If Cause Is Good, Lawmakers Should Embrace Trouble

"The recent California legislation seems to me like small steps when what is needed are great leaps," says Retired Judge Eugene Hyman of Santa Clara County Superior Court, of legislative efforts to address systemic racism in the criminal justice system.

By **Eugene M. Hyman** | August 07, 2020 at 07:06 PM

Retired Judge Eugene M. Hyman of the Superior Court of California

State legislators should embrace the late civil rights icon John Lewis' concept of "good, necessary trouble" and do away with the peremptory challenge, one of our criminal justice

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system's most reliable sources of race-based disenfranchisement.

Under state and federal law, attorneys may invoke a set number of peremptory challenges to exclude a potential juror from service. No explanation is necessary, and while opposing parties may object, they must show by a preponderance of the evidence that the exclusion was based on race, ethnicity or sex.

That's a tremendous hurdle, one most judges seem to believe they're not prepared to deal with. **An informal report** from the National Judicial College this month indicates a majority of judges surveyed (65% of 634 respondents) believe there is systemic racism in our criminal justice system.

"Most of the judges I know are not overtly racist and sincerely seek to treat all people equally," wrote one survey respondent. "But I suspect that our implicit biases impact our decision-making more than we realize."

Assembly Bill 242, recently signed into law, and the House-passed **Assembly Bill 3070** are the state's latest efforts to address several of these deficiencies. The former bill directs the state's Judicial Council to develop implicit bias training programs, while the latter would require attorneys to offer a reason for their peremptory challenge.

But AB242's bias training, however robust, won't help a judge outmaneuver a sufficiently clever attorney's strategic use of a peremptory challenge. AB3070, meanwhile, fails to address the underlying peremptory problem identified by U.S. Supreme Court Justice Thurgood Marshall in the decision establishing the rule the bill now looks to address.

In *Batson v. Kentucky* 476 U.S. 79 (1986), Marshall—at the time the court's sole minority jurist—recognized the difficult burden trial courts face when assessing a prosecutor's motive. He rightly predicted that prosecutors would still be able to game the system with ease, so long as their discrimination wasn't blatant.

As Marshall no doubt knew, the Supreme Court established that peremptory challenges are not a constitutional right in *Stilson v. United States*, 250 U.S. 583 (1919). There's nothing to

stop us from doing away with them, beyond a will to do so.

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

Given how few criminal cases actually end up before a judge, legislators could greatly increase the perceptions of a fair trial through the elimination of peremptories with limited risk.

Proponents of the current state of peremptories claim such a change would upend the legal system as we know it, prompting an upswell in the number of guilty defendants going free. But a recent **Pew Research Center poll** indicates only 2% of 80,000 federal criminal cases reviewed went to trial, with the majority ending in a guilty verdict.

We can look to our friends across the pond for further evidence to the contrary. The like-modeled courts of the United Kingdom eliminated peremptory challenges in 1989, and they haven't reversed track since, which seems evident to me that things have worked out alright.

The recent California legislation seems to me like small steps when what is needed are great leaps. If we want judges to feel comfortable calling out implicit bias, we should consider eliminating judicial elections and not just training programs. If we want to stop the subtle sort of discrimination that Marshall spoke of in Batson, we should follow his advice and get rid of peremptories.

Now is the time for our leaders to embrace the cause of "good trouble" to propose necessary reforms, even if that means making a few powerful enemies in the process. Santa Clara District Attorney Jeff Rosen, who controversially revealed last week that his office would no longer seek the death penalty, serves as an example of the type of good troublemaker we'll need.

Judge Eugene M. Hyman *retired from the Superior Court of California, County of Santa Clara (San Jose) where, for 20 years, he presided over cases in the criminal, civil, probate, family and delinquency divisions of the court. He has presided over an adult domestic violence court and in 1999 presided over the first juvenile domestic violence and family violence court in the United States that was honored by the United Nations with a Public Service Award in 2008.*