Implicit Bias and Disability

Thursday, May 4, 2023

Speaker:

Bryce Young

MCLE: **1.0 Hour Implicit Bias**

Conference Reference Materials

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Disability & Implicit Bias

Justice Richard Bernstein, Michigan Supreme Court

Bryce Young, Vice-Chair of Committee on Appellate Courts

Lack of Representation

Number of law students, lawyers, and judges with disabilities is grossly disproportionate to the general population

Adult Californians with Disabilities

- 6,734,666 (22.7%) adult Californians have a disability
- 1,517,714 (4.8%) have hearing impairments
- 2,965,588 (9.7%) have mobility impairments
- 1,295,828 (4.2%) have vision impairments
- 2,885,116 (10.1%) cognitive impairments
- 833,620 (2.8%) have impairments impacting self-care issues

Source: CDC, Disability and Health Data System, https://www.cdc.gov/ncbddd/disabilityandhealth/dhds/index.html (updated 2020).

Lawyers with Disabilities

- 5.5% of law school graduates identify as having a disability
- Graduates with disabilities have been least likely of any diverse group to be employed
- .6% of practicing lawyers report having a disability (national)
- California: 5.7% of attorneys have disability*
- Graduates with disabilities earn less: $72,500 vs. $80,000 (average); $105,000 vs. $131,500 (private practice)

Source for all but one statistic noted above: Nat'l Assoc. for Law Placement (NALP), Employment Outcomes for Graduates with Disabilities, https://www.nalp.org/1222research (December 2022).

*Source: State Bar of California, Diversity of 2022 California Licensed Attorney, https://publications.calbar.ca.gov/2022-diversity-report-card/diversity-2022-california-licensed-attorneys.

California Judges with Disabilities

- Supreme Court = 0 (out of 4 respondents)
- Courts of Appeal = 1 (out of 45 respondents)
- Trial Courts = 19 (out of 834 respondents)
- Federal judges = unknown*

Source: Judicial Council of California, Demographic Data Pursuant to Gov. Code § 12011.5(n) as of Dec. 31, 2022, https://www.courts.ca.gov/documents/2023-JO-Demographic-Data.pdf.

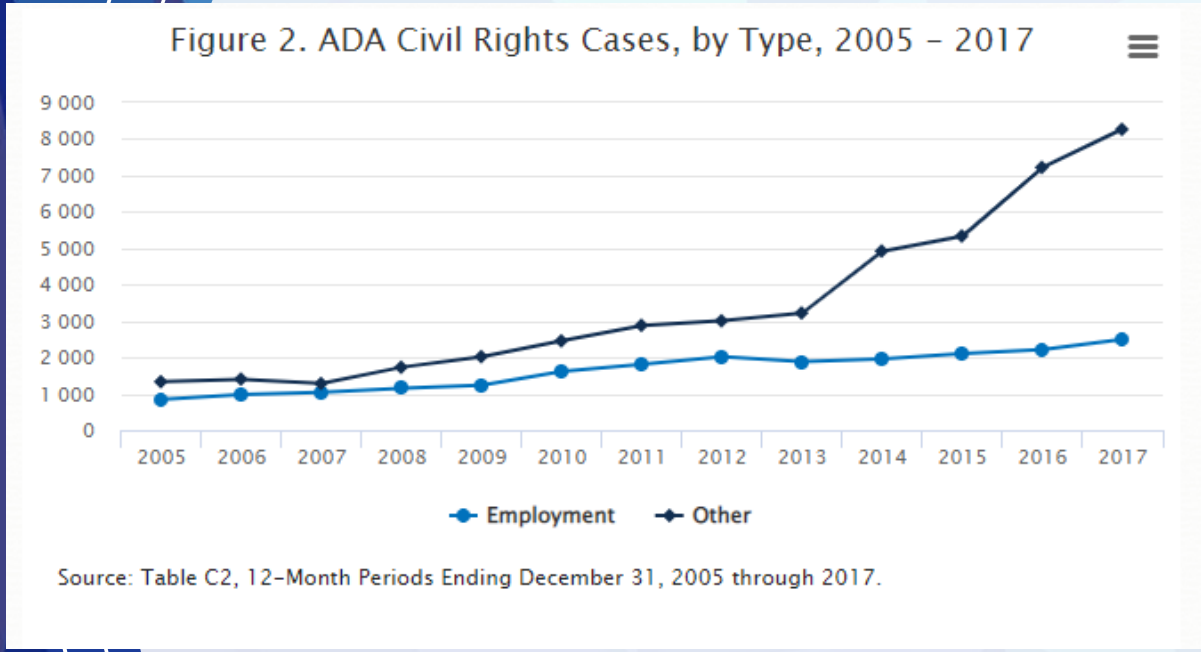
*Source: ABA, Why Disability Diversity Is Important in the Judiciary, https://www.americanbar.org/groups/business_law/publications/blt/2022/11/disability-diversity (December 2022)("For federal judges, the Federal Judicial Center keeps data on race, ethnicity, and gender but not disability."); *see also* Federal Judicial Center, Diversity on the Bench, https://www.fjc.gov/history/judges/diversity-bench (examining age, race/ethnicity, and gender).

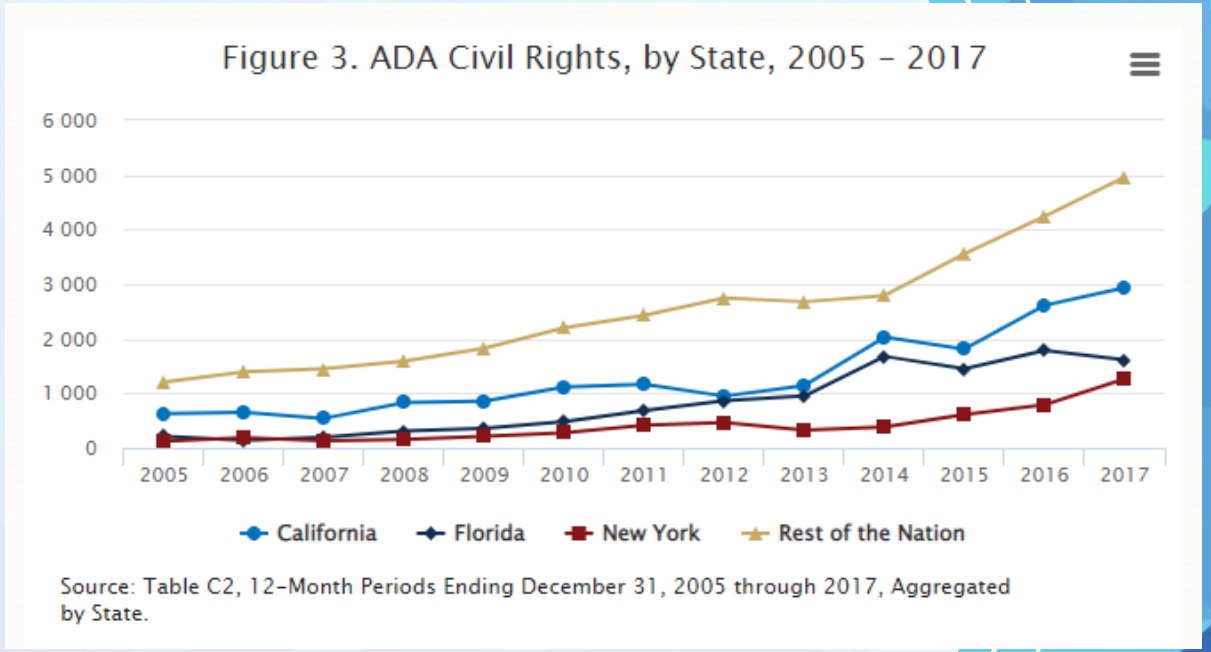
People with Disabilities Excluded from Juries

Unzueta v. Akopyan (2022) 85 Cal.App.5th 67 (reversing peremptory challenges of jurors who had family members with disabilities).

- California legislature in 2017 extended Batson/Wheeler challenges to include disability. Id. at 81 (discussing expansion in 2000, which did not include disability, and then 2017 expansion to include disability).
- "The United States Supreme Court and federal courts have not extended Batson/Wheeler to peremptory challenges based on a prospective juror's disability." Id. at 81, n.9.

ADA Lawsuits





Source: U.S. Courts, Just the Facts: Americans with Disabilities Act, https://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act (July 12, 2018)

Implicit Barriers

- Requiring entrance through a side or alternative entry.
- Relying on opposing counsel or clients to open doors into courtroom, conference rooms, and bathrooms.
- Courtroom features, such as podiums that do not lower, chairs at party's table, gates from gallery.
- Unavailability of transportation – very few (if any) accessible taxis or rideshares.
- Receptions where everyone stands, making conversation from a seated position difficult.
- Buffets where food is hard to reach for serving, food that is difficult to cut, drinks with no lowered tables
- Opposing counsel stands at table while making a point.
- Lack of affinity groups for people with disabilities (ABA/state bars, within firms).
- Lack of people with obvious disabilities in positions of authority, at networking events, in firms, etc.
- **Cal. Bus. & Prof. Code § 6070.5(a):** "(a) The State Bar shall adopt regulations to require, as of January 1, 2022, that the mandatory continuing legal education (MCLE) curriculum for all licensees under this chapter includes training on implicit bias and the promotion of bias-reducing strategies to address how unintended biases regarding race, ethnicity, gender identity, sexual orientation, socioeconomic status, or **other characteristics** undermine confidence in the legal system." *Accord* Rule 2.72(B)(2)(a)(ii)(1) (same list, even though disability is enumerated in explicit bias MCLE requirement).

Demographic Data Provided by Responding Justices and Judges Relative to Veteran and Disability Status (Gov. Code, § 12011.5(n)) As of December 31, 2022

Court	Veteran[1]						Disabled[1]					
	No		Yes		Total Respondents		No		Yes		Total Respondents	
	N	%	N	%	N	%	N	%	N	%	N	%
Supreme Court	**4**	***100%***	**0**	***0%***	**4**	***100%***	**4**	***100%***	**0**	***0%***	**4**	***100%***
Court of Appeal	**42**	***93%***	**3**	***7%***	**45**	***100%***	**44**	***98%***	**1**	***2%***	**45**	***100%***
First District	12	*100%*	0	*0%*	12	*100%*	12	*100%*	0	*0%*	12	*100%*
Second District	13	*93%*	1	*7%*	14	*100%*	13	*93%*	1	*7%*	14	*100%*
Third District	2	*100%*	0	*0%*	2	*100%*	2	*100%*	0	*0%*	2	*100%*
Fourth District	7	*87%*	1	*13%*	8	*100%*	8	*100%*	0	*0%*	8	*100%*
Fifth District	4	*100%*	0	*0%*	4	*100%*	4	*100%*	0	*0%*	4	*100%*
Sixth District	4	*80%*	1	*20%*	5	*100%*	5	*100%*	0	*0%*	5	*100%*
Trial Court	**779**	***94%***	**52**	***6%***	**831**	***100%***	**815**	***98%***	**19**	***2%***	**834**	***100%***
Alameda	34	*94%*	2	*6%*	36	*100%*	35	*97%*	1	*3%*	36	*100%*
Alpine	1	*100%*	0	*0%*	1	*100%*	1	*100%*	0	*0%*	1	*100%*
Amador	1	*100%*	0	*0%*	1	*100%*	1	*100%*	0	*0%*	1	*100%*
Butte	4	*100%*	0	*0%*	4	*100%*	4	*100%*	0	*0%*	4	*100%*
Calaveras	1	*100%*	0	*0%*	1	*100%*	1	*100%*	0	*0%*	1	*100%*
Contra Costa	16	*84%*	3	*16%*	19	*100%*	17	*89%*	2	*11%*	19	*100%*
Del Norte	1	*50%*	1	*50%*	2	*100%*	2	*100%*	0	*0%*	2	*100%*
El Dorado	4	*80%*	1	*20%*	5	*100%*	5	*100%*	0	*0%*	5	*100%*
Fresno	19	*100%*	0	*0%*	19	*100%*	19	*100%*	0	*0%*	19	*100%*
Glenn	1	*100%*	0	*0%*	1	*100%*	1	*100%*	0	*0%*	1	*100%*

Demographic Data Provided by Responding Justices and Judges
Relative to Veteran and Disability Status
(Gov. Code, § 12011.5(n))
As of December 31, 2022

Court	Veteran[1]						Disabled[1]					
	No		Yes		Total Respondents		No		Yes		Total Respondents	
Trial Court	N	%	N	%	N	%	N	%	N	%	N	%
Humboldt	5	*100%*	0	*0%*	5	*100%*	5	*100%*	0	*0%*	5	*100%*
Imperial	5	*100%*	0	*0%*	5	*100%*	5	*100%*	0	*0%*	5	*100%*
Inyo	1	*100%*	0	*0%*	1	*100%*	1	*100%*	0	*0%*	1	*100%*
Kern	14	*93%*	1	*7%*	15	*100%*	15	*100%*	0	*0%*	15	*100%*
Kings	3	*75%*	1	*25%*	4	*100%*	4	*100%*	0	*0%*	4	*100%*
Lake	2	*100%*	0	*0%*	2	*100%*	2	*100%*	0	*0%*	2	*100%*
Lassen	1	*100%*	0	*0%*	1	*100%*	1	*100%*	0	*0%*	1	*100%*
Los Angeles	230	*94%*	14	*6%*	244	*100%*	240	*98%*	5	*2%*	245	*100%*
Madera	1	*100%*	0	*0%*	1	*100%*	1	*100%*	0	*0%*	1	*100%*
Marin	5	*100%*	0	*0%*	5	*100%*	5	*100%*	0	*0%*	5	*100%*
Mariposa	2	*100%*	0	*0%*	2	*100%*	2	*100%*	0	*0%*	2	*100%*
Mendocino	3	*100%*	0	*0%*	3	*100%*	3	*100%*	0	*0%*	3	*100%*
Merced	5	*100%*	0	*0%*	5	*100%*	5	*100%*	0	*0%*	5	*100%*
Modoc	0	*0%*	1	*100%*	1	*100%*	0	*0%*	1	*100%*	1	*100%*
Monterey	7	*100%*	0	*0%*	7	*100%*	7	*100%*	0	*0%*	7	*100%*
Napa	5	*100%*	0	*0%*	5	*100%*	4	*80%*	1	*20%*	5	*100%*
Nevada	1	*100%*	0	*0%*	1	*100%*	1	*100%*	0	*0%*	1	*100%*
Orange	53	*95%*	3	*5%*	56	*100%*	53	*95%*	3	*5%*	56	*100%*
Placer	2	*50%*	2	*50%*	4	*100%*	4	*100%*	0	*0%*	4	*100%*
Plumas	0	*0%*	0	*0%*	0	*0%*	1	*100%*	0	*0%*	1	*100%*

Demographic Data Provided by Responding Justices and Judges
Relative to Veteran and Disability Status
(Gov. Code, § 12011.5(n))
As of December 31, 2022

Court	Veteran[1]						Disabled[1]					
	No		Yes		Total Respondents		No		Yes		Total Respondents	
Trial Court	N	%	N	%	N	%	N	%	N	%	N	%
Riverside	42	*100%*	0	*0%*	42	*100%*	42	*100%*	0	*0%*	42	*100%*
Sacramento	24	*89%*	3	*11%*	27	*100%*	26	*96%*	1	*4%*	27	*100%*
San Benito	1	*100%*	0	*0%*	1	*100%*	1	*100%*	0	*0%*	1	*100%*
San Bernardino	34	*92%*	3	*8%*	37	*100%*	36	*97%*	1	*3%*	37	*100%*
San Diego	69	*93%*	5	*7%*	74	*100%*	72	*97%*	2	*3%*	74	*100%*
San Francisco	24	*96%*	1	*4%*	25	*100%*	25	*100%*	0	*0%*	25	*100%*
San Joaquin	12	*100%*	0	*0%*	12	*100%*	12	*100%*	0	*0%*	12	*100%*
San Luis Obispo	5	*100%*	0	*0%*	5	*100%*	4	*80%*	1	*20%*	5	*100%*
San Mateo	14	*93%*	1	*7%*	15	*100%*	15	*100%*	0	*0%*	15	*100%*
Santa Barbara	8	*89%*	1	*11%*	9	*100%*	9	*100%*	0	*0%*	9	*100%*
Santa Clara	36	*97%*	1	*3%*	37	*100%*	38	*100%*	0	*0%*	38	*100%*
Santa Cruz	6	*86%*	1	*14%*	7	*100%*	7	*100%*	0	*0%*	7	*100%*
Shasta	5	*100%*	0	*0%*	5	*100%*	5	*100%*	0	*0%*	5	*100%*
Sierra	1	*100%*	0	*0%*	1	*100%*	1	*100%*	0	*0%*	1	*100%*
Siskiyou	4	*100%*	0	*0%*	4	*100%*	4	*100%*	0	*0%*	4	*100%*
Solano	10	*91%*	1	*9%*	11	*100%*	11	*100%*	0	*0%*	11	*100%*
Sonoma	11	*85%*	2	*15%*	13	*100%*	12	*100%*	0	*0%*	12	*100%*
Stanislaus	11	*85%*	2	*15%*	13	*100%*	13	*93%*	1	*7%*	14	*100%*
Sutter	2	*100%*	0	*0%*	2	*100%*	2	*100%*	0	*0%*	2	*100%*
Tehama	1	*100%*	0	*0%*	1	*100%*	1	*100%*	0	*0%*	1	*100%*

Demographic Data Provided by Responding Justices and Judges Relative to Veteran and Disability Status (Gov. Code, § 12011.5(n)) As of December 31, 2022

Court	Veteran[1]						Disabled[1]					
	No		Yes		Total Respondents		No		Yes		Total Respondents	
Trial Court	N	%	N	%	N	%	N	%	N	%	N	%
Trinity	1	*100%*	0	*0%*	1	*100%*	1	*100%*	0	*0%*	1	*100%*
Tulare	9	*100%*	0	*0%*	9	*100%*	9	*100%*	0	*0%*	9	*100%*
Tuolumne	3	*100%*	0	*0%*	3	*100%*	2	*100%*	0	*0%*	2	*100%*
Ventura	10	*91%*	1	*9%*	11	*100%*	12	*100%*	0	*0%*	12	*100%*
Yolo	6	*86%*	1	*14%*	7	*100%*	7	*100%*	0	*0%*	7	*100%*
Yuba	3	*100%*	0	*0%*	3	*100%*	3	*100%*	0	*0%*	3	*100%*

1. Tabled values for veteran and disability status include responses from justices and judges new to the bench in calendar years 2014 through 2022, as well as experienced justices and judges who chose to update their demographic information during the same 8 year period. Demographic questions pertaining to veteran status and disability status are new as of 2014 and reflect an expansion of the mandate for the collection of demographic information from new justices and judges.

(https://www.americanbar.org/products/inv/book/424808469/)

Business Of Law (Https://Businesslawtoday.Org/Practice-Area/Business-Of-Law/)

Why Disability Diversity Is Important in the Judiciary

11 Min Read By: Ann Motl (/author/ann-motl/) | November 11, 2022

Earlier this year, President Biden nominated his first judicial nominee who has a disclosed disability, Jamal N. Whitehead. Whitehead is a litigator in Seattle. He also uses a prosthetic leg. Although 26 percent of the United States' population has some type of disability,[1] the number of legal professionals with disabilities, including judges, is much lower. There are many reasons for low numbers of disabled judges, including implicit and explicit bias, pipeline issues, stigma associated with having and disclosing a disability, and an overall lack of data. Indeed, people with disabilities are sometimes termed "the forgotten minority," despite being the nation's largest minority.[2] Fortunately, more organizations are beginning to recognize disability as an integral part of the diversity, equity, and inclusion movement. This article discusses why disability diversity is important in the judiciary and how disability diversity is currently tracked (if at all), and it provides the first-ever attempt at publishing a list of judges with disabilities.

A judiciary that reflects its population is an important goal,[3] and disability is part of our nation's populace. Among the sixty-one million adults who have some type of disability in the United States,

disabilities are wide-ranging.[4] Although the typical symbol for disability is a person in a wheelchair, disabilities can be visible or invisible. The Americans with Disabilities Act (ADA) defines disability as a physical or mental impairment that substantially limits one or more major life activity. Unfortunately, in our inaccessible society, disability can have a detrimental effect on an individual's health, social status, employment, and living situation.

Judges have an important role in deciding cases based on disability-related laws. They interpret the ADA, the Rehabilitation Act of 1973, the Individuals with Disabilities Education Act of 1990 (IDEA), the Affordable Care Act, disability benefits laws such as Social Security Disability Insurance, and state laws related to disability. The millions of adults living with disabilities are therefore dependent on a judiciary in which only a small percentage of judges may have a lived understanding of disability.

Although the number of judges with disabilities is small, the exact number is not entirely clear. For federal judges, the Federal Judicial Center keeps data on race, ethnicity, and gender but not disability.[5] There does not appear to be any data on the number of judges with disabilities in state court, either. As the Center for American Progress notes, the "virtual absence of information on disabled [] judges is problematic and deserves more attention."[6] Indeed, it is difficult to measure progress if it is not tracked.

As an important concession, even if the judiciary tracked the number of judges with disabilities, the number likely would not be accurate. Many individuals do not disclose their disabilities. Stigma continues to exist surrounding disability, and judges who face reelection or reappointment may be wary to disclose.

Still, there are judges that have publicly disclosed disabilities. The following list represents the first known attempt to create a comprehensive list of current and former judges with disabilities in the United States. Some of these judges have retired or have passed away. The author would be grateful to receive any additional names to add to this list and apologizes for any omissions.

The list provides certain takeaways. Notably, most of the types of disabilities on this list are visible. It is likely many judges with invisible disabilities, including mental health issues, have not publicly disclosed them. Indeed, research notes that many judges experience depressive symptoms due to the unique nature of their positions,[7] but the number of judges who have disclosed mental health issues is nearly zero. The main takeaway is simply how few disabled judges there are. As an example, there are only a handful of current federal judges with disabilities on the list, yet there are approximately nine hundred

authorized federal judgeships.[8] If Whitehead is confirmed, this number will grow by one, and hopefully this number will continue to grow to create a judiciary that better reflects its citizens.

Note: This list was last updated on December 29, 2022.

- Sonia Sotomayor, United States Supreme Court Justice: Type I diabetes[9]
- Bruce M. Selya, Senior United States Circuit Judge of the United States Court of Appeals for the First Circuit: legally blind[10]
- David S. Tatel, Senior United States Circuit Judge of the United States Court of Appeals for the D.C. Circuit: blind, has a service dog[11]
- Ronald Gould, United States Circuit Judge of the United States Court of Appeals for the Ninth Circuit: multiple sclerosis and uses a wheelchair[12]
- Myron H. Thompson, Senior United States District Judge of the United States District Court for the Middle District of Alabama: polio survivor[13]
- Vanessa Lynne Bryant, Senior United States District Judge of the United States District Court for the District of Connecticut: legally blind[14]
- Robert W. Gettleman, Senior United States District Judge of the United States District Court for the Northern District of Illinois: polio survivor[15]
- Donovan W. Frank, Senior United States District Judge of the United States District Court for the District of Minnesota: addiction recovery[16]
- Eric N. Vitaliano, Senior United States District Judge of the United States District Court for the Eastern District of New York: blind[17]
- Richard C. Casey, United States District Judge of the United States District Court for the Southern District of New York: blind[18]
- Anne M. Burke, Illinois Supreme Court Justice: dyslexia[19]
- Richard Bernstein, Michigan Supreme Court Justice: first blind justice on his court[20]
- Richard B. Teitelman, Missouri Supreme Court Justice: blind[21]
- Peter J. O'Donoghue, New York State Supreme Court: blind[22]
- Grace Helen Whitener, Washington Supreme Court Justice: disabled[23]
- Michael J. Murphy, Illinois Appellate Court Judge: addiction recovery[24]
- Charles Susano, Tennessee Appeals Court Judge: paralysis, wheelchair user (longest-serving Tennessee appellate judge)[25]
- Richard S. Brown, Wisconsin Court of Appeals Judge: late-deafened or hard-of-hearing[26]
- Tony Cothren, Jefferson County Circuit Judge (Alabama): blind[27]
- Charles W. Ray Jr., Superior Court Judge for the Fourth Judicial District of Alaska: late-deafened or hard-of-hearing[28]

- Andi Mudryk, Sacramento County Superior Court Judge (California): osteogenesis imperfecta (also notably the first openly transgender person in California history to be appointed to serve on California State Court)[29]
- Rita F. Lin, San Francisco County Superior Court Judge (California): hearing disability[30]
- Tim Fall, Yolo County Superior Court Judge (California): anxiety and depression[31]
- Patricia A. Broderick, Senior Judge of the Superior Court of the District of Columbia: paralysis[32]
- Louis Corbin, Fourth Circuit Duval County Judge (Florida): blind (appointed in 1972)[33]
- Meenu Sasser, Palm Beach County (Florida) Circuit Judge: cancer survivor[34]
- Daniel Monaco, Collier County (Florida) Circuit Court Judge: polio survivor[35]
- Rachel Krause, Fulton County Superior Court Judge (Georgia): paralysis, wheelchair user[36]
- Nicholas T. Pomaro, Associate Circuit Judge of Cook County (Illinois): blind (appointed in 1976)[37]
- David Holton, Jefferson County District Judge (Kentucky): Kentucky's first blind judge[38]
- Thomas Dawson, Nelson County District Judge (Kentucky): polio survivor, wheelchair user[39]
- Duncan Beagle, Genesee County (Michigan) Circuit Court judge: paralysis, wheelchair user[40]
- Patrick Flanagan, Washoe District (Nevada) Court Chief Judge: paralysis, wheelchair user[41]
- Robert Pipia, District Court of Nassau County (New York) Judge: muscular dystrophy, wheelchair user[42]
- Howard Sturim, District Court of Nassau County (New York) Judge: Type II diabetes, uses a service dog[43]
- Ed Follis Jr., Lincoln County Justice Court Judge (Texas): polio survivor[44]
- Jacob Frost, Dane County (Wisconsin) Circuit Court Judge: spinal muscular atrophy, first judge with a disability on his court[45]
- Mary Beth O'Connor, Federal Administrative Law Judge: addiction recovery[46]
- Ralph K. "Tripp" Anderson, III, Chief Judge, South Carolina Administrative Law Court: paralysis, wheelchair user[47]
- Cathy Sellers, Administrative Law Judge, Florida Division of Administrative Hearings: cancer survivor[48]
- Azeema Akram, Administrative Law Judge for Illinois Human Rights Commission: deaf[49]

1. "Disability Impacts All of Us (https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html)," Centers for Disease Control and Prevention. ↑

2. "Diverse Perspectives: People with Disabilities Fulfilling Your Business Goals (https://www.dol.gov/agencies/odep/publications/fact-sheets/diverse-perspectives-people-with-disabilities-fulfilling-your-business-goals)," U.S. Department of Labor Office of Disability Employment Policy. ↑

3. Nancy Scherer, "Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible? (https://scholarlycommons.law.northwestern.edu/nulr/vol105/iss2/5/)" *Northwestern University Law Review* 105 (2) (2011): 587–634. ↑

4. "Disability Impacts All of Us (https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html)," Centers for Disease Control and Prevention. ↑

5. Ayanna Alexander and Madison Alder, "Judge Pick With Disability Raises Hopes for a Group Often Unseen (https://news.bloomberglaw.com/social-justice/judge-pick-with-disability-shows-biden-push-to-diversify-bench?context=search&index=0)," *Bloomberg Law*, October 7, 2022. ↑

6. Danielle Root, Jake Faleschini, and Grace Oyenubi, "Building a More Inclusive Federal Judiciary (https://www.americanprogress.org/article/building-inclusive-federal-judiciary/)," Center for American Progress, October 3, 2019. ↑

7. Debra Cassens Weiss, "Judges are stressed by their decisions, and 20% have at least one depressive symptom, survey finds (https://www.abajournal.com/news/article/one-in-five-judges-surveyed-report-at-least-one-symptom-of-depressive-disorder)," *ABA Journal*, January 7, 2021. ↑

8. "Authorized Judgeships (https://www.uscourts.gov/sites/default/files/allauth.pdf)," Administrative Office of the U.S. Courts. ↑

9. Samantha Balaban, "'Just Ask!' Says Sonia Sotomayor. She Knows What It's Like To Feel Different (https://www.npr.org/sections/health-

shots/2019/09/01/755845325/just-ask-says-sonia-sotomayor-she-knows-what-its-like-to-feel-different)," Weekend Edition, *NPR*, September 1, 2019. ↑

10. Ayanna Alexander and Madison Alder, "Judge Pick With Disability Raises Hopes for a Group Often Unseen (https://news.bloomberglaw.com/social-justice/judge-pick-with-disability-shows-biden-push-to-diversify-bench?context=search&index=0)," *Bloomberg Law*, October 7, 2022. ↑

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IMPLICIT BIAS GUIDE

Implicit Biases & People with Disabilities

By: ABA Commission on Disability Rights

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Introduction

Most of us believe that we are fair and equitable, free of prejudice and biases, and evaluate others based on objective facts. However, to our surprise all of us, even the most egalitarian, have implicit biases--also referred to as unconscious biases or implicit social cognition. They are triggered automatically, in about a tenth of a second, without our conscious awareness or intention, and cause us to have attitudes about and preferences for people based on characteristics such as age, gender, race, ethnicity, sexual orientation, disability, and religion. These implicit biases often do not reflect or align with our conscious, declared, explicit core values and beliefs and can cause individuals to act in ways that produce disparate and inequitable outcomes for different demographic groups. Notably, they influence our judgment, decisions and actions, both positively and negatively, and can predict our behavior, and ultimately may lead to discriminatory behaviors.

Implicit biases about persons with disabilities are pervasive. A 2018-2019 study released by the American Bar Association, in collaboration with the Burton Blatt Institute at Syracuse University, found that lawyers who identify either as having disabilities or as LGBTQ+ report experiencing both subtle and overt forms of discrimination at their workplaces, with common reports of subtle but unintentional biases. (1) Of 3.590 respondents, 38.5 percent (1,076) reported perceptions or experiences of subtle but unintentional biases, compared to 21.7 percent (607) for subtle and intentional biases. (2)

A 2007 study found that "[p]reference for people without disability compared to people with disabilities was among the strongest implicit and explicit effects across the social group domains" (e.g., gender, race, religion, sexuality, weight, political orientation, etc.), with only age showing more implicit bias. (3) Significantly, 76 percent of respondents showed an implicit preference for people without disabilities, compared to nine percent for people with disabilities. (4) Even test takers with disabilities showed a preference for people without disabilities. (5)

Another study using data from 300,000 participants ages 18 to 90 over a 13-year period (2004-2017) found that implicit bias from respondents increased over time and with age, meaning that they had less-favorable feelings toward people with disabilities. (6) However, when participants were asked explicitly how much they preferred people with individuals, they shared more positive responses with time and age. Further, women felt less implicit bias, and people who had contact with disabled individuals had lower prejudice. When you interact more with a stigmatized group, you may develop positive associations with them, challenging your biases and, thus, resulting in attitudinal changes.

The American Bar Association's Commission on Disability Rights has created this resource to increase awareness of implicit biases, both in general and in particular with regard to persons with disabilities, and to offer techniques to help mitigate these biases. We begin with an overview of implicit bias, in particular what is implicit bias, where do such biases originate, how can we measure them, why are they harmful, and how can we mitigate them. This is followed by a series of questions and scenarios that will allow you to examine your implicit biases about persons with disabilities.

Overview

What Is Implicit Bias?

Implicit or unconscious bias is defined as "the process of associating stereotypes or attitudes toward categories of people without our conscious awareness." [7] All of us have a natural human tendency to sort people into groups based on characteristics such as age, gender, race, ethnicity, sexual orientation, disability, and religion. These unconscious responses allow our brain to process vast amounts of information about one another automatically and at lightning speed. We process approximately 200,000 times more information each second unconsciously than consciously. [8] In other words, a majority of how we process information occurs outside of our conscious awareness or control. Having to process everything about each individual we meet would be both overwhelming and likely incapacitating. Sorting is a type of cognitive shorthand that saves cognitive resources.. [9]

We tend to look for or favor information that confirms our associations and ignore or screen out information that contradict them. This is called confirmation bias. We tend to see an individual as a representation of a particular group rather than as an individual.

Further, we tend to favor, prefer, and associate positive characteristics with members of the group to which we belong--people who are most like us and share similar interests, experiences, and backgrounds. This is known as affinity, in-group favoritism or in-group bias. [10] All of us belong to cultural groups defined by traits such as race, ethnicity, religion, gender, disability, sexual orientation, national origin, family, or social or professional status. In-group bias is so strong that, even when randomly assigned to a group, people report a preference for that group. [11] Accordingly, we tend to associate negative characteristics with or disfavor members of groups to which we do not belong. This is referred to as out-group bias. [12]

We also tend to think that examples of things that come readily to mind to be more factual or accurate are more representative than is actually the case. This is called availability bias. For instance, if you have been raised in a family that highlights differences between men and women, you will have numerous examples of those differences, but few examples of commonalities. All of these tendencies are the foundation of stereotyping, prejudice and, ultimately, may result in discriminatory decisions or actions, even if those decisions or actions might not be what we consciously intend or acknowledge.

Where Do Implicit Biases Originate?

Implicit biases are shaped by our personal and life experiences, the attitudes of family, friends and others, living and working environments, culture, the media, movies, and books. Implicit biases develop over the course of a lifetime, beginning at an early age. [13]

How Can We Measure Implicit Biases?

It used to be that if we wanted to know a person's biases, we asked. However, we now know that self-reports of biases are unreliable due, in part, to the fact that we are often unaware of our biases, believe we are not biased, or may modify our responses to align with what is regarded as socially acceptable. [14] The Implicit Association Test (IAT) is one of the most well-known, popular, and widely used tools for measuring one's implicit biases, and has been responsible for introducing the concept of implicit bias to the public. There are numerous IATs (over 90) that assess implicit biases across a wide range of characteristics, including race, disability, sexuality, age, gender-career, religion, and weight.

Introduced in 1998 and maintained by Project Implicit--a consortium comprised of researchers from Harvard University, the University of Virginia, and the University of Washington [15] --the IAT is a web-based test that measures the strength of associations between concepts (e.g., "Disabled Persons", "Abled Persons") and evaluations (e.g., "Bad", "Good"). Test takers are asked to quickly sort words and images/symbols into categories (e.g., Good, Bad, Disabled Persons, Abled Persons) by pressing the "e" key if the word or image/symbol belongs to the category on the left, and the "i" key if the word or image/symbol belongs to the category on the right.

An individual's IAT score is based on how long it takes (speed) the individual, on average, to sort words and images/symbols when the categories are combined, such as Good or Disabled Persons and Bad or Abled Persons and vice versa. The IAT recognizes that most of us identify words and images or symbols more quickly when they originate from what we perceive as closely related rather than unrelated categories. For example, if you are faster to categorize words when "Disabled Persons and Good" share a response relative to when "Disabled Persons and Bad" share a response key, you would have an implicit preference for "Disabled Persons."

How Are Implicit Biases Harmful?

Implicit biases influence our perceptions, judgments, decisions, and actions and can predict behavior. [16] Implicit biases can lead to microaggressions. These subtle, but offensive comments or actions, which are often unintentional and reflect implicit biases, unconsciously reinforce a stereotype when directed at persons based on their membership in a marginalized group. [17] Unlike explicit discrimination, microaggressions typically are committed by people who are well-meaning. For example, a waiter may ask the person accompanying a blind person or wheelchair user what he or she would like to order, sending the message that a person with a disability is unable to make decisions independently. These "small" slights are cumulative and significant over time. [18]

Social scientists point to mounting evidence that implicit biases can lead to discriminatory actions in a wide range of human interactions, [19] from education to employment, health care, housing, and criminal justice. When we look at some of the disproportionalities (i.e., the differences between a group's representation in the population at large and its over- or under-representation in specific areas) that have plagued us for so long, despite society's best intentions, it is hard to explain them.

For example, we know that students with disabilities achieve in school at a lower rate than others and are far more often and more severely disciplined in school. [20] Most of us believe that teachers and school administrators act in good faith and have good intentions. If we were to ask them whether they intentionally and explicitly intend to treat students with disabilities with lower expectations and discipline them more severely than students without disabilities, most if not all would say that was not their intent and believe that they are making decisions based on objective facts. Yet, it is difficult to understand the disproportionate results. One possible explanation is that these decision-makers are indeed acting in good faith but are responding with implicit biases. [21]

How Can We Mitigate Unconscious Biases?

Acknowledging the difficulties of controlling biases that are unconscious and automatic, the good news is that implicit biases are malleable and their effect on behavior can be managed and mitigated. [22] Although nearly all of us have implicit biases, we can take steps to minimize how often they are activated and how much they affect our perceptions, decisions, and actions. The first step is to acknowledge that all of us have implicit biases despite our egalitarian intentions and learn about the cognitive science and the influence of implicit biases on our judgment, decisions, and actions toward demographic groups, resulting in unequal outcomes. Taking the Implicit Association Test or other tests that measure implicit responses helps raise awareness. Once aware, motivation to change and to manage implicit biases is critical. critical. [23]

Researchers have developed various de-biasing interventions to counter the negative effects of implicit biases by building new mental associations. [24] To reinforce these new associations, these interventions must be consistently and continuously reapplied. These interventions include:

- *Intergroup Contact*: Meet and engage with individual members of outgroups. Getting to know people one-on-one and engaging in positive meaningful relationships can help you build new positive associations and reduce stereotyping.

- *Counter-stereotypes*: Develop new associations that counter your stereotypes. Expose yourself to or think about exemplars who possess positive traits that contrast with your stereotypes. For example, read about blind judge Richard Bernstein, Associate Justice of the Michigan Supreme Court.
- *Individuation*: Consider the attributes of the individual apart from their group. For instance, when you meet someone who has a mental health condition, focus on their individual characteristics, traits, interests, and preferences rather than stereotypes about persons with these conditions.
- *Perspective Taking*: Take the perspective of the individual. Try to understand from their perspective what they encounter and what adaptive techniques they might use to function successfully.
- *Deliberative Processing*: Reflect on your perceptions, judgments, behavior, decisions, and actions to better understand which ones are worthy of a more thoughtful consideration rather than a split-second reaction. We tend to act on our stereotypes when we have a lot of information to process in a short amount of time and feel stressed.
- *Common Ground*: Focus on what you have in common with the individual members of the groups you are stereotyping rather than their differences.
- *Education*: Participate in trainings and other educational programs aimed at raising awareness about implicit biases and their impact.
- *Self-Monitoring*: Continuously self-monitor your perceptions, judgments, behavior, decisions, and actions for the influence of implicit biases.
- *Accountability*: Hold yourself responsible for the negative influence that implicit biases have on your perceptions, judgments, behavior, decisions, and actions. Do not dismiss your accountability simply because implicit biases are triggered automatically without conscious awareness.

Implicit Disability Biases: Questions to Ask Yourself

Reflect on each of the questions below. Consider whether and to what extent your response may be influenced by stereotypes and biases about people with disabilities and/or informed by objective facts and evidence and actual experiences with them.

1. When you think of an individual with a disability, do you focus on the things the individual can do or cannot do? Where do you get the information on which you base your views? Do you ask or observe the individual with a disability?
2. Do you think "disabled" is a negative word? If so, which words should be used instead?
3. Do you think of an individual with a disability as working in certain careers? If so, which careers and why?
4. When you think of an individual with a disability, do you have sympathy or feel pity for that individual?
5. When you meet an individual with a disability, do you see the individual's disability before you see the individual?
6. Do you think about individuals with disabilities as a group or as individuals? If as a group, what characteristics do you think members of the group share?
7. Do you consider individuals with disabilities as different from individuals without disabilities? If so, how are they different?
8. What traits do you believe individuals with disabilities share?

9 Do you believe that the lives of individuals with disabilities are different from the lives of individuals without disabilities? If so, how are they different?

10 Do you use terms (e.g., "normal" or "able-bodied") to differentiate between individuals without disabilities individuals with disabilities?

11 Do you speak to and interact with individuals with disabilities differently than you do with individuals without disabilities? If so, how and why?

12 Do you perceive individuals with disabilities as dependent or in need of assistance as compared to individuals without disabilities? Do you base your belief on personal experiences or other sources? If the latter, what are the sources?

13 Do you view individuals with disabilities as vulnerable and at risk of being victimized compared to individuals with disabilities? If so, in what way?

14 Would you describe individuals with disabilities as exceptional, brave, courageous, inspirational, superhuman, and heroic for living with their disabilities? If so, why?

15 Do you view individuals with disabilities as angry or bitter because of their disabilities? If so, in what way?

16 Do you perceive individuals with disabilities as productive or competent as individuals without disabilities? If so, why?

17 Do you view individuals with disabilities as too costly for employers to hire? If so, please explain.

18 Do you view disability as an abnormality or sickness or as a challenge that needs to be overcome or corrected?

19 When you see an individual with a disability, do you automatically want to help them?

20 Do you think that individuals are disabled by their impairment or by society's systemic barriers, derogatory attitudes, and exclusion?

21 Do you think workers with disabilities receive special advantages or are held to a lesser standard than workers without disabilities? If so, please explain.

22 Do you think individuals who receive reasonable accommodations at work are given special treatment or an advantage to persons without disabilities?

23 Do you speak to an individual with a disability directly or to the person that accompanies them or a caretaker?

24 Do you view individuals with disabilities as being ill, in pain, and having a poor quality of life?

Specific Disabilities

1 Do you perceive individuals with mental illness as violent or dangerous? If so, based on what information?

2 Do you view individuals with intellectual disabilities or developmental disabilities as being: dependent on others to care for them? Vulnerable? Kind and generous? Innocent and sweet-natured?

3 Do you think all blind individuals have a keener sense of smell and hearing?

4 Do you think individuals with cerebral palsy have cognitive impairments as well?

5. Do you view individuals with hidden impairments such as psychiatric conditions, learning disabilities, chronic fatigue syndrome, arthritis, and heart conditions as having a disability?
6. Do you think all blind individuals read braille?
7. Do you think individuals with autism: Have an intellectual disability? Are unable to feel or express emotion? Are violent? Have savant abilities or extraordinary skills? Can be cured?
8. Do you believe individuals in wheelchairs: have mental disabilities? Cannot walk?
9. Do you think that a disability is not that bad or non-existent if you cannot see it?
10. Do you believe individuals with learning disabilities: Have a lower IQ? Lack motivation? Need to try harder?
11. Do you view people with developmental disabilities as asexual?
12. Do you associate mental health or cognitive conditions with incompetency? If so, why?
13. Do you believe that people who have a strong character can overcome substance abuse or mental health conditions?

Scenarios For Discussion

Scenario 1

Nicole, who has cerebral palsy and uses canes to walk, is interviewing for an associate position in the litigation department at a "big law" firm. The partner asks Nicole whether she: is comfortable speaking in court; needs an assistant to accompany her when she meets with clients and goes to court; believes she can effectively represent clients in court; is aware of the long hours involved, billing requirements, and the necessity to travel; is able to learn and remember the myriad rules and procedures for civil and criminal litigation and the rules of evidence; and has considered working in other departments that do not involve going to court. Nicole responds that her passion is litigation, pointing out that she served on a moot court/mock trial team that won several competitions, held a judicial clerkship, and has courtroom experience through a pro bono project and a legal aid clinic. The partner informs Nicole that if she was hired he would initially meet with prospective clients to prepare them to meet her.

- What implicit biases does the partner have about Nicole?
- What message is the partner sending her?
- What message is given to clients if the partner proceeds as he suggests?
- What could the partner have done differently?
- What questions are appropriate to ask in this situation?

Scenario 2

Robert, who has major depression, works at a medium law firm. At times he has depressive episodes that recur periodically. When these occur, he requests as accommodations a modified schedule to begin work late rather than early morning; breaks for calming and stress relief exercise; breaking down big projects into manageable tasks; and written feedback of his work. Robert's supervising attorney assembles a team to work on an important project for the firm. She decides, based on the long hours this will require, the numerous tight deadlines that need to be met, and the team meetings involved, not to assign Robert.

- What assumptions did the supervisor make about Robert's abilities?

- Were the supervisor's reasons for not including Robert on the team reasonable?
- What questions should the supervisor have asked Robert before making her decision?

Scenario 3

Judge Thompson is presiding over a custody battle involving three-year-old Sean, who has asthma. The boy's mother is blind, and his father does not have any disabilities. She decides that it would be in the best interests of Sean for his father to have primary custody. The judge expresses concern for Sean's safety because his mother is blind. Sean is an active and rambunctious toddler who likes to play at the park and is learning to ride a scooter. The judge also notes that Sean attends preschool five days and week, and his mother cannot drive him there. In addition, the judge points out that Sean is susceptible to ear infections, and needs to monitored closely.

- What factors should the judge consider in making his decision?
- What types of questions should the judge ask Sean's mother about her parenting?
- Does being blind necessarily impact her parenting capacity? If so, how?
- What types of evidence should Sean's mother present to show her capacity?

Glossary

- *Attitude:* The tendency to like or dislike, or to act favorably or unfavorably toward, someone or something.
- *Bias:* A prejudice in favor of or against one thing, person, or group compared with another, usually in a way that is considered unfair. [25]
- *Debiasing:* Methods, techniques, and strategies employed to ameliorate implicit biases and develop new associations to counter our subconscious stereotypes.
- *Disability:* A physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having a disability. [26]
- *Discrimination:* Behavior that treats people unequally because of their membership in a group. Discriminatory behavior, ranging from slights to hate crimes, often begins with negative stereotypes and prejudices. [27]
- *Implicit Bias:* The process of associating stereotypes or attitudes toward categories of people without our conscious awareness. [28]
- *Microaggressions:* Subtle, but offensive comments or actions directed at persons based on their membership in a marginalized group that are often unintentional or unconsciously reinforce a stereotype. [29]
- *Prejudice*: An opinion, prejudgment, or attitude about a group or its members ("out-group") that stems from a preference or favoritism for the group to which one belongs ("in-group"). [30]
- *Stereotype:* Making a favorable or unfavorable association between a group and a characteristic or trait --a generalization that allows for little or no individual differences or social variation. Stereotypes can be positive, negative, or neutral. They can be based on personal experiences and portrayals in mass media, and can be passed on by parents, peers, and other members of society. [31]

Endnotes

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No. B313215
California Court of Appeals, Second District, Seventh Division

Unzueta v. Akopyan

85 Cal.App.5th 67 (Cal. Ct. App. 2022) · 301 Cal. Rptr. 3d 93
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11-07-2022

Zulma UNZUETA, Plaintiff and Appellant, v. Asmik AKOPYAN, Defendant and Respondent.

McMurray Henriks and Yana G. Henriks, Los Angeles, for Plaintiff and Appellant. Cole Pedroza, Kenneth R. Pedroza, Matthew S. Levinson, San Marino; Packer, O'Leary & Corson, Robert B. Packer and Paul M. Corson, Pasadena, for Defendant and Respondent.

FEUER, J.

McMurray Henriks and Yana G. Henriks, Los Angeles, for Plaintiff and Appellant.

Cole Pedroza, Kenneth R. Pedroza, Matthew S. Levinson, San Marino; Packer, O'Leary & Corson, Robert B. Packer and Paul M. Corson, Pasadena, for Defendant and Respondent.

71 FEUER, J. *71 Zulma Unzueta appeals from a judgment entered in favor of defendant Asmik Akopyan, M.D., on Unzueta's action for medical malpractice after the trial court denied her motion under *Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (*Wheeler*) following our remand in *Unzueta v. Akopyan* (2019) 42 Cal.App.5th 199, 254 Cal.Rptr.3d 850 (*Unzueta I*). In this appeal, we consider whether under California law an attorney may properly strike a prospective juror based on the disability of the juror's family member. Historically *Batson / Wheeler* motions have been analyzed, as the trial court did here, in terms of whether the justification for excusing a prospective juror is race-neutral. However, in 2015 the Legislature expanded the scope of cognizable groups protected under *Batson / Wheeler* by its enactment of Assembly Bill No. 87 (2015-2016 Reg. Sess.) § 1 (Assembly Bill 87), effective January 1, 2017. Assembly Bill 87 amended Code of Civil Procedure section 231.5 [1] to specify by reference to Government Code section 11135 that peremptory challenges cannot be used to excuse prospective jurors on the basis of their sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental and physical disability, medical condition, genetic information, marital status, or sexual orientation. Nor can a peremptory challenge be based on the perception the juror possesses one of these characteristics or because of the juror's association with someone perceived to have one of these
72 characteristics. *72 In *Unzueta I* , we concluded the trial court erred in denying Unzueta's *Batson / Wheeler* motion (initially made sua sponte by the court) after Dr. Akopyan's attorney exercised peremptory challenges to six Hispanic[2]
97 prospective jurors out of *97 his seven total challenges. (*Unzueta I* , at p. 202, 254 Cal.Rptr.3d 850.) We agreed with Unzueta that the court erred in not requiring defense counsel to offer nondiscriminatory reasons for his first four challenges that formed the basis of the trial court's prima facie finding of racial bias. (*Id.* at p. 202, 254 Cal.Rptr.3d 850.) We conditionally reversed for the limited purpose of the court conducting the second and third steps of the *Batson / Wheeler*

inquiry as to all six challenged Hispanic jurors and directed the court on remand to "require defense counsel to state his reasons for challenging the first four prospective jurors, and ... [to] decide in light of the record as to all six jurors whether Unzueta has proved purposeful racial discrimination." (*Unzueta I* , at pp. 202-203, 254 Cal.Rptr.3d 850.) We directed the court further that if it found Dr. Akopyan's challenges were permissible, it should reinstate the judgment. (*Id.* at p. 203, 254 Cal.Rptr.3d 850.)

[1] Further undesignated references are to the Code of Civil Procedure.

[2] We refer to the prospective jurors as Hispanic, which is the term used by the trial court and counsel. "Hispanic" is defined as "of, relating to, or being a person of Latin American descent and especially of Cuban, Mexican, or Puerto Rican origin living in the U.S.," or "of or relating to the people, speech, or culture of Spain." (Merriam-Webster's Online Dict. (2022) < https://www.merriam-webster.com/dictionary/hispanic> [as of November 7, 2022], archived at < https://perma.cc/4URQ-7PWJ>; see Cambridge English Dict. Online < https://dictionary.cambridge.org/us/dictionary/english/hispanic> [as of November 7, 2022], archived at < https://perma.cc/V5W4-J4VE> [defining "Hispanic" as "from or connected with Spanish-speaking countries, especially those in Latin America, or having parents or grandparents from these countries"].) The term "Latinx" (a gender-neutral form of Latino and Latina), which is defined as "of, relating to, or marked by Latin American heritage," would alternatively describe the jurors. (Merriam-Webster's Online Dict. (2020) < https://www.merriam-webster.com/dictionary/latinx> [as of November 7, 2022], archived at < https://perma.cc/Z2JX-D5WB>.)

On remand, the trial court elicited justifications for the six prospective jurors at issue, which Dr. Akopyan's attorney provided. As to two of the jurors, Dr. Akopyan's attorney asserted they were excused because they had a family member who was disabled, and the attorney feared the family member's disability would cause the juror to be biased in favor of Unzueta, who alleged she became disabled as a result of Dr. Akopyan's professional negligence. The court found the justifications were "race-neutral," and after analyzing all the challenges, it denied the *Batson / Wheeler* motion and reinstated the judgment.

Unzueta argues in this appeal that Dr. Akopyan's striking of the two prospective jurors based on the disabilities of their family members was itself based on protected characteristics. Unzueta is correct. Dr. Akopyan's justification for excusal of the two jurors was race-neutral, but it was still impermissible under California law. We again
73 reverse and order a new trial. *73 **FACTUAL AND PROCEDURAL BACKGROUND**

A. *The Underlying Case*

Unzueta alleged in her complaint that Dr. Akopyan, the anesthesiologist during the birth of her child, negligently administered an epidural injection that resulted in the paralysis of Unzueta's right leg below the knee. After a trial, the jury returned a special verdict for Dr. Akopyan, finding she was negligent in the care and treatment of Unzueta, but Dr. Akopyan's negligence was not "a substantial factor in causing harm" to Unzueta.

B. *Jury Selection and the* Batson/Wheeler *Motion*

We described jury selection and the *Batson / Wheeler* motion in *Unzueta I, supra* , 42 Cal.App.5th at pages 208 through 210, 254 Cal.Rptr.3d 850. On the second day of jury
98 selection (February 7, 2017), Dr. Akopyan's *98 attorney, Robert Packer, exercised peremptory challenges to excuse four Hispanic prospective jurors: R. Medina, J. Quintero, G. Henriquez, and R. Villarreal.

Medina was a civil engineering student, unmarried, without children, with no prior jury experience.

Quintero was a sanitation worker for the City of Los Angeles, was married with four adult children, and was raising one grandchild. He had served on four criminal and one civil juries, all of which reached verdicts. One of his children did not work because of a disability.

Henriquez was a child specialist, married, with no prior jury experience. Her husband was disabled and did not work. Henriquez had a pending workers' compensation case for an injury sustained in a workplace fall. She stated she would be able to distinguish between the standard of negligence at issue in Unzueta's case and the no-fault standard for workers' compensation.

Villarreal was a children's social worker who supervised investigative teams responding to reports of child abuse. She had two adult children and no prior jury experience. As a supervisor, Villarreal was responsible for deciding based on social workers' investigations whether to file a petition in juvenile court in cases of suspected abuse.

Unzueta exercised all six of her peremptory challenges; Dr. Akopyan accepted the panel without exercising her final two peremptory challenges. That day (February 7) the jury panel was sworn. On February 8 voir dire continued for the selection of the alternate jurors. Packer exercised peremptory challenges on behalf of Dr. Akopyan to excuse three prospective jurors, two of whom were Hispanic: D. Zaldana and A.
74 Marquez. *74 Zaldana was a broadcast engineer, married, with three adult children. He had experience on one civil jury, which reached a verdict. A relative of Zaldana underwent heart surgery and "had items left in him" as a result of the surgery. When asked whether he could be fair to the defense, Zaldana promised to "be as objective as I can be." Zaldana's father had developed symptoms of Parkinson's disease about two months after having an angiogram performed. Zaldana questioned whether the symptoms were brought on by the angiogram test.

Marquez was single and a sales associate at a hardware store, with no prior jury experience. He had previously broken an ankle, which disrupted his daily living for three or four months. After the injury, Marquez "sat at home."

After Packer exercised peremptory challenges to excuse D. Winfrey,[3] Zaldana, and Marquez, the trial court sua sponte made a *Batson / Wheeler* motion based on Packer's exercise of four peremptory challenges on February 7, all of which were directed to Hispanic jurors, and three peremptory challenges on February 8, two of which were directed to Hispanic jurors. The court directed Packer to justify his February 8 challenges to Zaldana and Marquez. Packer provided a justification for his excusal of Marquez, but not Zaldana. He explained Marquez was single, had no jury experience, and appeared "disinterested in the case." Packer excused him in part because he felt Marquez "was completely unknown to me compared to the other jurors."
99 Packer added that there were *99 three Hispanic jurors on the panel as constituted.

[3] Unzueta does not contend Packer's peremptory challenge to Winfrey was made for an impermissible reason.

Unzueta's attorney, Yana Henriks, then requested the court require Packer to provide justifications for his excusal of the four Hispanic jurors on February 7. The court denied the request, explaining "that water is under the bridge." The court denied the *Batson / Wheeler* motion, finding Packer had justified his use of peremptory challenges as to the alternate jurors. In Unzueta's subsequent motion for a new trial she argued the court erred in not requiring Packer to explain his justifications for removing the four Hispanic prospective jurors on February 7 and Zaldana on February 8. Packer explained he challenged Zaldana because it appeared Zaldana believed the

cause of his father developing Parkinson's disease was his surgery. Packer did not provide justifications for his excusal of the first four jurors. The court denied Unzueta's new trial motion.

C. *Unzueta I*

On appeal, Unzueta argued Dr. Akopyan's exercise of six of her seven peremptory challenges to excuse Hispanic prospective jurors was based on
75 *75 race and deprived Unzueta of her federal constitutional right to equal protection (*Batson, supra* , 476 U.S. at p. 88, 106 S.Ct. 1712) and state constitutional right to a trial by a jury drawn from a representative cross-section of the community (*Wheeler, supra* , 22 Cal.3d at pp. 276-277, 148 Cal.Rptr. 890, 583 P.2d 748). Unzueta asserted the trial court erred in failing to require Packer to provide justifications for his excusal of the four Hispanic jurors on the second day of jury selection. Dr. Akopyan responded that the first four jurors did not fall within the scope of the court's sua sponte motion, so no explanation was necessary. We concluded that because the court based its sua sponte *Batson / Wheeler* motion on the excusal of all six prospective Hispanic jurors, "the court was required to elicit from Packer justifications for each of the six challenges forming the basis for the prima facie showing" of group bias. (*Unzueta I, supra* , 42 Cal.App.5th at p. 217, 254 Cal.Rptr.3d 850.)

We conditionally reversed the judgment and remanded for the trial court to perform the second and third steps of the *Batson / Wheeler* inquiry. We explained, "In this case, although jury selection took place almost three years ago, ... there is a transcript of the jury selection proceeding that will assist the trial court and parties in conducting a further *Batson / Wheeler* analysis. In addition, the parties' attorneys may still have their notes from the trial, which Packer referenced during his discussion of the reasons he challenged Marquez. On remand the trial court should require defense counsel to provide Packer's reasons for challenging the first four prospective jurors (Medina, Quintero, Henriquez, and Villarreal), evaluate the explanations, 'and decide whether [Unzueta] has proved purposeful racial discrimination.' " (*Unzueta I, supra* , 42 Cal.App.5th at p. 218, 254 Cal.Rptr.3d 850.) We directed the court to grant a new trial if it was unable to make a reliable determination based on the passage of time or if it determined defense counsel exercised his peremptory challenges based on racial bias. If the six peremptory challenges were made for permissible reasons, the court
100 should reinstate the judgment.[4] (*Ibid.*) *100 D. *The* Batson/Wheeler *Hearing on Remand*

[4] On remand, Unzueta filed a peremptory challenge to Judge Anthony J. Mohr under section 170.6. Dr. Akopyan filed a writ petition in which she argued section 170.6, subdivision (a)(2), which authorizes a peremptory challenge following a reversal on appeal where the trial court is assigned to conduct a new trial, does not authorize a challenge following a conditional reversal where the remand is for the purpose of requiring the trial court to reconsider a pretrial *Batson / Wheeler* motion. We agreed and granted the petition, directing the superior court to vacate its order granting Unzueta's motion to disqualify and to enter a new order deferring a ruling on the motion until after resolution of the *Batson / Wheeler* inquiry. (*Akopyan v. Superior Court* (2020) 53 Cal.App.5th 1094, 1096, 1105, 268 Cal.Rptr.3d 265.)

On January 8, 2021 the superior court set a hearing before the trial court (Judge Mohr) on Unzueta's *Batson / Wheeler* motion for January
76 27, 2021, *76 which was later continued to February 5. At the outset of the February 5 hearing, Henriks requested the court address whether it had a sufficient recollection of the 2017 jury selection, noting that in *Unzueta I* we stated that if the trial court was unable to perform a *Batson / Wheeler* evaluation because of the passage of time, the court should grant the motion.

The court responded, "No problem. And believe it or not, I did take notes, so it's not like I have no memory of that. I'm looking at my notes as we speak, by the way; so the fact that a few years [passed] doesn't really make it impossible to recollect." The court reviewed with counsel the challenges to each of the six jurors, hearing oral argument and having Packer read from the transcript of voir dire the relevant questioning of the jurors.

Packer stated as to Medina that she was a young student with no jury experience. He noted Medina had requested deferral of her jury service for hardship reasons because she had four midterm examinations in the following three weeks. Packer was concerned Medina was "disinterested" in the case and focused on her midterm examinations, so it would be difficult to concentrate on the case. After hearing argument, the court found Packer provided a race-neutral reason for striking Medina.

Packer stated as to Quintero that one of her four children was disabled. Packer explained Unzueta was claiming a permanent disability, and Packer "felt that this particular juror may be too sympathetic to this particular plaintiff to make a reasonable decision on the evidence." Henriks argued the fact the juror had a disabled child was not a sufficient reason to strike her.

After hearing argument, the court asked, "Is this truly a protected class?" Packer responded that the only issue raised in the *Batson / Wheeler* motion was whether or not there was racial discrimination, not discrimination based on a disability. He added, "This can't be raised for the first time now." The court agreed, noting it had "never even thought about it till this moment, but it's a question." After further argument, the court concluded as to Quintero, "Based on what we have here, I think the fact that this juror had a child who's disabled and the plaintiff is disabled, does provide a race-neutral reason for exercising a peremptory strike. So I don't think the Quintero strike violates *Wheeler Batson* ."

With respect to Henriquez, Packer explained he challenged the juror principally because her husband was disabled and unable to work, and he had an outstanding workers' compensation matter. Packer argued these two aspects suggested Henriquez might be sympathetic to Unzueta's claim based on her claimed disability. After hearing argument, the court found "the strike against Henriquez was not racially motivated. There are race-neutral reasons, especially because
77 of [the] disability of the husband." *77 Later in the hearing Henriks argued as to the family members of prospective jurors that " Government Code [section] 11135 specifically prohibits
101 discrimination *101 based on physical disability." She added that having a disability is "a protected class."

As to Villarreal, Packer explained she was a supervisor with the County Department of Children and Family Services, and as part of her position would respond to child abuse notifications. Packer expressed a concern that would likely make her sympathetic to Unzueta, who claimed an injury due to medical malpractice. After hearing further argument, the court found there was not a "race-based reason for exercising this strike." The court added, "It's not the strongest of the group, but it's there."

The trial court then turned to the alternate jurors. With respect to Zaldana, Packer stated, as he had in the trial court, that the juror believed his father had developed Parkinson's disease as a result of an angiogram he had undergone, resulting in a shaky leg. In addition, a relative had an instrument left in him following a surgery. The juror was uncertain whether he could be fair. After hearing further argument, the court found the challenge to Zaldana was proper and not based on race. The trial court again found no *Batson / Wheeler*

violation as to Marquez, accepting Packer's explanation Marquez "seemed to be disinterested and would rather not be on jury duty."[5]

> 5 Throughout the hearing Henriks raised that she wanted to perform a comparative juror analysis, but she needed additional time to review the transcripts. The trial court responded that Henriks could have obtained the voir dire transcript and performed a comparative juror analysis before the hearing. The court denied a continuance, explaining, "Today is the hearing. I want to get through this. We don't have the time to put this thing over and have lengthy briefing which never would have occurred during the actual voir dire process."

Henriks requested the court consider the passage of Assembly Bill No. 3070 (2019-2020 Reg. Sess.), which limits the use of peremptory challenges under new section 231.7. However, the trial court declined to consider the new law, explaining the legislation would not take effect in
78 civil trials until January 1, 2026.[6] *78 At the conclusion of the hearing, the trial court denied
102 the *Batson / Wheeler* motion, *102 explaining, "I think counsel has justified each of his peremptory strikes, some more strongly than others. Marquez and Villarreal, you know, are a little weak, but I'm not prepared to say they're race-based. [¶] ... [¶] I find no violation in this situation." The court found further "that the race-neutral explanations are credible, and I do accept them."

> 6 The trial court was correct. Section 231.7 took effect on January 1, 2021, but it provides "[t]his section shall not apply to civil cases." (*Id.* , subd. (k).) Further, section 231.7, subdivision (n), provides, "This section shall remain in effect only until January 1, 2026, and as of that date is repealed." Effective January 1, 2026 a new version of section 231.7 will take effect, applicable to all jury trials. (*Id.,* subd. (i) ["This section applies in all jury trials ...."].) Subdivision (a) of the law effective January 1, 2026 (and the current version of section 231.7, subdivision (a), as to criminal jury trials), provides, "A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups." Future section 231.7 also provides direction on how the court should evaluate the reasons provided to justify peremptory challenges. (*Id.* , subd. (d).) And subdivision (e) of future section 231.7 lists reasons "presumed to be invalid." Future section 231.7 has a narrower scope of protected classes than section 231.5, for example, not including a juror's mental or physical disability. However, as the Legislative Counsel's Digest for Assembly Bill No. 3070 clarified, "[e]xisting law" (section 231.5) prohibits a party from using a peremptory challenge to remove a prospective juror based on specified protected characteristics, including the mental or physical disability of the juror. (Legis. Counsel's Dig., Assem. Bill No. 3070 (2019-2020 Reg. Sess.) Stats. 2020, Summary Dig.); see Assem. Com. on Judiciary, Rep. on Assem. Bill No. 3070 (2019-2020 Reg. Sess.) p. 6 [listing protected characteristics under current law, including disability].) The legislative history of Assembly Bill No. 3070 does not reflect an intent to limit the scope of protected classes under section 231.5.

The trial court explained in its minute order, "The court concludes that counsel's peremptory challenges to each of the prospective jurors which were exercised during both days of jury selection were not based on the fact that the prospective jurors were Latinos or Latinas. Counsel articulated non-racial justifications for each, and the court accepts them. As further support for this

conclusion, the court notes that the jury did contain Latinos and counsel did not exercise all of his peremptory challenges."

On February 16, 2021 the trial court entered an order denying the motion. On April 6, 2021 the court[7] reinstated the judgment previously entered on April 18, 2017. Unzueta timely appealed.

[7] Judge Michael E. Whitaker signed the order.

DISCUSSION

Unzueta contends the justifications Packer gave for striking prospective jurors Quintero and Henriquez—that they had family members who were disabled—were prohibited bases for excusing the jurors under California law. Unzueta is correct.[8]

[8] Dr. Akopyan contends Unzueta forfeited her argument that Packer's justifications based on the disability of the prospective jurors' family members were impermissible. We decline to find forfeiture. Although Henriks made this argument for the first time at the hearing on remand, Packer did not raise the disability of the prospective jurors' family members as the basis for his peremptory challenges until that hearing.

"Peremptory challenges are a long-standing feature of civil and criminal adjudication. But the exercise of even a single peremptory challenge solely on the basis of race or ethnicity offends the
79 guarantee of equal *79 protection of the laws under the Fourteenth Amendment to the federal
1712 Constitution. (*Batson, supra* , 476 U.S. 79 *1712 ; [citation].) Such conduct [on the basis of race, ethnicity or other similar group bias] also violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. (*Wheeler, supra* , 22 Cal.3d 258, 276-277 [148 Cal.Rptr. 890, 583 P.2d 748].)" (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1157-1158, 218 Cal.Rptr.3d 289, 395 P.3d 186 (*Gutierrez*); accord, *People v. Ramirez* (2022) 13 Cal.5th 997, 1087-1088, 298 Cal.Rptr.3d 1, 515 P.3d 1085 [excluding prospective jurors on the basis of race " " 'violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross section of the community under article I, section 16 of the California Constitution ' " "].)

We employ a familiar three-step process in evaluating a *Batson / Wheeler* motion. "First, the party objecting to the strike must establish a prima facie case by showing facts sufficient to support an inference of discriminatory purpose. [Citation.] Second, if the objector succeeds in establishing a prima facie case, the burden shifts to the proponent of the strike to offer a permissible, nonbiased justification for the strike. [Citation.] Finally, if the proponent does offer a nonbiased justification, the trial court must decide whether that justification is genuine or instead whether
103 impermissible discrimination in *103 fact motivated the strike." (*People v. Reed* (2018) 4 Cal.5th 989, 999, 232 Cal.Rptr.3d 81, 416 P.3d 68, footnote omitted; accord, *People v. Baker* (2021) 10 Cal.5th 1044, 1071, 274 Cal.Rptr.3d 655, 480 P.3d 49.) The prohibition against the exercise of peremptory challenges to exclude prospective jurors on the basis of group bias applies to civil as well as criminal cases. (*Unzueta I, supra* , 42 Cal.App.5th at p. 212, 254 Cal.Rptr.3d 850 ; *Di Donato v. Santini* (1991) 232 Cal.App.3d 721, 731, 283 Cal.Rptr. 751 ; *Holley v. J & S Sweeping Co.* (1983) 143 Cal.App.3d 588, 592, 192 Cal.Rptr. 74.)

" 'Excluding even a single prospective juror for reasons impermissible under *Batson* and *Wheeler* requires reversal.' " (*People v. Baker, supra* , 10 Cal.5th at p. 1071, 274 Cal.Rptr.3d 655, 480 P.3d 49 ; accord, *Gutierrez, supra* , 2 Cal.5th at p. 1158, 218 Cal.Rptr.3d 289, 395 P.3d 186 ["Exclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error, requiring reversal."].) Moreover, at the second step of the *Batson /*

Wheeler analysis, the party that exercised the peremptory challenge cannot justify an allegedly impermissible challenge (here, to six Hispanic jurors) with a different impermissible justification (that two of the six had disabled family members). As discussed, once the objector makes a prima facie case of discrimination, the burden shifts to the party who exercised the peremptory challenge to provide "a permissible, nonbiased justification for the strike." (*People v. Reed, supra* , 4 Cal.5th at p. 999, 232 Cal.Rptr.3d 81, 416 P.3d 68 ; see *Gutierrez* , at p. 1158, 218 Cal.Rptr.3d 289, 395
80 P.3d 186 ["To meet the second step's *80 requirement, the opponent of the motion must provide 'a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' "].) Substituting one impermissible justification for another cannot meet this burden.

Where, as here, a trial court finds a prima facie showing of group bias but then denies the *Batson / Wheeler* motion based on an evaluation of the strike proponent's reasons for the challenges, "the reviewing court skips to the third [step] to determine whether the trial court properly credited the [proponent]'s reasons for challenging the prospective jurors in question." (*People v. Smith* (2018) 4 Cal.5th 1134, 1147, 233 Cal.Rptr.3d 1, 417 P.3d 662.) As to the third step, " '[w]hen the trial court makes a sincere and reasoned effort to evaluate the [proffered] reasons, the reviewing court defers to its conclusions on appeal, and examines only whether substantial evidence supports them.' " (*People v. Baker, supra* , 10 Cal.5th at p. 1077, 274 Cal.Rptr.3d 655, 480 P.3d 49 ; accord, *Smith* , at p. 1147, 233 Cal.Rptr.3d 1, 417 P.3d 662.) In this case, however, the question on appeal is not whether Packer's justifications were genuine (we have no reason to believe they were not), but whether the justifications Packer provided for his excusal of Quintero and Henriquez were based on impermissible group bias under federal or California law. We independently review this question of law on the undisputed facts. (See *Segal v. ASICS America Corp.* (2022) 12 Cal.5th 651, 658, 288 Cal.Rptr.3d 742, 502 P.3d 389 ["when the issue is one of statutory interpretation, it presents a question of law that we review de novo"]; *McHugh v. Protective Life Ins. Co.* (2021) 12 Cal.5th 213, 226, 283 Cal.Rptr.3d 323, 494 P.3d 24 [interpretation of statutory provisions is reviewed de novo]; *California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 208, 127 Cal.Rptr.3d 726, 254 P.3d 1019 [equal protection
104 claim reviewed de novo].) *104 The United States Supreme Court has extended the reach of *Batson / Wheeler* motions to forbid the exercise of peremptory challenges to those based on gender. (See *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 130, 114 S.Ct. 1419, 128 L.Ed.2d 89 [the Equal Protection Clause of the United States Constitution also "forbids peremptory challenges on the basis of gender"].) And under the California Constitution, use of a peremptory challenge "on account of bias against an identifiable group distinguished on racial, religious, ethnic, or similar grounds" is impermissible and the proper subject of a *Batson / Wheeler* motion. (*Gutierrez, supra* , 2 Cal.5th at p. 1158, 218 Cal.Rptr.3d 289, 395 P.3d 186 ; see *People v. Avila* (2006) 38 Cal.4th 491, 549, 43 Cal.Rptr.3d 1, 133 P.3d 1076 ; *Wheeler, supra* , 22 Cal.3d at p. 276, 148 Cal.Rptr. 890, 583 P.2d 748 ["when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds we may call this 'group bias and peremptorily strikes all
81 such persons for that *81 reason alone, he not only upsets the demographic balance of the venire but frustrates the primary purpose of the representative cross-section requirement"].)

The question before us is whether a justification for a strike on the basis of a disability (or the disability of a family member) is a permissible nondiscriminatory reason to support excusal of a prospective juror at the second step of the *Batson / Wheeler* analysis. Under California law it is not.[9]

In 2000 the Legislature enacted Assembly Bill No. 2418 (1999-2000 Reg. Sess.), which added former section 231.5 (Stats. 2000, ch. 43, § 3) governing peremptory challenges. Former section 231.5 expanded the list of cognizable groups subject to a *Batson / Wheeler* motion by stating, "A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds."

[9] The United States Supreme Court and federal courts have not extended *Batson / Wheeler* to peremptory challenges based on a prospective juror's disability. (See *U.S. v. Watson* (D.C. Cir. 2007) 483 F.3d 828, 829 [*Batson* did not prohibit use of peremptory challenges to strike two blind jurors because disabled persons are not suspect class and prosecutor's explanation for striking jurors based on disability was rational]; *United States v. Harris* (7th Cir. 1999) 197 F.3d 870, 876 ["If the government had struck [the juror] because of an irrational animosity toward or fear of disabled people, this would not be a legitimate reason for excluding her from the jury," but the government's use of a peremptory challenge was rationally related to provision of a fair trial and therefore did not violate the Equal Protection Clause].) The California Supreme Court has not addressed the application of *Batson / Wheeler* to jurors based on their disability (or the disability of a family member).

In 2015 the Legislature expanded the list of cognizable groups by its enactment of Assembly Bill 87, effective January 1, 2017. Section 231.5 now provides, "A party shall not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in Section 11135 of the Government Code, or similar grounds." Government Code section 11135, subdivision (a), states in turn, "No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the
105 benefits *105 of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state." And Government Code section 11135, subdivision (d), provides, "The protected bases used in this section include a perception that a person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."
82 *82 These sweeping protections apply here. (See *People v. Armstrong* (2019) 6 Cal.5th 735, 765, 243 Cal.Rptr.3d 105, 433 P.3d 987 [citing section 231.5, as well as *Batson* and *Wheeler* , in concluding "[p]eremptory challenges may not be used to exclude prospective jurors based on group membership such as race or gender"]; *People v. Duff* (2014) 58 Cal.4th 527, 544-545, 167 Cal.Rptr.3d 615, 317 P.3d 1148 [citing to section 231.5 in explaining limits on use of peremptory challenges].)

We construe section 231.5 and Government Code section 11135 together to prohibit use of peremptory challenges to excuse prospective jurors on the basis a person with whom the juror is associated has a disability. That is precisely what Packer did here in challenging Quintero because her child was disabled and Henriquez because her husband was disabled.[10] Dr. Akopyan counters that even if section 231.5 prohibited Packer from excusing prospective jurors on the basis of their disabilities, Quintero and Henriquez were not disabled, and thus, they were not stricken "because of a characteristic" listed in Government Code section 11135. We do not read section 231.5 so narrowly.

10 We analyze Packer's justification based on disability as part of the second step of the *Batson / Wheeler* analysis. We note the same analysis would have applied as part of the first step of the analysis had the *Batson / Wheeler* challenge been based on excusal of jurors based on their disabilities or the disabilities of their family members.

When interpreting a statute, "our core task ... is to determine and give effect to the Legislature's underlying purpose in enacting the statutes at issue." (*McHugh, supra* , 12 Cal.5th at p. 227, 283 Cal.Rptr.3d 323, 494 P.3d 24 ; accord, *Jarman v. HCR ManorCare, Inc.* (2020) 10 Cal.5th 375, 381, 267 Cal.Rptr.3d 696, 471 P.3d 1001.) "We first consider the words of the statutes, as statutory language is generally the most reliable indicator of legislation's intended purpose. [Citation.] We consider the ordinary meaning of the relevant terms, related provisions, terms used in other parts of the statute, and the structure of the statutory scheme." (*McHugh* , at p. 227, 283 Cal.Rptr.3d 323, 494 P.3d 24 ; accord, *Jarman* , at p. 381, 267 Cal.Rptr.3d 696, 471 P.3d 1001 [" 'We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment.' "].)

" 'If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend.' " (*Jarman v. HCR ManorCare, Inc., supra* , 10 Cal.5th at p. 381, 267 Cal.Rptr.3d 696, 471 P.3d 1001.) However, "[i]f the relevant statutory language is ambiguous, we look to appropriate extrinsic sources, including the legislative history, for further insights." (*McHugh, supra* , 12 Cal.5th at p. 227, 283 Cal.Rptr.3d 323, 494 P.3d 24 ; accord, *Mendoza v. Fonseca McElroy Grinding Co., Inc.* (2021) 11 Cal.5th 1118, 1125, 282 Cal.Rptr.3d 369, 492 P.3d 993 ["
83 'If the statutory language permits *83 more than one reasonable interpretation, courts may consider
106 *106 other aids, such as the statute's purpose, legislative history, and public policy.' "].)

Section 231.5 prohibits removal of a prospective juror on the assumption the juror is biased "merely because of a characteristic listed or defined in" Government Code section 11135. It is true the characteristic of a person being disabled is *listed* in Government Code section 11135, subdivision (a). But Government Code section 11135, subdivision (d), *defines* the "protected bases" in subdivision (a) to include the person's association "with a person who has, or is perceived to have, any of those characteristics." We construe these three provisions together to mean a prospective juror is a member of a cognizable class for purposes of a *Batson / Wheeler* motion if the juror has or is perceived to have a listed characteristic in Government Code section 11135, subdivision (a), or if the juror is associated with a person who has or is perceived to have a listed characteristic under subdivision (d) of that section.

The legislative history of Assembly Bill 87 supports this construction. The bill, as introduced on January 7, 2015, amended section 231.5 to prohibit the use of a peremptory challenge to remove a prospective juror based on the assumption the juror is biased merely because of "a characteristic listed or defined in subdivision (a) of Section 11135 of the Government Code, or similar grounds." On June 1, 2015 the bill was amended to read as it does today, removing the reference to "subdivision (a)," and instead referring to a characteristic "defined in Section 11135 of the Government Code, or similar grounds." It is a reasonable construction of this change to encompass characteristics listed and defined pursuant to Government Code section 11135, subdivisions (a) and (d).

Further, as the Senate Rules Committee Office of Senate Floor Analyses, third reading analysis of Assembly Bill 87 explained (following the June 1, 2015 amendment), "This bill now seeks to expand

this protection [under former section 231.5] by prohibiting the use of a peremptory challenge to remove a prospective juror on the basis of any characteristic for which a state agency may not discriminate (i.e. race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability), or similar ground." (Sen. Rules Com., Off. Of Sen. Foor Analysis, 3d reading analysis of Ass. Bill No. 87, (2015-2016 Reg. Sess.) p. 4.) Government Code section 11135 prohibits discrimination by state agencies (or state-funded entities) on the basis of a listed characteristic, as well as on the basis of the person's association with someone who has or is perceived to have a listed characteristic. Thus, including within the scope of cognizable groups for purposes of a *Batson / Wheeler* motion prospective jurors whose
84 family members have one *84 of the listed characteristics is consistent with the legislative intent for Assembly Bill 87 to align cognizable groups for purposes of impermissible peremptory challenges with prohibited discrimination under Government Code section 11135.[11]

[11] We recognize the legislative history does not directly address peremptory challenges on the basis of a prospective juror's association with a person with a listed characteristic. But the legislative history is clear that the intent of Assembly Bill 87 was to align the limitations on peremptory challenges with California law prohibiting other forms of discrimination by the state, a state agency, or entities funded by the state.

There is no dispute that the justifications Packer provided for excusing Quintero and Henriquez were their association with disabled family members. Packer stated that because one of
107 Quintero's *107 children was disabled, Packer "felt that this particular juror may be too sympathetic to this particular plaintiff to make a reasonable decision on the evidence." And with respect to Henriquez, Packer explained the prospective juror's husband was disabled and had an outstanding workers' compensation matter, which would likely make her sympathetic to Unzueta.[12] The trial court concluded as to both prospective jurors that Packer had provided "race-neutral" reasons for exercising his peremptory strikes. The trial court was correct that the justifications were race-neutral, but the challenges were still discriminatory because they were based on the disabilities of the prospective jurors' family members. Accordingly, we reverse the judgment and order a new trial.

[12] Dr. Akopyan argues on appeal that Packer challenged Quintero and Henriquez based on the fact they were unable to work as a result of the disability, not the disability itself. However, at the *Batson / Wheeler* hearing on remand, Packer focused specifically on the disability of the family members, not their inability to work. And further, the trial court in ruling on the motion likewise relied on the disability of the family members, not their inability to work.

DISPOSITION

The judgment is reversed. On remand the trial court is to vacate its order denying the *Batson / Wheeler* motion and to enter a new order granting the motion and setting the matter for a new trial. Unzueta is entitled to her costs on appeal.

We concur:

PERLUSS, P. J.

SEGAL, J.

casetext

Bryce Young serves as the Vice Chair of the California Lawyers Association's Committee on Appellate Courts. Born with a physical disability that requires him to use a wheelchair for mobility, Bryce focuses his education law and disability rights legal practice on helping individuals and institutions develop a thoughtful process for addressing disability issues. He is a frequent writer, speaker, and trainer on disability rights issues, and recently created a website addressing barriers to travel for people with disabilities. He has served on a government task force to counsel a state court system on disability law compliance and inclusivity and has trained state and federal judges on issues facing people with disabilities.

Prior to private practice, Bryce clerked for the Hon. Alan Page, Helen Meyer, and Christopher Dietzen of the Minnesota Supreme Court.