



# — 2017 UT SYSTEM — LEGAL CONFERENCE

*presented by the Office of General Counsel*

THE UNIVERSITY of TEXAS SYSTEM | FOURTEEN INSTITUTIONS, UNLIMITED POSSIBILITIES.

## Session 11a

### You're Not Doing Anyone Any Favors – Bias and Credibility in Investigations

September 29, 2017 | 1:00 p.m. – 2:00 p.m. CST

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# Agenda

1. Bias – Title IX Hypothetical
2. Acknowledging Implicit bias
3. Confirmation Bias and Priming
4. Minimizing Bias in Investigations
5. Credibility Best Practices
6. Serial: A Case Study
7. Trauma-Informed Credibility Assessment



# Title IX Hypothetical – Instructions

Read the hypothetical scenario on the sheet of paper at your seat and answer the question in accordance with the instructions on the page.



# Title IX Hypothetical: Group A

Group 1:

Malik and Emma are undergraduate students at your institution. They have been dating for four months, but they have not yet had sex because of Emma's strong religious beliefs against premarital sex. Malik has no concerns about premarital sex and would have otherwise had sex with Emma but for her concerns. Emma goes to a party at her sorority house and shows up at Malik's dorm room obviously drunk, with a strong smell of alcohol on her breath and is slurring her speech. Emma claims she is "totally wasted." Emma asks Malik to have sex. Malik points out her prior religious concerns, but Emma says she can't wait any longer. Malik agrees, and they have sex. The next morning, Emma wakes up and says that she does not remember anything after she left the sorority house. When Malik tells her what happened, Emma accuses him of taking advantage of her and having sex without her consent. Emma submits a complaint with your Title IX office.

Did Malik violate your institution's sexual misconduct policy?

# Title IX Hypothetical: Group A

Did Malik violate your institution's sexual misconduct policy?

[SHOW RESULTS OF GROUP A]

# Title IX Hypothetical: Group B

## Group 1:

Malik and Emma are undergraduate students at your institution. They have been dating for four months, but they have not yet had sex because of Malik's strong religious beliefs against premarital sex. Emma has no concerns about premarital sex and would have otherwise had sex with Malik but for his concerns. Malik goes to a party at his fraternity house and shows up at Emma's dorm room obviously drunk, with a strong smell of alcohol on his breath and is slurring his speech. Malik claims he is "totally wasted." Malik asks Emma to have sex. Emma points out his prior religious concerns, but Malik says he can't wait any longer. Emma agrees, and they have sex. The next morning, Malik wakes up and says that he does not remember anything after he left the frat house. When Emma tells him what happened, Malik accuses her of taking advantage of him and having sex without his consent. Malik submits a complaint with your Title IX office.

Did Emma violate your institution's sexual misconduct policy?

# Title IX Hypothetical: Group B

Did Emma violate your institution's sexual misconduct policy?

[SHOW RESULTS OF GROUP B]

# What Is Bias?

Preconceived judgment or opinion without just grounds or based on insufficient knowledge.

Can be **conscious or unconscious.**

I don't like sushi (even though I've never had it).



I like apples and pears the same (yet I always pick apples).





# Does Implicit Bias Equal Prejudice?

Most social scientists do not equate implicit bias towards with prejudice or intentional discrimination.

Prejudice is used to describe people who report and approve of negative attitudes toward out-groups.

Most people with an implicit bias for one group over another are not necessarily “prejudiced” by this definition.

- Persons with implicit bias may genuinely believe in equality towards the out-group.
- Persons within the out-group may also carry implicit bias against the out-group.



# Identifying Bias in Ourselves

- Implicit Association Test (IAT) & Project Implicit
- Developed by research psychologists from Harvard University, the University of Virginia, and the University of Washington
- IAT measure the strength of associations between concepts or groups (e.g., straight people, gay people) and evaluations (e.g., good, bad).
- Theory is that a person's answers in responding to two concepts is faster and more consistent when closely related items share the same response key.
- Project Implicit provides different IATs on a variety of issues (e.g., race, age, women in the workplace).

# IAT– Republicans vs. Democrats

Democ./ Negative	PART 1	Republ./ Positive	Democ./ Positive	PART 2	Repub./ Negative
	Ronald Reagan	X	X	Hillary Clinton	
X	Disgusting		X	Honorable	
X	Barak Obama			Mitt Romney	X
	Sincere	X		Fraudulent	X
X	Jimmy Carter			John McCain	X
	Honest	X	X	Excellent	
	Newt Gingrich	X	X	Michael Dukakis	
X	Crooked			Shady	X
X	Nancy Pelosi			Donald Trump	X
X	Devious		X	Genuine	

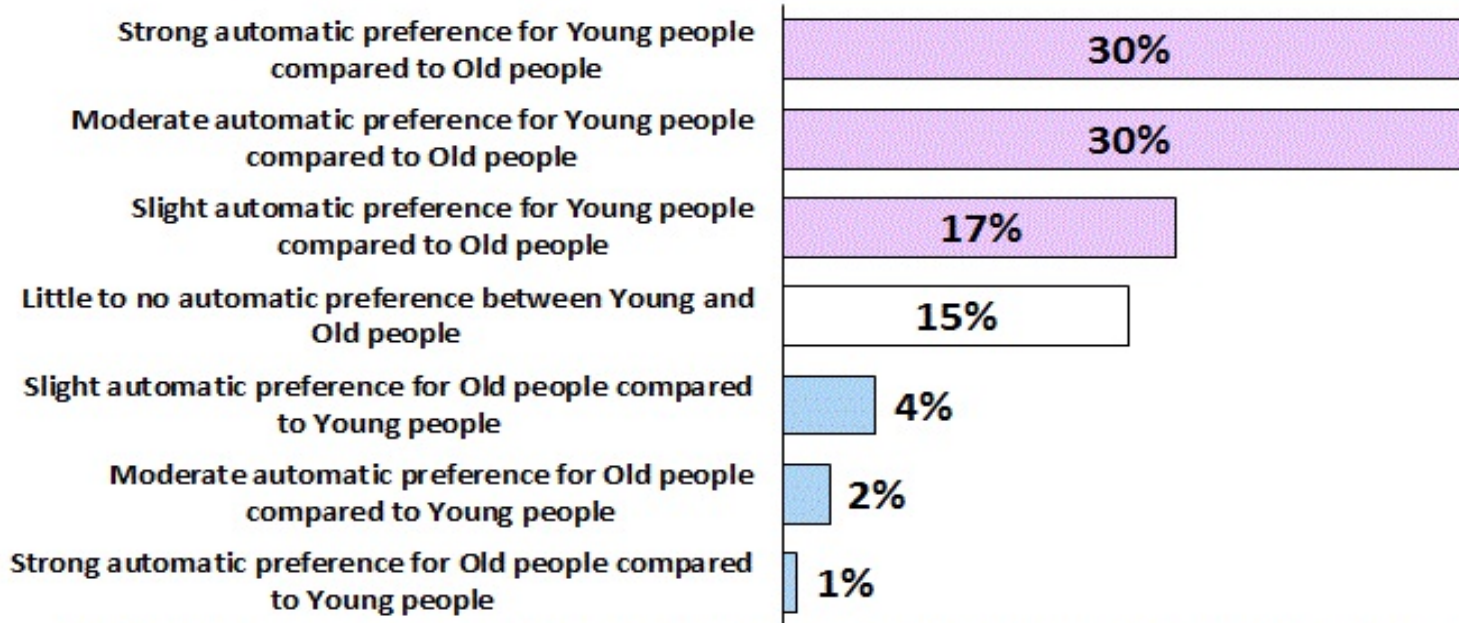


**The greater disparity in time and mistakes, the greater the preference.**

# Example IAT Results – Age

## *We wish we were young ...*

### Percent of web respondents with each score



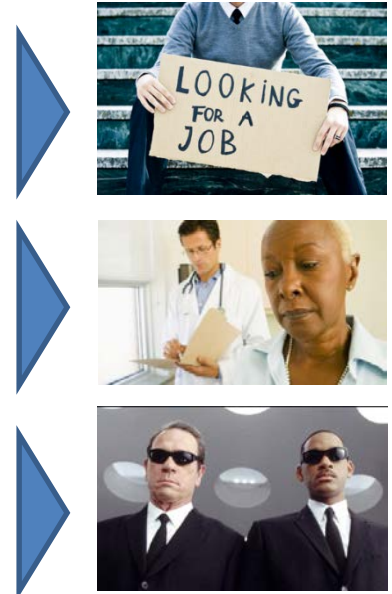
This distribution summarizes 974,726 IAT scores for the Age task completed between December 2002 and December 2015.

# IAT Predictive of Discriminatory Behavior

While the IAT test may seem simplistic, but research it corresponds to actions reflecting a preference for one group over the other.

Examples of actions predicted by White preference on Race IAT:

- Judging White job applicants more favorably than equally qualified than Black applicants.
- Emergency room and residency physicians recommending the optimal treatment less often for a Black patient than a White patient presenting the same symptoms.
- College students being more ready to perceive anger in Black faces than in White faces.



# Confirmation Bias: *I already knew that.*

- Tendency to seek out, favor or interpret information in a manner that confirms previously existing beliefs.
- Impacts how people gather and interpret information

Example 1: In fingerprint analysis study, experts less likely to find a match when first given exculpatory facts.



Example 2: Law firm partners much more critical of black associate's work versus same from white associate.



## Priming : *Nerds aren't so smart after all.*

- Priming is the unconscious influence of external information on what we expect to be an independent decision.
- Example: MIT students first asked last two digits of SSN. Then asked to estimate price of a computer trackball mouse.

Last two digits of SSN	Price of trackball
00 to 19	\$8.62
20 to 39	\$11.82
40 to 59	\$13.45
60 to 79	\$21.18
80 to 99	\$26.18



# Priming in Settlement: *Show me the money!*

- High initial demand can dramatically raise perceived case value.
- Two groups of judges were given the same fact pattern involving a car accident by a negligent truck driver.

Group 1:

No information about demand  
by Plaintiff.

Asked to estimate settlement  
value.

**\$808,000 average**



Group 2:

Told that Plaintiff's lawyer had  
demanded \$10 million.

Asked to estimate settlement  
value.

**\$2.2 million average**





# Techniques for Minimizing Bias: *Before the investigation*

## 1. Take the IAT tests at [implicit.harvard.edu](https://implicit.harvard.edu).

Test topic including race, gender, age, disability, and sexuality.

## 2. Assign diverse investigators.

When out-group dynamics important, staff the investigation with investigators across relevant groups.

Empower investigators to play active roles in conducting interviews, reviewing and assessing evidence, and finalizing the report.

# Techniques for Minimizing Bias: *During the investigation*

## 3. Identify the objective investigation criteria.

What are the elements of the alleged policy or legal violation?

What evidence will be sufficient to prove a violation?

Who bears the burden of proof of establishing a violation and what evidentiary standard will be used:

## 4. Avoid early hypotheses and recognize all possible outcomes.

Avoid anchoring investigation in early theories.

Expressly consider alternative explanations.

## 5. Find commonality with witnesses.

Learn as much as possible about interviewees to mitigate social distance.

Make sure to ask appropriate follow-up questions of persons in both groups to allow for context and explanations.

# Techniques for Minimizing Bias: *During the investigation*

## 6. Open-ended questions.

- Open-ended questions are shown to reduce confirmation bias and minimize priming of witnesses by investigators.

## 7. Obtain and consider all relevant evidence.

- Electronic communications are a critical resource for evidence in investigations.
- Read the entire chain of email or text conversations.
- Ask both sides for the same evidence and what additional information should be considered.
- Conduct follow-up interviews, when necessary, to fill in any gaps.

## 8. Prepare a detailed chronology of information and evidence.

- Organize information and evidence chronologically to understand the historical context and implication.
- Allow sufficient time for evidence to develop and avoid explanations for failure to completely investigate (e.g., heavy workload, insufficient resources, unavailability of witnesses).

# Techniques for Minimizing Bias:

## *Completing the investigation*

### **9. Cite to evidence in report and acknowledge credibility determinations.**

- Include a detailed statement of the facts, with direct quotes to documents and witness interviews and detailed footnotes to reference sources of evidence.
- Attach key evidence as exhibits to the report, and acknowledge conflicting evidence.
- Where a credibility assessment is required, acknowledge it, and explain the basis for the credibility determination.

### **10. Obtain outside input and feedback mechanisms.**

- Find someone you trust to review the draft report.
- Seek expert assistance when necessary.

### **11. Track sanctions across.**

- Track sanctions to determine if sanctions are consistent.
- Consider a sanctions matrix.



# CREDIBILITY

Every detail counts.

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# Credibility Assessments: best practices

Trust your gut.

- You assess credibility daily. Use those skills.

Assess all aspects of the witness's statement:

- Demeanor
- Personal Knowledge
- Bias or Interest
- Corroborating Testimony
- Inconsistencies
- Trauma Induced Behavior



“The story you are about to hear  
is kind of true....”

Copyright Rex May.

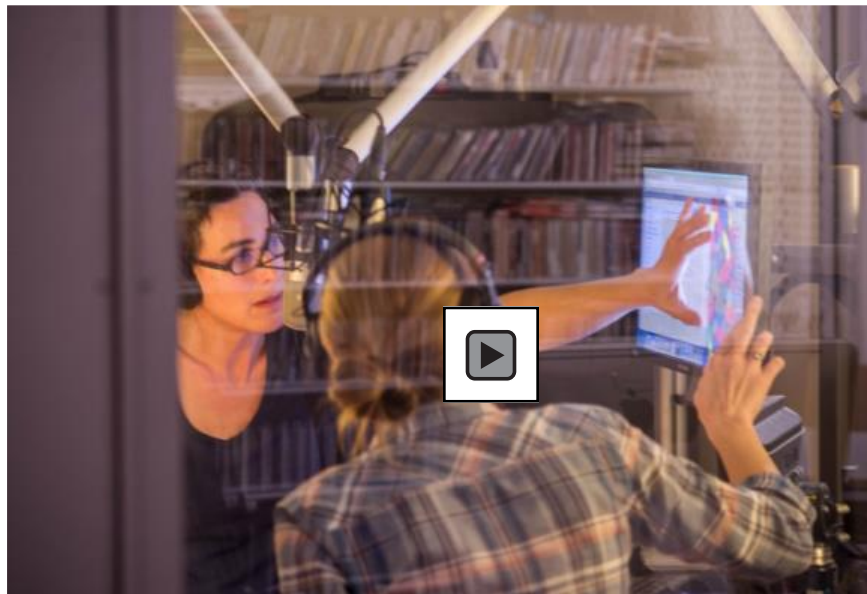
# Credibility – Pattern jury instructions

## 1.7 CREDIBILITY OF WITNESSES

- In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.
- In considering the testimony of any witness, you may take into account:
  - (1) the witness's opportunity and ability to see or hear or know the things testified to;
  - (2) the witness's memory;
  - (3) the witness's manner while testifying;
  - (4) the witness's interest in the outcome of the case, if any;
  - (5) the witness's bias or prejudice, if any;
  - (6) whether other evidence contradicted the witness's testimony;
  - (7) the reasonableness of the witness's testimony in light of all the evidence; and
  - (8) any other factors that bear on believability.

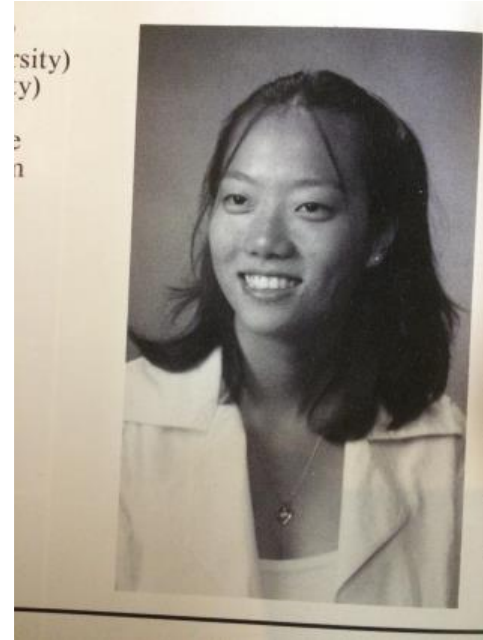


# SERIAL: A CASE STUDY



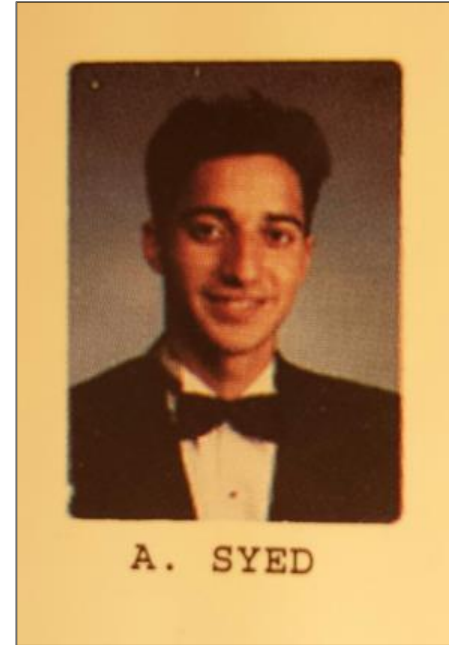
# The Murder of Hae Min Lee

- Baltimore
- January 13, 1999
- A high-school senior
- Honors student, athlete, well-liked, responsible.
- Hae vanishes after school one day.



# The Accused – Adnan Syed

- 17 years old
- A high-school senior
- Hae’s ex-boyfriend
- “Community’s golden child”
- Well-liked, goofy, athletic, prince of the junior prom.



# The Case Against Adnan

- No physical evidence linking him to the crime.
- A key prosecution witness (“Jay”).
- Jay knows the location of Hae’s car and leads the police to it.
- An anonymous tip tells them to look at Adnan.
- Some cell phone records corroborate the time line and locations provided by Jay.
- The “Nisha Call.”

# The Key Prosecution Witness - Jay



- The key witness.
- Consistently states that Adnan killed Hae.
- Consistently states that Jay was with Adnan when he buried Hae's body.
- He knows the location of Hae's car.

# Jay's changing story in his police interviews:

- The mall that he and Adnan went to that day changes.
- The location that Adnan tells Jay to pick him up after the murder changes from the “strip off Edmonson Avenue” to the “Best Buy parking lot.”
- The location that Adnan shows Jay Hae's body changes from the “strip” to the “Best Buy parking lot.”
- The location of where Jay went after he dropped Adnan off at track practice changes from Jay's house to Jay's friend Cathy's house.
- Other details about who was with whom, and when change.

# Jay's continued changing story

- Jay testified that Adnan told him he was going to kill Hae before he did it.  
***His story now is that Adnan did not tell him he was going to kill Hae.***
- Jay testified that Adnan showed him Hae's body in the Best Buy parking lot.  
***His story now is that Adnan showed him Hae's body at Jay's grandmother's house.***
- Jay testified that they buried Hae's body at around 8:00 pm.  
***His story now is that they buried Hae's body around midnight.***

# What now?

- Syed repeatedly pushed for post-conviction relief -- mainly on grounds of ineffective assistance of counsel and failure to interview key witnesses.
- During the Serial podcast, the Innocence Project became involved in Syed's case.
- In June 2016, a judge vacated Adnan Syed's conviction and granted him a new trial.
- Stay tuned...

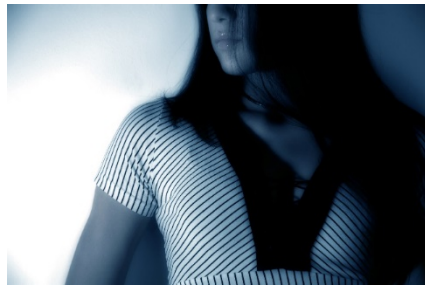


# Conducting Trauma-Informed credibility assessments

- Avoid re-traumatizing interviewees and perpetuating a hostile environment
- Conduct better investigations

# What is Trauma?

- Psychological trauma is the **unique individual experience** of an event or enduring conditions, in which:
  - The individual's ability to integrate his/her emotional experience is overwhelmed, or
  - The individual experiences (**subjectively**) a threat to life, bodily integrity, or sanity.



Esther Giller, Sidran Institute. What is Psychological Trauma? (1999)

<https://www.sidran.org/resources/for-survivors-and-loved-ones/what-is-psychological-trauma/>

# What is Trauma? (cont.)

“[T]rauma is defined by the *experience of the survivor*. Two people could undergo the same noxious event and one person might be traumatized while the other person remained relatively unscathed.” - Esther Giller



# The Impact of Trauma

- Factors That Tend to Increase Traumatic Impact of Event
  - **Severity**
  - **If it is interpersonal** (as opposed to non-interpersonal, such as accidents and natural disasters)
    - Interpersonal traumas may impact interviewee's views regarding safety, intimacy, and trustworthiness of others.
  - **When it is chronic or repeated**
    - Persistent traumas may leave the survivor feeling overwhelmed, helpless, and with a sense that the trauma is inescapable.

(Wamser-Nannay and Vandenberg, 2013)

# Counterintuitive Interviewee Behavior

- *Why didn't she scream?*
- *Why didn't she try to run away?*
- *Why didn't he fight back?*
- *How can it be rape if she didn't say "no"?*



# Behavior during interviews

- Some interviewees' behavior during interviews may appear odd. Remember that they may continue to be affected by the “chemical cocktail” associated with trauma when recalling a traumatic event
- Various “normal” responses include:
  - Emotional, crying, hysterical
  - Flat affect – seeming numb
  - Laughing, light-heartedness, inappropriate
  - Cycling of emotions

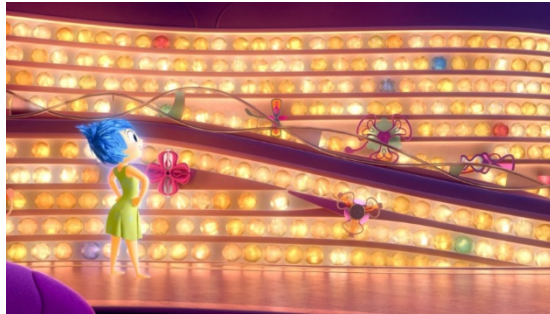
# Trauma and memory

- *She can't get her story straight...*
- *How could she not remember something as significant as **that**?*
- *He is obviously making it up as he goes along...*



# Trauma and memory

- **Explicit Memory:** can be consciously and intentionally recalled
  - Facts, general knowledge, autobiographical (*placing self in space & time*)
- **Implicit Memory:** Remember unconsciously and effortlessly
  - Emotional responses, body sensations, reflexive actions





# Trauma and memory

- Under extreme stress, the initial sorting of explicit and implicit layers continues, but processing is interrupted.



# Trauma and memory

## Memories of a Traumatic Event:

- Stored in amygdala (“implicit”)
- Non-linear recall of events
- Poor recall of contextual information (like the layout of a room)
- Details are fuzzy.
- Focus may be on what someone did to survive event; what are perceived as important details to interviewee may seem odd to investigator.

## Memories of a Non-Traumatic Event:

- Stored in hippocampus (“explicit”)
- Linear recall of events
- Specific details
- “Significant details” make sense to investigator



# When to conduct an initial interview

- There is evidence that waiting two days (two full sleep cycles) to conduct the interview of an interviewee may result in more coherent, detailed information because the brain will have had a chance to recover and consolidate memories during that period



(Campbell 2012)

# Trauma-informed interview tips

- Think about presentation and atmosphere. Be mindful of first impressions (in writing, on the phone, or in person).
  - Where is the interview taking place? Consider privacy, light, noise, accessibility, etc.
  - How do you present yourself?



# In closing – Making the Credibility assessment

- Remember all that you’ve learned about trauma and the body’s responses to trauma.
- Assess the interviewee’s statement with that information in mind.
- Remember that one who has been subjected to trauma may not “act” as expected, and that memory will be affected.