

LIBEL, SLANDER, AND REPUTATION ACCORDING TO ROTHBARD'S THEORY OF LIBERTARIAN LAW

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ABSTRACT: Rothbard's principal conclusion that libel and slander laws have no place in libertarian law is correct. We build upon his brilliant insight on this matter and wrestle with the following questions: How does a reputational right operate? Who, properly, owns such a right? Is this property right alienable—transferable? How would this work in practice? Is recovery for damages precluded under libertarian law? We do take issue with Rothbard's rejection of voluntary slavery contracts and relate this matter to reputation ownership.

LIBEL AND SLANDER

Libertarian philosophy in the Rothbardian sense does not base itself on moral claims but only on legitimate natural law. Legitimate natural law¹ can be regarded as self-evident or god given. The two basic axioms are ownership and nonaggression. Self-ownership exists according to Rothbard by virtue of being human (Rothbard 1978, 33–34). Ownership of objects exists through the mixing of our labor with objects in nature (*ibid.*, 42–43). The second axiom, the nonaggression principle (NAP),

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¹ Natural law, roughly, constitutes that which promotes human flourishing. The "legitimacy" aspect of it is conferred by the two principles mentioned immediately below.



provides “that no man or group of men may aggress against the person or property of anyone else” (ibid., 27). If someone breaks this rule, the victim² may use force in return in order to protect a person or property.³

In the most basic sense, the libertarian philosophy is devoid of moral claims. When Chelsea smashes Amy’s figurines to pieces and mutters, to Amy’s dismay, a series of expletives about her, the libertarian should be appalled about the property damage but indifferent to the expletives. There is, of course, nothing preventing a libertarian from reading the Stoics, Aristotle, or Kant and developing his own personal moral compass, just so long as this does not involve abridging the self-ownership rights of others through unwarranted aggression.

In many respects, the same sort of indifference felt towards the expletives is present in the realm of libel and slander. People with a strong moral compass will watch with disgust as our titular villain Chelsea lies in the most exorbitant manner about Amy’s failures. “It’s wrong!” they will shout. “This is hideous, unconscionable, and dare we say undefendable!” However, Rothbard maintains that Amy cannot find reprieve in our legal system, since she does not own the thoughts of the listeners to whom Chelsea directs her venom. Targets of libel and slander are left to defend themselves in the court of public opinion. That is their only legal option under Rothbard’s libertarian framework.

Specifically, Rothbard writes that “since every man owns his own mind, he cannot, therefore, own the mind of anyone else” (Rothbard 2015, 126). Reputation, he writes, “is purely a function of the subjective attitudes contained in the minds of *other people*” (ibid.) Finally, he asserts that a person “may not legitimately own the thoughts of others”(ibid.) The point is that Chelsea did not violate any of Amy’s rights with her utterances.⁴ Yes, the former “stole” the reputation of the latter. Chelsea, we may suppose, is eloquent and convinces all and sundry of Amy’s many and serious flaws. But, paradoxically, Amy does not own her own reputation. She may work hard to garner a good one and benefit from it when

² Or his agent, or even a passerby.

³ For a deeper understanding of this matter, see Rothbard (1978).

⁴ In sharp contrast, Chelsea’s destruction of Amy’s physical property is a crime.

she has.⁵ But, paradoxically, it is not her property, since it consists solely, and only, of the thoughts of other people, and she does not own their thoughts.

But is this always, and necessarily, the case?

OWNING THE THOUGHTS OF OTHERS

This section will demonstrate that at least one instance exists where a person could overcome Rothbard's ownership objection that denies victims of libel or slander from recovering damages.

What if it were possible for Amy to own the thoughts of others? In order to explore this possibility, we will use an extreme example, voluntary slavery. To begin, we note that such a concept is controversial and not fully accepted as even a possibility by many libertarian scholars.⁶ Even Rothbard himself rejected the idea (Rothbard 2015, 40–41; more on that later). The term *voluntary slavery* connotes a free person who voluntarily enters into a contract with another to become a slave. For the purposes of this example, the slave is now completely owned by the slave owner.

Consider the following scenario: standing among the gathering of onlookers listening to Chelsea's slander of Amy is none other than Brett. Brett had no luck in life, and when his mother became deathly ill from her lifelong smoking habit, he had no way to raise the funds for the expensive treatment without resorting to extremes. As a result, Brett the ever honorable son, wrote up a contract and handed it to Amy. Amy, a successful entrepreneur, upon receiving the contract, read it out loud, "I, Brett, hereby voluntarily agree to become Amy's slave indefinitely when the sum of \$2 million is sent to my mother." Amy immediately accepted. Brett's mother was able

⁵ Often, when a business firm is sold, its "good will," that is, its reputation, is worth a significant amount.

⁶ In the view of Boldrin and Levine (2008, 254): "Take the case of slavery. Why should people not be allowed to sign private contracts binding them to slavery? In fact economists have consistently argued against slavery—during the 19th century David Ricardo and John Stuart Mill engaged in a heated public debate with literary luminaries such as Charles Dickens, with the economists opposing slavery, and the literary giants arguing in favor." For supporters of this doctrine, see Andersson (2007); Block (1969, 1979, 1988, 1999, 2001, 2002, 2003, 2004, 2005, 2006, 2007a, 2007b, 2009a, 2009b); Boldrin and Levine (2008); Frederick (2014); Kershnar (2003); Lester (2000); *Bionic Mosquito* (2014); Nozick (1974, 58, 283, 331); Steiner (1994, 232–33; 2013, 230–44); Thomson (1990, 283–84).

to get treatment. Brett's first task was to purchase spinach and eggs to make Amy a fantastic breakfast. During his shopping adventures, Brett happened upon Chelsea giving a speech; Chelsea convinced Brett through her slander that Amy was a charlatan and a huckster involved with the most notorious of criminals. These claims have no basis in fact, but Chelsea was able to convince Brett through her excellent persuasion skills. Brett, who has an aversion to criminals, now hates Amy and works for her at reduced efficiency.

Amy, the complete owner of Brett as property, would by definition also own that part of her reputation that now exists in Brett's mind. Amy's property has therefore been damaged by Chelsea's slander.

THE LEGITIMACY OF THE RIGHT

This section will provide a robust endorsement of freedom of contract, reject Rothbard's rejection of voluntary slavery, and highlight what it means to be a voluntary slave and how it can relate to libel law.

When Rothbard wrote about libel law he never specifically rejected the idea of an ownership right in a reputation. Rather his critique was that the libellee had no ownership right in the minds of other people (Rothbard 2015, 1978). However, the previous master-slave example illustrated a situation where this precise reputational right could possibly come to be owned. At the outset such an extreme example seems too fringe to be of any practical use. We contend that it is not.

Freedom of contract looms large in the minds of most libertarians. Its two axioms are ownership and the right to be free from aggression (NAP). The ownership axiom includes self-ownership. Therefore, with these two axioms in mind a libertarian would not wish to interfere with a contract between two consenting adults who voluntarily enter into a contract.⁷ After all, they are each doing so with their own private property, without violating the rights of anyone else.⁸ If someone else or some third entity intervened

⁷ At least not violently. But it would be perfectly alright to "interfere" in other ways, such as speaking, writing, etc., under the libertarian code of law.

⁸ In the view of some libertarians, voluntary fractional reserve banking contracts are an exception to this general rule. This is so for reasons the explication of which would take us too far afield from our present topic. On this see Bagus (2003); Bagus, Howden and Block (2013); Barnett and Block (2005, 2009a, 2009b);

in this exchange and told *B* that he couldn't enter into a contract with *A*, a libertarian would properly view this as a violation of property rights absent some other voluntary contract from either party prohibiting such a contract.

Since the master-slave relationship is the most extreme example of complete ownership, all lesser forms are derivative. For instance, as a slave owner Amy owns Brett. In theory, Amy owns Brett's body, his organs, his labor, his ability to enter into new contracts; the list goes on and on. There is *nothing* he previously owned that is not now her property. Amy has complete dominion over everything Brett has to offer, from his intellect to his physical attributes. This, by definition, means that Amy has control over Brett's thoughts. Just as Amy can instruct Brett to curse Chelsea, Amy can instruct him to hate Chelsea and despise her accordingly. A critic might aver that a slave can only sell his physical attributes, but why can't he sell everything? We can easily imagine a machine that allows scientists to interpret our thoughts in the not so distant future. Would such a critic maintain that a voluntary slave would be able to willfully defy his owner's commands after having sold himself into voluntary slavery? Again, Brett sold in its entirety his property interest in himself. But surely if Brett can sell his entire property interest in himself, nothing is stopping him from selling only a part of that property interest instead.

In the sale of real property, selling a property in its entirety would be regarded as selling it in fee simple absolute. Real property rights are often described as a bundle of sticks. So a complete bundle of sticks is fee simple absolute (Sprankling and Coletta 2015, 316). However, individual sticks include and are not limited to the right to transfer, the right to exclude, the right to use, and the right to destroy (*ibid.*, 25–26). Property takes various forms; for instance, *A* rents to *B* for one year, but prohibits *B* from renting to a subtenant. Here *A* still owns the property but has given up the right to use it for one year. *B* owns the right to use the property for one year,

Batamarco (2014); Baxendale (2010); Block (2008); Block and Caplan (2008); Block and Garschina (1996); Block and Humphries (2008); Davidson (2008); Davidson and Block (2011); Hanke (2008); Hazlitt (1979); Hollenbeck (2013, 2014a, 2014b); Hoppe (1994); Hoppe, Hülsmann, and Block (1998); Howden (2013); Huerta de Soto (1995, 1998, 2001, 2006, 2010); Hülsmann (1996, 2000, 2002a, 2002b, 2003, 2008); Murphy (2011, 2018a, 2018b); North (2009); Polleit (2010); Reisman (1996, 2009); Rothbard (1975, 1990, 1991, 1993); Salerno (2010a, 2010b, 2011); Shostak (2017a, 2017b).

but the right to transfer it to a subtenant has been excluded. In addition, *B*'s ownership interest presumably does not permit him to destroy the property, but as a tenant he would retain the right to exclude other persons, up to and including *A*, the landlord, from the premises for one year.⁹

Most notably, the individual sticks in the bundle can be divided even further. For instance, the right to exclude could have an exception for annual walkthroughs or emergencies. Likewise, the right to use need not be general; it could be limited to mineral or grazing rights. The sticks in the bundle are distinct and divisible. As a result of such voluntary contracts, a property could find itself with tenants, mortgages, liens, licenses, easements, and all manner of encumbrances.

Leaving real property aside and returning to the subject of people, we find that free individuals have without compulsion sold their organs, their labor, and their right to do or not do an action. All of these individual private property rights are found bundled together in the master-slave relationship. No new sticks were created in the master-slave relationship that did not already exist individually in the bundle of property rights under the previous owner's legal control, Brett in the present instance. Ergo, it must be the case that the reputational right in Brett's mind (about Amy, in this case) is not an exception to this general rule. Since it can come to be owned as part of a complete bundle of rights, Brett's thoughts can come to be owned individually without the other sticks in the bundle—the other property interests.

At this point, it is appropriate to return to Rothbard, who rejected voluntary slavery. At the outset of this small detour, it should be noted that rejecting voluntary slavery does not sink the analysis thus far. Rather, rejecting voluntary slavery is simply rejecting the idea that the *entire* bundle of sticks can be offered up to the market; however, even in this view, each individual stick in the bundle may still be offered.

Rothbards writes as follows:

The distinction between a man's alienable labor service and his inalienable will may be further explained: a man can alienate his labor

⁹ *B* could even exclude *A*, the very owner of this property, for the twelve months, apart from inspections, with notice, if this proviso is part of the arrangement, which it might well be.

service, but he cannot sell the capitalized future value of that service. In short, he cannot, in nature, sell himself into slavery and have this sale enforced—for this would mean that his future will over his own person was being surrendered in advance. In short, a man can naturally expend his labor currently for someone else's benefit, but he cannot transfer himself, even if he wished, into another man's permanent capital good. For he cannot rid himself of his own will, which may change in future years and repudiate the current arrangement. (Rothbard 2015, 40–41)

Rothbard offers the following hypothetical,

Suppose that Smith makes the following agreement with the Jones Corporation: Smith, for the rest of his life, will obey all orders, under whatever conditions, that the Jones Corporation wishes to lay down. Now, in libertarian theory there is nothing to prevent Smith from making this agreement, and from serving the Jones Corporation and from obeying the latter's orders indefinitely. The problem comes when, at some later date, Smith changes his mind and decides to leave. Shall he be held to his former voluntary promise? Our contention—and one that is fortunately upheld under present law—is that Smith's promise was not a valid (i.e., not an enforceable) contract. There is no transfer of title in Smith's agreement, because Smith's control over his own body and will are inalienable. Since that control cannot be alienated, the agreement was not a valid contract, and therefore should not be enforceable. (Rothbard 2015, 135–36)

We find this line of argument unconvincing. Suppose Smith entered into a contract to work for Jones Corporation for ninety-nine years. After one day, Smith breaks his contract. How is this any different? While his entire "will" is not at issue, his ability to contract his labor in the future was certainly constrained; according to Rothbard, this would not be enforceable. In both cases, Smith agreed to something that would prevent him from doing something else because of the deal struck at an earlier date. Instead of ninety-nine years, suppose it was one year, or six months, or thirty days or eight hours; does that make a difference? Surely not. Consider a contract whereby Smith offers to deliver a certain number of widgets each month for one year at a fixed price. Surely all such deals among consenting adults must be enforced. What about a five-year lease agreement with monthly payments? Accepting a contract now must mean that you are held accountable in the future if property rights are to mean anything.

What about suicide? Should my ability to constrain my "will" in such a manner be illegal and not permitted? One of Rothbard's points about the "will" is that present-day decisions should not shackle future actions. What about the sale of my kidney?

Although it is now a great time to sell it in the ex ante sense, I may soon experience some ex post regret as my future self realizes the importance of having two working kidneys. The sale of the kidney constrained my “will” with respects to future uses of the kidney, so am I entitled to a refund?¹⁰ Another difficulty with the Rothbardian position is that it implies that suicide would be a crime, since it alienates the (future) will; this is a difficult stance for a libertarian to take; for that matter, the same applies to dying. These objections render Rothbard’s principal complaint about voluntary slavery untenable.

What we are now discussing are specific performance contracts. The usual example is X hires Y to sing at his wedding. At the last moment, Y reneges. In our view, X would have the right to frog march Y to the venue and compel him to sing at the point of a gun. Even we realize that this appears problematic. Our critic would object that if X is worried about being disappointed, he could arrange with Y to post a bond, which the latter would forfeit, in case he does not uphold his side of the arrangement. Or, X could rely on Y to show up, since if he did not, his reputation would suffer, and the demand for his services would slacken. So, let us consider a much more powerful case on behalf of specific performance contracts, e.g., voluntary slavery of a temporary sort. Here D is a tightrope walker; he performs his act of daring one hundred feet up in the air. D hires E to hold a net under him in case he falls. D starts his performance, and while he is in the middle of it, E decides to down tools, that is, walk off the job. F, a friend of D tells E that if he quits in the middle of D’s performance, he, F, will shoot E. Is F entitled to make this threat of physical violence against E, the would-be quitter? Most people would now agree, since D’s very life is at stake. The emotional impact changes from the case of the wedding singer to that of the net holder, but the two should be considered legally equivalent.

Returning now to libel and slander, in *Defending the Undefendable II* Walter Block discussed how a libertarian theater owner would deal with a fire “screamer” in a free market setting (Block 2013, chap. 10). In essence, how could a libertarian prevent a paying customer from shouting “Fire!” in a crowded theater? The answer

¹⁰ Not only a refund. In this view, I should be able to seize my (ex?) kidney out of the body of the person who purchased it from me.

is simple. The theater owner would make entry contingent upon a contract whereby the customer would agree not to falsely scream fire in his theater.

By analogy, something similar should work with libel and slander.

THE FREE MARKET APPROACH TO LIBEL: THE CASE OF THE THEATER OWNER

Here we take the next logical step and ask how the free market would interact with libel and slander. The ultimate conclusion seems to provide relief to the wronged party.

Suppose the following: Amy recently opened up a successful movie theater and is in direct competition with Chelsea's similar establishment, located down the street. Chelsea, who is losing business to Amy, resorts to making false claims about Amy and her business in order to gain more customers. Brett, a customer who frequents Amy's movie theater agrees, contingent on the purchase of a ticket, to sell one of the sticks in the bundle; specifically, Brett's property interest of Amy's reputation in his own mind. We have established under the master-slave relationship that Amy's reputation can be owned, since it exists in Brett's mind but Amy owns him, lock, stock, and barrel. Absent that master-slave relationship, by virtue of being a free person, Brett may sell this property interest in Amy's reputation to Amy. Suppose that Brett does this and that the next day he is convinced by Chelsea's false claims that Amy's theater has no permit to operate, is rat infested, and that Amy is funded by notorious gangsters. Brett, well-known and highly respected on the internet, takes to social media to express his dissatisfaction with Amy's establishment, and thanks Chelsea most endearingly for alerting him to these new "facts."

In theory, at trial, after Amy disproves these claims, she can call Brett to the stand. Brett would truthfully testify that he learned this information from Chelsea, believed it, and thus her reputation in his mind was damaged. Since Amy own's Amy's reputation in Brett's mind, property damage will have occurred. Thus the state could intervene, whether it be through civil or criminal law to rectify the wrong.

If you are NOT willing to accept that Amy can recover damages because her reputation was ruined in the mind of her slave, of whom she has complete ownership, then why not? If you are NOT

willing to accept that Amy can recover because her reputation was damaged in the mind of her customer, of whom she acquired an ownership interest, then why not? Rothbard opposed libel laws, because he focused only on the fact that Amy did not own her reputation (since it consisted of the thoughts of others, which Amy did not own). In this the eminent libertarian theorist was absolutely correct.¹¹ We diverge from him only in this matter of owning other people fully, outright, as in the case of voluntary slavery, or owning one of these “sticks”—the thoughts in other people’s minds, which, we claim, people can sell. Do people not own the contents of their minds? Are free people not free to contract? The point is, if you cannot sell something, then, to that extent, you are not really the full owner of it.¹² And if you are the complete and total owner of something, as Brett is of his thoughts, then you may prevent others from stealing them from you and, indeed, sell them. We owe Rothbard an intellectual debt for realizing and acquainting us with the fact that Amy cannot own her reputation. We stand on Rothbard’s shoulders when we combine this insight with our view on voluntary slavery and on selling this particular “stick.”

It cannot be denied that it is difficult to tell your slave what to think. Cogitation is almost like an involuntary reflex, akin to sneezing, breathing, a heartbeat, moving your foot when your knee is struck with a rubber hammer, etc. Does this mean that the thinking of the (voluntary) slave cannot at all be controlled by his master? Threats will not do, since pondering, deliberation, are private acts, and it would be exceedingly difficult for the owner to know, precisely, what is on her slave’s mind.¹³ However, there are drugs. If they cannot be counted upon to direct rumination along the lines preferred by the owner, at least they can be relied upon to ensure that he does not think at all. This might well decrease his

¹¹ Importantly though, the ownership argument doesn’t deny the existence of reputation as a property right; quite the opposite: it denies instances of libel because another party has ownership.

¹² Philosopher Norman Malcolm recounts a discussion with his mentor Ludwig Wittgenstein (Malcolm 1958, 31–32): “On one walk he ‘gave’ to me each tree that we passed, with the reservation that I was not to cut it down or do anything to it, or prevent the previous owners from doing anything to it: with those reservations it was henceforth mine.”

¹³ It may not even be necessary to instruct your slave how to think for a libeler to then cause damage. A change from whatever the prior state of mind happened to be could be sufficient.

overall productivity, but there is a cost to everything. If engaged in, this process will all but ensure that Brett is not being swayed by the Chelsea's lies against his owner, Amy.

HOW TO THINK ABOUT THE ROTHBARDIAN CRITIQUE ON LIBEL AND WHAT PRECISELY IS WRONG WITH LIBEL UNDER THE LIBERTARIAN FRAMEWORK?

Let's take a step back and view the larger picture. Rothbard's most interesting objection to the libellee recovering damages from the libeler was that the libellee did not own his reputation, the one besmirched by the libeler. Rather, the libellee's reputation consists of the thoughts in the listener's mind and the libellee did not own them.¹⁴ This implies that the right to reputation can be owned and that the reputation of another in an individual's mind is a discernible, albeit problematic, property right.

A critic might aver that Rothbard errs in thinking that a reputation cannot be owned at all because that "commodity" consists of the thoughts of third parties, owned by neither the libeler nor the libellee. But Rothbard's error is that a reputation *can* be owned but that it just isn't owned by the correct party. To wit, the libellee's reputation isn't owned by the libellee, but it *is* owned by the third parties, because the libellee's reputation consists of the thoughts of these latter folks. This was Rothbard's primary argument, and if it were the only argument such a criticism would be well founded. But this is an invalid criticism, since reputations cannot be owned at all, by anyone. They consist of information, thoughts. But, we cannot own intellectual property, since it is not scarce.¹⁵ More on this later. Thus, this criticism by Rothbard fails.

These two views are mutually exclusive. If the challenge is one of ownership, it presumes a valid property interest in reputation, whereas if the problem is a lack of scarcity with regard to intellectual property, the conclusion is that reputation is not a valid property interest. Therefore, criticizing of Rothbard on this ground would

¹⁴ We now put aside for the moment the issue of voluntary slavery, in which one person may possibly own the thoughts of another.

¹⁵ See Block (2013); Boldrin and Levine (2008); De Wachter (2013); Kinsella (2001, 2012); Long (1995); Menell (2007a, 2007b); Mukherjee and Block (2012); Navabi (2015); Palmer (1989).

be unfair. We believe that under libertarian law free people may enter into any contract they wish regarding a valid property interest and that those contracts should be enforced. Rothbard rejected this insight as concerns voluntary slavery and contracts that restrain an individual's future will. We believe that the logical outgrowth of adopting Rothbard's primary ownership argument against libel invites troublesome aspects, as seen in this paper, even if the property interest is inalienable. Rothbard had a different take on what was and was not an enforceable contract. It would be improper to criticize him for not adopting the intellectual property argument, because he never accepted what we consider to be a logical outgrowth of the ownership argument—that being free, people may buy and sell their property interests in other people's reputations.

INSTEAD OF SELLING TO AMY, SUPPOSE BRETT RETAINED OWNERSHIP OF HIS PROPERTY INTEREST OF AMY'S REPUTATION IN HIS MIND

As we continue to explore the odd reality of how libel law would operate in different situations, keep in mind what this sort of society would look like. For the purposes of these next sections, we are tabling our concerns with libel law and carrying out the recognition of a valid property interest in reputation to its logical end. If you are not yet troubled by the outcome, you soon will be.

Using the above movie theater example, now assume the truth of the facts as stated therein, but with one difference. Brett never agreed to sell Amy's reputation in his mind to Amy and therefore remained the owner of that right. On these facts is Brett prohibited from recovering damages? Absolutely not. Although it is true Amy's reputation is harmed, she cannot under libertarian law recover, because she holds no property interest. Brett on the other hand, by virtue of being the holder of that property interest,¹⁶ is harmed since the reputation of Amy in his mind is no longer reflective of what it would be had the truth prevailed.

Remember that the property right in Amy's reputation exists in Brett's mind.¹⁷ So at first, it seems rather bizarre. How has Brett been

¹⁶ We are now assuming away, *arguendo*, our point about not being able to own intellectual property to demonstrate the broad impact of the ownership argument given our robust acceptance and embrace of freedom of contract.

¹⁷ We know that Amy cannot own her own reputation, since it consists of the thoughts of others, such as Brett, etc. However, in the voluntary slavery case,

harmed by libel against Amy? Since falsity was used and believed, the damage to this property, the reputation of Amy in his own mind, occurred, and that allows the property owner to be compensated regardless of whose reputation is being damaged. The enforcement of a property right should be the same regardless of the identity of the property holder. Property rights are property rights, are property rights. In proper libertarian law, all that matters is who holds the legal property interest in question. As such, Brett need not base his harm anywhere else, such as in refusing future contracts with Amy at his own expense, because simply as the owner of Amy's damaged reputation in his mind, he can recover damages.

We must take a moment and pause, and remind ourselves of the quirkiness of the property right in question and its relation to truthfulness, because a reputational right is indeed peculiar. *A* owns an old car; *B* without permission keys the car. *A* owns an old car; *B* without permission gives the car a brand-new paint job. In instance one, *B* has caused a negative change in value and in instance two he has created a positive change in value.¹⁸ Nonetheless, *B* in both instances violated private property.

With a reputational right, matters are similar. *A* says, "*B* is a pedophile." *A* says, "*B* is verifiably the most handsome and charming individual on earth." In instance one, the words have a negative effect and in instance two they have a positive effect on the reputation of *B*. Just like in the car example, a negative or positive change makes no difference in the analysis; all that matters is that a change occurred. However, how that change occurs matters for this type of property right. Under a reputational property right system, we must ask if the statements are true or false. If true, then all positive and negative claims are permitted, because people should not be punished for saying what is, in fact,

where Brett sells to Amy all of his possessions apart from his thoughts, she can own them. Ignoring that, can Brett own (part of) Amy's reputation, since that consists, in part, of his thoughts? This, to be sure, is an awkward way of putting the matter, but we answer this in the affirmative. Ownership consists of the right to do anything at all with the "commodity" owned and to preclude others from using it except with the owner's permission as long as the NAP is not violated. So, what may Brett do with his (partial) ownership of Amy's reputation? Since it is a negative one, thanks to Chelsea's lies, Brett is fully within his rights if he boycotts Amy's movie house. Brett also has the ability to recover the damage done to Amy's reputation as the owner of the property interest.

¹⁸ Assuming that the owner sees matters in that way. Possibly he may have preferred the unpainted look.

the case, absent some contract calling for silence. The truth cannot be an illegal invasion of a property right under the nonaggression principle.¹⁹ Therefore, damage to a reputational property interest comes necessarily from false statements regardless of whether the claims are themselves positive or negative.

This can lead to bizarre situations. Imagine if Chelsea convinced Brett that she was a most accomplished musician when in reality she has never played an instrument. Brett as the owner of Chelsea's reputation in his mind will have experienced damage by both the libeler and the libellee despite the fact it enhances Chelsea's reputation as a musician.

So, to reiterate, truthful claims do not violate the nonaggression principle. Although truthful claims may help or hurt someone's reputation, the truthful nature of the claims reflects reality and is thus not an instance of aggressing against someone's property, whereas false claims concerning someone's reputation perpetrate a fraud or deception, hence violating the nonaggression principle.²⁰

Conversely, a critic may argue that general lies not concerning a reputation may violate the nonaggression principle based on this logic. However, Rothbard²¹ and most societies today recognize reputation as a distinct property interest and reject general lies as too abstract to be a distinct property interest. Therefore general lies cannot be aggressed against consistent with libertarian law. So when Chelsea lies and convinces Brett that $2+2=5$, Brett believes a falsehood, but the dynamic is entirely different, because lies of a general character do not violate a property interest.

¹⁹ On the other hand, we must take cognizance of the fact that truthful critical statements can ruin reputations. Joe is a child pornographer. We truthfully "out" him as such. His reputation sinks like a stone except among fellow members of the child pornography community). Nonetheless he would be barred from recovery, since the statement is truthful. We are presuming validity of the property right in reputation but not for general lies. Truth being a defense from libel, it would necessarily be the case that false claims concerning reputation would be libelous but not truthful ones.

²⁰ This holds true only if reputation is recognized under libertarian law as a valid property interest. Otherwise, lies concerning reputation would be no different from lies of a general character and both would be permitted.

²¹ The ownership argument that Rothbard principally advances in discussions of libel, slander, and reputation presumes that reputation is a valid property right. If reputation under libertarian law fails for other reasons, such as the intellectual property argument, the ownership argument is moot.

But why have virtually all societies mandated reputation as a property right? We can only speculate. Perhaps it is because the individual relies so much on a good reputation; perhaps it is because individuals work so hard to cultivate a good reputation among their peers; perhaps it is because the harm is twofold: both the listener and his object (the libelee) are harmed. Perhaps it is because the harm done is of an entirely different character from that of a general lie. An untruth about someone's reputation can destroy his occupation, his social life, his family relationships, and so much more. Even if the falsehood concerning a reputation is rebutted, the damage is already done and the person harmed may be wrongly associated with it for the rest of his days.

THE HOT NEW MARKET!

This section takes the next logical step. If the slave owner can come to own the thoughts of her slave and voluntary people can sell that interest, and individual people can recover damages, then how would this society function and how would it look?

Most property is generally regarded as alienable, which means transferable. Under a libertarian scheme, it seems entirely the case that all property is alienable unless otherwise contracted to by the parties. For why should consenting adults be denied the right to sell their property? If you legally cannot sell something, then to that extent you are not really its full owner.²² Thus, unless otherwise agreed to in the contract, all examples of inalienable property are properties regulated by the state—for instance, in most of the world it is illegal to sell body parts.

The reputation of the libellee in the mind of a listener as a property right is therefore no different and should also be regarded as alienable. Thus Brett's mind is in effect a type of commodity! Buyer Y might try to purchase the reputation of everyone in Brett's mind or Buyer Z might try to do the same regarding a select few such as A-list actors and politicians, who may be exposed to libel more often. But it is not only Brett's view of {insert anyone or everyone} that is up for sale; viz., every person's thoughts become a commodity, since we all have in our minds the reputations of many others.

²² See footnote 25, *supra*

So, instead of or in addition to bundling, buying, or selling mortgages, life insurance policies, and equities, individuals and companies should be legally allowed to start buying up reputations in the minds of individuals.

RATHER DRACONIAN?

Libel has several definitions, but generally it occurs when an individual makes false statements that cause damage to someone's reputation. Rothbard noted that the libellee does not own his reputation, as it exists only in the mind of another, but, as established *supra*, it is in theory possible given voluntary slavery that it can be sold. If permitted in that case, free individuals should be able to transfer that individual stick in the bundle of property interests separately. Even if one rejects alienability, that only means that the property interest cannot be transferred. However, the person with the reputation at stake, the libellee, is of little importance; rather the person with the property interest in the reputation of the person at stake is important. Thus, someone like Brett, who owns the reputation of Amy in his own mind, can recover damages when that property interest is harmed by Chelsea even if it is an inalienable property interest.

What could this all possibly mean under libertarian law? There would be an immediate chilling of the press. Since everybody can recover damages, enforcement will occur much more frequently. This is in contrast to the current system in which only the person with the reputation in question can sue. In the name of protecting property rights the government would be watching closely as people publish words on social media, in the newspaper, and elsewhere. The written word or a mere utterance could land otherwise law-abiding people in the hot seat with the government. There would be endless plaintiffs lining up to persecute all those who deal in misinformation and falsities.

Rothbard arguably understood this absurdity and listed several examples:

Let us consider, in fact, the implications of believing in a property right in one's "reputation." Suppose that Brown has produced his mousetrap, and then Robinson comes out with a better one. The "reputation" of Brown for excellence in mousetraps now declines sharply, as consumers shift their attitudes and their purchases, and buy Robinson's mousetrap instead. Can we not then say, on the principle of the "reputation" theory,

that Robinson has injured the reputation of Brown, and can we not then outlaw Robinson from competing with Brown? If not, why not? (Rothbard 2015, 127)

The answer is an unequivocal no. That property becomes damaged or loses value does not constitute a violation in the libertarian sense. Brown's mousetrap is simply inferior to Robinson's, so consumers have shifted their demand accordingly. Are consumers not allowed to do this? Are products not allowed to improve and compete with others? Where are the false statements, where is the libel? If a competitor is harmed by a better business that is not the sort of physical invasion associated with the nonaggression axiom, therefore, it would not be a violation. Nonetheless, Brown's reputation has indeed suffered. This is but further evidence that loss of reputation is not actionable, at least not by the person harmed in this manner.

Rothbard continues:

Or should it be illegal for Robinson to advertise, and to tell the world that his mousetrap is better? In fact, of course, people's subjective attitudes and ideas about someone or his product will fluctuate continually, and hence it is impossible for Brown to stabilize his reputation by coercion; certainly it would be immoral and aggressive against other people's property right to try. Aggressive and criminal, then, either to outlaw one's competition or to outlaw false libels spread about one or one's product.(ibid.)

This is a more interesting example only because if one mousetrap is advertised as better, then it follows that it is better in relation to others. This could very well be libel, in effect, albeit in an unusual sense, because false statements are less particular and concrete. Saying one product is better to the detriment of another is wholly different from directly lying about the product in question. However, on the whole, if a product is verifiably not better, the trier of fact may be convinced that it is indeed libel. Conversely, some level of puffery is common practice. The term *better* is often normative, and thus the creator of the mousetrap will no doubt subjectively believe his mousetrap is better. However, we could imagine a situation where the claimed "objectively better" mousetrap is in fact objectively inferior based on extensive testing and people now consider the reputation of the objectively better mousetrap as inferior. In such a case, a violation will have occurred. In all similar cases, determining whether a word

is subjective or objective is a question of fact, and a trier of fact, whether it be a judge or a jury should make these determinations. In short, reasonable persons may differ on whether this would be a violation of libel under a libertarian regime, and it would no doubt turn on a rather fact-intensive inquiry into the nature of the advertisement, its wording, custom, and much more.

Rothbard provided additional examples.

[S]uppose that Robinson publishes an investment advisory-letter, in which he sets forth his opinion that a certain corporation's stock is unsound, and will probably decline. As a result of this advice, the stock falls in price. Robinson's opinion has "injured" the reputation of the corporation, and "damaged" its shareholders through the decline in price, caused by the lowering of confidence by investors in the market. Should Robinson's advice therefore be outlawed? (ibid.)

This is similar to the mousetrap example. The letter is advisory, meaning that Robinson is of the opinion that the stock will decline. The mere fact that the corporation was harmed by Robinson's opinion does not imply that a libertarian axiom was violated. When a person propagates a subjective opinion as Robinson has done, it should almost never be considered libel.²³ Suppose that Robinson writes, "I believe the stock will probably decline in the future." This is not a false statement; it is premised on Robinson's belief and thus it would not be libelous. Now consider this: Robinson writes, "The corporate stock is unsound. Investigation underway by SEC. Officials are contemplating bankruptcy; record bonuses are going to the executive team. Sell or short now!" If at trial it can be established that the corporation was not contemplating bankruptcy, that there was no SEC investigation, and that executive bonuses were modest, with an increasing dividend payout expected for shareholders, Robinson will have indeed made false statements and thus would be guilty of libel. Both statements are opinions; one is based on Robinson's subjective belief while the other masquerades as fact.

According to Rothbard:

A writes a book; B reviews the book and states that the book is a bad one, the result is an "injury" to A's reputation and a decline in the sales

²³ We make a bad faith argument concerning subjective opinions below, in the discussion on the Nazi book.

of the book as well as A's income. Should all unfavorable book reviews therefore be illegal? (Rothbard 2015, 127n5)

We answer, absolutely not. If *A* is of the opinion that the book is bad, that statement is not false, and thus not libel. If *A* instead lies about the contents of the book and claims that it is pro-Nazi when in fact it clearly and concisely does not support those conclusions, that would be libel. What if *A* were *actually* of the belief that the book took that position? Here the trier of fact would have to determine the mental state of *A*. If *A* persisted in that absolutely unfounded belief in spite of clear and replete evidence, it seems entirely possible that *A* did so not out of an earnest belief, but out of an attempt at libel, but we would need more facts and in such a situation it would be up to the trier of fact to make the decision.

But, again, even if this were considered libelous, there would be no relief for the libellee, because although his reputation was indeed ruined, he does not own it.

These lines of commentary by Rothbard do not attempt to show how his anti-libel law view is consistent with libertarianism, as his commentary on the libellee not owning the thoughts of others did. Instead, this short section only appeals to our intuitions.²⁴ But in order to be critical in the libertarian sense, we must return to the two axioms. In doing so, we must confront whether a reputational right is a private property right.

REPUTATION HAS NO PLACE AS A PROPERTY RIGHT

Alas, here we are. Having presented the logical outgrowth of Rothbard's ownership argument but with a robust embrace of freedom of contract, we have created a rather unpleasant world to live in. To recap, Rothbard's anti-libel law stance is based on the ownership argument—that reputation consists of thoughts owned by other people, not the libellee. This precludes the libellee from being made whole, since he has no ownership interest. This argument presumes a valid property interest in reputation. The master-slave example illustrated an example where the libellee could, in theory, come to own his reputation. If a person can sell himself into slavery, then nothing is stopping him from selling

²⁴ This is our homage to Nozick's (1974) "utility monster" and "experience machine" thought experiments. He, too, was appealing to our intuitions.

something less. We then postulated a world in which people owned, purchased, and sold like a commodity the reputation of others in their own minds. This fostered a rather draconian situation.

All of this holds true for libertarians who embrace freedom of contract if reputation is a valid property right. However, we have some news for you! Such a property right does not exist at all, on the part of anyone, particularly to the Bretts of the world, who have been misled by Chelsea about Amy.²⁵ Our opinions belong to us. How can they not? Who else could they belong to? But merely because something can “belong” to us, does not automatically render it a property right. Our thoughts about other people are endless. Although others may work to make those thoughts positive and not negative, they are still only thoughts at the end of the day. They seem oh so important, but there are few things more intangible and less scarce than our thoughts about others. Therefore, we reject the existence of such a property right on the part of anyone. Abstractions, information, knowledge, and the like simply cannot be owned. To allow such would convey an ownership interest over the most basic essentials, precluding others from using even their most basic faculties.

There is yet another reason for drawing this conclusion. We have seen that when Chelsea bad-mouths Amy to Brett, Amy has no case in law for loss of reputation, since her reputation consists of Brett's (and others') thoughts, which Amy cannot own.²⁶ But Brett, to be sure, owns his own thoughts, and Chelsea has besmirched them with her lies about Amy. So, Chelsea did not violate Amy's rights (Amy does not own Brett's thoughts), but does Brett have a legal case against Chelsea? By extending Rothbard's logic perhaps,²⁷ but under libertarian law she does not. One reason

²⁵ When you stand on the shoulders of a giant like Rothbard, it is easier to see far afield.

²⁶ Absent a voluntary slavery contract, in which Brett sells himself lock, stock, and barrel to Amy, in which case she owns all of him, including his thoughts, e.g., the right to compel him to think along the lines she prefers. In addition, because we are dealing with an alienable property interest, it is not exclusively tied to a voluntary slave contract. An individual could sell his interest in it to another. We can imagine a deed of sale that states “Brett hereby transfers his ownership interest in the reputation of Amy in his mind to Reputations R US, LLC.”

²⁷ Rothbard's logic opposes libel law but heavily relies on ownership problems to justify his opposition. As demonstrated throughout this paper, that line of logic is deeply problematic if you embrace freedom of contract. Even if you did not fully embrace freedom of contracts and were left with an inalienable property

appears above: intangibility. A second comes about in this way: thoughts are information. Brett now looks askance at Amy, thanks to Chelsea. But information cannot be owned, at least not based on libertarian theory, since information is not scarce, and only scarce commodities can be owned.²⁸ If there were no scarcity whatsoever, there would be no private property rights under libertarianism, nor any need for them, since, by definition, no conflicts could possibly arise if everyone could have everything they wanted.²⁹ In one sense, if Brett's thoughts consist of X instead of Y, the conflict would be in that difference. However, the act of Brett changing from X to Y is done at virtually zero cost. In this way our thoughts are akin to the air we breathe or salt water at any ocean beach, so plentiful and easy to acquire again that conflicts need not arise.

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interest, this would still be problematic, because individual people could still sue but could not sell their interests.

²⁸ See footnote 27, *supra*

²⁹ Defeating scarcity is a manifestly impossibility, since there will always be alternative costs of time, and, as long as we all inhabit bodies, two of them cannot occupy the very same space.

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