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# Kant's *Naturrecht Feyerabend*, Achenwall and the Role of the State

**Abstract:** Kant's *Naturrecht Feyerabend* has recently gained more sustained attention for its role in clarifying Kant's published positions in political philosophy. However, too little attention has been given to the lecture's relation to Gottfried Achenwall, whose book was the textbook for the course. In this paper, I will examine how Kant rejected and transforms Achenwall's natural law system in the *Feyerabend Lectures*. Specifically, I will argue that Kant problematizes Achenwall's foundational notion of a divine juridical state which opens up a normative gap between objective law (prohibitions, prescriptions and permissions) and subjective rights (moral capacities). In the absence of a divine sovereign, formal natural law is unable to justify subjective natural rights in the state of nature. In the *Feyerabend Lectures*, Kant, in order to close this gap, replaces the divine will with the "will of society", making the state necessary for the possibility of rights.

## Introduction

Kant's lectures on natural right, as recorded in the lecture notes known as *Naturrecht Feyerabend*, have recently been receiving more sustained attention.<sup>1</sup> Kant's lectures engage heavily with Gottfried Achenwall's (1719–1772) *Ius Natur-*

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I would like to thank Pauline Kleingeld, Konstantin Pollok, Fred Rauscher, Fiorella Tomassini, the audience of the 2020 NAKS biennial conference, as well as the reviewers at the Kant Yearbook for each making my paper better. I would also like to thank Marshanda Gregory for her continued support. The research presented here has been generously funded by the Nederlandse Organisatie voor Wetenschappelijk Onderzoek (NWO).

<sup>1</sup> Some include Guyer (2000) on Kant's concept of freedom in the introduction of *Feyerabend*; Hirsch (2012) compares the legal philosophy in *Feyerabend* and *Mongrovius Lectures* to the *Metaphysics of Morals*; Zöller (2015) on bindingness and obligation; Rauscher (2015) on state sovereignty and revolution and Kleingeld (2019) on the relation of the lectures to the *Groundwork* concept of freedom. See also two recent edited volumes on the lectures: Ruffing et al. (2020) and Hüning et al (2021). For some of the problems that led to the lectures being ignored until recently, see Hinske (2020).

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<https://doi.org/10.1515/kantyb-2021-0003>

*ae*, which was assigned for the course, while also making original moves that would set the groundwork for his published *Metaphysics of Morals* years later.<sup>2</sup> However, most of the attention has focused on the *Feyerabend's* introduction, where Kant gives a sustained treatment of his foundational concept of freedom.<sup>3</sup> Yet, with respect to Kant's relation to Achenwall's natural law, scholars have either left their relationship in the *Feyerabend* lectures undetermined or suggested that while Kant changes the foundational value (freedom) which he uses to justify rights, the justificatory relationship between natural laws and coercive rights is essentially the same as in Achenwall.<sup>4</sup> This paper will challenge this latter picture by focusing on the role of the state in Kant and Achenwall. Specifically, I will argue that Kant's rejection and reformulation of Achenwall's foundations of natural law problematizes rights in the state of nature. Once we understand this, it is clear that Kant's rejection of Achenwall includes the necessity for an alternative justificatory strategy for rights.

For Achenwall, there are two aspects of *ius*, objective law and subjective right. Objective laws (propositions containing obligations) and subjective rights (permissible actions that can be coercively enforced) are both given a firm foundation in the will of God. God is not only the normative foundation but also the sovereign enforcer of rights, attaching divine punishments and rewards to obligations to respect each other's rights. Thus, concrete subjective rights are immediately justifiable in light of objective laws grounded in God's will. Kant, I will argue, rejected Achenwall's normative foundations and therefore opened a normative gap between objective law and subjective rights in the state of nature that was foreign to Achenwall. By 'normative gap' I mean that it is no longer possible to immediately justify subjective rights in light of objective laws. What is missing is an authoritative will that can determine genuinely universal and reciprocally enforceable external laws and rights. This, Kant suggests, is only possible in the

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<sup>2</sup> See Byrd and Hruschka (2010, 15–19) and Guyer (2020) for Kant's use of Achenwall's textbook.

<sup>3</sup> For instance, Willaschek (2018); Bordoni (2020); Grapotte (2020).

<sup>4</sup> See Caranti (2020) and Guyer (2016, 427–429); Guyer (2012, 113–114) where Guyer seems to argue that both Kant and Achenwall follow the same justificatory path to rights from different foundational norms, for Achenwall self-perfection/happiness, for Kant, the foundational value of freedom. This is connected with, what Guyer has called, his "normative essentialism" (Guyer 2016, 428). For non-essentialist readings of the *Feyerabend* introduction, see Willaschek (2018) and Bacin (2020). However, Willaschek and Bacin do not look beyond the introduction. Bacin comes the closest in the existing literature to the goal in this paper by contrasting Achenwall's "voluntarism" about rights (see my issues with this term in note 10 below) and Kant's "end-in-itself" (Bacin 2020). However, Bacin misses what I take to be the persistent difficulty for Kant, namely the absence of an authoritative external will.

civil condition where an authoritative will can put all others under obligations. Thus, the state becomes a necessary component for grounding rights. Therefore, Kant's insistence that we have an obligation to enter into a civil condition can be traced back to his rejection of Achenwall in the *Naturrecht Feyerabend*.

In the first section, I will introduce Achenwall's foundations for natural law and natural rights. I will focus on how he justifies the immediate relationship between laws, obligations and rights and how this effects the role of the civil state in his system. Then, in part two, I will lay out the commitments in Kant's critical system that reject foundational elements of traditional natural law in general and Achenwall's natural law in particular. In the third part I will explain how the rejection of fundamental aspects of Achenwall's natural law problematizes rights in the state of nature in new ways and how, in order to close the normative gap between objective law and subjective right, Kant makes the state a necessary condition for the possibility of rights generally.

## 1 Achenwall's *Ius Naturae*

Achenwall began his studies in Jena and studied briefly at Halle before earning his master's degree at the philosophical faculty at Leipzig.<sup>5</sup> Achenwall went on to teach at the University of Göttingen from 1748 to his death. Achenwall published the popular textbook *Ius Naturae*, in 1750. The fifth edition of the work, published in 1763, is the edition that Kant owned and used for his course.<sup>6</sup>

### 1.1 Achenwall and the Foundations of Natural Law

The aim of Achenwall's text is to give a comprehensive and systematic introduction to natural law. Achenwall defines natural law in the opening sentence of his text as "the knowledge of perfect natural laws, or the knowledge of external natural rights and obligations" (Achenwall 2020a, 7). In other words, for Achenwall, natural law is the general body of knowledge that concerns a set of laws, rights and obligations. Achenwall defines "law" as "a proposition stating an obligation" (Achenwall 2020a, 8) and an obligation is "the necessity that arises from a distinct representation (motive) of a true good, to determine a free action,

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<sup>5</sup> Significantly, Achenwall studied law at Halle from 1740 to 1742 which overlaps with the return of Christian Wolff to Halle in December 1740. Achenwall was no doubt influenced by the great natural law theorist, but also the Wolffian department at Leipzig.

<sup>6</sup> See Guyer (2020, xvi – xvii) and Streidl (2003, 30 – 33) for more detail.

i. e., it is the moral necessity that springs from some rational goal” (Achenwall 2020a, 8). The moral ability one has, given one’s moral and physical restraints and obligations, is called a moral right (Achenwall 2020a, 11).<sup>7</sup>

Natural laws, obligations and rights are, for Achenwall, types of moral law.<sup>8</sup> Moral laws and obligations in general are “norms for free actions which God obligates us to observe” (Achenwall 2020a, 11). Moral laws are natural insofar as they can be known from philosophical principles, i. e. without specific divine revelation. However, as Achenwall makes clear, natural laws, though indeed without the need for divine revelation, are still grounded on the *existence* of a God with specific attributes and a “sufficient knowledge” of his will, understood as “God’s aims that are manifest through creation” (Achenwall 2020a, 12). Therefore, Achenwall’s general principle of natural law comes out looking very dependent on knowledge of the actual will of God:

act in accordance with the will of God as much as you can in all actions in which you are able to *know that will by reason alone*; Live, therefore, in accordance with God’s perfections and aims; illustrate God’s glory, seek the best of mankind, the best for yourself, and your own and other’s happiness; don’t do what goes against the preservation of another man; perfect yourself and preserve yourself” (Achenwall 2020a, 12).

This serves as the general principle through which we deduce all other natural laws and obligations (Achenwall 2020a, 12). Achenwall’s natural laws do not rely on divine revelation, yet, the normative basis for natural laws is located in comprehension of divine will in nature(s) and the divine origins of human reason. Thus, though Achenwall suggests that the discovery of natural laws is an act of reason alone, he clearly thinks that the normative force of natural laws lies in their origins as commands of a partly knowable deity.<sup>9</sup> This has three important and related implications.

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<sup>7</sup> Achenwall uses the word *ius* for both the objective law and the subjective right. This is an interesting departure from Wolff who used the word *lex* for the objective natural laws and *ius* for the subjective capacities of right. Achenwall does distinguish between the two components, objective and subjective, but the terminological choice might reflect the immediacy that Achenwall sees between objective natural laws, natural obligations and natural subjective rights. For an argument about how Kant collapses brings both of these under *a priori* knowledge in the *Rechtslehre*, see Tomassini (2018b).

<sup>8</sup> Joachim Hruschka has pointed out that Achenwall’s relation of concepts forms a deontological hexagon, see Hruschka (1986).

<sup>9</sup> Bacin calls this Achenwall’s “voluntarism” since Achenwall’s moral theory is dependent on God’s commands (Bacin 2020). I have chosen not to adopt this terminology given that it seems Achenwall never commits himself to a voluntarist conception in the sense of the medieval voluntarist/intellectualist debate. A commitment to the necessity of knowledge of God’s will for

First, Achenwall is able to justify subjective rights directly from natural laws. Natural laws (objective) are propositional statements to direct our actions in accordance with God's will. These laws define natural obligations that we have, i.e. to pursue my own perfection. These obligations then ground my natural rights. My (subjective) rights are immediately justified because my natural obligations to pursue certain ends *contain* the permission to seek out the means necessary to pursue these ends. I have a perfect right (the ability to coerce another by force of external law) if my right corresponds to a natural obligation, i.e. the right to pursue my perfection. So, if one has a natural obligation to pursue some rational end, then one also has the natural right to prevent interference in the pursuit of that rational end (Achenwall 2020a, 14). This is true not only of obligations but also of permissions. Natural law grounds permissions, i.e. the permission to acquire things, which in turn ground rights, i.e. the right to enforce my ownership. These rights are directly and concretely established without the need for further elaboration other than their deduction from natural laws grounded in God's will.

Second, Achenwall sees natural laws as not only general moral laws but also *juridical laws* (Achenwall 2020a, 16). Juridical laws, according to Achenwall, are "made by a superior and obligate the subjects with the threat of punishment". Since, "all men are God's *subjects*, hence God is the *superior* of all mankind" (Achenwall 2020a, 16) and "strict natural law [...] is imputed by God as the legislator, by punishing" (Achenwall 2020a, 15), perfect natural laws are also juridical laws. In other words, natural laws are juridical because they are legislated *by God to subjects* in the context of a community subjected to the authority of God. Thus, the difference between natural and positive law is only the difference in legislator (source of obligation) (Achenwall 2020a, 16). For Achenwall, objective laws immediately ground coercive subjective rights non-problematically because even in the state of nature there exists an authoritative and legitimate legislator that can enforce my rights. Human juridical states can add to the obligations I have by legislating positive law, but are ultimately only contingently relevant for the validity of subjective coercive rights.

Third, Achenwall, because of the immediate justificatory relationship between objective natural laws and natural subjective rights, is able to ground private property rights in the exercise of a unilateral will. Achenwall distinguishes between absolute and conditional natural law, where absolute natural laws are

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knowledge of natural laws, or even the authority of natural laws, is wholly compatible with an intellectualist position. Achenwall surely thought that the divine will was the *source* of moral obligations (Achenwall 2020b, 40–41; Achenwall 2020a, 11) but I take voluntarism to be a claim that *X* is obligatory *only in virtue of* God's command. The latter is a more complicated claim that Achenwall does not straightforwardly defend. See also Streidl (2003, 204 ff.).

those that precede a rightful act and conditional natural laws are those that follow a rightful act (Achenwall 2020a, 39). This is the distinction between innate and acquired right, which Achenwall gets from Thomasio and that Kant adopts. For Achenwall, acquired right is grounded directly on my innate or absolute right to acquire things. Achenwall denies the claim of Grotius and Pufendorf that there needs to be an original community holding things in common in order to validate my right to acquire things. Achenwall says, “for an ownerless thing to become my own legitimately, the added will of other men is not required” (Achenwall 2020a, 41). This is because one’s permissive natural right to acquire external objects would *not be a right* because the right would be conditional on the consent of others (Achenwall 2020a, 41).<sup>10</sup> Rather, my right to acquire things, as a subjective capacity, is grounded directly in the objective law. My innate right to occupy things is the title by which my act of occupancy is rightful. In order to acquire ownerless things, all I need is to occupy them (Achenwall 2020a, 42–43). Achenwall defines occupancy as consisting in an act “by which someone brings a thing into his power to the exclusion of other” and the intention “to make it one’s own”. The former, bringing something under one’s physical powers, is called natural possession and the latter, the added declaration or intention to make the possession one’s own, is juridical possession. Thus, the rightful occupant only needs to take physical possession of a thing along with some declaration (though for Achenwall the seizure and the declaration are, at least sometimes, the same thing (Achenwall 2020a, 44)).

Furthermore, the possession of a thing through occupation creates both a right on the part of the occupant to the specific object, and an obligation on the part of others to respect not only your occupancy (Achenwall 2020a, 44–45) but also the judgement of the occupant about the rightfulness of his possession “by force of his natural liberty” (Achenwall 2020a, 42–43).<sup>11</sup> Achenwall is able to claim 1) that exercising my innate right to possession create obligations in others and 2) that we have to respect the judgement of the occupant only because Achenwall finds the foundations of natural right in natural laws legislated and enforced by a divine will. If my innate rights are juridical rights in the sense explained above, then any use of that right is also protectable and obligations created by its use enforceable. Achenwall grounds the legitimacy of rights to specific things (conditional rights to things) in the origins of our absolute, innate rights in a divine juridical community.

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<sup>10</sup> See Tierney (2014, 145 ff) for the place of Achenwall in the development of a permissive natural laws.

<sup>11</sup> See also Streidl (2003, 238–243).

To summarize the points I have made thus far, Achenwall takes the principle of right as agreement with the will of God which grounds natural obligations toward rational ends (preservation/perfection) and justifies natural rights as capacities to pursue those ends. As a consequence, Achenwall is able to directly justify rights under objective natural laws because the divine origin of natural laws gives us a legitimate and authoritative legislator.

## 1.2 Achenwall and the Role of the State

Achenwall begins part two of *Ius Naturae* by stating that while the first part focused on the *natural* state of individual men, the second part will look to those natural rights and obligations derived from the *social* state of man, that is, man as he is in society with others. Achenwall defines “society” as “the union of several people to pursue a common, non-transient goal, i. e., it consists in that enduring state of several people by which they strive to obtain the same goal with joint or united resources (forces, powers)” (Achenwall 2020a, 111).

Thus, in every society we can think of the following:

1) the common goal, and thus for the union of will and the common good, for the obtaining of which all the associates join their resources so that it will flow to all once it has been obtained; 2) the union of resources, as the means to the society’s end, and hence the cooperation of all associates to give each other mutual help (assistance), I §. 273, in all those things without which the goal of the society cannot be achieved; 3) many social affairs, i. e., affairs serving the society’s goal, which the associates have to conduct. (Achenwall 2020a, 111–112).

The basic elements of a society are the association to the pursuit of a *common goal*, the union of resources as means for achievement of that *common goal*, and certain common affairs (such as cultural gatherings, military ventures, etc.), again serving the society’s *common goal*. Given the emphasis he puts on the common goal, it is not surprising that Achenwall suggests that societies mainly differ with regards to the common goal they pursue. A society’s welfare “consists in its unimpeded progress towards its social goal” (Achenwall 2020a, 112). The society’s welfare is, Achenwall suggests, the supreme law of society (Achenwall 2020a, 113).

Universal social law is “natural law applied to societies, it teaches the natural rights and obligations that may be conceived once a particular society has been established.” (Achenwall 2020a, 112). The social rights and obligations we have are the obligations and rights to perform those actions that pertain to the common good, the social goal, that our society has adopted (cf. Achenwall

2020a, 112–113). Achenwall attaches all our social rights and obligations to furthering the social welfare of a society, which consists in its ability to pursue its social goal.

Achenwall distinguishes between two different types of society: equal and unequal. An unequal society is defined by the role of overlordship (cf. Achenwall 2020a, 116). This means that one of the associates has the right to subject the others to laws, to coerce the others by his will alone and that others (the subjects of the overlord) are obligated to obey the will of the overlord. The equal society, then, is simply the absence of overlordship. Achenwall then defines different types of societies which go from most simple to most complex. The basic societies are marital, parental and master societies. These three basic societies combine to create the composite society of a family (cf. Achenwall 2020a, 133). The goal of a family is then to further the goals of the marital, parental and master societies and so the welfare of all the societies that make it up. Families are necessarily unequal societies with an overlord whose will rules over the family (cf. Achenwall 2020a, 134).

Finally, we reach the state, which Achenwall defines as “an unequal society of several families for the pursuit of external happiness” (Achenwall 2020a, 135). Therefore, the structure of Achenwall’s state has an overlord, whose will is authoritative and subjects, which are family-societies obligated to obey the overlord of the state (cf. Achenwall 2020a, 137–138). Here I will argue for two points about Achenwall’s state, (1) that the state’s role is a contingent one, emerging from empirical factors about the maintenance of our right to external happiness and (2) that the validity of the state is ultimately grounded on the immediate relationship between objective laws and subjective rights explained above.

First, as pointed out in his definition, the state emerges because “the goal or primary and supreme purpose of all men is happiness; and in particular, whenever of course one is not thinking of beatitude and life after death, external happiness (prosperity)” (Achenwall 2020a, 135). Thus, when we are not concerned with internal happiness (beatitude) we are “busy preserving external goods [...] and increasing them with ever more goods” (Achenwall 2020a, 135). Thus, the means to pursue external happiness are security, for existing goods, and sustenance, to increase their external goods. The pursuit of these means led men into pre-state societies. When these societies became insufficient for the maintenance of security and sustenance, men “started to strive for external happiness directly by joining forces” (Achenwall 2020a, 135). Achenwall continues that the state has been proven, through experience, to be the most perfect way to maintain the necessary means to achieve external happiness: security and sustenance. Therefore, entrance into the state is due to circumstances that make the state, through our own experience, the best configuration for security and



sustenance. In fact, Achenwall leaves open whether there will be some other configuration that might better serve the purposes of men, or whether the family or some other less complex society would have to first fail to maintain security and sustenance for us to move to the state. The entrance into the state, for Achenwall, is the outcome of contingent factors that lead to the state being the most expedient and efficient option for our continued pursuit of external happiness.

Second, the universal laws of the state, like the universal laws of societies before it, are “nothing else than natural law applied to the state” (Achenwall 2020a, 135). The rights and obligations in the state are derived directly from the natural laws established prior to the state. Thus, the state simply “passes on the laws that the civil subjects and the civil overlord by nature must observe with respect to one another” (Achenwall 2020a, 137). However, Achenwall is clear that the authority of the overlord and the power of the state refer back not to God, but to the “civil pact of subjugation” which is the agreement that individuals entered into to transfer their natural liberty to the civil overlord for security and sustenance (Achenwall 2020a, 140). What Achenwall calls “natural liberty” is the freedom from overlordship by nature (Achenwall 2020a, 132–133). Civil overlordship is by nature with the people who then transfer their natural liberty to the overlord through a pact (cf. Achenwall 2020a, 140–141). The civil overlord has *valid* authority only if he can trace his authority back to a *valid* civil pact of subjugation. Thus, the right of the overlord to obligate his subjects to things that concern the social welfare of the state, and the subject’s obligation to submit to the authority of the overlord, are derived directly from the civil pact (cf. Achenwall 2020a, 142). While Achenwall does, indeed, separate the authority and power of the overlord from natural laws and attribute it to a historical pact, it is still the case that the civil pact is valid only in relation to natural law and that the agreements of the pact are merely natural law applied to a particular social reality. The immediacy between objective law and subjective right, grounded in God’s will still forms the foundations and defines the legitimacy of the state. This is because for an individual to transfer his right to pursue his external happiness to the overlord he must already possess a right to alienate. Remember that, for Achenwall, the transfer in the civil pact is a historical event where the subjects transfer their rights to the overlord. Therefore, for Achenwall, the state does nothing to validate rights but only transfers rights from subjects to overlord. As we have seen, the right of the overlord comes from the civil pact. However, the right of the overlord is only valid because the peoples right was already valid before the pact was made; the civil pact is only a shifting around of rights. The civil pact relies on previously valid natural rights grounded in the divine will.

In this section, I have outlined Achenwall's foundations for natural law and the role of the state in Achenwall's system. In the next section, I will show why and how Kant rejects the foundations of natural law asserted by Achenwall. Here we will take a step back in order to see that Kant's systematic commitments are at odds with Achenwall.

## 2 Kant's Problems with (Achenwall's) Natural Law

The discussion here will give us an idea of some of the reasons that Kant could not go along with key notions of Achenwall's natural law theory. In the next section, I will outline how the departure from key tenets in natural law created new problems for Kant's system of right.

### 2.1 Laws of Nature vs. Laws of Freedom

The first remark to be made is that Kant makes a distinction between laws of nature and laws of freedom. In the natural law tradition, by contrast, obligating laws are called laws of nature. Laws of nature can obligate us *because* of our rational nature. For Achenwall, as well, we are obligated by laws of nature because we are rational beings, and it is in virtue of our rationality and freedom that we can recognize the binding force of the law and act in accordance with them.

Kant had already committed himself to the distinction between laws of freedom and laws of nature in the critical investigation carried out in the *Critique of Pure Reason* four years prior to the *Feyerabend*. There, Kant claims that we can think of causality only in two ways: according to nature or according to freedom (*CPR*, A 532/B 560). From the point of view of transcendental idealism, the dialectic which opposes transcendental freedom to the necessity of nature disappears, and both propositions become possible. Kant's aim is not to prove the reality of freedom in the theoretical sense (*CPR*, A 557/B 585) but to show that freedom must have its *own* causality that is not in conflict with nature.<sup>12</sup>

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<sup>12</sup> The contrast between nature and freedom is, of course, not this simple in the *Critique of Pure Reason*. Kant makes a distinction within the notion of nature between material nature (objects in the phenomenal world) and formal nature (the real/logical essence of something). In this latter sense, Kant could call laws of freedom natural laws, but the point here is to follow Kant's terminology in the *Feyerabend* where he attempts to distinguish himself from natural law theorists.

In the *Feyerabend Lectures* Kant points out the distinction between the laws of nature and laws of freedom and suggests that the natural law tradition has confused them:

Laws are either laws of nature or laws of freedom. If freedom is to be under laws it must give the laws to itself. If freedom took laws from nature then it would not be freedom [...] It must itself be a law. Comprehending this appears to be difficult and on this point all the theorists of natural law have erred. (*V-NR/Feyerabend*, AA 27:1322).

Kant observes that natural law authors have missed the connection between law and free will. The idea of a free human will governed by the laws of nature would be contradictory, because a will subjected entirely to natural causality would not be free. Therefore, freedom and nature must make up two distinct causalities which follow distinct laws. Kant is unable to accept natural laws as obligating moral laws because they are deficient with respect to the two criteria of laws-in-general: legislation by a proper authority and categorical necessity.<sup>13</sup>

First, laws need to be legislated by some legitimate authority. As noted above, the modern natural law tradition has been distinguished from its medieval counterparts by its attempt to have natural laws independent of revelation. However, many natural lawyers, including Achenwall, still relied on God as the legitimate authority who authoritatively legislates the law. For Achenwall, as for the wider natural law tradition, there was a distinction between active obligation (to obligate) and the passive obligation (to be obligated). This seems to imply that there is one person who is obligated and *another* person or will that obligates. Achenwall, and other natural lawyers, fill the active role with the divine will.<sup>14</sup> Kant accepts the traditional distinction between passive and active obligation but denies that the notion of God is needed. Kant reformulates the distinction along the lines of the critical philosophy by appealing to the difference between the human being considered as a being subject to laws of nature (*homo phaenomenon*) and the human being considered as a moral being (*homo noumenon*).<sup>15</sup> Kant argues that if we want to identify the source of law with a moral person, this person cannot be God, because if the obligator is to be per-

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<sup>13</sup> This criterion is from Watkins (2019, 11–29). Tomassini (2018a) also argues in a similar way from Watkins criterion.

<sup>14</sup> See Kant's discussion in *V-MS/Vigil* (AA 27:510). Kant at least assumes that Baumgarten and Crusius also give the divine will the role of active obligation, though in the case of Baumgarten, in a more indirect way.

<sup>15</sup> See Tomassini (2018a) where she makes a similar argument for Kant's reformulation of natural law.

sonified as an ideal being, this must be the human being himself by virtue of his lawgiving reason. If law were grounded in God's will, the law would lose its legislative authority.

The second criterion of law is its necessity. For natural law theorists like Achenwall, laws of nature are rational norms that express the necessity to act according to our rational ends, given by our rational nature. Laws necessitate us, therefore, through our rational natures. Kant however, makes an important distinction between divine and human wills:

The human will is not the kind in which the subjective rules of volition correspond with the objective [...] A human being can choose good and evil, thus in human beings the good will is a contingent will. As for God his good will is not contingent. [...] Necessitation of an action that is in itself contingent through objective grounds is practical necessitation, which is different from practical necessity (*V-NR/Feyerabend*, AA 27:1322–1323).

The laws of freedom are objectively necessary for a purely rational being, such as a divine or holy will, because the will coincides spontaneously with reason. Human beings are not purely rational beings, having both a rational and sensible nature. The *law* is objectively necessary but whether human beings *act* in accordance with it is subjectively contingent; we can act, and judge, otherwise through the influence of inclinations. Therefore, we perceive the law as a form of constraint (*necessitation*, *Nöthigung*). The constraint the law imposes on us is an obligation. Kant suggested that obligations according to natural lawyers are merely hypothetical imperatives. This means that the necessity of law is conditioned on the previous adoption of some end. Kant agrees that human beings have an end by nature: happiness (*G*, AA 4:416). Yet, prescriptions to strive for our natural end are only precepts of prudence. Precepts of prudence are elaborated on empirical knowledge concerning the best means to achieve our happiness. Therefore, such imperatives cannot command objectively but can only counsel certain means (*G*, AA 4:418). In the *Mrongovius Lectures*, given just before Kant's recorded lectures on Achenwall, Kant gives a sustained objection against Wolff and Baumgarten for making the mistake of taking precepts of prudence, hypothetical imperatives, as moral laws (*V-MO/Mron*, AA 27:626). These sorts of laws contain the wrong kind of necessity. In order to be considered commands, laws need an unconditional and universal character. This can only be achieved by categorical imperatives that express the necessity of an action by itself, without referring to any desired end (*G*, AA 4:414). Only these precepts have the objective and unconditional necessity, and hence universal validity, needed to be a command (*G*, AA 4:416).

Thus, Kant rejects the natural law assumptions about the source of law and type of necessitation. First, he rejects the natural law account of the source of

law as being legislated by a divine will. He replaces this with the idea of a will that gives laws to itself. Second, he rejects as insufficient the connection between rational natures and necessity and suggests that the moral law must necessitate subjectively contingent wills through categorical imperatives.

## 2.2 Against Achenwall's Eudemonism

Kant rejection of natural law assumptions is followed by his rejection of a natural obligation to happiness as a proper foundation for rights. In the *Feyerabend Lectures*, Kant rejects Achenwall's instrumentalization of rights for the achievement of happiness. For Achenwall, rights are means through which to achieve our natural ends of perfection, preservation and happiness.<sup>16</sup> Kant's view of the state rejects this instrumentalism: "What is the end of a *republique*? Some say happiness, but that is as false as it is to say that God created human beings for their happiness" (*V-NR/Feyerabend*, AA 27:1382). Kant cannot maintain the role of the state as having an end in happiness. As his rejection of God's involvement in the validity of the law suggest, the foundations of rights cannot be the divine law oriented toward our happiness.

Neither happiness nor a command of duty but freedom is the cause of Right. The author [sc. Achenwall] has grounded it in his *Prolegomena* by saying that it is a divine law and that we would be made happy through it but that is not here [in my system] at all (*V-NR/Feyerabend*, AA 27:1329).

Kant insists that the foundation of right must be freedom (*V-NR/Feyerabend*, AA 27:1324). Freedom must give itself laws and thus the state and right cannot be foundationally dependent on external divine commands or precepts of prudence. Kant goes on to criticize Achenwall's connection of self-preservation and perfection with right. Recall that for Achenwall, rights are capacities that we have in light of natural obligations to seek our natural ends. So Kant rejects Achenwall according to the distinction he makes to explain the necessary nature of law rehearsed above. Kant says,

The author says that I am bound by my nature to preserve my life; this would be the principle of Right. But that does not belong to Right at all for in Right I can do with my life whatever I will [...] Each is obligated as far as he is able to refrain from anything that interferes with the self-preservation of others, *scil. Moraliter* (namely morally), says the au-

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**16** For more on Achenwall's eudemonism, see Hruschka (1987, 161–163).

thor. This is indeterminate from the start for I do not know how far it goes. If someone is indebted to me but has nothing at all I cannot take what is owed me – that is certainly not a juridical proposition [...] I am required only to resist his freedom [...] In right I must direct everything in accordance with laws of freedom, otherwise everything would be chaotic (*V-NR/Feyerabend*, AA 27:1334).

Right is not based on a natural obligation of pursuing our self-preservation. For Achenwall, rights are based squarely on the natural obligations. Achenwall claims this also creates obligations in others to not interfere with the pursuit of this end. However, as Kant points out, such a natural obligation cannot be the justificatory foundation for rights. This is for three reasons:

First, rights consist in negative omissions, rather than positive commissions. The “supreme law *neminem laede* is of course negative” (*V-NR/Feyerabend*, AA 27:1334). Right cannot be grounded on a principle of positive obligation because right is only the limitation of particular freedom so that universal freedom can exist (*V-NR/Feyerabend*, AA 27:1334). In other words, right must refer to *limitation* on external actions. Despite Achenwall’s insistence that natural obligations are all negative (cf. Achenwall 2020a, I §82), that we are all obligated by nature to preserve ourselves is a positive commission toward a substantial end. Kant insists that rights are *only* limitations defined by the free action of another.

This leads to the second reason that natural obligations do not belong to right: rights are relational. This is best summed up in the pithy remark, “how does his self-preservation concern me?” (*V-NR/Feyerabend*, AA 27:1334). Kant claims that the obligation to self-preservation just concerns the actions of the individual person, who has an individual obligation to seek his own self-preservation. Rights, according to Kant, have to do with the compatibility of a multiplicity of particular expressions of freedom with universal freedom. Therefore, rights are relational at least insofar as they concern the compatibility of the freedom of individuals with each other and universal law. Achenwall’s notion of rights grounded on natural obligations would require that I respect everyone’s individual right to his own self-preservation. However, Kant says that all I must do is “resist his freedom” (*V-NR/Feyerabend*, AA 27:1334) because rights deal with the *interaction* of individually pursued ends. Therefore, a natural obligation to a specific end cannot ground rights.

Third, natural obligations cannot ground rights because there is no shared criterion about what it is that belongs to self-preservation: everyone can interpret it in his own way (*V-NR/Feyerabend*, AA 27:1334). This is because of the contingent nature of the criterion of self-preservation. What counts as self-preservation, and what this looks like for each person, is a merely subjective criterion that underdetermines what my rights are in cases of conflict. However, this is not simply

a problem with the criterion of self-preservation. Natural obligations to ends are merely hypothetical imperatives and therefore cannot rise to the level of objectivity and necessity needed for laws. Moreover, Kant must recognize the distinction he draws between necessity in God and necessitation in *mixed* rational beings. As noted above, rational beings with a rational and sensible nature experience the moral law as a constraint in contrast to God who intuitively acts according to the law.

This suggests two things. First, that we can, because of our sensible nature, make false judgements about what we ought to do. We are not holy wills and therefore must make fallible judgements about what the moral law entails. Second, that in order to secure external compliance to the demands of right, the imperative itself is insufficient. This is in contrast to Achenwall who insists that our natural obligations are grounded in insight into the divine will and enforced through divine authority. Therefore, Kant suggests that natural obligations in general, and not just the particular ambiguity of self-preservation, insufficiently determine the realm of external action.

In the next section I will argue that these moves away from natural law theory creates problems for Kant that Achenwall did not have. Then I will offer an analyses of Kant's peculiar reformulation of the concept of right in the wake of his rejection of Achenwall's foundations.

### 3 Problems and Solutions in the *Feyerabend Lectures*

Even though the *Feyerabend Lectures* closely follows Achenwall's treatise, Kant also gives a positive account of his own system of right. Here I will focus on the point where Kant offers his own foundational principle of right after his rejection of Achenwall's principles. I will argue that Kant's move to make the state necessary is in response to the problems that arise after rejecting Achenwall's natural law. However, we first need to clearly define what these new problems are.

#### 3.1 New Problems for Kant

Whenever one rejects the systematic foundations of one system, it always reopens problems that the system was meant to address. Kant's rejection of Achenwall's foundations in *Ius Naturae* is no different. Let us first identify some key benefits of Achenwall's system.

First, as mentioned above, Achenwall is able to ground natural rights on natural obligations we have. We have natural laws based on God's will and validated by God's authority. This gives us natural obligations to pursue rational ends. These obligations directly ground concrete and enforceable rights to pursue these obligatory ends. Second, natural rights are also juridical rights, meaning they are enforceable and coercible by a legitimate authority: God. As I argued above, this is true of conditional natural rights or acquired rights. In order to have acquired rights we need juridical rights that are punishable. Because Achenwall suggests that natural rights are juridical rights under God, rights are never non-enforceable. Third, natural rights are determinable. Achenwall connects natural rights directly to natural obligations/laws. My natural rights are deducible directly from the God-given insights into my natural obligations, themselves grounded in the objectively valid will of God. Furthermore, since everyone is naturally obligated to the same end by nature, everyone, in virtue of their knowledge of natural law, can recognize a valid claim to a right, since rights are valid insofar as they are grounded in a natural obligation.

As we have seen, Kant rejects all three of these and so creates three corresponding problems: the normative problem of obligating others through a unilateral will, the problem of effective coercion (punishment) and indeterminacy.<sup>17</sup> The state of nature for Kant is the prejuridical state, which, as Kant would say later, is a state "devoid of justice (*status iustitia vacuus*)" (*DR*, AA 6:312). For Achenwall, the state of nature was a place where the objective moral law directly determined our subjective natural rights, and so we could have genuine pre-juridical rights. However, this is not so for Kant.

The first problem is the normative problem of obligating others through an act of individual choice. Rights necessarily include obligating others to respect my rights. Kant's principle of right is, "if an action can coexist together with the freedom of all in accordance with a universal law this action is allowed and we have authorization [to coerce]" (*V-NR/Feyerabend*, AA 27:1332). Here we are provided with the objective principle for determining rights, which specifies that an action must be brought into agreement with the freedom of *all others under a universal law*. However, Kant says that "I do wrong to others if I will to make my will into their law" (*V-NR/Feyerabend*, AA 27:1338). The subjective judgement about my right cannot obligate others, who may have judged otherwise (*V-NR/Feyerabend*, AA 27:1337). In other words, any specific claim to rights is insufficient to establish a right since the subjective will lacks the authority to

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<sup>17</sup> These follow the three problems with the state of nature that Ripstein identifies (cf. Ripstein 2009, chpt. 3).



make general laws that obligate all others. Since no authoritative will exists in the state of nature, the state of nature *lacks* an authoritative will which could obligate all others. This points directly to the developing gap between objective laws (principles of right) and subjective rights (claims to rights). Since there is no authoritative will in the state of nature there is no way to move directly from objective laws to subjective rights. All we have is the subjective judgements of individual agents, which lack the ability to determine the validity of rights under objective principles.

The second problem is the problem of punishable wrongs. For Achenwall, wrongs against the natural rights of others is immediately punishable by God. Therefore, Achenwall's system can accommodate the punishment of rights in the state of nature. Kant is blocked from this solution because of his rejection of the role of God in validating rights. Rather, because there is no legitimate authority in the state of nature, and individual claims to right are subjective judgements, righting wrongs by punishment in the state of nature is impossible.

The third problem is the indeterminacy of our rights. This problem turns on the possibility of disagreement in the state of nature. For Kant, unlike Achenwall, there is no direct correspondence from objective principles of right to specific and concrete coercive rights. The principles of right do not and cannot determine these rights. Of course, there is a limited sense in which Achenwall's natural law also leaves things *underdetermined* (e. g. which side of the road we ought to drive on), but Kant faces a more severe form of *indeterminacy*, where there are no determinate rights *at all*. Objective principles of right, are insufficient for determining judgements, "For I judge what is right, others could judge otherwise, and they do not act in accordance with my judgement" (*V-NR/Feyerabend*, AA 27:1337). Kant gives the example of a hunter who shoots a wild animal which runs onto another's land. The hunter can claim the animal as his, but the land owner can also claim the animal. These disputes can arise because the state of nature, with subjective claims to right, is unable to determine specific rights.

All three of these problems show that the issue in the state of nature is the lack of a legitimately authoritative will which can legislate external laws that are binding on all. Without the divine will as the authoritative sovereign, the state of nature becomes "not a state of unease but a state of injustice" (*V-NR/Feyerabend*, AA 27:1383). That is, a state where claims of justice and injustice lack legitimacy in the absence of an authoritative will.

In this section, we saw that Kant's rejection of key foundational claims in Achenwall's *Ius Naturae* creates problems for Kant that were foreign to Achenwall. Specifically, Kant problematizes rights in the state of nature, separating objective law and subjective right through his critique of Achenwall's invocation of

God to validate rights and the grounding of rights in rational ends. Next, I will show how Kant, in the *Naturrecht Feyerabend* shifts the role of the state in order to accommodate the normative gap in the state of nature.

### 3.2 The Role of the State in the *Naturrecht Feyerabend*

In addressing public right, Kant argues that the state of nature should not be contrasted with “the state of *socialis* but *civilis*” (*V-NR/Feyerabend*, AA 27:1382). Kant rejects Achenwall’s emphasis on organic, pre-state society, such as the domestic family. Achenwall suggested that the state of nature is properly contrasted to society, in which individuals enter into interdependent groups, such as the domestic family, who then proceed into a state. However, Kant suggests that the state of nature must be contrasted directly with the rightful condition. This is because the state of nature is not a condition of unease but injustice (*V-NR/Feyerabend*, AA 27:1383).

For Kant, the end of the state is not happiness or even self-preservation but public justice: “Not individual happiness but the state of public justice is its main point” (*V-NR/Feyerabend*, AA 27:1382). Unlike Achenwall, who sees the state as a means toward the natural end in happiness (perfection and self-preservation being included in this), for Kant the state is interested only in public justice. The state of nature is “a condition of childhood, *status justitiae privatae*” (*V-NR/Feyerabend*, AA 27:1381). As we have seen, the state of nature is caught in a condition where there are merely subjective claims to right. Therefore, the contrast between the state of nature and the civil condition is between private justice (subjective judgements of right) and public justice (rights determined through an authoritative will).

This is because “in order for a judgement or right to be valid for another we need...an explicit condition in which what is right for everyone is determined externally” (*V-NR/Feyerabend*, AA 27:1381). Rights and juridical judgements cannot be valid in pre-state society because, for Kant, there is no objective criterion in the state of nature which can immediately justify subjective rights: “each can have a different opinion about right” (*V-NR/Feyerabend*, AA 27:1381–1382). Thus, in the state of nature “*what right is* cannot be determined so that it is universally valid” (*V-NR/Feyerabend*, AA 27:1390). This is what Kant means, earlier in the lectures, by the suggestion that natural laws are alone insufficient for execution (*V-NR/Feyerabend*, AA 27:1338). In the state of nature, we have objective laws (principles of right) and subjective rights (individual claims to rights) but no clear way to validate subjective rights under objective law. There is a gap between the requirements of the objective laws and the claims of subjective rights.

Kant's shift in the foundations for natural law creates a normative gap between objective laws and subjective rights and problematizes the state of nature. Kant's rejection of God's will as the foundation for natural rights makes the state of nature a condition of merely subjective judgements enforced only by individual, arbitrary use of power. What is needed, then, is a will which can make an objectively valid judgment which justifies subjective rights under objective law. This will must be both legitimate in its form and authoritative in its scope.

In order for a will to give *external* laws, that is, laws that govern our actions toward others, it must be a will that is *authoritative* for all persons. This is what Kant will later call the difference between unilateral and omnilateral legislation (*MM*, AA 6:435). In order to establish authoritative external laws, there must be a will that can legislate omnilaterally, from a universal perspective, and not just unilaterally, from an individual or limited perspective. In the state of nature, unilateral judgement, as we have seen, is merely *subjective* judgement. Unilateral judgement lacks the authoritative scope to obligate others. When I judge unilaterally, I judge from a subjective perspective. Omnilateral judgements, in contrast, are those judgements that judge from a universal perspective and so have the authoritative scope to obligate others. An authoritative will is one that legislates for *all* and so legislates omnilaterally.

Kant defines a *legitimate* authority as “the authority of those whose will is at the same time a law” (*V-NR/Feyerabend*, AA 27:1337). Kant here connects the legitimate will with the autonomous will. As argued earlier, Kant insists that freedom can be subject only to its own laws (*V-NR/Feyerabend*, AA 27:1334–1335). Freedom can only respect the authority of, and so be subjected to, laws of its own. Therefore, legitimately authoritative external laws must be the product of a will that can legislate laws for itself. This is what Kant means by a will which is at the same time a law.

So, to close the gap between objective laws and subjective rights, Kant must provide a solution in the form of a will that is *autonomous* in form and *omnilateral* in scope.

Kant introduces the state as just such a will. Kant is clear that, given the gap between subjective right and objective law, “in order for one judgment or right to be valid for another, we still need a separate condition, according to which it is determined externally what is right for everyone”<sup>18</sup> (*V-NR/Feyerabend*, AA 27:1381) and so “outer laws must be established by the will of society” (*V-NR/*

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<sup>18</sup> This is my own translation. Rauscher renders *apparter* as *explicit* which, it seems to me, obscures the fact that Kant here is emphasizing that the state of nature is insufficient and so a *separate* condition must be added in order to have valid universal rights.

*Feyerabend*, AA 27:1337). Thus, the validity of rights can only be saved through the establishment of the will of society in a civil condition. As Kant says, “there also can be no other condition [other than the civil condition] where a law could be just” (*V-NR/Feyerabend*, AA 27:1382). For Kant, the civil condition is, at its most basic, the constitution of a *public will* that can legitimately, and so autonomously, and authoritatively, and so omnilaterally, justify subjective rights under objective laws. Here Kant seems to explicitly link the introduction of the civil condition with the normative gap present in the state of nature.<sup>19</sup>

The will of society is *authoritative* because civil unions are all grounded on the idea of an original contract that, as the representation of “all laws in civil society as given through the consent of all” (*V-NR/Feyerabend*, AA 27:1382), legitimizes law as the autonomous expression of the will of the *all* the people. In other words, the will of society is genuinely a *public will*, it legislates *omnilaterally*: on behalf of all people.<sup>20</sup>

The will of society in a civil condition is *autonomous* in its form in the sense that it gives laws only to *itself*.<sup>21</sup> Kant maintains that the civil will is nothing but the collective will of the people, “the *summus imperans* is always the people” (*V-*

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<sup>19</sup> Here I mean to suggest that both the introduction of the state has the effect of closing the normative gap *and* that Kant introduced the state with closing the normative gap in mind. The latter claim is obvious given that the civil condition is introduced in the direct context of the normative problem as shown above. This does not mean that Kant had the whole picture of the rejection of Achenwall to the state in mind in the *Feyerabend Lectures*, nor that the necessity of the state was adopted *solely* or even primarily as a result of Kant’s interaction with Achenwall.

<sup>20</sup> In the *Metaphysics of Morals*, Kant similarly says “The legislative authority can belong only to the united will of the people. For since all right is to proceed from it, it *cannot* do anyone wrong by its law. Now when someone makes arrangements about *another*, it is always possible for him to do the other wrong; but he can never do wrong in what he decides upon with regard to himself (for *volenti non fit iniuria*).’ Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative.” (*DR*, AA 6:314).

<sup>21</sup> Messina (2020) argues that Kant’s view in the 1780’s is to ground moral duties by a combination of self-legislated categorical imperatives and pathological incentives, like hope and fear. However, Kant clearly contrasts his view with both Achenwall’s and Baumgarten’s view: “But to oblige someone through *poenae* [punishment] and *praemia* [rewards] is *contradicto in adjecto* [a contradiction in terms] because in this case I move him to action which he does not out of obligation but out of fear and inclination” (*V-NR/Feyerabend*, AA 27:1326). To say the least, it would be odd for Kant to then reintroduce pathological motivations *to create* external obligations pages later. Furthermore, as shown above, Kant seems to understand the problem with the state of nature as more than merely a problem of motivation, but a problem of the normative status of external laws themselves.

*NR/Feyerabend*, AA 27:1382). The will of society gives laws only to itself, and so subjects the people only to their own laws, “for the will of all is the law. They are all legislators” (*V-NR/Feyerabend*, AA 27:1382). Of course, the *exercise* of the legislative power has many forms (*democratie, monarcha, aristocratie*) but the power of the legislator comes from the people. Thus, subjects are only subjected to laws of their own, and the will of society in the civil condition is therefore autonomous in form.<sup>22</sup>

Thus, the state has a legitimate form and authoritative scope.

In this way, the state replaces the will of God in Achenwall's system as the guarantor and validator of our subjective rights by justifying them under objective laws through a legitimate and authoritative will. Kant's insistence on the necessity of the state can be traced back to a response to problems that arise from Kant's rejection of key elements in Achenwall's system.

## Conclusion

I have shown that Achenwall's system of natural law included an immediate relationship between objective law and subjective right grounded in the will of God and natural ends. Achenwall's ability to immediately justify subjective rights in light of objective laws allowed him to mitigate the role of the state to a contingent, though important role in his system. Kant, through his critique of Achenwall's foundations, opened up a gap between objective laws and subjective rights that problematized the state of nature in new ways. Kant could not, with Achenwall, immediately justify subjective rights in light of objective laws. In the last section, I argued that Kant, in order to close the gap and make concrete rights objectively necessary, made the state a necessary rather than contingent component to his theory of rights, effectively replacing Achenwall's authoritative divine will with the will of society as expressed in the state. This reading of Kant's relationship to Achenwall accounts for the specific justificatory problems that rights face in Kant's system.

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<sup>22</sup> In the *Naturrecht Feyerabend* Kant still maintains that a legislator can will in a way that the people *ought* to have willed. This picture of the enlightened monarch is abandoned for a more republican model in *Toward Perpetual Peace* (*PP*, AA 8:350ff). See Kleingeld (2019).

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