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## ON JUSTIFYING ENFORCED REQUIREMENTS:

### A Reply to Baier

DAVID LYONS

There are limits to the possible subjects of justification. Typically, it concerns human behavior and things that human intervention can affect. Failing special circumstances, it makes no sense to speak of justifying the weather. There may be other limits to the class of possible subjects for justification; for example, it is sometimes said that a thing cannot be justified unless it has been indicted, though it is not clear how this claim should be taken. For there simply may be no point in bothering to justify something that is not suspect in some way, and the relevant condition can generally be satisfied by no more than an imaginary challenge or the mere request for a justification. But, suppose we assume for the sake of argument that justification has such narrow limits. Even within them, Professor Baier says, justification is not always possible. In one sense this is true, in another false. It is always possible for someone to offer a justification, for it to be accepted, and in such respects for there to *be* one. In another sense, however, which Baier seems to use, the existence of a justification is independent of what people give or accept. In this important sense, some *possible candidates* for justification simply *cannot* be justified, just because they aren't good enough. They fail to meet the minimum standards.

I begin with this elementary point so that my own attitude towards justification will be clear and to help us avoid being misled by some remarks in Baier's paper. He says, for example, that he is concerned with the matter of "people being required unconditionally or categorically to measure up to certain standards," or, in other words, with what he calls our "practice" of requiring people to justify or to be able to justify their conduct. He continues: "To say that they are thus categorically required to measure up to these standards is to imply that if they do not, then the community *is entitled* to compel them to do so," *etc.* (emphasis added). But this way of putting the point surely needs qualification, for the mere fact that a community has or accepts categorical requirements does not entitle them to anything, except, perhaps, in a qualified or technical sense. Their laws may make it lawful to use coercion, and this can be said to involve a kind of entitlement. But it is one that does not settle the problem of justification, for it merely amounts to their having methods of compulsion which can be challenged from (let us say) a moral point of view, with no guarantee that these methods meet the minimum standards. Laws and legal sanctions are not always justified. The same applies to the community's customs and conventional morality. Its members may believe that they have the right, the moral right, to use force, and they may act accordingly; but to *believe* that one has a right is no more to *have* a

right than to *give* a justification is really to *have* one, in the relevant sense. Of any merely accepted requirements and sanctions we can always ask: What justification can be given for them? For any at all, or for these in particular?

I believe that Baier would agree so far, and I am therefore confident that we can understand the main argument of his paper as *an attempt to justify* the use of coercive sanctions in support of certain requirements. It is also an attempt to indicate, in very general terms, the kind of requirement that might justifiably be enforced. Baier takes little for granted, so his enterprise is really quite ambitious. It is inevitable, therefore, that I should have a number of questions and criticisms, if only because his argument is necessarily compressed, abstract and sketchy. But it is also full of complexity and subtle detail, and I hope that I will be pardoned for ignoring many interesting points made and questions raised. I shall concentrate my remarks on what I take to be the main elements of his main argument.

This has two stages. Baier first defends a loosely defined set of standards for minimally acceptable behavior. Then he argues that the enforcement of some can be justified. I shall take these in turn; but I shall also try to show that they are more closely related than Baier seems to suggest.

The standards for minimally acceptable behavior are what Baier calls "categorical" or "overriding" precepts, meaning, apparently, that they are never to be broken (unless, perhaps, one may be broken in favor of another of the precepts). Baier argues that a set of such precepts could legitimately serve as the minimal social standards for behavior if their content is "such that it is preferable from anyone's point of view to have these precepts accepted as overriding, rather than let natural inclinations prevail."

This claim gives rise to some obvious questions. There are many possible tests: how does Baier come to this particular one? Why is the selection of this test not arbitrary? Is it based, perhaps, on Baier's notion of someone's "having a reason" to do something? If so, it also needs further clarification, for sometimes Baier seems to understand "having a reason" in terms of self-interest, actual or perceived, while other times Baier seems to fix it to having felt concerns. Thus, in one place Baier indicates that one has a reason to do something if it would favorably affect his life (or if it seems that way to him), while in another place Baier says that a person who is unconcerned about others does not have to have a reason to follow other-regarding precepts.

One might also ask how egoism and altruism (the rule of self- and other-regard respectively) drop out of the argument. They were said to be preferable as overriding considerations to the rule of natural inclinations, and one might infer from this that they pass Baier's supposed test for legitimate precepts, which is simply that they be preferable from anyone's point of view to the rule of natural inclinations. Baier says that they are not as helpful in settling conflicts as some (unspecified) alternative set of overriding precepts would be. Since they are disqualified, this remark suggests that Baier's stated test gives only a necessary and not a sufficient condition for selecting minimum standards. Is utility in settling conflicts, then, another necessary condition? And are we simply to assume that there *is* a set of precepts which would do the job

of settling conflicts better than egoism or altruism could? How should we decide? How can we *know* what is a good way or a more satisfactory way of settling conflicts, without knowing what the legitimate overriding precepts are? But if we knew what they were, what need would we have for the test? We might possibly be caught in a vicious circle.

Baier's stated test for legitimate overriding precepts seems rather weak in another respect. All it requires is that a set of precepts be preferable to the rule of natural inclinations. But if there are *any* such sets of precepts at all, there are likely to be an indefinitely large class of such sets of which this is true. How are we to decide among them? Is Baier's point simply that, if some set of precepts can pass this test, then the "practice of justification" – of setting minimum social standards for conduct – can itself be justified? Should we *also* use this test to determine whether a community's actual standards are legitimate?

The second stage of the main argument concerns which precepts may be enforced. This adds an important complication, for, as Baier grants, "the use of force is objectionable and so calls for justification." As we shall see, however, it is not at all clear that Baier addresses himself directly to this question. This stage of the argument can also be divided in two. Baier first argues that certain precepts, which he calls "reflexive," need no support from sanctions. Then he argues that other precepts, which he calls "distributive," need such support.

Suppose it is in one's interest to follow a certain precept, regardless of other's behavior. Then, Baier argues, given normal self-concern, sanctions would not be needed to guarantee that an individual always has "adequate reason" to follow it. Baier seems to infer from this that sanctions would not be justified in such a case. A further implication is suggested, namely, that paternalistic legislation cannot be justified, that is, laws designed to make a person serve his own best interests or at least to protect him from his own imprudent behavior.

As Baier's primary concern is with cases in which sanctions *are* justified, his remarks about reflexive precepts may well be misleading. But they do seem unsatisfactory as they stand. For they suggest that what is essentially wrong with social intervention in a person's private affairs is that it simply lacks any point. There is no need for it. Now this may be wrong in principle, if social intervention is inherently objectionable. But, in any case, the factual claim implied by Baier seems mistaken. Ignorance, superstition, pigheadedness and other factors keep people from following such precepts. Consider, for example, questions of diet, exercise, smoking, hard drugs, and seat belts. If all that is needed to justify enforcement of self-regarding precepts is the fact that people won't tend to follow them otherwise, then there is such justification. This applies on any of the tests suggested by Baier, whether based on a person's felt concerns, his perceived self-interest, or his actual interest. For a person does not necessarily do what he has good and sufficient reason to do.

Let us now turn to Baier's "distributive" precepts, general conformity to which would normally benefit everyone. These are supposed to require *other-*

regarding behavior, that is, conduct which can be characterized as favorably affecting other persons rather than oneself, or that seems to do this. For Baier's purposes, this further characterization of a "distributive" precept seems too narrow. He wants to contrast these precepts with those that require self-regarding behavior and for which sanctions are consequently not supposed to be needed. What is important in this respect about "distributive" precepts, then, is that they *not* require *self*-regarding behavior; we need not suppose that the behavior they require seems to affect others in a *favorable* manner, for the efficacy of useful precepts might be very complicated.

Suppose, then, that it is (normally, at least) in one's interest to follow a certain precept *if* others are following it too; but because conformity involves, say, restraint, effort, or sacrifice, it would not seem advantageous to conform to it; and it would not in fact be advantageous for one to conform *unless* others *are* generally conforming. Assuming normal self-concern, Baier supposes that one will not have adequate reason to conform to such a precept unless others are generally conforming. As the same condition applies to everyone, the only way of reaping the potential benefits from the precept is by adding motivation to conform. Baier assumes that this must be done by the use of sanctions. Enforcement would guarantee that enough people will conform, or will have reason to conform, so that any individual will have adequate reason to conform. Baier seems to conclude that the use of social force would be justified in such cases.

Baier suggests that an "adequate social sanction" would give everyone "adequate reason" to conform to the precept. But how is this to be understood? I noted earlier, in connection with reflexive precepts, that there can be and often is a gap between what we *have adequate reason* to do (because, say, it is or seems to be in our interest) and what we *actually* do. The same point can be applied here. One could have adequate reason to conform to a distributive precept, and not conform to it – even if the reason was provided by social sanctions. If the social sanctions are determined by what gives an individual adequate reason to conform, rather than what actually *makes* him conform, then it could happen that one would have an adequate reason to conform to a precept, because there is the social sanction which gives everyone else adequate reason to conform, while it would still be true that one would make a useless sacrifice by conforming. For enough others who have adequate reason to conform might nevertheless fail to conform, with the result that the benefits derivable from the general practice are never made available.

Or does Baier want adequate social sanctions to *guarantee* general conformity, and not merely to provide adequate reason for each individual to conform? To achieve this, it is likely that the ante must be raised – the sanctions must be made more severe, the likelihood of punishment increased, and so on. This would raise the costs of the whole affair. But perhaps this is the time to note that Baier ignores the matter of social costs entirely.

Baier granted that "the use of force is objectionable and so calls for justification." But why is it objectionable? Is it *only* because it may be used to

support social requirements that could not be justified on any ground? Or is it also because sanctions involve some cost in, say, human suffering? In deciding when sanctions would be justified, Baier only considers their possible *effectiveness* in securing conformity. He ignores the *price* that must be paid for having them even when the practice would otherwise be beneficial. But this price must be one reason why the use of force is initially objectionable, and so it cannot legitimately be ignored. But if it is not ignored, then Baier's tests must be altered significantly.

For Baier argues as if we can select precepts first and then justify enforcement of them simply on the ground that they would not be respected otherwise. This is a good Hobbesian position. But Baier does not say that desirable precepts are worth enforcing at any price (nor would it be plausible to say this), so he has given us no reason for ignoring the human costs of enforcement, of coercion, of compulsion. One would suppose, then, that the benefits to be reaped from the general practice *must at least outweigh* such social costs. (One might also require, incidentally, that the resulting distribution of benefits and burdens, once sanctions are added, still be *fair*.) It is possible, therefore, that some otherwise desirable precepts of the "distributive" variety *should not be enforced*. This is not because they would not need enforcement, but because they may be so difficult to enforce, or their benefits may be so small in relation to the price of enforcement, that their enforcement would not be worth while and thus could not be justified. One should perhaps take one's cues from Bentham here, rather than from Hobbes.

At this point, and by way of conclusion, it seems natural to wonder whether other means might be used to guarantee general conformity to the precepts. Baier says little about such possibilities, no doubt because he is chiefly concerned with the rationale of coercive sanctions. He seems to suggest, however (though he admittedly does not actually say), that measures short of compulsion or the use of social force do not need any justification. But this is questionable. Any form of social intervention, even including the use of inducements or rewards, is likely to have some costs. And, regardless of the costs, one might even think that any form of social intervention is inherently objectionable – simply because it is *intervention*. This does not mean that our concern about the behavior of others is illegitimate, only that our interference always stands in need of justification.

*Afterthoughts.* Short of challenging Baier's general approach to justification and to the criticism or evaluation of social rules (which I did not attempt in my original comments), the most important questions, it would seem, concern his basic test for the legitimacy of overriding precepts (whether they be "reflexive" or "distributive"). My main question about this test remains unanswered: Why is this *particular* test – which Baier simply lays down and does not argue for – not to be regarded as arbitrary? But other questions emerged during the discussion period following Baier's paper and in private conversations. Baier suggested that the idea of a precept's being "preferable from anyone's point of view" to alternatives can be glossed as their being "for the good

of everyone alike,” a phrase used in his book, *The Moral Point of View*. But he also indicated that the *most* preferable precepts would distribute goods or serve the persons concerned *equally*. This added stricture is not apparent in either formulation, since it is possible for all to benefit to some degree while they benefit unequally. The differences between precepts that would serve everyone equally and those that would merely serve everyone (equally or unequally) brings to mind the possibility of other cases, *e.g.*, where the vast majority would benefit greatly but one person would not benefit or suffer at all; where the majority would benefit but a few would suffer; where many would benefit greatly and many would suffer slightly, and so on – the range of possibilities obviously fills a wide spectrum that might be accommodated to considerations of justice in the distribution of benefits and burdens. And it also became clear in these discussions that Baier wanted in effect to build substantive considerations of justice into his test for legitimate precepts. It would seem desirable to make this clear and explicit. Moreover, in view of the range of possible precepts which Baier apparently would want to certify as legitimate, under certain circumstances – on the grounds of their effecting justice in those conditions, it would seem desirable for him to reconsider the form and content of his test for precepts entirely. If certain considerations of justice are to rule, then (even if they are not the sole considerations that are relevant) it would seem preferable to incorporate them explicitly. This would not only have the advantage of indicating more clearly the intended nature of the test for precepts, it would also provide a way of covering many more cases than Baier’s test could possibly cover as it now stands.

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