION BEFORE THE PARTY EXERCISING THE CHALLENGE IS REQUIRED TO STATE A REASON FOR THE CHALLENGE?

3) SHOULD SPECIFIC REASONS THAT ARE DISPROPORTIONATELY ASSOCIATED WITH PROTECTED GROUPS BE PRESUMED TO INDICATE DISCRIMINATION WHEN THEY ARE USED TO EXPLAIN PEREMPTORY CHALLENGES?

SYNOPSIS

Seeking to address ongoing concerns regarding the inappropriate and discriminatory use of peremptory challenges, AB 3070 prohibits the use of peremptory challenges in jury selection on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, and outlines new court procedures for evaluating and addressing peremptory challenges that are potentially discriminatory. Existing law allows the parties in criminal and civil cases to remove jurors from the panel by exercising challenges both for cause and on a peremptory basis, in which a juror is dismissed without the party needing to state a rationale for the dismissal. The current procedure to address unlawful discrimination in preemptory challenges is called a Batson-Wheeler motion. The party objecting to the challenge must make a prima facie showingof discrimination; the opposing party may respond with any reason for the challenge, so long as that reason is not expressly related to the prospective juror's race, ethnicity, or other protected characteristics; and the court will make a determination as to whether the challenge was made with discriminatory intent. Many studies have shown that the Batson-Wheeler process does not adequately prevent racial discrimination in jury selection.

This bill outlines a new process for identifying unlawful bias in the use of peremptory challenges during jury selection, which seeks to address the ongoing problem of discrimination in jury selection. Several important differences in process proposed by the bill from the existing Batson-Wheeler process include: recognizing the influence of implicit or unconscious bias in peremptory challenges; using an objective test to measure discrimination (i.e., whether an objective observer could view unlawful bias as a factor in the use of the peremptory challenge), rather than a subjective assessment of the challenging party's discriminatory intent; removing the requirement of the objecting party to make a prima facie case of discrimination before the opposing party provides the reason for their challenge; disallowing the use of any "facially neutral" reasons that are disproportionately associated with a certain protected group, unless it

can be clearly and convincingly demonstrated that the reason is unrelated to the prospective juror's protected group; and requiring appellate courts to only consider the reasons given for the challenge, rather than presuming other valid reasons.

This bill is sponsored by the California Attorneys for Criminal Justice and supported by the California Public Defenders Association and various criminal justice groups. This bill is opposed by the California District Attorneys Association.

SUMMARY: Prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of race, ethnicity, gender, and other specified characteristics, and outlines a court procedure for objecting to, evaluating, and resolving improper bias in peremptory challenges. Specifically, **this bill**:

1) States the intent of the Legislature to put into place a procedure for eliminating the unfair exclusion of potential jurors based on race, ethnicity, gender, and other specified identity groups through the exercise of peremptory challenges.

2) Makes findings as to the history and impact of intentional and unconscious bias in the use of peremptory challenges.

3) Prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation.

4) Permits a party to object to the use of a peremptory challenge in order to raise the issue of improper bias based on specified identity groups.

5) Requires the party exercising the peremptory challenge to state the reason for the peremptory challenge , and requires the court to evaluate the reasons given to justify the challenge and determine whether an objective observer, aware of unconscious biases, would view race, ethnicity, gender, and other specified characteristics, as a factor in the use of the challenge.

6) Requires the court, in making this decision, to consider:

    a) The identity groups of the objecting party, challenged juror, and opposing party.

    b) Whether issues concerning race, gender, or the other specified protected characteristics play a part in the case to be tried.

    c) The types and manner of questions posed to the prospective juror and whether other jurors were asked the same questions or gave similar answers.

    d) Whether a reason given by the party exercising the challenge is disproportionately associated with a specific identity group or was unsupported by the record.

    e) Whether the party has disproportionately used peremptory challenges against members of protected group in the present or past cases.

7) Prohibits the use of specified reasons for exercising a peremptory challenge (e.g., expressing a distrust of law enforcement, the prospective juror's neighborhood, not being a native English speaker) unless the party can show by clear and convincing evidence that the

rationale is unrelated to the prospective juror's identity group. Prohibits the use of specified behavior by the prospective juror as a reason for exercising a peremptory challenge, unless reasonable notice is given to remedy the behavior.

8) Requires that the court, upon granting an objection to the improper exercise of a peremptory challenge, provides an acceptable remedy, including, but not limited to, seating the challenged juror or jurors, or declaring a mistrial.

9) Applies these procedures to all jury trials in which jury selection has not been completed as of January 1, 2021.

10) Requires the appellate court to review the denial of an objection de novo. Requires the reviewing court to consider only the reasons given in 5), above, and not speculate on any other reasons. Requires the appellate court to reverse the judgment and remand the case for a new trial if the denial of the objection is determined to be erroneous.

EXISTING LAW:

1) Requires that all persons selected for jury service, for both civil and criminal cases, be selected at random from the population of the area served by the court and that all qualified persons have an equal opportunity to be considered for jury service in the state. (Code of Civil Procedure Sections 191 and 192.)

2) Prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of the assumption that the prospective juror is biased merely because they have a characteristic listed or defined in Government Code Section 11135, or on similar grounds. (Code of Civil Procedure Section 231.5.)

3) Prohibits any state or state-funded program or activity from unlawfully subjecting to discrimination, or unlawfully denying full and equal access to the benefits to, any person in the State of California on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation. (Government Code Section 11135 (a).)

4) Provides that after any jurors have been removed from the panel for cause, the parties may remove a specified number of jurors peremptorily (without giving any reason), and provides a specified number of peremptory challenges to which each party is entitled depending on the number of parties in the litigation and whether the case is criminal or civil in nature. (Code of Civil Procedure Section 231.)

5) Provides that a defendant's right to trial by a jury drawn from a representative cross section of the community, as guaranteed by the Sixth Amendment of the federal Constitution and article I, section 16, of the California Constitution, is violated when a "cognizable group" within that community is excluded from the jury venire. In order for a group to be considered cognizable, two requirements must be met: (1) the group's members must share a common perspective arising from their life experience in the group; and (2) it must be shown by the party seeking to prove a violation of the representative cross section rule that no other members of the community are capable of

adequately representing the perspective of the group assertedly excluded. (*Rubio v. Superior Court* (1979) 24 Cal.3d 93, 97-98, citing *People v. Wheeler* (1978) 22 Cal.3d 258, 272; see also *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1274.)

6) Prohibits the State from excluding members of the defendant's race from the jury venire on account of race, or on the false assumption that members of their race as a group are not qualified to serve as jurors. (*Batson v. Kentucky* (1986) 476 U.S. 79, 85-88.)

7) Prohibits peremptory challenges based on group bias in civil lawsuits in federal district court. (*Edmonson v. Leesville Concrete Co.* (1991) 500 U.S. 614, 630-631.)

8) Establishes a procedure (a "Batson-Wheeler hearing") whereby the court can address the use of a peremptory challenge (sometimes referred to as a "strike") that is believed to have been made in a discriminatory manner:

   a) Requires a party to make a timely objection if they believe the striking party is exercising their peremptory challenges in a discriminatory manner. (*People v. Perez* (1996) 48 Cal.App.4th 1310, 1314.)

   b) Requires the trial court to resolve whether or not the objecting party has raised a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*Johnson v. California* (2005) 545 U.S. 168.) In reaching this conclusion, many factors may raise an inference of discriminatory intent, including the following:

      i) Where a party has struck most or all members of an identified group or has used a disproportionate number of their peremptory challenges against members of that group. (*People v. Wheeler, supra* at p. 280.)

      ii) Where a party has failed to engage the prospective juror in meaningful questioning. (*Id.* at pp. 280-281.)

   c) Requires, if the court finds a prima facie inference of discriminatory action, the striking party to provide a justification for each challenged peremptory. Valid justifications need only be genuine and neutral, not necessarily justification of challenge for cause (*People v. Arias* (1996) 13 Cal.4th 92, 136), and may include the following:

      i) Antipathy towards prosecutor or criminal justice system. *(People v. Mayfield* (1997) 14 Cal.4th 668, 724.)

      ii) Bad feelings towards law enforcement. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1217.)

      iii) Family member with criminal conviction. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1282.)

      iv) Juror's occupation. (*People v. Semien* (2008) 162 Cal.App.4th 701, 708.)

      v) Hostile looks. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125.)

      vi) Hunches. (*People v. Hall* (1983) 35 Cal.3d 161, 170.)

vii) Manner of dress. (*People v. Barber* (1988) 200 Cal.App.3d 378, 396.)

d) Requires the court to decide if the proffered reasons are true or merely a pretext cloaking discriminatory intent. In making this decision, the court may consider the following:

i) An evaluation of the striking party's "state of mind" based on demeanor and credibility. (*Hernandez v. New York* (1991) 500 U.S. 352, 365.)

ii) Comparison of the dismissed juror against similar jurors who were not members of the cognizable group, whom the attorney did not dismiss. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241.)

iii) Whether or not the striking party failed to fully question the juror they now seek to dismiss. (*Id.* at p. 246.)

e) Requires the court, if it concludes that a juror has been improperly dismissed, to find an agreeable remedy, including:

i) Dismissing the panel and commencing jury selection again with a completely new venire. (*People v. Wheeler, supra* at p. 282.)

ii) Ordering the improperly dismissed juror reseated if they are able to serve. (*People v. Willis* (2002) 27 Cal.4th 811.)

iii) Giving the aggrieved party additional peremptory challenges. (*Id.* at p. 821.)

iv) Imposing monetary sanctions on the striking attorney, if the judge warned the attorneys before starting jury selection to comply with Batson-Wheeler. (*People v. Muhammad* (2003) 108 Cal.App.4th 313, 324-325.)

v) Reversing a judgement and ordering a retrial. (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: This bill prohibits the use of peremptory challenges in jury selection on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, and outlines new court procedures for evaluating and addressing peremptory challenges that are potentially discriminatory. This bill seeks to improve upon the current court procedure, hearings held in response to what are referred to as Batson-Wheeler motions, that are used to evaluate whether the dismissal of a prospective juror via a peremptory challenge was unlawfully discriminatory.

The author and sponsors of this bill, as well as many other legal experts, argue that the current Batson-Wheeler system makes it nearly impossible to prove discrimination in the use of peremptory challenges. Yet discrimination in jury selection, according to these experts, persists. The present inability to adequately address racial discrimination in jury selection undermines the integrity and impartiality of the court as a result, and raises the question of whether the current jury selection process can reliably produce a jury that represents a fair cross-section of the community.

AB 3070 seeks to address deficiencies in the Batson-Wheeler procedure by addressing unlawful discrimination in jury selection, both unconscious and intentional; by implementing an objective test to determine when discrimination has occurred in the use of a peremptory challenge, replacing the subjective *Batson* test; by requiring the party exercising a potentially discriminatory challenge to state their reasons for dismissing the prospective juror; and by disallowing a number of reasons for the challenge that are currently allowed but often closely associated with discriminatory stereotypes based upon race or ethnicity.

In support of the bill, the author writes:

> California citizens are too often excluded from serving on juries because of their race, ethnicity, gender, sexual orientation, or other legally-protected characteristics. The judicial procedure designed to reduce this long-standing practice is limited to acts of intentional discrimination. This approach has failed.
>
> Courts have acknowledged that it can be difficult and often impossible for the trial judge to determine whether the lawyer making the challenge actually intended to discriminate. … Perhaps more important, the existing procedure cannot address strikes exercised because of implicit bias, that is, unconscious or automatic attitudes and stereotypes. ...
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> Decades of jury selection under the existing procedure have been especially detrimental to African Americans, Latinos, and other people of color. AB 3070 aims to remedy the discriminatory use of peremptory challenges (also known as "strikes") against prospective jurors, and, especially against African Americans, who prosecutors have historically and continue to remove disproportionately from juries.

The voir dire process. Under California law, every citizen over 18 years of age is eligible and qualified to be a prospective juror, unless they fail to meet certain minimal requirements. For example, they must be a resident of the jurisdiction in which they are summoned to serve, be possessed of sufficient knowledge of the English language, not be convicted of a felony and on parole, post-release community supervision, felony probation, or mandated supervision, and not be subject to a conservatorship. Aside from these threshold qualification requirements that must be met for a person to be eligible, every California resident is qualified and obligated, when called, to serve on a jury. California law prohibits any person from being excluded from eligibility for jury service. While otherwise eligible persons may be excused by the courts on a case-by-case basis for hardship, be challenged for cause (such as for express or implied bias), or otherwise be subject to a peremptory challenge, California law prohibits the exemption of any eligible person from service by reason of occupation, economic status, or any protected characteristic listed or defined by existing law (i.e. race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability), or for any other reason. (See Code of Civil Procedure Section 204.)

Existing law allows the parties in criminal and civil cases to remove jurors from the jury panel (also called a venire) by exercising challenges for cause and peremptory challenges. Challenges are made during the voir dire process during which the court, with the assistance of the attorneys, inquires of the prospective jurors to determine the suitability of individuals to render a fair judgment about the facts of the case.

Challenges for cause are statutory and include: incapacity; consanguinity or affinity; fiduciary, domestic or business relationship; serving as a juror or witness in previous trial involving parties;

interest in the action; opinion on the merits; bias or prejudice; or being a party to another action. (Code of Civil Procedure Section 129; see also 7 Witkin Cal. Proc. Trial Sec. 130.) In contrast, peremptory challenges are made without need to state a cause. California court procedural manuals note, "the purpose of the peremptory challenge is to insure an impartial jury by allowing a specific number of jurors to be excused even though no statutory challenge for cause can be made; e.g., where a juror is believed to be biased but the bias cannot be proved." (7 Witkin Cal. Proc. Trial Sec. 125.) That being said, while peremptory challenges are permitted without initially stating a reason, "it has long been made clear in criminal cases that those challenges may not be made for the purpose of excluding a cognizable group. [. . .] More recently this principle, grounded on the guaranties of equal protection and trial by a jury drawn by a fair cross-section of the community, has been applied in civil cases as well." (7 Witkin Cal. Proc. Trial Sec. 127.) In that light, the Code of Civil Procedure expressly prohibits the exercise of a peremptory challenge "to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of their sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation. (Code of Civil Procedure Section 231.5.)

Current procedure to address discrimination in preemptory challenges: Batson-Wheeler motions. Peremptory challenges to prospective jurors during the jury selection process have been part of the civil law of California since 1851, and were codified in the original Field Codes in 1872. Their previous history in England dates back to at least the Fifteenth Century when persons charged with felonies were entitled to 35 peremptory challenges to members of the jury panel.

> It is important to keep in mind… that jury selection strategies used in the late 1800s were novel and are not deeply rooted in our common law heritage. Viewing them in historical context, we see that as soon as American procedures permitted any real use of peremptory challenges, they took on the character they have retained, permitting lawyers to play on stereotypes, allegiances, prejudices, and distrust to maximize their chances of winning. Some of the ugliness derided in present day practices, including the use of race, ethnicity, religion, politics, and class, has existed from these procedures' first use. (April J. Anderson, "Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners' Trial Manuals", Stanford Journal of Civil Rights and Civil Liberties, 2020 (forthcoming).)

In 1986, the United States Supreme Court decided *Batson v. Kentucky,* recognizing that the peremptory challenge could be a vehicle for discrimination. (*Batson v. Kentucky, supra,* at p. 89.) Prior to that, in 1978, the California Supreme Court, in deciding *People v. Wheeler*, had forbidden the use of peremptory challenges based on the belief that certain individuals are biased because they are members of a specific racial, ethnic, or religious group. (*People v. Wheeler, supra,* at p. 276.) Subsequent cases have sought, with some difficulty, to define the limits of inquiry into the motives of the parties in exercise of peremptory challenges which are suspected to be based on race or gender.

Out of these cases, a three-part Batson-Wheeler process for evaluating peremptory challenges for evidence of discrimination has emerged. First, after a party objects to the use of peremptory challenge for a discriminatory purpose, the trial court must first resolve whether or not the proponent has raised a prima facie case "by showing that the totality of the relevant facts gives

rise to an inference of discriminatory purpose." (*Johnson v. California, supra,* at p. 168.) Evidence of discriminatory intent may include a party using a disproportionate number of their peremptory challenges against members of a specific group, or a party has failed to engage the prospective juror in meaningful questioning. (*People v. Wheeler, supra,* at pp. 280-281.)

If the court makes a prima facie inference of discriminatory action, the judge then asks the striking party to provide a justification for each peremptory challenge. To be considered valid, the reason given must be facially neutral (i.e., not expressly related to the prospective juror's race, ethnicity, or other specified characteristic). The reason may be "trivial", so long as it is facially neutral. (*People v. Arias, supra,* at p. 136.) Examples of reasons considered valid and non-discriminatory include: antipathy towards prosecutor or criminal justice system, bad feelings towards law enforcement, family member with criminal conviction, juror's occupation, hostile looks, hunches, or manner of dress. (*People v. Mayfield, supra,* at p. 724; *People v. Johnson, supra,* at p. 1217; *People v. Cummings, supra,* at p. 1282; *People v. Semien, supra,* at p. 708; *People v. Gutierrez, supra,* at p. 1125; *People v. Hall, supra,* at p. 170; *People v. Barber, supra,* at p. 396, respectively.)

Finally, following the attorney's explanation, the trial court must decide if their reasons are genuine or merely a pretext cloaking discriminatory intent. In making this decision, the court may consider an evaluation of the striking party's "state of mind" based on demeanor and credibility; comparison of the dismissed juror against similar jurors who are not members of the cognizable group whom the attorney did not dismiss; or whether or not the striking party failed to fully question the juror they now seek to dismiss. (*Hernandez v. New York, supra,* at p. 365; *Miller-El v. Dretke, supra,* at p. 241; *Id.* at p. 246, respectively.) If a peremptory challenge is ultimately determined to have been made with discriminatory intent, the court may decide to reseat the prospective juror, dismiss the panel and recommence voir dire, or give the aggrieved party additional peremptory challenges.

The Batson-Wheeler process does not adequately prevent discrimination in jury selection. Multiple studies of criminal and civil jury trials have shown that, even after *Batson*, peremptory challenges are used at different rates depending on the race of the prospective jurors. From a study of the jury selection in capital cases in North Carolina:

> Over the twenty-year period we examined, prosecutors struck eligible black venire members at about 2.5 times the rate they struck eligible venire members who were not black. These disparities remained consistent over time and across the state, and did not diminish when we controlled for information about venire members that potentially bore on the decision to strike them, such as views on the death penalty or prior experience with crime. (Grosso, O'Brien and Woodworth. "A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials" (2012). Iowa Law Review, Forthcoming.)

Justice Liu of the California Supreme Court questions whether the *Batson* procedure stands up to its mandate of preventing discrimination in jury selection:

> In adjudicating *Batson* claims in more than 100 cases over the past two decades, this court has found unlawful discrimination in jury selection only once—and that was a case more than 12 years ago in which the prosecutor struck all five Hispanic members of the venire and through his own words "revealed an acute sensitivity to the presence of Hispanics on the jury panel and an evident belief that Hispanics would not be favorable jurors for the prosecution."

> (*People v. Silva, supra,* at p. 375 (Silva).) […] One need not question the overall excellence and integrity of our prosecutors and trial courts in order to pause and wonder, in light of the remarkable uniformity of this court's *Batson* decisions over the past 20 years, whether we have maintained the proper level of vigilance. Today, as when *Batson* was decided, it is a troubling reality, rooted in history and social context, that our black citizens are generally more skeptical about the fairness of our criminal justice system than other citizens. Yet it is precisely to ensure public confidence in our courts and their verdicts that *Batson* "forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." (*Batson v. Kentucky, supra* at 89.) I have serious doubts as to whether our jurisprudence has held true to *Batson*'s mandate. (*People v. Harris* (2013) 57 Cal.4th 804, 865-866.)

Other studies have noted a pattern of racial bias in peremptory challenges and juror dismissals by defense attorneys and trial judges as well as prosecutors. From a study of felony trials in 2011 in North Carolina:

> Our analysis shows that prosecutors in North Carolina—a state with demographics and legal institutions similar to those in many other states—exclude non-white jurors about twice as often as they exclude white jurors. Defense attorneys lean in the opposite direction: they exclude white jurors a little more than twice as often as non-white jurors. Trial judges, meanwhile, remove non-white jurors for 'cause' about 30% more often than they remove white jurors. The net effect is for non-white jurors (especially black males) to remain on juries less often than their white counterparts." (Wright, Chavis, and Parks. "The Jury Sunshine Project: Jury Selection Data as a Political Issue" (2017), University of Illinois Law Review, Vol. 2018, No. 4, 2018. https://ssrn.com/abstract=2994288.)

Further studies have noted that racial bias in jury selection is also present in civil cases, with racial stereotypes including "the general belief that black jurors are more sympathetic toward civil plaintiffs." (Bellin and Semitsu, "Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney" (2011). Cornell L. Rev., Vol 96, https://scholarship.law.cornell.edu/clr/vol96/iss5/7 .) This study of all federal criminal and civil jury trials between 2000-2009 led the researchers to conclude that, because *Batson* motions are so easily avoided through the use of a purportedly race-neutral reason, there is no reason to believe that *Batson* is "achieving its goal of eliminating race-based jury exclusion and little hope that it will ever do so."

The Washington Supreme Court developed new rules of court to address these concerns. A workgroup consisting of judges, attorneys, and representatives of legal rights organizations developed a set of rules for juror selection. The final workgroup report emphasizes the importance of addressing implicit bias in the jury selection process, and made several very important suggestions, including that the burden of proof should rest with the party opposing the juror (the person exercising their peremptory challenge to remove the juror). Recognizing the need to place the burden of defending the peremptory challenge on the party seeking to remove a juror, the Washington State workgroup noted, "instead of requiring the defendant or objecting party to prove a prima facie case of discrimination against a particular juror, workgroup members generally agreed the burden should be carried by the striking party to give reasons to justify the peremptory challenge for the judge's determination." (Washington Supreme Court, "Proposed New GR 37—Jury Selection Workgroup Final Report", (2018),

https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf .) The new Washington rule, GR 37, went into effect in April 2018. Although the proponents of this bill have noted that anecdotal evidence in Washington suggest a decrease in the overall use of peremptory challenges, no formal studies are yet available describing the effect of the new rule.

The California Supreme Court announced in January 2020 that they were launching a similar workgroup, the California Jury Selection Work Group. The group is tasked with "undertak[ing] a thoughtful, inclusive study of how Batson/Wheeler operates in practice in California and whether modifications or additional measures are warranted to address impermissible discrimination against cognizable groups in jury selection." Specific questions touch on the effects of the purposeful discrimination standard and unconscious bias as well as standards of appellate review. The results of this workgroup are not yet available.

This bill seeks to address areas of concern in the Batson-Wheeler procedure. This bill incorporates many of the suggestions from the Washington workgroup as well as language from existing California law prohibiting discrimination based on gender and sexual orientation. The primary changes between existing court procedure (Batson-Wheeler) and the procedure under this bill are as follows:

1. Instead of protecting only against acts of intentional discrimination, AB 3070 addresses unlawful discrimination in jury selection in the form of both intentional and unconscious bias.

2. Instead of using a subjective test where the court must determine the actual motivation of the opposing party, AB 3070 uses an objective test to measure discrimination (whether an objective observer could view unlawful bias as a factor in the elimination of a prospective juror).

3. Instead of requiring reasons for the peremptory challenge to be given only after a "prima facie" case of discrimination is shown, AB 3070 requires the challenging attorney to state reasons for the challenge whenever an objection is made that the challenge is discriminatory (stating reasons on the record whenever an objection is made), so that appellate courts will have more information with which to determine whether discrimination occurred during jury selection.

4. Instead of permitting any "facially neutral" reason for a peremptory challenge, AB 3070 disallows reasons that are commonly associated with racial and ethnic groups and women, unless they can be shown to be unrelated to the prospective juror's identity groups.

5. Instead of allowing the court to find new reasons to justify a peremptory challenge, AB 3070 requires the court to examine only the reasons given and not speculate on any other unstated reasons for the challenge.

Areas of concerns with procedure and implementation. The procedures laid out in this bill are modeled on the new rule used in Washington courts (GR 37) and tailored by various stakeholders and Committee staff in order increase clarity and workability. However, there are still lingering questions and concerns about several details of the procedure and implementation outlined in the bill.

Several of the reasons used to justify peremptory challenges, which are also historically associated with improper discrimination, are based on the courtroom behavior of the prospective juror. This includes sleeping or not paying attention, avoiding eye contact, exhibiting problematic attitude, or providing unintelligent or confused answers (Sec 1 (e)(13-15) of the bill). This bill prohibits these reasons for justification of a peremptory challenge if there has been no reasonable notice to remedy the behavior. The bill is vague on what constitutes "reasonable notice" to remedy the behavior, which could result in disparate implementation of this section in different courtrooms across the state. *As the bill is approved by the Committee and moves forward, the author may wish to clarify the process of providing reasonable notice and opportunity to remedy the behavior.*

Further, there are concerns over the standard for evaluating whether one of the disallowed reasons is actually unrelated to the protected group that the juror belongs to (Sec 1 (e) of the bill). As currently in print, the bill requires that the opposing party provide "clear and convincing evidence" that their rationale was unrelated to the prospective juror's race, ethnicity, gender, or other identity groups. While some may argue that this is too high of a standard for the voir dire process, after several discussions between stakeholders, the consensus was that it was best to err on the side of protecting the prospective juror and parties of the case from discriminatory behavior. *Should this bill advance, additional discussion is likely regarding the standard to be utilized when evaluating the merits of a specific peremptory challenge to a specific juror. Although this standard may change from the bill in print, this Committee notes that maintaining an objective, workable standard is imperative for the successful implementation of any reforms to the Baton-Wheeler process.*

The California District Attorneys Association expresses a number of additional concerns about the implementation of this bill. They argue that replacing the current standard of prohibiting purposeful discrimination with a "vague objective standard" is inadvisable. However, the author and proponents of this bill suggest that the importance of addressing implicit bias outweighs the potential negative consequences of the necessarily nonspecific standard in the bill ("an objective observer could view race, ethnicity, gender…as a factor in the use of the peremptory challenge"). Further, it is important to remember that the current standard for evaluating purposeful discrimination is also vague and subjective, because the determination of whether discrimination took place is based on assessments of the "state of mind" of the opposing party, which leads to very few findings of purposeful discrimination.

The California District Attorneys Association also expresses concerns about the invalidation of many long-accepted reasons for peremptory exemptions, including "negative experience with law enforcement, a juror's belief that the criminal laws have been enforced in a discriminatory manner, and employment in a field that is disproportionately occupied by members of a protected class". With respect to the employment question, they argue that "it is hard to determine without extensive occupational studies how such disproportion could ever be proven." In response, the proponents of this bill suggest that, despite the added effort on behalf of parties involved in voir dire to understand how different protected groups are disparately impacted by law enforcement and the job market, it is important to make sure that these factors are not used in order to unconsciously discriminate against large swaths of our population.

To that end, the implementation of these new procedures would require judges, and likely also the parties involved in voir dire, to receive training on unconscious and implicit bias in order to fully implement the provisions of this bill. Without adequate training, the implementation of the

test of whether "an objective observer could view race, ethnicity, gender…as a factor in the use of the peremptory challenge" would vary across the state. *Should this bill advance, the author may wish to consider delaying the implementation date of this bill to permit the Judicial Council and the legal community adequate time to conduct any needed trainings on the new procedures.*

Finally, there is concern about how this bill will affect court efficiency and the length of the voir dire process. Though this bill may encourage more objections to the improper use of peremptory challenges given the expansion of objectionable reasons, it's not clear that the deliberation in this process will take longer than the current Batson-Wheeler process. Furthermore, as noted above, early evidence in Washington suggests that the heightened standards for exercising peremptory challenges is leading to few challenges overall, which would in turn suggest this process may actually generate greater efficiencies in the voir dire process. However, concerns remain that the possible remedies for a discriminatory challenge may result in unnecessary delays. As in print, the bill lists several remedies for the discriminatory use of a peremptory challenge: reseating the challenged prospective juror, declaring a mistrial, or providing any other remedy the court deems appropriate and is acceptable to the objecting party. As it stands, a judge may order a mistrial even if the objecting party does not wish to completely abandon the current trial, ultimately delaying justice for all parties involved. *The author may wish to consider amending the bill to reflect that mistrials should only considered as a remedy if the objecting party agrees.*

ARGUMENTS IN SUPPORT: California Attorneys for Criminal Justice, the sponsors of the bill, write in support of the bill:

> The California Attorneys for Criminal Justice (CACJ), a statewide association of criminal defense attorneys in private practice or working in public defender offices, sponsors and writes in strong support of AB 3070 (Weber) to create an effective procedure for bringing an end to discrimination in the selection of juries. … Juries across the country, and in California, often fail to adequately reflect a cross-section of the community. Despite current safeguards, too often individuals are excluded from juries based because of their race, ethnicity, gender, sexual orientation or other legally-protected characteristics. This bill would improve the process to identify inappropriate bias in the jury selection process.
>
> … Our criminal justice system is filled with wrongful convictions that perhaps could have been prevented if we were able to address racial bias in jury selection. AB 3070 is a critical step to improve the integrity of our criminal justice system.

The California Public Defenders Association writes in support of the bill:

> AB 3070 (Weber) creates new procedures which address unlawful discrimination in the selection of juries, regardless of whether the bias is intentional or implicit; it replaces the *Batson* which is based effectively on an assessment of whether a party is being truthful in stating a juror was excused for reasons other than race etc. and requires the attorney challenging a juror to state the reasons for the challenge whenever an objection is made that the challenge is discriminatory; it disallows "facially neutral" reasons supporting excusal of a juror that are now permitted but that are inextricably intertwined with race or ethnicity … and it requires courts examine the reasons actually given and not speculate about whether there are other, unstated reasons for the challenge that were never made.

> CPDA members can attest to the failure of the *Batson* framework in preventing jurors from being excused based on race, ethnicity and other improper factors. This bill goes a long way to righting a wrong that has permeated the criminal justice system for many years.

The San Francisco Public Defender writes in support of the bill:

> The basic defect in the current procedure is that it only provides a remedy if the other party proves that the attorney making peremptory challenge was motivated by intentional discrimination. For a citizen who has been denied the right to serve on a jury or a defendant who has been denied the right to a trial by a jury that fairly represents the community, it does not matter whether the discrimination was intentional or the result of the unconscious biases that are always present. As the courts have acknowledged, it can be difficult and often impossible for a trial judge to determine whether the lawyer actually intended to discriminate. Judges are often reluctant to ask lawyers to provide reasons for challenging a juror, and even when they do, both the trial courts and the reviewing courts have been strongly inclined to accept whatever justifications are offered – even if those reasons are 'trivial' or 'arbitrary or idiosyncratic.' The result has been especially detrimental to African Americans, Latinos and other people of color.

ARGUMENTS IN OPPOSITION: The California District Attorneys Association writes in opposition of the bill:

> [We] regret to inform you that we are opposed to your measure, AB 3070. This bill would upend literally decades of state and federal jurisprudence, beginning with the seminal California case of People v. Wheeler (1978) 22 Cal. 3d 258, would remove judicial discretion during voir dire, and would replace the prohibition on purposeful discrimination with a vague objective standard. … Our Association completely supports the current and historical standard that neither side may utilize purposeful discrimination in jury selection (see, e.g., *Johnson v. California* (2005) 545 U.S. 162, 168.) … Moreover, your bill would presumptively invalidate a number of reasons that have long been accepted by state and federal courts to justify a juror challenge….

REGISTERED SUPPORT / OPPOSITION:

Support

California Attorneys for Criminal Justice (Sponsors)
8th Amendment Project
ACLU California
Anti-Defamation League
Asian Americans Advancing Justice - California
California Appellate Defense Counsel, INC.
California Coalition for Women Prisoners
California for Safety and Justice
California Public Defenders Association
California United for A Responsible Budget (CURB)
Ella Baker Center for Human Rights
Equal Justice USA
Friends Committee on Legislation of California
Harm Reduction Coalition

Initiate Justice
National Association of Social Workers, California Chapter
Re:store Justice
San Francisco Public Defender
Showing Up for Racial Justice (SURJ) Bay Area

Oppose

California District Attorneys Association

Analysis Prepared by: Emily Wonder & Nicholas Liedtke / JUD. / (916) 319-2334