Kant, Rights, and the General Will

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Kant's political philosophy[1] is one of the lesser studied areas of his corpus and, for some time, work on it tended to be on narrow or, alternately, comparative themes, rather than on Kant's 'philosophy of right' as such. Often, these studies focussed on Kant's strong, retributivist view of punishment.[2] Sometimes, they concentrated on what some consider an idiosyncratic aspect of Kant – idiosyncratic because of Kant's reputation as a liberal[3] – and that is his apparent rejection of the legitimacy of resistance to political authority[4] (MdS 319-323). And periodically scholars turned to Kant's political philosophy for his analysis of freedom[5] – but principally because of its appearance in the *Grundlegung zur Metaphysik der Sitten* [*Groundwork of the Metaphysics of Morals*],[6] the standard introduction to Kant's ethics.

Recently, however, interest in Kant's political thought has been more thorough-going, and it is experiencing a renaissance.[7] This is plausibly due to a number of reasons, of which one might signal three.

One reason for this renewed interest is that Kant's work bears on continuing concern in contemporary political thought with 'social contract' theory. A number of leading political philosophers in the late 20th century claimed to have drawn explicitly on Kant (e.g., John Rawls and Alan Gewirth[8]). And even though many critics have found these approaches unconvincing, it is still important to see in what way Kant's influence was – or was not – involved in the articulation of these views, and whether there are resources in Kant's work that could address the challenges to such accounts.

A second reason is that Kant's political thought may plausibly be said to occupy a middle place between two of the dominant traditions in contemporary political philosophy, i.e., between individualism and collectivism. Thus, we have, on the one hand, the view earlier traced by Locke and developed by Spencer (and, later, by Robert Nozick and American libertarianism)[9] that takes the notion of basic inalienable

individual rights in a strong sense, and we have, on the other, a conception of a social or common good as fundamental (which we find in Hegel and Marx). For many, however, the Lockean approach is too 'atomistic,' and the Hegelian approach – which sees the state as the 'realisation of freedom' – is too collectivistic. And so it is not surprising that some propose that we go 'back to Kant' – in whom we find both a clear defense of individual autonomy and an account of the necessity of life in community[10] – in order to see whether he can provide a third option.

Finally, Kant is a transitional thinker in the history of political philosophy–particularly between Rousseau and Hegel. Rousseau's claim that human beings are defined in terms of freedom[11] is taken up in Hegel's analysis of ethical life (*Sittlichkeit*) in his *Grundlinien der Philosophie des Rechts* [*Philosophy of Right*],[12] but this move cannot be fully understood without seeing how Kant reconceived Rousseau's emphasis on freedom in his ethics and political philosophy. Not only the historians of political theory, but also those who seek better to understand and assess the work of Hegel and later idealist thought, find important insights in Kant's social and political philosophy.

In what follows I take up a question that bears on each of these three reasons for the renewed interest in Kant, but which is particularly concerned with the second – that is Kant's account of rights in the *Die Metaphysik der Sitten* [*The Metaphysics of Morals*]. Specifically, I sketch out some aspects of Kant's political thought so that we may see how it is an alternative to Lockean individualism that avoids the anti-liberal characteristics attributed to Hegelianism and which remains *within* the liberal tradition – how it reflects both a robust theory of individual (human) rights and, at the same time, a recognition of the importance of political community.

I

The influence of Locke, and particularly of his *Second Treatise of Government*,[13] in recent Anglo-American political thought cannot be understated. The work of Nozick, Tibor Machan, Douglas den Uyl, and many other libertarian thinkers,[14] but also of figures such as Rawls and

Ronald Dworkin, is clearly indebted to Locke. All attempt to accommodate Lockean insights in their respective analyses while, at the same time, trying to address criticisms raised against Locke's original formulation of them.

Few critics would deny the importance of the principles of individual freedom and rights recognised by these authors, but many have claimed that to insist that these principles are fundamental and incontrovertible is incompatible with life in community. Lockean political thought has sometimes been regarded as justifying only a minimal state–so that, as it turns out, social life is precarious. Some authors see it as paradoxical, permitting the existence of rights including, conceivably, a right to do what is wrong or, at least, what is not good. And some see Lockean accounts as resting on analyses of the person and of property that are problematic.

Critics also challenge Lockean approaches for failing to explain adequately the source of rights or–if such rights are claimed to be basic and *sui generis*–for not being able to provide a clear statement of what rights a person has and how far they extend. Some argue as well that Locke does not deal plausibly with the issue of what gives a right (as a *moral* right) its sanction. And many see Lockean theory as running into difficulties in explaining the relation of the state to these rights.

But despite these difficulties with Locke or Lockean approaches, critics are also concerned that an alternative view– in which there is a focus on a common good or a priority of the community (as expressed, for example, in the notion of social or group rights) that trumps the rights of individuals – would entail that freedoms and rights cease to have a substantial role altogether. Is a Kantian account that recognises the fundamental importance of human freedom and the necessity of life in the state a viable liberal alternative to Locke?

II

In the first part of his *Metaphysik der Sitten*, the *Metaphysische Anfangsgründe der Rechtslehre* [*The Metaphysical First Principles of the Doctrine of Right*] (1797), Kant advances a detailed account of right.[15]

Kant writes there of the existence of an innate right, possessed by all human beings. This right, and the rights that follow from it, have a legal capacity, weight, or power, i.e., ultimately have the character of a legal right. But, from the start it is clear that these rights–whatever they are–also have a fundamental moral character; Kant's 'Recht' means 'right' in both (English language) senses of the term.

Right, including innate right, has a legal character. The innate right to freedom is constitutive of the basic framework of law (in the sense of *Recht* or *ius*) for, without freedom, there would be little sense to the existence of law. Moreover, for Kant, the aim of law is the preservation of freedom–i.e., of free will– and the exercise of practical reason. And (as we shall see) many rights depend for their articulation or for their assurance on an order of law.

But right also carries with it the sense of 'moral rightness'–e.g., it concerns "the right principles of law"[16]– because it is based on an a priori principle of practical reason (cf MdS 224).[17] It also applies to all rational beings. So, while the spheres of the moral and the legal are distinct, 'right' normally has a moral and a legal character.

Kant's view has frequently been seen to have similarities with classical natural law theory[18]–and it has been challenged as taking for granted that there is no 'is/ought gap.' Has Kant simply missed the force of Hume's–and, before him, Locke's–critique? No. I cannot discuss this at length here, but consider just one point: Kant would note that the law depends on a notion of the 'person' which is fundamentally a moral notion. And, after all, it is usually the absence of the attributes of moral personhood that precludes one from having legal responsibility. Kant writes "moral personality is nothing but the freedom of a rational being under moral laws" (MdS 223, Ladd trans., p. 24).[19] So Kant has an anthropology of moral personality that provides at least some reason to doubt the incommensurability of 'is' and 'ought.'

What is the *source* of this innate right? Clearly, for Kant the source of such a right is the human person. Still, one may ask what is it about the human person that gives rise to rights. This is a somewhat complex issue, and there is a good deal of debate on this point. Briefly, on one account, the source of right is personhood (understood as a moral category)–i.e., moral personhood. In this sense, it is because persons are rational and free, and have the capacity (as autonomous beings) to

operate within the limits of reason, that rights are ascribed to them. On another account (such as that of Jeffrie Murphy[20]), it is the fact or power of being able to choose or will – to exercise *die Willkür* –that is the basis for right. Murphy argues that it is 'free *Willkür*'–what he defines as "freedom of choice or the spontaneous self-activity of persons"[21] –and not free *Wille* that is the source of human dignity and its value. For otherwise, Murphy holds, there is circularity in Kant's account of morality[22] –that only those who have moral personality have dignity and, therefore, rights.[23] We should note, however, that Kant clearly says that

> "we know our own freedom (from which all moral law and hence all rights and duties are derived) only through the moral imperative, which is a proposition commanding duties"[24] (MdS 239, Ladd trans., p. 45),

and Murphy allows that his approach is an attempt to provide a consistent Kantian theory, not simply to exposit Kant's own view.

Nevertheless, it is clear that the source of right is not simply something about individuals as such, and in isolation from other persons. Kant notes that right requires that

> "an acknowledgement of being reciprocally bound to everyone else to [exercise] a similar and equal restraint with respect to what is theirs" (MdS 255, Ladd trans., p. 64).

And so the source of right involves a relation to others as well. (This relation to others is important, for–as we shall see below–it allows Kant to justify recourse to coercion when a right is violated, and to claim that the "use of coercion ... is necessarily consistent with everyone's freedom"[25] (MdS 232, Ladd trans., p. 36; cf MdS 237).[26] While the limitation of individual rights and the justification of punishment (i.e., coercion) by the state is found throughout the liberal tradition, Kant's approach is distinctive here.)

The notion of innate or natural rights is commonly associated with the notion of a state of nature; it appears in a number of key modern thinkers, such as Hobbes, Locke, and Rousseau,[27] and it is no surprise that we find it in Kant as well. Still, what appeals to states of nature are supposed to achieve is often not clear. Is the state of nature a *(quasi)* historical state of affairs? Is it a theoretical construct that proposes to explain the relation of individual rights to civil society? Is it a heuristic principle that provides a basis for establishing *(tacit)* consent to public

authority? This issue is significant because reference to a state of nature has tended to reinforce the idea of a priority of the individual over the community and of individual rights over group rights or over a common good.

Kant describes the state of nature as a "state of society" in which "each will have his own right to do what *seems just and good to him*" (MdS 312, Ladd trans., p. 76).[28] It is not "a condition of injustice" or chaos–for "Even in a state of nature there can be legitimate societies (for example, conjugal, paternal, domestic groups in general, and many others)" (MdS 306, Ladd trans., p. 70)–though it is "a state of society in which justice is absent" (MdS 312, Ladd trans., p. 76). The original condition, then, is not at all as Hobbes sees it. Moreover, while Kant speaks of people choosing to leave this 'state' through an original contract into civil society, he allows that they may also rightly be *compelled* to leave.[29] And further, on Kant's view (as in Rousseau), there is no loss of rights in this transition to civil society, for

> "all the people give up their external freedom in order to take it back immediately as members of a commonwealth, that is, the people regarded as the state" (MdS 315, Ladd trans., p. 80[30]).

Consequently, while Kant does employ the notions of a state of nature and a social contract, neither is in fact crucial to Kant's account. The state of nature is more of a regulative idea. And how the existence of innate rights fits with organised social life is explained by Kant in a way quite different from his predecessors in the liberal tradition, using a very different 'mechanism.'

Thus, given our nature as free beings who have an understanding of law and the capacity to be moral law makers– but also as beings who are members of a community and can be subject to law–we have rights. As beings having moral personality, we are beings with dignity. But it is because of the way in which rights arise and are ascribed that Kant is well-prepared to address the question of the relation of rights to the state– and he does so in a way that is quite distinct from earlier liberal theories.

III

What rights do human persons have? Kant distinguishes between

"innate [*angeborne*] rights" and "acquired [*erworbene*] rights"; the latter (unlike the former) requires a juridical act (MdS 237, Ladd. trans., p. 43).[31] But there is, Kant writes, strictly speaking only one innate right– the right to freedom or liberty (MdS 237). This is "the one sole and original right belonging to every human being by virtue of his humanity (MdS 237, Ladd trans., p. 44)."[32] (It is fundamental also because it essentially involves the condition for all social life under a condition of security– i.e., peace.[33])

Kant's identification of a right to freedom as an 'innate' right is explained by its indispensability to human moral personhood; without it, it would be impossible to live a life in which one could be autonomous. To have duties, a being must be (and must see itself as) free, be capable of knowledge of the principle of morality (i.e., the categorical imperative), and have the rights necessary to act as an autonomous moral being.

The model of a right is that of a property right. It is something one not only has but owns, and Kant refers to rights in such terms: (e.g., what is 'one's own,' etc.) (cf. MdS 237; cf MdS 247ff)–for example, "my freedom" is what is "internally mine."[34] But what exactly this means is unclear.

In general, Kant says that "the relation of having something ... as one's own [property] consists of a purely *de jure* union of the Will of the subject with that object." (MdS 254, Ladd trans., p. 62). But property in oneself is clearly different from property in external things. For, to begin with, one's freedom *qua* freedom of the will [*Willkür*] is not something that one could be said to acquire, as one acquires "something external" (MdS 240). Nor is there any 'law' (in a formal sense) from which such 'property' derives. One could say, perhaps, that one's property in oneself is a 'product' of the recognition of what it means to be free–i.e., it is a conceptual or logical feature of what it is to be a being having the capacity for free, rational, and autonomous action. So the conditions for the 'acquisition' of innate right make it a very unusual kind of property indeed.[35]

In its broadest sense, the right to freedom is a right to (negative) freedom[36]–i.e., "independence from being constrained by another's will" (MdS 237, cf. Ladd trans., pp. 43-44). But while this is the only innate right, Kant says that there are two principles that follow directly from

this: "innate equality" (MdS 237, Ladd trans., p. 44)–where one cannot be held to do more for others than one could reciprocally bind others to do – and the right to be one's own "master" (MdS 238)–where one has the liberty "to do anything to others that does not in itself detract from what is theirs" (MdS 238, Ladd trans., p. 44). So one's right to freedom contains within it a right to freedom from violence.[37] (There are two other principles which appear to follow from (or are "based on") this innate right: equity in treatment (MdS 233-4) and authorization to use coercion to protect one's rights (MdS 235)–which includes the so-called right of necessity to take the life of another, when one's own life is in danger (MdS 235-6). All this is bound up in the "System of natural Law" [*Naturrecht*] (MdS 238).

Of course, as noted earlier, for Kant a right to be free from violence does not entail a freedom from coercion (which can be resorted to when one threatens or violates the rights of another). Neither does innate equality or a right to equity in treatment entail a right to equality in possessions or results. Nevertheless, as we shall see, Kant understands liberty in a substantive sense (i.e., as involving policies that have as their goal public welfare and not just the capacity to choose freely).

One's innate right, and what follows from it, then, are not without limits; indeed, there are several ways in which we may speak of limits on rights. For example, they are limited by our (perfect) duties to ourselves and others (cf MdS 240 and MdS 389-90). The perfect duty to the humanity in us would clearly limit any so called right to do with one's body as one chooses. Or, again, one's innate right is limited by the like right of others to freedom and to equity in treatment. Or, yet again, a right can be limited so far as it violates or threatens peace, given that peace is the ultimate purpose of law.[38]

In general, then, while the innate right to freedom and the principles that follow from it are fundamental, we can be said to have a right to freedom only so long as it is lawful. One's innate or inherent right is not a right to do as one wishes or wills as such, but is a right to *lawful* liberty–a liberty that takes account of the right to freedom of others and that reflects one's own (rational) will.

These initial remarks concerning rights are far from complete. For example, to this point in the MdS there is no explanation of how such rights are binding–at least, any more binding than any moral prohibition

might be. Moreover, not all the rights that human beings have are innate or inherent; as noted above, there are what Kant calls "acquired rights" [*erworbene Recht* (MdS 237)]. (We may see these as including both general rights such as a right to acquire property as well as particular rights – e.g., the right to a specific piece of property in the appropriate circumstances.) So, while human beings do have certain rights inherently or in a way derived from the one innate or inherent right, Kant recognises that, apart from the state (i.e., in a state of nature with its minimal societies and 'private law,' but without juridical structure), most if not all rights are neither guaranteed nor even recognised. Outside of the state, all we have is a "wild lawless liberty."[39] Indeed, in such a condition, 'rights' or principles (as Hegel would later suggest) are purely formal and have no weight or content. But Kant anticipates such concerns and so his discussion turns to rights in the context of (what he calls) "public law"- "das öffentliche Recht."

IV

On Kant's view, an account of rights – not only the acquired but also the innate – is incomplete unless we introduce the state. The state is involved in one's acquired rights–as signalled above, these rights require a juridical act– though it does not necessarily grant them. But the state is also involved in one's innate rights.

The 'state,' for Kant does not mean 'government' and certainly not the legislature, executive, and judiciary of the day. The state is simply "a union of a multitude of men under laws of justice [or right]" (MdS 313, see Ladd trans., p. 77). So while Kant, like other liberal theorists, presents the state as being broadly representative (see MdS § 46, 314-5; § 52, MdS 340; MdS 367), not everyone need have an "active" status in it (for example, the right to vote), nor need it be democratic.[40] There is an element of consent involved in the criteria for the legitimacy of the state–but the character of this 'consent' 'fits' with the notion of rational choice and, as noted below, it is rather different from earlier liberal views.

How exactly is the state involved in rights? Perhaps the first and most obvious reason for the existence of the state is that all rights-

including the right to freedom–require security (or peace) to enjoy them, and so there must be a political order. In fact (as noted in section II above), given the right to freedom, Kant holds that once we find ourselves in sustained contact with others, we have the (moral) right to establish a state as well as a (moral) right to demand that others who have some relationship to us–conjugal, paternal, domestic, and so on–join.[41] There is, in short, not only a need for, but a fundamental right to, the existence of the state.

A second way in which the state is required for rights is that it is needed to articulate the conditions for rights and to secure rights.[42] For, beyond the simple existence of free will in a rational being capable of autonomous action (which shows that the necessary condition for the existence of the innate right to freedom has been satisfied), individuals cannot be certain that their assessment of the circumstances in which they live is correct, and allows for the legitimate exercise of these rights (i.e., know that this exercise is taking place within the proper limits of their rights). For Kant, where there is no political authority or law there is no justice–the state of nature is a state "devoid of justice [status iniustia vacuus]" where acquisition is only provisional (MdS 312, Gregor trans., p. 124). And so, political authority secures the rights that exist provisionally in a state of nature. It also addresses the concern that there is "no competent judge" (MdS 312) in a state of nature to adjudicate among conflicting claims to rights.[43] Thus, the state provides legal order – it adjudicates among claims to, and protects, rights in law. But there is a *moral* dimension to the role of the state here, as well. Mulholland argues, for example, that the "intelligible" or "rational" possession of something external to a person is not simply a legally recognised relation of a person to an object, but

> "a relation of a person to persons, all of whom are ***bound*** with regard to the use of the thing, by the ***will*** of the first person" (cf MdS 268) through moral laws which determine obligations – and that that "kind of [rational] possession assumes a political/legal system."[44]

For example, *pace* Locke, it is not enough to labour on something to establish a right to it[45] (see MdS 262-263). There must be, *inter alii*, a prior recognition that one is capable of such acquisition, that one has the right to start to labour on it, that what one does *is* labour, and so on. All this requires a (social) recognition.

Nevertheless, and to repeat what was noted earlier, in saying that the state articulates the conditions for, and 'secures,' rights, it does not follow – nor would Kant hold that – the state 'creates' all acquired rights.

A third reason for claiming that the state is necessary to rights is that it is implied by and also reflects law; by 'law' here, Kant means 'justice'–the a priori principles of practical reason. So, for example, as we have seen, Kant writes that "a state is a union of a multitude of men under laws of justice [or right]" (MdS 313). Or again, the idea of the state "provides an internal guide and standard for every actual union of men in a commonwealth" (MdS 313, Ladd trans., p. 77). Because the state is required by and represents the law (i.e., justice) and thereby the rights of others, there is a duty to obey it. And since without law there is no freedom or liberty, the state is implicated in the conditions for one's innate right so far as that right is a right to *lawful* liberty. In short, the state is necessary to ensure the moral and legal respect of the law that is itself necessary for rights.

The importance, value and, indeed, necessity of the state are characteristics of virtually all liberal thought. But unlike most other liberal theories, because the state is bound up with the rational possession of acquired rights, with identifying the conditions for and limits of rights, and with securing rights, Kant holds that there can be no right against it. It is because of this relation of rights to the state that Kant rejects the possibility of a right to challenge or resist the state.

Finally, the state is involved in rights so far as it is necessary to confirm both the moral legitimacy of one's own freedom and the moral obligation to respect the freedom of others. The state provides a basis for the respect of others because of Kant's understanding of the nature of freedom itself. Kant writes:

> "if a certain exercise of freedom is itself a hindrance of the freedom that is according to universal laws, it is wrong; and the compulsion of constraint which is opposed to it is right, as being a hindering of a hindrance of freedom, and as being in accord with the freedom which exists in accordance with universal laws. Hence, according to the logical principle of contradiction, all right is accompanied with an implied title or warrant to bring compulsion to bear on any one who may violate it in fact." (MdS 231, Gregor trans., p. 57).

But for Kant, while only that coercion that protects freedom is justified, this restriction of freedom in the name of freedom is not based

simply on the nature of others; it applies just as much to oneself. Indeed, as in Rousseau, there is also the possibility of being forced to be free (cf Rousseau, I, 7).[46]

Kant's account of the state in relation to rights, freedom, and law is, understandably, a controversial one, and the preceding arguments only sketch out briefly the grounds that underlie it. But the basis for this account – for Kant's view of the legitimacy of the state and law in general, and (by extension) for his theory of rights–also involves a more fundamental principle. This is will.

V

What does Kant mean by 'will' when he writes of the legitimacy of the state and law?

Earlier thinkers, such as Hobbes and Locke, were suspicious of the scholastic understanding of the will (which presented it as a rational faculty of an immaterial soul); indeed, Hobbes challenged the existence of such a faculty overall.[47] Nevertheless, we can certainly speak of a process in persons which involves deliberation about different courses of action, and the decision or assent given to one of them – and for these earlier thinkers, the existence of an assent or consent to entering society through the mechanism of a (real or tacit/implied) pact or contract was essential to its legitimacy. Now as we have seen, while the state can be 'justified' by a 'contract,' Kant does not put any significant emphasis on a contractual basis for society. Yet the notion of will is extremely important.

By 'will,' in the context of Kant's account of the state and rights, Kant does not refer only to one's free choice (i.e., *Willkür*) or to an individual will (*Wille*), but also to a "general" will. Indeed, it is on such a "united" or general will that Kant draws when he writes of the source of political legitimacy, of the possibility of possession of external objects (and perhaps more) – and, by extension, any acquired right.

What is this general will? Kant calls this "der allgemeine Volkswille"–the "united Will of the people" (MdS 338, Ladd trans., p. 109).[48] This "collective, or universal (common), and powerful Will" (MdS 256, Ladd trans., pp. 65)[49] is the means by which "each decides

the same for all and all decide the same for each" (MdS 314, Ladd trans., p. 78), i.e., it is the legislative authority in the state. Moreover, Kant says that it is

> "a will that is united a priori (i.e., only through the union of the choice [or will] of all who can come into practical relations with one another) and that commands absolutely" (MdS 263, see Gregor trans., p. 84).[50]

It is general in origin, in scope, in form and in object.[51] It is, *in this sense*, a general will.

Obviously, this notion reflects Rousseau's notion of the general will or "volonté générale,"[52] and it has a role that is roughly analogous to that which it has in Rousseau's political thought – though with some important differences. For Kant, the general will is essential to many of the same issues – and specifically to rights. And we can see how it is fundamental to rights in at least three ways: *first,* to an account of property and the obligation to respect it; *second,* to the nature and legitimacy of the state that secures rights; and *third,* to the legal and moral character of rights themselves.

First, then, because for Kant the "Idea of a general legislative will" [allgemein gesetzgebende Wille] is a necessary condition for any juridical state of affairs (MdS 306, Ladd trans., p. 69), this "collective will" has as its function "the first and original foundation of any public contract whatsoever" (MdS 342, Ladd trans., p. 114)–it is necessary for property (MdS 250). For property (in an external object)–and hence the right to property – come into existence only through a process of recognition and law. Kant says, for example, that the general will must be present for even original possession; that

> "the possessor bases his act [of private will] on [the concept of] an innate common possession of the earth's surface and on the a priori general Will corresponding to it"[53] (MdS 250, Ladd trans., p. 57).[54]

The general will must be present for both the general right (to acquire) property, as well as the existence of the right to acquire a specific piece of property; it is the source of the (legal) security for– and the (moral) obligation to respect–rights to property. For us even to be aware of an acquired right, we must be in a condition in which there is a general will. Kant writes that only such a will "can provide the

guarantee [for rights] required" (MdS 256, Ladd trans., p. 65). But it is also the source of obligation; appropriation is

> "the act of a general will (in Idea) giving an external law through which everyone is bound to agree with my choice" (MdS 258, Gregor trans., p. 81).[55]

Second, this general will is essential to the Idea of the state–i.e., that authority which secures rights. Kant writes that "Will unites them [i.e., a multitude of men]" (MdS 311, Ladd trans., p. 75). It is through this general will that we can speak of the possibility of relations with others, and Susan Shell rightly notes both that this is a "rational connection between finite wills" and that it is "a connection that resembles what Hegel will later call recognition."[56] It is, therefore, this will – the general or united will – that is the unifying principle of the state. But this general will also legitimates the state and its use of force: for Kant, "lawful force is found only in the general Will" (MdS 257, Ladd trans., p. 66). The state, then, is a product of rational and general will–and thus it is a product of justice, not merely desire (as in Hobbes) or utility. And the general will is necessary for the government of the state; it is manifest in the "general legislative will of the people" (MdS 320, Gregor trans., p. 96).

Third, the general will is necessary for rights. As we have seen, it is through the mechanism of the state – which is founded on this general will – that such rights can be officially recognised, adjudicated (if necessary), and secured or enforced. We have also seen above that the general will makes possible property and possession–for they depend on civil society that "can only be founded on a law of the common Will" (MdS 257, Ladd trans., p. 66). But perhaps most importantly, even to be aware of an acquired right and of having a title to it, we must be in relation with others, and we must be aware of a law governing our relation with them (e.g., whether this is *my* father, *my* family, *my* household, and so on [see MdS 307])–this, too, requires a general will. Thus, even the existence of individual rights depends on this will.

The general will, then, involves a union of wills, (presumably) based on a reciprocal recognition, and existing in law; the general will is nothing other than this union. And this explains why the general will requires the state – it needs to be maintained continually, Kant writes, and it is for this reason that it has "united itself into a society" (MdS 326, see Ladd trans., p. 93).

To these three ways in which the general will is necessary for the existence of rights, we should add a fourth– that the general will is necessary to freedom. It is required as an element, not merely in securing external freedom, but also in providing for a richer account of freedom– or, better, a transformation of freedom in a way that earlier liberals often had great difficulty to explain.[57] What the general will does is take freedom in the sense of *Willkür* or freedom of choice and action (e.g., physical freedom), and reconstitute it as a freedom that has both moral and legal weight (i.e., *Wille*) through a process of rational recognition and through law as a set of principles of a priori practical reason.

Freedom, Kant would argue, is not diminished by this general will. As we have seen in the discussion of the state of nature in section II above, Kant notes that with

> "the original contract, all ... give up their external freedom in order to take it back again immediately as members of a commonwealth, that is, the people regarded as the state" (MdS 315-6, Ladd trans., p. 80)

and so there is no loss or sacrifice of freedom. And Kant also recognises that some of one's actions, while an expression of *Willkür*, are not expressions of one's freedom but merely of one's physical power and, therefore, can be limited without explicit consent. And not only is there no logical incompatibility between freedom and restriction, but restriction may serve as a means to achieve a more concrete freedom; Kant writes that the state – because of its relation to the general will of the people – requires benevolence and support of the indigent. He argues, for example, that because the existence of persons with property

> "depends on the act of subjecting themselves to the commonwealth for the protection and care required in order to stay alive, they have bound themselves to contribute to the support of their fellow citizens, and this is the ground for the state's right to require them to do so" (MdS 326, Ladd trans., p. 93).

Yet while influenced by Rousseau, there are several differences in Kant's account of the general will – differences that indicate significant change from Rousseau's account. First, while the state that is legitimated by the general will is "a union proceeding from the common interest," Kant does not presuppose the existence of a common good. As Susan Shell remarks, Kant's approach does not entail identifying self-interest with the interest of the collective.[58] Second, by emphasizing that the

general will is not an empirical will but a rational will that can be a priori, Kant avoids some of the problems that arise in Rousseau's account where the general will appears to collapse into the will of all.[59] And, third, there is no sense that Kant's general will is the will *qua* 'voluntas' of any thing (which has often been a criticism of accounts of the general will[60]).

Kant's general will is not some hypostasized entity, but neither is it merely a turn of phrase or a fiction. Moreover, Kant's analysis of the general will sets the stage for developments of the notion that are fundamental to later accounts of political obligation and rights. For example, Hegel adopts terms similar to those used by Kant in describing the basis of political obligation. So while Hegel, in the *Philosophy of Right*, rejects Rousseau's notion of a general will (what he calls "der gemeinschaftliche Wille"), he does acknowledge something that he refers to, alternately, as "the absolute Will" (§ 301), "the substantial Will" [der substantielle Wille] (§ 258), and the "universal Will" [der allgemeine Wille] and Reason – the will "in itself and for itself" [der an und für sich seiende Wille, die Vernunft] (§§ 258 and 301). And similarly, while later philosophers, such as the British idealist Bernard Bosanquet, adopt Rousseau's term 'general will,' the account they give of this 'will' – and of freedom as the 'hindrance of hindrances' – is clearly indebted to Kant.[61]

VI

This is not to say that Kant's account is free from challenge. Murphy and Mulholland point to certain key ambiguities or confusions (e.g., concerning the nature of acquired right and the distinction between *Wille* and *Willkür*) in Kant's account– though both also note how these issues can be addressed. One might also well argue that there cannot be a consistent account of a general will without there being something that the general will wills and in terms of which mutual recognition in society is possible–i.e., a common good. And, as Hegel later noted, the account of ethical life and, particularly, of the nature of the state and its actions that we find in Kant, are given only briefly. Finally, as just noted, the general will itself has been a consistent target of criticism, and some suggest that its role in Kant's 'republican' theory leads him to setting

too high a standard for active participation for there to be any genuine democracy.[62]

Nevertheless, Kant's account reflects a robust theory of human rights. It is an account that involves a conception of practical reason and law, and so avoids the paradox of permitting a right to do wrong. It also provides an explanation of the limits of rights, and of how rights can be effective and have an appropriate moral and legal sanction. And, finally, Kant has a clear theory of the role of law and political authority that provides us with a more plausible description of the relation of rights to the state, and of how the state is both conditioned by, and yet contributes to, the existence of rights.

Kant's account is also able to provide a more complete justification for the necessity of life in community. It provides a 'thicker' explanation of the legitimacy of property and a 'thicker' theory of the person than in earlier liberal views (e.g., Locke), and reminds us of the central place of recognition in property, in the constitution of the individual will, and in rights. Kant also shows that an adequate theory of the state includes a recognition of the necessity of providing for public welfare, and that it does not legitimate only the minimal state envisaged in some liberal theories. And, though it is not contract-based, Kant's political theory revises and reinterprets the role of consent–as a rational rather than as an explicit or an empirical process.

It is also worth noting that, in Kant's political philosophy, we have a new approach to natural law theory. It is not natural law theory as the scholastic philosophers would have understood it, and it is clearly a shift from how Locke presents 'natural law.' It is, rather, close to what T.H. Green later called '*ius naturale*' – "a system of correlative rights and obligations, actually enforced or that should be enforced by law."[63] (And, interestingly, Green's formulation of this understanding of natural law followed lectures he had given on Kant's moral theory in Oxford in 1879, and many of the themes in his *Lectures on the Principles of Political Obligation* are not Hegelian, but Kantian, and more like the MdS than the *Philosophy of Right*.) There is, then, a case to be made for claiming that natural law theory can be quite consistent with liberalism.

In short, with Kant's account of right, we are led to some non-individualist conclusions while still remaining in the liberal tradition. Kant's political philosophy anticipates elements of the Hegelian critique

of contract theories without embracing decidedly collectivist conclusions. Understanding Kant in this way also helps to address charges made concerning some later accounts of rights, such as those found in Green and Bosanquet – that there are tensions in their moral and political theories to the extent that they follow a Kantian view of the individual moral agent while, at the same time, adopt a teleological (Hegelian) account of the importance of a common good.[64] Arguably, the distinction between individualist theories that focus on the individual will, and theories that focus on a general will, is much less than some critics (e.g., W.H. Walsh) affirm.

VII

It is no surprise that Kant's political philosophy is experiencing a renaissance and, as philosophers look for alternatives to classical liberal individualisms and more modern 'communitarian' or collectivist views, it clearly provides some useful resources.

I have argued here that Kant's political philosophy contains a strong and sustained account of human rights, but that it also provides a lengthy argument defending the importance– and necessity–of life in political community. Rights are rooted in something about the human person- in particular, the individual will. Yet for rights to be coherent and meaningful, we need the state. And to get a justification of the state and of rights – not just of negative rights, but of all rights to the removal of 'hindrances to hindrances of freedom'– we need the general will.

It is because of his development of the notions of freedom and will that we can see how Kant is a transitional figure between Rousseau and Hegel. And it is because of his ability to develop this notion of the general will in a way that shows the need for the state while, at the same time, recognising the value of human autonomy and the individual will that we see Kant's position as occupying a middle place between Lockean individualism and putative Hegelian collectivism. Kant's understanding of the nature and role of consent and will in establishing political legitimacy–without having to refer ultimately to naive social contract theories–may prove to be a useful guide in grounding a coherent account of the function of law in the political community, but also of

the nature and source of rights.

Notes

[1]Kant's political philosophy appears in a number of texts (e.g., *Beantwortung der Frage: Was ist Aufklärung?* [1784; 'An Answer to the Question: What is Enlightenment?']; *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis* [1793; 'On the proverb: that may be true in theory but it is of no practical use']; *Zum ewigen Frieden* [1795; 'Perpetual peace']), but its most extensive account is to be found in *Die Metaphysik der Sitten* [1797 (hereafter MdS), Band 6, Kant's *Gesammelte Schriften* [Preussischen Akademie der Wissenschaften] (Berlin: G. Reimer, 1914). Page references are, in the first instance, to this edition]. Translations are taken from either *The Metaphysics of Morals*, introd., trans., and notes by Mary Gregor (Cambridge: Cambridge University Press, 1991) or *The Metaphysical Elements of Justice*; *Part I of The Metaphysics of Morals*, trans. and introd. John Ladd (Indianapolis: Bobbs-Merrill, 1965), with my modifications.

[2]See, for example, Thomas E. Hill Jr, "Punishment, Conscience, and Moral Worth," in *Kant's Metaphysics of Morals: Interpretative Essays*, ed. Mark Timmons (Oxford: Oxford University Press, 2002), pp. 233-253; Nelson T. Potter, "Kant and Capital Punishment Today," *Journal of Value Inquiry* 36 (2002): 267-282; Jean-Christophe Merle, "A Kantian Critique of Kant's Theory of Punishment," *Law and Philosophy* 19 (2000): 311-338; Sarah Williams Holtman, "Toward Social Reform: Kant's Penal Theory Reinterpreted," *Utilitas* 9 (1997): 3-21; Douglas Lind, "Kant on Capital Punishment," *Journal of Philosophical Research* 19 (1994): 61-74; Samuel Fleischacker, "Kant's Theory of Punishment," *Kant-Studien* 79 (1988): 434-449; Don E. Scheid, "Kant's Retributivism," *Ethics* 93 (1983): 262-282; Igor Primorac, "Kant und Beccaria," *Kant-Studien* 69 (1978): 403-421; Stuart M. Brown Jr, "Has Kant a Philosophy of Law?," *Philosophical Review* 71 (1962): 33-48.

[3]See, for example, Christine Korsgaard, "Kant," in *Ethics in the History of Western Philosophy*, ed. Robert J. Cavalier (New York: St. Martin's Press, 1989), pp. 201-243.

[4]Cf. Peter Nicholson, "Kant on the Duty: Never to Resist the Sovereign," *Ethics* 86 (1976): 214-230; Sven Arntzen, "Kant on Duty to Oneself and Resistance to Political Authority," *Journal of the History of Philosophy* 34 (1996): 409-424; Wolfgang Schwarz, "The Right of Resistance," *Ethics* 74 (1964): 126-134; H.S. Reiss, "Kant and the Right of Rebellion," *Journal of the History of Ideas* 17 (1956): 179-192. Ratnamala Singh, "Kant: Morality

and the Right of Resistance," *South African Journal of Philosophy* 6 (1987): 8-15.

[5]See John Martin Gillroy, "Making Public Choices: Kant's 'Justice from Autonomy' as an Alternative to Rawls' 'Justice as Fairness'," *Kant-Studien* 91 (2000): 44-72, and Heinz-Gerd Schmitz, "Moral oder Klugheit? Uberlegungen zur Gestalt der Autonomie des Politischen im Denken Kants," *Kant-Studien* 81 (1990): 413-434.

[6]See the *Groundwork of the Metaphysics of Morals*, trans. H.J. Paton (New York: Harper Row, 1953).

[7]See, for example, *Kant's Metaphysics of Morals: Interpetative Essays*, ed. Mark Timmons (Oxford: Oxford University Press, 2002); *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics*, (Themenschwerpunkt: *200 Jahre Kants Metaphysik der Sitten*), ed. B. Sharon Byrd, Joachim Hruschka, and Jan Joerden, Bd. 5 (1997); Howard Williams, (ed.), *Essays on Kant's Political Philosophy* (Chicago: University of Chicago Press, 1992); H. Van Der Linden, *Kantian Ethics and Socialism* (Indianapolis: Hackett, 1988); A. D. Rosen, *Kant's Theory of Justice* (Ithaca: Cornell University Press, 1989); L. A. Mulholland, *Kant's System of Rights* (New York: Columbia University Press, 1990); see also such articles as John R. Goodreau, "Kant's Contribution to the Idea of Democratic Pluralism," in *Reassessing the Liberal State: Reading Maritain's Man and the State*, ed. Timothy Fuller (Washington DC: Catholic University of America Press, 2001), pp. 99-112; Paul Redding, "Philosophical Republicanism and Monarchism – and Republican and Monarchical Philosophy – in Kant and Hegel," *Owl of Minerva* 26 (1994): 35-46; Onora O'Neill, "Kantian Politics: The Public Use of Reason (Part I)," *Political Theory* 14 (1986): 523-551; Patrick Riley, "Kantian Politics: The 'Elements' of Kant's Practical Philosophy (Part II)," *Political Theory* 14 (1986): 552-583. See also Georg Cavallar, "Neuere nordamerikanische Arbeiten uber Kants Rechts-und politische Philosophie," *Zeitschrift fur philosophische Forschung* 46 (1992): 266-277.

[8]Relevant essays and texts by Rawls include *A Theory of Justice* (Cambridge, MA: Harvard, 1971); "Themes in Kant's Moral Philosophy," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999); and "Kantian Constructivism in Moral Theory," *Journal of Philosophy* 77 (1980): 515-572 [also reprinted in *Collected Papers*].) For Gewirth, see the essays in his *Human Rights: Essays on Justification and Applications* (Chicago: University of Chicago Press, 1982). For discussion of the relation to Gewirth to Kant, see (for example) Deryck Beyleveld, "Gewirth and Kant on Justifying the Supreme Principle of Morality," in *Gewirth: Critical Essays on Action, Rationality and Community*, ed. Michael Boylan (Lanham, MD: Rowman & Littlefield Pub., 1999), pp. 97–117.

[9]See note 14 below.

[10]See James F. Bohman, "Participating in Enlightenment," in *Knowledge and Politics*, ed. Marcelo Dascal, (Boulder: Westview Press, 1989), pp. 264-289. Bohman suggests that the views of Jürgen Habermas suggest a normative democratic theory that would be highly cognitive and based on a free, uncoerced consensus that resembles a Kantian general will.

[11]*Du Contrat Social* (Paris: Flammarion, 1966), Bk. I, 1; Bk. I, 4: "Renoncer à sa liberté, c'est renoncer à sa qualité d'homme, aux droits de l'humanité, même à ses devoirs."

[12]*Grundlinien der Philosophie des Rechts oder, Naturrecht und Staatswissenschaft im Grundrisse*, ed. Eduard Gans (Berlin: Duncker und Humblot, 1840) (Vol. VIII, *Georg Wilhelm Friedrich Hegel's Werke* [Berlin: Duncker und Humblot, 1832-45.)] Cf. *Philosophy of Right*, trans. with notes, T.M. Knox (Oxford: Clarendon Press, 1942).

[13]John Locke, *Second Treatise of Government*, ed. with introd. C. B. Macpherson (Indianapolis, IN: Hackett Pub. Co., 1980).

[14]See, for example, Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); Douglas B. Rasmussen and Douglas J. Den Uyl, *Liberty and Nature* (LaSalle, IL: Open Court, 1991); Tibor Machan, *Individuals and their Rights* (LaSalle, IL: Open Court, 1989).

[15]Kant deals with both objective and subjective right. Objective right, however, deals with the corpus of law; it is the latter – subjective right – that deals with the rights of persons and that approximates our contemporary notion of human rights.

[16]See Ladd, "Introduction," to *The Metaphysical Elements of Justice*, p. xvii.

[17]MdS 224: "... diejenigen, zu denen die Verbindlichkeit auch ohne äuâere Gesetzgebung a priori durch die Vernunft erkannt werden kann, zwar äuâere, aber *natürliche* Gesetze..." – "Those [obligatory laws] ... that can be recognised as obligatory a priori by reason even without external lawgiving are indeed external but natural laws" (Gregor trans., pp. 50-51).

[18]For a more extensive discussion of this, see Mulholland, *Kant's System of Rights*, pp. 278ff.

[19]Kant uses the term 'moral person' in another sense – i.e., as an artificial person (see MdS 297) – but it is in the sense above that I will employ it here.

[20]Jeffrie Murphy, *Kant: The Philosophy of Right* (London: Macmillan, 1970).

[21] See Murphy, *Kant*, pp. 82-83.

[22] See Murphy, *Kant*, pp. 80-85.

[23] For, Murphy argues, focusing on the possession of *Wille* ignores the possibility that there are those who have the capacity to act freely but not morally. I would argue that having a free *Willkür* is a necessary, but not (pace

Murphy, p. 84) a sufficient condition. For the general discussion of these two senses of freedom, see Lewis White Beck, *A Commentary on Kant's 'Critique of Practical Reason'* (Chicago: University of Chicago Press, 1960), pp. 176 ff.

[24] MdS 239 : "Wir kennen unsere eigene Freiheit (von der alle moralische Gesetze, mithin auch alle Rechte sowohl als Pflichten ausgehen) nur durch den *moralischen Imperativ*, welcher ein pflichtgebietender Satz ist."

[25] MdS [Introduction, § E] 232: "... man kann den Begriff des Rechts in der Möglichkeit der Verknüpfung des allgemeinen wechselseitigen Zwanges mit jedermanns Freiheit unmittelbar sein."

[26] See also MdS 237: "sofern sie mit jedes anderen Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann" – One's freedom must be "compatible with the freedom of everyone else in accordance with a universal law" (Ladd trans., p. 44).

[27] Although not unproblematically. In Hobbes, for example, this 'right' in the 'natural condition' is simply the natural, physical liberty that each one possesses – and this is anterior to, and independent of, the idea of justice (which only exists in civil society) and so entails no obligation on others to respect it (see Hobbes, *Leviathan*, ed. C. B. Macpherson (Baltimore: Penguin Books, 1968) ch. 13). See my "Hobbes, Jaume et les droits inaliénables," in *Carrefour*, 13 (1991): 127-130.

[28] See MdS § 47, pp. 315-316.

[29] See MdS 237 and MdS 306ff, and note 41 below.

[30] "Chacun de nous met en commun sa personne et toute sa puissance sous la suprême direction de la volonté générale; et nous recevons en corps chaque membre comme partie indivisible du tout" – Rousseau, *Contrat social*, I, 6.

[31] See Mulholland, *Kant's System of Rights*, p. 234f.

[32] MdS 237: "Freiheit ... ist dieses einzige, ursprüngliche, jedem Menschen, kraft seiner Menscheit, zustehende Recht."

[33] See MdS 355 and MdS § 61, pp. 350ff.

[34] See MdS 248: "... in Ansehung des *inneren* Meinen (der Freiheit)."

[35] I cannot pursue this here, but the implications for a theory of natural rights are significant.

[36] Negative liberty (or the negative concept of freedom) is simply freedom of will, i. e., "independence from determination by sensible impulses" (MdS 213, Ladd trans., p. 13; see MdS 226). Positive freedom is "the subjection of the maxim of every action... to law" (MdS 214 , Ladd trans., p. 13), i.e., will giving itself to – or submitting itself to – law. But is my right to negative liberty outside of law altogether? Law or rationality here is surely implicit

in the fact that one is *not* determined by sensible impulses.

[37] See Murphy, *Kant*, pp. 128f.

[38] Thus, "it can be said that the establishment of a universal and enduring peace is not just a part, but rather constitutes the whole, of the ultimate purpose of law [Rechtslehre]" (MdS 355, Ladd trans., p. 128), "attempting to approach this Idea [of a perpetual peace] is a requirement grounded in duty and in the rights of men and states" (MdS 350, Ladd trans., p. 124). This point is emphasised by Murphy, *Kant*, pp. 148-9. Kant discusses the interesting question of whether there is a right to respond to a threat in a state of nature by using extreme – i.e., lethal – force (see MdS 235-6).

[39] MdS 316: "...er hat die wilde gesetzlose Freiheit gänzlich verlassen, um seine Freiheit überhaupt in einer gesetzlichen Abhängigkeit, d.i. in einem rechtlichen Zustande unvermindert wieder zu finden" [i.e., man "has totally abandoned his wild, lawless freedom in order to find his entire freedom again undiminished in a lawful dependence, that is, in a condition of right or law; (undiminished), because this dependence springs from his own legislative will" (see Ladd trans., pp. 80-81)].

[40] Kant's 'ideal state' (see MdS 339ff) has a mixed constitution, on a republican model, with a right to expression for those who meet the requirements of self-sufficiency. Though Kant develops at length an account of the different authorities within the state (see MdS § 45 ff, 313ff) as well as comments on the three forms of the state (MdS § 51, 338ff), these need not be discussed here.

[41] Since an objective of this paper is to trace Kant's account of rights within the liberal tradition, it is worth explaining briefly how Kant comes to the view that no consent as such is required for entering civil society. It is true that Kant writes that the "original contract" is rooted in consent – it is "the Idea of [the act by which the people constitute themselves a state] that is the basis of the legitimacy of the state" (MdS 315, Ladd trans., p. 80). And Kant also holds that in a state of nature, there can be society. Nevertheless, there can be no guarantee of property here; this requires civil society (MdS 242, Ladd trans., p. 48). So, Kant argues, once people are in society, "if they could (even involuntarily) come into a relationship with one another that involves mutual rights" then they "ought to enter [the state]" (MdS 306, Ladd trans., p. 70; cf. MdS 307 and MdS 312) – i.e., they *must* "enter into a condition under which what is one's own is guaranteed to each person against everyone else" (MdS 237, Ladd trans., p. 43). Having rights – not only one's acquired rights, but one's innate or inherent rights – rationally requires willing that which is necessary to securing them. Consequently, Kant writes, people "act in the highest degree wrongly by wanting to be in and to remain in a state that is not juridical" (MdS 307-8, Ladd trans., p. 72). Kant also says that they act wrongly here because, without the state, there

can be no security against the violence that is inevitable in a "state of external lawless freedom" (MdS 307, Ladd trans., p. 72). Indeed, a refusal to enter into society is also a risk of violation of equity for, in such a situation, "each will have his own right to do what seems just and good to him" (MdS 312, Ladd trans., p. 76) and there is "no competent judge" to resolve disputes. Kant calls this the postulate of public law: "If you are so situated as to be unavoidably side by side with others, you ought to abandon the state of nature and enter, with all others, a juridical state of affairs, that is, a state of distributive legal justice" (MdS 307, Ladd trans., p. 71).

[42] Kant argues that the state must not only give legal recognition of rights, but must provide "... the conditions under which alone everyone is able to *enjoy* his rights..." (MdS 306, Gregor trans., p. 120). This is necessary to public justice.

[43] Kant writes that this also explains why the people cannot complain of injustice. He notes that, in a controversy between the people and the sovereign, the people may "want to act as judge of their own cause," but adds that this "is absurd" (MdS 320; cf. MdS 312).

[44] Mulholland, *Kant's System of Rights*, p. 242.

[45] Mulholland, *Kant's System of Rights*, pp. 274-275.

[46] See Susan Shell, *The Rights of Reason: A Study of Kant's Philosophy and Politics* (Toronto: University of Toronto Press, 1980), p. 105, referring to Kant, *Reflexionen zur Anthropologie, Kants handschriftlichen Nachlaß*, Bd. 2, zweiter halfte, in *Kants Gesammelte Schriften*, Bd. XV (Berlin & Leipzig: Walter de Gruyter, 1928), # 6960.

[47] See Hobbes, *Leviathan*, ch. 21: "when the words *free*, and *liberty*, are applied to any thing but *bodies*, they are absurd."

[48] See also *Zum ewigen Frieden*, ch. 2, § 23.

[49] MdS 256: "ein jeden anderen verbindender, mithin kollektiv-allgemeiner (gemeinsamer) und machthabender Wille."

[50] See MdS 263, i.e., a will "als nur so fern er in einem a priori vereinigten (d. i. durch die Vereinigung der Willkür aller, die in ein praktisches Verhältnis gegen einander kommen können) absolut gebietenden Willen enthalten ist" (see also MdS 256). See Mulholland, *Kant's Theory of Rights*, p. 304.

[51] See my "Bernard Bosanquet and the Development of Rousseau's Idea of the General Will," *Man and Nature / L'homme et la nature*, 10 (1991): 179-197, at p. 180.

[52] *Social Contract*, IV.1, p. 146; see II.2, p. 149f.

[53] MdS 359: "... angebornen Gemeinbesitze des Erdbodens und diesem a priori entsprechenden allgemeinen Willen."

[54] See here Mary J. Gregor, "Kant's Approach to Constitutionalism," in *Constitutionalism*, ed. Alan S. Rosenbaum (New York: Greenwood Press, 1988), pp. 69-87.

[55] In her Introduction to her translation of MdS, Mary Gregor notes that my act of choice or free will can effectively exclude others from my possession only when "my choice and that of every other who could be affected by its exercise is 'included' in a 'general will' giving laws for such an exercise of choice, that is, within the civil condition" (p. 13); a general will is just that which is presumed in there being a civil society or state. She explains that "a general will is required to put all others under a contingent obligation by the possessor's act of choice" (p. 15), and therefore there can be a real right and respect of property.

[56] Shell, *The Rights of Reason*, p. 130.

[57] See the two senses of freedom discussed in ch. 21 of Hobbes' *Leviathan*.

[58] Shell, *The Rights of Reason*, p. 131.

[59] See Bernard Bourgeois, "L'idealisation kantienne de la republique: Kant contre Rousseau," *Tijdschrift voor Filosofie* 55 (1993): 293-306. On Kant's general will as not involving preferences, see Mulholland, *Kant's System of Rights*, p. 333.

[60] See, for example, Bernard Mayo's "Is there a Case for the General Will?," in *Philosophy, Politics and Society*, first series, ed. Peter Laslett (New York: Macmillan, 1956), pp. 92-97. See also Gopal Sreenivasan, "What is the general will?," *Philosophical Review* 109 (2000): 545-581; Morris Ginsberg, "Is there a general will?," *Proceedings of the Aristotelian Society* 20 (1919-20): 89-112; J.H. Muirhead, "Recent Criticisms of the Idealist Theory of the General Will," *Mind* 33 (1924): 166-175; 233-241; 361-368; C.D. Broad, "The Notion of a General Will," *Mind* 18, (1919): 502-504.

[61] See Bosanquet, *The Philosophical Theory of the State and Related Essays by Bernard Bosanquet*, ed. with Introductions, notes, and annotations by William Sweet and Gerald F. Gaus (South Bend, IN: St Augustine's Press, 2001), especially ch. 5. See also my *Idealism and Rights* (Lanham, MD: University Press of America, 1997), pp. 124ff.

[62] Rolf George, for example, suggests that, on Kant's view, the general will has to be internalized by all citizens before a republican government is possible. See his "The Liberal Tradition, Kant, and The Pox," *Dialogue* 27 (1988): 195-206.

[63] See *T.H. Green: Lectures on the Principles of Political Obligation, and other Writings*, ed. Paul Harris and John Morrow (Cambridge: Cambridge University Press, 1986), § 8.

[64] According to W.H. Walsh, Bosanquet's political and ethical theory "was wrong in a serious way: [because] he did not see the contradiction between

adopting the Hegelian standpoint and continuing to lay stress on the individual will" (*Hegelian Ethics* [London: Macmillan, 1969], p. 75). Vincent argues that this tension is present in Hegel himself (See Andrew Vincent, "The Individual in Hegelian Thought," *Idealistic Studies* 12 (1982): 156-168, at pp. 165-166).