

# Libertarian's Corner: Reputation as Property

Joseph S. Fulda

*Joseph S. Fulda is a free-lance writer living in New York City.*

**T**he law of defamation, in which damages can be collected for false and defamatory statements about a person, may seem to some an anomaly with a classical liberal bent. Although these laws are as old as the Republic, and the founders believed in them, they seem to limit a person's freedom of speech. In this essay, we discuss why the law of defamation can be seen as consistent with classical liberal thought.

Freedom of action does not excuse action damaging personal property; thus if reputation is property—a claim to be discussed presently—freedom of speech does not excuse speech damaging someone's reputation.

**I. What Is Reputation Anyway?** At first glance, it might appear that it is nothing but other people's thoughts about us, and if so how can they possibly be ours? Actually, reputation is based on our abilities, capacities, and even physiognomy as modified over the years by every action we take, every behavior we display. Thus, like personal property, reputation is formed by taking natural resources and mixing our labor with it. This record of whom we are—ourselves and our record of conduct—exists independently of any thoughts others might have about us, and this record, our behavioral identity, is ours, part of us. To be sure, the *interpretation* of this record, the *opinion* other people have about us based on this record is not ours but theirs, and indeed, as the old saw goes, everyone is entitled to his opinion. That is why the law of defamation only allows recovery for false and defamatory *factual* statements, not for statements of *pure opinion*, no matter how unwarranted those opinions are.

Our behavioral record is part of our identity—part of what makes us who we are; what other people make of our record of conduct is primarily guided by their beliefs, and that is theirs to have, consistent with the facts, as most objective observers would see them, or not so consistent. It matters not; we cannot have a property right in the thoughts of others.

This meshes well with the teachings of the Austrian School on the question of value. Although our record of conduct is built by our behavior acting on our nature, and is therefore, following Locke to Nozick on the ownership of property in general, ours, the value of our reputation like the value of any personal property we create depends entirely on what others make of it. Painstaking labor that goes into a widget nobody cares for, like painstaking adherence to rules of conduct others do not value, results in personal property and a reputation, respectively, that

is worth little or nothing, and thus damages collected for destroying either are likely to be nominal.

**II. Further Evidence that Reputation Is Property.** If reputation were property, then it could be destroyed by its owner, as it can be, or alienated by him, by being bought and sold or given away freely.

Many behaviors on the market show trade in reputation. From the *Good Housekeeping* seal of approval to ratings from *Consumer's Digest* or *Consumers Reports* to backing by a company that is old and prestigious (it has built up a long record of conduct, none of which caused it to fold, quite an achievement in a dynamic, capitalist economy), to the importance of trademarks and service marks and laws preventing their dilution as well as market mechanisms for their sale or rental by licensing schemes (just think of franchises). Many a business sells not only its plant but its customer base and loyalty—and when this happens, the consideration for the sale increases dramatically. In all these cases, part (not all) of what is being bought and sold is reputation.

People also lend their names to advisory boards for nonprofit organizations, write letters of recommendation, co-sign loans, and, in numerous other ways, vouch for others. Again, part (not all) of what they are giving away is reputation.

Moreover, a bad call in the sale or gift of one's reputation value can, indeed, result in the diminution or even alienation of one's reputation. True, usually sale or gifts of reputational assets does not alienate one from one's property as happens with personal property, the analogy upon which we are drawing. But this is because it is only an analogy, based on the way personal property and reputation alike come into being. But reputational assets are part of one's property in one's person (again, following Locke), and are therefore less alienable.

A society built on trust—as free societies are—cannot afford to do without the signals reputation sends in the economic and social marketplace; laws against defamation are therefore needed as part of the framework of property rights within which free action can flourish.   Ω