

ORIGINAL ARTICLE

Microaggressions as negligence

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1 | INTRODUCTION

What makes microaggressions wrong? In this article, I suggest that the wrongness of most—though not all—cases of microaggressions can be captured as instances of *negligence*. A case of negligence holds when, regardless of an actor's personal intentions, they wrong another in a manner that is both reasonably foreseeable and reasonably avoidable (this failing is commonly summarized as a failure to exercise “due care”).

Thinking of microaggressions as negligence answers some objections of skeptics who overwhelmingly focus on the possibility that the alleged microaggressor “meant no offense.” It does so while retaining language explaining why a wrong was committed and suggesting what sort of corrective behavior can reasonably be demanded so as to avoid these wrongs in the future. I also argue that a negligence framework is a helpful way of *phenomenologically* explaining many microaggressions—both why they are occurring and why they are perceived as the sort of conduct that subjects the microaggressor to agent-level moral criticism. Indeed, I believe that negligence-style logic permeates many accounts that already exist regarding why microaggression is wrong, albeit without fully being recognized. Finally, in cases where it applies, the negligence framework has an advantage over alternate accounts in that it provides for consideration of both the moral culpability of the perpetrator as well as the tangible impact of microaggressions on the victim.

I do not here endeavor to proffer a comprehensive articulation of what microaggressions are.¹ Rather, my goal is to provide an account of why many (though not all) of the activities commonly thought of as “microaggressions” are morally wrongful and legitimately can carry agent-level moral culpability. My account (that many microaggressions can usefully be characterized as wrong because they are instances of negligence) stands in comparison to three common positions often seen in debates about microaggressions: (1) that many cases of what are called “microaggressions” are not wrong or morally blameworthy because they are typically unintentional, (2) that microaggressions are wrong and morally blameworthy because they are the product of (explicit or implicit) bias, and (3) that microaggressions are wrong, but not necessarily morally blameworthy at an agent-level, because their wrongness is primarily understood

as a matter of structure or by reference to the injury caused to the victim, not the moral culpability of the microaggressor.

While I believe that the bulk of the cases generally thought of as “microaggressions” fit well under the negligence model, two significant types of microaggressions are not encompassed:

- First, some microaggressive acts may be fully intentional in attempting (albeit in a subtle or relatively minute way) to express prejudicial views or cause harm (Friedlaender & Ivy, 2020; Sue, 2010, p. 29). These cases by definition cannot be negligent—but they are also more straightforward: we do not lack for theories explaining why it is wrong to intentionally harm or insult someone on the basis of their identity.
- Second, some microaggressions are described as “environmental” in that they lack any discrete perpetrator (Rini, 2020, pp. 21–22). These simply have to be addressed in a different way; they do not lend themselves to the same sorts of corrective actions as microaggressions perpetuated by a particular individual.

Moreover, a negligence frame is a mechanism for determining when we can assign individual moral culpability for allegedly microaggressive acts. This is not the same thing as determining whether the subject experiencing a microaggression has been injured (any more than determining that a car accident was non-negligent implies that the victim of such an accident cannot have sustained bodily injuries).² There is still much to be said about addressing such injuries, even without a finding of a particular perpetrator being individually liable—but a negligence frame will not especially assist with that inquiry.

Nonetheless, recognizing that limitation and excluding the two cases of microaggressions mentioned above still preserves much ground to work with. Many cases of microaggressions *do* involve particular actions or behaviors by discrete social actors, *do not* seem to involve perpetrators intentionally attempting to insult or degrade a target, and yet *seem* like they should nonetheless warrant moral condemnation of the alleged microaggressor. The core contribution of the negligence frame is that it takes the individual judgments of moral culpability that are featured in motivational accounts of microaggressions, and allows them to be applied to many (though not all) cases where the alleged microaggressor either is not or cannot be proven to be motivated by either implicit or explicit hostile attitudes toward their target.

2 | WHAT IS NEGLIGENCE?

Negligence is a term from tort law (and to a lesser extent criminal law) explaining how actors are liable for the harms they “accidentally or inadvertently cause.” It stands between two potential competing theories of liability: on the one hand, the idea that only *intentional* harms can garner recompense, and on the other hand, the theory of “strict liability” in which actors are presumptively liable for *any* harms they cause to another. The negligence principle, by contrast, allows recovery for unintentional harms, but only if the harm-causer “acted with insufficient care” (Epstein & Sharkey, 2008, p. 101).

Imagine a driver striking a pedestrian with their car. If the driver deliberately ran down the pedestrian—a case of road rage, perhaps—this would be an *intentional* harm, and few would dispute that the driver should be held morally (and legally) liable for the injuries they caused. In another case, we can imagine a driver who was distracted by an incoming text message. If this driver strikes a pedestrian, it would not be *intentional*, but it could be *negligent*—the driver was

not operating their car with the requisite care we expect from someone at the helm of a vehicle. And so here, too, we might find it appropriate to view the driver as culpable for injuries caused by the collision, notwithstanding the lack of any truly malign intent. And finally, sometimes a driver obeys the speed limits, carefully minds the road, and so on—and even still a pedestrian suddenly and without warning jumps into the middle of the street and is struck. Certainly, the collision was unintentional, but more than that, it was truly *accidental*—the driver could not have reasonably done anything to avert it. Under a strict liability regime, the driver would nonetheless still be liable—but not under either a theory of intentional harms or one of negligence.

Needless to say, in real-life examples the concept of appropriate “care” is often difficult to parse while ensuring that *due* care not be conflated with *infinite* care nor collapsed into *zero* care. Two concepts which have been used to cabin the reach of negligence are *foreseeability* and *cost-avoidance*. A person is liable for the foreseeable (if not intended or guaranteed) consequences of their actions so long as we can reasonably expect them to bear the cost of avoiding those harmful actions—say, by acting differently. In the case of the text-messaging driver, it is certainly foreseeable that distracted driving could cause the driver to strike an unaware pedestrian, and it is also reasonable to impose upon the driver the obligation to avoid texting or other similar distractions while driving. But, we do not ask drivers to account for risks that no reasonable person could foresee in advance, and neither do we ask them to take truly draconian steps at self-regulation whose costs drastically exceed the expected benefits of avoiding certain potential harms (such as driving at 5 miles per hour at all times).

Beyond its legal roots, negligence also offers an important, though often under theorized, tool of moral analysis. Seana Shiffrin, in particular, has done yeoman’s work in articulating and defending negligence as a both a significant moral wrong and, correspondingly, non-negligence as an important moral virtue (Shiffrin, 2017). She offers the example of a man who posted on Facebook vivid, graphically violent fantasies about his ex-wife, and was convicted of making violent threats against her.³ Stipulating that the man never intended to follow through on these threats, there remains the question of how to assess the predictable terror his words instilled in his former partner. We could express this question as whether the man *meant* to terrify his ex-wife, or whether this was an unintentional byproduct of his misbegotten attempts to self-therapize; this would suggest that the morally salient distinction lies in the man’s subjective intentions. For Shiffrin, however, this distinction is of minimal import: it is one between a world where “his victims’ terror mattered enough to him to try to elicit it” versus one where “his victims meant so little to him that they did not penetrate his self-absorbed bubble of rage.” Under either account, the man subordinated “the vulnerabilities and interests of others to his perceived interest in voicing his self-indulgent and horrific fantasies,” and consequently demonstrates “a culpable imperviousness to the evidently more important needs of others” (199). In a sense, it would not matter if the man was “intentionally” seeking to threaten his wife or not. At the very least, he behaved negligently toward her—he failed to exercise due care regarding the foreseeable terror his words would instill in her, and that more than suffices to demonstrate he gravely wronged her.

Around the same time, Liebow (2017) articulated a concept of an “Epistemic Negligence Condition” centered on the case of microaggressions where the perpetrators are unaware of the negative moral impact caused by their words or acts. For Liebow:

Agent X can be held morally responsible for a negatively morally significant action Y despite not knowing that Y has negative moral significance just so long as:

1. X has reasonable access to evidence that could support a belief that Y is negatively morally salient given the specific stakes associated with believing Y is morally troubling for X,

2. X possesses the interpretive tools necessary to make sense of the evidence, and,
3. X's failure to believe that the act has negative moral significance falls below standards determined by X's contextually contingent obligations (including epistemic obligations) (144).

Liebow's concern is situations where the perpetrator does not *know* that the action they are taking will have certain negative moral consequences—a weaker case than when the perpetrator does not *intend* these consequences (a case which could conceivably include circumstances where the perpetrator knows these consequences may attach but is motivated by other concerns). Still, an important feature of Liebow's account is that it offers a rationale for why microaggressors can be held morally liable for their conduct without making any claims about them possessing malign attitudes (even subconscious ones) toward their targets.

3 | A CASE OF MICROAGGRESSIONS-AS-NEGLIGENCE

One night after Jeremy Lin, a prominent Asian-American basketball player, had a particularly bad game, ESPN ran an article on Lin's performance under the headline "Chink in the Armor" (Yakas, 2012a). This was unsurprisingly and quite appropriately denounced as racist, and the headline writer was fired from his position. The headline was soon cited as a high-profile example of a microaggression targeting a prominent Asian-American (Nagayama Hall & Yee, 2012). In his apology, the writer agreed that he "owe[d] an apology to Jeremy Lin and all people offended." Nonetheless, he maintained that "I wrote the headline in reference to the tone of the column and not to Jeremy Lin's race. It was a lapse in judgment and not a racist pun. It was an awful editorial omission and it cost me my job" (Yakas, 2012b).

What did the headline writer do wrong? Many accounts of microaggressions focus on the mental state of the alleged perpetrator. Some cast microaggressions as subtler forms of conscious bigotry: little pokes and prods that are designed to provide a million points of buttress to structures of dominance and subordination. Others see microaggressions as primarily manifestations of implicit bias: subconscious hostility toward a given group causing certain actors to unknowingly—but consistently and nonrandomly—enact certain degrading practices toward members of that group. A third account ties microaggressions not to attitudes held by a particular perpetrator, but rather to a particular sort of injury experienced by the recipient, one they must endure regardless of whether any individual actor "intended" (consciously or not) to elicit the wound.⁴

Applying these frameworks to the Lin case, we encounter immediate problems. The first two frameworks suggest that moral culpability for microaggressions depends on the existence (whether conscious or not) of certain hostile attitudes toward the targeted group, which are operationalized by the microaggressive speech or act (e.g., Friedlaender, 2018). Yet, these attitudes may not be present in any particular case—this is a common criticism of "microaggressions" as a concept—and are in any event hard to prove. Alternative accounts of microaggressions, which concentrate on what experiential effect is endured by the target or which present microaggressions as a structural injustice which create oppressive conditions for marginalized groups, avoid this objection—but do so at the expense of obscuring or perhaps eliminating the ability to hold individual microaggressors morally responsible for their conduct.

If microaggressions are about *explicit* bias, then our hypothesis is that the writer intended to make a racist jab at Lin following his dodgy performance. While this sort of racist assault

causes harm on a different scale than, for example, an outright physical attack or a sustained White supremacist screed (hence the term *microaggression*),⁵ it nonetheless emanates from a deliberate and intentional effort to racially otherize and thereby harm its target. Yet, it is worth noting that, for the most part, the author's critics did not generally make claims asserting intentional racism on the author's part—indeed, they did not seem to think such an inquiry was necessary to establish the writer's culpability at all. And this is common in the broader literature on microaggressions. For example, because he views microaggressions as primarily “unintentional,” Derald Wing Sue is compelled to ask “why people become unintentional oppressors.” Why would, for example, a White person who consciously rejects racial bias and prejudice nonetheless “engage in racial microaggressions that harm others?” (Sue, 2010, p. 121) Much of the literature and public discourse about microaggressions does *not* seem to take for granted that the perpetrators are intentionally seeking to harm or injure those victimized by their behavior.

So perhaps the issue instead was that the ESPN writer caused harm by acting out of an *implicit* bias: he did not consciously intend to reference Lin's race, but prejudicial attitudes toward Asians directed him toward that particular turn of phrase when he otherwise would not use it. The implicit bias approach is particularly popular because it seemingly accounts for microaggressions' characteristic ambiguity and subtlety. Friedlaender (2018, p. 6), for example, describes microaggressions as “the behavioral consequence of an agent's implicit bias against a structurally oppressed group”. Friedlaender's goal is to preserve the attachment of moral responsibility for microaggressions notwithstanding the fact that, frequently, the alleged microaggressor will (plausibly) claim they are unaware of and did not intend to cause any harm.

Like with the explicit bias story, an implicit bias explanation is certainly quite possible here. Yet, both of these accounts often are vulnerable to the difficulty of satisfactorily proving that the alleged microaggressor possessed the relevant attitudes (whether explicitly or implicitly) and that these attitudes in fact caused them to engage in the allegedly microaggressive conduct. Implicit bias is very difficult to establish—perhaps even more so than it would be to establish conscious states of mind.⁶ A common objection to the discourse on microaggressions accordingly is that it too quickly tars as prejudiced acts or comments which may be wholly innocuous or innocent. Such critics complain that there is no immunity given to “unintentional” slights nonetheless perceived as microaggressions—the concept encompasses deliberate racists and good-faith blunderers alike (see Lilienfeld, 2020).

It is possible that either the explicit or implicit bias explanations account for the ESPN writer's actions. But suppose for the moment that neither one does, and that the writer's decision to use this phrase really was (in his words) “an awful editorial omission.” The third framework, focusing on the oppressive conditions created by microaggressions, can nonetheless explain why the headline was morally pernicious. But—if both implicit and explicit bias are not in play—it struggles to justify why that headline writer is individually culpable. Yet, it seems most of us do think that the writer acted in a morally irresponsible fashion. What justifies that judgment?

What many people would agree on is that, regardless of the writer's private motivations (conscious or otherwise), *he should have known better*. It's *possible* that the phrase popped to mind because of some form of implicit (or explicit) racial hostility; it's also possible that it was arrived at completely innocuously. But either way, describing an Asian-American person as a “chink in the armor” would foreseeably cause offense, and do so in a way that was manifestly avoidable. This is the heart of negligence: had the writer been more careful in his choice of

words, the entire controversy and the harms caused would not have occurred. The colloquial way of putting it is that the writer was being *thoughtless*, and that term is worth dwelling on. Both the explicit and implicit racial bias accounts imagine that the headline writer was thinking (whether consciously or not) some form of racist thought. But the negligence story can account for the possibility that he wasn't *thinking* at all—and it suggests a remedy that he should think harder (cf. Nadal, 2014, p. 75).

I also believe that the negligence account better describes how most of those who did believe the writer committed a wrong conceptualized what was, in fact, wrongful. Again, while it might be possible to impute either an explicit or implicit racist motivation to the headline writer, few of the denunciations sought to stake a claim regarding the writer's personal attitudes. The phrase itself was thought to be sufficient on its own to demonstrate the harm, irrespective of motivation and presumably *acknowledging* the possibility that it was simply a dreadful oversight. For these critics, even decisive proof of the author's "innocence" would not materially alter the moral judgment. Certainly, we would view him still worse if we did believe he was intentionally drawing on a racial slur. However, believing that his actions lacked any such motivation would not suffice to exonerate him.⁷

The Jeremy Lin case typifies a common form of microaggression: a discrete action taken by an individual which plausibly was not intentionally discriminatory but nonetheless seems like an ethical failing by the perpetrator. It accordingly helps demonstrate several advantages of viewing this sort of microaggression as a form of negligence—in particular, that this frame can do explanatory work that a purely motivational frame (whether depending on implicit or explicit bias), standing alone, cannot. To wit:

1. The negligence frame offers a better response to the concern that many alleged perpetrators of microaggressions are "innocent" in the sense that they did not intend to offer any sort of racial slight.
2. The negligence frame offers a better response to the contention that those victimized by microaggressions should "grow a thicker skin," as opposed those who allegedly perpetrate microaggressions being asked to alter their behavior (at least in cases where the slight was not intentional).
3. The negligence frame suggests a better account of what we can demand out of alleged microaggressors and how they might be held accountable *even in* circumstances where we do not believe or cannot establish they possess any sort of malign attitude (conscious or otherwise) toward the harmed minority.

These advantages will be explored in more detail in the subsequent sections. Here, it suffices to conclude that I do not dispute that microaggressions *can*, and perhaps often do, stem from implicit (or explicit) bias. However, the negligence frame is more general: it accounts for cases where implicit bias is the cause of the microaggression, and explains why the microaggressor can be held responsible for their action notwithstanding the lack of *conscious* motivation, but the existence of such (difficult to prove) subconscious beliefs is not a necessary condition in order to make out a valid case of microaggressions-as-negligence.

4 | NEGLIGENCE AND UNINTENTIONAL SLIGHTS

As noted above, one common objection to the discourse on microaggressions is that it leaves no space for "unintentional" slights—presuming guilt and malice in circumstances that may

simply be innocent misunderstandings. Defenders of the analytical utility of microaggressions respond to this challenge in a variety of ways. One response accepts that “unintentional” slights should be deemed morally innocent, but disputes that the bulk of cases identified as microaggressions are unintentional—particularly once one accounts for implicit biases, which may subconsciously drive actors to behave with hostility toward marginalized outgroups. Another tactic is to suggest that the focus on the alleged microaggressor’s intentions is a matter of mistaken priorities—wrongfully focusing on the culpability of discrete bad actors rather than on the experiential or structural injuries microaggressions foist upon their victims. Both responses, in different ways, accept that individual moral culpability must be tied to *some* form of malign attitude (even if unconscious). The first response argues for a more capacious view regarding who holds bad motives; the second response remains agnostic to that debate by largely jettisoning the desire to hold microaggressors individually culpable, a project it deems comparatively less important than identifying and hopefully rectifying the injuries caused to the target.

In this section and the one that follows, I argue that a negligence frame can explain why individual culpability for microaggressions can often be appropriate—a judgment experiential or structural accounts often struggle to justify—without delving into the subjective mental attitudes an individual may or may not possess toward the group to which the target belongs. Indeed, a negligence framework justifies this form of individual accountability more reliably than a motivational frame, for which the ability to assign culpability is a primary claimed advantage. In the final section, I will return to nonmotivational accounts of microaggression to show how a negligence approach not only allows but demands the discrete experiences of the targets of microaggressions occupy a central role in our moral considerations, thus responding to one (though not the only) core objection advocates of structural or experiential accounts of microaggressions level against a motivational approach.

In the academic literature, the acknowledged possibility that some who engage in allegedly microaggressive acts have no malign intentions is deeply woven into the concept of microaggressions itself. As one research team observes, because microaggressions typically involve conduct that is thought to be “innocuous,” or at least minimally harmful, “targets are faced with the additional burden of not overreacting to the seemingly innocuous situation because the perpetrator likely had no awareness that the behavior was hurtful” (Wang et al., 2011, p. 1666). Emily McTernan’s account of microaggressions insists that a microaggression is by definition at least plausibly unintentional; the term should *not*, she argues, encompass “explicit attacks” (McTernan, 2018, p. 267). The concept of microaggressions does not seem to presume that the perpetrators act with conscious aggression toward their targets.

Yet, it is the case that some theorists who view “microaggressions” as a useful analytical tool seem reliant on tying moral culpability to intentionality. For example, Williams (2020) identifies two properties of microaggressions, which militate against viewing microaggressions as wholly accidental:

1. Microaggressions are patterned, rather than idiosyncratic—it is not random happenstance that they cluster where they do and have the effects that they have.⁸
2. Microaggressions are (often) culpable, rather than innocent—the fact that the perpetrator does not subjectively intend malicious harm does not, in itself, exculpate the allegedly microaggressive actor (8–9).

Consequently, she argues that all microaggressions *are* “intentional,” but this intentionality is not necessarily present at the level of individual bias. Rather, the relevant intention can result from “the manifestation of the aggressive goals of the dominant group, taught to unwitting actors through observational learning or other social mechanism” (8).

Critics of the concept of “microaggressions,” in turn, often presume that the dividing line between morally culpable and morally innocent conduct, at least when it comes to microaggressions, is whether the alleged microaggressor *intended* to cause harm to the party claiming injury. As these critics would have it, since those concerned about microaggressions typically do portray microaggressors as morally culpable, they must be assuming that said microaggressors hold these bad intentions. These critics express doubt that this assumption always holds, instead averring that in many cases the putative “microaggression” stems from an actor who holds no such malign intentions. In such cases, the microaggression label misidentifies a significant quantity of innocent conduct as morally pernicious.

For example, Scott Lilienfeld suggests that it is wrong to assume all cases of microaggressions yield a straightforward inference of implicit (or explicit) bias, worrying that the social focus on microaggressions may “predispose[e] individuals to become hypervigilant toward perceived subtle signals of potential prejudice (even in their absence)” (Lilienfeld, 2017, p. 178). He goes on to say that “insinuating that emitters of ambiguous statements are implicitly aggressive” can be counterproductive to goals of facilitating intergroup cooperation and shared goals (179). Debating Williams, Lilienfeld complains that the “fiat” labeling of microaggressive acts as racist “plac[es] the critical question of whether microaggressions are statistically associated with racist tendencies outside the scope of scientific inquiry. Williams’s definition further precludes the possibility that certain microaggressions reflect misstatements or misunderstandings of cultural norms”⁹ (Lilienfeld, 2020, p. 28).

The core of Lilienfeld’s complaint is that those identifying microaggressions presume the allegedly microaggressive agent holds racist or otherwise aggressive attitudes toward their target; a presumption that in many cases may be incorrect. Williams’ attempt to argue that all microaggressions are “intentional” by focusing on group rather than individual intentions is a sort of sleight of hand at work: the group definition of “intentional” is used to justify labeling *individual* perpetrators of microaggressions as “offenders” when they lack actual malicious intent toward their targets (id. at 28–29).

Yet latent in Lilienfeld’s critique is the assumption that where these attitudes are not present the foundation for holding the alleged microaggressor morally culpable for their conduct disappears. But while the core characteristics—nonrandomness and moral culpability—that Williams ascribes to microaggressions in order to present them as nonaccidental certainly can be the product of bad “intentions,” it is a mistake to assume that one can *only* incorporate these characteristics by positing intentional wrongdoing by a discrete perpetrator. Both elements also can be found in cases of negligence. And indeed, though she does not use the term, Williams offers a classic example of negligence in presenting the case of an “inexperienced driver who unintentionally strikes and injures a pedestrian. Even though the accident was unintended, the driver can still be considered culpable and can be convicted for not being careful enough or skilled enough, at which point the driver becomes an offender” (Williams, 2020, p. 5). To the extent Lilienfeld’s objection to holding microaggressors morally culpable stems from them not engaging in *intentional* wrongdoing, the microaggression frame is helpful because it allows us to assert culpability for *nonintentional* acts. Moreover, it does so precisely because, as Williams observes, the effects of these acts are not idiosyncratic and accidental but predictable (and therefore foreseeable and preventable).

Rather than shoehorning all microaggressive conduct into a frame of intentional injury and opening ourselves up to Lilienfeld’s objection regarding cases where such intentions are absent, we can condemn microaggressors in situations where they could have reasonably foreseen and avoided the injury they caused but failed to do so. Williams may well be correct that

microaggressions help fulfill a collective “goal” of dominant groups to preserve hierarchies of inequality and marginalization. However, proving such an “intention”—at either the individual or collective level—is not necessary in order to assign moral culpability under a negligence paradigm.

And often, even advocates of a motivational approach end up appealing to negligence-style concepts to undergird their justification for moral criticism. Williams’ use of the negligent driver example is one such instance. Friedlaender, in her article seeking to explain why microaggressors motivated by implicit bias can be held morally accountable for their conduct notwithstanding the fact that they may be unaware of these subconscious motivations, relies on a distinction between “genuine” ignorance and “ought-to-have-known” ignorance. One cannot be held accountable for a bias one genuinely did not know one possessed, however, where a “microaggression is unconscious but it follows from an implicit bias you know you have,” (or I might add, have good reason to know you have), “then you ought to have known about your potential to contribute to cumulative harm, but have simply failed to address it” (Friedlaender, 2018, pp. 11–12). But this distinction between “genuine” and “ought-to-have-known” ignorance is not really an issue of *bias* in the normal sense. It rather is a matter of foreseeability—a negligence concept, not a motivational one. The actor who reasonably could be asked to account for the possibility that their behavior is marked by implicit biases, but fails to do so, can be held accountable for the harms that they cause, not solely because of the bias, but because of the failure to exercise due care in the face of a foreseeable injury. As Jennifer Saul argues, while we cannot blame people for attitudes they cannot control, they “may, however, be blamed if they fail to act properly on the knowledge that they are likely to be biased—e.g., by investigating and implementing remedies to deal with their biases” (Saul, 2013, p. 55). The negligence frame incorporates this but is more expansive, capturing cases beyond implicit biases. Certainly, one reason why one might be culpable in engaging in a microaggression is that it is foreseeable to think one has an implicit bias yet one failed to correct for it. But it is also could be wrong because the hurtful nature of the remark was foreseeable and yet was not avoided.

Indeed, it is worth noting that, at least in the microaggressions space, the negligence framework’s suggested remedy—think harder—carries to implicit bias cases as well. The implicit bias account of microaggressions suggests that microaggressions represent an unconscious form of racialized aggression from majoritarian actors who may not even be aware that they harbor these hostile tendencies. In many cases, implicit bias coexists with conscious egalitarian commitments: the actor does not wish to behave in a racially hostile manner and will refrain from doing so in cases where it is obvious, or they are otherwise aware, that this is what they would be doing. Hence, even if it were the case that an implicit bias against Asian-Americans was what ultimately caused the ESPN writer to seize upon the “chink in the armor” phrase, it is very likely that if he recognized linkage he would have opted against using the line (if he decided nonetheless to keep the headline, that would be strongly probative that his bias was *explicit* rather than *implicit*). Put differently, if would-be microaggressors were attentive to the sort of obligations that a negligence frame imposes, that likely would ameliorate many cases where a microaggression actually was a product of implicit bias as well.

5 | NEGLIGENCE AND COST-AVOIDANCE

Critics of “microaggressions” may at this point retreat to a slightly different argument for why we should not too freely impose moral culpability on alleged microaggressors. Stipulating that

those claiming to be microaggressed against have experienced an “injury” of some kind (at the very least, a feeling of offense or marginalization), critics of the contemporary focus on microaggressions often suggest that victims should buck up and endure the slight, rather than forcing others to dance around their sensibilities (cf. Campbell & Manning, 2014). Even if the injury is in some sense foreseeable and avoidable, it is unreasonable to demand that the alleged microaggressor radically alter their behavior or walk on eggshells in order to avoid even the slightest risk of causing unintentional offense. And it may be salutary (and in any event, reasonable) for those instinctually offended by a microaggression to cultivate the virtues of strength, generosity, and endurance rather than demand moral redress for every small infraction.

Implicit—but unstated—in this argument is that it is cheaper and easier for the victim to learn resiliency than for the perpetrators to learn how to avoid microaggressions. This presupposition is more typically assumed than established, and a negligence frame helpfully tees up the salient question for adjudicating this objection: who is the cheapest cost-avoider? That is, which party—the person who gave offense, or the person who takes offense—could most easily mitigate or eliminate the resultant injury? In some cases, the critics may be correct that the easiest and most reasonable demand is on the person taking offense to roll with the punch. However, in many cases it may well be more reasonable to expect the perpetrator to invest in thinking harder and learning to avoid microaggressive acts. Often, those who argue that those offended by microaggressions should learn greater resiliency systematically overweight the costs on perpetrators, while costs to victims are viewed as minute or nonexistent (see Nadal et al., 2016, p. 490). Certainly, how the balance of equities falls in any given case will be highly contextual; we will explore some cases falling on either side of the line below. But I suggest that the circumstances where it seems clearest that the microaggressor could and should be expected to “think harder” also track our moral intuitions about when they can be ethically blamed for not doing so; likewise, the cases where the effort necessary to avoid offense would be cost-prohibitive also track our intuitions about when the alleged microaggressor should indeed be adjudged morally innocent.

The concept of the cheapest cost avoider emerged in the 1970s as a means of systemizing rules and intuitions around tort negligence rules. The basic idea stems from Judge Learned Hand’s attempt to formulate the considerations that go into determining whether an actor has behaved with due care. Judge Hand argued that in making this determination, an evaluator should appraise (1) the magnitude of the loss if a given injury should occur, (2) the probability of that injury occurring, and (3) the cost of taking precautions that would avoid that injury. If the product of the first two exceeds the third, then an actor has behaved negligently (Posner, 1972, p. 32). Judge Hand implicitly imagined the cost of avoiding the injury as being incurred by the injurer—the cost of installing a bell on a train so as to warn unwary pedestrians who might otherwise be struck. However, sometimes the cheapest mechanism for avoiding an injury could have been taken by the injured party—a pedestrian choosing not to become intoxicated and fall asleep on the railroad track. As Richard Posner argued, “If the accident could be prevented by ... the curtailment or discontinuance of the underlying activity by the victim at lower cost than any measure taken by the injurer would involve, it would be uneconomical to adopt a rule of liability that placed the burden of accident prevention on the injurer” (33). By contrast, if the easiest way of avoiding an excessive injury is altering conduct by the injurer, then it is sensible to demand that party shoulder the costs of preventing the damage.

It is important to note that while the concept of cheapest cost avoider is perhaps most easily grasped by reference to purely economic costs, the theory can easily accommodate normative and other noneconomic considerations. When we speak of the relatively cheapness of a pedestrian choosing not to become intoxicated, we are not really looking at the monetary cost of

choosing (not to) consume alcohol. Rather, we are making a normative assessment that the “cost” of asking pedestrians to drink in moderation and retain their wits is minimal in comparison to the cost of at least some potential safety mechanisms that might be needed in order to secure the wellbeing of the most oblivious drunkard.

The concept of the cheapest cost avoider can be extended to the injury caused by microaggressions.¹⁰ To take a simple example, imagine a traveler to a foreign country sees a gesture on the street that would be very offensive in their home country.¹¹ They know that it is unlikely this gesture is intended to convey the same meaning in the place they are visiting, and it is also unlikely that the gesturing actor is even aware of its meaning in the traveler's home culture (although they have nominal access to the resources that would inform them—i.e., they could do internet research). In *this case*, it is cheaper for the traveler to “grow a thicker skin” than it is for the gesturer to avoid the gesture. But in a different circumstance—where the traveler and someone else have grown close as friends, say—these costs assessments might shift, and we could say it is reasonable for the friend to abjure that gesture in interactions with the traveler out of deference to avoiding the discomfort it causes.¹²

Indeed, it seems as though the instincts that animate a negligence approach to microaggressions are immanent in many popular accounts of microaggressions, even where they do not use the term or expressly appeal to negligence-style argumentation. In their survey of different potential definitions of microaggressions, McClure and Rini (2020) work through an illustrative example of two women, Yumiko and Angela, who hesitate to touch hands with Donna, an African-American retail worker offering them change. The first woman, Yumiko, is a foreign traveler to the U.S. from Japan where it is not customary to directly take change from the hands of a retail employee. The second, Angela, is an American of Japanese descent who has imbibed certain racial prejudices. From Donna's vantage, the behaviors are identical, and part of a pattern where as an African-American woman she is treated less respectfully compared to her White peers—in this, she *experiences* both instances identically as a microaggression. But the immediate cause of Yumiko's hesitation is cultural unfamiliarity, whereas Angela's behavior germinates from malign racial attitudes (albeit perhaps not consciously held). McClure and Rini contend that a definition of microaggressions should answer (a) which customers have committed a microaggression and (b) which features of their behavior indicate a microaggression (McClure & Rini, 2020, p. 2). I posit a slightly different question: whether either or both customers are *culpable* for the injury they caused to the retail worker.

Intuitively, we are significantly more inclined to judge Angela morally culpable for her behavior than Yumiko. It is natural to assume that the reason why is that Angela was motivated by certain bad attitudes toward African-Americans, while Yumiko was not. Yet, this may not fully account for the difference. A recent immigrant or traveler may not have any reason to suspect that a particular phrase or behavior tracks a history of injustice or abuse. However, if they remain for a long period, eventually it becomes reasonable to ask them to take note of and start thinking about these dynamics, and adjust their behavior in response. The *cost* of demanding that every traveler prior to their arrival comprehensively document and internalize local narratives of inequality and injustice, and alter their behaviors accordingly, is draconian. The sorts of precautions Yumiko would have had to take to avoid injuring Donna are excessive, hence, she was not negligent for failing to take them. By contrast, Angela, being from America, can reasonably be expected to know of and learn about matters of racial injustice and inequality, and so be cognizant of how certain behaviors (like hesitating to take change directly from an African-American cashier) may contribute to these inequalities. Because the cost of taking

“precautions” that would avoid the injurious conduct is reasonable for Angela, but is not for Yumiko, we can say that the former is morally culpable while the latter is not.¹³

This would remain true even if Angela in fact did *not* have malign attitudes toward African-Americans that prompted her microaggressive conduct.¹⁴ A prominent incident that had occurred at the University of Pennsylvania can help illustrate. An international student, frustrated by what he took to be unreasonably boisterous late-night behavior by several African-American sorority sisters outside his dorm room, yelled that they were “water buffalo” and urged them to “go back to the zoo.” The recipients perceived this as a racial slight, drawing on a long history of comparing Black people to animals. The international student, however, claimed he was simply translating a common idiom in his native language used to refer to loud or obnoxious individuals (Culp Jr, 1993, p. 221). Did he do anything wrong?

Under a pure motivational account, the answer appears to be no. Regina Rini characterizes such cases as “tragic coincidences”: the international student’s conduct was reasonably perceived to have been a racial slight; yet, it just so happens that in his case no slight was intended. At most, the international student may be obliged to apologize for causing his fellows to feel distressed, but we could not say he had done something wrong in the moment (Rini, 2020, pp. 58–62). Under the negligence frame, the student is not entirely out of the woods: the relevant question is whether it was reasonable for the international student to have learned of the associations between animality and anti-Black racism. This assessment could depend on several factors, including the length of time the student had been present in the United States. At some point, it is reasonable to expect even students not born and raised in the United States to absorb enough information about words likely to trigger racist associations such that failure to incorporate that knowledge into his own behavior is culpable misconduct.

The trajectory of a case like this provides an accelerated illustration. Whether or not, we think the international student was negligent the first time he used the term “water buffalo,” it seems relatively clear that if that student *continued* to call his Black colleagues “water buffalo” even after the ensuing reaction and contribution put him on notice of the damaging effect those words have *that* certainly would be morally culpable behavior. The reason, from a negligence standpoint, is that once the student becomes aware of the damaging effect his words have, the “cost” of avoiding the injury shrinks to virtual negligibility. Initially, it may have taken laborious research for an international student to learn what sorts of words are likely to trigger this sort of effect on Black colleagues. Now that labor is moot, because the student has simply been told in no uncertain terms that words such as these have damaging effects. At that point, all the student must do to avoid the injury going forward is be mindful enough to not use those words.

If one was truly wedded to a motivational account, one could argue that a student who continued to use those terms must in some way wish to invoke its racially derogatory effect, and so can be blamed on that basis. Perhaps, this is true in some or even many cases. But such an inference is not necessary for the judgment: the student who just really wanted to keep using a familiar idiom and could not be bothered to adjust his linguistic repertoire would be just as culpable. To borrow from Shiffrin (2017) above, the difference between these two cases is one between an actor who sought to provoke a feeling of racial marginalization in his targets compared to an actor who thought so little of his targets that he simply did not care about the feeling of racial marginalization his words would predictably elicit. In either case, it is entirely reasonable to hold the actor morally responsible for his conduct—the former for intentionally seeking to cause harm, the latter for neglecting to take basic and relatively costless steps to avoid that harm.

6 | NEGLIGENCE AND MORAL CONSIDERATION

Thus far, I have primarily juxtaposed the advantages of a negligence frame for microaggressions against a purely motivational account. Negligence sidesteps common objections to the motivational framework that seek to undermine moral culpability for alleged microaggressors, because it does not require either explicit or implicit biased intentions in order to hold an actor liable for wrongdoing. Some theorists on microaggressions, however, abjure the motivational account altogether. They prefer experiential or structural accounts of microaggression that focus on the injury caused to victims, rather than the potential misconduct of a perpetrator (see McClure & Rini, 2020). These accounts center the experiences of those hurt by microaggressions, experiences frequently overlooked by obsessive (and often fruitless) inquiry into whether the alleged perpetrator did or did not possess the requisite malign attitudes in order to be adjudged guilty (Freeman & Stewart, 2020, pp. 1010–1011).

Emily McTernan takes this approach in analogizing microaggressions to climate change or other environmental calamities, whose causes may be individually innocuous but which nonetheless have wide-spanning and morally salient consequences. We need not and perhaps should not look to judge individual perpetrators of microaggressions as having behaved “wrongfully” even as we should be cognizant of the unjust *structure* that microaggressions generate in the aggregate for socially marginalized individuals. This move preserves the analytical utility of “microaggressions” as a way of characterizing a morally salient phenomenon, but at the expense of self-consciously avoiding the question of whether “the perpetrator [of a microaggression] bears [moral] responsibility” for their conduct (McTernan, 2018, p. 272).

Liebow (2022) offers an intriguing intermediate position: her definition of microaggression encompasses cases, which implicitly signal the “high probability” that the microaggressor has certain (implicit or explicit) discriminatory attitudes that track broader oppressive patterns; however, she expressly states that a microaggression still occurs even in cases where that “high probability” does not translate to *actual* possession of the negative attitude. Liebow justifies keeping such cases under the umbrella of a microaggression because the underlying conduct still reinforces the systematic marginalization of socially oppressed groups, and so it is “important to identify [such] behaviors ... regardless of what particular attitudes motivate microaggressors’ behaviors” (203). This appeal to the continued moral importance of truly unintentional microaggressions is well-taken, but it once again comes at the expense of sacrificing assigning moral culpability to the microaggressive actor. Liebow instead seems to prioritize raising awareness of the microaggressive effects of a given action and the harms they cause via “open[ing] space for microaggressors and microaggressees to engage in dialogue ... without necessitating an initial presumption that the microaggressor intended harm ... or ‘is a bigot’” (ibid.).

The trade-off between centering harms done to victims and assigning liability to a discrete wrongdoer is an evergreen dilemma in debates over adopting perpetrator versus victim-centered approaches to social injustices (see, e.g., Freeman, 1978). Advocating for a “harm-based” account of microaggressions, Lauren Freeman and Heather Stewart contend that conceptualizing microaggressions primarily in terms of wrongs done by a perpetrator “decenters recipients of microaggressions and their harms” (Freeman & Stewart, 2020, p. 1010). Indeed, under a purely motivational account, the morally salient questions about a potential microaggression lie entirely within the psychology of the perpetrator. To the extent that an inquiry into moral culpability relies on perpetrators holding the right (wrong) intentions, a focus on agent-level culpability encourages this skewed prioritization. This might be a necessary sacrifice if

microaggressions only matter to the extent a discrete bad-actor perpetrator can be identified and punished. But advocates of experiential or structural accounts of microaggressions are correct in rejecting this alleged necessity. There are other bases for supporting moral or policy interventions against the injuries caused by microaggressions that do not demand morally culpable perpetrators be identified.

Nonetheless, I do think in many cases we would *prefer* to be able to assign moral culpability to certain actors in appropriate cases, even as we also wish to ensure that the phenomenological experience of those victimized by microaggressions is appropriately centered in our analysis. A negligence account straddles this line quite effectively, since the basis through which it assigns culpability lies precisely in the expectation that the would-be microaggressor be cognizant of the probability and gravity of the injury they are liable to cause. Indeed, a negligence frame helps explain and generate a broader social obligation that these harms be incorporated into our moral consideration when deciding how to speak and act under conditions characterized by structural marginalization.

In discussing the Jeremy Lin case above, we characterized the headline writer as “thoughtless”—a colloquial term which nonetheless importantly distinguishes such a person from a colleague who acting with intentional malice. As Augie Fleras observes, “Those who perpetuate micro-aggressions may intend no malice since they are *inattentive* to their complicity in communicating putdowns” (Fleras, 2016, p. 8). The writer’s sin here was (probably) not that he intended to evoke a racial slur, nor (possibly) that he was subconsciously guided toward making a racial slur, but rather that he did not think hard enough on his choice of words and so caused harm that was eminently avoidable. Unlike a pure motivational account, our assignment of moral liability depends in part on recognition of the injury the writer predictably caused—in this, a negligence account does place the wrong experienced by the target of the microaggression at the center of its analysis. Like in Liebow’s account, the negligence frame also opens space to consider the harms of microaggressive acts without presupposing intentional malice by the microaggressor—but it offers a vector by which to fold that demand for consideration into a moral judgment. It is because the headline writer should have recognized the harm his words would do (and the gravity of that harm in comparison to the amount of effort it would have taken him to avoid causing it) that he can be held culpable. The moral judgment against the microaggressor implies the existence of some social conclusion that they are obligated to think about the prospective impact their words and actions would have on others.

As discussed in the prior section, the decision over which costs are weightier—the costs on the victim of bearing the injury of a microaggression versus the costs on the perpetrator of identifying and avoiding the microaggressive conduct—is inescapably normative. A judgment that an actor was *negligent* in failing to avoid the harms of a microaggression is a conclusion that the effort it would have taken an actor to become aware of certain harms, and alter their conduct to avoid them, is less onerous than the injury caused to the microaggression’s target. And making explicit that the proper moral framework requires weighing *both* the gravity of the injury *and* the costs of avoiding it helps make visible certain assessments that often lie latent. Those who dismiss the import of microaggressions tacitly elevate the burden placed on the alleged microaggressor toward infinity while reducing the harm incurred by the recipient to negligibility; swapping perpetrator (asked to bear unreasonable costs) and victim (who should just learn to lump it). *Sometimes* it is true that the “victim” is the cheapest cost avoider, as we have seen in some of our examples of the foreign traveler. But not every time, and I suspect not most of the time, particularly in contexts of sustained, structural injustice where all actors are sufficiently enmeshed within a particular cultural framework such that it is entirely reasonable

to expect them to exhibit some amount of curiosity and attentiveness to how their words and actions might affect others they will regularly interact with.

7 | CONCLUSION

Negligence is an appealing framework for assessing many cases of microaggression. Microaggressions are harmful and we would like to preserve language for why those who engage in them are worthy of moral critique. Those seeking to skirt such critique, however, have often been able to rely on the difficulty of distinguishing cases of bad intent versus unwitting, innocent blunders—a difficulty amplified by the fact that most theorists of microaggressions agree that many if not all cases may not stem from intentional desire to do harm. Theorists who seek to preserve the moral salience of microaggressions have typically sought either to expand the scope of what count as “intentional” (including, for example, implicit biases), or to deprioritize the importance of identifying and condemning individual perpetrators as having engaged in wrongdoing in favor of experiential or structural accounts. But a negligence frame can support findings of individual moral culpability without relying on hard-to-prove assertions of subjective bad motives (conscious or not). Moreover, the manner through which it justifies such liability encourages if not demands attentiveness to the injuries microaggressions cause as experienced by the recipient; encompassing a central advantage claimed by nonmotivational accounts. Those who engage in microaggressions are not (necessarily) wrong because they possess the wrong attitudes toward their targets. They are wrong because they failed to avoid causing foreseeable injuries under circumstances where they were best positioned to absorb the costs of such avoidance.

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ENDNOTES

- ¹ The broader question of what microaggressions are has been of significant interdisciplinary interest. Representative works tackling this question include but are not limited to Sue (2010) (psychology), Solórzano and Lindsay (2020) (sociology), and Rini (2020) (philosophy).
- ² Nor, for that matter, does a negligence account directly answer how exactly victims should be made whole even in cases where we are willing to find a discrete perpetrator morally liable.
- ³ The example is drawn from an actual case, *Elonis v. United States*, 135 S. Ct. 2001 (2015), though Shiffrin clarifies that she is interested in assessing *Elonis*' moral culpability, not in how to best interpret the underlying statute.
- ⁴ For a discussion of psychological, experiential, and structural accounts of microaggressions, see McClure & Rini, 2020.
- ⁵ Though it is worth noting that many theorists contest whether an intentional racial slur should indeed be considered a *microaggression* at all, contesting the analytical utility of Sue's “microassault” category. See, for example, Freeman & Stewart, 2020, p. 1011. However, I believe that even these theorists would view an *unintentional* use of slurring language, or the use of language that is both plausibly a slur or a neutral turn of

phrase, as potentially different insofar as it possesses the “characteristic ambiguity” of microaggressions (Rini, 2020, p. 97).

⁶ By definition, implicit biases exist in persons who are not consciously aware of them and believe that they are acting based on neutral, nonprejudiced rationales. Certain studies can offer findings, which strongly suggest the presence of implicit bias at a population level by finding disparities in how members of certain groups are treated, such as Dovidio and Gaertner’s (2004; 2009) work on “aversive racism.” But these studies cannot establish implicit bias for any particular individual, at least some of whom (under the logic of the study) no doubt really *are* acting on the basis of the “neutral” rationale.

⁷ Some might wonder whether this is more analogous to a “strict liability” regime for microaggressions. I do not believe it is. Both negligence and strict liability frameworks hold persons culpable for injuries they do not intend to cause. The difference between them is that negligence also requires that the perpetrator fail to act with due care—that they reasonably could have foreseen and avoided the injury. To the extent our argument for holding the ESPN writer accountable is that he was “thoughtless,” we also rely on negligence-style logic. One can imagine, however, a scenario where a writer ends up causing offense to a given community under circumstances where the writer truly seems blameless—there was nothing (reasonable) he could have done to avoid the harm. Such examples include what Rini, below, will term “tragic coincidences,” and my instinct (along with Rini) is that we do not tend to think that the speaker in such cases is *personally* morally blameworthy.

⁸ For example, Williams (2020, p. 8–9) argues that “caste behavior” in the Jim Crow South was intended to reproduce an oppressive racial hierarchy, even if individual White actors were simply behaving as they had been taught.

⁹ For a general discussion on, and critique of, arguments which assert that overbroad and thereby improper claims of discrimination or bigotry have the effect of closing off or shutting down important political or social conversations, see Schraub, 2016.

¹⁰ Determining the magnitude of the damage microaggressions cause is not something the negligence frame itself can resolve. It must bootstrap onto other accounts for that conclusion, and their assessments in turn feed into the negligence formula of whether the magnitude of injury times probability is excessive to the cost of avoidance. For an assessment of microaggressions that concentrates on how they injure those exposed to them, see Freeman & Stewart, 2020.

The same is true regarding how to assess the “costs” incurred by either the potential microaggressor or the microaggressions’ recipient to avoid the injury. Once we expand beyond pure monetary analysis, which is “easier”—the microaggressor “thinking harder” about whether their conduct might hurt others or the recipient agreeing to “assume the best” and shrug off offense? While a negligence framework again cannot answer these questions directly, the framework usefully primes us to analyze these costs comparatively and so not unduly discount the burden imposed on either the perpetrator or (more frequently) the recipient.

Certain proposals for ameliorating the injuries caused by microaggressions simultaneously reduce costs for one party while increasing them for another. For example, requiring those who experience potentially microaggressive acts in the workplace to report them to HR before seeking other remedies reduces certain costs on the perpetrator (who is given clear notice that their conduct is injurious before being subjected to tangible consequences) but may raise them for the victim (who risks being labeled a troublemaker). Omitting a reporting requirement raises and lowers costs in the opposite fashion. Figuring out the optimal approach will again be highly context-specific; the point is that the negligence inquiry properly conducted must take into account both sorts of cost.

¹¹ There is debate as to whether microaggressions by definition only can target members of marginalized groups. Compare McTernan (2018), p. 265) with Liebow (2022), p. 198). To the extent “microaggressions” only includes incidents which target marginalized groups, assume that in their home country the gesture would be degrading to the traveler on basis of their marginalized identity.

¹² A potentially common example of such an incident could be Jews encountering swastikas in South Asia, where they are primarily not associated with Nazism but rather are symbols of good luck and prosperity. As jarring as the image might be, and notwithstanding the reality of both local and global antisemitic oppression, the Jewish traveler cannot reasonably contend that they are *wronged* by being exposed to it on a public street

(which is to say, the cost of completely rejiggering the public square in South Asia to account for the sensitivities of Jewish travelers from across the world is excessive compared to the magnitude of the injury times its probability). However, an Indian friend of the Jewish traveler, who has had reasonable occasion to know what a swastika symbolizes for Jews, could justifiably be criticized for giving their Jewish companion a gift emblazoned with a swastika, notwithstanding the fact that the friend could honestly say that the meaning they intended to communicate is only a positive one.

- ¹³ Note that this judgment does *not* depend on diminishing the injury Donna experienced at Yumiko's hands. A car accident can cause the same degree of grievous injury regardless of whether the driver was negligent or not. And, as is the case of compensating victims of non-negligent accidents, there may be more to be said about non-negligent microaggressions even where we cannot hold a particular perpetrator personally liable.
- ¹⁴ Indeed, it is notable that in this example the authors stipulate that Yumiko *both* is a new arrival to America *and* that she lacks the hostile racial attitudes possessed by Angela. If the dispositive difference between Yumiko and Angela was solely a matter of holding certain attitudes or intentions, the information about their respective countries of origin would not be necessary. The inclusion of the factoid that Yumiko is non-American and unfamiliar with American customs implicitly appeals to the notion that it would be *unreasonable* to expect Yumiko to have learned the information necessary to avoid the microaggression, and that is what makes her potentially innocent in a way Angela is not.

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