

## LIBERTARIANISM OR PROPERIALISTISM? SELF-OWNERSHIP AS THE FOUNDATION OF ROBERT NOZICK'S LIBERTARIAN THEORY (2024)

### LIBERTARIANISMO OU PROPRIETARIANISMO? A PROPRIEDADE DE SI MESMO COMO FUNDAMENTO À TEORIA LIBERTÁRIA DE ROBERT NOZICK (2024)

### ¿LIBERTARISMO O PROPERIALISTISMO? LA AUTOPROPIEDAD COMO FUNDAMENTO DE LA TEORÍA LIBERTARIA DE ROBERT NOZICK (2024)



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#### ABSTRACT

The present work aims to understand the theoretical foundations of the famous political philosophy developed by Robert Nozick in his work *Anarchy, State and Utopia*, addressing and defining the nature of the concept of self-ownership and the role it plays in libertarian argumentation, as well as the way in which the author is able to extract his “strong theory of rights” from it. During this study, we propose the thesis that self-ownership is seen in Nozick as a *quaestio facti*, and not just as a principle subordinate to the Kantian categorical imperative, as his critics claim. Important conclusions will emerge from this thesis, which, in our view, make the author's libertarian theory much more attractive and appealing than if we take his fundamental position as a mere principle. Among these lessons is that, although *Anarchy, State and Utopia* is routinely defined as libertarian, an epithet that suggests freedom with an unparalleled status in his work, its true foundation is found in self-ownership as a fact, in the private property rights arising from it and in the negative rights (side constraints) that arise from both.

**Keywords:** Nozick. Self-Ownership. Libertarianism. Property. Rights. Individual. Theory of Rights. Philosophy of Law. Political Philosophy.

#### RESUMO

O presente trabalho busca compreender as fundações teóricas da célebre filosofia política desenvolvida por Robert Nozick em sua obra *Anarquia, Estado e Utopia*, abordando e definindo a natureza do conceito de autopropriedade e o papel por ele desempenhando na argumentação libertária, bem como a forma pela qual o autor é capaz de dela extrair sua “teoria forte de direitos”. No curso do trabalho, propomos a tese de que a autopropriedade é encarada em Nozick como uma *quaestio facti*, e não apenas como princípio subordinado ao imperativo categórico kantiano, como pretendem seus críticos. Desta tese decorrerão conclusões importantes, que, a nosso ver, tornam a teoria libertária do autor muito mais atrativa e apelativa do que se tomassemos sua premissa fundamental por mero princípio. Dentre tais conclusões está a de que, embora *Anarquia, Estado e Utopia* seja rotineiramente

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classificada como libertária, epíteto que sugere a liberdade com status inigualável na obra, seu verdadeiro fundamento se encontra na autopropriedade enquanto fato, nos direitos de propriedade privada dela adivindos e nos direitos negativos (side constraints) que de ambos decorrem.

**Palavras-chave:** Nozick. Autopropriedade. Libertarismo. Propriedade Privada. Indivíduos. Teoria de Direitos. Filosofia do Direito. Filosofia Política.

## RESUMEN

Este artículo busca comprender los fundamentos teóricos de la célebre filosofía política desarrollada por Robert Nozick en su obra *Anarquía, Estado y Utopía*, abordando y definiendo la naturaleza del concepto de autopropiedad y su papel en la argumentación libertaria, así como la manera en que el autor logra extraer de él su "teoría fuerte de los derechos". En este trabajo, proponemos la tesis de que Nozick considera la autopropiedad como una *quaestio facti*, y no simplemente como un principio subordinado al imperativo categórico kantiano, como afirman sus críticos. De esta tesis se desprenden importantes conclusiones que, en nuestra opinión, hacen la teoría libertaria del autor mucho más atractiva y atractiva que si tomáramos su premisa fundamental como un mero principio. Entre estas conclusiones se encuentra que, si bien *Anarquía, Estado y Utopía* se clasifica habitualmente como libertaria —un epíteto que sugiere una libertad con un estatus incomparable en la obra—, su verdadero fundamento reside en la autopropiedad como un hecho, en los derechos de propiedad privada que de ella se derivan y en los derechos negativos (restricciones colaterales) que resultan de ambos.

**Palabras clave:** Nozick. Autopropiedad. Libertarismo. Propiedad Privada. Indivíduos. Teoría de los Derechos. Filosofía del Derecho. Filosofía Política.

## 1 INTRODUCTION

### 1.1 A LIBERTARIANISM WITH SOLID FOUNDATIONS

The choice of this theme stems from a sad observation about the academic treatment (or lack thereof) that many authors and researchers, especially in Brazil, have given to libertarian theories of justice, often considering them, in a shallow and unreflective way, as theories that have the sole purpose of justifying and perpetrating the status quo, which is why they are not even mentioned in the current progressive context of Brazilian Universities.

Proof of this is the significant disparity between the number of academic works produced within the scope of egalitarian theories of justice - which are very concerned with themes such as "distributive justice" or "social justice" - compared to the tiny amount of works produced within the scope of libertarian theories of justice - which are more concerned with the guarantee of individual rights and "natural justice".

Having verified this disparity, the present work proposes to study and understand the most influential - and probably the most serious - libertarian theory of justice already developed, especially with regard to its moral foundations, which seek to justify and legitimize the right to private property through what its author called "theory of ownership", the main unfolding of his "strong theory of rights".

It is, in this sense, a study whose object falls on the fundamental premises of Robert Nozick's political philosophy, formulated and developed by the author in his famous work *Anarchy, State and Utopia*, namely: (i) premise of self-ownership, or "ownership of oneself", his "major premise"; (ii) premise of legitimacy for original acquisition of external goods as a logical corollary of the premise of self-ownership, its "minor premise"; and (iii) deductive conclusion from the first two premises according to which any distributive policy would be illegitimate, as it would violate natural rights<sup>2</sup>.

As we will see, the premise of self-ownership, a premise from which Nozick starts in his argumentative task of justifying private property as a natural and inviolable right, stems from a factual observation of the author, or, as some of his critics prefer, from a "basic intuition", according to which we have "distinct existences" that can be verified from the fact that each and every one of us is capable of controlling our bodies, minds, talents, and actions, which makes us, by definition, "owners of ourselves."

It should be noted, however, that this is one of the most relevant interpretative proposals about Nozick's work that the present work intends to propose. This is because, when we look at the writings of his greatest critics, notably Kymlicka, Wolff and Gargarella,

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<sup>2</sup> GARGARELLA, R. *The Theories of Justice After Rawls: A Brief Manual of Political Philosophy*. 1st Ed. São Paulo: Martins Fontes, 2008. p. 35.

they see Nozick's self-ownership as a mere principle that, among others, would have been "chosen" by the author because it better suited the Kantian categorical imperative.

As we intend to demonstrate, however, in spite of the admitted absence of theoretical treatment of the premise in Nozick, it is not difficult to perceive that logic is, in fact, inverse to that intended by his critics, and the categorical imperative is rather a logical consequence of the premise of self-ownership, and not the other way around. Such a premise thus acts in Nozick's theory not as a principle, but as a true *quaestio facti*.

It goes without saying that attributing to the fundamental premise of a theory, whatever it may be, the character of a factual premise, verifiable from the very "nature of things", gives it a much more appealing character than principled theories, which depend first and foremost on a minimum consensus of their interlocutors as to the validity and breadth of the fundamental premise.

The facticity of a non-principled premise, however, does not depend on the acceptance of its interlocutors, and it is enough that it is impossible, from an epistemological point of view, for such a premise to be proven false. As we will see, this is exactly the case of self-ownership, a self-evident premise, empirically and rationally verifiable, since it is impossible to find in nature any human being who is not born with the ability to control himself exclusively.

And, although Kymlicka, Wolff, Gargarella and even Rawls also assume the premise of self-ownership in their respective theories, they do so by making use of it as a mere principle, which can, therefore, be relativized or weighed against other principles depending on the circumstances, making it truly possible, as Nozick will demonstrate, to invariably lead to the violation of rights.

Thus, despite Kymlicka's argumentative effort to the effect that "self-ownership would not in itself lead to a defense of capitalism, since capitalism requires not only the ownership of itself, but also the ownership of external resources," Nozick will be able to demonstrate that any attempt at forced redistribution of such legitimately obtained resources will necessarily imply a denial of human nature and a violation of self-ownership.

From this demonstration of the violation of rights by redistributive policies will follow the second Nozickean premise, that is, that of legitimacy in the original acquisition of external resources as a logical corollary of human nature capable of controlling and, therefore, possessing itself, individually and exclusively. To do so, the author will make use of the so-called Lockean proviso, that is, the moral foundations for the original acquisition of private property developed by John Locke.

In the end, we will see that it was precisely at this point that Nozick sinned by not remaining faithful to the deontic nature of his philosophy, when he tried to transpose a theory

of original acquisition that, although quite meritorious in certain aspects, is the result of an eminently theological, albeit empiricist, political philosophy, whose main purpose was to justify private property from the perspective of Christianity, and not from a strictly rationalist perspective.

Luckily for us, and for Nozickeans in general, Edward Feser perceived this exact same problem of the pure and simple transposition of Lockean proviso to Nozick's theory and, making punctual and necessary criticisms of it, proposed a brilliant alternative entitled self-ownership proviso<sup>2</sup>, which, in our view, proves not only to be more convincing but also to be more convincing.

Thus, from a detailed examination of the fundamental premise (self-ownership) and the minor premise (legitimacy for the original acquisition of external resources), we intend to demonstrate that Nozick's libertarianism not only has moral foundations, but also that such foundations, precisely because they are factual and not merely principled, are the most solid that any political philosophy could have.

## 1.2 LIBERTARIANISM OR PROPERTARIANISM?<sup>3</sup>

But, already from this brief introduction, the reader could ask himself here: if, as we have been saying, the foundation for Nozick's libertarianism lies in self-ownership, initially, and in the private ownership of external resources, later, and not in some abstract concept of freedom, then why do we call it a libertarian theory and not a proprietary theory?

This question, made quite emphatically by Bresolin, Kymlicka and Wolff, is usually directed from the outset in a critical way, pointing to the true pretensions that Nozick's libertarianism would be trying to hide, since, contrary to what his epithet suggests, he would not be so much concerned with freedom in itself, but rather with a "freedom of a certain type", that is, freedom delineated by self-ownership and private property rights<sup>4</sup>.

Thus, the most forceful criticisms directed at Nozick will be in the sense that it is egalitarian liberalism, rather than libertarianism, that would be truly concerned with the guarantee and maximization of individual freedom.

Among the arguments put forward by egalitarians, the most relevant - and to which we will pay more attention, therefore - will be that, if the premise of self-ownership is adopted in an absolute way, as Nozick proposes, there will be cases in which certain individuals will

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<sup>3</sup> FESER, E. There is no such Thing as an Unjust Initial Acquisition. In: Natural Rights Liberalism from Locke to Nozick. New York: Cambridge, 2005.

<sup>4</sup> BRESOLIN, K. The property of oneself and property in Robert Nozick. *Philosophos - Revista de Filosofia*, Goiânia, v. 25, n. 1, 2020. p. 161.

accumulate so many goods in certain societies that they will leave little or nothing for others, so that this, by itself, it would greatly restrict the freedom of the less fortunate.

That is to say: in order to be truly free, according to egalitarians, we must have access to a minimum of goods, whether to move around (property over land), or to communicate (ownership of media), or even to survive (ownership of consumer goods).

That is why, although they agree with the premise of self-ownership, adopting it as a principle, the real concern of the egalitarians would lie rather in the guarantee of individual freedoms, private property being only one of the various means of guaranteeing it, so that, consequently, it cannot be absolute, since it is a means and not an end.

Thus, Nozick's right to freedom (at least in the way it is conceived by him) would be, in fact, a mere logical consequence of self-ownership, which, at the same time, would ground and limit him.

For Bresolin:

ASU is routinely characterized as libertarian, an epithet that suggests liberty with unequalled status in libertarian political philosophy. Such a statement, according to Cohen, is trampled and does not demonstrate Nozick's most important thesis. According to him, the commitment of Nozick's political philosophy is not primarily to freedom, but to the thesis of Self-Ownership. The thesis argues that each person is the morally legitimate owner of his or her own person, powers, and talents and, consequently, each person is morally free to use these powers and talents as he or she wishes, as long as it does not harm the self-ownership of others. Thus, Nozick's libertarianism does not affirm freedom as such, but freedom of a certain kind, that is, freedom outlined by the Self-Ownership thesis. The lack of Self-Ownership implies the lack of freedom.

That is to say: if freedom derives from self-ownership, then it is subordinated to it, so that only he who is, first and foremost, master of himself can be free.

But if this is true, and if we know that, for Nozick, self-ownership is a fact arising from our own rational human condition, then are we not all equally free as well?

In a first stage of civilization, in fact, freedom and self-ownership seem to be confused, to the extent that both occupy the same space of action, both being circumscribed only to the other rights of self-ownership of third parties.

Thus, the theoretical distinction between freedom as an autonomous right and freedom as a right subordinated to self-ownership lacks, in the state of nature, any practical relevance,

a relevance that will arise only when self-ownership is transposed to the right to property of external resources, which, in principle, would not be possessed by anyone<sup>5</sup>.

Thus, the main question that the present work will propose to answer will be, precisely, to know if those who affirm that Nozick would not be truly concerned with "freedom" per se, but only with the unrestricted rights to private property, and, therefore, if his theory really lives up to the nickname of a libertarian theory.

## **2 LIBERTARIANSIMO WITHOUT FOUNDATIONS? THE FUNDAMENTAL PREMISE OF SELF-OWNERSHIP IN NOZICK**

As we stated in our introductory chapter, the main focus of the criticisms attributed to Nozick's libertarian philosophy resides, precisely, in its alleged absence of moral foundation, which, although in fact little explained – and, therefore, little developed – does not mean, however, that it is not present.

In this sense, a large part of the debates about Nozick continue to gravitate around the theme, some seeking to extract and justify its moral foundations, and others, in a way that is in our view quite mistaken, simply limiting themselves to attributing to him the nickname of a "libertarianism without foundations".<sup>6</sup>

Distancing ourselves from such radicalisms, it will not be difficult to demonstrate that Nozick's libertarian argumentation, as it could not be otherwise, starts from a fundamental premise, even if it is not itself endowed with an eminently moral character, but merely factual, rationally extractable from the human condition as such<sup>7</sup>.

This does not mean, however, that this theory is intended to be amoral, but only that its fundamental premise (and only it) is amoral, because it is factual. It is not by chance that Wolff will say that it is from this factual premise that Nozick will extract all his moral and political philosophy<sup>8</sup>, of an eminently deontological character.

It is, therefore, a political theory that has as its argumentative starting point a factual premise, but which is developed from an ethical background based on Kantian deontology, from which Nozick derives his "strong theory of rights".<sup>9</sup>

<sup>5</sup> On the discussion between an initially inappropriate world and a world collectively possessed by all, see: FESER, E. There is no such Thing as an Unjust Initial Acquisition. In: *Natural Rights Liberalism from Locke to Nozick*. New York: Cambridge, 2005.

<sup>6</sup> NAGEL, T. *Libertarianism without Foundations*, in Jeffrey Paul, ed., *Reading Nozick: Essays on Anarchy, State and Utopia*. Totowa, NJ: Rowman and Littlefield, 1981.

<sup>7</sup> GARGARELLA, R. *The Theories of Justice After Rawls: A Brief Manual of Political Philosophy*. 1st Ed. São Paulo: Martins Fontes, 2008. p. 35.

<sup>8</sup> WOLFF, J. *Robert Nozick*. Stanford University Press, 1991. P. 7.

<sup>9</sup> BRESOLIN, K. The property of oneself and property in Robert Nozick. *Philosophos - Revista de Filosofia*, Goiânia, v. 25, n. 1, 2020. p. 154.

Thus, when Nozick asserts, already in the preface to *Anarchy, State, and Utopia*, that "individuals have rights, and there are things that no person or group can do against them (without violating their rights),"<sup>10</sup> it is not because he merely presupposes the existence of these rights and refrains from justifying them, as some of his careless critics seem to suggest. but because they are logical consequences of the fact that each person "is a distinct person, that his life is the only one he possesses",<sup>11</sup> so that this, or the rights that derive from it, can never be used as means to ends desired by others.

That is to say: because it is verifiable from the factual world that human beings - unlike tools and animals, for example - are capable of controlling their own actions and the uses they make of their bodies, gifts and talents, that we can conclude that each of us leads an independent life (or existence), and that, therefore, any attempt to use our fellow human beings as means to our ends would be to deny our "independent existence".<sup>12</sup>

This factual finding of independent existence has been conventionally called "self-ownership", or "self-ownership", a characteristic inherent to each and every human being. It is important to emphasize, however, that it is precisely because such a premise is verifiable in the factual world that Nozick did not bother so much to justify it, or even to mention it expressly.

That is why, being a purely factual matter, self-ownership cannot be enunciated as a norm or principle, since it does not command something, nor does it have axiological content, but only enunciates a fact of nature, namely, that we control ourselves and therefore possess independent existences, which is why self-ownership can also be seen as an axiom<sup>13</sup>.

Kymlicka, in turn, understands that Nozick presents us with the "principle" of self-ownership as an interpretation given by the author to the second formulation of Kant's categorical imperative, according to which we should always treat people as "ends in themselves".<sup>14</sup> Kymlicka's critique, however, presupposes that Nozick has "chosen" the "principle" of self-ownership among several possible ones, as he understands it to be the one that best fits the categorical imperative.

Thus, Kymlicka understands that the fundamental premise in Nozick would be the categorical imperative itself, and not self-ownership, which would be its mere logical

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<sup>10</sup> NOZICK, R. *Anarchy, State and Utopia*. 1st Ed. São Paulo: WMF Martins Fontes, 2018. P. IX.

<sup>11</sup> NOZICK, R. *Anarchy, State and Utopia*. 1st Ed. São Paulo: WMF Martins Fontes, 2018. p. 40.

<sup>12</sup> WOLFF, J. Robert Nozick. Stanford University Press, 1991. P. 7.

<sup>13</sup> In this sense, the "axiom of self-ownership" reached its maximum theoretical development in Hoppe, constituting a central and indispensable concept for the development of his famous "argumentative ethics by performative contradiction", according to which for any rational subject to even be able to argue, he has to presuppose his self-ownership, that is, the internal control of his body and mind. See: Leonardi da Silva, R. *Ética Argumentativa Hoppeana*. Law, Philosophy, Libertarianism. Libertarian University, 2019.

<sup>14</sup> KYMLICKA, W. *Contemporary Political Philosophy*. 2nd Ed. Oxford University Press, 2002. p. 107.

consequence. As we intend to demonstrate, however, self-ownership is not a "choice" that is more adapted to the conception of individuals as ends in themselves, but rather it is the only alternative capable of guaranteeing such a conception, since it stems from the very factuality of independent human existence.

## 2.1 SELF-OWNERSHIP: PRINCIPLE OR FACT?

As said, although Kymlicka, Rawls and Nozick share Kant's influence on their respective thoughts, as well as the premise of self-ownership, they do so to different extents and for different reasons.

Kymlicka and Rawls take the categorical imperative as the fundamental premise of their argumentative constructions, from which they extract, by mere judgment of convenience and adequacy, the "principle" of self-ownership, which, like others, can be weighed and, therefore, limited in relation to other "principles".

In Rawls, for example, this is expressly present in the constant conflict between freedom and equality in his work, a conflict that, according to the author, should always be resolved in favor of the former.

In Nozick, on the other hand, self-ownership is not treated as a "principle", nor is it subordinated to some other primary foundation, as occurs in Rawls in relation to the Kantian categorical imperative. Self-ownership is actually a fact, a fact, a realization, or, as modern libertarians prefer, a true axiom.

Thus, if the right to property can be defined as the power of exclusive control of a certain good, then the simple fact that each and every human being, since rational, can control his body and his actions exclusively, makes it evident that they have property (the power of exclusive control) over their bodies, gifts and talents.

It is not denied that a certain individual is capable of imprisoning another in a cell, in a to cut off a part of his body, to torture or threaten him to work for him, but this does not imply a factual external control over someone, but only a physical control, and not a mental or volitional control, which will always reside exclusively with each one of us internally, until the day of our deaths.

Self-ownership, therefore, is prior to the categorical imperative, and not the other way around. It is not necessary to commit ourselves to the Kantian principle that commands us to act towards our fellow human beings always and simultaneously as an end and never only as means, in order to attribute to the human being a "right of self-ownership".

It is, in fact, self-ownership that commands the human being never to use his fellow men as means, but always and simultaneously as ends, because no human being belongs

to the other so that he can make use of him. Therefore, contrary to what Kymlicka claims, it is not "rights that affirm our 'separate existence'",<sup>15</sup> but it is our separate existence that requires the recognition of rights.

This inversion of premises made by Kymlicka leads to an unequivocal and relevant distortion of Nozick's argument, making his criticism fallacious from the beginning, as it seeks to justify that self-ownership is a principle and not a fact, and that the true premise to which Nozick would be committed would be that of the Kantian categorical imperative, and not that of self-ownership. which leads to both criticism and very mistaken conclusions from his work.

The true relationship between self-ownership and the categorical imperative in Nozick seems to have been better understood by Wolff, who defined the former as the finding according to which it is the individual himself who holds power over "his life, his liberty and his body", so that, for Nozick, unlike other liberal authors, such a finding acquires the character of a fact, whose rights deriving from it cannot be relativized in any way, under penalty of denying the very nature of things<sup>16</sup>.

Another very convincing way of attributing to self-ownership the status of fact - or axiom - as it appears in Nozick, can be found in Hoppe, according to which the very act of arguing already presupposes it, because without there being exclusive ownership over our own bodies, brains, vocal cords, mouths or any other means of communication, Argumentation would be impossible<sup>17</sup>.

Thus, whatever the view may be, whether from the very examination of Nozick's argumentation, or from a systematic interpretation of the theories of his libertarian colleagues, one cannot conceive of self-ownership as a mere "principle" in Nozick, nor as a "rule", since it does not have a moral character, but rather a mere *quaestio facti*.

It is a fact that we control our bodies, minds, talents and actions. And if we control our bodies, minds, talents and actions, then we are independent beings, with "distinct existences", which is why we must be recognized certain rights that guarantee us the maintenance and integrity of our distinct existences<sup>18</sup>.

From a fact (self-ownership), norms (individual rights) are extracted, whose argumentative process of justification we will focus on below.

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<sup>15</sup> KYMLICKA, W. *Contemporary Political Philosophy*. 2nd Ed. Oxford University Press, 2002. p. 108.

<sup>16</sup> WOLFF, J. *Robert Nozick*. Stanford University Press, 1991. P. 7.

<sup>17</sup> HOPPE, H. *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy*. 2nd ed. Auburn, Ala.: Ludwig von Mises Institute.

<sup>18</sup> KYMLICKA, W. *Contemporary Political Philosophy*. 2nd Ed. Oxford University Press, 2002. p. 107.

## 2.2 FROM FACT TO NORM: WHY SELF-OWNERSHIP DEMANDS THE RECOGNITION OF NATURAL RIGHTS

In the first year, not to say in our first class, we learned that law is "fact, value and norm". It is a succinct definition at first glance, but it brings with it the accurate notion that the norm starts from facts, just as facts are shaped by norms, and that, in this mutual relationship, values play a central role.

And if this is true, if it is verifiable in any and all legal practice, then it must also be true for philosophies of law. In Nozick, especially, the relationship between fact and norm appears quite evident when we analyze the passage from self-ownership to his "strong theory of rights".

This is because, a priori, facts are naturally amoral, and it is we, human beings, who value them and attribute meaning to them. Thus, the fact that we are masters of ourselves (since we control our bodies, minds, and actions), by itself, does not lead to any conclusions, and it is necessary before we value this fact and attribute meaning to it.

Thus, for example, we are more susceptible today to killing and eating animals because we do not see them as our equals, especially because of their inability to reason and express themselves. But if this fact were to change, if animals were suddenly capable of reasoning and communicating, surely our actions towards them would be different, for we attribute to the lives of beings who factually possess such characteristics a higher moral value than to those who do not.

In the same way, if we find that we are able to control our bodies, minds, and talents, and are also capable of guiding and guiding our actions in the factual world, we can consider ourselves as equal and independent beings, and from this we can formulate a duty according to which no one can morally claim our bodies, minds, talents, and actions without violating in this way.

In this sense, the distinction between fact and norm resides mainly in the nature of the restrictions that one and the other impose on our conduct. In the first case, the facts restrict our conduct physically, while in the second, our conduct is restricted only morally. Thus, we are not free to deny gravity physically, because nature does not allow us to do so, while I am free to kill others from the physical point of view, because it is possible to do so, although the law (norm) forbids me to do so.

The fact, therefore, cannot be denied, since it is impossible to act contrary to it. The norm, however, is liable to be violated, and only morally limits the field of possible and justified

actions, so that "rights are a moral concept that establishes the borderline conditions of justified action (as opposed to the borderline conditions of physically possible action)".<sup>19</sup>

That is why, by sharing the premise of self-ownership, even if mistakenly taking it as a principle and not as a fact, Kymlicka, Rawls and Dworkin are still able to develop a very convincing theory of rights within the scope of liberal philosophy, because although they consider it as one principle among others, they are always concerned with trying to justify their redistributive policies from the perspective of self-ownership.

If this were not the case, if these authors, as well as the utilitarians and Marxists, completely disregarded the premise of self-ownership, there is no doubt that they would be doomed to the condition of utopian authors, the only possible destiny for those who ignore – if not completely despise – the very nature of things.

This is not the case with Nozick's greatest opponents, the egalitarian liberals, whose greatest challenge is precisely the transposition of self-ownership into the natural rights deriving from it.

Thus, for both Nozick and Rawls, the fact that we have distinct existences and are able to guide our own actions, exclusively, leads to a necessary recognition that the rational being can - or "has the right to" - prevent third parties from arbitrarily interfering in the conduct of our lives, because such arbitrary interferences do not find a reason for being in the nature of things.

And it is precisely because we are distinct individuals, with our own distinct claims, that there are limits to the sacrifices that can be required of one person for the benefit of others, limits that can be expressed, precisely, in the form of a theory of rights<sup>20</sup>.

Rawls, for example, will say that these limits are not absolute, and there are cases in which it is even necessary (and therefore legitimate) to demand from certain people certain sacrifices for the good of others, for without such sacrifices the self-ownership of the less favored would be even more gravely injured than that of the more favored whose sacrifices were demanded of them.

In Nozick, on the other hand, since self-ownership is a fact and not a principle, the rights arising from it do not allow for weighting, especially when such weighting takes into account consequentialist premises, so that they are truly absolute and inviolable, and to deny them this condition would be to deny the fact itself. It would be the same as saying, for example, that gravity does not exist.

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<sup>19</sup> SKOUBLE, A. J. *The Essential of Robert Nozick*. São Paulo: Faro Editorial, 2021. P. 14.

<sup>20</sup> KYMLICKA, W. *Contemporary Political Philosophy*. 2nd Ed. Oxford University Press, 2002. p. 108.

Thus, one can perceive here one of the main practical-argumentative relevance of the distinction between self-ownership as a fact in Nozick and self-ownership as a principle in Rawls, who admits its weighting in relation to other principles – such as freedom and equality, for example – or even its weighting in terms of maximizing the principle itself collectively considered<sup>21</sup>.

It is thus concluded that Nozick seeks the norm from the fact, creating a theory of rights that intends to respect and allow the development of human nature at the same time. In the justification of his theory of rights, therefore, is implicit the premise that moral philosophy must try to recognize rights and duties without which our rational nature would not be respected, which would be unnatural and, therefore, morally and politically undesirable<sup>22</sup>.

### 2.3 THE THEORY OF RIGHTS AS INDIRECT MORAL CONSTRAINTS

Now, if it is true that Nozick considers self-ownership a fact, and if it is also true that from this fact norms can be extracted that aim to guarantee and respect this same fact, then the development of a theory of rights is both possible and necessary for political philosophy.

With this in mind, Skoble teaches that rights in Nozick should be understood as a moral concept that creates restrictions on human actions beyond those already imposed by nature. In this sense, it is true that we are not free to be in two places at the same time, because physics does not allow us to do so, but if we do not have a theory of rights, then we would be free, from this point of view, to kill and rob each other, for example.

A theory of rights arises, therefore, to establish "the borderline conditions of justified action", that is, to dispose of what we can or cannot do without violating the rights of others, so that we can conduct our lives respecting the lives of our equals, given that we are all equally owners of ourselves.

Thus, Nozick's theory of rights is based on "the fact that our existences are distinct", and aims precisely to ensure that such existences are in fact respected, and it is not lawful for any of us to subjugate others to our private interests through the use of force.

That is why Nozickean libertarian rights are usually defined as indirect moral constraints, since such rights impose on others only negative duties, that is, duties to refrain

<sup>21</sup> The theories that defend the collective maximization of rights Nozick called "utilitarianism of rights", according to which individual rights could be violated only in cases where such violations were the only alternative capable of ensuring these same rights to a greater number of people, so that the collective balance of the violated right would be, in fact, maximized (NOZICK, R. *Anarquia, Estado e Utopia*. 1st Ed. São Paulo: WMF Martins Fontes, 2018. P. 34)

<sup>22</sup> In this sense, Gargarella understands that Nozick's theory of rights is constituted by a series of "natural" rights, that is, "rights common to all men, in their condition as such, and which do not depend, for their creation or granting, on the will of any person" (GARGARELLA, R. *As Teoria da Justiça Depois de Rawls: Um Breve Manual de Filosofia Política*. 1st Ed. São Paulo: Martins Fontes, 2008. P. 35.)

from certain behaviors, in this case, to arbitrarily interfere with the "independent existences" of others.

For Nozick, no human being has the right to demand something from others by nature, not even by "necessity," since, if we consider the fact that our lives are distinct and that, therefore, "there can be no gesture of moral compensation between us," then "nothing justifies some of us sacrificing ourselves in the name of others."<sup>23</sup>

Thus, Skoble concludes, "the rights of one person are only the inverse of the restrictions of others,"<sup>24</sup> so that there are no positive duties by nature, which can only arise by consensus (in a contract, for example). In other words, no one is naturally obligated before another to give or lend him his goods, his body, his hours of work or anything else.

Wolff, following the same line, prefers to call Nozick's libertarian rights "rights of non-interference", whose underlying idea is essentially the same as that of indirect moral restrictions, in the sense that Nozick's theory of rights would be proposing only negative rights and duties to life, liberty and property.

In other words, Wolff explains, "negative rights are rights that cannot be violated, or cannot be interfered with, while positive rights are, in general, rights to be helped [by others] in some way."<sup>25</sup> Therefore, to say that I have a positive right to life would be to say that I can force others to provide for my basic needs to live (by providing me, for example, with food and water), whereas a negative right to life would be limited to affirming my right not to be murdered.

With this theory of rights, then, Nozick seeks to ensure that our human nature is not disrespected, thus ensuring that we can conduct our distinct lives without others arbitrarily interfering with it (negative rights), while we are also not obligated to help others lead their own lives, unless we have committed ourselves to doing so through consensus (positive rights).<sup>26</sup>

As we will see later in Chapter 4, this distinction between positive rights and negative rights is what will lead to the conclusion about the real concern and scope of the criticisms formulated against Nozick's libertarianism by egalitarian liberals, ultimately leading to a dispute between the concepts of "positive freedom" and "negative freedom".

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<sup>23</sup> NOZICK, R. *Anarchy, State and Utopia*. 1st Ed. São Paulo: WMF Martins Fontes, 2018. p. 41.

<sup>24</sup> SKOBLE, A. J. *The Essential of Robert Nozick*. São Paulo: Faro Editorial, 2021. P. 15.

<sup>25</sup> WOLFF, J. *Robert Nozick*. Stanford University Press, 1991. P. 19.

<sup>26</sup> In this sense, as already said, Wolff admits that "Nozick allows us to have positive rights. But only in exceptional cases do they exist only as a result of people voluntarily assuming obligations that correspond to these rights – for example, entering into a contract" (WOLFF, p. 19)

### 3 THEORY OF OWNERSHIP AND ORIGINAL ACQUISITION OF PRIVATE PROPERTY

From Nozick's theory of negative rights will follow the theory of ownership, according to which, if we are in fact owners of our bodies, minds, talents and actions, then we will also be legitimately owners of everything we obtain from their uses, whether from the original acquisition of resources, or from the derived acquisition. through exchanges.

Thus, the theory of ownership seeks to justify private property rights by abstracting any moral considerations about the way in which goods are distributed in a given society, provided that such distribution has resulted exclusively from legitimate original acquisitions and voluntary exchanges.

In the first case, Nozick will say, what legitimizes someone to become the owner of an asset initially not possessed will be the observance of the requirements of the Lockean proviso, namely: (i) if the subject factually employed some kind of work on the asset in order to "contaminate" it and make it something different from what it was in nature; and (ii) that this appropriation does not worsen the situation of other individuals.

In the second case, once a certain good is appropriated by someone, it can only be obtained by a third party through consensus, either by exchange or donation. In other words, after a certain good has been legitimately appropriated by a subject A, a subject B can only legitimately obtain this same good if he is able to convince A to donate it to himself or exchange it for some other good of B.

To better exemplify his theory of ownership, Nozick uses the famous Wilt Chamberlain argument, through which the author asks us to imagine a situation in which a certain ideal conception of justice is realized, resulting in a distribution of possessions that we consider fair. In this fair distribution, called D1, there is a basketball player named Wilt Chamberlain, who is highly sought after by teams due to his ability to attract audiences to games.

In this, Chamberlain signs a contract with a certain team and receives 25 cents for each ticket sold. Suppose that, over the course of the season, 1 million tickets are sold, resulting in a \$250,000 gain for Wilt Chamberlain, an amount far higher than that of anyone else in that same society.

Faced with this example, Nozick asks: Would Wilt Chamberlain be entitled to this income? Is this new distribution, D2, unfair? Nozick argues that if people are free to decide to transfer that 25 cents to someone else voluntarily, thus creating a new distribution of possessions, then that new distribution should also be considered fair.

Through this argument, Nozick tries to prove that it is impossible to stipulate a standardized theory of justice without denying the right of each individual to make their own choices and, with that, decide to spend their money as they please, since naturally when

people are free to make choices it is impossible to reach a pre-established final pattern of distribution of goods.

Therefore, if we are willing to commit ourselves to the premise of self-ownership and, consequently, to Nozick's theory of rights, then we have to accept the theory of ownership, because only it prevents a third party (in this case, the State) from directly and arbitrarily interfering in society to redistribute the goods legitimately acquired and voluntarily exchanged.

### 3.1 LEGITIMACY FOR THE ORIGINAL ACQUISITION

In view of the theory of ownership, and having already overcome the stir regarding the recognition of self-ownership as a fact, Nozick will go on to argue - and we will now analyze - that one of the inevitable logical consequences of the recognition of this fact will be, precisely, the possibility of individuals, owners of themselves, legitimately acquiring property rights also over external resources. provided that certain requirements are observed<sup>27</sup>.

In short, Nozick's central thesis to justify the legitimacy of the original acquisition of external resources will be that, taking as a premise the fact that we are all owners of ourselves – and, therefore, owners of our bodies, powers and talents – then we will also be owners of the fruits of our labor.

But how can something that is not owned become a person's rightful property? To explore this question, Nozick examines Locke's attempts to define his principle of fairness in acquisition. Thus, according to Locke, "the property rights of an unowned object arise from the combination of a person's labor with that object."<sup>28</sup>

It is, in short, the "theory of mixed labor", which seeks to legitimize the original acquisition of external goods based on the notion that two goods, one already appropriated and the other not yet appropriated, when mixed in such a way that the first transforms the second, generates in the latter a relationship of submission that can be characterized as their appropriation.

In this way, in both Locke and Nozick we are able to "contaminate" external resources from the use we make of them, thus projecting our self-ownership over them. As a result, resources that previously belonged to no one are appropriated by those who contaminate

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<sup>27</sup> It is precisely at this point that the influence of John Locke can be most felt in Nozick's libertarian theory, since the requirements presented by the author as both necessary and sufficient to legitimize the original acquisition of ownership of external resources will be, precisely, those set forth in the Second Treatise on Civil Government, namely: (i) that the individual "contaminates" the good with his labor to the point of making it a truly distinct good from that of the it was in nature; and (ii) that the removal of this asset from "common use" does not worsen the situation of other individuals.

<sup>28</sup> NOZICK, R. *Anarchy, State and Utopia*. 1st Ed. São Paulo: WMF Martins Fontes, 2018. p. 224.

them with their work, in order to legitimately remove them from "general use", with the only condition that this does not materially worsen the situation of other individuals<sup>29</sup>.

In sum, Kymlicka illustrated the argument underlying Lockean proviso as follows<sup>30</sup>:

1. People are masters of themselves;
  2. The world is initially owned by no one;
  3. You can acquire absolute rights over a disproportionate share of the world, provided you do not worsen the condition of others;
  4. It is relatively easy to acquire absolute rights over a disproportionate share of the world;
- So:
5. Once people have appropriated private property, a free market for labor and capital is morally demanded.

As exposed, the problem of Lockean proviso is that, despite its meritorious formulation about the "contamination" of external resources as a legitimate means of acquiring private property, the imposition of a utilitarian restriction ("3") on such appropriation does not conform, but rather departs from, the Kantian-deontological nature of Nozickian philosophy.

### 3.2 CRITICISM OF LOCKEAN PROVISO

This inherent contradiction, of course, could not go unnoticed by its critics, who, like Kymlicka, knew very well how to exploit the weakness of the argument with regard to the difficulty of justifying, on the basis of it, the morality of a unilateral original acquisition of a certain common good, even when the requirements of the Lockean Proviso were met.

In this sense, let us imagine, for example, an individual A and an individual B who, from a certain age, plant on the same land and divide the results of the harvest between them. After a while, both begin to realize that it may not be so worthwhile to continue working hard, as they can still enjoy the fruits of their partner's work, with less effort.

As a result, productivity starts to decrease exponentially, and neither A nor B are in a favorable situation anymore. This is the result of what has come to be called the "tragedy of the commons", a state in which the absence of private ownership of collectively owned goods generates an unsustainable deficit in productivity, due to the natural lack of individual incentives.

In this situation, according to the Lockean proviso, both A and B could legitimately claim the right to private ownership of the land, since whichever of the two did so first - considering that their partner would no longer be producing on it, due to the aforementioned

<sup>29</sup> In this sense, see KYMLICKA: "Nozick's answer is that appropriation of a particular object is legitimate if its withdrawal from general use does not make people worse off in material terms than they had been when in general use" (KYMLICKA, P. 115)

<sup>30</sup> KYMLICKA, W. Contemporary Political Philosophy. 2nd Ed. Oxford University Press, 2002. p. 116.

lack of incentives - would certainly lead to an increase in their productivity, improving both his own condition and that of his companion.

This is because, with the privatization of the common land, not only the original acquirer will have incentives to produce, aiming at the accumulation of goods, but also his non-owner companion, since the acquirer will probably need his

work to increase the productivity of the land, offering him, in exchange, part of the harvest as payment or consideration.

In this case, as it is easy to see, both A and B will have their condition improved, and this is enough to satisfy the lockean proviso.

But, Kymlicka asks, why A and not B (or, why B and not A)? After all, although both will benefit from the unilateral appropriation of the land by either of them, the one who becomes the owner will certainly benefit more, as he will be able to keep most of the resources produced and exercise greater control over both the land itself and his non-owner partner.

Such criticism seems to us, in fact, quite valid and forceful, insofar as the requirement of "not getting worse" of the other individuals compared to the original acquisition does not seem to provide any moral basis capable of justifying the legitimacy of appropriations that, despite improving the situation of those involved, occur contrary to the wishes expressed by them, a fact that, By itself, it would violate individual rights.

But if we accept Kymlicka's critique, then must we necessarily discard Nozick's libertarian theory? Would there not be, in this sense, another kind of theory of original acquisition equally compatible with self-ownership, but without the limitations inherent in Lockean proviso?

A very satisfactory answer to these questions can be found in a recent article published by the American philosopher Edward Feser, who, influenced by the thought of Eric Mack, proposed a solid alternative to the Lockean Proviso, according to which the original acquisitions would not involve moral valuations, but rather a mere factual question.

### 3.3 ORIGINAL ACQUISITION AS A FACTUAL ISSUE – SELF-OWNERSHIP PROVISIO

In his article *There Is No Such Thing As An Unjust Initial Acquisition*, Feser will state that, in lockean provision, in addition to a first stage of verifying the occurrence or not of the acquisition of the good, in factual terms, there would also be a second stage of verifying the legitimacy of this appropriation, which would act as a kind of resolute condition for the acquisition of the right, namely: that the situation of other individuals excluded from the common use of the appropriate good is not worsened.

For Feser, however, injustices could only occur at a time after the acquisition of the property, in cases where its use by the owner prevented the exercise of the minimum powers inherent to the self-ownership of other individuals.

Think, for example, of the famous hypothesis in which a certain individual is lost in the desert and, after days without access to water or food, ends up finding an oasis. Let us imagine, however, that another individual has built pipes, wells and a sophisticated water collection system around this same oasis, thus contaminating it with his work, and thereby appropriating it for himself, in a legitimate way.

In this scenario, for Feser, there is no doubt that the owner of the oasis is its legitimate owner, since he exercised his work over it to the point of transforming it into a distinct asset from what it was in nature, taking control of it. But would it still be lawful to deny the lost traveler access to water or to part of the food he has, or to charge him too much for it?

The answer is negative. Just as Nozick states that "the property rights I have to my knife allow me to leave it wherever I want, but not stuck in someone else's chest," so I cannot use my assets, such as the oasis, in a way that hurts to deny the self-ownership of others, which would certainly occur if the owner in our hypothetical scenario denied access to the resources that the lost traveler needs to survive in that extreme situation and specific.

Thus, just as the present work proposes to conceive self-ownership no longer as a principle, but as *quaestio facti*, Feser also proposed that we conceive the appropriation of external goods from a strictly factual perspective, empirically verifiable and therefore devoid of any axiological value as to its adequacy or convenience.

The valuation of private property should not, therefore, focus on the moment of appropriation of the asset, but should be limited to verifying only the legitimacy of the uses that are made of this asset. Thus, what Feser proposes to us is the maintenance of the first requirement of the Lockean proviso, but not of the second.

The title of his article is, in this sense, quite suggestive. If there is nothing like an "unfair initial acquisition", which is why the author proposes that "original acquisitions are neither fair nor unfair; the proposal is that, in fact, the effort or control employed [over a certain asset] constitutes an acquisition, period".<sup>31</sup>

But, someone might say, why does the fact that you have exercised control over a certain asset give you a subjective right to demand that other individuals refrain from using your asset without your consent? Does the simple coincidence that you arrived earlier and exercised power over the asset give you the right to it?

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<sup>31</sup> FESER, E. There is no such Thing as an Unjust Initial Acquisition. In: Natural Rights Liberalism from Locke to Nozick. New York: Cambridge, 2005. p. 66.

The answer to this question is actually quite simple, and quite consistent with the fundamental premise of self-ownership. Yes, as Nozick proposes, and Feser admits, randomness is amoral, for in the same way that Wilt Chamberlein may have "been lucky" to inherit the talent of being an excellent basketball player, we may also "be lucky" to find certain goods before others.

This, however, does not mean that I will be able to appropriate the good completely, as some critics usually suggest. To exemplify, Feser brings us the hypothesis of tomato sauce and the ocean, according to which if the tomato sauce belongs to me and I throw it into the ocean, does this mean that the ocean has become mine?

Obviously the answer is negative. Not because allowing such an acquisition to occur would not satisfy the second condition of the Lockean Proviso, according to which one must leave goods of similar quality and quantity to other individuals, but because there was simply no takeover over of the ocean, nor did tomato sauce transform it into something completely different from what it was in nature.

In this sense, it is easy to see that the self-ownership provided by Feser demands a true transformation and significant control over the appropriate good so that it can be said that someone has appropriated it, and it is not enough, for example, that I build a house in a certain valley for the entire valley to become mine, since I have not significantly transformed or controlled it.

However, as with self-ownership, although it is a mere factual issue, this does not prevent the formulation of theories of law (norms) that deal with the possible and desirable uses that are made of the appropriate resources.

In the same way that it is not lawful for us to use our body, our self-ownership, to hit someone, we also cannot use our kitchen knives to stick them in someone else's body, or to scratch someone's car.

Transposing the moral examination to the uses that are made of goods and, thus, treating the original acquisition as a mere *quaestio facti*, empirically verifiable from the observation of the control that the subject exercises over a given good, proves to be more adequate not only from the argumentative and epistemological point of view, but is also much more compatible with the rest of Nozick's political philosophy.

After all, the actual acquisition of private property is merely an extension of our natural condition as owners of ourselves.

#### 4 LIBERTARIANISM OR PROPRIETARIANISM? FREEDOM AS A LOGICAL CONSEQUENCE OF SELF-OWNERSHIP

As we have been discussing in the present work, there is no doubt that the true foundation of Nozick's libertarian theory is found in the factual premise of self-ownership. From this premise, Nozick extracted certain norms whose purpose would be precisely to guarantee and preserve human nature, thus allowing each of us to lead our distinct lives in a meaningful way<sup>32</sup>.

From this point of view, certain critics point quite emphatically to a supposed incongruity between the nickname of "libertarian" attributed to Nozick's political philosophy and his lack of concern with the guarantee of freedom itself. In this sense, Kymlicka turns almost all his argumentative efforts in an attempt to demonstrate that the true concept of freedom can only be achieved if we relax the premise of self-ownership and admit certain natural positive rights.

For Kymlicka, denying the existence of natural positive rights, among which the so-called "minimum existential rights", would be to deny freedom itself, since it considers a certain subject all the freer the more properties it has. Such an argument stems from a basic intuition, according to which in order to be able to move, express ourselves and even survive, it is obvious that we must have access to land, means of communication and food, respectively, and the more of each we have, the more "free" we will be, because the greater our possible alternatives will be.

That is, the more land I have, the farther I can go. The more access to food I have, the longer I can live and therefore enjoy my freedom. In short, the more money I have, the more things I can do.

It is, in this sense, the expression of one of the ways in which the traditional distinction between "positive freedom" and "negative freedom" is manifested in the philosophical debate, given that, even without expressly saying so, when Kymlicka criticizes a supposed lack of concern of libertarianism with the very concept of freedom (which would be contradictory) what he has in mind is, in fact, the distorted concept of positive freedom.

It is true that, although it is not within the scope of this work to examine such concepts in detail, the author himself provides us with very convincing answers to the defenders of positive liberty, notably the egalitarians, exposing the paradoxical nature that the concept affirms. This is because, in short, any positive rights by their very nature require equally positive consideration (duties).

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<sup>32</sup> For more in-depth and problematized discussions about what Nozick means by the concept of "meaningful life", see Kymlicka and Wolff.

That is, if in order to achieve the ideal of positive freedom it is necessary to attribute to certain subjects positive rights (such as the aforementioned minimum existential rights, for example), then it is necessary that we attribute to other subjects positive duties opposed to such rights (such as, in our example, the duty to provide the existential minimum to them).

Now, Nozick will tell us, to impose a natural duty to do or give something to another, without such duty deriving from consensus, is, by definition, to force someone to do something against his will, and it is no exaggeration to call such duties forced labor or even slavery. It is, in other words, to demand the sacrifice of some on behalf of others.

In view of this, we conclude that, although the argumentative effort made by Kymlicka is remarkable, in the sense that Nozick's libertarianism would not be in any way concerned with individual freedoms, it stems first and foremost from the author's use of a teratological concept of freedom, that is, the concept of "positive freedom".

And even if this were not the case, even if we were to admit that Nozick's theory is not concerned with a broader concept of freedom, but only with "freedom of a certain kind", as said by Bresolin, such a criticism does not refute in any way the argument developed by Nozick, since, as said, the only true verifiable fact of nature is that we are masters of ourselves and, therefore, free to act within our spheres of self-ownership and private property.

Precisely because it is not a consequentialist philosophy, but a deontological one, such criticisms do not even make sense, because at no time does Nozick intend to defend an abstract and ideal concept of freedom. He only starts from a factual premise (self-ownership), irrefutable therefore, and from it extracts norms that correspond to the reality of human nature (theory of rights).

For all these reasons, regardless of how we classify it, whether as a libertarian theory or not, the fact is that Nozick's political philosophy, despite the various attacks and criticisms received, continues to remain largely an extremely solid political philosophy that is difficult to contest without, in one way or another, if it ends up "rejecting the idea of the reality of the uniqueness of each person".<sup>33</sup>

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<sup>33</sup> SKOBLE, A. J. *The Essential of Robert Nozick*. São Paulo: Faro Editorial, 2021. P. 15.

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