

## What Do Prosecutors Think about *Batson*?

NANCY S. MARDER\*

### TABLE OF CONTENTS

INTRODUCTION .....	83
I. CONTRIBUTIONS OF OFFIT’S STUDY .....	85
II. LIMITATIONS OF OFFIT’S STUDY .....	87
III. GOING FORWARD.....	90
CONCLUSION.....	92

### INTRODUCTION

Anna Offit, a law professor and legal anthropologist, has published *Race-Conscious Jury Selection*,<sup>1</sup> a qualitative study of prosecutors’ views of jury selection, which makes an important contribution to the literature on *Batson v. Kentucky*.<sup>2</sup> By observing prosecutors during jury selection and by interviewing them about the ways in which they believe *Batson* affects their exercise of peremptory challenges, she paints a picture of prosecutors who are concerned about their professional reputation. These prosecutors worry that a *Batson* violation, or even a *Batson* challenge, will leave them branded as racists or sexists.

Offit’s study of prosecutors’ views provides an intriguing piece of the *Batson* puzzle, and one that has not received much attention to date. As Offit notes, *Batson* has been studied in myriad ways—from court cases that involve *Batson* challenges to transcript analyses of voir dire to statistical studies and interviews with African-American prospective jurors who have been struck from juries by prosecutors exercising their peremptory challenges.<sup>3</sup> Offit’s study adds to what we know about prosecutors’ views of *Batson*. She finds that the prosecutors in her study are concerned about their reputations and for the most part they want to do the right thing.

Offit captures what prosecutors reveal about their experiences with *Batson*, but they might not always be reliable narrators. How can these prosecutors’ accounts be reconciled with the cases involving *Batson* challenges when it seems like any reason that a prosecutor gives will suffice and be accepted by the trial court judge as race- or gender-neutral? In these cases involving *Batson* challenges, prosecutors can give almost any reason, no matter how “silly” or

---

\* Professor of Law and Director of the Justice John Paul Stevens Jury Center, IIT Chicago-Kent College of Law. I thank *Ohio State Law Journal Online* for inviting me to write this commentary.

<sup>1</sup> Anna Offit, *Race-Conscious Jury Selection*, 82 OHIO ST. L.J. 201 (2021).

<sup>2</sup> 476 U.S. 79 (1986).

<sup>3</sup> Offit, *supra* note 1, at 205.

“fanciful,”<sup>4</sup> just as long as it is race-neutral. Most recently, the U.S. Supreme Court has focused on cases in which it found *Batson* violations.<sup>5</sup> In several cases, the Court has established that comparisons can be made between the reasons that prosecutors give for excluding black prospective jurors while accepting white prospective jurors who share those same characteristics.<sup>6</sup> The prosecutors in these Supreme Court cases seem very different than the prosecutors that Offit interviewed.

The prosecutors that Offit observed and interviewed seem painstakingly careful about trying to do the right thing. However, the prosecutors in the *Batson* cases heard by the U.S. Supreme Court, such as the state prosecutors in *Foster v. Chatman* and *Flowers v. Mississippi*, do not seem the least bit concerned about avoiding race-based peremptory challenges.<sup>7</sup> Indeed, these prosecutors come as close as possible to creating smoking guns. The prosecutors’ office in *Foster* produced a list of black prospective jurors that the prosecutors did not want on the jury and that they removed with peremptory challenges. The prosecutor in *Flowers* tried the defendant six times, and each time he used peremptory challenges to strike numerous African-American prospective jurors and to seat almost all-white juries in this capital case. As the Court notes, the prosecutor in *Flowers* used peremptory challenges to strike 41 of the 42 African-American prospective jurors in the six trials combined.<sup>8</sup>

Although the prosecutors Offit observed in her study were scrupulous in their exercise of peremptory challenges, she suggests that some states’ recent revisions to the *Batson* test might be one way to make it more effective. For example, the State of Washington opted for an objective standard rather than the current need to show purposeful discrimination to succeed on a *Batson* challenge. An objective test might make it easier for prosecutors to know what they must avoid. I am grateful to Offit for having provided us this window into the prosecutorial perspective, but I am less sanguine than Offit that a state’s objective standard will do away with discriminatory peremptory challenges. The revised *Batson* test might help, but there are still ways to elude it. Time will tell whether the states’ efforts will suffice or whether Justice Marshall will be proven right. In his concurrence in *Batson*, Justice Marshall presciently suggested that the only way to eliminate discriminatory peremptory challenges is to eliminate *all* peremptory challenges.<sup>9</sup>

---

<sup>4</sup> Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam).

<sup>5</sup> See, e.g., *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019); *Foster v. Chatman*, 136 S.Ct. 1737 (2016).

<sup>6</sup> See, e.g., *Flowers*, 139 S.Ct. at 2248-49; *Foster*, 136 S.Ct. at 1750-52.

<sup>7</sup> *Foster*, 136 S.Ct. at 1744 (noting that prosecutors created a list of “definite NO’s,” which included the five African-American prospective jurors who remained on the venire); *Flowers*, 139 S.Ct. at 2245-46.

<sup>8</sup> *Flowers*, 139 S.Ct. at 2235.

<sup>9</sup> *Batson*, 476 U.S. at 102, 108 (Marshall, J., concurring) (“[O]nly by banning peremptories entirely can such discrimination be ended.”).

This commentary on Offit's article proceeds in three Parts. Part I identifies the contributions that Offit's qualitative study makes to what we know about how prosecutors perceive their role in light of *Batson*. Part II notes what is missing from this account. Part III considers how best to proceed in the future; the answer depends on how bleak one finds the past and the present.

### I. CONTRIBUTIONS OF OFFIT'S STUDY

Offit's qualitative study of prosecutors makes an important contribution to the literature on *Batson*. In her five-year (2013–2017) study of federal prosecutors, Offit observes them in 26 federal jury selection proceedings and interviews 133 Assistant U.S. Attorneys about their work. She is like a “fly on the wall” and from this unique vantage point, she paints a picture of how this group of Assistant U.S. Attorneys in the Criminal and Civil Divisions of a U.S. Attorney's Office does its work. This is an impressive accomplishment and adds enormously to what we know about how *Batson* affects a group of prosecutors and their conception of their role during jury selection.

Offit draws from her observations and interviews and highlights prosecutors' comments that reveal their main concerns. They view a *Batson* challenge as a taint on their professional reputation.<sup>10</sup> They want to avoid *Batson* challenges and will err in the direction of extreme caution. Even when they feel that there are legitimate reasons to remove some prospective jurors, they often decline to do so, out of fear that these prospective jurors' race or gender could lead the opposing attorney to raise a *Batson* challenge. Some prosecutors declined to exercise any of their peremptory challenges so fearful were they of *Batson* challenges.<sup>11</sup>

These prosecutors express concern that any *Batson* challenge could be a stain on their professional reputation and could even lead the jury to think of them as racists or sexists. They do not want to risk that label. Therefore, they think carefully about how they exercise their peremptory challenges. They refrain from exercising peremptory challenges that could lead to *Batson* challenges, and they even avoid raising *Batson* challenges when they think the opposing counsel has engaged in discriminatory peremptory challenges.

These prosecutors also understand that they need to keep track of prospective jurors' race, gender, and ethnicity, as well as their own non-discriminatory reasons for exercising peremptory challenges, in case they have to explain their strike at step 2 of the *Batson* test (where the defense has established a prima facie case of discrimination at step 1 of the *Batson* test and so the prosecutor would have to give reasons for his or her peremptory challenge at step 2; at step 3 the trial judge decides whether those reasons are pretextual). Some of these prosecutors lament that they have to think about prospective jurors' race, gender, and ethnicity as part of their trial strategy and write down

---

<sup>10</sup> Offit, *supra* note 1, at 206, 229–30, 232, 235–36, 237.

<sup>11</sup> *Id.* at 227, 229.

these characteristics during jury selection. These prosecutors thought that the goal of *Batson* was to have lawyers exercise peremptory challenges without taking account of a prospective juror's race, gender, or ethnicity. Instead, they have to spend time during jury selection trying to ascertain prospective jurors' race, gender, or ethnicity, and making a note of it in case they have to defend their peremptory challenge if the defense raises a *Batson* challenge. As one prosecutor explained: “[*Batson* is] supposed to prevent you from taking race into account . . . but in fact [*Batson*] makes you think of it more.”<sup>12</sup>

Although the dominant finding was that these prosecutors were concerned about *Batson* challenges because they want to maintain their professional reputation and because they want the jury to think well of them, they did not always act in accordance with *Batson*. For example, one female prosecutor held the view that “a young female juror might feel attracted to [the defendant].”<sup>13</sup> She continued to strike young female prospective jurors for this reason,<sup>14</sup> even though *Batson*, as expanded by *J.E.B. v. Alabama ex rel. T.B.*,<sup>15</sup> does not permit strikes based on gender.<sup>16</sup> Other prosecutors continued to ask questions that could be regarded as “proxies” for race.<sup>17</sup> Although the current *Batson* test does not prohibit this, some states, such as Washington and California, have revised the *Batson* test to prohibit these proxies, which they have recognized as discriminatory.<sup>18</sup>

Offit's observations and interviews shine a light on this group of federal prosecutors and how they think about jury selection under *Batson*. These prosecutors describe their concerns about *Batson* challenges and explain that such challenges will harm their professional reputation and they go out of their way to avoid such stigma. These prosecutors also acknowledge that they engage in record-keeping during jury selection in which they note the race, gender, and ethnicity of prospective jurors, even though they think that the goal of *Batson* was to exercise peremptory challenges without consideration of such characteristics. They also make careful note of the nondiscriminatory reasons that motivate their exercise of peremptory challenges in case they need them for step 2 of *Batson* or for any appeals. The picture that Offit provides of these federal prosecutors and their concerns is one that adds to our knowledge of how one set of trial participants believes they have been affected by *Batson*.

In sum, Offit's study reveals a group of federal prosecutors who think carefully about the exercise of their peremptory challenges and who try hard to avoid *Batson* challenges in the twenty-six jury selection proceedings that Offit

---

<sup>12</sup> *Id.* at 231 & n.246 (interviews with AM, Assistant U.S. Attorney (2013–17)).

<sup>13</sup> *Id.* at 234.

<sup>14</sup> *Id.*

<sup>15</sup> 511 U.S. 127 (1994) (holding that gender-based peremptory challenges violate the Equal Protection Clause of the Fourteenth Amendment).

<sup>16</sup> *Id.* at 129.

<sup>17</sup> Offit, *supra* note 1, at 234.

<sup>18</sup> See *infra* notes 35–40 and accompanying text (including examples of presumptively invalid reasons).

observed. Indeed, there were only four *Batson* challenges in these twenty-six proceedings,<sup>19</sup> and no *Batson* violations.<sup>20</sup> Offit observed that the possibility of a *Batson* challenge was “a frequent source of anxiety for the attorneys in this study,” even though *Batson* challenges were “uncommon in practice.”<sup>21</sup> It is good to discover prosecutors who take care when they exercise their peremptory challenges, but this is just one group. Not all prosecutors or lawyers are so careful or so anxious about avoiding *Batson* challenges.

## II. LIMITATIONS OF OFFIT’S STUDY

There are many studies and cases involving *Batson* challenges that suggest that prosecutors and other lawyers do not show the same restraint and are not guided by the same concerns as the federal prosecutors in Offit’s study. Although Offit is right that these federal prosecutors’ perspectives are important to learn about, they are only one piece of the *Batson* landscape and it is important to understand the broader context to which Offit’s study contributes.

First, as Offit acknowledges, there are limitations to her study. She mentions that her study is not random and is limited to one location. Although the number of jury proceedings (26) in Offit’s study is impressive, as is the number of interviews (133) she conducted over an extended period of time (5 years), there are other limitations. One is that this is a study of federal prosecutors in one U.S. Attorney’s Office. These prosecutors are an elite group with a strong sense of professionalism and esprit de corps. They also take seriously their status as officers of the court, and even though they undoubtedly want to win their cases, they also try to hold themselves to a high professional standard. So, one question is whether the views of this elite cadre of prosecutors are widely shared across the country by federal and state prosecutors alike.

Second, although Offit saw her task as “learning about research subjects’ experiences and opinions by engaging in work alongside them,”<sup>22</sup> it means that she was listening to what they told her, taking down their words as faithfully as possible, and organizing their comments according to the themes that she discerned. This method does not seem to include questioning what her sources told her. As a result, this group of prosecutors offers a very rose-colored view of their own behavior. It may be an accurate reflection of their behavior or it may be a view that should be taken with a grain of salt because it was not subject to questioning. If it is not the place of the interviewer to push her subjects and to question them, then perhaps one way of achieving more balance would be to interview defense attorneys and judges in the same location as the prosecutors. They are participants in the jury selection proceedings and they might be able

---

<sup>19</sup> Offit, *supra* note 1, at 224, 226 n.186.

<sup>20</sup> *Id.* at 224 n.166.

<sup>21</sup> *Id.* at 226.

<sup>22</sup> *Id.* at 224 n.165.

to shed some light on how accurate they thought the prosecutors' descriptions of their practices were, at least in the courtroom.

Third, although Offit explains that her approach is useful because it is in "real time"<sup>23</sup> and offers a view of how prosecutors understand and put into effect *Batson* on a daily basis, other studies, which Offit describes as taking a "retrospective orientation" or "work[ing] backward" because they work from "strike patterns and seated-jury demographics,"<sup>24</sup> merit more discussion in her Article because these studies provide a context in which to place Offit's study.

*Batson* was decided in 1986. There are thirty-five years of cases that involve *Batson* challenges, as well as myriad academic studies of *Batson*, many of which are critical of *Batson* and find *Batson* to be ineffective at constraining discriminatory peremptory challenges.<sup>25</sup> These many studies take a variety of approaches, as Offit acknowledges.<sup>26</sup> Some of them are statistical analyses that show that African-American prospective jurors are the subject of race-based peremptory challenges and no other factor could explain their exclusion.<sup>27</sup> Other studies focus on transcript analyses to show that prosecutors question African-American and white prospective jurors differently during voir dire so as to provide cover for their peremptory challenges based on race.<sup>28</sup> Other studies focus on capital cases, where some of the most egregious instances of race-based peremptory challenges are found.<sup>29</sup> Still other studies look at the case law of *Batson* challenges and show how hard it is to succeed with a *Batson* challenge.<sup>30</sup> Studies of the case law reveal how easy it is to give a race-neutral reason, how reluctant trial judges are to question that reason, and how deferential courts of appeals judges are to trial judges' assessments because the latter are in the courtroom whereas the former have only the cold, hard record before them. Some studies have focused on a region of the country and have interviewed African-American prospective jurors who were excluded from the jury through

---

<sup>23</sup> *Id.* at 205.

<sup>24</sup> *Id.* at 222.

<sup>25</sup> See, e.g., Nancy S. Marder, Foster v. Chatman: A Missed Opportunity for *Batson* and the Peremptory Challenge, 49 CONN. L. REV. 1137, 1140 n.9 (2017) (providing a sampling of studies critical of *Batson*).

<sup>26</sup> Offit, *supra* note 1, at 205.

<sup>27</sup> See, e.g., David C. Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the Miller-El Line of Cases as Reflected in the Experience of One Philadelphia Capital Case*, 97 IOWA L. REV. 1425 (2012).

<sup>28</sup> See, e.g., Barbara O'Brien, Catherine M. Grosso & Abijah P. Taylor, *Examining Jurors: Applying Conversation Analysis to Voir Dire in Capital Cases, a First Look*, 107 J. CRIM. L. & CRIMINOLOGY 687 (2017).

<sup>29</sup> See, e.g., Barbara O'Brien & Catherine M. Grosso, *Beyond *Batson*'s Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Peremptory Strikes Following the Passage of the North Carolina Racial Justice Act*, 46 U.C. DAVIS L. REV. 1623, 1628 (2013).

<sup>30</sup> See, e.g., Marder, *supra* note 25, 1182–85; Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683, 1708–09 (2006) (collecting *Batson* appeals in the Seventh Circuit between 1986 and 2005, and showing how rare it was to succeed on appeal).

a peremptory challenge and were convinced that it was because of their race.<sup>31</sup> Such interviews captured the feelings of sadness and exclusion that these prospective jurors experienced. Although Offit's study offers a bright spot in that she tells the story of federal prosecutors who try to exercise their peremptory challenges carefully and for the most part in conformity with *Batson*, this account stands in stark contrast to so many other studies and cases over thirty-five years. Although Offit alludes to this larger picture, she needs to provide far more context so that the reader understands that her study offers a depiction that has not been very prevalent. There is the need for further study to see whether other prosecutors—state and federal prosecutors throughout the country—engage in good behavior when they exercise peremptory challenges or whether Offit's prosecutors are an anomaly.

The backdrop of past cases and studies is necessary in order to know how to interpret new developments. For example, in several capital cases involving *Batson* challenges the Supreme Court has suggested two ways to proceed that give some hope to those who raise *Batson* challenges. One way is for those raising a *Batson* challenge to show that a black prospective juror was struck for one reason while a white prospective juror who shared that same reason was permitted to serve on the jury ("comparative strike analysis").<sup>32</sup> Another way is for those raising a *Batson* challenge to show that white prospective jurors are being questioned during voir dire in a different way than black prospective jurors ("comparative voir dire analysis").<sup>33</sup> Both of these comparative approaches are important because they provide some way for *Batson* challenges to succeed. Before these approaches were available, the prosecutor could simply give a reason—any reason at all—and as long as the reason was race-neutral the trial judge would accept it. It was exceedingly difficult to show purposeful discrimination. But now that comparisons between white and black prospective jurors are a viable route, there is finally a way to show that the prosecutor had treated prospective jurors of different races differently and had engaged in discriminatory peremptory challenges. The problem is that there are not always comparisons to be made. Those raising a *Batson* challenge have to hope that there is a white juror who was allowed to serve when a black juror with the same characteristics had been excluded. Although this comparative approach opened up an avenue for *Batson* challenges that had not existed before, the approach only works when there are comparisons to be made.

Although Offit notes this comparative development and describes it in Part II of her Article, in Part III she mainly focuses on how it affects the prosecutors she observed and interviewed. They now have to look carefully to make sure that they are questioning black and white prospective jurors in the same way and for the same amount of time and that they are not excluding a black

---

<sup>31</sup> See, e.g., EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 28–34 (2010), <http://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf> [<https://perma.cc/3K84-6NH8>].

<sup>32</sup> Offit, *supra* note 1, at Part II.A.

<sup>33</sup> *Id.* at Part II.B.

prospective juror who has the same characteristics as a white prospective juror who is allowed to serve on the jury. For Offit, this comparative approach is important because it adds complexity to the prosecutors' day-to-day job. The prosecutors in her study now have to spend more time taking good notes and reviewing transcripts to make sure that their behavior does not make them vulnerable to any *Batson* challenges based on comparisons. While it is good to know that this comparative turn has led to prosecutors taking greater care with their peremptory challenges, the fact that they have to spend more time taking notes and reviewing them is not a downside. Rather, the comparisons should further constrain their behavior. Offit's study suggests that this comparative approach is having the desired effect, even though the prosecutors mainly complain about it because they have to spend time keeping track of their questions and reasons.

### III. GOING FORWARD

*Batson* studies and cases over the past thirty-five years provide important background for figuring out how best to reform *Batson* in the future. The main message that the case law and studies convey is that *Batson* has been ineffective. Lawyers still exercise discriminatory peremptory challenges and *Batson* has not stopped them. The Supreme Court has addressed the most extreme examples of race-based peremptory challenges, but it has been unwilling to reexamine the viability of *Batson*. In its most recent *Batson* cases, it has found that state prosecutors violated *Batson*, but that has not led the Court to abandon *Batson*. Nor has the Court expressed any willingness to consider eliminating peremptory challenges, though a number of Justices, judges, academics, and lawyers have urged that reform.<sup>34</sup>

Some of the states have begun to revise the *Batson* test, and it might be that change will come about through efforts by the states. For example, the Washington State Supreme Court has adopted a rule, known as "GR37,"<sup>35</sup> which tries to create an objective *Batson* test. A lawyer raising a *Batson* challenge in state court in Washington does not have to show that the opposing lawyer exercised a peremptory challenge based on "purposeful discrimination," but simply that he or she satisfied "an objective observer[']s" view that race or ethnicity was a factor in the exercise of that peremptory challenge.<sup>36</sup> Moreover, GR37 contains a list of reasons that will no longer be accepted for exercising a peremptory challenge even though they have been given by lawyers in the past and have been accepted by trial judges as nondiscriminatory. Under GR37, these prohibited reasons are now recognized as having been "associated with improper discrimination" and are "[p]resumptively [i]nvalid."<sup>37</sup> Thus,

---

<sup>34</sup> See Marder, *supra* note 25, at 1194–97 (identifying state and federal judges who have recommended eliminating peremptory challenges).

<sup>35</sup> WASH. SUP. CT. GEN. R. 37, Jury Selection (adopted effective Apr. 24, 2018).

<sup>36</sup> WASH. SUP. CT. GEN. R. 37(e).

<sup>37</sup> WASH. SUP. CT. GEN. R. 37(h).



prosecutors will no longer be able to excuse African-American prospective jurors because they “liv[e] in a high-crime neighborhood”; they or their family members have had contact with the criminal justice system, or they have failed “to make eye contact” or they have made too much eye contact (“staring”) during voir dire.<sup>38</sup> This objective test will be used whether the side exercising the peremptory challenge acted based on explicit or implicit bias.<sup>39</sup> Washington is not the only state to have addressed peremptory challenges and the *Batson* test. For example, the California legislature passed a statute that amended its *Code of Civil Procedure* by expanding the groups that are protected from discriminatory peremptory challenges, switching to an “objectively reasonable person” standard in determining whether a peremptory challenge is discriminatory, recognizing that bias could be implicit or explicit, and identifying a number of presumptively invalid reasons for a peremptory challenge, even though lawyers had used these reasons in the past and judges had accepted them.<sup>40</sup>

Having the states revise the *Batson* test has several advantages. It allows for states to learn from each other. In that sense, the states can serve as “laborator[ies],” as Justice Louis D. Brandeis once suggested.<sup>41</sup> It also means that there can be a groundswell of support for change at the state level, which might inspire change at the federal level, just as some states had taken the lead on finding race-based<sup>42</sup> and gender-based peremptory challenges unconstitutional well before the Supreme Court made that determination.<sup>43</sup>

On the downside, however, waiting for states to revise the *Batson* test is likely to be a long, drawn-out process and one that is likely to produce a patchwork quilt result. Some states might change the *Batson* test, while others might not, and those that change it might do so in different ways. Meanwhile, African-American prospective jurors will remain with little protection. They

---

<sup>38</sup> WASH. SUP. CT. GEN. R. 37(h) & (i).

<sup>39</sup> WASH. SUP. CT. GEN. R. 37(f).

<sup>40</sup> AB 3070, Juries: peremptory challenges (Sept. 30, 2020) (amending CAL. CIV. PROC. CODE § 231.7).

<sup>41</sup> Justice Brandeis suggested this approach when he wrote: “[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>42</sup> See *McCray v. New York*, 461 U.S. 961, 961–62 (1983) (Stevens, J.) (respecting the denial of the petitions for writs of certiorari) (noting that while the issue of race-based peremptory challenges was important, he nonetheless recommended that the issue percolate because there were no conflicts among the federal circuits and only two states had held that the prosecutor’s use of discriminatory peremptories violated provisions of their state constitutions); Marder, *supra* note 30, at 1693–94 (explaining the strategic importance of the opinion in *McCray*).

<sup>43</sup> See Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1049–50 & nn.19–27 (1995) (identifying the extensive split among federal circuit and state courts on gender-based peremptory challenges before the U.S. Supreme Court decided the issue).

will continue to be the target of discriminatory peremptory challenges. In addition, lawyers are likely to find new ways to evade the states' revised *Batson* test. Prosecutors could come up with new reasons that are not on the list of prohibited reasons. In addition, the Washington rule only protects against peremptory challenges exercised on the basis of race or ethnicity. It does not protect against peremptory challenges based on gender, which is also an impermissible basis for exercising a peremptory challenge according to the Supreme Court.<sup>44</sup>

Although I am intrigued by the ways in which Washington and California revised the *Batson* test and I will watch how these new tests work in practice, I remain convinced that a more comprehensive, uniform, and robust solution is required. Thirty-five years of seeing *Batson* in practice has persuaded me that Justice Marshall was right when he concurred in *Batson* but wrote that discriminatory peremptory challenges would continue until all peremptory challenges were eliminated. If the Court is truly committed to nondiscrimination during jury selection, then it needs to eliminate peremptory challenges.

Offit takes a more sanguine view than I do of how *Batson* is working, but she, too, is interested in the experiments in Washington and other states with the revised *Batson* test. Her qualitative study of a group of federal prosecutors showed her that *Batson* was working, at least among the group she studied. Her study suggests that at least these federal prosecutors are taking care when they exercise peremptory challenges and are not for the most part exercising them in a discriminatory manner. She concluded that these prosecutors were guided by their professional reputations and wanted to be seen in a good light by the jury. Thus, *Batson* was doing its job, at least for the prosecutors Offit studied. However, Offit also recognized that the studies and cases from the past thirty-five years pointed in another direction, which was that *Batson* was unable to combat systemic racism and sexism. Although Offit describes the prosecutors in her study as taking their role seriously and trying to do the right thing with respect to *Batson*, she suggests that a middle ground might be the best way to proceed in the future. The middle ground she suggests is to watch what the states are doing and to see if their revision of the *Batson* test works to eliminate discriminatory peremptory challenges. She suggests that the objective test could help prosecutors because they would not have to worry as much about being labeled as racist or sexist, but it might make their job harder if it makes *Batson* challenges easier to bring and to win.

#### CONCLUSION

Offit's qualitative study of federal prosecutors shows that they are careful about exercising peremptory challenges because they view *Batson* challenges as

---

<sup>44</sup> See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (holding that gender-based peremptory challenges violate the Equal Protection Clause of the Fourteenth Amendment).

a taint to their professional reputation. They err on the side of caution so that they can avoid *Batson* challenges and *Batson* violations. Unfortunately, not all prosecutors or lawyers share this group's concerns or anxieties about avoiding *Batson* challenges. In the thirty-five years since *Batson* was decided there have been myriad cases and studies showing that *Batson* has been ineffective at stopping lawyers from exercising discriminatory peremptory challenges.

In light of *Batson*'s ineffectiveness, there are different ways to proceed. Some states are now taking the lead and revising the *Batson* test so that it will be easier to succeed with a *Batson* challenge. Both Offit and I agree that this is a positive development and we will see how this experiment fares and whether other states will follow suit. Offit is more optimistic than I am, perhaps because she thinks the problem is less prevalent than I do. After all, her study showed federal prosecutors behaving as they should for the most part. I am more skeptical. Since lawyers found ways to elude *Batson* by quickly learning which reasons they could give and which reasons they had to avoid, I worry that they will soon find ways to circumvent any state's objective *Batson* test. Thirty-five years of *Batson* cases and studies support Justice Marshall's view that peremptory challenges need to be eliminated. My hope is that the states' efforts to revise the *Batson* test will inspire the Supreme Court to reexamine *Batson*, to accept that it has been ineffective, and to follow Justice Marshall's approach and eliminate peremptory challenges.