Staff Memorandum 2025-10
Updates on Staff Research and Preliminary Proposals: Gender Bias, Retroactivity, and 170.6 Disqualifications

This memorandum provides research updates and preliminary staff proposals for topics discussed at the April and May 2025 Committee meetings.

Research Update

Gender bias in criminal proceedings

Committee staff have continued researching gender bias in criminal proceedings. As presented at the April meeting, Professor Sandra Babcock's review of death penalty trial transcripts involving women defendants found that irrelevant and inflammatory evidence — such as a defendant's sexual history, clothing, and parenting choices — was often introduced to frame women as immoral, manipulative, or undeserving of mercy.[1] While Professor Babcock's current research has focused on capital cases, staff is working with her and her team to determine how often this type of evidence has also been presented in non-capital cases in California.

Staff has also made a preliminary conclusion on the best approach to address this issue. While the Racial Justice Act was discussed as a possible model for such reforms, the RJA's implementation challenges, discussed in Staff Memorandum 2025-08, could present similar challenges for a "Gender Justice Act." Additionally, statistical disparity claims based on gender could be complicated by the disproportionate number of male defendants in the criminal legal system.[2] Developing evidentiary reforms that limit the admissibility of evidence reflecting gender bias may be a more suitable approach. Although the RJA did not amend the Evidence Code, its provisions operate to exclude racially biased testimony or arguments from trials, making an evidentiary reform approach for gender bias consistent with the RJA.[3]

Under current law, lawyers have wide latitude to introduce material as evidence in trial that could trigger gender-based stereotypes, such as prior sexual conduct, sexually explicit photos, and evidence of poor parenting. The Evidence Code broadly defines "relevant evidence" to include anything "having any tendency in

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[1] See Sandra Babcock, *Gendered Capital Punishment*, 31 Wm. & Mary J. Race, Gender Soc. Just. (March 2025).

[2] In California, women made up only 4% of the population of people incarcerated in 2023. Mia Bird, et al., *Women in California's Prisons*, California Policy Lab, 3 (July 2025). The average sentence length for most offenses is higher for men than it is for women, and the discrepancy is most likely caused by additional offenses or enhancements added onto their sentences. Id. at 4–5.

[3] Penal Code § 745(a)(2).

reason to prove or disprove any disputed fact that is of consequence to the determination of the action."[4] Although courts are required to weigh the probative value of any evidence against its risk of undue prejudice, there is currently no specific rule — as there are for other types of evidence — highlighting the risk of gender bias or the limited probative value of such evidence.[5]

California's Evidence Code currently contains several provisions providing for increased judicial scrutiny of certain types of evidence, including some limitations on evidence that has the potential to activate gender bias:

- "**Rape shield" laws**:[6] These statutes limit the use of a complaining witness's prior sexual conduct in sexual assault cases.[7] A written motion and sealed affidavit are required, followed by a hearing outside the jury's presence.[8] Courts can issue orders specifying exactly what evidence can be introduced and the type of questions that can be asked.[9]

- **Creative expressions:** Enacted in 2022, this law requires a special balancing test before admitting "creative expressions" (such as rap lyrics) as evidence.[10] Courts must consider the heightened risk of racial bias and the limited probative value of the expression.[11]

- **Citizenship**: Prohibits the introduction of a person's citizenship or immigration status "unless the judge presiding over the matter first determines that the evidence is admissible in an in camera hearing."[12]

- **Condom possession**: Bars the use of condom possession as evidence in prostitution cases.[13]

[4] Evidence Code § 210.
[5] See Evidence Code § 352.
[6] "Complaining witness" generally refers to the alleged victim of the crime charged. See Evidence Code § 782(b).
[7] Evidence Code §§ 782, 1103(c). This can include exclusion of evidence of how a complaining witness was dressed at the time of an offense when offered by a defendant to prove consent. Evidence Code § 1103(c).
[8] Evidence Code § 782(a).
[9] Evidence Code § 782(a)(4).
[10] Evidence Code § 352.2.
[11] Id.
[12] Evidence Code § 351.4.
[13] Evidence Code § 782.1.

- **Character evidence**: Generally, evidence of character or past bad acts to prove conduct on a particular occasion is inadmissible.[14] Felony convictions involving moral turpitude can be used for impeachment, but evidence of misdemeanor and other felony convictions is typically excluded.[15]

These existing Evidence Code provisions may provide a framework for developing a new law addressing gender bias. After discussion with the Committee, staff will continue research to identify specific types of evidence that have a strong likelihood of eliciting gender and intersectional bias, with the goal of developing a proposal subjecting this type of evidence to heightened scrutiny by courts.

Preliminary Staff Proposals

After hearing witness testimony and reviewing legal developments at the Committee's April and May 2025 meetings, staff propose the following recommendation for further discussion and analysis.

Allow habeas corpus relief for people convicted of failure-to-protect murder under pre-*Collins* standards.

Summary Staff Proposal
Amend Penal Code section 1473.5 to authorize habeas corpus relief for people convicted of murder based on a failure-to-protect theory where the conviction would likely not have occurred under the clarified legal standard announced by the California Supreme Court in *People v. Collins*.

Current Law
Penal Code section 1473.5 allows convicted people to seek habeas corpus relief if their trial predated the admissibility of expert testimony on IPV and its effects.

Background
In *People v. Collins*, the California Supreme Court reversed the second-degree murder conviction of a mother whose child was killed by the child's abusive father.[16] The court held that although the defendant had a duty to protect her child, failure-to-protect liability requires proof that the parent actually knew, to a substantial degree of certainty, that a life-endangering act was occurring or about to occur, and that they failed to act in conscious disregard for life.[17]

[14] Evidence Code § 1101(a); But see Evidence Code § 1101(b) (allowing such evidence when offered to prove a fact other than a person's disposition to commit a crime, such as motive, intent, or preparation).
[15] Evidence Code § 788. See also *People v. Castro*, 38 Cal.3d 301 (1985).
[16] *People v. Collins*, 17 Cal.5th 293 (2025).
[17] Id. at 310.

This clarification significantly narrowed the scope of accomplice liability for murder in failure-to-protect cases and emphasized that general awareness of abuse or risk is not enough to support a murder conviction under this theory. However, under current law, whether the *Collins* decision applies retroactively to individuals already convicted under broader failure-to-protect theories is uncertain.[18]

When the Legislature enacted Penal Code section 1473.5 in 2002, it recognized that many IPV survivors had been convicted of murder under legal standards that did not account for their trauma or abuse.[19] The statute created a limited remedy allowing those individuals to return to court to petition for habeas relief in light of the newly established Evidence Code provision making expert testimony on IPV and its effects admissible.[20] In 2004, the law was expanded to apply to individuals convicted of any violent offense before an important California Supreme Court decision in August 1996 that expanded the scope of expert testimony in IPV cases.[21]

The proposed expansion here follows this same model, providing a targeted avenue for relief based on a major legal development that reshaped how criminal responsibility is assessed in IPV-related deaths.

Staff Proposal

The Committee should consider recommending a statutory amendment to Penal Code section 1473.5 that authorizes habeas relief for individuals convicted of murder under a failure-to-protect theory, where the conviction would likely not be valid under *People v. Collins*.

Limit blanket challenges in criminal cases under Code of Civil Procedure § 170.6.

Summary Staff Proposal

Create a broad definition of a blanket challenge: repeated disqualifications under Code of Civil Procedure § 170.6 that prevent a judge from hearing all criminal cases or a particular type of case or recurring docket, such as arraignments, mental health court, or domestic violence cases.

When a blanket challenge is filed, allow the challenged judge or Presiding Judge to request a hearing, which will be determined by a judge from another county.

[18] Although new "substantive" rules must apply retroactively, changes deemed "procedural" are generally not given retroactive application, and courts evaluating this question must navigate different federal and state retroactivity standards. See *In re Milton*, 13 Cal.5th 893 (2022).
[19] See SB 799 (2001–2002 Regular Session). See also Evidence Code § 1107.
[20] Penal Code § 1473.5(a).
[21] See SB 1385 (2003–2004 Regular Session). The case was *People v. Humphrey*, 13 Cal.4th 1073 (1996).

At the hearing, the party bringing the blanket challenge must establish a reasonable good faith belief, through particularized facts, that the judge is prejudiced against the office, the group of attorneys, or their interest. While the prejudice standard should not be difficult to meet, similar to the law in Oregon, these additional requirements will help to limit abuse of 170.6 disqualifications.

This process would still allow individual case-based automatic disqualifications under Code of Civil Procedure § 170.6.

Current Law
Code of Civil Procedure § 170.6 allows an attorney to disqualify any judge if the attorney alleges that the judge is "prejudiced against a party or attorney."[22] To make these allegations, an attorney needs only to note the disqualification orally under oath or file a boilerplate motion prescribed in the statute.[23]

Background
While 170.6 challenges are generally exercised on a case-specific basis, a public agency such as a prosecutor's office or public defender can use 170.6 challenges systematically against a judge so that the judge can no longer hear a particular type of or any criminal cases.[24] California law allows these "blanket" disqualifications without giving judges a way to respond.

In 1977, the California Supreme Court upheld the use of blanket challenges in *Solberg v. Superior Court*. In the decades following *Solberg*, appellate courts have questioned its holding.[25] The California Supreme Court recently agreed to revisit *Solberg* in a case where the San Joaquin County Counsel's Office, representing the Public Conservator, blanket disqualified a judge for all mental health cases.[26]

Two court decisions since the Committee's meeting in May show the continued need for additional requirements for blanket challenges.

- In San Diego, prosecutors filed 170.6 challenges in two cases referred to Behavioral Health Court over the prosecutor's objection. The sole judge in Behavioral Health Court attempted to deny the motions as improper and untimely, but her decision was overturned on appeal because there was no legal basis to deny the 170.6 challenge.[27]

[22] Code of Civil Procedure § 170.6(a)(2).
[23] Code of Civil Procedure § 170.6(a)(2). See *Autoland v. Superior Court*, 205 Cal.App.3d 857, 862 (1988) (describing the "empty pretension" of the sworn statement).
[24] See, e.g., *People v. Superior Court (Tejeda)*, 1 Cal.App.5th 892, 905 (2016).
[25] See *NutraGenetics, LLC v. Superior Ct.*, 179 Cal. App. 4th 243, 260 (2009); *People v. Superior Court (Tejeda)*, 1 Cal.App.5th 892, 903, 907–911 (2016) (noting that most of *Solberg* appeared to be dicta and urging the California Supreme Court to revisit the case).
[26] *J.O. v. Superior Court (San Joaquin County Public Conservator)*, Supreme Court No. S287285, review granted December 18, 2024.
[27] *People v. Superior Court of San Diego County (Broadway)*, 2025 WL 1873313 (June 25, 2025)

- In Yolo County, prosecutors blanket challenged the only Hispanic judge in the county and disqualified her from hearing felony criminal cases. Defense attorneys raised an equal protection challenge to the 170.6 disqualifications, but the Presiding Judge was forced to deny it without any record of intentional discrimination, currently the only bar to a 170.6 challenge.[28]

At the Committee's request, Judge Daniel Maguire, who appeared as a witness at the May meeting, conducted an informal survey of presiding judges throughout the state on blanket challenges. While many courts do not keep this data and several presiding judges did not respond, the survey did reveal that both prosecutors and defense attorneys make significant use of blanket disqualifications, with prosecutors and county counsel using them slightly more often.[29]

California is also in a shrinking minority of states — currently only 5 other states allow blanket challenges — that permit this practice. For example, Oregon recently amended its law to allow a judge to challenge a party that files motions to disqualify that "effectively denies the judge assignment to a criminal or juvenile delinquency docket."[30]

Because blanket challenges present serious threats to judicial independence and the administration of justice, abuses of the practice should not be allowed. While individual case-based automatic disqualifications under Code of Civil Procedure § 170.6 should still be permitted, manipulation of the judicial process by blanket challenges can be limited by a process that allows challenged judges to require the party bringing a blanket challenge to set forth specific facts. A judge from another county will then determine whether those facts establish a reasonable good faith that the judge is prejudiced against the party. In addition, the Presiding Judge of each Superior Court should also have the ability to trigger this review of a blanket challenge because they may have a better sense of how a blanket challenge will impede the administration of justice.

And because there is a wide variety of case management practices across California, there should also be some flexibility in defining what a blanket challenge is. The definition should not be limited exclusively to challenges that result in a judge hearing no criminal cases but should also apply if challenges are filed to prevent a judge from hearing common motions or types of cases,

[28] *People v. Dlallo*, CR-202501543, Superior Court for Yolo County, Order, July 3, 2025.
[29] The Committee also asked another Committee panelist, DA Dan Dow of San Luis Obispo County and current president of the California District Attorneys Association, for similar data. Staff has yet to receive anything.
[30] See Oregon SB 807 (2023 Regular Session) (creating Oregon Rev. Stat. § 14.260(7)).

such as arraignments, bail hearings, mental health diversion, or domestic violence cases.

Staff Proposal
The Committee should consider recommending an amendment to Code of Civil Procedure § 170.6 for blanket challenges in criminal cases as specified above.

Conclusion

Staff looks forward to discussing the research and proposals presented in this memorandum with the Committee.

Respectfully submitted,

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