Legal philosophy is inconceivable without an examination of the fundamental ideas of rights and justice. Rights, legal and moral, pervade the law and legal system, and are thus a central concern of jurisprudence. And the ideal of justice is both a vaunted virtue of domestic legal systems and, in its claims of universality, aspires to transcend law itself.

Individuals and groups are nowadays quick to assert their right to almost anything, and are no less adroit in claiming that their rights have been violated. Increasing pressure is put on governments and international organizations to safeguard and advance the rights of women, of minorities, and of citizens in general. The enactment of bills of rights in many countries has imposed new duties on courts to recognize rights that are either explicitly or implicitly protected.

What is a right? Is there a distinction between my rights as recognized by the law, and rights that I believe I ought to have? What of the problems generated by the escalating variety of human rights that individuals demand? Is it appropriate to insist on such rights when – in the case, say, of the right to work or the right to education – they entail considerable public expenditure?

While legal theory seeks answers to some of these questions, its chief preoccupation has been to define the concept of a right, and to
develop theories to support or explain the nature of rights, and how competing rights are to be reconciled.

There are two major theories of rights. The first is known as the ‘will’ theory, and holds that, when I have a right to do something, what is effectively protected is my choice whether or not to do it. It accentuates my freedom and self-fulfilment. The second theory, known as the ‘interest’ theory, claims that the purpose of rights is to protect, not my individual choice, but certain of my interests. It is generally regarded as a superior account of what it is to have a right.

Those who espouse this theory raise two main arguments against the will theory. First, they refute the view that the essence of a right is the power to waive someone else’s duty. Sometimes, they argue, the law limits my power of waiver without destroying my substantive right (e.g. I cannot consent to murder or contract out of certain rights). Secondly, there is a distinction between the substantive right and the right to enforce it. Thus children clearly lack the capacity or choice to waive such rights, but it would be absurd, they say, to argue that therefore children have no rights.

### Hohfeld

The springboard for any analysis of rights is normally the well-known analysis by the American jurist, Wesley Hohfeld (1879–1918). He attempted to elucidate the proposition ‘X has a right to do R’ which he argued could mean one of four things. First, it could mean that Y (or anyone else) is under a duty to allow X to do R; this means, in effect, that X has a claim against Y. He calls this claim right simply a ‘right’. Secondly, it might mean that X is free to do or refrain from doing something; Y owes no duty to X. He calls this a ‘privilege’ (though it is often described as a ‘liberty’). Thirdly, it could mean that X has a power to do R; X is simply free to do an act which alters legal rights and duties or legal relations in general (e.g. sell his property), whether or not he has a claim right or privilege to do so. Hohfeld calls this a ‘power’. Finally, it might
suggest that X is not subject to Y’s (or anyone’s) power to change X’s legal position. He calls this an ‘immunity’.

Each of these four ‘rights’, Hohfeld argues, has both ‘opposites’ and ‘correlatives’ (i.e. the other side of the same coin) as shown in the box.

<table>
<thead>
<tr>
<th>Opposites</th>
<th>Correlatives</th>
</tr>
</thead>
<tbody>
<tr>
<td>right</td>
<td>right</td>
</tr>
<tr>
<td>privilege</td>
<td>privilege</td>
</tr>
<tr>
<td>power</td>
<td>power</td>
</tr>
<tr>
<td>immunity</td>
<td>immunity</td>
</tr>
<tr>
<td>no-right</td>
<td>duty</td>
</tr>
<tr>
<td>duty</td>
<td>disability</td>
</tr>
<tr>
<td>disability</td>
<td>liability</td>
</tr>
<tr>
<td>liability</td>
<td>disability</td>
</tr>
</tbody>
</table>

In other words, to use Hohfeld’s own example, if X has a right against Y that Y shall stay off X’s land, the correlative (and equivalent) is that Y is under a duty to keep off the land. A privilege is the opposite of a duty, and the correlative of a no-right. Hence, whereas X has a right (or claim) that Y should stay off his land, X himself has the privilege of entering on the land, or, in other words, X does not have a duty to stay off.

Claim rights (i.e. rights in the ordinary sense) are, Hohfeld maintains, strictly correlative to duties. To say that X has a claim right of some kind is to say that Y (or someone else) owes a certain duty to X. But to say that X has a certain liberty is not to say that anyone owes him a duty. Thus, if X has a privilege (or liberty) to wear a hat, Y does not have a duty to X, but a no-right that X should not wear a hat. In other words, the correlative of a liberty is a no-
right. Similarly, the correlative of a power is a liability (i.e. being liable to have one’s legal relations changed by another), the correlative of an immunity is a disability (i.e. the inability to change another’s legal relations).

This analysis has been extremely influential, even though it suffers from certain limitations. All four of Hohfeld’s rights (which, in modern accounts, are usually called claim rights, liberties, powers, and immunities) are rights against a specific person or persons. But it does not seem to be true that, whenever I am under some duty, someone else has a corresponding right. Or vice versa. Can I not have a duty without you (or anyone else) having a right that I should perform it. Thus, the criminal law imposes certain duties on me (say, to observe the rules of the road), but no specific person has a correlative right to my performing these duties. This is because it is possible for there to be a duty to do something which is not a duty owed to someone. For example, a police officer is under a clear duty to report offenders; but he owes this duty to no one in particular, and, hence, it gives rise to no right in anyone.

And even where someone owes a duty to someone to do something, the person to whom he owes such a duty does not necessarily have any corresponding right. Thus, a teacher has certain duties towards her students, but this does not necessarily confer any rights upon them. Similarly, we acknowledge our duties to infants or animals; yet many would claim that it does not follow from this that they have rights. On the other hand, an advantage of a theory of rights based on correlativity is that the claimant of a right to, say, employment, is compelled to identify the party who is under a corresponding duty to find him a job!

Rights theory

We live in the age of rights. Human rights, animal rights, moral and political rights play a leading role in public debate. But in addition to right-based theories, some moral and legal philosophers adopt
either duty-based or goal-based theories. The differences between the three is worth noting, and may be illustrated as follows. You are opposed to torture because of the suffering of the victim (this is rights-based), or because torture debases the torturer (duty-based), or you may regard torture as unacceptable only when it affects the interests of those other than the parties involved (utilitarian goal-based).

Ronald Dworkin’s theory of law is underpinned by his rights thesis (see Chapter 3). Rights are trumps. The right to equal concern and respect is fundamental to human dignity and to a fair society. Equality is assigned primacy over liberty. And the ideal of equal rights has had a spectacular impact in numerous societies; think of the Civil Rights movement in the 1950s in the United States, and the collapse of apartheid in South Africa. Constitutional change has

9. Nelson Mandela with the author soon after the ANC leader’s release from 27 years of imprisonment. A trained lawyer, Mandela’s dedication to the overthrow of apartheid made him an international symbol of the struggle against injustice, and a champion of the establishment of liberty and equality under law.
been wrought through the strength of legal and moral argument based on the relatively uncomplicated concept of human equality.

The concept of human rights has acquired a prominent place in contemporary political and legal debate today. Turn on the news or read a newspaper: issues of human rights are ubiquitous. The idea rests on the claim that each of us as a human being, regardless of our race, religion, gender, or age, is entitled to certain fundamental and inalienable rights – merely by virtue of our belonging to the human race. Whether or not such rights are legally recognized is irrelevant, as is the fact that they may or may not emanate from a ‘higher’ natural law (see Chapter 1).

The acceptance by the United Nations, in the aftermath of the Holocaust, of the Universal Declaration of Human Rights in 1948, and the International Covenants on Civil and Political Rights, and

10. In the United States the campaign for equality before the law was protracted and painful. Racial prejudice assumed many forms, but the American South produced its own violent brand: between 1889 and 1918, 2,522 blacks were lynched, including 50 women.
Economic, Social and Cultural Rights in 1976, reveals a dedication by the community of nations to the universal conception and protection of human rights.

Human rights have passed through three generations. The first generation were mostly the negative civil and political rights as developed in the 17th and 18th centuries by English political philosophers like Hobbes, Locke, and Mill (see Chapter 1). They are negative in the sense that they generally prohibit interference with the right-holder’s freedom. A good example is the First Amendment to the American Constitution, which makes it unlawful for the legislature to restrict a person’s freedom of speech.

The second generation consists in the essentially positive economic, social, and cultural rights, such as the right to education, food, or medical care. The third generation of human rights are primarily collective rights which are foreshadowed in Article 28 of the Universal Declaration which declares that ‘everyone is entitled to a social and international order in which the rights set forth in this Declaration can be fully realized’. These ‘solidarity’ rights include the right to social and economic development and to participate in and benefit from the resources of the earth and space, scientific and technical information (which are especially important to the Third World), the right to a healthy environment, peace, and humanitarian disaster relief.

Justice
The law is frequently equated with justice. Courts are designated ‘courts of justice’, their buildings flamboyantly emblazoned with the word itself, or its symbolic representations of equity and fairness. Governments create ministries of ‘justice’ to oversee the administration of the legal system. Alleged offenders are no longer charged or prosecuted, but ‘brought to justice’. But caution is required. The law occasionally deviates from justice. Worse, it may actually be an instrument of injustice, as in Nazi Germany or
apartheid South Africa. Though the law may, in virtuous societies, aspire to justice, it is mistaken to bracket the two together.

Justice, in any event, is a far from simple concept. Most discussions of the subject begin with Aristotle’s claim that justice consists in treating equals equally and ‘unequals’ unequally, in proportion to their inequality. He distinguished between ‘corrective’ justice (where a court redresses a wrong committed by one party against another), and ‘distributive’ justice (which seeks to give each person his due according to what he deserves). Distributive justice in Aristotle’s view was chiefly the concern of the legislator. But he does not tell us what justice actually is.

We gain somewhat clearer guidance from the Romans. The *Corpus Juris Civilis* is the body of civil law codified under the order of the Emperor Justinian (c.482–565). Justice is there defined as ‘the constant and perpetual wish to give everyone that which they deserve’. And the ‘precepts of the law’ are stated to be ‘to live honestly, not to injure others, and to give everyone his due’. These expressions, though fairly general, do contain at least three important overlapping features of any conception of justice. It conveys the importance of the individual; secondly, that individuals be treated consistently and impartially; and, thirdly, equally.

The significance of impartiality as a key element of justice is often depicted in material form as Themis, the goddess of justice and law. She typically clutches a sword in one hand and a pair of scales in the other. The sword signifies the power of those who occupy judicial positions; the scales symbolize the neutrality and impartiality with which justice is served. In the 16th century, artists portrayed her blindfolded to emphasize justice is blind: resistant to pressure or influence.

Equality seems helpful in our search for a satisfactory concept of justice. Treating equals equally and unequals unequally has a
certain appeal – provided we can agree on objectively ascertainable and relevant grounds for distinguishing between individuals. One criterion might be their different needs. Elizabeth is rich, James is poor. Would a reasonable person object to providing resources to him rather than to her? One might if the cause of James’ poverty is his profligacy and extravagance. The principle of need is therefore not without difficulty.

What of desert? Can justice be made to turn on what individuals deserve? It is often said that someone got his ‘just deserts’, suggesting that since Doris worked hard, she deserves her promotion over Boris. But Boris may lack Doris’s drive because he has to support several dependants and fatigue is an impediment to
his commitment to his job. Since he lacks complete control over his depressing domestic predicament, basing justice on desert could actually generate injustice!

Justice between individuals is no less problematic than the challenge of social justice: the establishment of social and political institutions to slice the cake fairly. Modern accounts of justice are inclined to focus on how society can most fairly distribute the burdens and benefits of social life. One especially influential theory is that of utilitarianism, and its modern alternative, the economic analysis of law. The rest of this chapter is devoted to considering this approach to justice. I shall then sketch the main features of John Rawls’s celebrated theory of ‘justice as fairness’.

**Utilitarianism**

Justice, according to utilitarians, lies in the maximization of happiness. Most famously, Jeremy Bentham (whose positivist theories we examined in Chapter 2) argued that, since in our daily lives, we strive to be happy and avoid pain, so too should society be structured to realize this objective:

> Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. . . . The **principle of utility** recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law. Systems which attempt to question it, deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light.

The determining factor is thus the outcome of our actions: do they make us happy or sad? Through the application of a ‘felicific calculus’, he argued, we can test the ‘happiness factor’ of any action
or rule. Utilitarianism thus looks to the consequences of actions; it is therefore described as a form of ‘consequentialism’ which must be distinguished from deontological systems of ethics which hold that the rightness or wrongness of an action is logically independent of its consequences – ‘Let justice be done though the heavens fall!’ is one of its uplifting slogans.

It is important to note that utilitarians distinguish between ‘act utilitarianism’ (the rightness or wrongness of an action is to be judged by the consequences, good or bad, of the action itself) and ‘rule utilitarianism’ (the rightness or wrongness of an action is to be judged by the goodness or badness of the consequences of a rule that everyone should perform the action in like circumstances).

Generally, discussions of utilitarianism concern themselves with ‘act utilitarianism’, though legal theorists often appeal to ‘ideal rule utilitarianism’ which provides that the rightness or wrongness of an action is to be judged by the goodness or badness of a rule which, if observed, would have better consequences than any other rule governing the same action. This form of rule utilitarianism has clear advantages in circumstances where a judge is called upon to decide whether the plaintiff should be awarded damages against the defendant. He must obviously disregard the result of his judgment on the particular defendant.

Modern utilitarians tend to regard Bentham’s version of hedonistic act utilitarianism as rather quaint. Nor is there a great deal of contemporary sympathy for John Stuart Mill’s form of utilitarianism that distinguishes between higher and lower pleasures – implying that pleasure is a necessary condition for goodness, but that goodness depends on qualities of experience other than pleasantness and unpleasantness. This may be because both Bentham and Mill appear to substitute their own preferences for the preferences they believe people ought to have.

Contemporary utilitarians therefore talk of maximizing the extent
Evaluating the consequences of our actions

I am stranded on a desert island with no one but a dying man who, in his final hours, entrusts me with $10,000 which he asks me to give to his daughter, Rita, if I ever manage to return to the United States. I promise to do so, and, after my rescue, I find Rita living in a mansion; she has married a millionaire. The $10,000 will now make little difference to her financial situation. Should I not instead donate the money to charity? As a utilitarian, I consider the possible consequences of my action. But what are the consequences? I must weigh the result of my broken promise against the benefit of giving the $10,000 to an animal welfare charity. Would keeping my promise have better consequences than breaking it? If I break my promise, I may be less likely to keep other promises I have made, and others may be encouraged to take their own promise-keeping less seriously. I must, in other words, attempt to calculate all the likely consequences of my choice. But a non-consequentialist Kantian might argue that the reason why I should give the money to Rita is that I have promised to do so. My action ought to be guided not by some uncertain future consequence, but by an unequivocal past fact: my promise. My reply might be that I do consider the past fact of my promise – but only to the extent that it affects the total consequences of my action of giving the money to the charity instead of to Rita. I might also say that it is absurd to argue that I am obliged to keep every promise I make.

to which people may achieve what they want; we should seek to satisfy people’s preferences. This has the merit of not imposing any conception of ‘the good’ which leaves out of account individual
choice: you may prefer football to Foucault, or Motown to Mozart. But this approach is afflicted with its own problems; see below.

Utilitarianism has the considerable attraction of replacing moral intuition with the congenially down-to-earth idea of human happiness as a measure of justice. But the theory has long encountered resistance from those who argue that it fails to recognize the ‘separateness of persons’. They claim that utilitarianism, at least in its pure form, regards human beings as means rather than ends in themselves. Separate individuals, it is contended, are important to utilitarians only in so far as they are ‘the channels or locations where what is of value is to be found’.

Secondly, opponents of utilitarianism claim that, though the approach treats individual persons equally, it does so only by effectively regarding them as having no worth: their value is not as persons, but as ‘experiencers’ of pleasure or happiness. Thirdly, critics query why we should regard as a valuable moral goal the mere increase in the sum of pleasure or happiness abstracted from all questions of the distribution of happiness, welfare, and so on.

A fourth kind of attack alleges that the analogy used by utilitarians, of a rational single individual prudently sacrificing present happiness for later satisfaction, is false for it treats my pleasure as replaceable by the greater pleasure of others. Some have attacked the assumption at the very heart of utilitarianism: why should we seek to satisfy people’s desires? Certain desires – e.g. cruelty to animals – are unworthy of satisfaction. And are our needs and desires not, in any event, subject to manipulation by advertising? If so, can we detach our ‘real’ preferences from our ‘conditioned’ ones? Is it then acceptable for utilitarians to seek to persuade individuals to prefer Dworkin to Doo Wop? If so, how do we justify doing this? If we answer that the principle of utility requires us to do it, are we not suggesting that the felicific calculus includes not only what we want, but also what we may one day decide we want as a result of persuasion or re-education?
A different point is made by John Rawls who argues that utilitarianism defines what is right in terms of what is ‘good’. This means that the theory starts with a conception of what is ‘good’ (e.g. happiness) and then concludes that an action is right in so far as it maximizes that ‘good’.

Should we, in any event, seek to maximize welfare? Some consider it more important that welfare be justly distributed. Another target of critics is the intractable problem of calculating the consequences of one’s actions: how can we know in advance what results will follow from what we propose to do. And how far into the future do – or can – we extend the consequences of our actions?

There are obvious difficulties in attempting to weigh my pleasure against your pain. Similarly, on a larger scale, judges or legislators will rarely find it easy to choose between two or more courses of action, and sensibly balance the majority’s happiness against a minority’s misery.

**The economic analysis of law**

Like utilitarianism, those who champion an economic analysis of law believe that our rational everyday choices ought to form the basis of what is just in society. Each of us, it is argued, seeks to maximize our satisfactions – and if it means paying for something that will achieve this objective, we are generally willing to do so. In other words, if I want a Ferrari badly enough, I will be prepared to find the money to buy one.

The leader of this latter-day form of economic hedonism is the jurist and judge Richard Posner (b. 1939). Although he denies that he espouses a utilitarian position, Posner maintains that a good deal of the common law can be explained as if judges were seeking to maximize economic welfare. In other words, many legal doctrines are based, often unconsciously, on judicial attempts to find the most efficient outcome. Judges, Posner
claims, frequently decide hard cases by choosing an outcome which will maximize the wealth of society. By ‘wealth maximization’ Posner means a state of affairs in which goods and other resources are in the hands of those people who value them most; that is to say, those who are willing and able to pay more to have them.

To take a simple example, suppose you buy my copy of this book for $5. The highest price you were willing to pay was $10. Your wealth has therefore been increased by $5. Similarly, Posner argues, society maximizes its wealth when all its resources are distributed in such a way that the sum of everyone's transactions is as high as possible. This is, he claims, is exactly as it should be.

Economic factors, Posner and his so-called Chicago School claim, explain several doctrinal developments of the law. For instance, in the law of negligence, liability generally depends on what is most efficient economically. The common law method is to allocate responsibilities between those engaged in interacting activities so as to maximize the joint value, or, what amounts to the same thing, minimize the joint cost of the activities. This is achieved by redefining a property right, or by devising a new rule of liability, or by recognizing a contract right. And Posner analyses several aspects of the common law in this manner.

Reading Posner’s prodigious writing does require a fair degree of familiarity with economic theory. In particular, he deploys various concepts of efficiency, especially that of Pareto optimality, and the Kaldor-Hicks test. The former (named after the Italian economist Vilfredo Pareto) describes a situation which cannot be altered without making at least one person worse off than he was prior to the change. A change is said to be Kaldor-Hicks efficient when the increase in value to those who gain exceeds the losses to those who lose. Both are measured in terms of readiness to pay. He applies also the concept of ‘diminishing marginal utility’ which refers to the fact that $1 given to an impoverished beggar would have a major effect
on his wealth, whereas to a millionaire $1 would make almost no difference at all.

The celebrated Coase theorem (named after the economist Ronald Coase) postulates a situation in which one outcome is the most ‘efficient’. See, for example, the circumstances illustrated in the box on page 68.

Real life may, however, be more complex than this simple example suggests. Certain costs would inevitably be incurred in this process. The straightforward version of the Coase theorem may thus be stated as follows: where there are zero transaction costs, the efficient outcome will occur regardless of the choice of legal rule.

What has any of the above to do with justice? It presumes an initial distribution of wealth which may be wholly unjust. ‘Efficiency’ is an instrument by which to maintain existing inequalities. In other words, is the economic analysis of law little more than a particular ideological predilection that fortifies the capitalist, free-market system?

More fundamentally perhaps, can wealth maximization plausibly be equated with justice? It is doubtful whether wealth maximization is a value – in itself or instrumentally – that a society would consider worth trading off against justice. Many would doubt whether increasing social wealth would really improve society, or suggest that our desires are more complex than Posner claims.

Justice as fairness

*Justice as fairness* by John Rawls (1921–2002) is widely regarded as a *tour de force*. It expounds the concept of justice as fairness, and has – justly – become the focal point for contemporary discussions of the subject.

The idea of justice as fairness may, at first blush, strike you as trite.
A factory emits smoke which causes damage to laundry hung outdoors by five nearby residents. In the absence of any corrective measures, each resident would suffer $75 in damages, a total of $375. The smoke damage may be prevented in one of two ways: either a smoke-screen could be installed on the factory’s chimney, at a cost of $150, or each resident could be provided with an electric tumble-drier at a cost of $50 per resident. The efficient solution is obviously to install the smoke-screen since it eliminates total damage of $375 for an outlay of only $150, and it is cheaper than purchasing five electric driers for $250. Would the outcome be efficient if the right to clean air were assigned to the residents or if the right to pollute is given to the factory? In the case of the former, the factory has three choices: pollute and pay $375 in damages, install a smoke-screen for $150, or buy five tumble-driers for the residents at a total cost of $250. The factory would, naturally, install the smoke-screen: the efficient solution. If there is a right to pollute, the residents have three choices: suffer their collective damages of $375, buy five driers for $250, or buy a smoke-screen for the factory for $150. They, too, would choose to buy the smoke-screen. The efficient outcome would therefore be achieved regardless of the assignment of the legal right.

This assumption is based on the view that the residents would incur no costs in coming together in order to negotiate with the factory. Coase calls this ‘zero transaction costs’.

But, in dismissing utilitarianism as a means of determining justice, Rawls rejects the very idea of inequality – even if it secures maximum welfare. Welfare, he argues, is not about benefits, but
primary social goods’ which includes self-respect. In particular, he contends that questions of justice are prior to questions of happiness. In other words, it is only when we regard a particular pleasure as just that we can judge whether it has any value. How can we know whether the gratification Tom derives from torture should be counted as having any value before we know whether the practice of torture is itself just? Put another way, utilitarianism defines what is right in terms of what is good, while Rawls considers what is right as prior to what is good.

12. John Rawls’s theory of justice as fairness has exerted considerable influence on the analysis of this difficult concept.
Chapter 1 touched on the social contract theories of Hobbes, Locke, and Rousseau. Rawls’s theory of justice as fairness is rooted in this enduring idea. In *A Theory of Justice*, he expresses the objective of his project as carrying the social contract to a higher level of abstraction. To do so, he argues, we are to think not that the original contract as one to enter a particular society or to set up a particular form of government, but that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons seeking to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles regulate all further agreements; they specify the types of social cooperation and the forms of government that can be established. This manner of treating the principles of justice he calls justice as fairness.

He stresses the need to distinguish between people’s genuine judgements about justice and their subjective, self-interested intuitions. The inevitable distinction between the two must be adjusted by re-examining our own judgements so that we ultimately reach a state of affairs in which our considered intuitions are in harmony with our considered principles. This is the position of ‘reflective equilibrium’.

Rawls presents an imaginary picture of the people in the ‘original position’, shrouded in a ‘veil of ignorance’, debating the principles of justice. They do not know their gender, class, religion, or social position. Each person represents a social class, but they do not know whether they are intelligent or dim, strong or weak, or even the country or period in which they are living. And they have only certain elementary knowledge about the laws of science and psychology.

In this state of almost perfect ignorance, they are required unanimously to choose the general principles that will define the terms under which they will live as a society. In this process they are
motivated by rational self-interest: each seeks those principles which will give him or her (but they are unaware of their gender!) the greatest opportunity of accomplishing his or her chosen conception of the good life. Stripped of their individuality, the people in the original position will select, says Rawls, a ‘maximin’ principle which is explained by Rawls’s own gain and loss table (slightly adapted).

I am faced with a choice from a number of several possible circumstances. Suppose I choose D1, and C1 occurs. I will lose $700. But if C2 occurs, I will gain $800 and, if I am really fortunate and C3 occurs, I will gain $1,200. And the same applies in the case of both decisions D2 and D3. Gain $ therefore depends on the individual’s decision $d$ and the circumstances $c$. Thus $g$ is a function of $d$ and $c$. Or, to express it mathematically $g = f(d, c)$.

What would I choose? The ‘maximin’ principle dictates that I opt for D3. In this situation the worst that can happen to me is that I gain $500, and this is clearly better than the worst for the other actions (in which I stand to lose either $800 or $700).

Exercising their choice, the people in the original position, as rational individuals, would also select principles that ensure that

<table>
<thead>
<tr>
<th>Decisions</th>
<th>Circumstances</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>C1</td>
</tr>
<tr>
<td>D1</td>
<td>−$700</td>
</tr>
<tr>
<td>D2</td>
<td>−$800</td>
</tr>
<tr>
<td>D3</td>
<td>$500</td>
</tr>
</tbody>
</table>
the worst condition one might find oneself in, when the veil of ignorance is lifted, is the least undesirable of the available alternatives. In other words, I will select those principles which, if I happen to end up at the bottom of the social order, will be in my best interests. Similarly, Rawls argues, the people in the original position will choose the following two principles.

[1] Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

[2] Social and economic inequalities are to be arranged so that they are both:
   (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
   (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

The first principle has what Rawls calls ‘lexical priority’ over the second. In other words, the people in the original position place liberty before equality. Why? Because of the ‘maximin’ strategy, described above, no one wants to risk his or her liberty when the veil of ignorance is lifted – and it is revealed that they are among the least well-off members of society!

Similarly, each will opt for clause (a) of the second principle, the so-called ‘difference principle’. This ensures that the worst anyone could be is ‘least advantaged’ and, if they do end up as members of this group, they will benefit from this clause. It would be entirely rational to choose this principle – rather than either total equality or some form of greater inequality – because of the respective risks of being worse off or reducing the prospects of improving their lot. And, in a society that puts liberty above equality, they will be in a better position to improve their lot. Why? Because various ‘social primary goods’ (which Rawls defines to include rights, liberties, powers, opportunities, income, wealth, and especially self-respect) are more likely to be attained in a society that protects liberty.
Rawls argues that the people in the original position will select the difference principle because neither of its two principal competitors (the ‘system of natural liberty’ and the idea of ‘fair equality of opportunity’) offers them the prospect of prosperity should they turn out to be among the least advantaged. The former corresponds to an uncontrolled, free-market economy indifferent to wealth distribution. The people in the original position would jettison this principle, he claims, because it ‘permits distributive shares to be improperly influenced by . . . factors so arbitrary from a moral point of view’. They would regard the accident of being born into an affluent family as morally irrelevant.

They would spurn the second arrangement even though it is plainly preferable to the first. While it rewards natural talent and its application, this system suffers from a similar deficiency: it attaches moral relevance to individual talent, but this is no less accidental than being the offspring of a millionaire. In neither situation, do accidents of birth have any association with desert. If they choose the difference principle, however, it guarantees that talented individuals may increase their wealth only if, in the process, they also increase the wealth of the least advantaged.

Note that Rawls’s second principle includes two significant limitations to secure the interests of the least advantaged. First, he introduces the ‘just savings principle’ which requires the people in the original position to ask themselves how much they would be willing to save at each level of the advance of their society, on the assumption that all other generations will save at the same rate. Remember that they have no idea which stage of civilization their society has reached. Consequently they will save some of their resources for future generations. The second limitation refers to the fact that jobs should be available to all.

Rawls’s project is a highly ambitious one and, while it has won enormous praise and generated a huge literature, critics have, not surprisingly, expressed reservations about several features of his
theory. For example, some oppose the very idea of any patterned distribution of social goods. Others attack the ‘original position’ as artificial (can people really be wholly stripped of their values?) or as necessarily producing the result that Rawls postulates: why should they prefer liberty to equality?

In response to some of this criticism, Rawls published in 1993 another book, *Political Liberalism*, in which he refines and modifies a number of his original ideas. I cannot here analyse the plethora of critical debate, but an important misunderstanding is clarified in this later work. Rawls explains that ‘justice as fairness’ is not intended to provide a universal standard of social justice. His theory is a practical one that pertains to modern constitutional democracies. His is, in other words, a political and practical – rather than a metaphysical – conception of justice, philosophically neutral, that transcends philosophical argument.

In pursuit of what he calls an ‘overlapping consensus’, Rawls posits his principles of justice as the terms under which members of a pluralistic, democratic community with competing interests and values might achieve political accord. His conception of political liberalism acknowledges that this consensus may be challenged by a state’s establishment of a shared moral or religious doctrine. But the community’s sense of justice would prevail over the state’s interpretation of the public good.