

## **Playing with Cards: Discrimination Claims and the Charge of Bad Faith**

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**Abstract:** A common response to claims of bias, harassment, or discrimination is to say that these claims are made in bad faith. Claimants are supposedly not motivated by a credible or even sincere belief that unfair or unequal treatment has occurred, but simply seek to illicitly gain public sympathy or private reward. Characterizing discrimination claims as systematically made in bad faith enables them to be screened and dismissed prior to engaging with them on their merits. This retort preserves the dominant group's self-image as unprejudiced and innocent without having to risk critical analysis of the claim's substance.

**Keywords:** racism; antisemitism; sexism; race card; discrimination; equality; psychology of prejudice

An African American alleging he was racially profiled at a department store is told he is “playing the race card.” A woman objecting to a culture of sexual harassment in the tech industry is dismissed as covering up for her own lack of drive and ambition. A Jew who expresses concern about antisemitism at her university is told she is only interested in shielding Israel from criticism. Refrains such as these are routine responses to members of marginalized groups claiming bias, harassment, or discrimination.<sup>1</sup> The presumption that underlies this response is that the paradigmatic claim of discrimination is made in bad faith. It is not motivated by a credible (or perhaps even sincere) belief that unfair or unequal treatment has occurred, but is merely a ploy designed to harness the widespread commitment to oppose such injustice. The “card” metaphor is evocative: it connotes a strategic gambit that one deploys to win a game, rather than an honest and organic attempt to advance discussion.

The “bad faith” charge, in short, is an allegation that the discrimination claimant<sup>2</sup> knows or should have known that her claim was baseless. This

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<sup>1</sup>I group together this entire cluster of wrongs—including individual discriminatory acts as well as contentions of structural oppression—under the general moniker “discrimination.” While there are important differences between these types of wrongs, the “bad faith” response reacts to all of them similarly (and often affirmatively collapses the distinctions between them).

<sup>2</sup>For clarity, I refer to persons alleging discrimination as “claimants” and those making the bad faith charge in response “respondents.” The respondent may, but need not, be the

response has proven to be an exceptionally effective way to shut down public discussion of discrimination claims, no matter what their substance. By presenting the paradigmatic discrimination claim as a baseless one, the bad faith response justifies dismissing these claims *prior* to engaging with them on their merits—instead casting them as a part of a pattern or practice of illegitimate claims that need not occupy our attention. In this way, the bad faith response is dominating speech in a very literal sense—it takes an important claim, one that should occupy our attention as citizens concerned about fair and egalitarian treatment, and removes it from the domain of acceptable public discourse. It dominates speech about discrimination.

Discrimination claimants have lacked a cohesive theory about the bad faith response and therefore have struggled to articulate why their claims do not merit this *prima facie* dismissal. This paper seeks to fill that gap in three ways. First, it provides an account of the assumptions and characteristics that reflect how the response is deployed in practice. Second, it identifies how the bad faith response interacts with discriminatory attitudes and occupies an important niche in the *psychological* rationalization of ongoing discriminatory practices. Third, it identifies the wrongs the bad faith charge imposes upon discrimination claimants, obstructing our ability to effectively respond to injustice and degrading their equal participation in political and social discourse.

### 1. The Card in Play

The core of the bad faith response is the contention that discrimination claims should *generally* be viewed with suspicion. In this way, the response can be seen as a special form of Miranda Fricker's larger concept of testimonial injustice. "The basic idea [of testimonial injustice] is that a speaker suffers ... if prejudice on the hearer's part causes him to give the speaker less credibility than he would otherwise have given."<sup>3</sup> Fricker's "central case" of testimonial injustice occurs when there exists *systematic* prejudice on the basis of one's identity that consistently yields this credibility deficit.<sup>4</sup> This maps on well to the generalized belief that discrimination claims are leveled opportunistically and therefore should be appropriately discounted. The context of discrimination claims sharply compounds the testimonial injustice, however, because it is self-insulating—prejudice yields the injustice, and simultaneously wards off complaints aimed at attacking the prejudice.

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person who is the subject of the discrimination claim.

<sup>3</sup>See Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford: Oxford University Press, 2007), p. 4.

<sup>4</sup>See *ibid.*, p. 28.

That the bad faith response relies upon prejudicial outlooks is illustrated by the fact that, for the most part, the bad faith claim is not keyed to the claimant's specific history. Rather, it is asserted to be a common feature of discourse by members of his or her social class (women, African Americans, Jews, and so on). Consider two brief examples. Anita Sarkeesian's series "Tropes versus Women in Video Games" contended that many prominent video games were replete with sexist themes and practices. Sarkeesian's criticisms were met with a torrent of abusive threats and calls for violence. But in addressing these issues, video game columnist Ryan Carroll asserted that any claim of sexism was merely an "'I win' button" and "a way to shut out opposing viewpoints."<sup>5</sup> Likewise, critic Howard Jacobson alleged that Caryl Churchill's play *Seven Jewish Children* was antisemitic: he argued the play presented Jews as conspiratorial and deceitful, trafficked in the blood libel by casting Jews as reveling in the blood of non-Jewish children, and played upon old-school antisemitic interpretations of the concept of "chosen." Churchill dismissed Jacobson's arguments by calling such contentions "the usual tactic" and suggested that Jacobson purposefully elided the distinction between criticism of Israel and antisemitism.<sup>6</sup> In asserting this type of cynical opportunism, neither Carroll nor Churchill cite any specific practices by Sarkeesian or Jacobson. The allegation is rather that sexism claimants (women) or antisemitism claimants (Jews) as a whole illicitly register these charges. The self-insulating nature of the response is also evident: if Sarkeesian or Jacobson argued that Carroll's or Churchill's arguments reflected ingrained prejudice, they could be dismissed using the same reasons and rhetoric leveled against the original critiques.

The key element of the bad faith response is not just that it allows the claim to be rejected, but that it can be rejected *prior* to significant substantive engagement in the merits of the claim. This obviates the need for any sustained look into the particular controversy at hand. It is the move of first resort—not a conclusion drawn from careful consideration of the evidence,<sup>7</sup> but rather a presumption drawn from one's view of the paradigm

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<sup>5</sup>Ryan Carroll, "'Gamergate' is an Accountability Problem, Not a Sexism One," *ModVive*, 1 September 2014, <http://www.modvive.com/2014/09/01/gamergate-accountability-problem-sexism-one/> (accessed 19 June 2015).

<sup>6</sup>Caryl Churchill, "My Play is not Anti-Semitic," *The Independent*, 21 February 2009, <http://www.independent.co.uk/voices/letters/letters-jacobson-on-gaza-1628191.html> (accessed 19 June 2015) (responding to Howard Jacobson, "Let's see the 'Criticism' of Israel for What It Really Is," *The Independent*, 18 February 2009, <http://www.independent.co.uk/voices/commentators/howard-jacobson/howard-jacobson-lets-see-the-criticism-of-israel-for-what-it-really-is-1624827.html>) (accessed 19 June 2015).

<sup>7</sup>To be clear, it is possible to make a warranted assertion of bad faith. But the evidence supporting such an assertion would almost certainly come after substantive investigation, the avoidance of which is a prime motivator behind the response.

case of discrimination claims. It is only upon adopting the view that these claims are *systematically* groundless that one can plausibly infer that the next claim will be false as well. The bad faith response isn't troubling because discrimination claims are never made in bad faith, it is troubling because it is relied on as a first-cut response that presents marginalized persons as inherently untrustworthy, unbelievable, or lacking in the basic understandings regarding the true meaning of discrimination.

The assertion that members of marginalized groups routinely level groundless charges of discrimination relies on seemingly obvious prejudicial foundations. Yet there is a peculiar Janus-face to this mode of argument. Even as they assert systematic bad faith across the entire class of racism, sexism, antisemitism, or other like charges, respondents will almost invariably couple their case with the counterintuitive assertion that these forms of discrimination are severe moral failings. Discrimination is a serious wrongdoing, not to be taken lightly. Both Carroll and Churchill are well aware of, and condemn, certain instances of sexism and antisemitism (respectively). In his book *The Race Card*, Stanford Law Professor Richard Thompson Ford argues that we should be vigilant against “opportunistic[]” accusations of racism precisely because such claims “undermine popular support for racial justice”—a project Ford clearly believes has considerably more work ahead of it.<sup>8</sup>

On its face, this affirmation is strange. Intuitively, it would seem easier to dismiss discrimination claims if they were seen as no big deal and the consequences of a false negative were viewed as minimal. Yet respondents seem adamant that they do take discrimination seriously even in the course of urging systematic dismissal of actual extant claims. And they often explicitly connect this concern with their decision to dismiss—doing so, they argue, ensures that we take “real” discrimination claims (whatever those might be) seriously. That the argument for regularly dismissing actual discrimination claims is paired with vigorous affirmation of the grievous wrong discrimination represents suggests that something deeper is at work. The following section situates these affirmations and the bad faith response generally as part of a larger practice that reduces the perceived conflict between liberal egalitarian ideals and ongoing prejudicial beliefs and behaviors.

## 2. Bad Faith and the Aversive Racist: Commonality Versus Condemnation

Noting the mechanics of the bad faith response does not explain *why* it works, or, perhaps more accurately, why the bad faith allegation is so

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<sup>8</sup>Richard Thompson Ford, *The Race Card: How Bluffing About Bias Makes Race Relations Worse* (New York: Picador, 2009), p. 339.

ubiquitous as a response to discrimination claims. I suggest that the bad faith response does important work in allowing public commitments to equal treatment to coexist with private (or subconscious) animus. The key to the riddle lies in the professed belief that the theoretical type of discrimination at issue (racism, sexism, antisemitism, and so on) is a serious breach of ethical conduct.

The primary theoretical model that explores the concurrent possession of conscious egalitarian commitments alongside continuing subconscious prejudice is John Dovidio and Samuel Gaertner's concept of "aversive racism."<sup>9</sup> Aversive racists abjure overt antipathy or hostility toward racial outgroups—the traditional "dominative" form of racism that characterizes Nazis, the Klan, or Jim Crow. They affirm noble ideals of racial egalitarianism and fair treatment. Nonetheless, they retain "some negative feelings toward or beliefs about [racial minorities], of which they are unaware or which they try to dissociate from their nonprejudiced self-images." Consequently, these people display aversion—not outright hatred—to nonwhites, while also being averse to suggestions that they are in fact prejudiced (charges that conflict with their egalitarian self-image).<sup>10</sup> Aversive racist behavior seeks to reduce the dissonance between subconscious prejudices and conscious egalitarian commitments.

Typically, aversive racists are said to only act on their subconscious prejudices in cases of ambiguity—where there is a credible, nonprejudiced rationale for engaging in hostile or discriminatory treatment.<sup>11</sup> Hence, aversive racists will only behave in a discriminatory fashion in circumstances in which it would not be obvious (to themselves and to others) that their behavior is motivated by prejudice. The act of robustly condemning discrimination helps create this ambiguity—it makes it harder to conclude that the actor is such a discriminator. Obviously, part of this effect is simply a function of the declaration, and indeed there is considerable evidence that persons given the opportunity to affirm their opposition to

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<sup>9</sup>See, e.g.: John F. Dovidio and Samuel L. Gaertner, "Aversive Racism," *Advances in Experimental Social Psychology* 36 (2004): 1-52; "Aversive Racism and Selection Decisions: 1989 and 1999," *Psychological Science* 11 (2009): 315-19; and "The Aversive Form of Racism," in John F. Dovidio & Samuel L. Gaertner (eds.), *Prejudice, Discrimination, and Racism* (Orlando: Academic Press, 1986), pp. 61-89. Name notwithstanding, Dovidio and Gaertner have affirmed that their theory is not limited solely to the racial context ("Aversive Racism," p. 3).

<sup>10</sup>Dovidio and Gaertner, "Aversive Racism," p. 4.

<sup>11</sup>Dovidio and Gaertner, "Aversive Racism and Selection Decisions," p. 315: "Because aversive racists consciously recognize and endorse egalitarian values, they will not discriminate in situations in which they recognize that discrimination would be obvious to others and themselves .... However, because aversive racists do possess negative feelings, often unconsciously, discrimination occurs when bias is not obvious or can be rationalized on the basis of some factor other than race."

discrimination will be more likely to indulge in discriminatory practices—the pronouncement having given them a “moral credential” that blunts otherwise credible inferences of prejudice.<sup>12</sup> But there are more subtle forces at work. Presenting “discrimination”—as a concept—as a serious wrong simultaneously constructs it as rare, aberrant, and therefore unlikely to apply to anything but the most vicious cases of obvious antipathy.

In prior scholarship, I have hypothesized that there is an inverse relationship between how people perceive the severity of an ambiguous norm and how they perceive its scope.<sup>13</sup> The more serious (the breach of) a norm is taken to be, the narrower the range of behavior that will be seen to be encompassed under the norm’s ambit. There are several reasons why this might be the case. In general, people tend to believe in a “Just World,” wherein for the most part people play fairly and get what they deserve.<sup>14</sup> Consequently, they are likely to be resistant to the notion that significant moral wrongdoings are commonplace, which would imply widespread and systematic injustice. More concretely, people have a very obvious rationale for narrowly interpreting what constitutes a severe moral breach: the alternative risks encompassing their own behavior.<sup>15</sup> Not wanting to be viewed as moral monsters, people naturally will be suspicious of ethical reasoning that risks placing them in such a category. Moreover, this theory is bidirectional: Persons will not view common behavior as constituting a severe moral breach, and they will view wide application of a normative rule as diminishing the seriousness of its content. Ford registers this concern in stark terms:

The good-natured humanitarian who listens attentively to the first claim of social injustice will become an impatient curmudgeon after multiple similar admonishments .... The growing number of social groups making claims to civil rights protection threatens the political and practical viability of civil rights for those who need them the most.<sup>16</sup>

<sup>12</sup>See, generally, Benoit Monin and Dale T. Miller, “Moral Credentials and the Expression of Prejudice,” *Journal of Personality and Social Psychology* 81 (2001): 33-43.

<sup>13</sup>See David Schraub, “Sticky Slopes,” *California Law Review* 101 (2013): 1249-1314, pp. 1300-1301.

<sup>14</sup>See Melvin J. Lerner and Dale T. Miller, “Just World Research and the Attribution Process: Looking Back and Ahead,” *Psychological Bulletin* 85 (1978): 1030-51, pp. 1031-32; Jon Hanson and Kathleen Hanson, “The Blame Frame: Justifying (Racial) Injustice in America,” *Harvard Civil Rights-Civil Liberties Law Review* 41 (2006): 413-80, pp. 419-20.

<sup>15</sup>Taunya Lovell Banks, “Exploring White Resistance to Racial Reconciliation in the United States,” *Rutgers Law Review* 55 (2003): 903-64, p. 948: “[A] person who believes that racism is wrong will have trouble admitting that her own acts, though not motivated by racial hatred normally attributed to Klansmen or Nazis, can still be classified as racist”; Hanson and Hanson, “The Blame Frame,” p. 446: “Because ‘racists’ are people with ugly prejudices or malignant dispositions, most of us do not perceive ourselves to be racists—indeed, we abhor such people; by adopting [a narrow] definition, we comfort ourselves with the assurance that we are not among them.”

<sup>16</sup>Ford, *The Race Card*, p. 176.

Elevating the moral seriousness of a given norm perversely acts to *limit* the range of behavior the norm can constrain.

This “sticky slope” effect illuminates why respondents are so anxious to elevate the moral seriousness of discrimination as a concept: doing so sharply decreases the likelihood that the particular behavior they are defending will be perceived as falling within its ambit.<sup>17</sup> Promoting, in the abstract, harsh moral condemnation of bigoted, prejudiced, or discriminatory practices insulates concrete examples from critical examination—it will be seen as overkill to view them as exemplars of something as extreme as *discrimination*. Sociologist David Hirsh recounts an illustrative conversation with a Dutch friend regarding *Seven Jewish Children*:

I asked if she had judged that the play was antisemitic. She looked concerned and surprised and told me that in the Netherlands one would not characterise such a play as antisemitic. After the Holocaust the word “antisemitic” was too strong, she explained.<sup>18</sup>

Antisemitism is defined in terms of the Holocaust, one of the greatest atrocities of the twentieth century in which millions were killed. *Seven Jewish Children*, which is not responsible for even a single measly murder, thus cannot rightfully be mentioned in the same breath as antisemitism. Teun A. van Dijk found similar reproaches against the use of the term “racism” in Western political debates. The term was effectively off-limits because it is “by definition too strong, if only because the present situation cannot be compared to the monstrosities of the Nazis.”<sup>19</sup> In this way, elevating the seriousness of antisemitism, racism, or sexism acts to shield from consideration all but the most overt and vicious instances of the wrong.<sup>20</sup> The impact of this rhetorical turnabout is impressive indeed—the act of dismissing discrimination becomes a mechanism for performing one’s commitment to taking discrimination seriously; the act of claiming discrimination is demonstrative that one has little concern for “real” racism, sexism, or antisemitism.

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<sup>17</sup>Cf. Schraub, *Sticky Slopes*, p. 1313 (asserting that one risk of sticky slopes is that they may “block changes without [decision-makers] ever having to directly address the substantive merits of the claim”).

<sup>18</sup>David Hirsh, “Struggles over the Boundaries of Legitimate Discourse: Antizionism, Bad-Faith Allegations and The Livingstone Formulation,” in Charles Asher Small (ed.), *Global Antisemitism: A Crisis of Modernity; Volume V: Reflections* (New York: ISGAP, 2013): pp. 89-94, p. 89.

<sup>19</sup>Teun A. van Dijk, “Denying Racism: Elite Discourse and Racism,” in John Solomos and John Wrench (eds.), *Racism and Migration in Western Europe* (Oxford: Berg, 1993), pp. 179-93, p. 191.

<sup>20</sup>Hirsh, “Struggles over the Boundaries,” p. 89: “[T]he concept *antisemitic* could not be used in a civilised rational or analytic discussion about Churchill’s play because it was too big and too powerful. It could not be used as a scalpel, to dissect a text; it was a nuclear bomb ...”

It is no accident, then, that the bad faith charge almost always constructs the claim in question as of a very particular sort: overt, conscious antipathy towards the target group. This stands in contrast to other potential understandings of discrimination, such as the presence of unconscious prejudice, disparate impact against vulnerable populations, or a cultural meaning of inferiority. Conscious intentionality is for many a functional prerequisite before any claim of racism, sexism, or other like claims will be taken seriously—hence the appeal of stock responses like “that’s not what I meant!” “you’re taking me out of context,” or “it was just a joke.” And because actual conscious intent to wound is nearly impossible to prove, this requirement erases all but the most outrageous instances of discriminatory practice. Racism becomes restricted only to extreme hate or violence,<sup>21</sup> antisemitism the domain of “nobody except a crazed Nazi.”<sup>22</sup>

Given these considerations, the appeal of the bad faith defense to the aversive racist is evident. Most obviously, it presents a “neutral” reason for rejecting the possibility of discrimination. The reason is “neutral” both in the sense that making a claim in bad faith is wrong no matter who the claimant is, and in the sense that it is socially coded as a normal and legitimate response to discrimination claims that is not inconsistent with a sincere belief in egalitarianism. Indeed, this response allows one to perform an outward commitment to egalitarianism in the course of rejecting consideration of the concrete case before one. Stating that one’s interlocutor is “playing the race card” (or analogous assertions applied against other groups) perversely draws much of its power from accepting the importance of egalitarian principles. The aggressive response to claims of racism necessarily recognizes the moral gravity of such charges and the implied ethical obligation to be responsive towards them, and as noted, proponents of the “race card” trope typically couple their arguments with sweeping statements affirming the seriousness with which they take racism and racial discrimination. They often assert that the “race card” is dangerous because it minimizes the significance of some unidentified core of “real racism” or (ironically enough) causes people to fail to take claims of racism seriously because of the supposed glut of false accusations.

Equally importantly, the bad faith response heads off potentially dissonant argumentation that might force the aversive racist (or others whose opinions the aversive racist respects) to seriously account for the possibility of prejudice. The only thing better than ambiguity, for the aversive racist, is certainty that prejudice will not be taken seriously as an explanatory factor for one’s behavior. Viewed in isolation, it would be difficult to

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<sup>21</sup>Banks, “Exploring White Resistance,” p. 948.

<sup>22</sup>Hirsh, “Struggles over the Boundaries,” p. 91 (responding to a union’s proposed definition of antisemitism restricted to “hostility towards Jews as Jews”).



determine in advance whether a claimant's charge of discrimination has merit until after significant investigation and inquiry (at which point we might as well play the analysis out to its end, rather than making an inferential judgment based on the credibility of the claimant). But creating an understanding of discrimination claims as *systematically* erroneous or false justifies refraining from even entertaining the claim in the first instance. The bad faith charge preemptively boxes out such claims as outside the bounds of legitimate discourse, and thereby dissipates the risk that information that "proves" discrimination will come to light.

The conscious, intentionalist model of understanding "discrimination" is of great use to the respondent in this endeavor. In addition to elevating the severity of the wrong (deliberate attempts to hurt others are generally viewed as more serious than thoughtless participation in damaging institutions), it shifts the terrain of the debate to one where the respondent is in an epistemically privileged position. Persons accused of biased conduct can examine their own mind, adjudge themselves to be innocent, and thus justify brushing the claim off as patently frivolous.<sup>23</sup> Third-party observers who may have harbored comparable beliefs or taken similar actions to those claimed to be discriminatory can do the same; unless they are willing to self-identify as bigoted, they will be reticent to infer discriminatory animus in another based on evidence that would also self-indict. At this stage, the status of the initial claim starts to look insupportable, even outrageous. What possible basis could the claimant have for claiming any insight (much less superior insight) into the minds of those they claim practice discrimination?

Indeed, thinking in terms of the bad faith response helps further illuminate the lay appeal of the simplistic, intentionalist-only account of discrimination. Lay theories of discrimination "tend to be constructed in ways that allow [people] to maintain a safe distance from any appearance of personal bias."<sup>24</sup> Persons who can credibly claim not to possess conscious biases have a vested interest in the conversation ending there, and so the intentionalist model of bias has the straightforward "benefit" of being a relatively narrow account of discrimination that encompasses only a few extreme behaviors or beliefs. But it also has a secondary effect of placing the relevant facts about the discrimination claim in the minds of the respond-

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<sup>23</sup>See *ibid.*: "Antiracists who are accused of antisemitism .... find it easier to look within themselves and to find they are not intentionally antisemitic, indeed they are opponents of antisemitism. Intimate access to the object of inquiry yields an apparently clear result and seems to make it unnecessary for the antiracist to look any further at how contemporary antisemitism actually functions independently of the will of the particular social agent."

<sup>24</sup>Samuel R. Sommers and Michael I. Norton, "Lay Theories About White Racists: What Constitutes Racism (and What Doesn't)," *Group Process & Intergroup Relations* 9 (2006): 117-38, p. 119.

ent, enabling such claims to be dismissed without a significant investment of time. It is easy to make a bad faith allegation if discrimination is purely a function of conscious intent. But if discrimination is defined more broadly—for example, accounting for structural barriers faced by marginalized groups or with attention to the “cultural meaning”<sup>25</sup> of a given claim as perceived in surrounding society—then accurately reckoning with a discrimination claim seems to require deeper analysis (and more importantly, analysis of facts that are not primarily in the mind of the respondent). In short, adopting a more robust theory of discrimination does not just implicate a wider range of behavior as potentially discriminatory, it also removes some of the epistemic controls that respondents possess over the nature of the debate when it is cast in intentionalist terms. To the extent that people value the ability to quickly dispense with uncomfortable discrimination claims, it is obvious why that trade-off would be unappealing.

### 3. The Bad Faith Charge as a Testimonial Injustice

The prior sections have identified examples and general characteristics of the bad faith response, and provided a theory explaining its utility and appeal for members of the dominant classes seeking to preserve both a credible commitment to egalitarian ideals alongside significant subconscious prejudice. Unsurprisingly, these “benefits” come with real costs to the victims whose discrimination claims are cavalierly dismissed. Both the practical impact of this response, as well as the political and social presumptions that prop it up, assist in the project of domination.

Power, in the words of Carol Gilligan, means “you can opt not to listen. And you do so with impunity.”<sup>26</sup> The ability to dismiss discrimination claims by contending they are made in bad faith is a concrete exercise of this form of power. The universal availability of the bad faith response means one can always “opt not to listen” and there will be no consequences—material or psychological—for the declination. By contrast, the consequences of the bad faith response with respect to those making the initial claim are quite significant: the response obstructs—even obliterates—the ability to effectively challenge discrimination. “Denials challenge the very

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<sup>25</sup>See Charles Lawrence III, “The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,” *Stanford Law Review* 39 (1989): 317-88, pp. 345-46 (inquiring whether the challenged conduct “conveys a symbolic message to which the culture attaches racial significance”).

<sup>26</sup>Carol J. Gilligan, “Feminist Discourse, Moral Values, and the Law—A Conversation: The 1984 James McCormick Mitchell Lecture,” *Buffalo Law Review* 34 (1985): 11-88, p. 62 (Isabel Marcus and Paul J. Spiegelman, moderators; Ellen C. DuBois, Mary G. Dunlap, Carol J. Gilligan, Catherine A. MacKinnon, and Carrie J. Menkel-Meadow, conversants).

legitimacy of anti-racist analysis, and thus are part of the politics of ethnic management: As long as a problem is being denied in the first place, the critics are ridiculed, marginalised, or delegitimated: denials debilitate resistance.”<sup>27</sup> The most straightforward harm of the bad faith response, of course, is simply that it assists in preserving and perpetuating continued unjust structures of domination.

Who we opt to listen to in large part defines who we consider to be our moral and political equals.<sup>28</sup> This is true for at least two reasons. First, who we decide to listen to channels how we make collective decisions regarding what we conceptualize to be social problems and our strategies for resolving them. Ideally, these decisions should be made “under conditions of equality and mutual respect” where “all the affected perspectives have a voice.”<sup>29</sup> By contrast, where certain groups’ contributions to this conversation are preemptively dismissed, it is quite likely that their discrete needs and concerns will be systematically unaddressed. But there is a further harm in the bad faith charge, related again to Fricker’s idea of testimonial injustice. Testimonial injustice harms people in their capacity as knowers.<sup>30</sup> As Fricker observes, this would always be problematic—to be degraded as a knower is to be degraded as a human, for one’s ability to know is a defining feature of one’s status as a human.<sup>31</sup> The decision to systematically dismiss certain classes of claimant as lacking credibility necessarily places them as lesser members of the political community.

In the discrimination context, these harms combine to devastating effect, because the particular arena in which the claimant is deemed especially *uncredible* is precisely his or her ability to identify and contest unjust differential treatment. The injustice here has the peculiarly dangerous function of insulating itself from critical engagement—the act of protesting against it reifies the credibility gap. It is thus no wonder that so many prominent negative stereotypes key in on the supposed unreliability of the targeted group—devious and conspiring Jews, irrational and emotional women, simple and unsophisticated blacks.<sup>32</sup> If the best way to correct

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<sup>27</sup>van Dijk, “Denying Racism,” p. 181.

<sup>28</sup>See Brandon Morgan-Olsen, “A Duty to Listen: Epistemic Obligations and Public Deliberation,” *Social Theory and Practice* 39 (2013): 185-212, p. 188: “[T]o fail to listen fair-mindedly in the public square ... represent[s] a failure to acknowledge another’s status as citizen.”

<sup>29</sup>Iris Marion Young, *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy* (Princeton: Princeton University Press, 1997), p. 59.

<sup>30</sup>Fricker, *Epistemic Injustice*, p. 44.

<sup>31</sup>See *ibid.*

<sup>32</sup>See Linda Martin Alcoff, “On Judging Epistemic Credibility,” in Nancy Tuana and Sandra Morgen (eds.), *Engendering Rationalities* (Albany: State University of New York Press, 2001) pp. 53-80, at p. 61: “Peasants, slaves, women, children, Jews, and many other nonelites were said to be liars or simply incapable of distinguishing justified beliefs from

prejudices against marginalized others is in their ability to effectively communicate a countervailing narrative of their own experience,<sup>33</sup> testimonial injustice guards against even that personal, direct challenge to the maintenance of prejudiced beliefs.

As a means of regulating and redirecting the effective participation of marginalized persons in public deliberation, the bad faith response has a clear connection to more traditional forms of “hate speech” (cross-burnings, Klan rallies, and the like). One of the most important goals of hate speech is “to intimidate targeted groups from participating in the deliberative process.”<sup>34</sup> A direct way of accomplishing this is overt threats of violence or explicit statements of degradation towards the outgroup. But as we have seen, the bad faith charge yields similar results while still superficially remaining within, and citing the values of, free and open political discussion. This parallels the distinction between dominative versus aversive racism noted above. While both preserve preexisting hierarchies and result in unjust discrimination against marginalized persons, the latter does so in a much more subtle fashion that preserves its practitioners’ self-conception as fair-minded and egalitarian.

The effect of all of this is to preserve the ability of the dominant class to maintain a hegemonic interpretation of others’ experiences. Christine Littleton describes the feminist method as starting “with the very radical act of taking women seriously, believing that what we say about ourselves and our experience is important and valid, even when (or perhaps especially when) it has little or no relationship to what has been or is being said *about us*.”<sup>35</sup> The bad faith response inverts this paradigm; the life of

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falsehoods. Women were too irrational, peasants too ignorant, children too immature, and Jews too cunning.”

<sup>33</sup>See, e.g.: Fricker, *Epistemic Injustice*, p. 41: “I think this possibility of a subject’s unprejudiced perception of another human being winning out against his prejudiced beliefs is crucially important for our understanding of how social change is possible, including the social change involved in reforming our patterns of credibility judgment”; Young, *Intersecting Voices*, p. 45: “[T]he only correction to ... misrepresentation of the standpoint of others is their ability to tell me that I am wrong about them”; David Schraub, “Racism as Subjectification,” *Berkeley Journal of African-American Law & Policy* 17 (2016), in press: “[B]ecause nothing can replace the voice of the Other in deliberative discourse, their presence is an indispensable part of the democratic project.”

<sup>34</sup>Alexander Tsesis, “Dignity and Speech: The Regulation of Hate Speech in a Democracy,” *Wake Forest Law Review* 44 (2009): 497-532, p. 499.

<sup>35</sup>Christine A. Littleton, “Feminist Jurisprudence: The Difference Method Makes,” *Stanford Law Review* 41 (1989): 751-84, p. 764. See also, e.g.: George Yancy, “Introduction: Fragments of a Social Ontology of Whiteness,” in George Yancy (ed.), *What White Looks Like: African American Philosophers on The Whiteness Question* (New York: Routledge, 2004), pp. 1-24, at p. 12: “[W]hiteness admits of no ignorance vis-à-vis the black. Hence, there is no need for white silence, a moment of quietude that encourages listening to the black”; Richard L. Rubenstein, *After Auschwitz: History, Theology, and*

women is whatever men conceptualize it to be. The same goes for blacks and whites, or Jews and Gentiles. Functionally, this also acts to deny that members of these groups have any special insight into the nature of their own oppression. The respondent instead tacitly asserts his or her own superior (“objective”) vantage on the question. Particularly for persons who share the respondent’s privileged social position, this is a desirable entitlement.<sup>36</sup> For members of the marginalized group, by contrast, the results are less sanguine: they are taken to be either pathological liars or delusional about their own experiences.

#### 4. Objections

I have sought to explain the function—and the harm—of using the charge of bad faith as a means of dismissing discrimination claims. The implied obligation, then, is that when encountering a discrimination claim, we should take it seriously. While we are not obliged to ultimately agree or accede to every discrimination claim we face, we should not preemptively dismiss them prior to giving them full and fair consideration.<sup>37</sup>

The most obvious objection to this principle is tackling what appears to be one of its foundations: that discriminations are *not* for the most part false, bad faith, or opportunistic. Yet even if we believed the opposite, it would not necessarily follow that the bad faith response is appropriate. Even if most discrimination claims are groundless, prior to examination it would be at most an inference to say that the claim at hand is as well. Valid claims inevitably will be scooped up and tarred as illegitimate without ever receiving due examination. Giving discrimination claimants full and fair consideration—insuring that we do not miss the few genuine cases—may

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*Contemporary Judaism*, 2nd ed. (Baltimore: Johns Hopkins University Press, 1992), p. 70 (arguing that Christians have long claimed, as against Jews, a superior vantage point on the meaning of Judaism).

<sup>36</sup>See, e.g.: Naomi Scheman, “Feminist Epistemology,” *Metaphilosophy* 26 (1995): 177-90, p. 184: “[T]here are good reasons, from the perspectives of privilege, for dismissing as unreliable the perspectives of those in subordinated positions: from such perspectives are frequently revealed truths damaging to the maintenance of their subordination”; Schraub, *Sticky Slopes*, p. 1304: “Because a legitimating ideology helps resolve the cognitive dissonance latent between our desire to see ourselves as just and the reality of injustice, buying into these ideological justifications is to the advantage of privileged persons.”

<sup>37</sup>See David Hirsh, “Accusations of Malicious Intent in Debates about the Palestine-Israel Conflict and about Antisemitism: The Livingstone Formulation, ‘Playing the Antisemitism Card’ and Contesting the Boundaries of Antiracist Discourse,” *Transversal* 1 (2010): 47-77, pp. 47-48 (distinguishing between “those who are accused of employing antisemitic discourse and who respond in a measured and rational way to such accusations in a good faith effort to relate to the concern, and to refute it” and those who refuse outright “to engage with the issue of antisemitism”).

trump whatever gains we might experience from preemptive dismissal. After all, bad faith claims presumably would not survive an honest, critical, engaged inquiry into the possibility of prejudice or bias.

Moreover, the self-insulating character of the bad faith charge should give us considerable pause regarding how reliable our intuitions regarding discrimination claims might be. The belief that discrimination claims are generally groundless may well have been arrived at precisely because we still possess these discriminatory impulses. Without some guarantee that discrimination claims will receive reasonable consideration, there is no way to ratify the legitimacy of the bad faith belief. And proponents of the bad faith response face a further difficulty in that they seem to take inconsistent approaches in how they appraise the intentions of discrimination claimants and respondents. For the respondent, epistemic humility and a presumption of good faith are paramount. Even where there might be some markers suggesting malice or very real deleterious impacts on a vulnerable community, absent extraordinary evidence we should be reluctant to ascribe bad motives to potentially innocent behavior. In contrast, the bad faith charge depends on precisely such an ascription of malign motivation to claimants. Instead of humility and charity, the minds of the marginalized are taken to be transparent and suffused with opportunism. Given the widespread disagreement over the meaning of discrimination and the inability to confidently assess the motives of discrimination claimants, our intuitions about how regularly discrimination claims are made in bad faith can be given only so much influence over how we treat individual claims and claimants.

To be sure, none of this denies that there are circumstances in which it is perfectly reasonable to contend that a given discrimination claim is being made in bad faith. We might fully and charitably explore the allegation and, in doing so, discover that it is obviously unsupported by facts known to the claimant or inconsistent with principles supposedly acknowledged by the claimant. Such a conclusion, however, would differ substantially from the sort of problematic bad faith response I indict, precisely because it would be tied to specific shortcomings of the particular claim (or, perhaps, specific behaviors of the claimant); it could not rely on a *general* assertion that claims of this sort lack credibility. Perhaps more importantly, in nearly all cases, such a conclusion could only be arrived at following considerable investigation into the claim itself; it could not be deployed as the tactic “of first resort,” and thus could not have the deleterious effects of suppressing discourse into the merits of the allegation.<sup>38</sup>

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<sup>38</sup>The prime exception might be a situation in which an individual person has, time and again, shown a propensity to make frivolous allegations. It is clear, though, that one must tread very carefully in relying on such an assessment. The pattern would have to be specific to the person (rather than stemming from affiliation with a specific group), and we would

It is worth considering, however, what benefit this sort of (accurate, justified) bad faith allegation would then carry. After all, much of the evidence that would tend to support an inference of bad faith would be the same evidence that would refute the claim on its merits. Once one can address and reject the claim on its substance, it is unclear what additional benefit is derived from adding a bad faith allegation on top. While such a contention would not be unjust in these circumstances, it also would not be a terribly important element of the discussion. So it makes sense that bad faith responses are not typically put forward to gild the lily of a well-constructed substantive refutation, but rather as responses of first resort designed to elide substantive discussion (and to suggest that future claims of a similar sort can likewise be summarily dismissed).

Outside of direct challenges to the premise, perhaps the most frequent objection leveled by defenders of the bad faith retort is that being forced to address issues of prejudice has a chilling effect on discourse. Discrimination claims supposedly prevent important issues from being debated openly. Carroll, continuing with the “card” metaphor, described sexism claims as a “trump.”<sup>39</sup> John Mearsheimer and Stephen Walt make the same allegation with respect to antisemitism; they refer to it as “the great silencer” surrounding debates over Israel.<sup>40</sup> This argument often dovetails with the declarations regarding the moral seriousness the respondent ascribes to discrimination claims—it is *because* they are so important that raising them supposedly blots out the ability to have a dispassionate, objective discussion. As Hirsh puts it, when claims of discrimination are characterized as “nuclear bombs”—attributed the rhetorical impact of nuclear weaponry—then they cannot actually be deployed. Doing so “would not only destroy the object of inquiry but also the whole discursive space.”<sup>41</sup>

Unfortunately, the bad faith charge relies on premises incompatible with a true desire for open dialogue. For political communication to proceed in any meaningful fashion, there must be the “*expectation*—however counter-factual—that one’s interlocutor will speak sincerely, truthfully, openly, and uncoercively.”<sup>42</sup> The bad faith charge, of course, denies all of these premises—it is precisely an allegation that the claimant is engaging in a deceptive, malicious, and opportunistic game designed to browbeat

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have to have confidence that our assessment of the prior allegations that allegedly constitute the pattern of frivolity was not itself biased, or did not rely on the problematic tropes of bad faith articulated above.

<sup>39</sup>See Carroll, *Gamergate*.

<sup>40</sup>John J. Mearsheimer and Stephen M. Walt, *The Israel Lobby and U.S. Foreign Policy* (New York: Farrar, Straus and Giroux, 2007), pp. 191-96.

<sup>41</sup>Hirsh, “Struggles over the Boundaries,” p. 89.

<sup>42</sup>Noelle McAfee, *Habermas, Kristeva, and Citizenship* (Ithaca: Cornell University Press, 2000), p. 25.

her interlocutor into agreement. And contrary to the respondent's allegation, this same sin is not (or at least not necessarily) fairly attributed to those who claim discrimination. A claim of racism, sexism, or antisemitism need not come attached to any assertion of insincerity or bad faith. This is because the contours of discrimination are not exhausted by the intentions of the speaker. It is a perfectly valid discursive request to interrogate potential injustices lurking within positions honestly taken and passionately felt. To reduce such inquiry to a mere search for hidden motivations is to dramatically circumscribe justice talk generally.

Moreover, whether or not discrimination claims descriptively "chill" discourse, it is inaccurate to place the blame on the claimant. It is not the discrimination claimant who wants conversation to stop; she merely wants another element (the possibility of discrimination) added to the discussion. In the racism context, Julie Suk notes the function of the "'race card' card," where "in response to the slightest allusion to racism, past or present, the speaker is accused of playing the race card, and this new allegation is used to deflect attention away from legitimate complaints of racial injustice."<sup>43</sup> It is the bad faith response—and the respondent's concurrent refusal to carry the conversation forward unless the discrimination claim is dropped—that stifles open conversation.

The argument that discrimination claims chill discourse is thus better understood as a perceived entitlement to not have to discuss issues of discrimination. Instead of opening conversational opportunities, it places artificial borders on legitimate discourse in ways that can render the ensuing discussion stilted, even nonsensical. Anyone who has ever taught a class that considers affirmative action has encountered that student who is very interested in having a discussion regarding racial preferences but is exceptionally aggrieved at being asked to talk about racism while he's at it. The absurdity of this position is obvious: while there are indeed important questions regarding the efficacy, implementation, and legitimacy of affirmative action programs, to discuss these issues while ignoring racism is an exercise in gibberish. What the student desires is not an open conversation, but "a coerced argument ... that concedes the key intellectual contest."<sup>44</sup>

Finally, it is possible to reject the obligation to take seriously all discrimination claims in order to triage scarce deliberative resources.<sup>45</sup> There are reasons to be cautious of this argument, however. It is true that deliberative resources are limited, but it is also true that any robust theory of

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<sup>43</sup>Julie C. Suk, "Race Without Cards," *Stanford Journal of Civil Rights and Civil Liberties* 5 (2009): 111-22, p. 117 (reviewing Ford, *The Race Card*).

<sup>44</sup>Jerome McCristal Culp, Jr., "To the Bone: Race and White Privilege," *Minnesota Law Review* 83 (1999): 1637-79, p. 1641.

<sup>45</sup>See Mark E. Warren, "Deliberative Democracy and Authority," *American Political Science Review* 90 (1996): 46-60, pp. 57-58.



deliberation will often require holding multiple thoughts at the same time. Clearly, decisions regarding the allocation of deliberative resources also can mask substantive preferences—permitting discussion of certain (amiable) claims while warding off uncomfortable or undesirable presentations. The fact that deliberative resources *are* genuinely scarce makes it particularly valuable as a neutral rationale for dismissing particular clusters of information that the listener would rather not risk hearing. Similar to the “bad faith” response itself, the “limited resources” objection allows entire categories of potentially dissonant information to be excluded from the conversation while not obviously running afoul of norms of equal treatment.

Nonetheless, the scarce resources objection cannot be entirely ignored on its merits. But it does seem only tangentially related to the *bad faith* response specifically. If the problem is purely one of limited time and energy, then our refusal to consider certain discrimination claims should not require degrading claimants by accusing them of rendering the charge in bad faith.<sup>46</sup> They have every right to have their claims considered; it is an unfortunate limitation of resources that prevents us from giving their allegations the attention they deserve. To the extent that the bad faith response is rendered in such circumstances, it resonates strongly with the “just world” literature discussed above.<sup>47</sup> The key study grounding that literature found that when persons were unable to rectify an injustice, they would simply reimagine the victims as deserving of their plight (rather than concede the existence of an unavoidable injustice).<sup>48</sup> Similarly, instead of conceding the unfairness (inevitable, perhaps, but still unfair) of disregarding potentially valid claims, constructing the allegations as probably made in bad faith acts as a salve—confirming that no injustice occurred and that the dismissed claimants deserved to be ignored.

A more powerful version of the scarce deliberative resources objection, however, points specifically to discrimination claims that appear obviously groundless but nonetheless occupy disproportionate public attention. The most striking example of the problem might be a “Men’s Rights Activist” who insists that “men are the real oppressed group in society!” Technically a claim of systematic sexism, it appears under the argument made above that this is an assertion that must be given serious attention even if all we really want to do is roll our eyes. In a sense, this provides a stronger example of the objection dismissed above—that certain types of discrimination claims really *are* leveled in bad faith and are worthy of

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<sup>46</sup>See Fricker, *Epistemic Injustice*, p. 172 (noting that in “contexts where there is not sufficient time” to attend to a claim, the virtuous response would be “*reserving* judgment” on the claim’s merits).

<sup>47</sup>See text surrounding n. 14.

<sup>48</sup>See Hanson and Hanson, “The Blame Frame,” p. 419.

preemptive dismissal.

The most obvious limiting principle, then, is that our obligation to take discrimination claims seriously can be limited to those that sound from actually extant oppressed groups (which men are not). While initially attractive, this solution relies on a very shaky presupposition—that our pre-discursive intuitions on which groups are and are not oppressed are reliable. Unfortunately, there is no reason to believe that our naïve views on this issue are not infected by the same biases and prejudices that prop up discriminatory systems more generally. “The ability to name oppressions,” Jessica Greenebaum observes, “is a mode of power and those who produce these categories occupy a position of power.”<sup>49</sup> Indeed, many groups—Jews, for example—are oppressed by stereotypes that present them as controlling, world-dominating figures. Such stereotypes make it particularly difficult to conceptualize the targeted groups as oppressed and thus create a significant loophole for dismissing their discrimination claims.

A slightly more expansive approach would require serious engagement with discrimination claims from *historically* oppressed groups. Even those who contend that racism is over, or that Jews are now a privileged group, or that women have attained total equality, usually will concede that this was not always the case. The debate is not whether the group has been oppressed, but whether it still is (or is in the relevant context). The fact of the historical oppression makes it reasonable to believe that the oppression is ongoing—at least reasonable enough to demand that we actually follow through and investigate the claim.

Nonetheless, this response is unsatisfactory as well. For one, while it may have validity as against structural oppression claims, it is less useful in individual cases (e.g., employment discrimination claims) that are less likely to rely on generalizations about a group’s social position and more likely to rely on idiosyncratic and situation-specific facts. And even on its own terms, it may be overly optimistic regarding which groups we consider to be *historically* oppressed (for the same reason we can’t be confident about the groups we consider *currently* oppressed). Ultimately, it may be that we do have to “take seriously” even many discrimination claims that seem patently frivolous on their face. Given the serious consequences that false negatives pose toward the entire democratic project and our inability to have confidence in our pre-discursive intuitions regarding the social position of differentiated groups, the desire to dismiss such claims must yield. We can take solace, however, in the fact that (if we’re right) the results of our investigation should confirm the initial instinct.

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<sup>49</sup>Jessica Greenebaum, “Placing Jewish Women into the Intersectionality of Race, Class and Gender,” *Race, Gender & Class* 6 (1999): 41-60, p. 42.

## 5. Conclusion

The bad faith charge occupies a central niche in public debates regarding discrimination. Its role is not a salutary one. The bad faith response manages the delicate task of affirming one's personal status as an egalitarian while minimizing the threat that one will have to take concrete (even painful) steps to confront inequalitarian injustice. At the same time, it seizes from marginalized persons control of their interpretation of their own experiences and forces them to accept both the majoritarian interpretation of prejudice as well as the majority actor's self-definition as unprejudiced. Perhaps most importantly, the bad faith response is a means by which discrimination claims can be rejected without being considered on their merits. In this way, the response insulates itself—as well as the surrounding structure of discrimination—from critical review.<sup>50</sup>

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<sup>50</sup>In addition to the anonymous reviewer, thanks to Allison Buccola, Anna Moltchanova, Alexander Tsesis, and the participants at the University of Connecticut Workshop on Dominating Speech for their helpful comments.

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