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Thurgood Marshall had it right all along on peremptory challenges

In her June 29 column, UC Berkeley School of Law Clinical Professor Elizabeth Semel discussed the "straightforward and surprising" history of prosecutorial peremptory challenge abuse.

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In her June 29 column "The pandemic, the killing of George Floyd and discriminatory jury selection," UC Berkeley School of Law Clinical Professor Elizabeth Semel discussed the "straightforward and surprising" history of prosecutorial peremptory challenge abuse.

Tracing the problem to its source, the U.S. Supreme Court decision in *Batson* v. Kentucky, 476 U.S. 79, (1986), Semel notes the design failures in the majority's establishment of a three-stage inquiry process had been identified by a concurring Justice Thurgood Marshall.

"The decision today will not end the racial discrimination that peremptories inject into the jury-selection process," Marshall wrote. "That goal can be accomplished only by eliminating peremptory challenges entirely."

Rightly predicting not just when but where, why and how the process would fail, Marshall highlighted the inclinations judges would have towards non-intervention. The process assumes a peremptory challenger acted on instinct and "gut feeling" and burden defendants with proving otherwise. Conversely, a judge would have to show a preponderance of the evidence showed the challenge was racially motivated.

Opposing an explanation based on body language, tone or other less-than-clear-cut forms of evidence would not only likely fail, but it could also be an invitation to war on a judge's re-election campaign. Winning support from prosecutor groups can often be the difference between smooth sailing and a hotly contested race, so why would a judge roll the dice absent anything less than clear and undeniable proof of racial bias when they can simply pass the buck to an appellate court?

Assembly Bill 3070, which was modelled on a similar law adopted by the Washington Supreme Court in 2018, proposes the end of the three-step inquiry that Marshall warned from the start would not work. I join with Semel in celebrating it and commend her for her role in drafting it for California. But it's not likely to empower trial judges to stake a claim on questionable peremptoriness.

A hypothetical example: A Black potential juror in a police shooting case voices disgust at the killing of George Floyd and strong support for the Black Lives Matter movement. The prosecutor strikes the juror from service and the defense attorney objects. The prosecutor explains they didn't believe the juror was telling the truth when they said they could decide the case impartially based on their body language.

Even in a post-*Batson* challenge California, how is a judge equipped to evaluate that?

Legislators, admirably, have made efforts to address this deficiency. The recently passed Assembly Bill 242, which goes into effect next year, amends the Rules of Court to provide that the Judicial Council "may" develop implicit bias programs and that they "may provide" them to judicial officers. Given the apparent lack of definition of these program plans, I'm not confident this will supply judges with the tools necessary to identify every racially motivated peremptory abuse, let alone all of them.

After wrangling for some time with what a proper solution should look like, I've come around to the idea that Marshall had it entirely right all along. Just as he foresaw the failings of the *Batson* challenge, the court's sole Black justice recognized that anything short of the elimination of peremptory challenges would be an incomplete fix. □

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