



Reap What You Sue

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Public figures harm free speech when they resort to defamation law, argues libertarian lawyer Matthew S. Widmaier.

Earlier this year, two lawsuits were filed against Canada's Wilfrid Laurier University (WLU) for its ham-fisted handling of the Lindsay Shepherd academic freedom affair. The first was lodged by Shepherd herself, who alleges harassment, intentional infliction of distress, negligence, and constructive dismissal. The second was brought by none other than psychologist-come-celebrity, Jordan Peterson, who claims recoverable damages primarily under defamation law.

WHAT DID PETERSON FIND SO OBJECTIONABLE? WHY WERE ACTIVISTS SO INCENSED BY HIS PUBLIC OPPOSITION?

Peterson's profile, personality, and best-selling book were highlighted in the *IPA Review* May edition. Peterson is a clinical psychologist and professor at the University of Toronto (U of T) and



is, as John Roskam observed, a 'new kind of (intellectual) rock star'.

Selling out shows in Melbourne, Sydney, and Brisbane as recently as March, this unlikely Axl Rose has found fame in philosophy that cannot be ignored, regardless of your political persuasion.

Peterson's leap from academic obscurity began in September 2016, when he started speaking out against Canada's Bill C-16. The proposed legislation, which has since become law, sought to add 'gender identity and expression' as protected grounds to the Canadian Human Rights Act. Of concern to opponents, including Peterson, was the proposal leaving open the possibility that failure to use the 'correct' pronoun when addressing someone might constitute actionable abuse, discrimination, 'hate speech', or even violence.

As the bill approached parliamentary consideration, public opposition grew, fuelled by Peterson's three-part YouTube video. Fanning the flames further, Peterson then publicly committed to personal non-use of non-binary pronouns, arguing his speech would not and ought not be compelled by government fiat.

After several October 2016 on-campus U of T rallies regarding free speech and trans/non-binary issues, Peterson received a letter from U of T administration claiming 'the refusal by a teacher or colleague to use the personal pronoun that is an expression of [a] person's gender identity can constitute discrimination'. The letter also suggested that certain members of the U of T community found Peterson's positions so 'unacceptable, emotionally disturbing and painful' that, coupled with campus rally activity, they feared for their safety. 'In view of these impacts', the letter goes on to read, 'as well as the requirements of the Ontario Human Rights Code, we urge you to stop repeating these statements'.

Within days of the letter, Peterson's YouTube exploits continued with a video announcement that U of T would be hosting a debate on Bill C-16 and free speech concerns. The debate, which took place in November 2016, was boycotted by trans/non-binary activists. Their stance? C-16 was '#NotUpForDebate'.

What did Peterson find so objectionable, why were activists so incensed by his public opposition? On its face, the proposed legislation merely added two traditionally marginalised classes to a list of others deserving protection from institutional discrimination. On TVOntario (TVO) current affairs program *The Agenda*, Peterson tried to explain. (The hour-long segment, which is widely available online, is what ultimately sparked the WLU controversy. More on that to come.)

Peterson outlined his concerns with C-16: it would codify aggressive and politically-motivated attempts to control language; it would remove certain gender issues from reasoned disagreement and debate; and it would subject individuals and the institutions with which they associate to civil and, by extension, criminal sanction.

According to a Canadian Department of Justice (DOJ) Q&A on Bill C-16, the terms 'gender identity' and 'gender expression' weren't defined in the legislation so 'the law would be as inclusive as possible', leaving the details to 'courts, tribunals and commissions' given their

‘experience with particular cases’. One such authority, the Ontario Human Rights Commission, recognised by the DOJ as providing ‘helpful discussion and examples that can offer good practical guidance’, has asserted as follows:

Refusing to refer to a trans person by their chosen name and a personal pronoun that matches their gender identity, or purposely misgendering, will likely be discrimination when it takes place in a social area covered by the [*Human Rights*] Code, including employment, housing and services like education. The law is otherwise unsettled as to whether someone can insist on any one gender neutral pronoun in particular.

PETERSON’S RESORT TO LEGAL PROCESS IS AS PROBLEMATIC AS THE LEGISLATION AT ROOT OF THE WHOLE SAGA

Not only does the Commission seemingly confirm that failure to refer to someone by their chosen pronoun constitutes actionable discrimination, ‘good practical guidance’ according to the Canadian DOJ, but it also implies this regulation is beyond legal rebuke. ‘The law recognises that everyone has the right to self-identify their gender and that “misgendering” is a form of discrimination’, so they say.

The Commission has also suggested:

Discrimination happens when a person experiences negative treatment or impact, intentional or not, because of their gender identity or gender expression ... and that organisations are liable for any discrimination and harassment that happens.

If the legislation permits courts, tribunals, and commissions to define gender identity harassment and discrimination, considering some have done so to include misuse or non-use of preferred pronouns, how can reasonable people dismiss Peterson’s concerns out of hand? Straw men, ad hominem attacks, presupposition, cherry picking, and manipulation. That’s how. Peterson’s January 2018 interview with Cathy Newman of Britain’s *Channel 4 News* is a good example.

During that now notorious interview—another YouTube sensation nearing 12 million views—Peterson fends off aggressively inconsiderate questioning about campus protests, postmodernism, and his positions on gender issues.

Why people can’t listen to and critically engage Peterson’s reasonable and generally inoffensive points of view on this subject remains a mystery to me, but one place where I would assume his ideas might find at least some welcome is the university. Unfortunately, the university, where the free exchange of ideas theoretically reigns supreme, was the next stop on Peterson’s ‘intellectually dark’ rock star tour.

Wilfrid Laurier University is a public university in Waterloo, Ontario. Established in 1911, it now boasts a student population the size of Wangaratta. The WLU controversy and subsequent litigation arose when Shepherd, a WLU teaching assistant at the time, showed her ‘Canadian



Communication in Context' class a clip of Peterson's TVO appearance. Despite the clip being part of an educational public service broadcast, Shepherd was summoned to an interrogate-and-reprimand meeting with WLU officials within days of showing portions to her students.

The meeting, 40-plus minutes of which were recorded by Shepherd and made available online for our benefit, is disturbing to anyone interested in academic freedom, liberty of thought and expression, open debate, and the testing of ideas. In attendance were Shepherd, Nathan Rambukkana (her faculty supervisor), Herbert Pimlott (another faculty member), and Adria Joel (WLU's 'Manager of Gendered Violence & Sexual Assault Prevention').

The recording begins with the implication Shepherd was either a former student of Peterson or one of his 'followers'. Once Shepherd explains she's neither and, instead, a self-identified leftist who doesn't share Peterson's ideology, the interrogation turns to why she could possibly think it okay to expose students to Peterson's 'transphobic' views. Taken aback, as anyone in her position would be, Shepherd retorts:

Can you shield people from [these] ideas? Am I supposed to comfort [students] and make sure that they are insulated away from this? Like, is that what the point of this is? Because to me, that is so against what a university is about ... I was not taking sides. I was presenting both arguments.

Rambukkana replies:

So the thing about this is, if you're presenting something like this, you have to think about the kind of teaching climate that you're creating. And this is actually, these arguments are counter to the Canadian Human Rights Code. Ever since ... C-16, ever since this passed, it is discriminatory to be targeting someone due to their gender identity or gender expression.

The exchange continues:

Shepherd: Like I said, it was in the spirit of debate.

Rambukkana: Okay, 'in the spirit of the debate' is slightly different than 'this is a problematic idea that we might want to unpack'.

Shepherd: But that's taking sides.

Rambukkana: Yes.



Shepherd: It's taking sides for me to be like 'oh, look at this guy, like everything that comes out of his mouth is B.S., but we're going to watch anyway'.

Rambukkana: I understand the position that you're coming from and your positionality, but thereality is that it has created a toxic climate for some of the students.

And continues:

Rambukkana: Do you see how this is something that is not intellectually neutral, that is kind of 'up for debate', I mean this is the Charter of Rights and Freedoms.

Shepherd: But it is up for debate.

Rambukkana: You're perfectly welcome to your own opinion, but when you're bringing it into the context of the classroom that can become problematic, and that can become something that is ... that creates an unsafe learning environment for students.

Insisting she's not transphobic, Shepherd reiterates that, consistent with her role, she remained neutral. To Rambukkana, however, that's precisely the problem.

After Shepherd is accused of violating federal and provincial human rights codes, Joel chimes in, explaining she also has run afoul of the university's gendered and sexual violence policy. She alleges Shepherd 'targeted' 'trans folks' by legitimising Peterson's C-16 position as a 'valid perspective'. According to Joel, Shepherd caused actual harm to trans students by questioning the validity of their identity and their pronouns.

When Shepherd argues Peterson is a public figure with a perspective that matters, right or wrong, Pimlott notes Richard Spencer, an American neo-Nazi, is a public figure as well. His theories and ideas, like Peterson's, simply 'don't have any academic credibility'. Not to be outdone, Rambukkana continues the comparison: 'Playing a clip of Peterson, without first providing any previous context to the students, was like neutrally playing a speech by Adolph Hitler'.

When Shepherd's recording of the meeting became public, rather than widespread recognition that universities should recommit to academic freedom, partisans predictably withdrew to their echo chamber battle stations. As on-campus harassment of Shepherd increased, WLU began its clumsy, insincere, and, at times, dishonest response. That's when Shepherd decided to sue.

Once it became clear the school's bungling would only continue, Peterson joined the plaintiffs' party. According to him, his hope was that 'the combination of the two lawsuits [would] be enough to convince careless university professors and administrators, blinded by their own ideology, to be much more circumspect in their actions and their words'.

So, now, we have legislation potentially compelling speech, a university restricting academic freedom, AND a free speech advocate suing to control what goes on in the classroom because a



school hasn't learned 'what needed to be learned'. Call me cynical, but something doesn't quite seem right here. (Every rose has its thorn, Axl included.)

Peterson's resort to legal process is as problematic as the legislation at root of the whole saga. To me, employing defamation law the way he has axiomatically undermines the ideals that, in this context at least, Peterson seeks to advance. Individuals should be free to identify as they wish without compelling others to alter their thoughts or language in a way that suits their interests. Inasmuch as Peterson should not be made to say 'ey' (an accepted gender-neutral pronoun), university administrators should not be legally deterred from comparing him to neo-Nazis, no matter how ludicrous the link may be. After all, if certain trans/nonbinary activists are 'Maoist', as Peterson has claimed, why couldn't he be 'Hitleresque'? (I don't think he is, by the way, but that's beside the point.)

Personally, I'll call someone whatever it is they want me to call them, provided my horrible memory permits. The point here is that, morally, individuals are inherently valuable and deserving of respect, regardless of gender identity OR point-of-view. This means they must be allowed to express their identities or views (good, bad or neutral) free of institutional persecution. It seems our preference for emotion over reason lately has us all forgetting this fact from time to time.

Shirking the societal right to free expression so that a person or group can enjoy being identified by others as they wish is troubling no matter who the speaker or what the utterance. Certain LGBTQ activists need the reminder that freedom of expression has advanced their causes much faster than had intolerant cisgender majoritarians been allowed to continually stifle discourse (and cultural progress). Peterson needs reminding he's a powerful figure and using the blunt instrument of law to get his way cedes moral authority on the matter at hand.

For additional context, enter stage left: the Southern Poverty Law Center (SPLC), a storied, Alabama-based legal advocacy organisation. In October 2016 it included the founder of UK think tank, *Quilliam*, Maajid Nawaz, in its *Field Guide to Anti-Muslim Extremists*. Despite the label, Nawaz is actually a former Islamist turned anti-extremism activist, now considered a human rights champion worldwide and across political spectrums.

EMPLOYING THE FORCE OF INSTITUTIONAL POWER ... TO COMPEL OR RESTRICT INDIVIDUAL THOUGHT OR EXPRESSION SHOULD BE RESISTED

Like Peterson, Nawaz sued. He later explained: The 'SPLC, [which] made [its] money suing the KKK, was set up to defend people like me, but now [it has] become the monster they have claimed they wanted to defeat [...] Placing my name on a list like this not only smears my name but also puts me in physical danger'.

In June, we learned the Nawaz case settled for an apology and a whopping US\$3.375 million. Announcing the settlement on SPLC's behalf was its president, Richard Cohen: 'After getting a deeper understanding of their views and after hearing from others for whom we have great respect, we realize that we were simply wrong to have included Mr Nawaz and *Quilliam* in the *Field Guide*'



Arguably, the Nawaz case is a closer call than Peterson's, but, even so, its effect remains concerning. Was the SPLC wrong to call Nawaz an anti-Muslim extremist? Of course. Nawaz is as anti-Muslim as Peterson is Hitleresque. But shouldn't Nawaz, 'a moderate Muslim [who] will not be silenced', think twice before suing to silence another? Shouldn't those concerned about the 'Regressive Left' endeavour not to become the 'Regressive Right'?

Human development rests on engaging ideas, not repressing them. Employing the force of institutional power—be it via discrimination law, defamation law, or otherwise—to compel or restrict individual thought or expression should be resisted, regardless of proponent, party, or political ideology. Just as we should be wary of legislation like C-16, we should be sceptical of defamation claims, especially those of public figures. (Sydney's reputation as 'defamation capital of the world' is a title worth shedding, by the way.)

What C-16, WLU, Peterson, and, to a lesser extent, Nawaz tell us is that empanelling judges, juries, or administrators to rule on the permissibility of speech should be universally concerning. To own oneself is to own one's thoughts, feelings, and expression. If this matter of natural right is really 'up for debate', I'll happily co-opt the hashtag. If it isn't, as I hope, then we need to recommit to engaging with one another reasonably, resist the temptation to institutionalise every human interaction, and remember (for Axl's sake and our own): 'So never mind the darkness, we still can find a way'.

Matt Widmaier is an American lawyer who recently relocated to Melbourne. Prior to his work in litigation, he served as counsel to a Pennsylvania senator. Matt hails from the 'cradle of liberty', where his political philosophy and sporting allegiance find root (Fly, Eagles, Fly!).