

Vox

Gawker was irresponsible, but the precedent Peter Thiel is setting is dangerous

Ezra Klein

May 26, 2016

In the narrow case of Peter Thiel being pissed off at Gawker, I think Thiel is right and Gawker was wrong.

A decade ago, Gawker publicly outed Thiel as gay. Gawker's reasoning? Other people in Silicon Valley knew Thiel was gay, so why shouldn't the whole world know it as well?

Thiel served his revenge cold. There was nothing he could do about the post outing him. So he instructed a team of lawyers to look for lawsuits that could hurt Gawker, and he began funding those lawsuits. The most dangerous of those cases concerned a private sex tape Gawker obtained and posted of Hulk Hogan — a jury recently awarded Hogan \$140 million in damages in that case, though many expect the verdict to be reduced or overturned on appeal. But Thiel says he's funding other lawsuits against Gawker, too.

What's tough about defending Gawker here is, well, defending Gawker here. The press might have the freedom to forcibly out private citizens or post their personal sex tapes for no other reason than clicks, but that doesn't mean we should use that freedom. There's plenty the press can do that it shouldn't, and the more frequently and gleefully we cross that line, the likelier we are to eventually lose the ability to cross it.

But even if Gawker was wrong to post those articles, Thiel's method of reprisal is dangerous.

Thiel's weapon isn't the law, it's his money

Billionaires might have the resources to fund endless lawsuits that bury their media enemies beneath legal fees, but that doesn't mean they should use that freedom. There's plenty that billionaires can do that they shouldn't, and the more frequently and gleefully they cross that line, the likelier they are to eventually lose the ability to cross it.

The key question here relates to precedent. Do you think the Hogan case will set precedent — either explicitly through the legal system or implicitly through a culture of fear — that will chill other publishers who have better reasons for posting private information about public figures? Do you think Thiel's strategy of using his billions to back a potentially endless number of

lawsuits that will crush Gawker beneath legal fees and judgments will go unnoticed by other plutocrats with less defensible vendettas and targets?

My guess, in both cases, is yes, this will create precedent. And this is where Thiel's protestations sound tinny. "I refuse to believe that journalism means massive privacy violations," he told the New York Times. "I think much more highly of journalists than that. It's precisely because I respect journalists that I do not believe they are endangered by fighting back against Gawker."

I've interviewed Thiel on a number of occasions, and he's much smarter, and much more of a consequentialist, than that. What's endangering Gawker isn't a specific case — odds are the Hogan lawsuit will be lost on appeal, and none of the other cases seem like a serious threat to the company.

What's endangering Gawker is Thiel's endless resources, and his apparently limitless appetite for revenge. Those tools can be used by anyone with enough money, against any media target they choose, for any slight they perceive.

Anyone with enough money can do what Thiel is doing, and to any media target they choose

As my colleague Tim Lee notes, a similar tactic has been employed against the liberal magazine Mother Jones:

Last year, the liberal magazine Mother Jones defeated a defamation lawsuit filed by Republican donor Frank VanderSloot. Winning the lawsuit cost Mother Jones, a relatively small nonprofit organization, \$2.5 million in legal fees.

If VanderSloot's goal was to punish Mother Jones for writing an accurate but unflattering story about him, a loss was almost as good as a victory. His lawsuit sought \$74,999. (Staying just under the \$75,000 threshold that would have allowed Mother Jones to move the case to federal court and away from an Idaho jury that might have favored the hometown plaintiff.) So "winning" the lawsuit cost Mother Jones 30 times as much as the amount it would have had to pay if it had lost.

What was really ominous was what happened after VanderSloot's loss. He "announced that he was setting up a \$1 million fund to pay the legal expenses of people wanting to sue Mother Jones or other members of the 'liberal press.'"

The crucial point here is that Thiel isn't actually using the legal system as a venue in which to adjudicate his dispute with Gawker; hell, his lawsuit isn't even about his personal dispute with Gawker. Rather, Thiel is using the legal system as a weapon to bleed Gawker in every single case.

As Felix Salmon writes, "Gawker could continue to fight the Hogan case; it could even win that case outright, on appeal. But even if Hogan went away, Thiel would not ... investing in Gawker right now is a very unattractive proposition, since any investor knows that they will be fighting a years-long battle with a single-minded billionaire who doesn't care about how much money he spends on the fight."

But the press is not powerless, and Thiel's strategy will create a response. In particular, attention is now centering on third-party financing of litigation — a feature of our legal system that's often an important mechanism through which poor and marginalized plaintiffs can seek justice. Here's Lee again, interviewing Walter Olson, a legal expert at the Cato Institute:

Olson argues that if you went back a century or two and talked to British or American legal scholars, "they'd say of course, they always knew these things would be used by the rich and powerful if you allowed them." Under doctrines called champerty and maintenance, the law used to bar unrelated third parties from paying someone else to engage in litigation and financing a lawsuit in exchange for a share of the damages.

But those laws have fallen out of favor over the past 50 years, in part because lawyers began to see easy access to the courts as being in the public interest. This was driven in part by the rise of public interest litigation — think, for example, of an environmental group finding a third-party plaintiff to sue a company to stop an environmentally sensitive development project.

The result of Thielism, looking a few years down the line, is likely to be an equilibrium that's bad for everyone: limits on third-party funding of lawsuits and a more fearful press corps that has to worry over not just the accuracy and newsworthiness of what's being written but the resources, litigiousness and vindictiveness of whom it is writing about.

Thiel was right to be angry in the first place. But his reprisal goes way, way too far.