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Anarchy, State, and Property

Abstract:

The fundamental function of the state is safeguarding the safety of its citizens. The combination of Nozick's invisible hand explanation with his theory of justice implies that individuals can have full private property rights in the state. An individual with such property rights thus has the right to sell and destroy what he or she owns. This implies that it is perfectly fair to buy a state and dismantle it, thereby leaving citizens without protection. I conclude that Nozick's theory of the state fails since it cannot guarantee the protection of its citizens' safety.

Keywords: the state, invisible hand explanation, property, Nozick, security.

1. Introduction

Reading Robert Nozick is an adventure. Although you may find yourself agreeing with almost everything or almost nothing, you cannot dispute the elegance and creativity of his work. In this paper, I will discuss two fundamental parts of Nozick's *Anarchy, State, and Utopia* (1974): the theory of the state and the theory of justice. I will then argue that the combination of these two theories spell trouble for invisible hand explanations in libertarian political philosophy.

This might seem like a somewhat odd project to undertake, given that the Special Topic under consideration is 'Can the Social Contract Be Signed by an Invisible Hand?' A topic of this nature might seem to raise primarily empirical questions. However, as Lahno (2013) points out, there is a normative issue underlying this question. I turn directly to the normative issue and ask what the implications of the invisible hand account are if it succeeds. The starting point of my argument is the following idea, widely shared from Hobbes and onwards: the state should guarantee the protection of our safety. However, I shall then argue that a theory that combines these two theories cannot guarantee such protection. The combination of Nozick's theory of the state and his theory of justice implies that the state can be bought and sold. It even implies the stronger thesis that it is entirely just to buy a state and then dismantle it. This means that even if the mechanics of the invisible hand explanation work, it cannot provide us with the result we want. The invisible hand signs the wrong contract.

In the *next section*, I will present Nozick's invisible hand explanation and justification for the state, as well as his theory of justice. *Section 3* presents my

argument that the state, according to Nozick's theory, can be bought and sold. Furthermore, I argue that this is a failure for a theory of the state. The fourth section concludes this article.

2. Nozick's Theories of Justice and of the State

Nozick's alternative to theories of distributive justice is well known. In the place of end-state and patterned theories, he prefers a historical theory. Such a theory consists of three parts. First, there is a principle of justice in acquisition. Here Locke's Proviso plays an important role; you are allowed to appropriate a thing if you leave enough and as good for others. If you have acquired something justly out of the state of nature, you have full property rights to that something. The second part of Nozick's theory concerns trade. We do not gain property rights only by taking things out of the state of nature. Most of the time, we acquire property by trading with others. The principle of justice in transfer thus explains the proper conditions for justified transfer of property rights. Essentially, proper consent is required. If both parties are informed, uncoerced, and in agreement, then they can exchange property rights in such a way that justice is preserved. For Nozick, justice is fundamentally the protection of property rights. Unfortunately, sometimes people try to obtain things in other ways, which means that a third principle is needed. This is the principle of rectification. As its name indicates, the point of this principle is to see to it that injustices are rectified. If property is stolen, it must be returned to the rightful owner.

There has been much discussion about the best way to interpret these principles. For our purposes in the present argument it will not be necessary to dig into thorny issues such as how to best interpret consent or the implications of rectification. However, we must examine the following two notions in greater detail: the concept of property and the Lockean Proviso. Let us start with property. If you acquire property in accordance with the two abovementioned principles, you gain full property rights to whatever you have acquired. What then are full property rights? Nozick characterizes property rights as "rights to determine which of a specified range of admissible options concerning something will be realized" (1974, 281–282). This is a version of the standard account of property rights. What such accounts have in common is that they hold that property consists in a bundle of rights. These rights standardly include the right to use, trade, change, and destroy what one owns.¹ If you own something you may use it or sell it. What you may not do, however, is use your property to violate others' property rights. In Nozick's classic example, your property rights to a knife do not include the right to stab someone with it (Nozick 1974, 182). Moreover, there is no overriding principle that would demand that you keep an object in your possession if you want to sell it. The same goes for the right to change

¹ A classic account of property is Honoré 1961. For an overview, see Waldron 2012.

something you own. If the house is mine, then I have a right to repaint the living room. Moreover, if it is my house I am in my rights to take it down if I so choose. To stop me from tearing down a house I own would be an injustice. If there is such a principle, it would come into conflict with justice, since justice, in the Nozickian account, consists in property and property implies that you have the right to sell, change, or destroy what you own.

How could we justifiably move from a state of nature, where everything is unowned, to a situation where there is property? The Lockean Proviso plays an important part in answering this question. It implies that one is allowed to appropriate a thing from nature on the condition that one does not make anybody else worse off by doing so, i.e., making somebody worse off than he or she would have been in the state of nature. If somebody is worse off, then there is not enough and as good left for others. If read strictly, however, every appropriation worsens the situation for others since there would be one less object to appropriate. This is why Nozick argues that the Proviso should be understood as applying to the system of property (as opposed to piecemeal appropriations). He notes that “compensation would be due to those persons, if any, for whom the process of civilization was a *net loss*” (Nozick 1974, note on page 179, emphasis in original). For the purposes of this article the important thing to notice is that the Lockean Proviso sets up a baseline—the situation in the state of nature—against which claims of property rights are to be evaluated. This means that there are two ways in which a holding can be unjust in Nozick’s theory, i.e., either by infringing on someone else’s right or by bringing someone below the baseline of the Lockean Proviso.

We have started out by describing Nozick’s theory of justice, but as he notes, “The fundamental question of political philosophy, one that precedes questions of about how the state should be organized, is whether there should be any state at all” (Nozick 1974, 4). At least since Hobbes, the standard answer has been that the justification of the state has its basis in its function to protect us. If the state cannot protect our safety and our property rights, it fails at its most fundamental task. Nozick shares this approach with the tradition; the state is a protector of property rights. It is important to note here that property rights do not only have to do with rights to things; we have property rights to our persons as well. This means that, for example, assault should be understood as a crime against your property rights to your own person. The state’s role then will be to protect our property rights both to ourselves and to external objects.

For someone writing in the Lockean tradition it would seem natural to turn to social contract theory for a justification of the state; however, this is not the case for Nozick. Since actual consent to such a contract seems incredible and, furthermore, since “tacit consent isn’t worth the paper that it’s not written on” (Nozick 1974, 287), this is not a viable option. Instead he prefers to think about the state’s justification in terms of an invisible hand explanation. Such an explanation can be understood as follows:

“A theory of a state of nature that begins with fundamental general descriptions of morally permissible and impermissible actions, and of deeply based reasons why some persons in any society would violate these moral constraints, and goes on to describe how a state would arise from that state of nature will serve our explanatory purposes, *even if no actual state ever arose that way.*” (Nozick 1974, 7, emphasis in original)

In order for this kind of justification to work, it must show how the state, in a recognizable form, can come about unintentionally through a process which respects the rights of all individuals. Such an explanation would be fundamental. An explanation is fundamental if it fully explains the political in terms of the nonpolitical. This is why invisible hand explanations are particularly interesting. Since they explain outcomes through unintended consequences, they do not have to, and cannot, assume what is to be explained at any level. If one would have to resort to assuming intentions in order to bring about the outcome on the part of the agents, then what we have is neither an invisible hand explanation nor a fundamental explanation. In other words, an invisible hand explanation of the state cannot make use of an assumption that people want to bring about a state. What must be shown is how the state comes into being without anyone intending to bring it into existence.

However, it is not necessary to show that the state has actually come about in this way. Nozick is looking for what he calls a fundamental potential explanation, which can be law, fact, and process defective, yet still have significant explanatory power. A potential explanation is “what would be the correct explanation if everything mentioned in it were true and operated” (Nozick 1974, 7). Such an explanation can be fact defective in terms of the facts it makes use of, the processes it assumes, and even in terms of the laws it uses. The idea is that even if in the final analysis the state must be explained in terms of power and violence (or a will to justice for that matter), we learn about the nature of the state through such fundamental potential explanations, particularly through the kinds of invisible hand explanations that Nozick develops.

Nozick does not only want to explain the state; rather, he wants to show how a certain kind of state can be given moral justification. One could think that taking an explanation as providing a justification would be an obvious breach of Hume’s Law, but Nozick’s strategy is much more subtle than it may initially seem. The idea is that if an explanation of the state can be given which demonstrates that it could have come about in a way that has respected all rights, then the state is legitimate. Similar to how a distribution of goods brought about by Adam Smith’s invisible hand is just, provided that it has come about without breaches of any rights, the state is legitimate if an explanation can be given regarding how it could have come into existence without infringements of rights. Nozick argues that “moral philosophy sets the background for, and boundaries of, political philosophy” (Nozick 1974, 6). When this background is in place an invisible hand explanation can perform its justificatory role.

Nozick argues that the state could have come about through the following five steps (Nozick 1974, 10–17; 22–25; 54–58.) We start from the state of nature, which is to be understood in a more or less standard Lockean way. The state of nature is mostly peaceful, but there is some crime and violence. Each person has an individual right to punish criminals, whether the crime is committed against them personally or if it is committed against some other person. Moreover, each person is individually in charge of his or her own protection. Disagreements about the interpretation of natural law, and hence proper punishments, will lead to conflicts and therefore give rise to a need for an impartial third party to adjudicate competing claims. The route toward the state begins here.

In step two, people find that it is much more efficient to form protective associations. Rather than having each person fending for herself, people cooperate on a voluntary basis to defend themselves against crime. These associations will adjudicate competing claims. This is clearly an improvement over the state of nature. As a third step, the voluntary associations find that it would be preferable to outsource the protective work to private companies. It is more rational for each individual to buy security services from a company than it is to take part in a communal protective association.² In this way people would be able to avoid the inconvenience of having to take part in the neighborhood watch round. Moreover, some people will be entrepreneurs and notice a business opportunity for private security companies. What we have here is a standard example of the division of labor. In these three steps, we have moved from a state of nature to a world where security is handled by private companies.

Nozick has promised to show us how *the state* could be explained as coming about through an invisible hand process, but at this point in the story there is a multitude of different companies that compete for customers. How do we get to the Weberian monopoly of legitimate violence? The story must continue. Step four consists of the somewhat surprising argument that a free market for protective services will lead to a monopoly. The reason that there will be a monopoly on protective services is that the value of this service is relative. If there is competition between different companies, it is better to be a customer with the stronger firm since it will be in a better position to enforce one's rights. This makes it rational for each person to buy his or her protective service from the most dominant company. And, of course, if each person buys from the same company, we have a monopoly.

In Nozick's terms, what we have is an ultraminimal state, which is not yet a proper state, i.e., it is not a minimal state. It maintains a monopoly on force, but provides its service only for those who pay for protection. This means that one private company will have a monopoly in the sense that everyone that buys protective services buys it from the same agency. But some people may prefer not to buy such protection. Someone, who we will call Clint Eastwood, might prefer to settle issues of justice privately and on his own. If this is the case, then

² Note that if it were more rational to handle protection communally, the idea of a social contract theory would be almost irresistible, because then the group cooperating would need a contract to set up the terms of cooperation.

the ultraminimal state will not have a monopoly on violence in the important sense. Furthermore, it seems difficult to see how it would gain such a monopoly in a way that would make it legitimate. To solve this problem, at this fifth and final step, Nozick invokes the principle of compensation, which “requires that people be compensated for having certain risky activities prohibited to them” (Nozick 1974, 83). To be compensated is to be made no worse off than one would have been in the absence of the intervention; that is, to remain at the same indifference curve. If the ultraminimal state forces Eastwood to stop enforcing his rights in such a manner that he would judge himself no worse off than if he had not been forced, then this enforcement is consistent with justice. The way in which the state compensates Eastwood is by providing him with security services. Therefore, this principle gives the ultraminimal state a justification for the kind of monopoly on legitimate force that is necessary in order to have a proper state. What began as just another private company has now turned into a monopoly on legitimate force. This is, then, how we can “Back into a State, without Really Trying” (Nozick 1974, 1).

3. The Market for States

What is important and fascinating about Nozick’s justification of the state is how it shows how the state can come about without violating anyone’s rights. However, this is also the seed of this theory’s greatest weakness. In this section, I will show how the combination of this theory of the state and his theory of justice leads to some problematic implications.

Property consists of a bundle of rights, and these rights include the right to use, sell, and destroy. Justice demands that I should be allowed to use my property as I see fit. If I own Black Water Security, I have the right to decide how to use this company, including the right to sell it or, if I wish, to dismantle it. If we return to the third step of Nozick’s story, we will be able to identify what kind of trouble this will create for his theory of the state. Let us assume that I have exercised my entrepreneurial instincts and started a private security company—Grey Water Security—and begin marketing it. The members of neighborhood watch organizations start buying my services and the company is up and running. At this point I have full property rights to my company. At step four, the free market will have run its course and Grey Water Security will have achieved a monopoly position in the geographical area we serve. This means that there is a rudimentary state in place. However, nothing in Nozick’s theory would indicate that I would lose rights by being successful. I would still have full property rights in my company. I could still use, sell, or destroy my company as I see fit.

What about the fifth and final stage? Grey Water forces Eastwood to stop enforcing his rights privately. That Grey Water is now a state has to do with it being in a position to invoke the compensation principle and nothing else. This

in itself does not imply that I will lose my property rights as the owner; it just means that there is a legitimate way Grey Water could force Eastwood to comply with its demands. To repeat, the compensation principle “requires that people be compensated for having certain risky activities prohibited to them” (Nozick 1974, 83). The truth of this principle has no implications whatsoever for the property rights of the owner of the state. If the compensation had any such implications for property rights, this would probably undermine the invisible hand argument. It would mean that there is a strong incentive for any owner to remain at the stage of an ultraminimal state, since otherwise he or she would lose property rights in the company. It seems irrational for an owner with a monopoly to decide to give up property rights in order to compensate Eastwood. That would amount to incurring a cost in order to incur a further cost. If we must assume this kind of irrationality to explain the emergence of the state, then it appears that we do not arrive at the proper kind of invisible hand explanation. The conclusion must be that the state, according to Nozick’s invisible hand theory, is a private company in which the owner has full property rights.

However, why can’t we assume irrationality? It is important to note that people act rationally in Nozick’s account of the emergence of the state. I would argue that there are two good reasons for this aspect of his explanation. First, if we are allowed to assume irrationality, then potential explanations risk becoming both uninteresting and possibly ad hoc. This would be the case if we assumed that the owner of the ultraminimal state would pay in order to incur a further cost. Of course, it would not be irrational for the owner to incur this cost if he would like to bring about a state. Perhaps he or she would like to do so for moral reasons. We should not deny that people can act for moral reasons; however, the explanation then runs into another problem. If we assume moral intentions, then it stops being an invisible hand explanation. Second, assuming irrationality drains Nozick’s account of normative interest. In his original account people have their preferences satisfied while rights are respected. If we assume irrationality, the Pareto aspect of his account disappears. Therefore, we should assume rationality.

The basic problem with Nozick’s account of the route out of the state of nature is that it implies that a person can own the state; people can have justified and just property rights in the monopoly of legitimate force. This is in itself counterintuitive, but it also has absurd consequences. Property rights include the right to sell and to destroy, which means that there will be individuals who have a right to destroy the state for any reason as they see fit. This would then allow me to buy the Norwegian state (if I could find the sufficient funds) and dismantle it out of spite. Very few people would, of course, have the means or inclination to carry this out. However, the important point is that since property rights guarantee that I can do as I please with my property, doing so would be considered fully just according to Nozick’s theory. Some might argue that the assumption I make here about how people would act is unrealistic. This assumption about how people would act is used to illustrate a theoretical point.

If unwanted consequences could occur within the theoretical framework, then this indicates a problem with the framework.

Moreover, if someone would try to stop me from disassembling the state, that person would be guilty of an injustice. For instance, if I tell the police to stop using the resources that I now own to capture a criminal but they persist in pursuing and apprehending murderers, then they are violating my rights. They become guilty of an injustice. It might not seem absurd that it is unjust to use somebody else's property, but in this case we are talking about property in the state, the final guarantor of justice. Moreover, while it would be an injustice to hinder somebody from dismantling a just state, it could be fully just to dismantle a just state. Implications do not get much more absurd in the context of political philosophy.

But would not dismantling the state harm both its customers and Eastwood? It would clearly be a setback, at least for the customers. However, in order for such a setback to amount to a wronging it must either be a breach of rights or a violation of the Lockean Proviso. Let us start with harm understood in terms of violations of rights.³ The baseline consists of a person's rights, and the idea is that a person is harmed only if his or her rights are violated. However, if the state can come about without the violation of any rights, it is hard to see how one could make the case that harm is caused by someone not exercising his or her rights. If neither the non-existence nor the existence of a state violates rights, and the dismantling of the state is consistent with property rights, then there is no harm. No rights are violated. Moreover, it would be strange to say that if I stop producing something to the benefit of my customers, I would harm them in the sense that I have violated their rights. Obviously, a breach of contract is another matter, which I will return to below.

What about the Lockean Proviso? It is not immediately clear how the Proviso could cause problems for my argument. If the state is dismantled, then we have a situation without any state, i.e., we are back in the state of nature. This means that when we are asking if this dismantling would wrong anybody, we are in essence asking if the state of nature is worse than the state of nature. The state of nature is not worse than the state of nature. Therefore, the Lockean Proviso is not breached.

For the case of Eastwood, it is difficult even to identify any potential ground for complaint. He has been forced to accept the protection of the state, and if the state is dismantled, this ceases. It is hard to think that this would not be experienced by Eastwood as an improvement, but *ex hypothesi*, he must remain at the same indifference curve regardless of whether there is a state or not. Still, there is no theoretical ground for saying that he will be harmed either in terms of his rights or the Proviso.

Not only does this theory of the state lead to the absurd implications of ownership, it fails at perhaps the most fundamental task of a theory of the justifi-

³ The particulars of Nozick's theory of consent and the paramount importance of the issue of the baseline are not discussed at any length in *Anarchy, State, and Utopia*. His theory in this area is most fully presented in Nozick, 1997, 15–44.

fications of the state. This kind of state becomes fundamentally unstable. If property rights in the state are granted, then we cannot be sure that the state will continue to exist. Furthermore, we cannot be sure in what form it will continue to exist. It could be sold or dismantled at any point if the owner wishes to do so. That the existence of a state could be held captive by the flimsiest preferences of any person with enough resources to take control of it is an implication of a theory of the state that just does not take the importance of the state seriously. In order for the state to perform its fundamental function, it is necessary that we know that it will continue to exist. How could we trust that contracts will be enforced? Why would we refrain from punishing criminals ourselves if we cannot be sure that the state will be there to perform this task? In other words, what would stop us from returning to Locke's state of nature? If such a return is a viable option, then, in essence, we remain in the state of nature. This is not a justification of the state.

One way of countering this conclusion would be to deny that property rights in the state consist of the full bundle of rights. For instance, why could we not bargain away the rights to sell or destroy when hiring a private protective agency? Obviously, this is a possibility, but there are several reasons why this will not help Nozick's theory. First, even if this is a possibility, it is not at all certain that such a process would materialize; people might not succeed in negotiating such a result. There might be reasons of efficiency or market power which lead customers to prefer a company that retains the right to sell or destroy. If the company that provides the best security services refuses to budge on this issue, then the process stops.⁴ The way that the invisible hand theory is formulated implies that the development of the state will be path dependent. As long as the path to a privately owned state is open, this is enough to show that this is a problem for the libertarian, since there does not seem to be a way to stop the conclusion that the 'state' could come about in such a way that it would be privately owned.

A further problem, which is theoretically even more pressing, is that assuming that people would try to bargain away the property rights to sell and destroy must mean that they have formed an intention to do just that. But if we assume such an intention, then we end up with something that is neither fundamental nor an invisible hand explanation. The unique selling point of invisible hand explanations was supposed to be that they do not assume what was to be explained. It seems, therefore, that this attempt would have to assume that people would have an intention of avoiding the problem that I have outlined. Trying to save the invisible hand explanation by undermining it is not a feasible strategy.

Even if this strategy could be made to work in an invisible hand framework, it would have to rely on a theory of human nature which assumes a very high degree of foresight in people. People might insist on, say, ten-year contracts with

⁴ Note also that if people make different price/quality tradeoffs, it might not even be the case that a monopoly will appear at the end of the invisible hand process. Perhaps one could say that people will not engage in such tradeoffs, but it is hard to see what the justification would be for saying this.

the state, which would create some stability. Perhaps we have that ability to look forward into the future, but I would probably be more concerned with security right here and now if I were in the state of nature than with what would happen in the long term. It is difficult to see that there could be a feasible account of human rationality that would imply this kind of focus on the long term. The approach raises some further questions. First, what happens after the ten years? An owner of Grey Water with a monopoly on force and an interest in retaining control over his or her company could just refuse to renew that contract. Second, when a monopoly has been achieved, why would new customers get this contract? The monopolist would have no reason to make such an offer. Even very long-term contracts would at some point become unstable. If contracts were eternal, we would have the right kind of state, but it is very difficult to see how an invisible hand explanation could be constructed that would lead to this result. Who would bargain for this? Would it be worth a higher price or inferior service? Furthermore, could one develop an answer to these two questions without assuming intentions that would undermine the fundamental character of the explanation of the state? Maybe there is a way of spelling out a plausible account of rational choice that can answer such questions, but at present no such theory has been developed.

In Nozick's *reductio* of the welfare state, he argues against it by showing that there is one very unattractive manner in which it might come into existence (1974, 280–292). By splitting up the bundle of property rights that people have in themselves and then selling them, people can begin a process that ends with them being owned by the state. However, if this unattractive counterfactual history is reason to reject the welfare state, then consistency demands that we reject Nozick's state if it too can come about in an uninviting manner. What Nozick aims to show is that the state could come about through an invisible hand process, and that this in itself is reason enough to accept the minimal state. I have demonstrated that Nozick's own account of the invisible hand leads to an unappealing account of the state. Consistency demands that we either reject the libertarian state or give up on the project of justifying the state through an invisible hand explanation. My argument, therefore, follows a strategy that Nozick himself uses. Note also that since I use Nozick's own assumptions, counterarguments to the effect that my counterfactual history is unrealistic miss the mark.

I have argued that the state, as construed by Nozick, can be bought and sold, but who is in a position to sell? The short answer is he or she who founded the company that went on to become the dominant protective agency and later the state. However, couldn't one think of more complex structures of ownership? If the state is owned by all of its citizens, this may be a way of solving the problem of these counterintuitive implications. What if our property rights must be managed democratically? However, this attempt to counter my argument has several problems. First of all, it lacks an invisible hand account of how this ownership structure has come about. Second, if such an account could be developed it would have to show how people would opt for this structure in the face of what

seem to be rather severe transaction costs. Third, this account would also have to steer clear of turning into a social contract theory. The invisible hand account is supposed to be an alternative to that kind of theory. It cannot assume that people have gathered to form a state. Fourth, it must be a fundamental explanation. The intention to form a collectively owned state cannot be a part of the explanation. And finally, the state must be owned in the right way. Even if the state is owned by all citizens, it would seem that each individual citizen would have his or her individual rights of property. And that would again give rise to the problem that the state could be bought and sold. If I have stock in the state of Norway, then I am, of course, free to sell this stock. Perhaps nothing but fully socialized property can help Nozick.

4. Concluding Remarks

The most fundamental problem in political philosophy is the justification of the state. One of the most creative attempts to solve this problem is Robert Nozick's invisible hand argument. In this paper, I have shown that this argument suffers from a fundamental problem: it implies that people can have standard property rights in the state, which makes the kind of organization that appears at the end of the invisible hand process unsuitable to serve as a state. Since Weber, we have thought of the state as an organization that protects the rights of all within its territory and which has a monopoly on legitimate violence. However, we have also thought about it as an entity to which no one has property rights. Whether Louis XIV actually ever said "L'État, c'est moi" or not, we continue quoting it anyway since it is such a clear expression of deep corruption. Furthermore, the state must guarantee stability. A state that could be dismantled at any moment could never serve the functions that we would demand of a state. An unstable state would not be able to guarantee that contracts would be enforced or that criminal acts would be punished.

Although it is difficult to see how one could develop a Nozickian invisible hand account that gets around these problems, I have not demonstrated that it is impossible. As things stand, however, we seem to have the following two options: giving up the invisible hand explanation of the state or giving up the theory of justice. The first alternative means that Nozick is left without a theory of the state, and the two open alternatives would seem to be 1) the anarchism that we (and Nozick) would like to avoid or 2) opting for some form of social contract theory, neither of which are palatable alternatives to a Nozickian libertarian. Giving up at least some part of the theory of property is starting to look like the better option, but this would essentially mean giving up a core tenet of libertarianism. The issues raised by granting property rights in the state lead us to a dilemma for libertarianism. If, like Nozick (and like most of us), one believes that the fundamental question of political philosophy is the justification of the state, libertarianism turns out to have some fundamental problems.

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