SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2025-2026 Regular Session

SB 645 (Umberg)
Version: February 20, 2025
Hearing Date: April 8, 2025
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Juries: peremptory challenges

DIGEST

This bill permanently exempts civil cases from requiring certain procedures to be used when a peremptory challenge is exercised against a potential juror.

EXECUTIVE SUMMARY

The United States and California Constitutions protect the right to a trial by an impartial jury in criminal and civil cases. The voir dire process, in which the court and counsel select a jury, permits counsel to exercise peremptory strikes against potential jurors without needing to state a reason for the strikes. To ensure that peremptory strikes are not used to remove jurors for discriminatory reasons—e.g., to keep potential jurors of a specific race or gender off of the panel—California courts have used a three-step process by which counsel can challenge the other party's peremptory strike and the court determines whether the strike was, in fact, improperly motivated.

In 2020, the Legislature enacted AB 3070 (Weber, Ch. 318, Stats. 2020), which established a more in-depth process by which courts would determine whether a peremptory challenge was the product of improper discrimination. AB 3070's new process was immediately applicable in criminal cases, and is set to apply in civil cases beginning January 1, 2026.

This bill removes the January 1, 2026, date for AB 3070's application in civil cases, so that voir dire in civil cases will continue to use the three-step process for testing potentially discriminatory peremptory strikes. The bill does not affect AB 3070's application in criminal cases.

This bill is sponsored by the Consumer Attorneys of California and California Defense Counsel. The Committee has not received timely opposition to this bill.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Provides for the right to trial by an impartial jury as follows:
    a) In all criminal prosecutions; however, in a criminal prosecution in state court, the jury may be waived with the consent of both parties in open court. (U.S. Const., 6th amend; *Ramos v. Louisiana* (2020) 590 U.S. 83, 93 (Sixth Amendment applies to the states through incorporation by way of the Fourteenth Amendment); Cal. Const., art. I, § 16.)
    b) In civil suits at common law in federal court, where the value in controversy exceeds $20. (U.S. Const., 7th amend.; *Minneapolis & St. Louis Railroad Co. v. Bombolis* (1916) 241 U.S. 211, 217.)
    c) In civil suits under state law in state court; a verdict may be rendered by three-fourths of the jury. (Cal. Const., art. I, § 16.)

2) Establishes the Trial Jury Selection and Management Act (the TJSMA), which governs the selection of jurors and the formation of trial juries in civil and criminal cases in all trial courts of the state. (Code Civ. Proc., pt. 1, tit. 3, ch. 1, §§ 190 et seq.)

3) Provides that voir dire of potential jurors in criminal and civil cases shall be conducted in two steps:[1]
    a) First, the judge conducts an initial examination of prospective jurors; the judge may, as they deem proper, include in their initial questioning additional questions submitted by the parties.
    b) Second, upon completion of the judge's initial examination, counsel for each party has the right to examine, by oral and direct questioning, any of the prospective jurors. The scope of counsel's examination shall be within reasonable limits prescribed by the judge, and the judge shall permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case. (Code Civ. Proc., §§ 222.5, 223.)

4) Establishes two types of challenges to a potential trial juror:
    a) Challenges for cause, which may be for one of three reasons: (1) the juror is disqualified from serving in the action or trial (e.g., because they are a party or a witness); (2) the juror's implied bias, based on the facts as ascertained; or (3) the juror's actual bias, which will prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of any party.
    b) Peremptory challenges. (Code Civ. Proc., §§ 225-231.)

5) Establishes the number of peremptory challenges available by case type, as follows:

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[1] There are slight differences between the criminal and civil voir dire process that are not relevant to this analysis. (*Compare* Code Civ. Proc., § 222.5 *with id.*, § 223.)

a) In a criminal case in which the offense charged is punishable by death or life imprisonment, the defendant and the people are entitled to 20 peremptory challenges each.
b) In a criminal case in which the offense charged is punishable by less than death or life imprisonment, but more than a maximum term of imprisonment of 90 days or fewer, the defendant and the people are entitled to 10 peremptory challenges each.
c) In a criminal case in which the offense charged is punishable with a maximum term of imprisonment of 90 days or fewer, the defendant and the people are entitled to 6 peremptory challenges each.
d) In civil cases, each party is entitled to six peremptory challenges.
e) In criminal cases in which multiple defendants are tried jointly, and in civil cases in which there are more than two parties, each party is entitled to additional peremptory challenges, as specified. (Code Civ. Proc., § 231.)

6) Prohibits a party from using a peremptory challenge on the basis of a juror's membership in a cognizable group, as follows:
   a) A party may not use peremptory challenges to discriminate against members of a cognizable racial, religious, ethnic, or other identifiable group. (*People v. Arias* (1996) 13 Cal.4th 92, 135; *see also Batson v. Kentucky* (1986) 476 U.S. 79, 84 (deliberate exclusion of an individual from a jury on the basis of the individual's race violates the Equal Protection Clause of the Fourteenth Amendment).)
   b) A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the juror is biased merely because of the juror's sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, sexual orientation, gender, gender identity, gender expression, or similar grounds. (Code Civ. Proc., § 231.5; Gov. Code, §§ 11135, 12926.)

7) Establishes, through case law, a procedure (known as a *Batson-Wheeler* hearing) by which the judge can address a party's objection to another party's peremptory challenge, when the first party believes that the peremptory challenge was improperly exercised:
   a) The party who believes the peremptory challenge was improper must make a timely objection, i.e., before jury empanelment is complete.
   b) The trial judge then must rule on whether the objection party raised a prima facie case of discriminatory purpose "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose" (*Johnson v. California* (2005) 545 U.S. 162, 168); the judge must consider a number of factors in determining whether an inference of discriminatory intent has been established, including whether the party has struck all or most of the members of an identified group.

c) If the trial judge finds that a prima facie case of discriminatory intent has been made, the party exercising the challenge must provide a genuine and neutral justification for each challenged peremptory strike.
d) The trial judge must then determine whether the proffered genuine and neutral reasons are true or merely a pretext for discrimination.
e) If the court determines that the peremptory challenge was improper and a juror was improperly stricken, the court must fashion an agreeable remedy, which may include dismissing the panel and commencing jury selection with an entirely new venire, or ordering the improperly dismissed juror reseated. (*Johnson*, *supra*, 545 U.S. at p. 168; *People v. Scott* (2015) 61 Cal.4th 363, 383-392; *People v. Wheeler* (1978) 22 Cal.3d 258, 278-283, *overruled in part by Johnson*, *supra*.)

8) Establishes, by statute, an alternative procedure for a party to object to an allegedly improper use of a peremptory challenge, and for the judge to rule on the objection, in criminal cases. Among other things, this statutory procedure makes certain bases for exercising a peremptory challenge presumptively invalid and requires a judge to consider whether unconscious bias motivated the use of a peremptory challenge. (Code Civ. Proc., § 231.7.)

9) Provides that the provision exempting civil cases from using the alternative procedure set forth in 8) will sunset on January 1, 2026. (Code Civ. Proc., § 231.7(n); AB 3070 (Weber, Ch. 318, Stats. 2020, § 3.)

This bill:

1) Removes the January 1, 2026, sunset date for the provision excluding civil cases from the statutory peremptory challenge objection statute, making the exclusion permanent.

COMMENTS

1. Author's comment

According to the author:

> SB 645 would prohibit certain prohibitions on peremptory challenges from being applicable to civil cases.
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> *Voir dire* is the process by which prospective jurors are questioned by the judge and the attorneys from both sides to evaluate their backgrounds and potential biases. Existing law allows the parties in criminal and civil cases to remove jurors from the jury panel by exercising challenges for cause and peremptory

challenges, to select a jury composed of individuals who can render a fair judgment about the facts of the case.

Challenges for cause are statutory and include incapacity, relationship to the parties' interests in the action, opinion on the merits, bias, or prejudice. In contrast, peremptory challenges are made without the need to state a cause if the attorney believes they are not a good fit for their case. Code of Civil Procedure (CCP) §231.7 contains a list of statutorily invalid reasons for an attorney to exercise preemptory challenges. The list of invalid reasons has long included traditionally protected classes such as race, sex, and religion.

In 2020, AB 3070 sought to improve the peremptory challenge process in California for both civil and criminal cases. Civil justice advocates supported an exclusion for civil cases, which was accepted by the author prior to Senate hearings. However, contrary to the author's wishes, a civil sunrise provision was inserted into the bill in Senate Appropriations, applying AB 3070 to civil cases beginning in 2026.

The jurisprudence concerning peremptory challenges and their improper use by counsel has been almost exclusively a phenomenon in criminal cases. Criminal proceedings implicate liberty interests in a way that civil cases do not. Take for example, the concept of patterns of conduct.. In every case, the "plaintiff" in a criminal case is the people, represented by city, county, or state prosecutors. In criminal matters, judges and counsel can evaluate patterns of conduct in the use of peremptory challenges that are completely different than in civil matters, since plaintiffs in civil cases are very rarely repeat parties, and even defendants may well only be named in one or a small number of cases.

Second, civil cases encompass a broad range of issue areas, including personal injury, employment, class actions, environmental toxic exposure, privacy/data breaches, civil rights, elder abuse, and more. AB 3070 was crafted specifically with criminal court in mind to avoid all the case types in civil cases.

Third, criminal voir dire is often a lengthy process, longer than civil voir dire. Consequently, civil counsel often must make decisions on jury selection based off less information from potential jurors…

Under SB 645, California's new and improved peremptory challenge policies and rules will only apply to the much more complicated and nuanced cases of criminal court. In doing so, this measure will allow for the continued streamlining of California's civil court proceedings as the courts work to clear longstanding backlogs and will preserve the *Batson-Wheeler* process for civil cases, ensuring civil proceedings remain protected from unlawful discrimination in the jury selection process.

2. The voir dire process in civil cases

The right to trial by jury is protected in both the federal and state Constitutions.[2] While the Seventh Amendment's guarantee of a trial by jury in civil cases has not been incorporated to apply to the states by way of the Fourteenth Amendment,[3] California's Constitution separately guarantees the parties the right to a trial by jury.[4] The right may be waived with the consent of both parties, and unlike in a criminal case, a civil jury verdict may be rendered when only three-fourths of the jurors agree.[5]

The TJSMA governs the jury selection process in California state court proceedings.[6] The TJSMA covers matters from who is qualified to serve as a juror[7] to how lists of qualified jurors are created for jury selection[8] to jurors' duties during trial.[9] Relevant to this bill are the TJSMA's provisions for voir dire and peremptory challenges.

In voir dire, or the jury selection process, members of the jury pool are asked questions to determine their fitness to serve in the particular trial. The judge first asks the potential jurors a standardized set of general questions, and then counsel for the parties are permitted to ask more probing questions to determine if there are reasons why the juror may not be fit to serve.[10] After questioning, counsel for one of the parties can request that a juror be struck from the panel in one of two ways: through a "for cause" strike; or through a "peremptory challenge."[11]

A party may ask a court to strike a juror "for cause" when they believe that there is a statutory reason why the juror is unfit to serve in the particular trial.[12] For-cause strikes may be granted for a range of reasons, including that the juror does not possess sufficient knowledge of the English language to meaningfully participate; that the juror is the subject of a conservatorship; or that the juror harbors an implied or actual bias that would prevent them from rendering a fair verdict at trial.[13] There is no limit on how many strikes for cause may be granted, but trial judges are generally reluctant to grant for-cause strikes unless it is clear that the potential juror does not satisfy the statutory requirements.

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[2] U.S. Const., 6th & 7th amends.; Cal. Const., art. I, § 16.
[3] *E.g.*, *Curtis v. Loether* (415 U.S. 189, 192, fn. 6.
[4] Cal. Const., art. I, § 16.
[5] *Ibid.*
[6] Code Civ. Proc., pt. 1, tit. 3, ch. 1, §§ 190 et seq.
[7] *Id.*, § 203.
[8] *Id.*, §§ 198, 198.5.
[9] *Id.*, § 236.
[10] *Id.*, §§ 222.5, 223.
[11] *Id.*, § 225.
[12] *Ibid.*
[13] *Id.*, §§ 203, 225, 228-230.

In addition to for-cause strikes, each party in a civil case also has six peremptory challenges, which the party may exercise against a potential juror without stating a reason.[14] The parties take turns exercising their peremptory challenges,[15] which can lead to a game of chicken wherein each side declines to use a peremptory challenge on a potentially problematic juror with the goal of forcing the other side to use one of their challenges. Peremptory challenges can generally be exercised for any reason or no reason,[16] except that peremptory challenges cannot be exercised to discriminate against members of a "cognizable racial, religious, ethnic, or other identifiable group."[17] Additionally, a party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the juror is biased as a result of specified characteristics, including race, sex, gender, gender identity, sexual orientation, religion, and other similar bases.[18]

3. *Batson-Wheeler* and AB 3070

Through 2020, in both criminal and civil cases, if a party believed that another party was exercising peremptory challenges for an improper purpose—e.g., to exclude all members of a particular race from the jury—the party would object to the challenge and the court would hold a "*Batson-Wheeler* hearing" to rule on the objection.[19]

A *Batson-Wheeler* hearing is a three-step process. First, the party objecting to the peremptory challenge must make a prima facie case that the challenge was improper by "showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose."[20] If the objecting party succeeds in making their prima facie case, the burden shifts to the party that exercised the challenge "to give an adequate nondiscriminatory explanation for the challenges," which must be "reasonably clear and specific."[21] Assuming the challenging party offers a nondiscriminatory reason—unsurprisingly, it is rare for a party to admit to improper discrimination—the judge is then required to determine whether the objecting party proved purposeful determination.[22] At this step, the judge must determine whether the objecting party has established that it is more likely than not that the challenger engaged in purposeful

[14] *Id.*, § 231(c). If there are more than two parties in the case, the judge determines which parties are on each "side," and each side gets eight peremptory challenges; if there are more than two "sides," the judge may grant additional peremptory challenges as the interests of justice require. (*Ibid.*)
[15] *Id.*, § 231(d).
[16] *Id.*, § 226(b).
[17] *People v. Arias* (1996) 13 Cal.4th 92, 135 (cleaned up).
[18] Code Civ. Proc., § 231.5.
[19] *Batson-Wheeler* hearings are named for federal and state cases prohibiting discrimination in jury selection. (*See Batson v. Kentucky* (1986) 476 U.S. 79, 84; *People v. Wheeler* (1978) 22 Cal.3d 258, 278-283, *overruled in part by Johnson v. California* (2005) 545 U.S. 162, 168.)
[20] *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158.
[21] *Ibid.* (internal quotation marks omitted).
[22] *Ibid.*

discrimination.[23] In making this ruling the judge must determine whether, as a subjective matter, the challenging party's justification was a pretext for discrimination or whether it was genuine.[24] If the judge determines that the challenge was improper, the judge has broad discretion to fashion an equitable remedy, including allowing the improperly stricken juror to be seated or dismissing the venire and restarting jury selection with an entirely new panel of potential jurors.[25]

In 2020, the Legislature enacted AB 3070 (Weber, Ch. 318, Stats. 2020), which established a new process by which courts would determine whether a peremptory challenge was the product of improper discrimination. AB 3070's process is significantly more intricate than the *Batson-Wheeler* process, requiring courts to look not only for deliberate discrimination but also implicit and unconscious bias.[26] AB 3070 also requires courts to use an objective, rather than subjective, test to determine whether a challenge was motivated by the juror's membership in a protected group, and requires courts to consider a number of factors in reaching this decision.[27] The author of AB 3070 believed that the *Batson-Wheeler* process was insufficient to address the still-rampant problem of discrimination, including discrimination as a result of implicit bias, in the jury selection.[28]

AB 3070 was originally drafted to apply in both civil and criminal cases. The Senate Appropriations Committee, however, amended the bill to exclude civil cases from AB 3070's requirements until January 1, 2026. The bill was signed with the 2026 sunset intact.

4. <u>This bill removes the sunset provision exempting civil cases from AB 3070</u>

This bill eliminates the sunset on AB 3070's exemption for civil cases, permanently preventing AB 3070's peremptory challenge process from applying in civil cases. Under this bill, the *Batson-Wheeler* procedure for ruling on peremptory challenge objections would remain in effect in civil cases. Because this bill does not alter AB 3070's application in criminal cases, this bill has not been referred to the Senate Public Safety Committee.

The Consumer Attorneys of California and California Defense Counsel, the bill's sponsors, explain why they believe AB 3070's peremptory challenge process is not needed in civil cases:

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[23] *Ibid.*
[24] *Id.* at pp. 1158-1159.
[25] *People v. Willis* (2002) 27 Cal.4th 811, 821-822.
[26] *See* Code Civ. Proc., § 231.7 (enacted by AB 3070).
[27] *Ibid.*
[28] Sen. Com. on Public Safety, Analysis of Assem. Bill No. 3070 (2019-2020 Reg. Sess.) as amended Jul. 28, 2020, pp. 8-9.

> The jurisprudence concerning peremptory challenges, and their improper use by counsel, has been almost exclusively a criminal phenomenon. In terms of *Batson-Wheeler* challenges in California, our research suggests that *Batson v. Kentucky* has been cited in 1,569 published and unpublished appellate decisions, of which 1,559 were criminal and only 10 were civil. With respect to citations to *Wheeler v. California*, we have located 2,090 published and unpublished appellate decisions citing the case, of which 2,065 were criminal cases and only 25 were civil.[…]
>
> Criminal proceedings implicate liberty interests in a way that civil cases do not. In every case, the "plaintiff" in a criminal case is the people, represented by city, county, or state prosecutors. In criminal matters, judges and counsel can evaluate patterns of conduct in the use of peremptory challenges that are completely different than in civil matters, since plaintiffs in civil cases are very rarely repeat parties, and even defendants may well only be named in one or a small number of cases.
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> Second, civil cases cover a far-ranging variety of issue areas such as personal injury, employment, class actions, environmental toxic exposure, privacy/data breach, civil rights, elder abuse, and more. The provisions of AB 3070 are crafted specifically with criminal [cases] in mind rather than considering all the case types in civil cases. For example, in law enforcement whistleblower cases where a law enforcement officer is suing their department for misconduct, whether a juror has a distrust in law enforcement is relevant to the proceedings. Instead of this factor being racially motivated as in criminal cases, in a civil whistleblower case distrust would provide counsel insight as to how the juror views the case at hand.
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> Third, criminal voir dire is often a lengthy process, longer than civil voir dire. Therefore, civil counsel often must make decisions on jury selection based off less information from the jurors. For example, one of the factors a court can consider in whether a peremptory challenge was improper relates to the length of time questioning the specific juror. With more stringent time constraints, this factor would be problematic for either side's counsel to challenge an alleged AB 3070 violation by clear and convincing evidence as required under the bill.

SUPPORT

California Defense Counsel (co-sponsor)
Consumer Attorneys of California (co-sponsor)

OPPOSITION

None received

RELATED LEGISLATION

Pending legislation: SB 758 (Umberg, 2025) limits certain bases relating to beliefs and feelings about law enforcement, and the juror's history with law enforcement, in Section 231.7's list of presumptively invalid bases for a peremptory challenge, so that they do not apply in cases where a law enforcement officer is the defendant or alleged victim. SB 758 is pending before the Senate Public Safety Committee.

Prior legislation:

AB 3039 (Essayli, 2024) would have removed two bases relating to beliefs and feelings about law enforcement from Section 231.7's list of presumptively invalid bases for a peremptory challenge. AB 3039 failed passage in the Assembly Judiciary Committee.

SB 212 (Umberg, 2021) would have eliminated peremptory challenges in criminal cases and repealed Section 231.7 as it applied to criminal cases. SB 212 failed passage in the Senate Public Safety Committee.

AB 3070 (Weber, Ch. 318, Stats. 2020) *See* Part 3 of this analysis.

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