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KANT AND THE PROBLEM OF UNEQUAL ENFORCEMENT OF LAW

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THE QUESTION of when disobeying the law may be justified as a means of protesting or otherwise resisting injustice is often narrowed from the start by the assumption that the only plausible candidate for such justified disobedience, at least in contemporary Western democracies, is civil disobedience.[1] There have been some recent exceptions, most notably Candice Delmas's series of arguments that standard liberal justifications for a duty to obey the law—fairness, justice, samaritanism, among others—will, in some circumstances, actually justify not only civil disobedience but also *uncivil* disobedience, including violent or destructive disobedience.[2] One figure to whom it might seem we cannot look for help justifying any such disobedience, particularly violent or destructive disobedience, is Kant, for in *The Doctrine of Right* and elsewhere he explicitly rejects not only revolution but also any resistance by citizens that aims to compel states to reform themselves. Indeed, it is not clear that Kant would even countenance what most liberals would take to be paradigmatic cases of justified civil disobedience.[3]

My aim here is to show that, in fact, the Kantian account of the legitimate state has the resources for a distinctive justification of principled disobedience,

1 The paradigm version of this view is Rawls's account in *A Theory of Justice*. Others have responded to Rawls's narrow account of justifiable disobedience by expanding the scope of what can count as civil (and so justifiable) disobedience. See, for instance, Brownlee, *Conscience and Conviction*.

2 These arguments are collected in her *A Duty to Resist*. Other recent exceptions are Shelby, *Dark Ghettos*; and Pasternak, "Political Rioting."

3 *The Doctrine of Right* is the first half of Kant's *The Metaphysics of Morals*. All citations to Kant are to the Akademie numbers listed in the margins of most editions; unless otherwise stated, all English translations are from *Practical Philosophy*, translated and edited by Mary Gregor. Kant does appear once in *The Doctrine of Right* to allow for individuals to disobey the law: "*Obey the authority who has power over you* (in whatever does not conflict with inner morality)" (*The Metaphysics of Morals*, 6:371). But he does not explain what he means by "inner morality," and the disobedience here seems more akin to conscientious objection than to disobedience as public protest or resistance.

including even violent or destructive disobedience, that applies to citizens of contemporary Western democracies. The argument is thus a contribution to this larger project of justifying on squarely liberal grounds a wider variety of ways citizens might resist injustice and try to compel reform. As Kant himself would reject this argument, my claim is not that Kant's own account allows for such principled disobedience; it is rather that a recognizably Kantian account—one that does not abandon the core Kantian commitments—can (and perhaps should) allow for it. In this way, the argument is also a contribution to the larger project, pursued by many over the last few decades, of reviving and defending the basic Kantian approach to questions of political authority and obligation while also moving beyond some of the more austere parts of Kant's own account.[4]

In *The Doctrine of Right*, Kant argues that a community of free and equal persons is possible only under the rule of law. His argument is distinctive in part because of the importance it places on the *equal enforcement* of law as required to secure persons' rights against invasion by their fellows. Individuals will have varying amounts of coercive power at their disposal to defend their rights themselves, and the result of this unequal distribution of coercive power is that absent state enforcement that assures them of the security of their rights, some will be vulnerable to domination by others, a condition incompatible with equal freedom. And so, for Kant, a civil condition—the condition under which citizens are governed by legitimate law, law they must obey and otherwise uphold—has two constitutive parts, the latter of which solves this "problem of assurance": "What is to be recognized as belonging to [citizens] is determined *by law* and is allotted to [them] by adequate *power*."[5]

What opens the door to the justifiability of disobedience that aims to compel a state to reform itself, even violent or destructive disobedience, is that a state may achieve the first part of a civil condition ("what is to be recognized as belonging to [citizens] is determined *by law*") and yet at the same time *fail* to achieve the second (what the law says belongs to citizens is *not* "allotted to [them] by adequate *power*") by failing to enforce the law equally. When this failure is a failure to provide some citizens the assurance of the security of their rights, the state has thereby failed to bring them entirely out of a state of nature and into a civil condition; they are instead in an incompletely civil condition,

4 Some examples are Korsgaard, "Taking the Law into Our Own Hands"; Hill, "A Kantian Perspective on Political Violence"; Holtman, "Revolution, Contradiction, and Kantian Citizenship"; Flikschuh, "Reason, Right, and Revolution"; Ripstein, *Force and Freedom*; Stilz, *Liberal Loyalty* and "Provisional Right and Non-State Peoples"; and Sinclair, "The Power of Public Positions."

5 Kant, *The Metaphysics of Morals*, 6:312. As I understand them, these two parts are necessary to and jointly sufficient for a civil condition.

one that contains local illegitimacies. And so, were these citizens to employ tactics of resistance, even violent or destructive ones, with the aim of compelling the state to reform itself so that it provides them with equal assurance of the security of their rights, they would be using force to bring about (or at least get closer to) a full civil condition, and in that way, their use of force will count as furthering rather than undermining the project of governance by legitimate law.

Importantly, whether a Kantian account can justify resistance to injustice on these grounds is not merely a theoretical question, for many existing states fail in significant ways to provide their citizens with equal assurance of the security of their rights. One clear case, as I will argue, is that of wage and hour laws in the United States. While American law defines for workers their wage rights, the United States fails to enforce those laws against employers and so fails to provide those workers with assurance of the security of those rights within the employment relationship. Whether workers get the wages to which they are legally entitled is, in the end, up to employers, and so, unsurprisingly, wage theft in the United States is widespread. Thus, within the employment relationship, workers and employers are not yet fully in a civil condition. On the Kantian argument I defend here, workers are permitted to use tactics of resistance that aim to compel those reforms to the United States' enforcement regime that are necessary for the security of their wage rights.

1. EQUAL FREEDOM AND THE PROBLEM OF ASSURANCE

Kant argues that the private enforcement of rights is incompatible with equal freedom. We can capture the basic problem by thinking about how inequalities of coercive power among persons would affect the prospects for private enforcement of one's rights against others. Imagine a case where the relevant principles clearly define who owns what. Suppose, somewhat fancifully, that according to some valid principle of acquisition (finders keepers, say), one clamshell on the beach is mine and another is yours.[6] Because on Kant's account a right to a thing includes the authorization to coerce, that we each have a right to our respective shells would mean, in part, that we each may use coercion against the other should that other try to take our shell. The problem is that in this situation you may have available more power to coerce me than I have to coerce you (or vice versa). If you do, your greater coercive power is a powerful incentive for me to respect your claim, but at the same time, your greater power means that you lack a similar incentive to respect my claim. You are thus able to secure your shell for yourself and against me while I am unable similarly to secure my shell for my-

6 I have borrowed this example from Sinclair, "The Power of Public Positions," 32.

self and against you. And so, were we both authorized by right to use coercion to defend our rights ourselves, this inequality of coercive power would make it such that only you can take advantage of this authorization: you can oblige me to respect your right to your shell in a way that I cannot in turn oblige you.

That your greater coercive power here gives you assurance of the security of your right is not itself a problem, as this assurance is partly what makes you independent of me: because you can defend your right against invasion by me, your enjoyment of your right does not depend on my decision to invade it or not, and in that way, it is independent of my will. The problem is that because of your greater coercive power, I lack this same assurance of the security of my right: you could decide to invade my right simply because you wanted my shell for yourself and I would be unable to stop you. My property—my shell—is thus available to you, just as your property is, as a means for you to use for your own private ends, and so I depend on your will for my enjoyment of this right. Were the principle of acquisition above authoritative in these conditions of unequal coercive power—were we to have conclusive rights to our shells—I would then be required to respect your right even though, because of my dependence on you, I would lack assurance that you will respect my right. As Thomas Sinclair puts it, I would be required by right "to leave [myself] open to be taken advantage of" by you.[7] But because such a requirement is incompatible with our equal freedom, the principle is not authoritative and we do not have conclusive rights to our respective shells.

A distinctive feature of Kant's account is thus that our unequal access to coercive power means that we cannot settle what our rights are simply by appeal to what the relevant principles say, for while the principles may assign to each of us ownership of our respective shells, our unequal access to the coercive power we require to secure our rights ourselves undermines our equal freedom. In this way, the freedom at stake is not merely formal freedom: it is not enough that a valid principle of right gives you ownership of the shell and, in doing so, authorizes the use of coercion to protect this right; it matters also whether you actually have access to the coercive power—and, if so, how much relative to others'—needed actually to secure your rights. You are not in fact free if you are able to enjoy the rights that constitute your freedom only at the whim of some other person(s).

Now, to be precise, what matters for the question of assurance is not inequalities in coercive power but rather inequalities in the coercive threat persons pose to one another. Presenting it in terms of inequalities of coercive power, as in the clamshell case, is simply a way to make this problem clear and vivid, for one standard way for you to pose more of a coercive threat to me in some situation

7 Sinclair, "The Power of Public Positions," 33.

than I do to you is for you to have more coercive power at your disposal than I do.[8] For instance, that you have a gun (and I do not) will often result in an inequality of coercive threat between us such that you are able to defend your right to your shell. But not always. That you have a gun will pose much less of a threat to me, for instance, if you have fallen asleep and I can take your shell without waking you up. What matters, at bottom, is the incentive your coercive power actually gives me to respect your right and, in particular, whether the threat that power poses is able to oblige me to respect your right. It may fail to oblige me either because your gun has jammed (you have lost that coercive power and so any threat it might pose) or because you have fallen asleep (this coercive power no longer translates into a threat). That the issue is ultimately about inequalities of coercive threat matters because it is exceedingly unlikely that any particular person, regardless of how much coercive power they have at their disposal, will be able to oblige others consistently across time and changing circumstances to respect their rights. The inequalities of coercive threat between persons will thus vary: your enjoyment of your rights will, at times, be at my whim and my enjoyment of mine will, at times, be at your whim, and so we will each be threats to the security of the other's rights. As a result, neither of us will be able to secure our rights by means of private enforcement.

This problem of assurance features in Kant's core argument for the state. The argument begins with a state of nature occupied by idealized human beings—they are entirely "good and right-loving"—and this is so that, as Arthur Ripstein observes, the case for the state will not depend on any "empirical defects of the state of nature, such as self-preference and limited knowledge."[9] According to this argument, even these idealized human beings will require a state:

> However [good and right-loving] human beings might be, it still lies a priori in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established, individual human beings … can never be secure against violence from one another, since each has its own right to do *what seems right and good to it* and not to be dependent upon another's opinion about this.[10]

In this state of nature, everyone is subject to the rules of right defining their equal freedom. What they are not subject to is an authority's judgments of those

8 I am indebted to an anonymous reviewer for pressing me about these issues.

9 Ripstein, *Force and Freedom*, 146.

10 Kant, *The Metaphysics of Morals*, 6:312. The bracketed text comes from Arthur Ripstein's translation in *Force and Freedom*, 146. The Gregor translation has it as "well-disposed and law abiding."

rules and how they apply; they are each instead self-governing, acting on their own judgments. Kant's claim here is that in a situation where even entirely good and right-loving human beings govern themselves according to their own judgments of right, they cannot be secure from violence. This insecurity stems from the absence of a mechanism for resolving their inevitable disagreements about right: when such disagreements arise, each will act on their own judgment of the matter, standing up to others in defense of what they take right to be. From their own perspective, their use of coercion will be authorized by right, but because of their disagreements about right, their uses of coercion will oppose one another. Everyone will thus be subject to coercive threat—doing only what you judge consistent with right will be no protection from others who may disagree—and, in that way, no one will be secure from violence. In the state of nature, a person will lack assurance that others will respect her rights (as she sees them), and as a result, she will not be required to respect their rights (as she sees them).

The solution, Kant argues, is a state that not only settles by legislation and adjudication what counts as right among them but also *enforces* those laws and legal decisions so as to secure for each their rights so defined:

> So, unless [a human being] wants to renounce any concepts of right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined *by law* and is allotted to it by adequate *power* (not its own but an external power); that is, it ought above all else to enter a civil condition.[11]

The problem, however, is that Kant's argument here does not actually establish that if these idealized human beings are to be assured of the security of their rights, the state must operate as a central enforcement agent. In this state of nature, recall, the reason why they lack equal assurance is that rights are in dispute: it is because others disagree with her about right that she cannot be assured that they will respect her rights (as she sees them). This suggests that were they to solve the problem of disagreement, they would thereby also solve the problem of assurance.[12] Suppose they have solved the former problem with a state that is solely legislative and adjudicative. Provided that it is common knowledge

11 Kant, *The Metaphysics of Morals*, 6:312.

12 I depart here from the interpretation offered by Ripstein. He argues that for our idealized persons in the state of nature, the problem of assurance would persist even if the problem of disagreement were solved. See Ripstein, *Force and Freedom*, 146, 159.

among them—and there is no reason to think that it will not be—the fact that they all are entirely good and right-loving would seem to provide each of them with the equal assurance necessary for them to be required to respect the rights of others (as the state defines them), for what they are assured of is that those others will respect their rights (as the state defines them).

If the state must also be the central enforcement agent even among entirely good and right-loving human beings, it cannot be because equal assurance requires it. Perhaps it is instead the unequal dependence itself, apart from whether it results in unequal assurance, that is incompatible with equal freedom.[13] On this line of thought, even though I have assurance that you, entirely good and right-loving, recognize an obligation to respect my right to my shell, I still depend on your recognition of this in a way that because you pose more of a threat to me than I do to you, you do not depend on my recognition of the corresponding obligation to you. Your greater threat gives me an additional incentive to respect your right—it obliges me to do so—and this is an incentive that you do not have to respect mine. Even though we enjoy equal assurance—your ability to oblige me here is superfluous and my inability to oblige you does not make my rights any less secure than yours—this inequality of threat is still incompatible with equal freedom, for it is nevertheless true that the security of your right in this instance is independent of my will in a way that the security of mine is not independent of yours. Among the entirely good and right-loving, then, what the state as a central enforcement agent does is to make the security of everyone's rights independent of the wills of others, and equally so. It deploys its coercive power so as to oblige everyone equally to respect the rights of everyone else, and even though no one requires this incentive to respect others' rights, that the state provides it to all is necessary for equal freedom.

One might reasonably wonder whether this argument succeeds as a justification of the enforcement functions of the state when persons are idealized in this way. If the inequalities of coercive threat among them do not undermine the security of their rights—the fact that they are all entirely good and right-loving secures them, and equally so—then, one might think, those inequalities do not undermine their equal freedom. Fortunately, whatever one thinks of this justification, Kant provides a noticeably more powerful justification for why realizing equal freedom among human beings like us, ones who are decidedly *not* entirely good and right-loving, requires the state to be the central enforcement agent.

13 Sinclair's interpretation does not make clear whether the problem at issue is unequal dependence itself or rather the insecurity of one's rights that can result from such unequal dependence. See Sinclair, "The Power of Public Positions," 33. This is also true of Anna Stilz's account. See Stilz, *Liberal Loyalty*, 51.

In a different passage, Kant does not idealize the human beings in the state of nature, and in this version of the argument, the problem of assurance reemerges:

> No one is bound to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint toward him. No one, therefore, need wait until he has learned by bitter experience of the other's contrary disposition; for what should bind him to wait till he has suffered a loss before he becomes prudent, when he can quite well perceive within himself the inclination of human beings generally to lord it over others as their master (not to respect the superiority of the rights of others when they feel superior to them in strength and cunning)?[14]

In this state of nature, human beings are not entirely good and right-loving but instead possess "the inclination … to lord it over others as their master." Here, then, though you and I may agree about what right requires in some situation, that you have, and perceive yourself to have, more threat power than I do in that situation means that though you are assured of the security of your right, I cannot be similarly assured of the security of mine: you might act on this inclination to dominate me and invade what you yourself acknowledge to be my rights, and were you to do so, I would be unable to stop you. My dependence on you here makes my rights insecure. We thus require a state as a central enforcement agent to oblige us both, and equally so, to respect the other's rights, for it is only then that our rights will be equally secure and we equally free.

The question now concerns what the state as central enforcement agent must do to achieve the condition under which the rights of people like us are, as Kant puts it, "allotted to [them] by adequate *power*." On Ripstein's reading, the incentive that the state's enforcement power provides us to respect one another's rights has "two dimensions":

> First, it assures the private right holder that the right will remain intact, even if another violates it. Second, it makes rights violations prospectively pointless. If a right holder is assured of a remedy, others will not normally have any incentive to violate rights, because a violator will expect to gain nothing and could possibly lose something through a violation.[15]

This might seem relatively straightforward. But it cannot be, as Ripstein has it, that what the state is to do is to assure "the private right holder that the right will remain intact," thereby making rights violations "prospectively pointless," for as

14 Kant, *The Metaphysics of Morals*, 6:307.

15 Ripstein, *Force and Freedom*, 165–66.

Sinclair points out, that would require that the state's enforcement apparatus be fully effective, remedying every rights violation in society, which is an impossible standard to satisfy.[16] The problem seems to me, however, to be even worse. Assuring a remedy for every rights violation would not make those violations prospectively pointless, for if people are generally inclined "to lord it over others as their master," the rights violation itself, as an assertion of power, will often be the point, not some further payoff. To render these violations prospectively pointless, as Ripstein's reading requires, the state would need to be such that it credibly promises not to remedy every rights violation after the fact but rather to block every one before it occurs.

So what then are the conditions the state must provide citizens such that their rights are allotted to them by adequate power? Sinclair argues that they are the conditions under which "I am not *more* assured of compliance with my claims of acquired right than you are of yours. For only that makes for a problem of *unequal* freedom."[17] On this reading, it is not that a citizen must be guaranteed that her rights are totally secure from violation by others but rather that she must have assurance of their security equal to that of others. Sinclair's version of this reading goes awry, however, in holding that equal assurance is secured when it is the case that "even if some are better positioned than others to violate acquired rights, they don't have a better prospect than others of maintaining the resultant configuration of external freedom."[18] What matters for equal assurance is not, as Sinclair has it, persons' chances relative to others at getting away with an unremedied rights violation but rather their chances relative to others at suffering one. That several people might suffer such a violation at the hands of the same perpetrator—someone better positioned than others to get away with rights violations—will not by itself mean that they do not enjoy equal assurance, for it may still have been that their chances at suffering a violation were roughly equal.[19] The problem arises instead when some person is particularly vulnerable, more so than others, to such violations, whether at the hands of one perpetrator or several.

On my reading, then, a state secures citizens' rights with adequate power when it has more coercive power than any particular citizen across a full range of situations and circumstances—it is able to oblige them to respect others' rights—and when it wields that power in those situations such that the security it provides to the rights of those involved is distributed equally among them so that no one is specially vulnerable to an unremedied rights violation. This does

16 Sinclair, "The Power of Public Positions," 39.

17 Sinclair, "The Power of Public Positions," 46.

18 Sinclair, "The Power of Public Positions," 46.

19 I am indebted to an anonymous reviewer for pressing me about Sinclair's account.

leave open the possibility that sometimes one citizen will suffer a rights violation that is not remedied—the assurance the state provides is not total—but so long as that citizen's prospects at suffering such a violation are not meaningfully worse than others' prospects, that possibility is not incompatible with equal freedom, for she is no more dependent on others for the security of her rights than her fellows are. And, unlike Ripstein's reading, this reading has the advantage that the standard it sets is one a state *can* meet. (The Kantian account will succeed only if the state can do what the account claims the state must do.)

The literature on Kant's assurance argument is almost wholly concerned, first, with defending the claim that inequalities of coercive power (or threat) are incompatible with equal freedom and, second, with showing that the state as the central enforcement agent can solve this problem of assurance. What has not gotten attention is the fact that this requirement that the state provide citizens with equal, though not total, assurance is still a *very* demanding one. Even if it is possible for a state to solve the problem of assurance, actually doing so will be quite difficult. It is far from obvious, for instance, that existing states even come close to succeeding at this task.[20] And since providing equal assurance is, on Kant's account, a core function of the state—indeed, one on which the state's claim to legitimate authority rests—it is an important question what the implications are for a state's authority when it does not in fact succeed.

This question is not a merely theoretical one. Many existing states, for instance, contain large inequalities of economic power, inequalities that tend to generate corresponding inequalities of political power and influence; these inequalities of political power and influence tend, in turn, to shape both the decisions lawmakers make about funding enforcement agencies and the decisions officials within those agencies make about enforcing the law. As a result, these states tend to enforce the law more stringently when poor citizens are the violators or wealthy ones the victims than when wealthy citizens are the violators or poor ones the victims. Across a range of rights, wealthy citizens will tend to be more assured of the security of their rights than poor citizens will be of the security of theirs. Indeed, the police and courts may even come to function as tools available for the wealthy and powerful to use not only to protect their rights but also to violate the rights of others with relative impunity. One clear example of this phenomenon is the severe and widespread underenforcement of wage and hour laws in the United States. As the next section explains, in this area of law, the United States not only fails to provide one group of Americans with equal

20 Sinclair seems to admit as much: "I am not claiming that any existing state secures the condition of equal assurance. But it is not implausible to think that a realistically attainable state might" ("The Power of Public Positions," 47).

assurance of the security of their rights but also, arguably, does not even try to do so.

2. WAGE THEFT IN THE UNITED STATES

In the United States, wage theft—"the failure to pay workers the full wages to which they are legally entitled"—is severely underpoliced and, as a result, is fairly widespread.[21] Wage theft comes in many forms: underreporting hours worked, taking illegal deductions from paychecks, or failing to pay the legally mandated overtime rate for hours worked over forty hours per week.[22] But according to Daniel Galvin, the "most pernicious type of wage theft is minimum wage noncompliance," for violations of minimum wage laws "disproportionately affect the most vulnerable workers in society: immigrants, people of color, less-educated workers, younger workers, women, and low-wage workers who can least afford to be underpaid."[23] Wage theft in the United States is a clear and compelling example of a state's failure to provide certain of its citizens—here, some of its least powerful—equal assurance of the security of their legally defined rights.

The losses from wage theft in the United States are quite large, both absolutely and as a proportion of income. A study conducted in 2008 of the losses to workers in three American cities (New York, Los Angeles, and Chicago) from all forms of wage theft combined found the following:

> More than two-thirds (68 percent) of our sample experienced at least one pay-related violation in the previous work week. The average worker lost $51, out of average weekly earnings of $339. Assuming a full-time, full-year work schedule, we estimate that these workers lost an average of $2,634 annually due to workplace violations, out of total earnings of $17,616. That translates into wage theft of 15 percent of earnings.[24]

Another report, this one focusing only on minimum wage violations in the ten largest states and using data from 2013 to 2015, found that in these states, "2.4 million workers lose $8 billion annually (an average of $3,300 per year for year-round workers) to minimum wage violations—nearly a quarter of their earned wages."[25] If this report's findings hold true also for workers in the remaining forty

21 Cooper and Kroeger, "Employers Steal Billions from Workers' Paychecks Each Year," 4.

22 Cooper and Kroeger, "Employers Steal Billions from Workers' Paychecks Each Year," 4. See also Bernhardt et al., "Broken Laws, Unprotected Workers."

23 Galvin, "Deterring Wage Theft," 325.

24 Bernhardt et al., "Broken Laws, Unprotected Workers," 5.

25 Cooper and Kroeger, "Employers Steal Billions from Workers' Paychecks Each Year," 1.

states, upward of $15 billion is stolen from workers in the United States via minimum wage violations each year.[26]

In his study concerning the prospects for more effective enforcement of wage and hour laws, Galvin offers these further statistics about minimum wage violations:

> An estimated 16.9 percent of low-wage workers experienced a minimum wage violation in 2013. Those workers worked on average 32 hours per week and earned an hourly wage of $5.92. Had they earned their state's minimum wage, they would have earned, on average, an hourly wage of $7.62, which means they lost 23 percent of their income ($1.76 per hour).[27]

It is admittedly quite difficult to gather data about wage violations, particularly in low-wage sectors, and as a result, the estimates of the extent of wage theft vary quite a bit. But as Galvin notes, "while an estimated income loss of 23 percent may seem high, it is actually toward the lower end of other published estimates."[28] We can thus confine ourselves to the lower-end estimates and still the problem of wage theft is quite large: millions of workers in the United States are victims of it, many of them routinely so, and the thefts are significant, both in the absolute amount and as a percentage of their income. Indeed, if we use the $15 billion estimate, the money stolen from workers via minimum wage violations alone is more than the value of what is stolen in property crimes in the United States: "According to the FBI, the total value of all robberies, burglaries, larceny, and motor vehicle theft in the United States in 2015 was $12.7 billion."[29]

Why might wage theft be such a pervasive problem in the United States? One important reason seems to be that government, both the federal government and many state governments, does very little to enforce the wage and hour laws on the books. For instance, over the past seventy years, the number of federal investigators in the Wage and Hour Division of the Department of Labor has remained static even though the workforce is now six times larger, and the result is that employers are exceedingly unlikely to be investigated (only a 0.5 percent chance in 2012).[30] Indeed, between 1980 and 2015, the number of cases inves-

26 Cooper and Kroeger, "Employers Steal Billions from Workers' Paychecks Each Year," 28.

27 Galvin, "Deterring Wage Theft," 330–31.

28 Galvin, "Deterring Wage Theft," 331. As he notes, a 2014 study commissioned by the US Department of Labor found that in 2011 the average income loss to minimum wage violations in New York and California was 37 percent and 49 percent, respectively. See US Department of Labor, *The Social and Economic Effects of Wage Violations*.

29 Cooper and Kroeger, "Employers Steal Billions from Workers' Paychecks Each Year," 28.

30 Galvin, "Deterring Wage Theft," 327.

tigated by the Wage and Hour Division has shrunk by 65 percent.[31] In light of this, a worker might reasonably decide to pursue a wage violation claim against her employer herself. Were she to do so, she would find that in many jurisdictions, the process for filing such a claim is quite difficult, seemingly arbitrarily so. For instance, in Iowa, the complaint process "contains a multitude of procedural obstacles that may actively discourage workers from pursuing claims."[32] Class action lawsuits may also be an option, though normally only against large companies and only for those employees who have not already agreed, as a condition of employment, to take any employment disputes to binding arbitration.[33]

The results are unsurprising. As Galvin observes, "because the probability of detection in the United States is so low, the literature on minimum wage compliance has long concluded that in actuality government-imposed penalties do not seriously affect the employer's incentives."[34] Indeed, even in the rare cases where employers are investigated and found to have committed wage theft, the settlements reached often do not require that they pay all the back wages owed but rather only up to two years' worth. As Orley Ashenfelter and Robert S. Smith point out, "the requirement that a violating employer merely pay to em-

31 Cooper and Kroeger, "Employers Steal Billions from Workers' Paychecks Each Year," 5.

32 Gordon et al., *Wage Theft in Iowa*, 14. They add:

> Under existing procedural rules, workers with limited literacy skills, limited English, or those who simply lack time or access to documentation, or have no permanent mailing address, would all effectively be precluded from filing claims. And under current rules, where a worker's burden to provide additional documentation perversely increases in proportion to an employer's nonresponsiveness, even workers who manage to file initial written claims are at high risk of having their cases "closed" at any point in the process for a myriad of procedural reasons. (14)

Additionally, workers are on their own during the process:

> Though employers are allowed to have attorneys or other third parties represent them in the claims process, workers are not. In fact, IWD [Iowa Workforce Development] will close a worker's case if it learns that an attorney or other third party (a pastor, union representative, or community organizer, for example) is assisting the worker in contacting the employer, communicating with enforcement agencies, or using other means to try [to] recover the worker's wages. (14)

33 As Gilman explains, employees must typically pursue a wage claim in arbitration individually, which raises the costs to the employee: "To begin with, employees need a lawyer if they want any hope of prevailing—although this is nearly impossible in the absence of a class action option. In addition, arbitrators charge hundreds of dollars an hour, and many agreements require employees to pay part of the costs" ("Supreme Court Ruling against Class Action Lawsuits Is a Blow for Workers—and #MeToo"). For a thorough discussion of the use of binding arbitration in employment disputes, see Colvin, "Mandatory Arbitration and Inequality of Justice in Employment."

34 Galvin, "Deterring Wage Theft," 328.

ployees a fraction of the difference between the minimum and the actual wage received does not constitute a penalty for noncompliance at all."[35] Furthermore, as Galvin notes, "civil or criminal penalties are rare, reserved for cases of employer retaliation, repeat, or 'willful' violations."[36] From the standpoint of American employers, then, it is as if there is no state enforcement of wage and hour laws at all.[37]

The legal regime of property rights in the United States offers little to no assurance to workers that their rights to their wages will be respected. These workers are thus dependent on their employers in a way incompatible with their equal freedom, for given the inequality of power generally between employers and workers, whether their rights to their wages are respected depends on the will of their employer. Of course, particular employers may have various other incentives either to respect these rights fully or at least not to violate them egregiously (e.g., concerns about productivity effects or bad PR, or perhaps concern for employee well-being or even moral principle) but what is missing is the incentive required, on the Kantian account, to solve the problem of assurance, the incentive provided equally to all by the state's promise of enforcement.

3. Wage Theft and Principled Disobedience

As we saw, for Kant, the solution to the problems of the state of nature is a civil condition, and this condition has two constitutive parts: "What is to be recognized as belonging to [citizens] is determined *by law* and is allotted to [them] by adequate *power*."[38] What is troubling about the situation of low-wage workers in the United States is that they are not entirely in such a civil condition with employers, for while the law does define their wage rights—and so "what is to be recognized as belonging to [them] is determined *by law*"—it is not the case that their wages are "allotted to [them] by adequate *power*." Though Kant nowhere explicitly discusses the possibility of persons being in such a situation, we can ask what a Kantian account should say about their rights and obligations in it.[39]

35 Ashenfelter and Smith, "Compliance with the Minimum Wage Law," 337, quoted in Galvin, "Deterring Wage Theft," 328.

36 Galvin, "Deterring Wage Theft," 328.

37 This problem of wage theft admittedly also involves the failure of adjudicative and administrative agencies to apply the law, and so it seems also to impact the first of Kant's two parts of a civil condition. As my interest here is to see how far one can get with just a focus on failures of enforcement, I am bracketing this other important aspect of the wage-theft case. I am indebted to an anonymous reviewer for pressing me on this point.

38 Kant, *The Metaphysics of Morals*, 6:312.

39 Kant does discuss a situation like this when it comes to states, for he argues, in *Toward Per-*

Since the state is failing to allot to these workers their wages by adequate power, what may they do themselves to secure their legal rights to their wages? May they, at most, raise objections and issue calls for reform, with the implication that while they await those reforms, they must confine themselves to the wholly inadequate avenues of redress the legal system makes available to them as victims of wage theft? Or may they engage in acts of disobedience and resistance, perhaps even violent or destructive acts, with the aim of compelling the state to reform itself and improve its enforcement of wage laws?

The answer Kant himself would give is clear, as he argues that even if a constitution is "afflicted with great defects and gross faults and [is] in need eventually of important improvements," citizens must nevertheless obey its laws, for "the defects attached to it must instead be gradually removed by reforms the state itself carries out."[40] The state's duties to reform itself are not ones citizens may coerce it to fulfill, for instance, by threatening resistance or revolution; the most they may do is raise complaints and objections.[41] Kant's answer, then, would be that even those left vulnerable to wage theft by the state's failure to enforce wage and hour laws must nevertheless obey the law. They must put up with this great defect in the legal system and confine themselves to whatever inadequate avenues of redress the legal system makes available to victims of wage theft. They may protest the legal system's failure to protect their wage rights by raising objections for officials to consider, but on Kant's view, that seems to be all they may do to push for reform.[42] Even civil disobedience is ruled out.

My aim here is to show that a different answer is possible, one that is arguably truer to the basic commitments of the Kantian account. These workers may engage in acts of disobedience and resistance—acts of strategic illegality—to compel the United States to reform its enforcement of wage laws so that it provides them the equal assurance of the security of their wage rights that is partly constitutive of a civil condition. This resistance will be what Delmas calls "principled disobedience": "politically or morally motivated resorts to illegality in the

petual Peace and elsewhere, against a transition to a world state and in favor of the establishment of a federation of states (8:357). The difference is that when it comes to states, such a situation is one that, on Kant's view, they ought to strive for, while when it comes to persons, it seems one that they would need to overcome. I am indebted to an anonymous reviewer for pointing me to Kant's discussion of a federation of states.

40 Kant, *The Metaphysics of Morals*, 6:372; see also 6:322.

41 Kant, *The Metaphysics of Morals*, 6:319. Kant claims that "a people has a duty to put up with even what is held to be an unbearable abuse of supreme authority" (6:320).

42 Kant says that even when it comes to an action done by the executive power ("the ruler") that is contrary to law, citizens "may indeed oppose this injustice by complaints but not by resistance" (*The Metaphysics of Morals*, 6:319).

opposition or refusal to conform to the system's dominant norms."[43] And since such disobedience may involve property damage or destruction, it will not fall under the umbrella of civil disobedience. As civil disobedience is often the only kind of principled disobedience liberals are comfortable admitting can be justified, the claim here is that the Kantian account has the resources to be somewhat more radical than the standard liberal view.

3.1. The Possibility of Local Illegitimacy

Kant's claim about citizens' duties to obey the law, even in the face of "great defects," is based on the ideal of the fully rightful state, an ideal that, as he puts it, "serves as a norm for every actual union into a commonwealth ([and] hence serves as a norm for its internal constitution)."[44] As Anna Stilz explains, this ideal acts as a guide for reforming the current defective condition:

> Even if their . . . existing constitution falls grossly short of this norm, [this constitution] is still legitimately binding because the existing juridical union is an important prerequisite for progress *toward* a republican constitution. It is for the ruler to reform the constitution legally, not for the subject to use force to usher in a new order of things.[45]

Despite its failure to enforce wage and hour laws, workers must still recognize the American state's legitimacy, for its legitimacy is a prerequisite for the reforms that would secure their wage rights. As Stilz's gloss makes clear, Kant's position assimilates any use of force by citizens against the state, even force exercised to compel the state to take their objections seriously, with resistance that rises to the level of revolution ("usher[ing] in a new order of things").

Katrin Flikschuh makes a similar point about the defective state: "Kant regards entrance into the civil condition as a necessary but not a sufficient condition of possible relations of Right. The fact that a regime fails to meet the sufficiency condition does not entitle the people to violate the necessity condition: one does not ensure justice by challenging legitimacy."[46] The result, as Flikschuh makes clear, is that "for Kant, most existing states are legitimate yet more or less unjust."[47] This distinction between justice and legitimacy is indeed crucial, and my argument here does not deny it, for its claim is not merely that the state's failure to enforce wage laws is unjust; it is rather that it is a failure to bring workers

43 Delmas, *A Duty to Resist*, 42.

44 Kant, *The Metaphysics of Morals*, 6:313.

45 Stilz, "Provisional Right and Non-State Peoples," 216.

46 Flikschuh, "Sidestepping Morality," 138.

47 Flikschuh, "Sidestepping Morality," 138.

and their employers entirely into a civil condition in the first place, and thus that in this context, the state is not fully legitimate. Some great defects may not pose a challenge to legitimacy, but the failure to enforce workers' wage rights is one that does.

The challenge to legitimacy at issue here is, as it were, a *local* one. The claim is thus that a state can be generally legitimate while also locally illegitimate. Why might this be? In Kant's core argument for the state, you must enter into a civil condition with those with whom you cannot avoid interacting. A civil condition, as Kant has it, is relational: when you are in a civil condition, you are in it *with* particular others. So, being in a civil condition with some other means that in your interactions with them, what belongs to you both—your rights in those interactions—is determined by law *and* allotted to you both by adequate power. It is possible, of course, to be in a civil condition with some people and not with others. But it also seems possible to be in a civil condition with another person not generally but only with regard to some interactions, for whether the state allots to us our rights with adequate power can vary across types of interactions in a society: in some interactions, the state may enforce the various rights involved equally while, in others, it may not. The state's failure in these latter interactions to allot some citizens their rights with adequate power would amount to a local illegitimacy, as one necessary constituent of a civil condition is absent. And the case of wage theft in the United States seems to me a clear instance of this. The American economy is structured in such a way that a large portion of the population cannot help but work for others for a wage, and so their unavoidable interactions with those others will involve the rights and obligations that the law sets out as constituting the employment relationship. But the legal system fails to enforce workers' wage rights, while it does enforce employers' rights, and so in their interactions with employers within this legally defined employment relationship, workers are not in a civil condition with employers. This relationship is instead the site of a local illegitimacy.

The claim here is thus not that the American state, as a whole, is illegitimate. When the failure to provide equal assurance is in this way local, the resulting illegitimacy will be as well. Allowing for such local illegitimacies is compatible with the basic thrust of the Kantian position, as presented by Stilz and Flikschuh: the existing state, though grossly defective in particular ways and so locally illegitimate, nevertheless goes some distance toward bringing everyone into a civil condition, and because it at least does this, citizens are to respect the existing institution. Since American law, including wage and hour laws, does define a system of property rights that applies to all—the first part of a civil condition—anyone committed to entering into a civil condition with others will have no

reason not to recognize the existing legal system as achieving at least one major step toward such a condition. They are thus not to challenge the legitimacy the American state does possess by trying to "usher in a new order of things" via revolt or revolution. But they may aim to reform it so as to remove the defect and with it the local illegitimacy. And because the defect at issue is one of legitimacy, they may use force—and in doing so, disobey the laws—to bring about the necessary reforms so that the American state moves closer to achieving the conditions of fully legitimate rule across all citizens.

Indeed, the Kantian account ought to allow for this kind of local illegitimacy if it is to stay true to its claims about the importance of equal assurance to equal freedom. The American state does provide assurance to employers of their rights in this employment relationship—its coercive power obliges workers to respect those rights—so, on the assurance argument, employers are bound by wage and hour laws to pay workers what those laws declare them entitled to. But the state does not provide such assurance to the workers of their rights in this relationship, and this failure puts workers in exactly the position that, on Kant's assurance argument, undermines claims of right in the state of nature. Consider the claim that despite the state's failure to enforce wage rights, workers are bound to abide by the laws governing the employment relationship and so to respect employers' rights. This amounts to claiming that they are required by right to leave themselves open to being taken advantage of by employers, a requirement that the assurance argument claims is incompatible with their equal freedom. As a result, they cannot be so required. The Kantian position, then, should be that these citizens need not confine themselves to whatever inadequate avenues of redress the legal system makes available to them as victims of wage theft; instead, they may use the coercive power available to them to try to compel reform.

In addition, this failure to provide workers with equal assurance of their wage rights changes the significance of the assurance of rights the state provides to employers. Because the state secures employers' rights against workers (were an employee to attempt to steal from her employer, the state would be very likely to remedy it and punish her) but not vice versa, workers are obliged by the state's power to respect employers' rights even though employers are not obliged to respect theirs. Employers are thus not only left free by the state to engage in wage theft but also protected by the state from consequences, for the state will protect the proceeds of wage theft from any private remedies workers might attempt as if those proceeds were employers' rightful property. The state's selective enforcement of rights within this relationship thus functions as the exercise not of properly public coercive power but of private power that both reinforces and widens the power inequality between employers and workers in the employ-

ment relationship, making workers' rights to their wages even more vulnerable to invasion and so even less secure. In this context, the legal system's requirement that workers leave the defense of their wage rights to the state cannot help but be illegitimate and so not binding.

But why is it that workers not only may disobey the law here but also may use force to try to compel reform? The answer has to do with the status of the power that is used against them in this context. When employers engage in wage theft, taking advantage of this opportunity to steal wages with impunity, they reveal themselves to be individuals who are "not willing to submit" to a civil condition with workers.[48] The same is true, say, when employers hire lobbyists or form industry groups with the aim of undermining state- or federal-level efforts at reform. Exercising power in these ways against workers amounts to refusing to do what Kant's core argument for the state claims is "the first thing" right requires of them, which is to enter into a civil condition with those "with [whom they] cannot avoid interacting."[49] And the state, by failing to enforce workers' rights while also standing ready, under the guise of protecting employers' rights, to block workers from pursuing private avenues of redress, reveals itself to be an accomplice to employers' resistance to a civil condition. In a state of nature, resistance to entering into a civil condition amounts, on Kant's view, to a repudiation of right altogether, so one may use force to counter this sort of resistance and bring about a civil condition: "Each may impel the other by force to leave this state [of nature] and enter into a rightful condition."[50] What workers face here regarding their wage rights is simply a local version of this resistance, so they too may use force in response.

3.2. Wage Theft and Principled Disobedience

Because the failure to enforce wage laws is a defect of legitimacy, workers' acts of principled disobedience can count as efforts to compel the state to bring the employment relationship fully into a civil condition. In that way, their disobedience can count as furthering rather than undermining the project of governance by legitimate law. The primary requirements for such principled disobedience are thus that it be oriented toward bringing the employment relationship fully into a civil condition, but without threatening "to usher in a new order of things," and that it target either those who exploit the local illegitimacy (i.e., employers who engage in wage theft) or those who are substantially responsible for the il-

48 Kant, *The Metaphysics of Morals*, 6:257.

49 Kant, *The Metaphysics of Morals*, 6:312.

50 Kant, *The Metaphysics of Morals*, 6:312; see also 6:256.

legitimacy (i.e., those employers, lobbyists, and industry groups working against reform as well as the state itself).

Accordingly, a group of workers might organize a sit-in at their workplace or at a series of workplaces, disrupting normal operations. Or they might go further and organize a longer-term takeover and occupation, stopping normal operations altogether. They may even resist police efforts to remove them, barricading themselves in even if doing so requires damaging or destroying property. They might instead do any of this at the offices of lobbyists hired by employers or industry groups to undermine state- or federal-level efforts at reform, or at the offices of those industry groups themselves. Or they might hack into the computer systems of such lobbying firms or industry groups so as to release to the public internal documents detailing those efforts against reform.

These tactics may have one or more intermediate aims, any of which would be consistent with the larger aim of bringing the employment relationship fully into a civil condition. For instance, their aim may be not only to raise awareness among the wider public of the wage theft they suffer but also to underscore the injustice of it, as the perceived radicalness of their tactics will communicate something about the severity of the injustice. Or their aim may be to raise awareness among other workers, as well as to develop solidarity among themselves, so as to build a wider movement for reform. That the problem of wage theft is not only large but also largely overlooked by the state, the wider public, and even the workers themselves (insofar as they do not recognize it as a systemic problem of nonenforcement) raises the stakes for the workers, making it imperative that they engage in protest actions that will be noticed and taken seriously. Additionally, since employers (and lobbyists and industry groups) are generally politically powerful, the workers' aim in engaging in these kinds of resistance may also be to raise the cost to employers of the status quo, leveraging employers' economic or political self-interest in order, ideally, to force them onside, enlisting them in the cause of reform, or, at the very least, to push them to the sidelines and out of the way of reform.

Workers' resistance may also target the state itself, as it is responsible for their vulnerability to wage theft. Indeed, as we saw, the state's enforcement of employers' rights may even exacerbate this vulnerability. Because of this, it would be consistent with a commitment to the project of governance by legitimate law for workers to engage in disruptive protests and sit-ins of government offices and perhaps even takeovers of those offices tasked with enforcing wage laws. The use of these tactics against the state can have many of the same intermediate aims that their use against employers can have. And here again workers may even resist police efforts to remove them from those offices.

Workers' decisions about whether to pursue these tactics of principled disobedience will be largely strategic decisions. (How likely are these tactics to advance their cause? How likely are they to result instead in counterproductive backlash? Even if they did, might backlash at least build solidarity among workers?) Though these tactics will violate their targets' property rights as defined by the law, these rights do not have the full force of conclusive rights in a civil condition. Workers may use the coercive power available to them to bring about a full civil condition, and these tactics are justified as efforts to do just that.

4. CONCLUSION

Nothing in this discussion is meant to suggest that these tactics are at all likely to be used anytime soon by wage workers in the United States, for there is not a militant labor movement available to organize and pursue these kinds of protest and resistance in a sustained way. But such actions would be justifiable on the Kantian account I have offered, for they would be compatible with a commitment to right. It is thus a mistake to claim, as it seems Kant would, that the only protest available to these workers would be for them to voice their complaints and objections for officials to consider. And it is a mistake because of the kind of defect the American state's failure to enforce their wage rights is: by depriving workers of the equal assurance of the security of their rights that forms part of the basis of the state's claim of authority in the first place, this failure is a defect of legitimacy. And because it is a defect of legitimacy, the Kantian account ought to allow that workers may engage not only in civil disobedience but also in uncivil disobedience, even violent or destructive disobedience, in order to compel the American state to reform itself, for were they to do so, their disobedience would count as furthering rather than undermining the project of governance by legitimate law.[51]

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