

Dear LSA Members,

President Kim Scheppele asked me to write a memo explaining LSA's new Policy on Discrimination and Harassment, which was passed by the Board of Trustees at their annual meeting in Toronto.

I would first like to thank the Taskforce on Discrimination and Harassment, which was convened to write this policy this past March. The taskforce members included: Catherine Albiston, Lauren Edelman (chair), Catherine Fisk, Liora Israel, Angela Onwuachi-Willig, and Diana Reddy. It is certainly strange to have a taskforce comprised of people all at one university, but this seemed to make sense because time was short and Berkeley happened to have a lively group of work law scholars who could work together to craft the policy. It was an especially challenging task since most of us have been strong critics of the largely symbolic policies that so many organizations have adopted or revamped in the wake of the #MeToo movement. The policy we recommend differs from other association policies because it takes into account the insights of law and society scholarship on discrimination, harassment, and organizational policies.

### **1. Policies alone won't fix the problem but people can work toward an inclusive culture**

First, we considered law and society scholarship that suggests that policies alone are unlikely to fix the problem of discrimination and harassment (e.g., Gusfield 1986; Onwuachi-Willig 2005; Albiston 2010; Edelman 2016; Berry et al. 2017). In particular, policies have a limited impact where cultural stereotypes and scripts result in many people lacking awareness of how their actions or words may affect others, especially those who have historically lacked social, political, and economic clout (see e.g., Krieger 1995; Fiske 1998; Onwuachi-Willig 2005; Carbado and Gulati 2013 on discrimination, and Lach and Gwartney-Gibbs 1993; Cortina and Berdahl 2008 on harassment).

Thus, the most unusual aspect of the LSA policy is that it opens with a statement that outlines LSA's commitment to an inclusive environment and requests that all LSA members and conference participants actively participate in creating an inclusive environment. To help create such an environment, we request that all participants be aware of situations, actions, or language that may have the effect of making others feel unwelcome or disrespected and, if necessary, take action when such situations, action, or language are observed. We encourage all participants to be reflective about their language and to strive to ensure that their biases, both explicit and implicit, are not contributing to an environment that may be perceived by some as hostile to their group. We recognize that including such a request in the LSA policy is no panacea, yet we hope that it will help to raise awareness and engage the goodwill of LSA participants in a way that will help to reduce discrimination and harassment.

### **2. Civil rights law addresses only a fraction of harmful actions but LSA can do more**

Second, we considered the many critiques of U.S. judicial doctrine on discrimination and harassment. U.S. courts tend to find only the most overt and egregious behaviors as violating law. In discrimination cases, U.S. courts in most cases require that the plaintiff establish that the defendant intended to discriminate (Freeman 1990; Krieger 1995; Edelman 2016). While this approach made some sense in addressing the overt intentional discrimination typical of the Jim Crow era, it fails to address the more subtle forms of discrimination that exist today, which include structural barriers that place members of traditionally disenfranchised groups at a disadvantage, stereotypical expectations based on group status, informal networks that tend to exclude members of less powerful groups (such as "old boys

networks”), implicit biases, and language and actions that are experienced as intimidating and harassing by members of minority groups or women (Crenshaw 1989; Krieger 1995; Onwauchi-Willig 2005; Carbado and Gulati 2013; Edelman 2016). U.S. courts regularly overlook meaningful evidence of discrimination by finding racist comments to be “stray remarks,” assuming that the “same actor” who hires a person of color or a woman cannot also discriminate, and that an employer who bases a discriminatory action on mistaken assumptions nonetheless has “honest beliefs” (Krieger 1995; Gertner 2012). In sexual harassment cases, U.S. courts tend to overlook meaningful evidence of harassment especially when organizations have antiharassment policies and grievance procedures in place, irrespective of the effectiveness of those procedures (Edelman 2016). Thus, in the vast majority of sexual harassment cases, plaintiffs are left without legal redress.

For all these reasons, we decided to define discrimination and harassment more broadly than does U.S. federal law and to suggest a standard for evaluating complaints that is less dependent on the intent of the perpetrator. Broadening the policy beyond the categories protected by U.S. federal law (race, ethnicity, sex, religion, national origin, age, veteran status, disability) and some common categories protected by some local jurisdictions (sexual orientation, criminal record) does create a risk of failing to acknowledge the particularly detrimental effects of discrimination or harassment on people of color, women, and other groups who have suffered disproportionately. At the same time, however, a broader policy recognizes LSA strives to be an international organization and that the categories protected by U.S. law may not cover groups that have suffered discrimination in other countries. Further, harassment and discrimination are generally undesirable even when focused on groups that do not enjoy legal protections (e.g. discipline, methodological approach, institution).

Thus, the LSA policy includes a broad prohibition of discrimination and harassment coupled with explicit mention of the categories of people who, at least in the U.S., have been uniquely harmed by discrimination or harassment. We included socioeconomic status in this list even though we are not aware of any laws protecting people on this basis because it has historically been a dimension of discrimination in many countries, including the U.S. The LSA policy thus prohibits discrimination and harassment including but not limited to actual or perceived sex, gender identity, race, ethnicity, sexual orientation, disability, socioeconomic status, age, religion, national origin, citizenship status, criminal record, veteran status, or their intersection.

### **3. Reporting harassment or discrimination is difficult but LSA strives to make it easier**

There is a substantial body of law and society literature that suggests that complaint procedures can easily be ineffective because many victims of harassment or discrimination are extremely reticent to complain (e.g., Bumiller 1978; Marshall 2005; Albiston 2010; Berrey, Nielsen & Nelson 2017). In light of that literature, the LSA policy strives to make it as easy as possible for people who experience discrimination or harassment to complain and that they should have multiple options for complaining. The new LSA policy has two prongs. Anyone who experiences discrimination or harassment may use either prong or both at their discretion.

The first is a more informal system involving ombuds who can assist any participant confidentially, can offer advice about options and how to proceed, and if appropriate, may attempt conciliation. Ombuds are also available for people who witness harassment or discrimination. LSA will in the future make sure that at least two ombuds are available by email and cell phone at all times during LSA meetings. Perhaps more than most associations, LSA probably has a number of members who have training in

being an ombuds so President Scheppele will shortly be sending out an inquiry to find members willing to serve in this capacity.

The second is a more formal procedure, which involves an investigation and possible sanctions. President Scheppele will also create a new Complaint Committee, which will investigate and respond to any formal complaints filed by LSA participants. One or two members of the Complaint Committee will be designated as Intake Officers, and will be available by email or phone during future LSA meetings. To avoid the problems highlighted above regarding the U.S. courts' standards for evaluating discrimination and harassment, the Complaint Committee will evaluate complaints in light of the experience of a reasonable person in the complainant's position, using a preponderance of the evidence standard, rather than on the intent of the perpetrator.

The entire LSA policy can be found [here](#). We encourage all participants in LSA meetings to join in helping to make LSA meetings and other events as inclusive and free of discrimination and harassment as is humanly possible.

Sincerely,



Lauren Edelman, Chair  
Ad hoc Taskforce on Discrimination and Harassment

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