

## **A Critical Commentary on Kukathas's "Two Constructions of Libertarianism"<sup>1</sup>**

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(As the text indicates in various places, a version of this essay is now a chapter in a book: Lester, J. C. 2014. *Explaining Libertarianism: Some Philosophical Arguments*. Buckingham: The University of Buckingham Press.)

### **Abstract**

*Kukathas's alleged libertarian dilemma is introduced and the two key criticisms of it stated. The succeeding critical commentary then makes several main points. Kukathas's account of libertarianism offers no theory of liberty at all, nor a coherent account of aggression. Consequently, he cannot see that his "Federation of Liberty" is not libertarian by a basic understanding of morals and non-invasive liberty, still less by a more precise theory of liberty. In trying to explain his "Union of Liberty", Kukathas evinces considerable confusion about the nature of libertarianism. His argument that a monopoly legal system is inevitable, is also neither plausible nor libertarian. He has apparently overlooked the cogent arguments against Nozickian minarchy, and in favour of anarchy. It is concluded that the neglect of libertarian theories of liberty and anarchy is the underlying problem.*

### **Introduction**

Kukathas believes he has discovered a serious and unavoidable dilemma for libertarians.<sup>2</sup> He claims we must choose between (1) strictly self-defensive communities in a "Federation of Liberty" possibly with no libertarian communities in the federation, and (2) a centrally authoritarian "Union of Liberty" that tolerates no dissent, possibly including that of self-styled libertarians. This article provides a critical commentary on Kukathas's relevant assumptions and arguments in the order in which he makes them. This approach is intended to facilitate comprehensive criticism and any comparison between the texts. However, the two main criticisms are that Kukathas's dilemma arises out of misunderstandings of libertarian liberty and of anarchic law.

### **"The Federation of Liberty"**

Kukathas first gives an account of libertarianism. Unfortunately, this is typical in being without a theory of interpersonal liberty that explicitly relates liberty to the various things that "libertarians believe" (1). His article thus both fails as a philosophical account of libertarianism and helps to set him up for the dilemma that he thinks he has discovered. For he tells us that there are

at least two very different societies which might be constructed out of such libertarian first principles. And it must be asked, first, which of these is the one that libertarians ought to

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<sup>1</sup> I thank Mark Brady and David McDonagh for their invaluable comments on this essay, and absolve them of any remaining errors. An edited version appeared in *Libertarian Papers*, 4, 2: 77-88. The version in this book takes precedence.

<sup>2</sup> Kukathas 2009.

prefer; and, second, whether either of them is wholly acceptable from a libertarian point of view. (1)

The first imagined society is called “the Federation of Liberty. In this society it is recognized that aggression is fundamentally wrong.” But then Kukathas gives a definition of ‘aggression’<sup>3</sup> that simply will not do if it is intended to be a clear account of what libertarians are against:

Aggression is recognized to mean “the initiation of the use or threat of physical violence against the person or property of someone else.” (2)

This won’t suffice for libertarian purposes for two main reasons. First, a thief, embezzler, fraudster, etc., does not need to engage in “the initiation of the use or threat of *physical violence* against the person or property of someone else.”<sup>4</sup> For instance, if someone steals your garden gnome, then no kind of “physical violence” against you or your gnome has thereby occurred by any normal usage of those words.<sup>5</sup> Second, legitimate policing services when dealing with a non-violent thief, embezzler, fraudster, etc., will themselves engage in “the *initiation* of the use or threat of *physical violence* against the person or property of someone else.” For instance, they will be engaging in this initiation against the peaceful gnome-thief if they arrest him.<sup>6</sup>

The usual defence of libertarians without a theory of liberty is to ignore normal English-language usage and insist on Pickwickian definitions of the words so that the entirely non-violent gnome-theft counts as “the *initiation* of the use or threat of *physical violence*” but the police arresting and incarcerating the peaceful thief does not.<sup>7</sup> And there are two main problems with this approach. First, people who genuinely wish to make clear sense of libertarianism cannot do so (at least until they acquire an adequate theory of liberty – or aggression, understood as liberty’s opposite). Second, critics of libertarianism can, and often do, make philosophical hay with such confusion.<sup>8</sup> Why does this matter here? Kukathas helps to perpetuate an important incoherence dressed up as a simple principle about the nature of liberty (or non-aggression). This needs to be corrected wherever it occurs. And, as I hope to show, Kukathas’s muddled conception pervades his article and helps to obscure the mistake in his alleged dilemma.<sup>9</sup>

Kukathas summarizes the “Federation of Liberty” by saying, “In other words, it recognizes two central axioms: the right to self-ownership and the right to ‘homestead’” (3). Again, this is

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<sup>3</sup> There is a relevant ambiguity with ‘aggression’ itself. The ethological sense is about threatening or physically attacking another animal. The social or moral sense, which libertarians intend, is about any invasion or trespass on another person’s body or legitimate property. Neither sense need imply the other.

<sup>4</sup> Taken literally, “physical violence” must involve the use of overwhelming force. It includes such things as slapping, strangling, stabbing, and shooting.

<sup>5</sup> My point is that Kukathas’s account of the non-aggression principle—or liberty itself – is incoherent as it stands. There can be a coherent account, but it is not the orthodox interpretation. I have offered one account myself. See, for instance, Lester 1997, and – at far greater length – Lester 2012.

<sup>6</sup> Ex hypothesi, the thief did not use physical violence. But the police use it, or its threat, when arresting the thief. Therefore, they have *initiated* the “use or threat of *physical violence*” (albeit entirely legitimately). I apologise to those people who think I am labouring an obvious point, but it is not obvious to some libertarians.

<sup>7</sup> The all-too-common idea that this is just a semantic issue, resolved by simple clarification, is completely mistaken. In its details, there is a complicated and important philosophical problem here.

<sup>8</sup> Jeffrey Friedman is a typical example: “... all legal systems, including libertarianism, coercively enforce rules that assign the “ownership” of all persons and all bits of the world. ... So, strictly in terms of negative liberty – freedom from physical coercion – libertarianism has no edge over any other system.” Friedman 1997, 428. See also Lester 2011, Chapter 22, and Lester 2012, 71-75.

<sup>9</sup> However, I am reminded that Kukathas’s article is the substance of a public lecture, and so should not be interpreted as a definitive or complete statement of his view of libertarianism.

recognizable as what is called ‘libertarianism’, but there is no theory of liberty to explain exactly how these two things are libertarian or to apply to any problem cases that might arise – such as Kukathas’s alleged “dilemma.”

The question is then posed: “What should be libertarianism’s attitude to those who disagree with libertarian principles?” And the answer given in the Federation of Liberty is

If they are numerous enough, they might form their own communities or groups, and live by their own lights. If they will not aggress against libertarians, then libertarians will not aggress against them. ... The consequence of this attitude ... might well be that there are quite a few groups or communities ... in which the freedom of the individual to dissent from the community’s powerful authorities is not respected – or even conceded. Indeed, the freedom of the individual to leave the community or group may not be accepted, so that many people are effectively held within the community against their will. (3)

The crucial question here is, is this a “consequence” that is compatible with genuine libertarianism? And here I suggest the clear answer is, no. Libertarianism is not a personal matter. Insofar as it is held as a moral theory it is categorical (not a matter of mere preferences) and universal (including all relevant moral agents, which usually means all people).<sup>10</sup> It would indicate confusion if one were to say that X is immoral for some people but not for others, unless one were to believe that these are two types of people and they are not moral equals (e.g., as Aristotle thought that some people were natural slaves). So unless one does believe that some humans are not entitled to liberty, then infringing liberty is immoral for me and immoral for you; and immoral in my community and immoral in yours.

Consequently, libertarianism cannot forbid people in community A from assisting someone whose liberty is infringed just because he is in community B that is not itself threatening the liberties of community A.<sup>11</sup> Libertarianism is about the interpersonal liberty of everyone. It is not only about the liberties of individuals already in libertarian communities (and if it were, we might have a problem as we do not live in such communities ourselves). Of course, we are not obliged to help protect the liberty of others either. And even if we would like to help, we might see that we would do more harm than good. But these are separate matters. The point is that it cannot go against libertarianism as such to liberate some oppressed individual – even though he does not, and maybe cannot, explicitly ask or “appoint” us to help – solely because his society is not itself threatening our society’s liberties.

The attentive reader might have noticed that I have made this argument without appealing to a theory of liberty, despite having stated that such a theory is required. I have done this by appealing to certain ideas and intuitions about liberty, and also morality, rather as Kukathas did. But to be fully cogent we do indeed need some such theory (and I have, in fact, been tacitly guided by one). Otherwise we cannot really assess whether the argument is sound. And we also leave ourselves open to someone from an illiberal community producing a theory of liberty that ostensibly puts us in the wrong, and that we would be unable to answer satisfactorily. I theorize interpersonal liberty as the absence of proactive impositions. I cannot go into the detail of that theory and its defence here.<sup>12</sup> Suffice it to say that it minimizes overall proactive impositions for people to own themselves (except in some unrealistic thought-experiments). Therefore, one does not proactively impose on anyone else, let alone a whole community, by rescuing someone who is being proactively imposed on in some community (even if the rest of the community chooses to work themselves into a frenzy of outrage

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<sup>10</sup> See Lester [2000] 2012.

<sup>11</sup> Unless, says Kukathas, in “self defence,” he both can and does “appoint an agent – or indeed many agents – to act on his behalf” (6).

<sup>12</sup> See Lester [2000] 2012.

about the ‘interference’ in their traditional customs of suttee,<sup>13</sup> or slavery, or stoning, etc.). And so not only self-defence but the (even unrequested or appointed) defence of others is clearly allowed by libertarianism. Those in the Federation of Liberty are mistaken in thinking that it is a libertarian principle that “It simply is not permissible to initiate the use of force against others who are not threatening to use force against *you* or *your* property” (3).

Kukathas rightly observes that “under this understanding of libertarianism ... it is possible, in principle, that *no one* accepts the principles of libertarianism. The principle of non-aggression operates only between groups or communities...” (4). And he asks, “can this really be a libertarian society?” And I answer, no it cannot. Kukathas has provided a *reductio ad absurdum* of this interpretation of libertarian principles.

### “The Union of Liberty”

A second society is now imagined by Kukathas: “the Union of Liberty.” The set-up is the same as the first except that “the principle of libertarianism is not one that people may choose not to adopt. The principle holds for all persons, in their dealings with all persons. What is the point, after all, of a moral principle that does not apply to all?” (7). Quite. Or, more precisely, how is it a moral principle at all? Kukathas then asks, “what is the implication of this for the kind of society that will emerge...?” And we then again see the sort of confusion that results when someone uses his intuitions about liberty instead of applying an explicit theory of liberty. For Kukathas thinks that it is possible that some people might

agree with one another to form associations in which they live, voluntarily, by non-libertarian principles. They might agree to hold their property in common and limit private ownership; and they might place restrictions on speech, or require all to abide by strict rules limiting what each may do and authorising some to hold considerable power [over?] the others. (7)

On the contrary, say I, none of these agreements amount to people living by “non-libertarian principles” in the sense of other people interfering with their liberty (or proactively imposing on them). They are, presumably, all contractual agreements. So if they flout liberty then it would seem that all contracts flout liberty. However, Kukathas explicitly rules slave contracts as being non-enforceable because of “non-aggression” (7). And this is a further confusion as it is not aggression to enforce a contract, but I won’t elaborate on this more controversial issue here.<sup>14</sup>

Therefore, it is a conceptual muddle to state that “no one is permitted to live without liberty unless he has explicitly relinquished those particular liberties he lacks” (7). Part of the problem here is probably a common equivocation between two completely different conceptions of interpersonal liberty. The first is ‘liberty’ understood as not suffering any aggressions (the non-aggression principle), or initiated invasions or interferences by other people.<sup>15</sup> Only this is the libertarian conception. The second is ‘liberty’ understood as not being constrained by other people in any way whatsoever. And this entails that a gain in liberty by one person is a loss in liberty by another.<sup>16</sup> However, Kukathas is correct to say that in the Union of Liberty, “the only legitimate associations are *voluntary* associations” (7).

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<sup>13</sup> Widow-burning.

<sup>14</sup> See Lester [2000] 2012.

<sup>15</sup> I attempt to reformulate and explicate this libertarian sense as the “absence of initiated imposed costs” or the “absence of proactive impositions” in Lester 2012.

<sup>16</sup> Hence I call this “zero-sum liberty” in Lester 2011, Chapter 1.

Now Kukathas supposes that he spots a problem: “there are a great many communities and associations which operate without respecting the principle of liberty, or which violate the requirement of consent” (8). True, but he goes on to say, “Most obviously, most dealings with children invariably involve some restriction of their liberty, and usually without children’s consent.” However, most self-identified libertarians themselves advocate some paternalistic restrictions on liberty for children (decreasing in proportion as children approach their adult maturity).<sup>17</sup> And these restrictions might sometimes have culturally relative aspects. So this example is of limited use in clarifying the problem that Kukathas is trying to explain. He is on firmer ground when he says that some “communities might restrict the application of the principle of liberty ... on the basis of gender or ethnicity or religion or sexuality” (9).

But exactly where is the problem with the idea that “liberty must be enforced”? Kukathas thinks that “The first, and fundamental, implication is that there can be only one authoritative understanding of liberty.” I disagree: competition seems more likely and more desirable. “Second, and following from this, there cannot be a multiplicity of authorities with the right to set standards of conduct.” Surely there can, but they cannot set different standards without risking clashes that will need to be dealt with in some manner. Further, “it is permissible to intervene in the workings of communities or associations which do not respect libertarian principles”(10). Permissible, yes, but neither compulsory nor always prudent.

Kukathas continues,

If intervention in the affairs of people who have not aggressed against us is permissible – to stop aggression within their own community – this must be either because anyone may determine whether or not intervention is justifiable, or only when it is authorised as lawful to intervene. (10)

But, say I, these are neither the only nor the right options. For if anyone *correctly* determines that an intervention is libertarian, then an intervention is permissible and lawful. And if some alleged ‘authority’ *mistakenly* determines that it is not libertarian, then an intervention is still permissible and lawful. We cannot rule out a disagreement between some individuals and those who think they are the ones who decide what is “authorised as lawful”. But what happens then?

Kukathas incorrectly concludes that “intervention is permissible only when it is lawful – and authorised as such. I say this because I am assuming that a libertarian society is a society under law” (10). I regard this attitude to law as mistakenly deferential and implicitly statist. A libertarian, but especially an anarchist, would be unlikely to view a libertarian society as being “under” some particular system of law any more than as being “under” some particular system of money. It is not “under” law because the law is not above the people and aggressively dictating what is allowed, as the ‘law’ is with a state. The law is a market-produced service at the level of individuals, merely protecting them and their property from aggression. If some alleged authority makes an error about what is libertarian, then it is de jure permissible to ignore this authority on that error. And only that attitude can hope to preserve a libertarian society from degenerating into hierarchical conformity with whatever some alleged authority decrees.

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<sup>17</sup> There is some (disputed) age or level of maturity below which libertarians typically think it at least acceptable (and possibly even a duty) forcibly to prevent a child from running across a busy street, going off with an unknown adult offering him enticements, putting his hand into a wood chipper, eating a known poison, etc. However, the age of non-paternalism can be low. David Friedman, for instance, suggests that “Any child above some very low age (say, nine years old) who is willing to arrange for his own support should be free from the authority of his parents” (Friedman 1989, 93).

Kukathas then asks, “But what law is this?” (10). He concludes that the Union of Liberty “must prescribe ... what standards every community must meet if it is to pass the libertarian test, for no non-libertarian community may operate.” However, this way of expressing things gives the erroneous impression that the Union of Liberty must be committed to worldwide invasion of all (allegedly) non-libertarian societies, which sounds like a recipe for endless wars. In reality, the Union of Liberty is merely committed to the permissibility of rescuing any individuals who are being aggressed against in other societies. And, of course, this is only as long as it is not counterproductive – which it often is (hence the liberal tradition of non-intervention). And that does not sound alarming in the slightest. Rather, it sounds both moral and prudent.

This is not how Kukathas sees things. He states that “the implication of this is that there will be a central judicial body with final authority ... to determine when intervention is permitted ... also ... who may rightly intervene ....” But this is all based on the hierarchical error we have just observed. And so we do not need to go on to agree that there would be “a strong central authority” that is “more than likely to – be captured by the most powerful groups or communities ...” and then end up “depriving people of their wish to live by dissenting moral standards, even if they are dissenting *libertarian* moral standards” (11).

Consequently, we do not need to choose between these interpretations of the “Federation of Liberty” – which “can, in principle, turn out to contain no communities of that federation which actually value or respect liberty” – and the “Union of Liberty” – which “can, in principle turn out to be [a] society ruled by a strong authority with little respect for dissenting moral traditions, including some self-styled libertarian moral traditions.” Kukathas has produced a false dilemma.

### “Conceptual Space”

Kukathas concludes,

Alas, as I see it, no other construction of libertarianism is possible. The two alternatives described here occupy all the available conceptual space; and there is no third way, theoretically speaking. Libertarians must bit[e] one bullet or another.” (11)

On the contrary, as we have seen, there is no “conceptual space” for either of Kukathas’s interpretations of these “two constructions” in genuinely libertarian terms. Moreover, correctly understood, a libertarian society remains viable with slightly varying conceptions of liberty being enforced by different protection and arbitration agencies, plus the possibility of prudent intervention in non-libertarian societies. Kukathas himself opts for the “Federation of Liberty” giving the reason that “power ought not to be entrenched ... no power should be established as the final court of appeal from which no dissent is possible” as it would in the “Union of Liberty” (12). But this “final court of appeal” is not a plausible interpretation of how a “Union of Liberty”, or at least a realistic libertarian society, would likely operate.

Kukathas’s main error here appears to be a statist presupposition. His article does not consider anarchy. It is not even directly mentioned. The “state” and “government” are mentioned several times each, and not in any critical or cautious way. An example is where he writes of the “libertarian account of the justification for, and role of, the state” (2). Except for one bracketed aside – “(For some libertarians ... no government is legitimate)” – the idea that there might not be a state does not occur. This is hard to explain, or excuse, in an article on the best way to maintain a libertarian society – especially as anarchy is a “third way” and it solves the underlying problem. It prevents the emergence of “a strong central authority.” A *modus vivendi* between communities with slightly different conceptions is far more likely.

Kukathas appears to take the view that the consequence of differing interpretations of libertarianism must lead to serious conflict or a “single higher authority” – and that the “single higher authority” must win out. But this is analogous with Nozick’s view on how states evolve out of anarchy. And it is mistaken for the sorts of reasons that Roy Childs, Murray Rothbard, and various other libertarians have explained.<sup>18</sup> In short, it is more than likely that clashing defence companies and their customers will strongly prefer arbitration to violence. And it is the fallacy of composition to think that because all clashing defence companies must agree to some arbitration agency, therefore they must all agree to the *same* arbitration agency<sup>19</sup> – which thereby establishes a monopoly that is, supposedly, one step away from being a state. Moreover, a business is always reliant on giving an economic service to its customers. It is not based on the authority to rule, as the state always is. Therefore, even if one dominant arbitration agency were to arise, there is no natural likelihood for it to slide from being a business into being a state.

## Conclusion

It is, of course, possible that I have misread Kukathas or failed to see the force of his arguments. But unless and until I am corrected, I am obliged to conclude that there is no problematic dilemma for libertarians concerning the best type of libertarian society. Neither of Kukathas’s options is libertarian, as he might see if he had a clearer conception of non-invasive liberty. And the anarchic alternative remains not merely conceptually possible but entirely practical, as Kukathas might see if he were not to ignore it. There is, however, clearly a problem in persuading political theorists to take seriously libertarian theories of liberty and anarchy.

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<sup>18</sup> For instance, Childs 1977 and Rothbard 1977.

<sup>19</sup> Compare: all spouses were married by some official; therefore, all spouses were married by the same official.