

## Denying the Suberogatory

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Received: 17 October 2011 / Revised: 17 November 2011 / Accepted: 24 November 2011 /  
Published online: 15 December 2011  
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**Abstract** Julia Driver has argued that there is a special set of actions, lodged between neutral actions and wrongful actions called suberogatory actions. These actions are not impermissible, according to Driver, but still strike us as troubling or bad, and are therefore worse than morally neutral (1992). Since this paper was written 20 years ago, many philosophers have utilized or alluded to this moral territory. The existence of some action-types that are not wrong but still carry some dis-value has become a staple in the realm of moral evaluation. However, Driver's argument for the existence of this moral territory amounts to three types of moral cases that, according to Driver, can only be explained by the existence of the suberogatory. In this short paper, I will respond by saying that we can account for these cases using our traditional notions of moral neutrality and moral wrongness. The temptation of invoking the suberogatory is that it can be used as a substitute for answering a variety of hard ethical questions. However appealing this substitute may be, we should resist it so long as the problem cases put forward to motivate the new evaluative realm can be handled, and handled well, by our traditional apparatus.

**Keywords** Suberogatory · Supererogatory · Obligation · Moral evaluation · Gratitude · Abortion

Julia Driver has argued that there is a special set of actions, lodged between neutral actions and wrongful actions called suberogatory actions. These actions are not impermissible, according to Driver, but still strike us as troubling or bad, and are therefore worse than morally neutral (1992). Since this influential paper's publication 20 years ago, the suberogatory has become a well-accepted moral realm on the scale of right and wrong. Driver's argument for the existence of this moral territory amounts to three types of moral cases that, according to her, can only be

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explained by the existence of the suberogatory.<sup>1</sup> In this short paper, I will respond by saying that we can account for Driver's cases using our traditional notions of moral neutrality and moral wrongness. The temptation of invoking the suberogatory is that it can be used as a substitute for answering a variety of hard ethical questions. However appealing this substitute may be, we should resist it so long as the problem cases put forward to motivate the new evaluative realm can be handled, and handled well, by our traditional apparatus.

Driver begins her discussion by presenting three types of cases that are morally confusing. First, she discusses "morally charged situations" which are cases in which an agent must choose between a supererogatory act and an act that is worse than neutral. In these cases there is no neutral option.<sup>2</sup> One example of such a case is as follows: you board a train in front of a couple. You must choose between a less preferred seat and preferred seat, perhaps by a window, such that, if you choose that preferred seat then the couple boarding behind you must sit apart from each other. If you choose your less preferred seat then you have acted in a supererogatory manner. However, if you choose the window seat and force the couple to split up, then you have acted in a way that seems worse than neutral, even though you did board the train first, and the choice was rightfully yours to make. It seems like your options are such that you must either be a sweetheart or a jerk.

Driver presents another example of a morally charged situation in which a man must decide between donating a kidney to his brother and not doing so. Again, the moral agent seems to be without a neutral option. If he donates a kidney, his action is laudable and, seemingly, supererogatory. However, if he withholds his kidney, his action seems un-brotherly, less than neutral.

Second, Driver discusses "owed favors." Such debts are puzzling because if you "owe" something, then that suggests that another person has a claim against you. However, "favor" suggests something supererogatory. However, there are circumstances in which one person does seem to "owe" a favor to another person. Consider a case wherein your friend, one who has always helped you pack and move between apartments in the past, is herself in need of help moving from one apartment to another. Helping her *would* be a favor. However, due to reciprocity considerations, you also seem to owe her this favor.<sup>3</sup> When you say 'no,' you do not violate her rights, and you are not required to help her move. However, your refusal still strikes one as less than morally neutral.

Third, Driver describes a case called "The Nine Abortions." Driver explains that, typically, conservatives oppose abortion and liberals think it permissible. However, Driver goes on to note that even liberals, and even those who think that early fetuses and embryos have no moral status, think there is something less than morally neutral about having lots of abortions, say, nine abortions. This seems strange because if one abortion is permissible on the grounds that the early fetus has no moral status, then it

<sup>1</sup> Driver's view is an expanded and altered account of a moral realm first described by Richard Chisholm, who called bad acts that are not forbidden "offensive" (1963). Though dealing with Chisholm's conceptual scheme for ethics is not within the scope of this paper, I should say here that I believe that the examples he describes as requiring the evaluative term "offense" fall into Driver's case-types 1 and 3, and can be accommodated at the level of applied ethics in the same method that I use in this work.

<sup>2</sup> Driver, 286–287. Do not confuse "morally charged situations" with "moral dilemmas." The latter occurs when the only options available to a moral agent are all morally wrong.

<sup>3</sup> Driver, 289

should follow that nine abortions are permissible on the same grounds, assuming all nine abortions involve early fetuses. Yet, most people balk at saying that there is nothing morally problematic about the same woman having nine abortions.

Driver thinks that all three of these cases are characterized by an abuse of our moral rights. That is, we are not morally forbidden from taking the preferred seat on the train, withholding kidneys from our brothers, refusing to help our friends, or, assuming that fetuses have no moral status, aborting many of them. However, there is still something bad about these actions. The problem, as Driver describes it, is in “justifying the blame when the agent is acting within his rights.”<sup>4</sup> So, she stipulates a definition for suberogatory acts, which is: “permissible but bad acts.”<sup>5</sup> She explains what is unusual about the three cases that she has presented by classifying them as: not wrong but, instead, suberogatory.

Driver recognizes that some critics might not think that this category is necessary. She successfully explains why suberogatory acts, as she describes them, are distinct from failures to discharge imperfect duties.<sup>6</sup> She explains that suberogatory actions are often bad irrespective of anything related to past performance. You cannot say, ‘well as long as you *sometimes* donate kidneys to your brother you are not in violation of a duty, just so long as you don’t *always* refrain from such donation.’ After all, we each have, at most, one kidney that we do not need. The moral permissibility of refusing to donate ones kidney does not depend on how many times we have refused to donate the kidney in the past.

The suberogatory, as Driver defines it, is unnecessary. Driver does not allow that there are any truly wrongful actions that are not moral rights violations. Yet, there are all sorts of such wrongs. For instance, Peter Singer famously captures most people’s intuitions when he claims that I must ruin my expensive suit to save a toddler from drowning in a mud puddle (1972). If I choose to refrain from saving the toddler drowning in the mud puddle, I would not be violating the moral right of the toddler, but I would still be acting as “moral monster.” Similarly, if I were to approach an obese child emerging from a school bus and say to him, “You are obese, did you know?” I would not be violating his moral rights. After all, no one has a *right* against being told an insulting truth. However, most would agree that I had committed a wrong. So, Driver cannot claim that suberogatory acts are always permissible if they include any action that falls into the territory of being a less-than-neutral and not a rights violation.

In response to the suggestion that suberogatory acts are impermissible actions that it would be wrong to prevent someone from doing, Driver says,

This will not work, however, because it fails to distinguish the suberogatory actions from ones that are clearly impermissible. Suppose that a friend of yours has become an ‘invisible man’, and has been corrupted by his ability to do whatever he wants without getting caught. He delights in causing minor harms. He does a lot of bad things, and some of them you *could* prevent, but if he should find out that you thwarted him, he would go berserk and cause a massive harm. For example, suppose you could prevent him from sticking a

<sup>4</sup> Driver, 287

<sup>5</sup> Driver, 291

<sup>6</sup> Driver, 292

pin in a baby, but you realize that if you did this, he would lash out and kill thousands of people instead. Here it would be wrong to interfere with his action of sticking the pin into the baby, but this action is more than merely bad. Sticking pins into babies is clearly impermissible.<sup>7</sup>

Certainly, as can be seen in the case that Driver presents, the suggestion (i.e. that suberogatory acts are impermissible actions that it would be wrong to prevent someone from doing) does not successfully distinguish suberogatory acts from rights violations. However, this just shows that we cannot define rights violations as all and only those acts that it would be permissible to prevent someone from doing. However, we may still allow that there are impermissible actions that are not rights violations.

Alan Wertheimer and Jeremy Waldron defend this view (Waldron 1981).<sup>8</sup> Waldron introduces the position, and Wertheimer neatly sums it up in the following way:

...to say that A has a (moral) right to do X is not best understood as a statement about what it is right for A to do. Indeed, to say that A has a right to do X is not to say that A has any reason whatsoever to do X. To say that A has a right to do X is better understood not as a statement – perhaps only a placeholder – for what *others* have moral reason to do with respect to A's doing X, to wit, that others have a moral reason not to interfere with A's doing X (Wertheimer 1996).

On this view, a rights violation is distinct from a merely wrong action in that other people have a moral reason to interfere with the action, whereas, they do not necessarily have a moral reason to interfere with a wrong that is not a rights violation. For instance, the fact that I have a moral right to insult the fat child by telling him he is fat does not give me a reason to do so, but it does give you a reason (perhaps one that could be overridden) to refrain from clamping your hand over my mouth and muffling my words. However, if I start prodding the fat child with my baton while calling him fat, you have no moral reason arising from wrongful action itself to refrain from interfering. Of course, there could be reasons stemming from other sources for you to refrain from interfering (e.g. you know that if you interfere then I'll strike you with the baton and then commence in striking the fat child). However, this reason, coming from a different source, does not muddy Waldron's distinction.

Driver's example of the "invisible man" does not create a problem for Waldron's distinction because, in that example, you do have a moral reason, stemming directly from his action of sticking a pin into a baby, to stop him. However, you have an overriding reason, stemming from a different source (i.e. from your knowledge that stopping him from pinning the baby will result in him doing much greater damage) to refrain from stopping him. Therefore, Driver has provided no reason why suberogatory acts are not just wrongful actions that are not rights violations.

One might be concerned that, if there exist wrongful actions that are not rights-violations, then we sometimes have the right to do what is wrong. Of course, this is true when it comes to legal rights. I have a legal right to free speech and I can

<sup>7</sup> Driver, 292.

<sup>8</sup> Waldron, 21–39.

commit wrongful actions (e.g. speech acts) by exercising this right. However, can I truly have a moral right to do something that is morally wrong? <sup>9</sup> In asking this question, I am not asking, ‘can it be morally right to do what is morally wrong?’ It is the confusion of the former question with the latter that leads some to worry about a seeming paradox or contradiction in the view. On traditional theories of the function of rights, we do not necessarily have moral rights against others doing all that it would be impermissible for them to do to us.<sup>10</sup> As I stated above, the fat child probably has no right against me speaking honestly, even though my words insult him for no worthwhile purpose. My speech act is wrongful – it must always be wrong to intentionally cause a child to suffer for no worthwhile purpose – but it would be a strange ethical theory that would implement rights to function to protect people against true utterances from others. So, Driver is too strict when she says that an act must violate someone’s rights to be a wrongful action. To support such a claim, she would need to map out an ethical theory involving rights that function to preserve a right-holder from ever being treated wrongly.<sup>11</sup>

Driver’s support for the suberogatory consists in the following: she claims that the three cases that she presents cannot be categorized as wrong or neutral, and hence require an intermediate category. Those three cases are: (i) morally charged situations, (ii) owed favors, and (iii) multiple abortions. Suberogation exists because cases like these exist. I will now argue that these cases *can* be categorized as either wrong or neutral, rendering the special category of suberogation unsupported.

Morally charged situations and owed favors are morally complicated. Consider the case in which the train rider must decide between taking his preferred seat, and thus separating the couple boarding behind him, or taking a less preferred seat so that the couple may sit together. Now, imagine that the train-rider does choose the preferred window seat and the couple behind him has to split up for the duration of the ride. Driver says that the train-rider does nothing wrong, but does do something less than morally neutral in this case. Hence, she says, we need a category in between to explain his action. However, the problem is not that we have no category for the bus-rider’s action.

The problem is that it takes serious work in applied ethics, combined with some missing empirical data, to determine whether he acts wrongly, or permissibly, or if a

<sup>9</sup> Thomson famously argues that this is possible in her 1971 “A Defense of Abortion.” She describes a scenario in which an elder brother receives a big box of delicious chocolates as a present while the younger brother receives none. She suggests that it is probably morally impermissible for the older brother to refuse to share the chocolates. Yet, we cannot say that the younger brother has any *right* to the chocolates that the eldest violates by refusing to share (56–57).

<sup>10</sup> Will theorists believe that the function of rights (whether legal or moral) is to protect the autonomy and choices of the right holder. Interest Based Rights theorists contend that rights (again, whether legal or moral) function to protect the interests of the right holder. Will theory does have to not deny that an individual’s interests can be frustrated in an impermissible way, even if the impermissible action does not amount to the violation of a right. Interest based rights theory does not have to deny that an individual’s discretion can be undermined in an impermissible way, even if the impermissible action does not amount to the violation of a right. These traditional theories identify some normative claims and privileges that we actually have as rights and others as non-rights. For a discussion of these traditional theories and the collections of normative advantages that each theory identifies as a moral right, see Leif Wenar’s 2005 work on “the Nature of Rights.”

<sup>11</sup> Even if Driver *can* success full describe such a theory, the rest of my paper can be read as arguing that the cases she describes as suberogatory are either permissible acts or rights violations.

new category is needed. The answer will hinge on how valuable it is to him to sit in the preferred seat over the less preferred seat, how much reason he has to believe the couple wants to sit together, and how much self-partiality is permissible when making moral decisions. For instance, if it turns out that the couple announced, before boarding the train, that this ride constitutes their final hour together before one member of the couple is shipped off to war then the train-rider's action is certainly impermissible. Also, if it turns out that self-partiality is only morally permissible when there is equality, a tie, between the objective value of one option and another, then that fact might also render the train-rider's action impermissible. If a greater amount of self-partiality is permissible, then the first boarded train-rider's preference for the window seat might justifiably be prioritized over the couple's wish to sit together, if it is the first boarded train-rider making the choice. So, the problem cannot be *resolved* by adding a new category in between moral neutrality and moral wrongness. The new category does not save us the work in applied ethics and the empirical data collection that is required to properly evaluate this case.

The kidney donation case, as well as the owed favor cases, must be evaluated in the same way. The question of whether or not I must give my brother my kidney when he experiences renal failure, and the question of whether or not I must help my friend move who has helped me move in the past are problem-cases. However, they are not problem cases because they belong to some oft-ignored category of action. They are problem cases because much work in applied ethics as well as the gathering of contextual information is required to determine whether these actions are morally obligatory. For instance, did I tacitly consent to enter into a reciprocal helping relationship with my friend when I accepted her offer to help me move on previous occasions? If I had wanted to avoid the responsibility of helping her move this year, ought not I have said the year before when she offered to help me move "oh no, I cannot accept that offer, it is too much." Is it permissible for me to be so partial to myself in my decision to keep my kidney instead of save my brother's life? Will he actually die if he doesn't get my kidney, or will he just be forced to live on dialysis for a few more years before receiving a post mortem donation? What is the relationship like between me and my brother? All of these are questions that need to be answered in order to determine whether these actions are obligatory. They appear to be problem-cases because categorizing them takes a lot of work, not necessarily because the categories are insufficient.

Finally, let us look at the case of the multiple abortions. Either early fetuses have moral status or they do not. If they do have moral status, then Driver suggests that the case is like that of the "morally charged situations," like the case of kidney donation, where someone must choose between a supererogatory action and a less than neutral action. I have already explained, immediately above, why appealing to a missing category of moral action is unnecessary for explaining what makes the case problematic. If a fetus *does* have moral standing, then the answer to the question of whether 9 months of pregnancy, massive bodily contortion and childbirth, which could well require invasive surgery, are obligatory undertakings also depends on answers to questions about the justifiability of self-partiality, etc. How much sacrifice is required for the sake of saving another person?<sup>12</sup> Does the initial act of

<sup>12</sup> Recall that the same question arose in the kidney donation case.

creating a situation in which someone has a life result in an obligation, despite the massive sacrifices involved, to help maintain that life?<sup>13</sup> Does the amount of precaution one has taken to avoid creating a person influence the degree to which it is permissible to have an abortion?<sup>14</sup> If so, is the fact that one has had eight previous abortions indicative of the fact that one has failed use the amount of precaution requisite for a morally justifiable abortion? All of these questions need to be examined before we can determine whether the ninth abortion is morally permissible.

If early fetuses do not have moral status, as Driver goes on to suggest, then it is less clear why a single abortion appears to be permissible but a ninth abortion appears to be impermissible. Driver compares abortion to a case in which an owner of a grand piano smashes up the piano for no good reason. In both cases Driver says that what has occurred is a waste of something valuable, even if the thing is not intrinsically valuable. The piano owner has a right to smash his piano just as the pregnant woman has the right to terminate her pregnancy. However, the destruction is still regrettable and bad, though, in the pregnancy case, it is so only if the abortion is unnecessary or frivolous. We judge the ninth abortion as bad because the circumstance makes us think that the conditions resulting in the abortion were not necessary (certainly nine pregnancies could have been prevented!).

However, it is not clear why Driver thinks that an aborted fetus is a waste. Recall that we are considering the case from the angle that the fetus has no moral status. Now, in today's world, an extra grand piano is a good thing. There are fewer grand pianos than there are people who want them or who could benefit from them. On the other hand, turning a fetus with no moral status into a child is, at best, permissible.<sup>15</sup> Perhaps it may be laudable on other grounds; for example, it may be a laudable feat of physical strength and endurance. Certainly, if the conditions of our world changed and we were in *need* of more humans, and we had reason to think that we could provide decent life experiences for that set of future humans, then it would become morally laudable to turn a fetus without moral status into a person. However, Driver thinks that there is something wasteful about nine abortions even in our current world's context.

Assuming we think fetuses have no moral status, perhaps our judgment of the woman who has nine abortions can be better explained by other means. For instance, perhaps we are culturally conditioned to look down upon and punish sexual promiscuity or even sexual activity in women, and the need for nine abortions is strong evidence for such activity. Perhaps, if a woman is poor and seeking state funding for her abortions, we think this behavior is profligate, as it would have been cheaper for the state to supply birth control than to supply nine abortions. Perhaps

<sup>13</sup> David Boonin (then Boonin-Vail) examines this question. He suggests that a doctor who saved a patient's life at Time-1 would not have to then go through great physical sacrifice at T-2 in order to keep the patient alive. This is true, according to Boonin, even though the doctor is responsible for the existence of the patient's life at T-2 (1997).

<sup>14</sup> Judith Jarvis Thomson examines this question in her article "A Defense of Abortion." She suggests that the degree of reasonable precaution a woman takes against getting pregnant is positively correlated with the degree to which it is morally permissible for her to have an abortion (1971).

<sup>15</sup> Note that when Thomson calls carrying a child to term supererogatory she is working under the assumption that the fetus does have moral status.

we are upset when people are imprudent. For the same reason we would be upset if someone kept bicycling without a helmet even though he kept injuring his head, we might be upset that the woman kept putting herself in situations where she had to undergo as unpleasant an operation as an abortion. This imprudence might amount to a moral wrong if it turns out that we have self-regarding duties. So, again, the reason why the case of the nine abortions is problematic, even if the fetus has no moral status, is not that we have no category in which place the action. Categorizing the action just requires answering difficult moral questions. Adding a category between neutral and wrong does not save us any of this work.

Julia Driver believes that suberogation mirrors supererogation. That is, a supererogatory action is one that is neither obligatory nor wrong and sits on the positive side of the moral spectrum, whereas a suberogatory act is neither obligatory nor wrong and sits on the negative, or “bad” side of the moral spectrum. Though I have argued that there is no reason to posit the suberogatory as a realm of moral evaluation, it does not follow that the supererogatory can be dismissed in the same way. I do not intend this work to shed any light on whether the supererogatory exists.

I have argued that suberogation, as Driver defines it, is neither useful nor necessary for handling the problem cases that Driver presents. Perhaps there *is* a realm of the suberogatory. Perhaps Driver is correct in saying that it is a realm below moral neutrality and above moral wrongness. However, the cases she describes do not require such a realm for moral explanation. We need to gather empirical information about cases in applied ethics and determine the answers to questions such as: just how much self-partiality is permissible? We should not invoke the suberogatory as a method of bypassing such considerations. We will be left with an evaluative scheme that yields inaccurate moral conclusions.

**Acknowledgements** Thanks to Thomas E. Hill Jr. and David Pruitt for helpful conversations that improved this work.

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