

Microaggressions, Torts, and the Right to Apology

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Works Cited:

- Derald Wing Sue, *Microaggressions in Everyday Life: Race, Gender, and Sexual Orientation*
- Christiana Friedlaender, "On Microaggressions: Cumulative Harm and Individual Responsibility"
- Iris Marion Young, "A Social Connection Model" in *Responsibility for Justice*
- Arthur Ripstein, *Private Wrongs*

1. What is a microaggression?

A small slight against a member of a marginalized group, which can accumulate into serious damage when repeated over long periods of time or from a wide variety of sources

Stranger in Your Own Land: Brad, a white man, and Patricia, an Asian-Canadian woman, are in a Vancouver bar that is frequented by students from the nearby University of British Columbia. Brad attempts to strike up a conversation by asking Patricia: "Where are you from?" She responds: "Toronto." Brad presses her: "No, where are you *really* from?" Patricia frowns at him, angry but unsurprised, and corrects his misconception: "I'm Canadian. It's racist to assume only white people can be Canadian." Brad becomes angry and yells back: "How dare you! I have plenty of Asian friends, and they don't think I'm racist. Stop being so sensitive!"

Brad sees this one interaction in isolation, whereas Patricia has experienced a pattern of racist assumptions and demeaning stereotyping. In order to protect herself from internalizing negative stereotypes, Patricia may call out her interlocuter.

Q: Is Patricia justified in being angry at—and blaming—Brad? Can she demand an apology?

2. Problems for a Liability Model of Moral Responsibility for Microaggressions

Friedlaender argues that blame is inappropriate in microaggressive interactions for two main reasons:

1. *Problem of Ignorance:* The microaggressor didn't intend to cause harm and (perhaps) couldn't even have known that their seemingly innocuous comment/question was likely to cause harm.

2. *Problem of Delayed Damage*: The slow accumulation of discomfort makes it impossible to precisely apportion blame according to individual contribution to overall harm. The most angering microaggressions might not be the most damaging, and the early, most diachronically damaging microaggressions might have been completely forgotten by the time the harm is felt.

Friedlaender (following Young) points out that liability models tend to emphasize intention and causal responsibility as necessary conditions for blameworthiness. The less clear the intention or damage becomes, the less likely we are to consider the perpetrators culpable for the harm. Yet these are precisely the features that microaggressions tend to lack.

3. The Tort of Trespass

Young considers the most well-known tort, negligence, and dismisses it because although negligence doesn't require intention, it still requires clear causal responsibility for harm.

Ripstein has recently argued that the tort of trespass provides a better illustration of tort liability. Trespass laws have two distinctive features:

1. *Strict liability*: The perpetrator is liable regardless of intent to harm. A lost hiker may not be aware of whose land they are trespassing on, but since they are aware of the action they are taking (walking on land they do not own) and they are not acting under coercion (no one has kidnapped them and forced them to walk on that land), their action counts as intentional.
2. *Actionable per se*: The perpetrator is liable even when no damage is done. The lost traveler may not do any harm by walking across the land. In fact, trespass can be prosecuted even when, on net, it benefits the landowner. If someone trespasses in order to mow your overgrown lawn, they can still be prosecuted for trespassing—despite their good intentions and the good effect of their actions.

These two features may seem counterintuitive, but Ripstein reveals their underlying structure. In its simplest form: “the complaint is ‘the defendant is not allowed to do that to me’” (4). More complexly:

“I wrong you only by interfering with something to which you have a right, or, as I shall put it, something you already have. You already have your person (including your body, mental capacities, and reputation) and your property... Nobody else is in charge of your body and property. That is, no other person gets to determine the purposes they are used to pursue.” (29-30)

Now we can see why tort liability does not fit Young's (or Friedlaender's) categories:

Strict liability does not track malicious intentionality and thereby avoids the *problem of ignorance*: the hiker is not aware of who owns the land she is trespassing upon, but she is nevertheless blameworthy for violating the right of the property owner to choose how the land is being used.

Actionability per se does not track causal responsibility for harm and thereby avoids the *problem of delayed damage*: the mower does not damage the lawn, but since she did not ask permission, she is nevertheless blameworthy for violating the right of the property owner to choose when their lawn is mowed.

Although tort liability is a legal framework, Ripstein argues that it is based in fundamentally moral relationships. In the next section, I will argue that these same interpersonal relations, rights, and duties are at play in conversational contexts like the *Stranger in Your Own Land* microaggression.

4. Microaggressions as Trespass

Returning to the example from §1, can this interaction be described as an violation of Patricia's right to be in charge of herself and choose her own purposes?

Brad is not using Patricia's body or her property, but he is using her mental capacities by forcing her to think of herself as an outsider:

- In order to make sense of his words, 'where are you *really* from,' Patricia must recognize his assumption that she can't really be from Canada and must more truly belong to the category 'non-Canadian' or 'foreigner.'
- These categories carry particular expectations: Patricia is pressured to adopt restrictive and (often) dehumanizing roles, rather than being acknowledged as an individual who rightfully decides her own actions and reputation.
- After repeated pressure, Patricia may come to think of herself in stereotyped and demeaning ways. Her ability to control her own life, body, and property may be seriously damaged by the many small violations of her self-confidence, self-esteem, and self-worth.

[If there's time] a few clarifications are in order:

1. *Don't other people have the right to challenge our self-conceptions and influence the categories we use to define ourselves?*

The tort of defamation provides a useful parallel. We have the right that other people do not make baseless accusations that threaten our reputation. This does not mean that other people can never make statements that influence our reputation; it just means that those statements must be true.

To continue the microaggression example, if Patricia says to Brad, "That was racist," her comment will (hopefully) influence his self-conception. Brad's racist question, on the other hand, placed Patricia in the category 'foreigner' on the basis of her phenotypically Asian features, rather than on the basis of any action she had committed.

2. *Don't these kind of violations occur all the time? Surely we can't be held responsible every time we unintentionally miscategorize someone?*

Here a comparison to battery (trespass against a person's body) is illuminating: just as accidental jostling on a streetcar should be distinguished from tortious battery, so too should we mark and maintain the division between the normal hazards of conversation and wrongful microaggressions.

Everyone—even white, cishet men like Brad—occasionally suffer from being inaccurately categorized, but these mistakes do not pose the systematic threat to self-esteem that members of marginalized groups routinely experience when miscategorized on the basis of their skin tone, gender presentation, sexual orientation, or religious affiliation.

3. *Given the legal comparisons, the question of punishment arises. Am I recommending that guilty parties be fined?*

Tort law already contains different degrees of punishment. Different fines are levied, but the point of the punishment remains the same: to reinstate the violated right and make it—as much as possible—like the violation never occurred. In the case of microaggressions, I think this aim is best served by an apology, rather than a legalistic scheme of monetary compensation.

An apology admits wrongdoing and acknowledges that the target had the right to self-determination. An apology, if genuine, is also a promise not to wrongfully interfere with the future direction of the target's mental capacities. Finally, an apology affirms that the target is not over-reacting when they feel angry and hurt. An offense has been committed, so feeling offended is appropriate and justified.