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Peter Thiel's Legal Smackdown

With Gawker under attack, the press wakes up to a justice system that invites abuses.

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A Silicon Valley billionaire's decade-long mission to drive a snarky website out of business has the media up in arms: What happens to freedom of the press if wealthy people can fund lawsuits to bankrupt media outlets they don't like?

Good question. Here's a better one: Why did it take so long for journalists to discover abuses of the legal system that torment every other industry?

Media commentators have almost universally condemned Peter Thiel, a PayPal co-founder and early investor in Facebook, for how he went after Gawker, which outed him as gay in 2007. Mr. Thiel defends his actions as "less about revenge and more about specific deterrence." Gawker, he argues, plays a "uniquely degrading role in our culture."

Mr. Thiel, himself a Stanford-trained lawyer, was smart enough to take advantage of a radical change in the U.S. legal system. He paid the lawyers representing professional wrestler Hulk Hogan, who sued for invasion of privacy after Gawker disseminated an explicit video of the plaintiff and another man's wife.

Until recently Mr. Thiel's backing would have been a crime, known as "maintenance" and dating from 13th-century English statutes aimed at preventing feudal lords from interfering with the legal process. English jurist William Blackstone defined maintenance as "officious intermeddling in a suit that no way belongs to one" and characterized it an "offense against public justice, as it keeps alive strife and contention and perverts the remedial process of the law into an engine of oppression." But laws against maintenance, as well as the related offenses of "champerty" and "barratry," were repealed in most U.S. states in the 1960s, when lawyers persuaded policy makers that funding to encourage more litigation was good for society.

It was long understood why only parties to a lawsuit should have an interest in it: The wealthy could influence others' cases, outside funding would encourage "vexatious" litigation, and conflicts in interest between funders and litigants would corrupt the legal process. Example: Mr. Hogan's lawyers excluded a claim that would have activated Gawker's insurance to pay its fees and damages, and they rejected settlement offers. It looks as if the lawyers' primary loyalty was to Mr. Thiel, who signed their checks, not to their client.

Litigation finance quickly became a huge business, funding everything from mass tort claims by plaintiff lawyers to endless lawsuits by patent trolls against technology companies. Outside investors bankrolled the multibillion-dollar case brought by Ecuadorians against Chevron that resulted in the plaintiff lawyer being convicted of fraud and racketeering.

Walter Olson, author of "The Litigation Explosion" (1991), explained in his Overlawyered.com blog that Mr. Thiel's approach was predictable after maintenance "metamorphosed around the 1960s into what we now know as the public interest litigation model: foundation or wealthy individual A pays B to sue C. Since litigation during this period was being re-conceived as something socially productive and beneficial, what could be more philanthropic and public-spirited than to pay for there to be more of it?"

With maintenance decriminalized, Mr. Olson warns, "It will be used not just against the originally contemplated targets, such as large business or government defendants, but against a wide range of others—journalistic defendants included."

The effect is compounded by American juries' tendency to award huge sums in damages—$140 million in Mr. Hogan's case. Contrast that with the £60,000 ($80,000) England's High Court in 2008 awarded Max Mosley, the 76-year-old son of British Fascist Oswald Mosley,when a British tabloid published video and photos of what it called "a sick Nazi orgy" he had organized. Mr. Mosley, who had run the Formula One car-racing organization, won a privacy judgment when the judge ruled there was no Nazi theme, only "bondage, beating and domination," which was not a matter of public interest.

Even without the enormous award—even if all the plaintiffs he solicited and funded lost every case—Mr. Thiel could have sued Gawker out of business. In almost all other countries, losing litigants cover the winning party's legal bills, but in the U.S., successful defendants must pay their own lawyers. The costs to Gawker of a few lawsuits would eventually have depleted the online publisher's modest assets.

The Constitution usually shields journalists from litigation, but that immunity too often blinds the news industry to abuses in the legal system. The Gawker case's lesson for journalists isn't that they deserve protections beyond the First Amendment, but that they should do a better job reporting the abuses committed through a legal system that makes it so easy to achieve injustice.