

# JUSTICE

WHAT'S THE RIGHT  
THING TO DO?

*MICHAEL J. SANDEL*



**JUSTICE**

WHAT'S  
THE  
RIGHT THING  
TO DO?

**MICHAEL J. SANDEL**

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# JUSTICE

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## 1. DOING THE RIGHT THING

**In the summer of 2004**, Hurricane Charley roared out of the Gulf of Mexico and swept across Florida to the Atlantic Ocean. The storm claimed twenty-two lives and caused \$11 billion in damage.<sup>1</sup> It also left in its wake a debate about price gouging.

At a gas station in Orlando, they were selling two-dollar bags of ice for ten dollars. Lacking power for refrigerators or air-conditioning in the middle of August, many people had little choice but to pay up. Downed trees heightened demand for chain saws and roof repairs. Contractors offered to clear two trees off a homeowner's roof—for \$23,000. Stores that normally sold small household generators for \$250 were now asking \$2,000. A seventy-seven-year-old woman fleeing the hurricane with her elderly husband and handicapped daughter was charged \$160 per night for a motel room that normally goes for \$40.<sup>2</sup>

Many Floridians were angered by the inflated prices. “After Storm Come the Vultures,” read a headline in *USA Today*. One resident, told it would cost \$10,500 to remove a fallen tree from his roof, said it was wrong for people to “try to capitalize on other people’s hardship and misery.” Charlie Crist, the state’s attorney general, agreed: “It is astounding to me, the level of greed that someone must have in their soul to be willing to take advantage of someone suffering in the wake of a hurricane.”<sup>3</sup>



## 4 JUSTICE

Florida has a law against price gouging, and in the aftermath of the hurricane, the attorney general's office received more than two thousand complaints. Some led to successful lawsuits. A Days Inn in West Palm Beach had to pay \$70,000 in penalties and restitution for overcharging customers.<sup>4</sup>

But even as Crist set about enforcing the price-gouging law, some economists argued that the law—and the public outrage—were misconceived. In medieval times, philosophers and theologians believed that the exchange of goods should be governed by a “just price,” determined by tradition or the intrinsic value of things. But in market societies, the economists observed, prices are set by supply and demand. There is no such thing as a “just price.”

Thomas Sowell, a free-market economist, called price gouging an “emotionally powerful but economically meaningless expression that most economists pay no attention to, because it seems too confused to bother with.” Writing in the *Tampa Tribune*, Sowell sought to explain “how ‘price gouging’ helps Floridians.” Charges of price gouging arise “when prices are significantly higher than what people have been used to,” Sowell wrote. But “the price levels that you happen to be used to” are not morally sacrosanct. They are no more “special or ‘fair’ than other prices” that market conditions—including those prompted by a hurricane—may bring about.<sup>5</sup>

Higher prices for ice, bottled water, roof repairs, generators, and motel rooms have the advantage, Sowell argued, of limiting the use of such things by consumers and increasing incentives for suppliers in far-off places to provide the goods and services most needed in the hurricane's aftermath. If ice fetches ten dollars a bag when Floridians are facing power outages in the August heat, ice manufacturers will find it worth their while to produce and ship more of it. There is nothing unjust about these prices, Sowell explained; they simply reflect the value that buyers and sellers choose to place on the things they exchange.<sup>6</sup>

Jeff Jacoby, a pro-market commentator writing in the *Boston Globe*, argued against price-gouging laws on similar grounds: “It isn’t gouging to charge what the market will bear. It isn’t greedy or brazen. It’s how goods and services get allocated in a free society.” Jacoby acknowledged that the “price spikes are infuriating, especially to someone whose life has just been thrown into turmoil by a deadly storm.” But public anger is no justification for interfering with the free market. By providing incentives for suppliers to produce more of the needed goods, the seemingly exorbitant prices “do far more good than harm.” His conclusion: “Demonizing vendors won’t speed Florida’s recovery. Letting them go about their business will.”<sup>7</sup>

Attorney General Crist (a Republican who would later be elected governor of Florida) published an op-ed piece in the Tampa paper defending the law against price gouging: “In times of emergency, government cannot remain on the sidelines while people are charged unconscionable prices as they flee for their lives or seek the basic commodities for their families after a hurricane.”<sup>8</sup> Crist rejected the notion that these “unconscionable” prices reflected a truly free exchange:

This is not the normal free market situation where willing buyers freely elect to enter into the marketplace and meet willing sellers, where a price is agreed upon based on supply and demand. In an emergency, buyers under duress have no freedom. Their purchases of necessities like safe lodging are forced.<sup>9</sup>

The debate about price gouging that arose in the aftermath of Hurricane Charley raises hard questions of morality and law: Is it wrong for sellers of goods and services to take advantage of a natural disaster by charging whatever the market will bear? If so, what, if anything, should the law do about it? Should the state prohibit price gouging, even if doing so interferes with the freedom of buyers and sellers to make whatever deals they choose?

**Welfare, Freedom, and Virtue**

These questions are not only about how individuals should treat one another. They are also about what the law should be, and about how society should be organized. They are questions about justice. To answer them, we have to explore the meaning of justice. In fact, we've already begun to do so. If you look closely at the price-gouging debate, you'll notice that the arguments for and against price-gouging laws revolve around three ideas: maximizing welfare, respecting freedom, and promoting virtue. Each of these ideas points to a different way of thinking about justice.

The standard case for unfettered markets rests on two claims—one about welfare, the other about freedom. First, markets promote the welfare of society as a whole by providing incentives for people to work hard supplying the goods that other people want. (In common parlance, we often equate welfare with economic prosperity, though welfare is a broader concept that can include noneconomic aspects of social well-being.) Second, markets respect individual freedom; rather than impose a certain value on goods and services, markets let people choose for themselves what value to place on the things they exchange.

Not surprisingly, the opponents of price-gouging laws invoke these two familiar arguments for free markets. How do defenders of price gouging laws respond? First, they argue that the welfare of society as whole is not really served by the exorbitant prices charged in hard times. Even if high prices call forth a greater supply of goods, this benefit has to be weighed against the burden such prices impose on those least able to afford them. For the affluent, paying inflated prices for a gallon of gas or a motel room in a storm may be an annoyance; but for those of modest means, such prices pose a genuine hardship, one that might lead them to stay in harm's way rather than flee to safety. Proponents of price-gouging laws argue that any estimate of the general welfare must include the pain and suffering of those who may be priced out of basic necessities during an emergency.

Second, defenders of price-gouging laws maintain that, under certain conditions, the free market is not truly free. As Crist points out, “buyers under duress have no freedom. Their purchases of necessities like safe lodging are forced.” If you’re fleeing a hurricane with your family, the exorbitant price you pay for gas or shelter is not really a voluntary exchange. It’s something closer to extortion. So to decide whether price-gouging laws are justified, we need to assess these competing accounts of welfare and of freedom.

But we also need to consider one further argument. Much public support for price-gouging laws comes from something more visceral than welfare or freedom. People are outraged at “vultures” who prey on the desperation of others and want them punished—not rewarded with windfall profits. Such sentiments are often dismissed as atavistic emotions that should not interfere with public policy or law. As Jacoby writes, “demonizing vendors won’t speed Florida’s recovery.”<sup>10</sup>

But the outrage at price-gougers is more than mindless anger. It gestures at a moral argument worth taking seriously. Outrage is the special kind of anger you feel when you believe that people are getting things they don’t deserve. Outrage of this kind is anger at injustice.

Crist touched on the moral source of the outrage when he described the “greed that someone must have in their soul to be willing to take advantage of someone suffering in the wake of a hurricane.” He did not explicitly connect this observation to price-gouging laws. But implicit in his comment is something like the following argument, which might be called the virtue argument:

Greed is a vice, a bad way of being, especially when it makes people oblivious to the suffering of others. More than a personal vice, it is at odds with civic virtue. In times of trouble, a good society pulls together. Rather than press for maximum advantage, people look out for one another. A society in which people exploit their neighbors for financial gain in times of crisis is not a good society. Excessive greed is therefore a vice that a good society should discourage if it can. Price-

gouging laws cannot banish greed, but they can at least restrain its most brazen expression, and signal society's disapproval of it. By punishing greedy behavior rather than rewarding it, society affirms the civic virtue of shared sacrifice for the common good.

To acknowledge the moral force of the virtue argument is not to insist that it must always prevail over competing considerations. You might conclude, in some instances, that a hurricane-stricken community should make a devil's bargain—allow price gouging in hopes of attracting an army of roofers and contractors from far and wide, even at the moral cost of sanctioning greed. Repair the roofs now and the social fabric later. What's important to notice, however, is that the debate about price-gouging laws is not simply about welfare and freedom. It is also about virtue—about cultivating the attitudes and dispositions, the qualities of character, on which a good society depends.

Some people, including many who support price-gouging laws, find the virtue argument discomfiting. The reason: It seems more judgmental than arguments that appeal to welfare and freedom. To ask whether a policy will speed economic recovery or spur economic growth does not involve judging people's preferences. It assumes that everyone prefers more income rather than less, and it doesn't pass judgment on how they spend their money. Similarly, to ask whether, under conditions of duress, people are actually free to choose doesn't require evaluating their choices. The question is whether, or to what extent, people are free rather than coerced.

The virtue argument, by contrast, rests on a judgment that greed is a vice that the state should discourage. But who is to judge what is virtue and what is vice? Don't citizens of pluralist societies disagree about such things? And isn't it dangerous to impose judgments about virtue through law? In the face of these worries, many people hold that government should be neutral on matters of virtue and vice; it should not try to cultivate good attitudes or discourage bad ones.

So when we probe our reactions to price gouging, we find ourselves pulled in two directions: We are outraged when people get

things they don't deserve; greed that preys on human misery, we think, should be punished, not rewarded. And yet we worry when judgments about virtue find their way into law.

This dilemma points to one of the great questions of political philosophy: Does a just society seek to promote the virtue of its citizens? Or should law be neutral toward competing conceptions of virtue, so that citizens can be free to choose for themselves the best way to live?

According to the textbook account, this question divides ancient and modern political thought. In one important respect, the textbook is right. Aristotle teaches that justice means giving people what they deserve. And in order to determine who deserves what, we have to determine what virtues are worthy of honor and reward. Aristotle maintains that we can't figure out what a just constitution is without first reflecting on the most desirable way of life. For him, law can't be neutral on questions of the good life.

By contrast, modern political philosophers—from Immanuel Kant in the eighteenth century to John Rawls in the twentieth century—argue that the principles of justice that define our rights should not rest on any particular conception of virtue, or of the best way to live. Instead, a just society respects each person's freedom to choose his or her own conception of the good life.

So you might say that ancient theories of justice start with virtue, while modern theories start with freedom. And in the chapters to come, we explore the strengths and weaknesses of each. But it's worth noticing at the outset that this contrast can mislead.

For if we turn our gaze to the arguments about justice that animate contemporary politics—not among philosophers but among ordinary men and women—we find a more complicated picture. It's true that most of our arguments are about promoting prosperity and respecting individual freedom, at least on the surface. But underlying these arguments, and sometimes contending with them, we can often glimpse another set of convictions—about what virtues are worthy of honor and reward, and what way of life a good society should promote. De-

voted though we are to prosperity and freedom, we can't quite shake off the judgmental strand of justice. The conviction that justice involves virtue as well as choice runs deep. Thinking about justice seems inescapably to engage us in thinking about the best way to live.

### **What Wounds Deserve the Purple Heart?**

On some issues, questions of virtue and honor are too obvious to deny. Consider the recent debate over who should qualify for the Purple Heart. Since 1932, the U.S. military has awarded the medal to soldiers wounded or killed in battle by enemy action. In addition to the honor, the medal entitles recipients to special privileges in veterans' hospitals.

Since the beginning of the current wars in Iraq and Afghanistan, growing numbers of veterans have been diagnosed with post-traumatic stress disorder and treated for the condition. Symptoms include recurring nightmares, severe depression, and suicide. At least three hundred thousand veterans reportedly suffer from traumatic stress or major depression. Advocates for these veterans have proposed that they, too, should qualify for the Purple Heart. Since psychological injuries can be at least as debilitating as physical ones, they argue, soldiers who suffer these wounds should receive the medal.<sup>11</sup>

After a Pentagon advisory group studied the question, the Pentagon announced, in 2009, that the Purple Heart would be reserved for soldiers with physical injuries. Veterans suffering from mental disorders and psychological trauma would not be eligible, even though they qualify for government-supported medical treatment and disability payments. The Pentagon offered two reasons for its decision: traumatic stress disorders are not intentionally caused by enemy action, and they are difficult to diagnose objectively.<sup>12</sup>

Did the Pentagon make the right decision? Taken by themselves, its reasons are unconvincing. In the Iraq War, one of the most common injuries recognized with the Purple Heart has been a punctured eardrum, caused by explosions at close range.<sup>13</sup> But unlike bullets and

bombs, such explosions are not a deliberate enemy tactic intended to injure or kill; they are (like traumatic stress) a damaging side effect of battlefield action. And while traumatic disorders may be more difficult to diagnose than a broken limb, the injury they inflict can be more severe and long-lasting.

As the wider debate about the Purple Heart revealed, the real issue is about the meaning of the medal and the virtues it honors. What, then, are the relevant virtues? Unlike other military medals, the Purple Heart honors sacrifice, not bravery. It requires no heroic act, only an injury inflicted by the enemy. The question is what kind of injury should count.

A veteran's group called the Military Order of the Purple Heart opposed awarding the medal for psychological injuries, claiming that doing so would "debase" the honor. A spokesman for the group stated that "shedding blood" should be an essential qualification.<sup>14</sup> He didn't explain why bloodless injuries shouldn't count. But Tyler E. Boudreau, a former Marine captain who favors including psychological injuries, offers a compelling analysis of the dispute. He attributes the opposition to a deep-seated attitude in the military that views post-traumatic stress as a kind of weakness. "The same culture that demands tough-mindedness also encourages skepticism toward the suggestion that the violence of war can hurt the healthiest of minds . . . Sadly, as long as our military culture bears at least a quiet contempt for the psychological wounds of war, it is unlikely those veterans will ever see a Purple Heart."<sup>15</sup>

So the debate over the Purple Heart is more than a medical or clinical dispute about how to determine the veracity of injury. At the heart of the disagreement are rival conceptions of moral character and military valor. Those who insist that only bleeding wounds should count believe that post-traumatic stress reflects a weakness of character unworthy of honor. Those who believe that psychological wounds should qualify argue that veterans suffering long-term trauma and severe depression have sacrificed for their country as surely, and as honorably, as those who've lost a limb.



The dispute over the Purple Heart illustrates the moral logic of Aristotle's theory of justice. We can't determine who deserves a military medal without asking what virtues the medal properly honors. And to answer that question, we have to assess competing conceptions of character and sacrifice.

It might be argued that military medals are a special case, a throw-back to an ancient ethic of honor and virtue. These days, most of our arguments about justice are about how to distribute the fruits of prosperity, or the burdens of hard times, and how to define the basic rights of citizens. In these domains, considerations of welfare and freedom predominate. But arguments about the rights and wrongs of economic arrangements often lead us back to Aristotle's question of what people morally deserve, and why.

### **Bailout Outrage**

The public furor over the financial crisis of 2008–09 is a case in point. For years, stock prices and real estate values had climbed. The reckoning came when the housing bubble burst. Wall Street banks and financial institutions had made billions of dollars on complex investments backed by mortgages whose value now plunged. Once proud Wall Street firms teetered on the edge of collapse. The stock market tanked, devastating not only big investors but also ordinary Americans, whose retirement accounts lost much of their value. The total wealth of American families fell by \$11 trillion in 2008, an amount equal to the combined annual output of Germany, Japan, and the UK.<sup>16</sup>

In October 2008, President George W. Bush asked Congress for \$700 billion to bail out the nation's big banks and financial firms. It didn't seem fair that Wall Street had enjoyed huge profits during the good times and was now asking taxpayers to foot the bill when things had gone bad. But there seemed no alternative. The banks and financial firms had grown so vast and so entwined with every aspect of the econ-

omy that their collapse might bring down the entire financial system. They were “too big to fail.”

No one claimed that the banks and investment houses deserved the money. Their reckless bets (enabled by inadequate government regulation) had created the crisis. But here was a case where the welfare of the economy as a whole seemed to outweigh considerations of fairness. Congress reluctantly appropriated the bailout funds.

Then came the bonuses. Shortly after the bailout money began to flow, news accounts revealed that some of the companies now on the public dole were awarding millions of dollars in bonuses to their executives. The most egregious case involved the American International Group (A.I.G.), an insurance giant brought to ruin by the risky investments of its financial products unit. Despite having been rescued with massive infusions of government funds (totaling \$173 billion), the company paid \$165 million in bonuses to executives in the very division that had precipitated the crisis. Seventy-three employees received bonuses of \$1 million or more.<sup>17</sup>

News of the bonuses set off a firestorm of public protest. This time, the outrage was not about ten-dollar bags of ice or overpriced motel rooms. It was about lavish rewards subsidized with taxpayer funds to members of the division that had helped bring the global financial system to near meltdown. Something was wrong with this picture. Although the U.S. government now owned 80 percent of the company, the treasury secretary pleaded in vain with A.I.G.’s government-appointed CEO to rescind the bonuses. “We cannot attract and retain the best and the brightest talent,” the CEO replied, “if employees believe their compensation is subject to continued and arbitrary adjustment by the U.S. Treasury.” He claimed the employees’ talents were needed to unload the toxic assets for the benefit of the taxpayers, who, after all, owned most of the company.<sup>18</sup>

The public reacted with fury. A full-page headline in the tabloid *New York Post* captured the sentiments of many: “Not So Fast You Greedy

Bastards.”<sup>19</sup> The U.S. House of Representatives sought to claw back the payments by approving a bill that would impose a 90 percent tax on bonuses paid to employees of companies that received substantial bailout funds.<sup>20</sup> Under pressure from New York attorney general Andrew Cuomo, fifteen of the top twenty A.I.G. bonus recipients agreed to return the payments, and some \$50 million was recouped in all.<sup>21</sup> This gesture assuaged public anger to some degree, and support for the punitive tax measure faded in the Senate.<sup>22</sup> But the episode left the public reluctant to spend more to clean up the mess the financial industry had created.

At the heart of the bailout outrage was a sense of injustice. Even before the bonus issue erupted, public support for the bailout was hesitant and conflicted. Americans were torn between the need to prevent an economic meltdown that would hurt everyone and their belief that funneling massive sums to failed banks and investment companies was deeply unfair. To avoid economic disaster, Congress and the public acceded. But morally speaking, it had felt all along like a kind of extortion.

Underlying the bailout outrage was a belief about moral desert: The executives receiving the bonuses (and the companies receiving the bailouts) didn't deserve them. But why didn't they? The reason may be less obvious than it seems. Consider two possible answers—one is about greed, the other about failure.

One source of outrage was that the bonuses seemed to reward greed, as the tabloid headline indelicately suggested. The public found this morally unpalatable. Not only the bonuses but the bailout as a whole seemed, perversely, to reward greedy behavior rather than punish it. The derivatives traders had landed their company, and the country, in dire financial peril—by making reckless investments in pursuit of ever-greater profits. Having pocketed the profits when times were good, they saw nothing wrong with million-dollar bonuses even after their investments had come to ruin.<sup>23</sup>

The greed critique was voiced not only by the tabloids, but also (in more decorous versions) by public officials. Senator Sherrod Brown

(D-Ohio) said that A.I.G.'s behavior "smacks of greed, arrogance, and worse."<sup>24</sup> President Obama stated that A.I.G. "finds itself in financial distress due to recklessness and greed."<sup>25</sup>

The problem with the greed critique is that it doesn't distinguish the rewards bestowed by the bailout after the crash from the rewards bestowed by markets when times were flush. Greed is a vice, a bad attitude, an excessive, single-minded desire for gain. So it's understandable that people aren't keen to reward it. But is there any reason to assume that the recipients of bailout bonuses are any greedier now than they were a few years ago, when they were riding high and reaping even greater rewards?

Wall Street traders, bankers, and hedge fund managers are a hard-charging lot. The pursuit of financial gain is what they do for a living. Whether or not their vocation taints their character, their virtue is unlikely to rise or fall with the stock market. So if it's wrong to reward greed with big bailout bonuses, isn't it also wrong to reward it with market largess? The public was outraged when, in 2008, Wall Street firms (some on taxpayer-subsidized life support) handed out \$16 billion in bonuses. But this figure was less than half the amounts paid out in 2006 (\$34 billion) and 2007 (\$33 billion).<sup>26</sup> If greed is the reason they don't deserve the money now, on what basis can it be said they deserved the money then?

One obvious difference is that bailout bonuses come from the taxpayer while the bonuses paid in good times come from company earnings. If the outrage is based on the conviction that the bonuses are undeserved, however, the source of the payment is not morally decisive. But it does provide a clue: the reason the bonuses are coming from the taxpayer is that the companies have failed. This takes us to the heart of the complaint. The American public's real objection to the bonuses—and the bailout—is not that they reward greed but that they reward failure.

Americans are harder on failure than on greed. In market-driven societies, ambitious people are expected to pursue their interests vig-

orously, and the line between self-interest and greed often blurs. But the line between success and failure is etched more sharply. And the idea that people deserve the rewards that success bestows is central to the American dream.

Notwithstanding his passing reference to greed, President Obama understood that rewarding failure was the deeper source of dissonance and outrage. In announcing limits on executive pay at companies receiving bailout funds, Obama identified the real source of bailout outrage:

This is America. We don't disparage wealth. We don't begrudge anybody for achieving success. And we certainly believe that success should be rewarded. But what gets people upset—and rightfully so—are executives being rewarded for failure, especially when those rewards are subsidized by U.S. taxpayers.<sup>27</sup>

One of the most bizarre statements about bailout ethics came from Senator Charles Grassley (R-Iowa), a fiscal conservative from the heartland. At the height of the bonus furor, Grassley said in an Iowa radio interview that what bothered him most was the refusal of the corporate executives to take any blame for their failures. He would “feel a bit better towards them if they would follow the Japanese example and come before the American people and take that deep bow and say, ‘I’m sorry,’ and then either do one of two things—resign or go commit suicide.”<sup>28</sup>

Grassley later explained that he was not calling on the executives to commit suicide. But he did want them to accept responsibility for their failure, to show contrition, and to offer a public apology. “I haven’t heard this from CEOs, and it just makes it very difficult for the taxpayers of my district to just keep shoveling money out the door.”<sup>29</sup>

Grassley’s comments support my hunch that the bailout anger was not mainly about greed; what most offended Americans’ sense of justice was that their tax dollars were being used to reward failure.

If that's right, it remains to ask whether this view of the bailouts was justified. Were the CEOs and top executives of the big banks and investment firms really to blame for the financial crisis? Many of the executives didn't think so. Testifying before congressional committees investigating the financial crisis, they insisted they had done all they could with the information available to them. The former chief executive of Bear Stearns, a Wall Street investment firm that collapsed in 2008, said he'd pondered long and hard whether he could have done anything differently. He concluded he'd done all he could. "I just simply have not been able to come up with anything . . . that would have made a difference to the situation we faced."<sup>30</sup>

Other CEOs of failed companies agreed, insisting that they were victims "of a financial tsunami" beyond their control.<sup>31</sup> A similar attitude extended to young traders, who had a hard time understanding the public's fury about their bonuses. "There's no sympathy for us anywhere," a Wall Street trader told a reporter for *Vanity Fair*. "But it's not as if we weren't working hard."<sup>32</sup>

The tsunami metaphor became part of bailout vernacular, especially in financial circles. If the executives are right that the failure of their companies was due to larger economic forces, not their own decisions, this would explain why they didn't express the remorse that Senator Grassley wanted to hear. But it also raises a far-reaching question about failure, success, and justice.

If big, systemic economic forces account for the disastrous losses of 2008 and 2009, couldn't it be argued that they also account for the dazzling gains of earlier years? If the weather is to blame for the bad years, how can it be that the talent, wisdom, and hard work of bankers, traders, and Wall Street executives are responsible for the stupendous returns that occurred when the sun was shining?

Confronted with public outrage over paying bonuses for failure, the CEOs argued that financial returns are not wholly their own doing, but the product of forces beyond their control. They may have a point.

But if this is true, there's good reason to question their claim to outsized compensation when times are good. Surely the end of the cold war, the globalization of trade and capital markets, the rise of personal computers and the Internet, and a host of other factors help explain the success of the financial industry during its run in the 1990s and in the early years of the twenty-first century.

In 2007, CEOs at major U.S. corporations were paid 344 times the pay of the average worker.<sup>33</sup> On what grounds, if any, do executives deserve to make that much more than their employees? Most of them work hard and bring talent to their work. But consider this: In 1980, CEOs earned only 42 times what their workers did.<sup>34</sup> Were executives less talented and hardworking in 1980 than they are today? Or do pay differentials reflect contingencies unrelated to talents and skills?

Or compare the level of executive compensation in the United States with that in other countries. CEOs at top U.S. companies earn an average of \$13.3 million per year (using 2004–2006 data), compared to \$6.6 million for European chief executives and \$1.5 million for CEOs in Japan.<sup>35</sup> Are American executives twice as deserving as their European counterparts, and nine times as deserving as Japanese CEOs? Or do these differences also reflect factors unrelated to the effort and talent that executives bring to their jobs?

The bailout outrage that gripped the United States in early 2009 expressed the widely held view that people who wreck the companies they run with risky investments don't deserve to be rewarded with millions of dollars in bonuses. But the argument over the bonuses raises questions about who deserves what when times are good. Do the successful deserve the bounty that markets bestow upon them, or does that bounty depend on factors beyond their control? And what are the implications for the mutual obligations of citizens—in good times and hard times? Whether the financial crisis will prompt public debate on these broader questions remains to be seen.

### Three Approaches to Justice

To ask whether a society is just is to ask how it distributes the things we prize—income and wealth, duties and rights, powers and opportunities, offices and honors. A just society distributes these goods in the right way; it gives each person his or her due. The hard questions begin when we ask what people are due, and why.

We've already begun to wrestle with these questions. As we've pondered the rights and wrongs of price gouging, competing claims to the Purple Heart, and financial bailouts, we've identified three ways of approaching the distribution of goods: welfare, freedom, and virtue. Each of these ideals suggests a different way of thinking about justice.

Some of our debates reflect disagreement about what it means to maximize welfare or respect freedom or cultivate virtue. Others involve disagreement about what to do when these ideals conflict. Political philosophy cannot resolve these disagreements once and for all. But it can give shape to the arguments we have, and bring moral clarity to the alternatives we confront as democratic citizens.

This book explores the strengths and weaknesses of these three ways of thinking about justice. We begin with the idea of maximizing welfare. For market societies such as ours, it offers a natural starting point. Much contemporary political debate is about how to promote prosperity, or improve our standard of living, or spur economic growth. Why do we care about these things? The most obvious answer is that we think prosperity makes us better off than we would otherwise be—as individuals and as a society. Prosperity matters, in other words, because it contributes to our welfare. To explore this idea, we turn to utilitarianism, the most influential account of how and why we should maximize welfare, or (as the utilitarians put it) seek the greatest happiness for the greatest number.

Next, we take up a range of theories that connect justice to freedom. Most of these theories emphasize respect for individual rights,



though they disagree among themselves about which rights are most important. The idea that justice means respecting freedom and individual rights is at least as familiar in contemporary politics as the utilitarian idea of maximizing welfare. For example, the U.S. Bill of Rights sets out certain liberties—including rights to freedom of speech and religious liberty—that even majorities may not violate. And around the world, the idea that justice means respecting certain universal human rights is increasingly embraced (in theory, if not always in practice).

The approach to justice that begins with freedom is a capacious school. In fact, some of the most hard-fought political arguments of our time take place between two rival camps within it—the *laissez-faire* camp and the fairness camp. Leading the *laissez-faire* camp are free-market libertarians who believe that justice consists in respecting and upholding the voluntary choices made by consenting adults. The fairness camp contains theorists of a more egalitarian bent. They argue that unfettered markets are neither just nor free. In their view, justice requires policies that remedy social and economic disadvantages and give everyone a fair chance at success.

Finally, we turn to theories that see justice as bound up with virtue and the good life. In contemporary politics, virtue theories are often identified with cultural conservatives and the religious right. The idea of legislating morality is anathema to many citizens of liberal societies, as it risks lapsing into intolerance and coercion. But the notion that a just society affirms certain virtues and conceptions of the good life has inspired political movements and arguments across the ideological spectrum. Not only the Taliban, but also abolitionists and Martin Luther King, Jr., have drawn their visions of justice from moral and religious ideals.

Before attempting to assess these theories of justice, it's worth asking how philosophical arguments can proceed—especially in so contested a domain as moral and political philosophy. They often begin with concrete situations. As we've seen in our discussion of price gouging, Purple Hearts, and bailouts, moral and political reflection finds its occasion in disagreement. Often the disagreements are among parti-

sans or rival advocates in the public realm. Sometimes the disagreements are within us as individuals, as when we find ourselves torn or conflicted about a hard moral question.

But how exactly can we reason our way from the judgments we make about concrete situations to the principles of justice we believe should apply in all situations? What, in short, does moral reasoning consist in?

To see how moral reasoning can proceed, let's turn to two situations—one a fanciful hypothetical story much discussed by philosophers, the other an actual story about an excruciating moral dilemma.

Consider first this philosopher's hypothetical.<sup>36</sup> Like all such tales, it involves a scenario stripped of many realistic complexities, so that we can focus on a limited number of philosophical issues.

### **The Runaway Trolley**

Suppose you are the driver of a trolley car hurtling down the track at sixty miles an hour. Up ahead you see five workers standing on the track, tools in hand. You try to stop, but you can't. The brakes don't work. You feel desperate, because you know that if you crash into these five workers, they will all die. (Let's assume you know that for sure.)

Suddenly, you notice a side track, off to the right. There is a worker on that track, too, but only one. You realize that you can turn the trolley car onto the side track, killing the one worker, but sparing the five.

What should you do? Most people would say, "Turn! Tragic though it is to kill one innocent person, it's even worse to kill five." Sacrificing one life in order to save five does seem the right thing to do.

Now consider another version of the trolley story. This time, you are not the driver but an onlooker, standing on a bridge overlooking the track. (This time, there is no side track.) Down the track comes a trolley, and at the end of the track are five workers. Once again, the brakes don't work. The trolley is about to crash into the five workers. You feel helpless to avert this disaster—until you notice, standing next to you on the bridge, a very heavy man. You could push him off the

bridge, onto the track, into the path of the oncoming trolley. He would die, but the five workers would be saved. (You consider jumping onto the track yourself, but realize you are too small to stop the trolley.)

Would pushing the heavy man onto the track be the right thing to do? Most people would say, “Of course not. It would be terribly wrong to push the man onto the track.”

Pushing someone off a bridge to a certain death does seem an awful thing to do, even if it saves five innocent lives. But this raises a moral puzzle: Why does the principle that seems right in the first case—sacrifice one life to save five—seem wrong in the second?

If, as our reaction to the first case suggests, numbers count—if it is better to save five lives than one—then why shouldn’t we apply this principle in the second case, and push? It does seem cruel to push a man to his death, even for a good cause. But is it any less cruel to kill a man by crashing into him with a trolley car?

Perhaps the reason it is wrong to push is that doing so uses the man on the bridge against his will. He didn’t choose to be involved, after all. He was just standing there.

But the same could be said of the person working on the side track. He didn’t choose to be involved, either. He was just doing his job, not volunteering to sacrifice his life in the event of a runaway trolley. It might be argued that railway workers willingly incur a risk that bystanders do not. But let’s assume that being willing to die in an emergency to save other people’s lives is not part of the job description, and that the worker has no more consented to give his life than the bystander on the bridge has consented to give his.

Maybe the moral difference lies not in the effect on the victims—both wind up dead—but in the intention of the person making the decision. As the driver of the trolley, you might defend your choice to divert the trolley by pointing out that you didn’t *intend* the death of the worker on the side track, foreseeable though it was; your purpose would still have been achieved if, by a great stroke of luck, the five workers were spared and the sixth also managed to survive.

But the same is true in the pushing case. The death of the man you push off the bridge is not essential to your purpose. All he needs to do is block the trolley; if he can do so and somehow survive, you would be delighted.

Or perhaps, on reflection, the two cases should be governed by the same principle. Both involve a deliberate choice to take the life of one innocent person in order to prevent an even greater loss of life. Perhaps your reluctance to push the man off the bridge is mere squeamishness, a hesitation you should overcome. Pushing a man to his death with your bare hands does seem more cruel than turning the steering wheel of a trolley. But doing the right thing is not always easy.

We can test this idea by altering the story slightly. Suppose you, as the onlooker, could cause the large man standing next to you to fall onto the track without pushing him; imagine he is standing on a trap door that you could open by turning a steering wheel. No pushing, same result. Would that make it the right thing to do? Or is it still morally worse than for you, as the trolley driver, to turn onto the side track?

It is not easy to explain the moral difference between these cases—why turning the trolley seems right, but pushing the man off the bridge seems wrong. But notice the pressure we feel to reason our way to a convincing distinction between them—and if we cannot, to reconsider our judgment about the right thing to do in each case. We sometimes think of moral reasoning as a way of persuading other people. But it is also a way of sorting out our own moral convictions, of figuring out what we believe and why.

Some moral dilemmas arise from conflicting moral principles. For example, one principle that comes into play in the trolley story says we should save as many lives as possible, but another says it is wrong to kill an innocent person, even for a good cause. Confronted with a situation in which saving a number of lives depends on killing an innocent person, we face a moral quandary. We must try to figure out which principle has greater weight, or is more appropriate under the circumstances.

Other moral dilemmas arise because we are uncertain how events will unfold. Hypothetical examples such as the trolley story remove the uncertainty that hangs over the choices we confront in real life. They assume we know for sure how many will die if we don't turn—or don't push. This makes such stories imperfect guides to action. But it also makes them useful devices for moral analysis. By setting aside contingencies—"What if the workers noticed the trolley and jumped aside in time?"—hypothetical examples help us to isolate the moral principles at stake and examine their force.

### **The Afghan Goatherds**

Consider now an actual moral dilemma, similar in some ways to the fanciful tale of the runaway trolley, but complicated by uncertainty about how things will turn out:

In June 2005, a special forces team made up of Petty Officer Marcus Luttrell and three other U.S. Navy SEALs set out on a secret reconnaissance mission in Afghanistan, near the Pakistan border, in search of a Taliban leader, a close associate of Osama bin Laden.<sup>37</sup> According to intelligence reports, their target commanded 140 to 150 heavily armed fighters and was staying in a village in the forbidding mountainous region.

Shortly after the special forces team took up a position on a mountain ridge overlooking the village, two Afghan farmers with about a hundred bleating goats happened upon them. With them was a boy about fourteen years old. The Afghans were unarmed. The American soldiers trained their rifles on them, motioned for them to sit on the ground, and then debated what to do about them. On the one hand, the goatherds appeared to be unarmed civilians. On the other hand, letting them go would run the risk that they would inform the Taliban of the presence of the U.S. soldiers.

As the four soldiers contemplated their options, they realized that they didn't have any rope, so tying up the Afghans to allow time to find

a new hideout was not feasible. The only choice was to kill them or let them go free.

One of Luttrell's comrades argued for killing the goatherds: "We're on active duty behind enemy lines, sent here by our senior commanders. We have a right to do everything we can to save our own lives. The military decision is obvious. To turn them loose would be wrong."<sup>38</sup> Luttrell was torn. "In my soul, I knew he was right," he wrote in retrospect. "We could not possibly turn them loose. But my trouble is, I have another soul. My Christian soul. And it was crowding in on me. Something kept whispering in the back of my mind, it would be wrong to execute these unarmed men in cold blood."<sup>39</sup> Luttrell didn't say what he meant by his Christian soul, but in the end, his conscience didn't allow him to kill the goatherds. He cast the deciding vote to release them. (One of his three comrades had abstained.) It was a vote he came to regret.

About an hour and a half after they released the goatherds, the four soldiers found themselves surrounded by eighty to a hundred Taliban fighters armed with AK-47s and rocket-propelled grenades. In the fierce firefight that followed, all three of Luttrell's comrades were killed. The Taliban fighters also shot down a U.S. helicopter that sought to rescue the SEAL unit, killing all sixteen soldiers on board.

Luttrell, severely injured, managed to survive by falling down the mountainside and crawling seven miles to a Pashtun village, whose residents protected him from the Taliban until he was rescued.

In retrospect, Luttrell condemned his own vote not to kill the goatherds. "It was the stupidest, most southern-fried, lamebrained decision I ever made in my life," he wrote in a book about the experience. "I must have been out of my mind. I had actually cast a vote which I knew could sign our death warrant. . . . At least, that's how I look back on those moments now. . . . The deciding vote was mine, and it will haunt me till they rest me in an East Texas grave."<sup>40</sup>

Part of what made the soldiers' dilemma so difficult was uncertainty about what would happen if they released the Afghans. Would

they simply go on their way, or would they alert the Taliban? But suppose Luttrell knew that freeing the goatherds would lead to a devastating battle resulting in the loss of his comrades, nineteen American deaths, injury to himself, and the failure of his mission? Would he have decided differently?

For Luttrell, looking back, the answer is clear: he should have killed the goatherds. Given the disaster that followed, it is hard to disagree. From the standpoint of numbers, Luttrell's choice is similar to the trolley case. Killing the three Afghans would have saved the lives of his three comrades and the sixteen U.S. troops who tried to rescue them. But which version of the trolley story does it resemble? Would killing the goatherds be more like turning the trolley or pushing the man off the bridge? The fact that Luttrell anticipated the danger and still could not bring himself to kill unarmed civilians in cold blood suggests it may be closer to the pushing case.

And yet the case for killing the goatherds seems somehow stronger than the case for pushing the man off the bridge. This may be because we suspect that—given the outcome—they were not innocent bystanders, but Taliban sympathizers. Consider an analogy: If we had reason to believe that the man on the bridge was responsible for disabling the brakes of the trolley in hopes of killing the workers on the track (let's say they were his enemies), the moral argument for pushing him onto the track would begin to look stronger. We would still need to know who his enemies were, and why he wanted to kill them. If we learned that the workers on the track were members of the French resistance and the heavy man on the bridge a Nazi who had sought to kill them by disabling the trolley, the case for pushing him to save them would become morally compelling.

It is possible, of course, that the Afghan goatherds were not Taliban sympathizers, but neutrals in the conflict, or even Taliban opponents, who were forced by the Taliban to reveal the presence of the American troops. Suppose Luttrell and his comrades knew for certain that the goatherds meant them no harm, but would be tortured by the Taliban

to reveal their location. The Americans might have killed the goatherds to protect their mission and themselves. But the decision to do so would have been more wrenching (and morally more questionable) than if they knew the goatherds to be pro-Taliban spies.

### **Moral Dilemmas**

Few of us face choices as fateful as those that confronted the soldiers on the mountain or the witness to the runaway trolley. But wrestling with their dilemmas sheds light on the way moral argument can proceed, in our personal lives and in the public square.

Life in democratic societies is rife with disagreement about right and wrong, justice and injustice. Some people favor abortion rights, and others consider abortion to be murder. Some believe fairness requires taxing the rich to help the poor, while others believe it is unfair to tax away money people have earned through their own efforts. Some defend affirmative action in college admissions as a way of righting past wrongs, whereas others consider it an unfair form of reverse discrimination against people who deserve admission on their merits. Some people reject the torture of terror suspects as a moral abomination unworthy of a free society, while others defend it as a last resort to prevent a terrorist attack.

Elections are won and lost on these disagreements. The so-called culture wars are fought over them. Given the passion and intensity with which we debate moral questions in public life, we might be tempted to think that our moral convictions are fixed once and for all, by upbringing or faith, beyond the reach of reason.

But if this were true, moral persuasion would be inconceivable, and what we take to be public debate about justice and rights would be nothing more than a volley of dogmatic assertions, an ideological food fight.

At its worst, our politics comes close to this condition. But it need not be this way. Sometimes, an argument can change our minds.



How, then, can we reason our way through the contested terrain of justice and injustice, equality and inequality, individual rights and the common good? This book tries to answer that question.

One way to begin is to notice how moral reflection emerges naturally from an encounter with a hard moral question. We start with an opinion, or a conviction, about the right thing to do: “Turn the trolley onto the side track.” Then we reflect on the reason for our conviction, and seek out the principle on which it is based: “Better to sacrifice one life to avoid the death of many.” Then, confronted with a situation that confounds the principle, we are pitched into confusion: “I thought it was always right to save as many lives as possible, and yet it seems wrong to push the man off the bridge (or to kill the unarmed goat-herds).” Feeling the force of that confusion, and the pressure to sort it out, is the impulse to philosophy.

Confronted with this tension, we may revise our judgment about the right thing to do, or rethink the principle we initially espoused. As we encounter new situations, we move back and forth between our judgments and our principles, revising each in light of the other. This turning of mind, from the world of action to the realm of reasons and back again, is what moral reflection consists in.

This way of conceiving moral argument, as a dialectic between our judgments about particular situations and the principles we affirm on reflection, has a long tradition. It goes back to the dialogues of Socrates and the moral philosophy of Aristotle. But notwithstanding its ancient lineage, it is open to the following challenge:

If moral reflection consists in seeking a fit between the judgments we make and the principles we affirm, how can such reflection lead us to justice, or moral truth? Even if we succeed, over a lifetime, in bringing our moral intuitions and principled commitments into alignment, what confidence can we have that the result is anything more than a self-consistent skein of prejudice?

The answer is that moral reflection is not a solitary pursuit but a public endeavor. It requires an interlocutor—a friend, a neighbor, a

comrade, a fellow citizen. Sometimes the interlocutor can be imagined rather than real, as when we argue with ourselves. But we cannot discover the meaning of justice or the best way to live through introspection alone.

In Plato's *Republic*, Socrates compares ordinary citizens to a group of prisoners confined in a cave. All they ever see is the play of shadows on the wall, a reflection of objects they can never apprehend. Only the philosopher, in this account, is able to ascend from the cave to the bright light of day, where he sees things as they really are. Socrates suggests that, having glimpsed the sun, only the philosopher is fit to rule the cave dwellers, if he can somehow be coaxed back into the darkness where they live.

Plato's point is that to grasp the meaning of justice and the nature of the good life, we must rise above the prejudices and routines of everyday life. He is right, I think, but only in part. The claims of the cave must be given their due. If moral reflection is dialectical—if it moves back and forth between the judgments we make in concrete situations and the principles that inform those judgments—it needs opinions and convictions, however partial and untutored, as ground and grist. A philosophy untouched by the shadows on the wall can only yield a sterile utopia.

When moral reflection turns political, when it asks what laws should govern our collective life, it needs some engagement with the tumult of the city, with the arguments and incidents that roil the public mind. Debates over bailouts and price gouging, income inequality and affirmative action, military service and same-sex marriage, are the stuff of political philosophy. They prompt us to articulate and justify our moral and political convictions, not only among family and friends but also in the demanding company of our fellow citizens.

More demanding still is the company of political philosophers, ancient and modern, who thought through, in sometimes radical and surprising ways, the ideas that animate civic life—justice and rights, obligation and consent, honor and virtue, morality and law. Aristotle,

Immanuel Kant, John Stuart Mill, and John Rawls all figure in these pages. But their order of appearance is not chronological. This book is not a history of ideas, but a journey in moral and political reflection. Its goal is not to show who influenced whom in the history of political thought, but to invite readers to subject their own views about justice to critical examination—to figure out what they think, and why.

## 2. THE GREATEST HAPPINESS PRINCIPLE / UTILITARIANISM

**In the summer of 1884**, four English sailors were stranded at sea in a small lifeboat in the South Atlantic, over a thousand miles from land. Their ship, the *Mignonette*, had gone down in a storm, and they had escaped to the lifeboat, with only two cans of preserved turnips and no fresh water. Thomas Dudley was the captain, Edwin Stephens was the first mate, and Edmund Brooks was a sailor—“all men of excellent character,” according to newspaper accounts.<sup>1</sup>

The fourth member of the crew was the cabin boy, Richard Parker, age seventeen. He was an orphan, on his first long voyage at sea. He had signed up against the advice of his friends, “in the hopefulness of youthful ambition,” thinking the journey would make a man of him. Sadly, it was not to be.

From the lifeboat, the four stranded sailors watched the horizon, hoping a ship might pass and rescue them. For the first three days, they ate small rations of turnips. On the fourth day, they caught a turtle. They subsisted on the turtle and the remaining turnips for the next few days. And then for eight days, they ate nothing.

By now Parker, the cabin boy, was lying in the corner of the lifeboat. He had drunk seawater, against the advice of the others, and become ill. He appeared to be dying. On the nineteenth day of their ordeal, Dudley, the captain, suggested drawing lots to determine who

would die so that the others might live. But Brooks refused, and no lots were drawn.

The next day came, and still no ship was in sight. Dudley told Brooks to avert his gaze and motioned to Stephens that Parker had to be killed. Dudley offered a prayer, told the boy his time had come, and then killed him with a penknife, stabbing him in the jugular vein. Brooks emerged from his conscientious objection to share in the gruesome bounty. For four days, the three men fed on the body and blood of the cabin boy.

And then help came. Dudley describes their rescue in his diary, with staggering euphemism: “On the 24th day, as we were having our breakfast,” a ship appeared at last. The three survivors were picked up. Upon their return to England, they were arrested and tried. Brooks turned state’s witness. Dudley and Stephens went to trial. They freely confessed that they had killed and eaten Parker. They claimed they had done so out of necessity.

Suppose you were the judge. How would you rule? To simplify things, put aside the question of law and assume that you were asked to decide whether killing the cabin boy was morally permissible.

The strongest argument for the defense is that, given the dire circumstances, it was necessary to kill one person in order to save three. Had no one been killed and eaten, all four would likely have died. Parker, weakened and ill, was the logical candidate, since he would soon have died anyway. And unlike Dudley and Stephens, he had no dependents. His death deprived no one of support and left no grieving wife or children.

This argument is open to at least two objections: First, it can be asked whether the benefits of killing the cabin boy, taken as a whole, really did outweigh the costs. Even counting the number of lives saved and the happiness of the survivors and their families, allowing such a killing might have bad consequences for society as a whole—weakening the norm against murder, for example, or increasing people’s ten-

dency to take the law into their own hands, or making it more difficult for captains to recruit cabin boys.

Second, even if, all things considered, the benefits do outweigh the costs, don't we have a nagging sense that killing and eating a defenseless cabin boy is wrong for reasons that go beyond the calculation of social costs and benefits? Isn't it wrong to use a human being in this way—exploiting his vulnerability, taking his life without his consent—even if doing so benefits others?

To anyone appalled by the actions of Dudley and Stephens, the first objection will seem a tepid complaint. It accepts the utilitarian assumption that morality consists in weighing costs and benefits, and simply wants a fuller reckoning of the social consequences.

If the killing of the cabin boy is worthy of moral outrage, the second objection is more to the point. It rejects the idea that the right thing to do is simply a matter of calculating consequences—costs and benefits. It suggests that morality means something more—something to do with the proper way for human beings to treat one another.

These two ways of thinking about the lifeboat case illustrate two rival approaches to justice. The first approach says the morality of an action depends solely on the consequences it brings about; the right thing to do is whatever will produce the best state of affairs, all things considered. The second approach says that consequences are not all we should care about, morally speaking; certain duties and rights should command our respect, for reasons independent of the social consequences.

In order to resolve the lifeboat case, as well as many less extreme dilemmas we commonly encounter, we need to explore some big questions of moral and political philosophy: Is morality a matter of counting lives and weighing costs and benefits, or are certain moral duties and human rights so fundamental that they rise above such calculations? And if certain rights are fundamental in this way—be they natural, or sacred, or inalienable, or categorical—how can we identify them? And what makes them fundamental?

### Jeremy Bentham's Utilitarianism

Jeremy Bentham (1748–1832) left no doubt where he stood on this question. He heaped scorn on the idea of natural rights, calling them “nonsense upon stilts.” The philosophy he launched has had an influential career. In fact, it exerts a powerful hold on the thinking of policy-makers, economists, business executives, and ordinary citizens to this day.

Bentham, an English moral philosopher and legal reformer, founded the doctrine of utilitarianism. Its main idea is simply stated and intuitively appealing: The highest principle of morality is to maximize happiness, the overall balance of pleasure over pain. According to Bentham, the right thing to do is whatever will maximize utility. By “utility,” he means whatever produces pleasure or happiness, and whatever prevents pain or suffering.

Bentham arrives at his principle by the following line of reasoning: We are all governed by the feelings of pain and pleasure. They are our “sovereign masters.” They govern us in everything we do and also determine what we ought to do. The standard of right and wrong is “fastened to their throne.”<sup>2</sup>

We all like pleasure and dislike pain. The utilitarian philosophy recognizes this fact, and makes it the basis of moral and political life. Maximizing utility is a principle not only for individuals but also for legislators. In deciding what laws or policies to enact, a government should do whatever will maximize the happiness of the community as a whole. What, after all, is a community? According to Bentham, it is “a fictitious body,” composed of the sum of the individuals who comprise it. Citizens and legislators should therefore ask themselves this question: If we add up all of the benefits of this policy, and subtract all the costs, will it produce more happiness than the alternative?

Bentham’s argument for the principle that we should maximize utility takes the form of a bold assertion: There are no possible grounds for rejecting it. Every moral argument, he claims, must implicitly draw on the idea of maximizing happiness. People may say they believe in cer-