PERFECTING THE JUDICIAL PEREMPTORY CHALLENGE: A NEW APPROACH USING PRELIMINARY DATA ON CALIFORNIA JUDGES IN 2021

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ABSTRACT

Even the most carefully planned and genius strategies are pointless without an assumption of fairness: chess depends on a fair arbiter, soccer depends on a fair referee, and litigation depends on a fair judge. Just as arbiters and referees are frequently criticized for questionable decisions, judges also deal with accusations that bias has impossibly clouded their judgment. To protect litigants, the California Legislature presented a solution—the California Code of Civil Procedure section 170.6, a statute arming litigants with the option to replace their assigned judge if they declare that judge biased. This judicial peremptory challenge asks for no evidence of bias, further frustrating the disagreement between proponents who claim that this right will trigger a chain reaction to increased public confidence and decreased discrimination against litigants, and opponents who conversely warn that it will open a Pandora’s box of abuse, intimidation, and discrimination against innocent judges. The difficulty of constraining various harmful human tendencies is the problem of judicial peremptory challenges writ large.

It appears that much of this policy debate about judicial peremptory disqualification is informed by theory rather than empirical data. The study conducted by this Note reveals that, at least in 2021, (1) peremptory
challenges do not occur often but abuse still occurs among the few times they are asserted, and (2) timing and form rules are weak procedural obstacles. My proposal acknowledges that judges are sometimes not the epitome of neutrality but takes issue with litigants who may inflict damage on undeserving judges and the adjudication generally. Instead of the current “no-questions-asked” regime, the recommended procedure is the following: after litigants receive judicial analytics, they can file the disqualification motion with an independent judge who will review both the motion and the challenged judge’s evidentiary explanation for factual and legal sufficiency. Admittedly, like its federal counterpart, this is not peremptory per se, but it is preferrable as it will perfect the peremptory challenge and diminish the risk of abuse even more than the current model.

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INTRODUCTION

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals.

—Justice Cardozo

The Lady Justice sculptures that adorn the United States Supreme Court building serve as a reminder of the high standards to which we hold judges: her blindfold and scales represent unwavering impartiality. But juxtaposing Lady Justice, a godlike figure from ancient mythology, with judges, human beings vulnerable to inevitable fallibility, begs the question of whether these standards are unattainable ideals. What happens when judges cannot wear the blindfold and hold the scales yet still wield the sword symbolizing power? The California Legislature responded to this reality by enacting California Code of Civil Procedure section 170.6 (“Section 170.6”) which grants judicial peremptory challenges, or the power to automatically disqualify a judge for bias even without any evidence of such bias, to litigants. Given that plaintiffs and defendants in the United States bear the burden of proof to succeed in their claims and defenses respectively, the

3. Id.
4. Understandably, judges may find it challenging to be “patient, dignified and courteous” at all times given stressors in their personal life. Debra C. Weiss, Judge Agrees to Reprimand after Outbursts Directed at Plaintiff’s Attorney, Scheduling Clerk, ABA JOURNAL (Sept. 26, 2022, 9:55 AM), https://www.abajournal.com/news/article/judge-agrees-to-reprimand-after-outbursts-directed-at-plaintiffs-attorney-scheduling-clerk [https://perma.cc/LZS9-K3D9]. For example, a magistrate judge in South Carolina self-reported himself to the Office of Disciplinary Counsel for using profanity in a comment directed at the plaintiff’s attorney and subsequently completed anger management counseling under the direction of the South Carolina Supreme Court. Id. At the time of his outburst, the judge was struggling to take care of his severely autistic son with epilepsy and his wife who had recently experienced serious health issues. Id.
5. Figures of Justice, supra note 2.
7. CAL. CIV. PROC. CODE § 170.6 (Deering 2023).
significance of this exceptional legal right is apparent. But the California Legislature was not blind to the potential for this statute to act as a double-edged sword: litigants and their attorneys are naturally inclined to exploit this power to “shop” for a judge that is likely to favor their cause. This cost-benefit analysis (“judge shopping,” which seems contradictory to the very essence of judging, weighed against public confidence in the judiciary) still plagues practitioners, legal academics, and judges today, decades after Section 170.6 was added to the California Code of Civil Procedure.

Although peremptory challenges are more commonly associated with jurors rather than judges, the ability to change the assigned judge cannot be understated. The jury has indisputable influence over a case’s outcome by “mak[ing] findings of fact and render[ing] a verdict for [] trial.” Indeed, the foundational right to a judgment by one’s peers in the community dates back to the Magna Carta. Nonetheless, the judge still decides questions of law and thus arguably holds equal, if not more, influence than the jury. This is especially so given all cases have a judge but not all of them have a jury. Moreover, a majority of cases do not proceed to trial: a judge’s ruling on a summary judgment motion has a conclusory effect akin to the end of trial. Even if a case reaches trial, a successful motion for judgment as a matter of law means the judge, not the jury, decides the facts of the case and applies the law. The possibility that Section 170.6 may be abused by parties seeking to delay trial or to obtain a favorable judge was a matter to be balanced by the Legislature against the desirability of the objective of the statute.

8. Johnson v. Superior Ct., 329 P.2d 5, 8 (Cal. 1958) (“The possibility that [Section 170.6] may be abused by parties seeking to delay trial or to obtain a favorable judge was a matter to be balanced by the Legislature against the desirability of the objective of the statute.”).
9. Consider former President Trump’s lawsuit against Hillary Clinton, among others, in which “Trump’s legal team... was specifically seeking out a particular federal judge: one he appointed as president.” Jose Pagliery, Trump Went Judge Shopping and It Paid Off in Mar-a-Lago Case, DAILY BEAST (Sept. 6, 2022, 11:07 AM), https://www.thedailybeast.com/donald-trump-went-judge-shopping-and-it-paid-off-in-mar-a-lago-case [https://perma.cc/V8Y8M-JMMK].
15. BRIDIE HEING, WHAT DOES A JUROR DO? 7 (2018). In a bench trial without a jury, the judge “decides the facts of the case and applies the law.” Bench Trial, LEGAL INFO. INST., https://www.law.cornell.edu/wex/bench_trial [https://perma.cc/E4P7-BX5Q]. Unlike criminal cases in which defendants are guaranteed the right to a trial by jury under the Sixth Amendment of the U.S. Constitution, civil cases are not always afforded the same right. Jury, supra note 11.
matter of law\textsuperscript{17} or a motion for new trial\textsuperscript{18} can subvert the jury’s verdict.

Considering judges’ unparalleled authority over litigants’ fate, notwithstanding the jury’s role, it is no surprise that judges must not “manifest bias . . . including but not limited to bias . . . based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation . . . .”

Judicial independence not only has a rich history predating Enlightenment philosophy,\textsuperscript{20} but is also at the core of national identity in the United States: former President Adams, one of the Founding Fathers, wrote about the right to trial by “judges as free, impartial, and independent as the lot of humanity will admit” in the original Massachusetts Constitution.\textsuperscript{21} Judges are supposed to represent the best of human nature, maintaining superior morals and ethics. This image erodes when judges rule with regard to “which side is popular” and “who is ‘favored.’”\textsuperscript{22} Impartiality in the courts is not a mere exercise in political correctness but a vital component of a fair, just, and democratic society rid of corruption. Once the public no longer trusts judges to treat them equally with their adversary, a domino effect to anarchy may ensue whereby people will stop respecting and therefore complying with orders from the judiciary and government at large. However, judicial discretion is as crucial to the proper functioning of the legal system as judicial impartiality because indeterminate laws require judges to “consider practical consequences and the overall context of a matter.”\textsuperscript{23} Alexander Hamilton, one of the Framers of the U.S. Constitution, distinguished between the “guided exercise of discretion” and the “imposition of personal will and preference” by highlighting the “importance of courageous judges to the preservation of individual liberty and to the amelioration of oppressive legislation.”\textsuperscript{24}

\begin{footnotesize}

\textsuperscript{17} Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling, LEGAL INFO. INST., https://www.law.cornell.edu/rules/frcp/rule_50 [https://perma.cc/7822-FHUR].

\textsuperscript{18} Motion for New Trial, LEGAL INFO. INST., https://www.law.cornell.edu/wex/motion_for_new_trial [https://perma.cc/XJ9E-DBKR].

\textsuperscript{19} MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS’N 2020); see also MODEL CODE OF JUD. CONDUCT Canon 2 (AM. BAR ASS’N 2020) (“A judge shall perform the duties of judicial office impartially, competently, and diligently.”).


\textsuperscript{22} See also How Courts Work, supra note 14.


\textsuperscript{24} Id.

\end{footnotesize}
Ideally, litigants would always use Section 170.6 in good faith to defend themselves from judicial bias. Unfortunately, courts confront the ironic truth that some litigants abuse this ability as an offensive maneuver instead. Litigants may take advantage of peremptory challenges to substitute their judge with one that has aligned interests—that is, a biased judge. Section 170.6 can accordingly exacerbate the very problem it was designed to minimize. Bias is a two-way street in which litigants can also discriminate against judges of a particular gender, race, or ethnicity, among other demographics. There was increased legislative movement toward eliminating peremptory juror challenges for this reason in 2021 and publicity on race-based discrimination in jury selection in 2022. If attorneys can discriminate against potential jury members, they can discriminate against judges as well, and the legal field should brace for any future spillover on peremptory challenges to judges. In 2022, 60.1% of judges in California were male, and 61.4% of them were white. Imagine the harm that would result if most of the disqualified judges were members of groups that have historically endured discrimination. The judiciary would subsequently lose the diversity of thought and experiences necessary to adequately understand and evaluate heterogeneous litigants from the United States, a country often referred to as a melting pot.

This Note illustrates the need to abandon the judicial peremptory challenge as it exists today and instead opt for a blend of other variations—specifically, the challenge should be less peremptory and more stringent. Preliminary empirical data in 2021 reveals that (1) peremptory challenges do not occur frequently but abuse still occurs among the few times they are asserted, and (2) timing and form rules are weak procedural obstacles. Although the challenge is not widely abused, a different model will decrease the incidences of abuse even further. In lieu of a conclusory allegation of bias that is instantaneously granted, the proposed disqualification approach allows the challenged judge to refute the allegation with evidentiary explanations. This will hopefully pull the reins on the litigants, however few.

who make an unwarranted, illusory charge of bias against their judge in order to gain a tactical advantage.

This Note begins by providing a high-level overview of how peremptory challenges to judges are treated by federal courts and other state courts besides California. It also explores Section 170.6 in detail, particularly the statute’s legislative history and interplay with judicial rules and peremptory juror challenges. Next, it summarizes the current policy arguments both in favor and against peremptory disqualification of judges: points of contention include discrimination against judges and confidence in the judiciary, among others. It continues with an analysis of data collected from every order in 2021 in which a California superior court judge decided on a Section 170.6 motion, tracking for the number of filed motions, number of denied motions and why they were rejected, number of disqualified judges, and the disqualified judges’ political party. It then synthesizes the findings with judicial disciplinary actions due to bias in 2021, which informs the policy debate by revealing the concerns that actually come to fruition in practice, rather than in theory only, at least in the context of California for this time frame. It additionally explores the reasons behind challenging a judge using The Robing Room, a public forum. Afterwards, it discusses alternative disqualification procedures offered by some legal scholars before advocating a new approach. Finally, the Note ends with recommendations for future research.

I. MODERN LAW OF JUDICIAL PEREMPTORY DISQUALIFICATION

Section 170.6 is a relatively recent addition to judicial disqualification law— the decades since its enactment pale in comparison to the more than one thousand years people have spent developing legal justifications for disqualifying judges. In the mid-eighteenth century, the thirteen American colonies adopted English jurisprudence that, unlike civil law countries, narrowed the scope of judicial disqualification so that a judge could only face disqualification if they had a direct pecuniary interest in the case. Thus, lacking basis in common law, disqualification for bias did not enter

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29. See, e.g., THE CODEX OF JUSTINIAN 619 (Bruce W. Frier & Serena Connolly, eds., Fred H. Blume trans., 2016) (stating that Roman law allowed for judicial disqualification if it occurred before trial).
32. Frank, supra note 30, at 612.
the stage until 1903, well after the founding of the United States, when Montana’s legislature answered the cries of a losing litigant. This win for victims of judicial bias was part of a growing focus on ensuring that judges apply the law in an evenhanded manner, eventually escalating into the federal law’s official acknowledgment. The evolution of judicial disqualification finds itself at a fork in the road: some states in the West and Midwest, including California, allow disqualification with an allegation of bias alone—known as a peremptory challenge—while other states in the East and South join the federal courts in imposing stricter standards by requiring support for the allegation as well.

A. FEDERAL LAW

In 1911, 28 U.S.C. § 144 introduced judicial peremptory challenges into the federal realm. This federal statute closely mirrors Section 170.6 as it permits the disqualification of a district court judge upon a timely affidavit claiming bias. However, it departs from Section 170.6 in a significant way: it requires the affidavit to “state the facts and the reasons for the belief that bias or prejudice exists” and accordingly affords less leeway to litigants. On its face, its wording and legislative history hint at the intent for peremptory disqualification, judicial interpretation steered it on the opposite trajectory. 

33. See id. at 608 n.8.
34. See, e.g., Act of Mar. 3, 1821, ch. 51, § 3 Stat. 643 (ordering recusal if a judge believes they are so related or connected to a party that their decision would be improper) (codified at 28 U.S.C. § 144); Act of Mar. 3, 1891, ch. 517, § 3, 26 Stat. 826, 827 (forbidding a judge from hearing the appeal of a case they tried) (codified at 28 U.S.C. § 47).
36. See, e.g., CAL. CIV. PROC. CODE § 170.6 (Deering 2023); 725 ILL. COMP. STAT. ANN. 5/144–5 (LexisNexis 2023); N.Y. JUD. LAW § 14 (Consol. 2023); TEX. GOV’T CODE ANN. § 25.00255 (LexisNexis 2023); Wamser v. State, 587 P.2d 232, 234–35 (Alaska 1978) (“In the absence of a challenge for cause, no such right [to peremptory challenges] existed at common law, and it is not afforded in the federal courts or in many states in the absence of a showing of factual bias.” (footnotes omitted)).
37. See, e.g., ALAN J. CHASET, DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE: 5–6 (1981) (“28 U.S.C. § 144 has remained virtually unchanged since it was enacted in 1911.” (footnote omitted)).
38. 28 U.S.C. § 144.
40. Frank, supra note 30, at 629 (“Frequent escape from the statute has been effected through narrow construction of the phrase ‘bias and prejudice.’”). Judges are incentivized to narrowly interpret
opined that the challenged judge may conduct a hearing to scrutinize the alleged facts for legal sufficiency, the Court clarified in *Liteky v. United States* that "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display" fall short of bias. The latter case defined the extrajudicial source doctrine: critical, disapproving, or hostile opinions based on facts or events during the proceedings do not warrant disqualification unless "they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible."

Congress largely acquiesced to this rejection of peremptory intent lest they infringe upon the separation of powers by attempting to regulate the judiciary. As a result, "disqualification under [28 U.S.C. § 144] has been rare."

Naturally, the statute could no longer be classified as fully peremptory, distinguishing it from its state counterparts that order automatic disqualification, like Section 170.6.

### B. CALIFORNIA LAW

1. California Code of Civil Procedure Section 170.6

   In 1957, the California legislature debated whether to accept or deny the legacy of judicial peremptory challenges and ultimately concluded with the birth of Section 170.6 through an "overwhelming vote of both houses of the Legislature" and approval by the Governor. The legislation was more radical than California Code of Civil Procedure section 170.1 which

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43. *Id.* at 555. It is worth mentioning that the Ninth Circuit also adds a reasonable person test. Pesnell v. Arsenault, 543 F.3d 1038, 1043 (9th Cir. 2008).
44. Flamm, *supra* note 40, at 756 ("Congress could have taken steps to disabuse the federal judiciary of this notion, but it did not."); Frost, *supra* note 40, at 551–52 ("The legislative and executive branches may feel that it is inappropriate to dictate the minutiae of procedures to be followed when litigants seek to remove a judge from a case, preferring to leave it to the judiciary to clean its own house.").
47. See, e.g., CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—BEFORE TRIAL § 7.2 (West 2022) ("The right to exercise a peremptory challenge against a judge is a creation of statute: it did not
concerns challenges for cause and California Code of Civil Procedure section 170.5 (added as section 170.4 in 1897), which addresses bias as a ground for disqualification. This was not the first time the Legislature dealt with judicial peremptory challenges: four previous measures failed to receive executive approval despite passage by the Legislature. Therefore, Johnson v. Superior Court, the first case to apply Section 170.6, acknowledged how the “[s]tate [b]ar and the Legislature have long felt that there is a need for such a measure.”

Unlike federal judges under 28 U.S.C. § 144, California judges generally fortified Section 170.6 by “liberally constru[ing it] with a view to effect its objects and to promote justice,” starting with its constitutionality. Since the constitutionality of peremptorily disqualifying a judge has been debated since the early twentieth century, it comes as no surprise that Section 170.6 came under attack almost immediately after its enactment. Even before the Legislature took action, the courts in the state ruled in several cases that a similar disqualification statute enacted in 1937 was exist before the enactment of [Section 170.6].”.

48. CAL. CIV. PROC. CODE § 170.1 (Deering 2023); CCP 170.6 – Disqualification of a Judge on Grounds of Prejudice, SHOUSE CAL. L. GRP., https://www.shouselaw.com/ca/defense/disqualification-of-judge-for-prejudice [https://perma.cc/LCSB-E6W8] (“Under [California Code of Civil Procedure section 170.1], a judge can be removed ‘for cause’ if any one or more of the following are true: the judge has personal knowledge of disputed facts in the case, the judge served as an attorney in the proceeding or advised a party in the proceeding, the judge has a financial interest in the proceeding, the judge, or the judge’s spouse, is a party in the case or an officer, director, or trustee of a party, or a person related to the judge, is associated in private practice of law with an attorney in the case.”). Section 170.1 also permits self-removal if the judge believes their recusal would “further the interests of justice” or their impartiality is at risk. Id. Unlike Section 170.6, there are no limits on the number of challenges, Disqualification of a Judge for Prejudice, EISNER GORIN LLP, https://www.egattorneys.com/disqualification-of-a-judge [https://perma.cc/M72S-TTU7], and specific proof is required, How to Request to Change Your Judge, RES. CTR. FOR SELF-REPRESENTED LITIGANTS, https://www.courts.ca.gov/partners/documents/request_change_judge.doc [https://perma.cc/F764-FBN8]. See generally O’CONNOR’S CALIFORNIA PRACTICE CIVIL PRETRIAL Ch. 2-D § 3 (West 2023).

49. CIV. PROC. § 170.5 (Deering 2023); Johnson, 329 P.2d at 7–8.


52. Le Louis v. Superior Ct., 257 Cal. Rptr. 458, 466 (Ct. App. 1989); see, e.g., Pappa v. Superior Ct., 353 P.2d 311, 314–15 (Cal. 1960) (“[L]imiting each ‘side’ to one challenge [of a judge for prejudice] . . . does not arbitrarily discriminate among multiple parties,” since “[t]he Legislature could reasonably determine that this limited restriction was justified in order to prevent undue delays which could otherwise occur.” (citing Johnson, 329 P.2d at 5)); Mayr v. Superior Ct., 39 Cal. Rptr. 240, 243 (Ct. App. 1964) (“[Section 170.6] should not be so strictly construed that the legislative will is thwarted.”); Solberg v. Superior Ct., 561 P.2d 1148, 1159 (Cal. 1977) (“[Section 170.6] makes no provision for a detailed statement of facts, and it is reasonable to infer the Legislature did not intend to impose such a condition.”).

53. Annotation, Constitutionality of Statute Making Mere Filing of Affidavit of Bias or Prejudice Sufficient to Disqualify Judge, 5 A.L.R. 1275 (1920) (summarizing cases that declared peremptory challenges of judges either constitutional or unconstitutional).
unconstitutional. 54 Johnson represented a turning point as the Supreme Court of California deemed Section 170.6 constitutional and overruled the lower court’s decision that “the statute makes an unconstitutional delegation of legislative and judicial powers to litigants and their attorneys and is an unwarranted interference with the powers of the courts.” 55 Section 170.6 is materially different from its unconstitutional predecessor because it calls for litigants to submit a sworn statement instead of a “judicial determination of the existence of the fact.” 56 According to the court, Section 170.6 complies with the Constitution and deserves protection because “[p]rejudice, being a state of mind, is very difficult to prove, and, when a judge asserts that he is unbiased, courts are naturally reluctant to determine that he is prejudiced.” 57 About twenty years later, Section 170.6’s constitutionality returned to the forefront in Solberg v. Superior Court—this court found no separation of powers violation under California Constitution Article III, Section 3. 58 In a post-Johnson and Solberg world, the conversation between Section 170.6’s proponents and opponents has shifted away from constitutionality, but policy concerns persist. As this Note will later discuss, the thousand-year-old debate has still not found its rest.

Section 170.6 was amended to widen its scope: beginning in 1959, the statute extended to criminal, not just civil, cases, 59 and beginning in 1961, oral statements under oath, not just written documents. 60 This trend halted in 1965, when the Legislature forbade litigants from receiving a judicial reassignment if their original judge already presided over a proceeding prior to trial that involved a “determination of contested fact issues relating to the merits.” 61 For the next ten or so years, the statute was only amended twice—


56. Id. at 8–9 (“[T]he disqualification statute enacted in 1937 [provided for a ‘peremptory challenge’ of the judge assigned to hear the case without requiring the person making the challenge to state the ground for his objection or to make a declaration under oath that the ground in fact existed.”).

57. Id. at 8.


59. Act effective Sept. 18, 1959, ch. 640, 1959 Cal. Stat. 2620, 2620. This amendment settled the dispute regarding whether withholding this right from criminal parties was unconstitutional discrimination under the Fourteenth Amendment of the U.S. Constitution and the California Constitution under Article I, Sections 11 and 21, and Article IV, Section 25 for unreasonable classifications. See Johnson, 329 P.2d at 9.


61. Act of 1965, ch. 1442, sec. 1, § 170.6(2), 1965 Cal. Stat. 3375, 3375–76; see Bambula v. Superior Ct., 220 Cal. Rptr. 223, 224 (Ct. App. 1985) (“This addition preserves the right of a party to disqualify a judge under [the statute] notwithstanding the fact that the judge had heard and determined an earlier demurrer or motion, or other matter not involving ‘contested fact issues’ relating ‘to the merits’ without challenge in the same cause.”).
in 1967\textsuperscript{62} and 1976\textsuperscript{63}—to subject court commissioners and referees to potential peremptory disqualification as well.\textsuperscript{64} The Legislature obviously did not shy away from its peremptory intent, given that the affidavit form was amended in 1981 to add “peremptory challenge.”\textsuperscript{65} After another amendment in 1982 that clarified the timeliness requirement for single-judge systems,\textsuperscript{66} the statute was expanded yet again in 1985. Now, litigants who file an appeal that results in the reversal of the trial court’s judgment qualify for protection if the “trial judge in the prior proceeding is assigned to conduct a new trial on the matter.”\textsuperscript{67} Timeliness was then defined as ten days for criminal cases with an all-purpose assignment in 1989.\textsuperscript{68} The following two amendments in 1998\textsuperscript{69} and 2002\textsuperscript{70} responded to modifications of the California Constitution—the elimination of the justice court\textsuperscript{71} and unification of the municipal and superior courts, respectively\textsuperscript{72}—which were products of the Legislature’s “stead[y] move[ment] towards completion of the courts’ restructuring.”\textsuperscript{73} In 2003, the Legislature merely maintained the codes\textsuperscript{74} and did not make any substantive changes.\textsuperscript{75} The last amendment, in 2010, made similar corrections, but also extended the filing deadline for civil cases with an all-purpose assignment to fifteen days after receiving notice of the assignment\textsuperscript{76} and “cod[ified] existing court practices by requiring the party making the challenge to notify all other parties within five days after making the motion [to peremptorily disqualify the judge].”\textsuperscript{77}

\textsuperscript{62} Act of 1967, ch. 1602, sec. 2, § 170.6(1), 1967 Cal. Stat. 3832, 3832. It also added the option of including a “declaration under penalty of perjury.” \textit{Id.} at sec. 2, § 170.6(2) at 3833.


\textsuperscript{64} Although Section 170.6 applies to judges, court commissioners, and referees of a superior, municipal, or justice court, it does not affect a superior court judge who is appointed by an appellate court as a referee. \textit{People v. Gonzalez}, 800 P.2d 1159, 1197 n.44 (Cal. 1990).


\textsuperscript{67} Act of 1985, ch. 715, sec. 1, § 170.6(2), 1985 Cal. Stats. 2350, 2351.


\textsuperscript{70} Act of 2002, ch. 784, sec. 36, § 170.6(1), 2002 Cal. Stats. 4710, 4744. There was also the technical change of updating the year on the affidavit form. \textit{Id.} at sec. 36, § 170.6(5) at 4746–47.

\textsuperscript{71} \textsc{Cal. Const.} art. VI, §§ 1, 5(b) (§ 5 repealed 2002).

\textsuperscript{72} \textsc{Cal. Const.} art. VI, § 5(3) (repealed 2002).

\textsuperscript{73} \textsc{Senate Judiciary Comm.}, SB 1316 \textsc{Senate Floor Analyses}, at 2 (Cal. 2002).

\textsuperscript{74} \textsc{Senate Judiciary Comm.}, SB 600 \textsc{Senate Floor Analyses}, at 2 (Cal. 2003) (“Each year, the Legislative Counsel’s Office identifies grammatical errors and other errors of a technical nature that have been inadvertently enacted into statutory law.”).


\textsuperscript{76} \textsc{State Assembly} 1894, 2010 Leg., Reg. Sess. (Cal. 2010). There was a need to reconcile the Code of Civil Procedure and the Trial Court Delay Reduction Act of 1990. \textsc{Cal. Assembly Judiciary Comm.}, AB 1894 \textsc{Assembly Floor Analysis}, at 2 (Cal. 2010).

\textsuperscript{77} \textsc{Cal. Assembly Judiciary Comm.}, AB 1894 \textsc{Assembly Floor Analysis}, at 2 (Cal. 2010).
In general, Section 170.6 guarantees litigants the extraordinary right to have an alternate superior court judge hear their matter once they accuse their judge of bias, even without any factual basis for actual bias. Litigants can raise a challenge under Section 170.6 at any trial, special proceeding, or hearing involving a “contested issue of law or fact,” including trial, law and motion proceedings, injunction hearings, and contested probate or family law proceedings, but excluding settlement or case management conferences. Each side in a case, defined by whether the co-plaintiffs or co-defendants have substantially adverse interests, is given one challenge—the norm. “[I]f the trial judge in the prior proceeding is assigned to conduct a new trial on the matter” after “reversal on appeal of a trial court’s final judgment,” the movant can still use Section 170.6 regardless of whether they have already availed themselves of this procedure. They, however, cannot make the motion “for the first time in post-trial matters which are essentially a ‘continuation’ of the main proceeding,” meaning “action[s] . . . involv[ing] ‘substantially the same issues’ and ‘matters necessarily relevant and material to the issues involved

78. This covers both retired judges who are assigned to temporarily act as a regular sitting judge to hear a case and active, full-time judges. People v. Superior Ct. (Mudge), 62 Cal. Rptr. 2d 721, 725 (Ct. App. 1997).
80. CAL. CIV. PROC. CODE § 170.6(a)(1) (Deering 2023); Andrews, 48 Cal. Rptr. at 650–51; Est. of Cunco, 29 Cal. Rptr. 497, 499 (Ct. App. 1963). From a policy standpoint, this stops litigants from seeking more favorable rulings from a different judge. People v. Richard, 149 Cal. Rptr. 344, 347 (Ct. App. 1978); People v. Paramount Citrus Ass’n, 2 Cal. Rptr. 216, 221 (Ct. App. 1960); Dennis v. Overholtzer, 3 Cal. Rptr. 458, 459 (Ct. App. 1960).
82. Pappa v. Superior Ct., 353 P.2d 311, 314 (Cal. 1960) (“The privilege conferred by section 170.6, unlike the right to counsel, may be exercised by more than one codefendant only where they have substantially adverse interests, and obviously the mere fact that they choose to be represented by separate counsel does not show that such a conflict of interests exists.”). If co-parties share interests, but one party already moved forward with a challenge without the other parties’ consent, they all lose their one challenge. Louisiana-Pacific Corp. v. Philo Lumber Co., 210 Cal. Rptr. 368, 369 (Ct. App. 1985).
83. Note that challenges for cause through California Code of Civil Procedure section 170.1 are still available after exhausting the peremptory challenge. Serbulea, supra note 45, at 1144.
84. If the issue to be resolved on remand requires the court to perform “merely a ministerial act,” there is no “new trial” within the meaning of Section 170.6. Stegs Invs. v. Superior Ct., 284 Cal. Rptr. 495, 495 (Ct. App. 1991); Overton v. Superior Ct., 27 Cal. Rptr. 2d 274, 275 (Ct. App. 1994). The “new trial” does not have to take place after trial: it can occur after any kind of final judgment, such as summary judgment. Stubblefield Constr. Co. v. Superior Ct., 97 Cal. Rptr. 2d 121, 124 (Ct. App. 2000).
85. CIV. PROC. § 170.6(a)(2) (emphasis added).
in the original action,” **87 Absent good cause, there is no continuance of the trial or hearing because of the motion; if a continuance is granted for other reasons, the matter must be continued for limited periods to be reassigned as soon as possible.**88 In the aftermath of the 2010 amendment, civil litigants must serve notice on all parties within five days of making the motion.**89**

Either an affidavit accompanied with a declaration that a “fair and impartial hearing or trial cannot take place” under penalty of perjury, **90** or an oral motion under oath will suffice as long as it is made before the hearing or trial commences.**91** Litigants should submit the written or oral motion “as soon as possible after [they] know[] with some reasonable certainty who the actual trial judge will be” **92** and must take care to abide by the timing rules governing master calendar, all-purpose, and single-judge systems. Table 1 below describes each of these various case-management systems and their nuances:

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87. Matthews v. Superior Ct., 42 Cal. Rptr. 2d 521, 523 (Ct. App. 1995). A proceeding can be a continuation even if it has a different county clerk’s file number. Andrews v. Joint Clerks Port Lab. Relns. Commn., 48 Cal. Rptr. 646, 653–54 (Ct. App. 2012). The court in Pickett v. Superior Court, 138 Cal. Rptr. 3d 36, 42 (Ct. App. 2012), opined that the second plaintiff’s action was not a continuation of the first plaintiff’s action despite both actions alleging the same wrongful conduct because the second action sought additional relief. Likewise, in Bravo v. Superior Court, 57 Cal. Rptr. 3d 910, 914 (Ct. App. 2007), the instant case was not a continuation even though it concerned the same plaintiff and defendant because “the [second] action [arose] out of later events distinct from those in the previous action.”

88. CIV. PROC. § 170.6(a)(4).

89. Id. § 170.6(a)(3).


91. CIV. PROC. § 170.6(a)(2) (“In no event shall a judge, court commissioner, or referee entertain the motion if it is made after the drawing of the name of the first juror, or if there is no jury, after the making of an opening statement by counsel for plaintiff, or if there is no opening statement by counsel for plaintiff, then after swearing in the first witness or the giving of any evidence or after trial of the cause has otherwise commenced. If the motion is directed to a hearing, other than the trial of a cause, the motion shall be made not later than the commencement of the hearing.”); Haldane v. Haldane, 26 Cal. Rptr. 670, 675 (Ct. App. 1962).

92. Augustyn v. Superior Ct., 231 Cal. Rptr. 298, 302 (Ct. App. 1986); see Lawrence v. Superior Ct., 253 Cal. Rptr. 748, 751 (Ct. App. 1988) (“Knowledge of the assignment does not mean actual knowledge on the part of the party or his attorney but only that, upon further investigation or inquiry, the identity of the judge assigned to a particular department is ascertainable.”).
TABLE 1.

<table>
<thead>
<tr>
<th>Case-Management System</th>
<th>Definition</th>
<th>Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>Master Calendar</td>
<td>The case is assigned to different departments for specific types of matters.¹</td>
<td>The litigant should make the motion to the judge supervising the master calendar. When the case is set for immediate trial, litigants are instructed to make their challenge at the time of assignment, but when the case is set for a later trial date, they should comply with the 10-day/5-day rule.² The 10-day/5-day rule dictates that a litigant must make their challenge at least five days before the trial or hearing date if the judge’s identity is known at least ten days before the trial or hearing date.³ If they wait until they appear before the judge, they will have essentially waived their right to challenge that judge.⁴ However, a late-appearing or late-named party will not be penalized as long as they make the motion within ten days after their appearance.⁵</td>
</tr>
<tr>
<td>All-Purpose/ Direct-Calendar</td>
<td>The randomly assigned judge “maintain[s] [their] own calendar, set[s] and handl[es] all motions and other proceedings, and conduct[s] trial.”⁶ At the time of the assignment, the judge must be expected to process all substantial matters in addition to trial.⁷</td>
<td>Once a civil litigant receives notice⁸ of an all-purpose assignment, they have fifteen days to make their challenge.¹ If the litigant receives service by mail, they are entitled to a five-day extension.¹ If the litigant has not yet appeared, they have fifteen days after their appearance.⁴ For a criminal litigant, they have ten days instead of fifteen days.¹</td>
</tr>
<tr>
<td>Single-Judge</td>
<td>There is only one judge in the courts.¹⁰</td>
<td>A litigant must make their challenge within thirty days after they first appear in the action.¹¹</td>
</tr>
</tbody>
</table>

Sources: ¹ O’CONNOR’S CALIFORNIA PRACTICE CIVIL PRETRIAL, supra note 48, at Ch. 3-E § 3.3(2)(a). ² See, e.g., People v. Roerman, 10 Cal. Rptr. 870, 878–79 (Ct. App. 1961) (rejecting the motion because it was not made until the day trial was scheduled to begin even though the case was calendared to the judge for more than a month). ³ E.g., Eagle Maint. & Supply Co. v. Superior Ct., 16 Cal. Rptr. 745, 747 (Ct. App. 1961). ⁴ See, e.g., Michaels v. Superior Ct., 7 Cal. Rptr. 858, 860–61 (Ct. App. 1960); Peremptory Challenges to a Judge in California, L. OFF. OF STIMMEL, STIMMEL & ROESER, https://stimmel-law.com/en/articles/peremptory-challenges-judge-california [https://perma.cc.6NLU-5PLS]. ⁵ Sch. Dist. of Okaloosa Cnty v. Superior Ct., 68 Cal. Rptr. 2d 612, 612 (Ct. App. 1997). ⁶ O’CONNOR’S CALIFORNIA PRACTICE CIVIL PRETRIAL, supra note 48, at Ch. 3-E § 3.3(2)(b). ⁷ See, e.g.,
If litigants who successfully appeal the trial court’s judgment end up with the same trial judge, they must make the motion “within [sixty] days after the party or the party’s attorney has been notified of the assignment,”[^93] or else it will be time-barred. The motion must be directed to the very judge under attack (the particular department will not suffice) who will then determine if it has been duly presented.[^94]

There are compelling policy reasons for these rules, namely that both litigants who “wish[] to postpone [the] motion until [they are] fully informed” and the court that needs “time to make adjustments after a disqualification” are satisfied.[^95] Also, criminal litigants have less time to submit their motions than civil litigants because, like the Legislature probably thought, there are heightened concerns of abuse in criminal cases[^96] in which “the sides . . . are not in symmetrical positions,” as the prosecution possesses more power.[^97] Criminal cases usually involve juries that dilute the judge’s influence, whereas civil cases are usually wholly decided by the judge.[^98] Even so, criminal defendants are insulated from the “depriv[ation] of life, liberty, or property, without due process of law” by the Bill of Rights in the Fifth Amendment of the U.S. Constitution.[^99] Given what they have to lose as compared to civil litigants, it is critical to avoid infringement on their right to a fair trial.

[^93]: CIV. PROC. § 170.6(a)(2).
[^94]: See, e.g., Fry v. Superior Ct., 166 Cal. Rptr. 3d 328, 333 (Ct. App. 2013) (denying a peremptory challenge that was not made to anyone).
If the motion is timely filed with acceptable form, it will be granted, and the transition process is automatic in the sense that the affidavit is not contestable. The “judge immediately loses jurisdiction over the case,” and “any action that [they] make[] in the case [is] considered ‘void,’ ” save to transfer the case to another judge. A challenge is “exercised when the challenged judge transfers the case for reassignment,” and it cannot be rescinded, no matter what—the dismissal of the movant makes no difference. If no other judge is available, the disqualified judge should contact the Chairman of the Judicial Council to solicit the assignment of an outside judge. In order to prevent the appearance of judicial impropriety, if the judge is assigned to more than one case concerning the same movant, they are disqualified from all such cases. A writ of mandate petition is the “exclusive means of appellate review” for the motion, irrespective of its success. Upon a failed motion, the litigant has two avenues of redress before appeal: review by a different judge, like the district’s chief judge, and mandamus review. On the other hand, litigants who never assert a challenge will have “forfeited the right to complain about [how the trial court’s alleged bias affected subsequent rulings] on appeal.”

2. Judicial Rules

Section 170.6 intersects with other bodies of judicial rules, complicating the tapestry of California peremptory disqualification law. Upholding impartiality in the courts permeates all the guidelines that judges

100. CAL. CIV. PROC. CODE § 170.6(a)(6) (Deering 2023) and Peremptory Challenge to Judicial Officer (Code Civ. Proc., § 170.6), SUPERIOR CT. OF CAL., CNTY. OF L.A., https://www.lacourt.org/forms/pdf/laciv015.pdf [https://perma.cc/3EBJ-9QME], provide a template for the motion. For examples of a Motion for Peremptory Challenge, Declaration in Support of Peremptory Challenge, and Order of Transfer, see Peremptory Challenge of a Judge: Remove the Judge from Your Case, supra note 81, at 5–10.


102. Truck Ins. Exch. v. Superior Ct., 78 Cal. Rptr. 2d 721, 724 (Ct. App. 1998) (permitting a party to file a second peremptory challenge because the first peremptory challenge was against the first judge who denied the motion and thereafter retired, rendering the issue moot).


106. In re Sheila B., 23 Cal. Rptr. 2d 482, 485 (Ct. App. 1993). This process serves “judicial economy and fundamental fairness” by “eliminating the waste of time and money which inheres if the litigation is permitted to continue unabated, only to be vacated on appeal because the subsequent rulings and judgments were declared ‘void’ by virtue of the erroneously denied disqualification motion.” Id.


should follow, regardless of origin—Standard 10.20(b)(3) of the California Rules of Court instructs judges to “ensure that all orders, rulings, and decisions are based on the sound exercise of judicial discretion and the balancing of competing rights and interests and are not influenced by stereotypes or biases.”109 In light of this goal, the California Rules of Court encourage outreach to the community110 and collaboration with local committees and bar associations that endorse programs designed to educate about unconscious biases.111 When litigants encounter judges who ignore Standard 10.20 of the California Rules of Court, they can submit complaints of bias either directly to the court or to the Commission on Judicial Performance without losing their statutory remedy through Section 170.6.112 California Code of Judicial Ethics Canon 3D(4), Government Code section 68725, and Rule 104 of the Rules of the Commission on Judicial Performance obligates judges to cooperate with the Commission on Judicial Performance.113 In one instance, the Commission on Judicial Performance ordered the removal of a judge who communicated with the potential movant to stop their challenge.114

California Code of Judicial Ethics Canon 3B(5), Canon 3C(1), and Canon 3E(5)(f)(iii), among others, comport with the Model Code of Judicial Conduct rule 2.3115 because they advise that judges should be free of bias.116 Similar to the California Standards of Judicial Administration, California Code of Judicial Ethics Canon 3B(6) directs judges to “require lawyers in proceedings before [them] to refrain from . . . bias.”117 They consequently may feel cognitive dissonance (psychological discomfort from simultaneously complying with incongruous beliefs118) from essentially allowing litigants to discriminate against them using Section 170.6. Granted, these “standards, insofar as they may conflict with [S]ection 170.6, would be ‘invalid’ since the Judicial Council may only make rules which are not

110. 2023 CAL. RULES OF CT. § 10.20(a) (“[E]ach court should work within its community to improve dialogue and engagement with members of various cultures, backgrounds, and groups to learn, understand, and appreciate the unique qualities and needs of each group.”); Id. § 10.20(c)(3) (“Each committee should . . . engage in regular outreach to the local community to learn about issues of importance to court users.”).
111. Id. § 10.20(c)(2).
112. Id. § 10.20(d).
115. MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS’N 2020).
117. Id. at Canon 3B(6).
3. Comparison to Peremptory Juror Challenges

In California, judicial peremptory challenges enjoy less resistance than in some other jurisdictions but are nonetheless more controversial than peremptory juror challenges. The California legislature passed AB 3070 in 2020—a proposal to require “the party exercising the peremptory challenge [to] show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror’s race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation.” The Legislature deliberately replaced the need to show purposeful discrimination under an objective standard in order to better target unconscious bias. Unlike judicial peremptory disqualification, in which there is confusion regarding who holds the cause of action for discriminatory exclusion, the bill clearly gives the right to both the party

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120. JUD. ETHICS Canon 3D(1). The advisory committee’s commentary states that “[a]ppropriate corrective action could include direct communication with the judge or lawyer who has committed the violation, writing about the misconduct in a judicial decision, or other direct action, such as a confidential referral to a judicial or lawyer assistance program, or a report of the violation to the presiding judge, appropriate authority, or other agency or body.” Id. at Canon 3(D)(2).
121. Incentives are vital to eliminating bias in both judges and jurors. See Suzy J. Park, Racialized Self-Defense: Effects of Race Salience on Perceptions of Fear and Reasonableness, 55 COLUM. J.L. & SOC. PROBS. 541, 571 (2022) (“Since the data suggest that it is difficult to make people ‘turn off’ their prejudices through the use of race salience, it is critical to choose jurors who are internally and genuinely motivated to be unprejudiced.”).
122. See, e.g., Miller-El v. Dretke, 545 U.S. 231, 272 (2005) (Breyer, J., concurring) (criticizing the peremptory challenge system as a whole); Swain v. Alabama, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting) (“Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.”); State v. Veal, 930 N.W.2d 319, 480 (Iowa 2019) (“The only way to stop the misuse of peremptory challenges is to abolish them.”); Minetos v. City Univ. of N.Y., 925 F.Supp. 177, 183 (S.D.N.Y. 1996) (“All peremptory challenges should now be banned as an unnecessary waste of time and an obvious corruption of the judicial process.”).
124. Gravdal, supra note 123.
125. Infra p. 281.
and the trial court. California Governor Gavin Newsom signed the legislation into law (California Code of Civil Procedure § 231.7), which went into effect for criminal trials on January 1, 2022 and will take effect for civil trials starting January 1, 2026.\textsuperscript{126} The statute joined reforms in other states;\textsuperscript{127} Washington enacted a similar procedure in 2018 that was praised as a solution to \textit{Batson v. Kentucky},\textsuperscript{128} a landmark case prohibiting unconstitutional discrimination during jury selection.\textsuperscript{129} After observing \textit{Batson}'s shortcomings in actually resolving racial bias and discrimination,\textsuperscript{130} supporters argue that the spirit and letter of this legislative decision carries the promise of giving life to the federal precedent.\textsuperscript{131}

But this law is not without dissenters. The Alliance of California Judges rebukes it for creating “confusion and delay” since “lawyers could challenge every peremptory challenge made by the other side.”\textsuperscript{132} Ultimately, it falls

\textsuperscript{126} CAL. CIV. PROC. § 231.7 (Deering 2023).


\textsuperscript{132} Jim Frederick, \textit{New Jury Selection Procedure in California: Is This the End of Peremptory Challenges? Is This the End of Batson?}, FAEGRE DRINKER ON PRODUCTS (Dec. 2, 2020),
short of putting an end to peremptory juror challenges altogether, making others think that the change is not enough: Senate Bill 212 was introduced in 2021, which would have abolished peremptory challenges in criminal cases. One wonders at the end of the day if it is still accurate to classify this challenge as peremptory as “[a] challenge subject to questioning and explanation is, by definition, not peremptory.” Whether judicial peremptory challenges can inherit this reform such that it is workable to judges poses an interesting question.

C. COMPARISON BETWEEN CALIFORNIA LAW AND OTHER STATES’ LAW

Section 170.6 is one of the two forms of judicial peremptory challenges practiced by twenty states. Judicial officers in thirteen states, like jurors, can be substituted upon request without any accusation of improper personal interest, while those in the remaining seven states can only be substituted upon an affidavit of bias. Table 2 below describes some differences between Section 170.6 and peremptory challenge statutes in other states:


135. The states are Alaska, Arizona, California, Hawaii, Idaho, Illinois, Indiana, Kansas, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Washington, Wisconsin, and Wyoming. Gary L. Clingman, A Clash of Branches: The History of New Mexico’s Judicial Peremptory Excusal Statute and a Review of the Impact and Aftermath of Quality Automotive Center, LLC v. Arrieta, 46 N.M. L. REV. 309, 336–37 (2016); see ALASKA STAT. § 22.20.022 (LexisNexis 2023); ARIZ. REV. STAT. § 12-409 (LexisNexis 2023); CAL. CIV. PROC. CODE § 170.6 (Deering 2023); HAW. REV. STAT. ANN. § 601-7 (LexisNexis 2023); IDAHO CODE § 40(d)(1) (LexisNexis 2023); 725 ILL. COMP. STAT. ANN. 5/114-5(a) (LexisNexis 2023); IND. CODE § 35-36-5-1 (2023); KAN. STAT. ANN. § 20.311(d) (LexisNexis 2023); MINN. STAT. § 542.16 (2023); MO. R. CIV. PRO. § 51.05 (LexisNexis 2023); MONT. CODE ANN. § 3-1-804 (West 2023); NEV. REV. STAT. ANN. § 1.230 (West 2023); N.M. STAT. ANN. § 38-3-9 (2023); N.D. CENT. CODE § 29-15-21 (2023); OR. REV. STAT. § 14.260 (West 2023); S.D. CODIFIED LAWS § 15-12-22 (LexisNexis 2023); TEX. GOV’T CODE ANN. § 74.053 (LexisNexis 2023); WASH. REV. CODE ANN. § 4.12.040-50 (LexisNexis 2023); WIS. STAT. § 801.58 (LexisNexis 2023); WYO. R. CIV. P. 40.1(b)(1).
TABLE 2.

<table>
<thead>
<tr>
<th>Parameters</th>
<th>Section 170.6</th>
<th>Statutes in Other States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is there a fee for reassignment to a new judge?</td>
<td>No</td>
<td>Yes^</td>
</tr>
<tr>
<td>How many challenges to a party per case?</td>
<td>One</td>
<td>Two^</td>
</tr>
<tr>
<td>Does alignment of interest or lack thereof define a party (or side)?</td>
<td>Yes</td>
<td>No^c</td>
</tr>
<tr>
<td>Must litigants informally ask the judge to voluntarily recuse from the case before filing an affidavit?</td>
<td>No</td>
<td>Yes^d</td>
</tr>
<tr>
<td>Can criminal litigants transfer their case to a different judge?</td>
<td>Yes</td>
<td>No^e</td>
</tr>
</tbody>
</table>

Sources: ^ See, e.g., MONT. CODE ANN. § 3-1-804 (West 2023); NEV. REV. STAT. ANN. § 1.230 (West 2023). ^ See, e.g., OR. REV. STAT. § 14-250-70 (West 2023). ^ MO. R. CIV. PRO. § 51.05 “divides the parties into classes (e.g. plaintiffs, defendants, third party plaintiffs, third party defendants, interveners) and affords one change of judge per class” and NEV. REV. STAT. ANN. § 1.230 treats “[e]ach action, whether single or consolidated . . . as having only two sides. Clingman, supra note 135, at 337–38. ^ S.D. CODED LAWS § 15-12-22 (2023); see Clingman, supra note 135, at 338. ^ IND. CODE ANN. § 35-36-5-1, NEV. REV. STAT. ANN. § 1.230, TEX. GOV’T CODE ANN. § 74.053, and WYO. R. CIV. P. 40.1(b)(1) are some statutes that recognize this right in civil cases only. Clingman, supra note 135, at 338.

Although these states are not uniform in protocol, they all place weight on a movant’s good faith and decline to investigate whether the movant’s reasons, if even stated, are true, differentiating state law from federal law, which demands supporting facts.

II. THE POLICY TRADE-OFFS

A. PUBLIC CONFIDENCE IN THE JUDICIARY

Those who applaud the judicial peremptory challenge, a device that makes it easier to disqualify judges, emphasize its utility in maintaining and increasing public confidence that the judiciary will deliver equal justice under the law. Although “the law, not any individual or group, is a judge’s
only legitimate constituent,” judges have free speech protections in judicial election campaigns.\textsuperscript{136} If their views on controversial legal and political issues are broadcast through various media outlets, the public will naturally lose hope that due process\textsuperscript{137} still exists in the courtroom. Since judges will likely reveal their biases, there are practitioners who advocate for appellate courts to adopt the peremptory strike system, as in California trial courts through Section 170.6, so the public can trust that their matters will be heard by a neutral arbitrator.\textsuperscript{138} They echo Justice Kennedy’s advice for states to “adopt[] recusal standards more rigorous than due process requires” in an effort to protect judicial integrity.\textsuperscript{139} Meanwhile, worried about the increasing caseload burdening the federal judiciary, some academics urge Congress to set up a commission responsible for establishing a judiciary reform act that would go into effect in 2030.\textsuperscript{140} As the judiciary becomes more congested with inefficient case management and reduced dockets, judicial competence suffers, especially considering the “10% problem,” which is a “rough estimate of the percentage of district court judges who are considered unfit or limited in their capacity to dispense justice fairly.”\textsuperscript{141} These academics provide the 2030 Commission with a solution: peremptory challenges.\textsuperscript{142}

Curiously, the reason cited for condemning the challenge sounds familiar—increasing public confidence in the administration of justice. One legal scholar believes peremptory disqualification injures the judiciary’s reputation because “automatic transfer does not permit a judge to refute the allegations of bias, and so may create the public impression that more judges are biased, or have conflicts of interests, than is actually the case.”\textsuperscript{143}

\begin{itemize}
\item \textsuperscript{138} Phillips & Poll, \textit{supra} note 136, at 718–20.
\item \textsuperscript{139} Republican Party of Minn. v. White, 536 U.S. 765, 794 (2002); \textit{see Serbulea, supra} note 45, at 1146 (“Recusal motions are different than other procedural motions because they implicate the very legitimacy of the legal system.”).
\item \textsuperscript{141} \textit{Id.} at 884–85.
\item \textsuperscript{142} \textit{Id.} at 885.
\item \textsuperscript{143} Frost, \textit{supra} note 40, at 587; \textit{see Serbulea, supra} note 45, at 1144 (“Allowing peremptory
\end{itemize}
Regrettably, judicial discretion, in which “the law gives the judge a range of options and choices, or relies on the judge’s assessment of the circumstances in drawing further conclusions,” exposes judges to criticism without crisis managers to guide them through this era of social media. As committees and organizations dedicated to judicial independence face extinction, many stress the need for the legal profession to rally in defense of judges, perhaps by devoting resources to educating the public on what judges actually do.

B. ABUSE OF THE CHALLENGE

Peremptory challenges to judges can disrupt the harmony between not just a litigant and their judge, but also the litigant’s attorney and the judge, as well as the litigant and their attorney, essentially poisoning the most material relationships in the courtroom. First, the litigant must present the motion to the very judge they want disqualified. Since the judge knows the movant’s identity, they may feel “frustrated at being required to grant relief to a party who had made what [they] consider to be an unwarranted slight to their integrity.” If the motion is rejected, the litigant is stuck with the allegedly biased (and now insulted) judge until appeal because it is difficult to prevail on other review proceedings. Second, although the attorney might wish to evade a particular judge for their entire legal career, a successful motion in one case does not insulate them from the judge’s hostility in future cases. Third, caught in a web of ethical obligations, the attorney deals with an uncomfortable dilemma: Are they loyal to the judge or their client? No matter their self-interest to stay on good terms with the judge, they must reconcile their duty of vigorous advocacy on behalf of their client with their duty of honesty and respect to the court. They are probably tempted to use their affidavit power (that is, to capitalize on the boilerplate affidavit requesting only a conclusory accusation of bias) to win their client’s case, for they are given the benefit of the doubt. However, their capability challenges will most likely result in an increased number of disqualifications.

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145. See, e.g., id. (“It is distressing that in recent years we have seen the demise of two leading organizations most devoted to judicial independence—the American Judicature Society and Justice at Stake—as well as the defunding of the one American Bar Association committee dedicated to judicial independence.”); Serbulea, supra note 45, at 1149 (“Educating the people about the judicial system and its inner workings will increase the public’s confidence in the judicial system.”).
146. E.g., Lewis v. Linn, 26 Cal. Rptr. 6, 9 (Ct. App. 1962).
148. See Stempel, supra note 107, at 2269.
149. Miller, supra note 147, at 481–82 (“While litigants may never appear in the judge’s courtroom again, the attorney probably will, and judges have long memories. Judges may bide their time and then take out their frustration on an attorney in another case.”).
150. For explanatory hypotheticals, see Miller, supra note 147, at 482. This temptation is why “allow[ing] peremptory challenges only on consent of both parties with the challenges waived if no
as “true advocates” is impeded by ethical rules that impose professional
discipline should they lie about judges.\textsuperscript{151} They also cannot claim the full
extent of free speech rights under the First Amendment, presumably fueling
their apprehension at the growing number of sanctions in 2022.\textsuperscript{152}

Since the genesis of peremptory disqualification statutes, the risk of
“judge shopping” has haunted legal scholars and practitioners alike. They
argue that marginal improvements to judicial accountability do not warrant
sacrificing judicial independence and integrity. When litigants judge shop
under the guise of eliminating bias, they perpetuate the narrative that judges
are simply “politicians in black robes” even though the Model Code of
Judicial Conduct, court rules, judicial discipline sanctions,\textsuperscript{153} and public
opinion motivate judges to act properly. Admittedly, this illegitimate
purpose is not allowed; the challenge, however, is an absolute right without
regard for pretenses. For instance, according to one columnist, “[Section
170.6] could be warranted against the judge who tends to let all of [their]
cases go to trial” if the attorney is “hoping to escape [the case] via summary
judgment.”\textsuperscript{154}

To rebut these complaints of abuse, the challenge’s supporters point to
the stringent rules governing the motion: specifically, its timing (framed as
rushing litigants to “move[] as expeditiously as . . . is possible . . . after
theretofore agreed on matter becomes litigated”)\textsuperscript{155} and form. These
restrictions should discourage litigants from not only judge shopping, but
also “from waiting to see how the judge views the case and rules on motions
before making the peremptory challenge decision.”\textsuperscript{156} Section 170.6, for
example, is a “limited right and is not a vehicle for disqualifying judges in

\begin{table}[h]
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151. & See, e.g., MODEL RULES OF PRO. CONDUCT r. 8.2(a) (AM. BAR ASS’N 2023) (“A lawyer shall
not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity
concerning the qualifications or integrity of a judge . . . .”); MODEL RULES OF PRO. CONDUCT r. 8.4(d)
(AM. BAR ASS’N 2023) (“It is professional misconduct for a lawyer to . . . engage in conduct that is
prejudicial to the administration of justice . . . .”).
\hline
152. & See generally John B. Harris, Lawyers Beware: Criticizing Judges Can Be Hazardous to Your
Professional Health, FRANKFURT KURNIT KLEIN + SELZ PC (Feb. 1, 2022), https://professional
responsibility.lkk.com/post/102hmt/lawyers-beware-criticizing-judges-can-be-hazardous-to-your-
professional-health [https://perma.cc/YCZ6-YGPZ] (discussing both new and old cases regarding
attorneys’ criticism of judges to demonstrate a trend toward discipline).
\hline
153. & See generally CYNTHIA GRAY, A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS (2002).
\hline
154. & Rick Merrill, Tech Tip: Using Judicial Analytics to Stay One Step Ahead, 60 ORANGE CNTY.
\hline
\hline
1963), the defendants peremptorily challenged the judge over three years after judicial assignment when
the judge had already heard their case and found them guilty.
\hline
\end{tabular}
\caption{Peremptory Challenge Discussion}
\end{table}
all situations in which there is a potential for bias.”¹⁵⁷ One law professor advances a limited conception of misuse such that litigants (1) can avoid extremist judges who are not necessarily biased but (2) cannot technically judge shop since a randomly assigned judge will preside over the previously assigned judge’s disqualification.¹⁵⁸ Peremptory disqualification increases the chance of the new judge sharing the same beliefs as most judges, which promotes a representative judiciary that reflects the citizenry because “an average judge may be more representative than a random one.”¹⁵⁹ This kind of judge shopping, as defined by the challenge’s opponents, is akin to “forum shopping,”¹⁶⁰ but the former is attacked as a radical threat to American ideals, while the latter enjoys more forgiveness from critics. The same can be said of “filing several cases simultaneously and dismissing all but the case before one’s preferred judge.”¹⁶¹ Besides statutory safeguards, like the very short window of opportunity to exercise a challenge, litigants might eschew the challenges—if their motion succeeds, they risk an even more unfavorable judicial draw, but if their motion fails, they risk a resentful judge.

C. INTIMIDATION OF JUDGES

There is also a strong assertion that judges will encounter intimidation, further cementing the deadlock between the two stances. A judge is more likely to be influenced by pressure from the litigant and their attorney when the defendant’s life, liberty, and property are hanging in the balance—in other words, criminal cases. Does the judicial peremptory challenge enable prosecutors to shop for “law and order” judges who are “tough on crime”?¹⁶² If a judge is peremptorily disqualified from every criminal matter to which they are assigned (colloquially known as “papering” or “blanket challenges”),¹⁶³ they risk not only a non-criminal reassignment that poses a

¹⁵⁸. Stempel, supra note 107, at 2274–75 (“For example, a defense attorney may want to eject a harsh sentencing ‘hanging’ judge from the case . . . . But it hardly makes the challenge improper when used to avoid judges at the extremes in terms of both jurisprudential tendencies and competence.”).
¹⁶⁰. Stempel, supra note 107, at 2275–76 (“For example, litigants may employ the following strategies: removal to federal court; a “minimum contacts” approach to personal jurisdiction; a liberal approach to venue (but subject to the possibility of transfer to a more convenient venue); stringent enforcement of forum selection and choice of law clauses, including arbitration or other forum-specific dispute-resolution clauses; and clever selection of particular plaintiffs or claims in order to bring a test case or a potentially precedent-setting case in a favorable forum.” (footnotes omitted)).
¹⁶³. See, e.g., Roger M. Grace, Gascón Crosses the Line—Again, METRO. NEWS–ENTER. (May 3,
“very serious problem for a judge whose entire legal career has been spent in the criminal justice system,” but also transfer to a court that is, in their opinion, more inconvenient or less prestigious.\(^ {164}\) As judges try to appease prosecutors to avoid repeated disqualification, the pool of judges actually deciding criminal cases becomes undersaturated with lenient and liberal judges.\(^ {166}\) Prosecutorial control over judges (along with other challenges due to unusual judicial philosophies) results in a much smaller spectrum of worldviews among judges, hampering the development of legal interpretations and encumbering healthy debate.\(^ {167}\) Erwin Chemerinsky responds to the “unlimited use of peremptory challenges against a single judge, albeit in different cases,” by prescribing even greater procedural protections.\(^ {168}\) However, even if litigants manipulate this mechanism to pressure judges,\(^ {169}\) it is hard to imagine judges succumbing to partiality after only one or even a few cases. Perhaps district attorneys or public defenders who frequently appear in the same court can effectively intimidate judges,\(^ {170}\) but in the big picture, criminal cases make up a small subset of total filings.\(^ {171}\)


\(^{165}\) Ted Rohrlich, *Scandal Shows Why Innocent People Plead Guilty*, L.A. Times, Dec. 31, 1999, at A1 ("If you called the police liars, they'd [issue a peremptory challenge against] you . . . . . [I]nstead of working on a nice assignment near your home, they [your fellow judges] send you downtown or to juvenile or dependency court, where they send the slugs.").


\(^{167}\) For an article discussing how peremptory juror challenges make it more probable that the jury will be composed entirely of jurors on one extreme of an ideological spectrum, see Francis X. Flanagan, *Peremptory Challenges and Jury Selection*, 58 J.L. & Econ. 385, 385 (2015). One law professor argues that the challenges hurt jurors' ability to render accurate verdicts by "systematically eliminating jurors with a range of perspectives who might have challenged erroneous or mistaken ideas." Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 Tex. L. Rev. 1041, 1045 (1995).


\(^{169}\) Schepple, supra note 164, at 1523.

\(^{170}\) See id. at 1523–24.

D. DISCRIMINATION AGAINST JUDGES

Two law professors illustrate how judicial peremptory challenges can act as a vehicle for discrimination: one uses a hypothetical,172 while the other uses two cases in which attorneys were accused of discriminating against their judges.173 There is a 1985 study suggesting that race-based abuse of the challenge was rare,174 but the latter professor dismisses its applicability because there is now greater awareness about the unconstitutionality of racially charged decisions.175 Especially after Batson and J.E.B. v. Alabama ex rel. T.B.176 With more judges who identify with marginalized groups, there are consequently more opportunities for challenges based on protected characteristics (leading to disproportionate disqualifications along racial lines, for example).177 In California, where 63.1% of judges are white, a white judge will probably substitute a disqualified judge of color.178 These removals are contrary to a socioeconomically representative judiciary—judicial officers from historically oppressed groups are more likely to have public-interest experience and less likely to have a upper-class background

172. Jack H. Friedenthal, Exploring Some Unexplored Practical Issues, 47 ST. LOUIS L.J. 3, 9 (2003) (“Suppose that an employment discrimination case is filed by a woman in a state court which has an automatic dismissal law, against a handful of male defendants with related yet somewhat factually divergent interests that, at least technically, are hostile to one another. The pool of judges available to try the case consists of a number of females whom the lawyers for the defendants fear may tend to favor plaintiff’s case. Suppose further that counsel for each of the defendants agrees that each, in turn, will automatically eliminate any female judge who is initially or subsequently assigned to try the case, thus virtually ensuring that a male judge will ultimately be selected.”).

173. King, supra note 161, at 512–13 (summarizing People v. Williams, 54 Cal. Rptr. 2d 521 (Ct. App. 1996), in which the prosecution’s peremptory challenge against a Black judge in a case concerning two Black criminal defendants was scorned by the public as racist, and People v. Williams, 774 P.2d 146 (Cal. 1989), in which a Black judge rejected a race-based peremptory challenge against him).

174. See LARRY C. BERKSON & SALLY DORFMANN, JUDICIAL SUBSTITUTION: AN EXAMINATION OF JUDICIAL PEREMPTORY CHALLENGES IN THE STATES 142 tbl.VII-9 (1986) (reporting the 1985 study’s findings—among those surveyed, 10% of defense attorneys, 4% of chief judges, and 1% of prosecutors thought judges were peremptorily disqualified due to race).

175. Consider the Black Lives Matter and Anti-Asian Hate movements that shed light on racial inequality. See Hannaford-Agor, supra note 130, at 39 (“Within weeks of George Floyd’s murder, dozens of state-court systems had convened task forces and commissions charged with identifying the root causes and drafting recommendations to address the lack of demographic diversity in jury pools and juries.”).

176. J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127, 146 (1994) (“When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.”).

177. King, supra note 161, at 517 (“Because the bench has consisted almost entirely of white judges until the last several years, only recently have litigants had the ability to shop for a judge of a particular race or ethnicity. In particular, there were very few, if any, judges of color on the bench in the predominantly western and mid-western states that authorized judicial peremptory challenges at the time when past studies were conducted.”) (footnotes omitted); see Mentoring Program Aims to Increase Diversity of Judge Applicants, CAL. CTs. NEWSROOM (Mar. 5, 2021), https://newsroom.courts.ca.gov/news/mentoring-program-aims-increase-diversity-judge-applicants (“For the 15th straight year, California’s judicial bench has grown more diverse . . . [A] new mentorship program in Los Angeles County seeks to accelerate the diversity of the bench . . . .”).

178. JUD. COUNS. OF CAL., supra note 27, at 1.
than their colleagues. Additional studies implying that age and gender are outcome determinative may tempt litigants into issuing ageist or sexist challenges. Other studies have confirmed the discriminatory effects of peremptory juror challenges, substantiating arguments that the challenge is inherently flawed and does more discriminatory harm than any good. This could ring true for judicial peremptory challenges as well: What is stopping attorneys who discriminate against jurors from also discriminating against judges?

Then again, litigants are forbidden from exercising the challenges solely based on group affiliation like race and ethnicity, gender, sexual orientation, religion, and so forth. They may not even want to rely on such factors—a judge’s “prior decisions made while on the bench, statements made in public forums, [and] professional and political reputations years deep” better predict judicial propensity, after all. According to a member of the Alaska Judicial Council, the challenges in that state did not, in fact, depend on race or gender. The problem, however, is not simply solved.

179. King, supra note 161, at 521.
180. See, e.g., Morris B. Hoffman, Francis X. Shen, Vijeth Iyengar & Frank Krueger, The Intersectionality of Age and Gender on the Bench: Are Younger Female Judges Harsher with Serious Crimes?, 40 COLUM. J. GENDER & L. 128, 164 (2020) (“Younger female judges sentence high-harm cases significantly more harshly than their male and older female colleagues.”); Maureen A. Howard, Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges, 23 GEO. J. LEGAL ETHICS 369, 401 (2010) (“Ironically, research suggests that the two demographics that actually have some empirical validity (and are thus ‘rational’ bases for peremptories), are those that are specifically prohibited by the Constitution: race and gender.”).

181. See, e.g., C.J. Williams, Striking Some Strikes: A Proposal for Reducing the Number of Peremptory Strikes, 68 DRAKE L. REV. 789, 817–18 (2020) (“The broader conclusion that can be reached from these studies is that the greater the number of peremptory strikes available to the parties, the less diverse the petit jury becomes regardless of the diversity of the jury venire.”).

182. See, e.g., Alen v. State, 596 So.2d 1083, 1086 (Fla. Dist. Ct. App. 1992) (Hubbart, J., concurring) (“Rather than engage in a prolonged case-by-case strungulation of the peremptory challenge over a period of many years which in the end will effectively eviscerate the peremptory challenge or, at best, result in a convoluted and unpredictable system of jury selection enormously difficult to administer— I think the time has come, as Mr. Justice Marshall has urged, to abolish the peremptory challenge as inherently discriminatory.”); Morris B. Hoffman, Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective, 64 U. CHI. L. REV. 809, 871 (1997) (“Even assuming the peremptory challenge ever worked in this country as anything other than a tool for racial purity, and even assuming it is working today in its post-Batson configuration to eliminate hidden juror biases without being either unconstitutionally discriminating or unconstitutionally irrational, I submit that its institutional costs outweigh any of its most highly-touted benefits. Those costs—in juror distrust, cynicism, and prejudice—simply obliterate any benefits achieved by permitting trial attorneys to test their homegrown theories of human behavior on the most precious commodity we have—impartial citizens.”).

183. Peter David Blanck, The Appearance of Justice: The Appearance of Justice Revisited, 86 J. CRIM. L. & CRIMINOLOGY 887, 903 (1996); see People v. Superior Ct., 10 Cal. Rptr. 2d 873, 884 (Cal. App. 1992) (“Section 170.6 cannot be employed to disqualify a judge on account of the judge’s race.”).

184. King, supra note 161, at 521. But see Howard, supra note 180, at 401 (“Ironically, research suggests that the two demographics that actually have some empirical validity (and are thus ‘rational’ bases for peremptories), are those that are specifically prohibited by the Constitution: race and gender.”).

185. King, supra note 161, at 521 n.75.
Take California Code of Civil Procedure section 170.2, Section 170.6’s sister judicial disqualification statute, for example. It prohibits discrimination against judges, yet it does not seem to apply to Section 170.6.\(^{186}\) Despite precedent that judges deserve shelter under the Equal Protection Clause of the Fourteenth Amendment,\(^ {187}\) “any party charging that [their] adversary has used a [S]ection 170.6 challenge in a manner violating equal protection bears the burden of proving purposeful discrimination,”\(^ {188}\) which is a high, if not unattainable, standard. Historical patterns of a movant’s discrimination could replace direct evidence of discriminatory intent, but there is a caveat: Is it possible to discern a pattern from a relatively small sample size?\(^ {189}\) Moreover, in the event the judge, as the right holder, declines to pursue their cause of action for discriminatory challenges, there is much uncertainty about whether litigants then have standing to object.\(^ {190}\)

III. EMPIRICAL FINDINGS IN CALIFORNIA

A. RESEARCH METHODOLOGY

It appears that much of the policy debate about judicial peremptory disqualification is informed by theory rather than empirical data. Where are the surveys asking the public in states that allow the challenge about their confidence in the judiciary and perception of judicial bias? There is some research investigating how the challenges can intimidate judges (especially if initiated by prosecutors\(^ {191}\)) and discriminate against judges of a certain race or gender.\(^ {192}\) Nonetheless, there remains a dearth of statistical findings regarding the frequency and type of abuses resulting from peremptory challenges in actual operation.\(^ {193}\) “[W]ithout [the collection of empirical data], predictions about what attorneys will do [or cause] with peremptory challenges are guesswork,” leaving the aforementioned hypotheses with no answers.\(^ {194}\) Therefore, this Note aims to paint a more complete picture by

\(^{186}\) CAL. CIV. PROC. CODE § 170.2 (Deering 2023).

\(^{187}\) See City of Cleburne v. Cleburne LivingCtr., 473 U.S. 432, 439 (1985) (“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” (citing Plyler v. Doe, 457 U.S. 202, 216 (1982))).

\(^{188}\) People v. Superior Ct., 10 Cal. Rptr. 2d 873, 884 (Ct. App. 1992).

\(^{189}\) King, supra note 161, at 524.

\(^{190}\) Id. at 528–32.

\(^{191}\) See Utz, supra note 162, at 84 regarding the study of San Diego courts in the late 1970s and infra note 163 regarding District Attorneys’ offices and “papering” or “blanket challenges.”

\(^{192}\) See infra note 161 regarding the Alaska Judicial Council’s research and infra note 174 regarding the 1985 survey.

\(^{193}\) See, e.g., Miller, supra note 147, at 482 (“The frequency of peremptory challenges . . . do not appear to be maintained or distributed.”).

\(^{194}\) King, supra note 161, at 515 n.49.
tackling two questions: (1) do strict procedural rules really act as a barrier to slow the number of disqualifications, so the number of disqualified judges is roughly equal to the number of judges disciplined for bias, and (2) are there discriminatory effects based on judges’ political parties that prevent a representative judiciary? It will do so by adhering to the recommendations to examine orders on peremptory challenges in cases.195

Due to limited time and resources, only the available orders on LexisNexis (specifically, the 240 citing decisions of Section 170.6 after filtering for a timeline of January 1, 2021 to December 31, 2021) are analyzed. LexisNexis is a trustworthy source,196 but checking other databases, such as Westlaw, would have ensured that this methodology did not overlook orders. This truncated sample is largely not generalizable to the years before or after 2021. California is also not a microcosm for the entire nation: when interpreting the number of disqualified judges who were registered Democrats versus the number of disqualified judges who were registered Republicans, one should remember that California is a “blue” state that is considered a Democratic stronghold. Further, this Note interprets suggestive trends, not causal relationships, from the data as no formal statistical methods are used. Lastly, given that the cases’ dockets, including other related orders, opinions, and filings are not reviewed, there is missing information for some orders (for instance, the disqualified judge’s identity, the order’s date, whether the order was accepted or denied, and the reason behind the decision), which could misrepresent the results. For decisions that anonymously mention both the disqualified judge and the supervising or presiding judge, and hence create confusion about the role of the decision’s author, the analysis below errs on the side of caution and excludes these orders when tracking disqualified judges. Ideally, the study would only include orders from 2021; for consistency, it includes orders both without a date and from before 2021 if the decision that discusses the order is from 2021.

195. E.g., N.Y. STATE JUST. TASK FORCE, RECOMMENDATIONS REGARDING REFORMS TO JURY SELECTION IN NEW YORK 18–19 (2022) ("[E]xamination would likely take place through the creation of records . . . on peremptory challenges across cases, including tracking the stated reasons, if any, given for a challenge, and the judge’s ruling on the challenge.").

B. PRELIMINARY EMPIRICAL DATA

There were 134 cases from January 8, 2021 to December 30, 2021 that revealed 158 ascertainable orders either accepting, denying, or discussing previously accepted or denied judicial peremptory challenges. For reference, there were 4,464,380 total filings in California superior courts in 2021. Curiously, out of the 58 counties in California, only 11 (19%) had reported orders: Los Angeles (76 filed motions), Orange (41 filed motions), Sacramento (24 filed motions), San Diego (5 filed motions), Alameda (3 filed motions), Riverside (3 filed motions), Contra Costa (2 filed motions), Butte (1 filed motion), Madera (1 filed motion), San Francisco (1 filed motion), and Santa Clara (1 filed motion). Given that the study found 158 motions from just 134 cases and movants in only 11 out of 58 counties, this low occurrence of the challenges suggests that (1) litigants are generally not taking advantage of this litigation tool for improper purposes and (2) a majority of judges are perceived to be impartial. Since succeeding judges are randomly selected, there is a chance that litigants who detected bias in their judge would have issued a challenge if not for the fear that they might have to litigate under an even more biased judge. But, excluding pessimistic litigants who have little faith in judicial officers as a whole, it is unlikely that they will choose not to file a motion and endure a laborious litigation under a biased judge.

Among the 158 motions under Section 170.6, only 54 (34%) denied the challenge—Figure 1 displays the number of denials per specific reason:

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Section 170.6 is replete with rigorous procedural rules to make it harder for litigants to recklessly eliminate a qualified judge assigned to their matter. First, a little more than half of the denied motions (52%) failed to comply with Section 170.6(a)(2)’s timing standards.198 Second, 4 challenges (7%) were defeated because they were addressed to an appellate judge and thus did not survive Section 170.6(a)(1).199 Third, there was a three-way tie for reasons that blocked 3 motions (5.5%) each: submitting more than one challenge, in violation of Section 170.6(a)(4), whether it was from one party or one determined side;200 the continuation rule, codified by Section 170.6(a)(5); and the form standards, mandated by Section 170.6(a)(5) for written affidavits and Section 170.6(a)(6) for oral statements.201 Fourth, 2
others (4%) were unsuccessful because the court had no authority.\footnote{202} Fifth, 1 (2%) was denied as the movant had not yet appeared in the action.\footnote{203} There was also a strange motion that was declared a “sham” since the litigant who filed the challenge was not a real person—as a result, the judge denied the challenge as it was not “duly presented” in accordance with Section 170.6(a)(4).\footnote{204} Regrettably, the reasons for 9 denials (17%) could not be gleaned from the publicly available case material.\footnote{205}

In line with the empirical finding that 66% of challenges were granted, attorneys, at least competent ones, are not only aware of the timing and form rules, but also successfully follow them. This comes as no surprise considering they are used to meeting the many deadlines that make up litigation. The odds of submitting a faulty challenge and consequently suffering under an offended judge are negligible—presumably, counsel would not carelessly file a motion that they know or should know is bound to fail. There are several safeguards that litigants must navigate, but untimeliness, the most frequent reason for rejected motions, was a weak barrier, stopping just 18% of the challenges. The statute counts on the time limit for filing the motion to prevent litigants from peremptorily disqualifying their judge based on how the judge has been ruling on the case. However, litigants or their attorneys may already know how the judge will view their case as soon as they receive the judicial assignment (or at least within the designated time frame) due to “random internet searches, anecdotal opinions from colleagues, or perhaps printed biographical material about the judge.”\footnote{206} Hence, it looks like the limit on the number of challenges per case is the only statutory design that might effectively stall abuse, as litigants are reluctant to gamble that their new judge will not be worse.

The remaining 104 successful challenges (66%) disqualified at least 37 judges from 1 or more cases. Figure 2 below illustrates this proportion:

\footnote{203}{Court Order, Second Site LLC v. Scott, No. BC723513, 2021 Cal. Super. LEXIS 73877 (Apr. 22, 2021).}
\footnote{204}{Minute Order, Hannaford v. Seven Satellite Pty, No. 19STCV13245, 2021 Cal. Super. LEXIS 76672, at *10 (July 30, 2021).}
\footnote{205}{E.g., Order Resetting the Order to Show Cause Hearing for Why a Preliminary Injunction Should Not Issue and to Extend the Temporary Restraining Order, Genuis Fund I ABC v. Co. V, No. 20STCV39545, 2021 Cal. Super. LEXIS 25876 (May 28, 2021).}
\footnote{206}{Merrill, supra note 154, at 50.}
Given there were 1,755 superior court judges in 2021, 2% of those judges (notwithstanding both the unnamed judges and judges who ruled prior to 2021) were peremptorily disqualified. According to the California Commission on Judicial Performance’s 2021 Annual Report, a judge was disciplined for bias on 8 occasions: 5 times for “bias or appearance of bias not directed toward a particular class (includes embroilment, prejudgment, favoritism)” and 3 times for “bias or appearance of bias toward a particular class.” For context, there were “1,868 judgeships within the commission’s jurisdiction” including the judicial positions at the supreme court, courts of appeal, and superior courts. Even if all 8 instances of bias were from different superior court judges, less than 1% (0.5%) of all superior court judges would have faced discipline.

According to this data, there were more disqualified judges (2%) than judges disciplined for bias (0.5%). Judicial accountability was promoted when the 0.5% of judges who deviated from ethical guidelines were disqualified; what about the remaining 1.5% of judges? Of course, these judges might have just luckily evaded discipline for their bias. Discipline, unlike peremptory challenges, requires an investigation, not solely a mere allegation. That being said, if the litigants and their attorneys truly thought their judge was biased, they could have complained to the Commission on Judicial Performance (at least anonymously) in order to avoid facing the same judge again.  

208. Id. at 17. In 2021, three of the four private admonishments, id. at 40, and one of the eleven advisory letters dealt with bias, id. at 41–42.
209. Id. at 11.
210. Id. at 10 (“[T]he standard of proof in [commission proceedings is] proof by clear and convincing evidence sufficient to sustain a charge to a reasonable certainty.” (citing Geiler v. Comm’n on Jud. Qualifications, 515 P.2d 1, 4 (Cal. 1973))).
211. Id. at 1.
A disqualified judge’s age, race, and gender, among other characteristics, were not easily identifiable. However, the judge’s political leanings (determined by which political party they were registered for) were discoverable for 21 out of the 37 disqualified judges. Thirteen judges (62%) were Democrats, 7 judges (33%) were Republicans, and 1 judge (5%) was a Libertarian. This Note is committed to preserving these judges’ anonymity as they may understandably want to keep their politics confidential. Unfortunately, the distribution of party affiliation in the state judiciary was not readily ascertainable, but the total voter registration by political party provided some context—in 2021, 46.5% of voters were Democrats, and 24% of voters were Republican.\footnote{15-Day Report of Registration, CAL. SEC’Y OF STATE (Aug. 30, 2021), https://elections.cdn.sos.ca.gov/rot/15day-recall-2021/historical-reg-stats.pdf [https://perma.cc/2BTT-MGFN].} The comparison is illustrated by Figure 3 below:

![Figure 3](image-url)

The law does not and cannot cover every kind of situation, so judicial discretion in the interpretation of the law maintains the legal system. Accordingly, judicial disqualification must take into account the diversity of experiences and legal philosophies that make up the bench. Each judge should have opportunities to arbitrate cases; otherwise, caselaw will cease to think outside the box. Yet, the data reveals that 62% of the disqualified judges were registered Democrats, and 33% of those judges were registered...
Republicans. Granted, without knowing how many California judges in sum have a Democratic-party affiliation, this is weak evidence for party-affiliation bias. But it is at least some insight that may suggest at best discriminatory effects and at worst purposeful discrimination against Democrat judges—for not only criminal, but also civil cases.\textsuperscript{213} If judges from a particular political party are systematically taken off matters through peremptory challenges, the judiciary becomes less representative. Consider how there are “persuasive correlations between the political party of the appointing authority and the judge’s decisions on certain issues,” according to an academic study of judicial decision-making.\textsuperscript{214} Other group affiliations are also implicated: Black, Hispanic, and Asian voters are typically more liberal than conservative.\textsuperscript{215}

Of 37 disqualified judges, 33 of them had reviews on The Robing Room—a forum “by attorneys for attorneys” in which “judges are judged.”\textsuperscript{216} Fifteen judicial profiles had at least 1 comment from or before 2021 that mentioned a Section 170.6 motion—all but 1 recommended a peremptory challenge. Out of the 32 comments urging others to use Section 170.6 (many of which listed more than one reason), only 15 comments (47\%) complained of the judge’s bias. While 3 comments (9\%) gave no reason at all, the remaining 17 comments cited explanations that did not concern bias: 17 (53\%) for incompetence, 9 (28\%) for unpleasant temperament, 4 (12.5\%) for unnecessary delay, and 4 (12.5\%) for disliked persons working in the judge’s chambers. Out of respect for these judges, their identities will remain anonymous, especially since the information is not necessary to this Note’s analytical aims. Figure 4 below demonstrates this distribution of motives:

\begin{itemize}
  \item \textsuperscript{213} See infra Section II.C.
  \item \textsuperscript{214} Levi, supra note 23.
  \item \textsuperscript{216} FAQs, THE ROBING ROOM, http://www.therobingroom.com/california/FAQs.aspx?state=CA [https://perma.cc/FSY6-LW55]. The Robing Room is “owned and operated by North Law Publishers, Inc., a New York Corporation, whose principal shareholders are attorneys.” \textit{Id}.\
\end{itemize}
Section 170.6 blatantly spells out the one acceptable rationale for challenging the judge—bias. When litigants abuse their affidavit power against unbiased judges (that is, “judge shopping,” although the term does not quite capture the concept), they are admitting their search for a judge who will favor their side. The sample of comments from The Robing Room implies that Section 170.6 is not an obscure and hidden procedure. Rather, attorneys understand that they can peremptorily disqualify their judge through Section 170.6. Fifty-three percent of these comments recommending a challenge did not complain that the judge was biased. Admittedly, it is uncertain whether the litigants who challenged their judge in this study held the same beliefs as these reviewers or were influenced by these reviews in making their challenge. Though the data does not definitively prove that reasons outside of bias motivated these challenges, it still exposes what some practitioners think these challenges should be used for. Incompetence, unpleasant temperament, unnecessary delay, and disliked persons working in the judge’s chambers are undoubtedly serious problems, but they are problems that nevertheless affect both the plaintiff and defendant—there is no favoritism and therefore no bias. The duty of vigorous advocacy on behalf of the client is not a free pass for attorneys to bend the law to their will.

Besides The Robing Room, there were other published sources documenting criticism of the disqualified judges: circulating petitions for removal, judicial corruption activism pages, and news articles about their behavior in their private or public lives. One news outlet asked a disqualified judge about her alleged bias toward women to which she responded that there is probably an equally strong sentiment that she is biased toward men. Notably, the Commission on Judicial Performance publicly admonished one of the disqualified judges for improper conduct extraneous to bias.

There is arguably universal consensus that public confidence in the judiciary is of the utmost importance—the public needs assurance that they
can rely on the courts for remedies to their legal grievances. The uproar against judges on the Internet (that is, the petitions, activism pages, news reports, and so forth) feeds the public impression that judicial independence is forgotten and left behind on the courthouse’s steps. Even if a judge’s attitudes on contentious issues in the legal and political community escape the public eye, the seemingly innocuous knowledge of the judge’s political-party registration can speak volumes given modern political polarization. Republican litigants confronting Democrat judges may believe the “politicians in black robes” will unequivocally rule left, and vice versa for Democrat litigants. The perception of bias in the courts is disconnected from whether bias is actually rampant among judges.

IV. ALTERNATIVES TO CALIFORNIA’S JUDICIAL PEREMPTORY CHALLENGE

A. EXISTING ALTERNATIVE PROCEDURES

Despite an overall low risk of abuse, since judicial peremptory challenges are seemingly infrequent, there is little need for the challenge at all, at least in its current form. The empirical findings cast alternative approaches in a new light. This Note focuses on three ideas for compromise: the panel-exclusion approach, the interlocutory appeal approach, and the independent judge approach.

1. The Panel-Exclusion Approach

The panel-exclusion approach advocates the adoption of a procedure similar to that used in arbitration. Litigants would anonymously exclude judges who are randomly placed on the case’s panel. Unlike the challenge as it currently stands, court administrators would provide litigants with a “compilation of numerous exclusion decisions,” including rates, prior to any challenge, so litigants can make informed decisions without relying solely on “mistakes in individual cases.” This is an especially fruitful

217. See Levi, supra note 23 (“[F]or judges to consider or present themselves as of different political teams . . . and for the experience of parties and lawyers to see judges so arrayed, would be highly destructive of the reality and appearance of fair and impartial, non-partisan courts.”).

218. See, e.g., LAB. ARB. RULES r. 12 (AM. ARB. ASS’N 2019) (“If the parties have agreed that the arbitrators shall appoint the neutral arbitrator from the National Roster, the AAA shall furnish to the party-appointed arbitrators . . . a list selected from the National Roster, and the appointment of the neutral arbitrator shall be made as prescribed in that section.”).

219. Miller, supra note 147, at 482–83.

220. Id. at 483–84. Disclosure of campaign activities could also help. Serbulea, supra note 45, at 1145 (“It would be difficult and costly for litigants to discover relevant information, so judges could be required to have on file copies of their campaign statements, as well as information on their campaign finances.”).
modification considering the overwhelming amount of unsolicited opinions and false stories online. Judicial analytics not only puts judges on notice about their inappropriate behavior and thus provides opportunities to cure such behavior, but also wins trust from the public by prioritizing transparency and honesty.

2. The Interlocutory Appeal Approach

A retired Associate Justice of the Arkansas Supreme Court admires Tennessee’s civil procedure in which “[t]he judge refusing to recuse, following a motion to do so accompanied by an affidavit, must enter an order stating his or her reasons for not recusing and any other pertinent information from the record for an immediate, interlocutory appeal to the Tennessee Court of Appeals, where that court will expedite and conduct a de novo review.”221 Through the appeal, parties who failed to disqualify their judge would not have to endure a lengthy trial with an offended judge. Therefore, the challenge’s opponents might appreciate this third type of recourse before appeal of the entire case (joining review by a different judge, like the district’s chief judge, and mandamus review). The retired Associate Justice praises its efficacy in guarding judicial integrity and due process and urges Arkansas, a state where judges have discretion to deny disqualification motions without stating reasons, to follow suit.222 His argument has merit in other jurisdictions with automatic disqualification, such as California, because appellate review will presumably lead to fewer judicial removals and prevent the public from falsely believing that there are more biased judges than is actually the case. The remedy provides no relief to litigants and attorneys who fear the insulted judge’s retaliation, but it should curtail judge shopping, especially on discriminatory grounds like race or gender, and minimize the odds of judicial intimidation. There is instinctive apprehension about crowding the appellate dockets, including the Supreme Court, but the Tennessee Administrative Office of the Courts—finding only ten or less appeals per year in a span of three years—and a Tennessee Court of Appeals judge—a “self-described ‘fan of the rule’”—calm these concerns.223 However, litigants lacking sufficient resources may not appeal even if their judge’s personal views have irreparably infected the proceeding.224

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222. Brown, supra note 221, at 73.
223. Id. at 73 & nn.75–77.
224. Frost, supra note 40, at 571–72; see also Serbulea, supra note 45, at 1143 (“[F]inding an impartial appellate judge for an interlocutory appeal places a heavy burden on litigants.”).
3. The Independent Judge Approach

Although his analysis revolves around a federal recusal statute’s reform, one legal scholar contributes a slightly different antidote to this dialogue. Another disinterested trial judge (that is, not the affected judge with a personal stake in the challenge) should rule on the disqualification motion because even the best-intentioned judge might be oblivious to their own faults. He further diverges from the affidavit procedure by suggesting that “the challenged judge be encouraged to file evidence refuting facts asserted in the recusal motion, and perhaps also an explanation of why disqualification is not justified,” so there is an “adversarial presentation of the issue.”

Judges may worry about offending their colleagues, but given dissenting opinions and reversals of lower courts’ judgments, they are likely already accustomed to internal disagreement and can consequently stomach any potential discomfort. Additionally, he contends that “the appearance of justice will be better served, even if the actual rate of recusal remains unchanged.”

B. The Proposed Alternative Procedure

A more promising solution is a hybrid model between the panel-exclusion approach (specifically, the dissemination of judicial analytics) and the independent judge approach. After litigants receive the exclusion decisions and rates, they can file the motion with a different trial judge who will review both the motion and the challenged judge’s evidentiary explanation for factual and legal sufficiency. An interlocutory appeal is rendered unnecessary if an independent judge can accurately filter for allegations that actually deserve a judicial peremptory challenge. Admittedly, like federal law, this is not peremptory per se, but it will hopefully further reduce the number of “uninformed, misinformed, [and] delusional” litigants who exercise the challenge.

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225. Frost, supra note 40, at 588; see, e.g., Tony Mauro, Courtside: When Planets Collide, LEGAL TIMES, Mar. 29, 2004, at 10 (“We are the only branch of government that must give reasons for what we do.”) (quoting Justice Kennedy); Serbulea, supra note 45, at 1142–43 (“It is . . . the judge who plays the role of the adversary party, but in an unfair way: getting to decide the matter, and rarely giving a reasoned (and written) explanation . . . . [J]udge impartiality[] is not consistent with the self-judging of recusal motions, which is the law in most states and the federal system . . . .”).

226. Frost, supra note 40, at 552 (“Judges who wish to maintain collegial relations with one another hesitate to set in stone recusal procedures that might be viewed as disrespectful of their fellow judges.”).

227. See, e.g., United States v. Microsoft Corp., 253 F.3d 34, 116 (D.C. Cir. 2001) (per curiam) (disqualifying a district court judge from a highly publicized case even though the circuit judges who made the decision worked in the same courthouse as the disqualified judge).

228. Frost, supra note 40, at 586.

As judges lack crisis managers, it is imperative that resources are invested into educating the public on judicial duties and verified statistics on judicial bias. Unlike news outlets, petitions, social media posts, and activism pages probably do not check the accuracy of the information they release. With the help of Big Data and artificial intelligence, judicial analytics will become more accurate over time, which will better alert litigants about the judges who are actually biased than other unverified sources. By making such information accessible, perhaps litigants will place less weight on factors like the judge’s race and gender, for example. The Robing Room states that slanderous comments posted in bad faith are subject to removal; realistically, it can hardly stop all “sour grapes” who harbor disdain toward their judge for merely siding with the opposing party after fairly applying the law to the facts. Consider how one of the disqualified judges in the study asserted that there are an equal number of people who think she is biased toward either women or men. There is a possibility that the other sources noted in the study, besides the public admonishment, are campaigns by losing litigants to unjustifiably vilify their judge.

It seems problematic to allow judges to entertain motions petitioning their own disqualification, and the public agrees. An independent adjudicator should handle the challenge, so the challenged judge does not have to awkwardly decide their own neutrality. It is a win-win situation—if the reviewing judge finds the challenged judge corrupted with partiality, then the public will trust that the judiciary is void of collusion, but if the reviewing judge deems the challenged judge unbiased, then the public will have faith in the judiciary’s independence, and the judge will be guarded from discrimination. Some argue that the challenged judge is ideal because they are closest to the alleged facts; this is precisely the issue. That said, the reviewing judge may have a connection to the challenged judge—for example, a friendship—that skews their decision in favor of a denial. Perhaps the reviewing judge should show that there is no personal relationship to the challenged judge, but at some point, judges have to be trusted to rule fairly.

In lieu of an automatic transfer, judges can defend their fitness to serve and expose the litigants who use bias as a pretense for prohibited reasons,

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230. See generally id.
231. FAQs, supra note 216 (“We reserve the right to delete comments and ratings which we believe are libelous or not submitted in good faith.”).
233. Serbulea, supra note 45, at 1146 n.346.
like discrimination based on party affiliation. It is easy for Section 170.6 to act as a Trojan horse carrying ulterior motives because automatic reassignment is swiftly delivered following a quick evaluation of procedural adequacy. If judges have no chance to prove the allegations of bias wrong, these litigants unwittingly trigger an endless feedback loop in which their baseless challenges inflate the number of “biased” judges which, in turn, instigates more challenges. The expectation is that fewer than 1.5% of judges will encounter peremptory disqualification, closing the disparity between the number of disqualified judges and the number of judges disciplined for bias. This will then demonstrate to the public that judges are not always predisposed to bias. To play devil’s advocate, the public may feel disheartened upon witnessing too many judges found guilty of bias, but the judiciary should commit to their integrity and weed out the “10% problem,” supranote 140 the estimate of incompetent judges. Judges inevitably do not command from Olympian heights; rather, they are subject to their beliefs and attitudes. It is difficult to procure solid evidence of judges’ unconscious biases, but litigants should still explain what manifestations, whether inside or outside the courtroom, caused them to suspect such biases. They should not have free reign to judge shop due to a random feeling, especially in the U.S. legal system that is rooted in proof. Judicial economy is indeed lost if an inquiry is made into the merits as well, but it is a wiser alternative than the current framework that passively allows litigants to chase unequal justice.

V. RECOMMENDATIONS FOR FUTURE RESEARCH

Regrettably, without formal statistical methods to control for irrelevant factors, this Note is unable to confirm a causal relationship between a judge’s peremptory disqualification and any complaints of bias on their Robing Room profile. For the same reason, it is unknown if failed judicial peremptory challenges affected case outcomes (comparing the case in which the challenge was initiated to any future cases with the disqualified judge—this would have informed the policy debate on whether disqualified judges

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234. Menell & Vacca, supra note 140, at 884–85.
236. For example, the judge addresses male attorneys as “counsel” but refers to female attorneys by their first name.
237. Serbulea, supra note 45, at 1146 n.346.
are truly hostile). Therefore, the first recommendation for future research is setting up a more sophisticated study in order to discover results beyond mere correlations. Another recommendation is conducting surveys directed to (1) the public asking about their impression of judicial bias,\textsuperscript{238} (2) judges asking about their various group affiliations (especially characteristics that are not available through public materials such as race and ethnicity, gender, and age), and (3) attorneys asking what resources they have at their disposal when deciding whether they should use Section 170.6. Since judicial disciplinary proceedings for bias may miss judges with more subtle manifestations of bias, one suggestion is to conduct an experiment\textsuperscript{239} testing how widespread conscious and unconscious biases are among superior court judges in California. Ideally, this Note would analyze the relationship between the type of case (for example, personal injury) and judge shopping; unfortunately, there were not enough free and accessible documents online. For this pursuit, as a judge’s area of professional expertise is easy to find, future researchers should investigate whether movants of a specific type of case are strategically challenging judges with or without experience in that practice area. Lastly, the challenge’s prevalence is a regional phenomenon in the United States, so studies conducted in other states are recommended as well.

CONCLUSION

Notwithstanding limitations, the empirical data reported in this Note has value—it discovered that judicial peremptory challenges were quite rare and therefore abuse from these challenges was not out of hand. Among the few filed motions, most were automatically granted, indicating that the procedural protections were a flimsier shield than the statute had planned. Juxtaposing the higher percentage of disqualified judges with the lower percentage of judges reprimanded for bias implies that litigants are alleging bias as a mere formality. This is further corroborated by the finding that more than half of the comments on The Robing Room recommending others to challenge a certain judge did not mention bias.\textsuperscript{240} In regard to discrimination, it found significantly more Democrat judges disqualified than Republican judges. Without additional research, this Note can only surmise about possible fixes to prevent discrimination, like the standard for employment law in which the judge’s ability to perform their duties must relate to the

\textsuperscript{238} Surveys should be carefully formulated as people do not always answer honestly. See Park, supra note 121, at 571.

\textsuperscript{239} See id. at 571–72 for one of the methods of uncovering unconscious biases.

\textsuperscript{240} To reiterate, this Note acknowledges issues other than bias—the California Legislature can determine whether these additional grounds for disqualification are warranted.
reasons for exclusion. Whether the challenge can inherit AB 3070 (the 2020 law that “requir[es] an attorney exercising peremptory strikes to show clear and convincing evidence [under an objective standard] that [their] action is unrelated to that juror’s membership in a protected group or class”) such that it is workable to judges poses an interesting question. Altogether, this Note concludes that there is not a serious risk of abuse from the challenge but Section 170.6 is still not a satisfactory remedy by legislation—there is no need to settle for less when there is a better solution. As Justice Kennedy wrote, judicial disqualification standards should extend beyond the minimum requirement of due process; however, they should not stretch so thin when judicial integrity is not completely broken. The proposed alternative will heal the issues produced when the challenge is granted as a matter of right by implementing an audit into the accusation’s truth. In other words, as a middle ground in the policy dichotomy, it will perfect the peremptory challenge and diminish the risk of abuse even more than the current model.


242. Gravdal, supra note 123 (emphasis omitted).