OF LIBERTY AND SOCIAL PRACTICES: THE CASE OF MALCOLM ROSS

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In 1988, a complaint was made to the New Brunswick Human Rights Commission that the District 15 School Board had deprived Jewish and other minority students of equal opportunity within the education system. For many years Malcolm Ross, a mathematics teacher in District 15, had published books and publicly expounded views which many people believed were anti-Semitic. It was alleged that through its inaction, the Board had condoned a racist and anti-Jewish role model and fostered a climate in which students could feel more at ease expressing anti-Jewish views. Eventually an inquiry was held, and in August 1991 the Board of Inquiry found in favour of the complainant.[1] The Inquiry found Ross' writings were, indeed, anti-Semitic,[2] and that although he had not expressed his views in class during the relevant period, an anti-Jewish climate had been fostered. It ordered that Ross be removed from the classroom and placed in a non-teaching position and that his employment be terminated if he published any further anti-Semitic writing, or sold or distributed his earlier anti-Semitic works.

In December 1991 an appeal against this ruling was heard in the Court of Queen's Bench of New Brunswick.[3] Justice Paul Creaghan found that removing Ross from the classroom in fact did impinge his "freedom of conscience and religion and his freedom of thought, belief, opinion and expression," thus violating s. 2 of the *Canadian Charter of Rights and Freedoms*.[4] He found further, however, that the limitations placed on Ross' rights were "demonstrably justified in a free and democratic society," and thus saved by s. 1 of the *Charter*. The order requiring termination of Ross' employment if he again published anti-Semitic writings, on the other hand, was beyond the Board's jurisdiction, and in any event would not be saved by s. 1 of the *Charter*.

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[1]*Attis* v. *Board of Education of District 15* (1991), 121 N.B.R. (2d) 1, (*sub nom. Attis* v. *New Brunswick School District No. 15*) 15 C.H.R.R. D/339 (Human Rights Board of Inquiry).

[2]While not using the word "anti-Semitic," the Board of Inquiry had "no hesitation in concluding that there are many references in these published writings and comments by Malcolm Ross which are *prima facie* discriminatory against persons of the Jewish faith and ancestry. ...These comments denigrate the faith and beliefs of Jews and call upon true Christians... to hold those of the Jewish faith and ancestry in contempt... Malcolm Ross identifies Judaism as the enemy and calls on all Christians to join the battle" (*supra*, note 1 at 52).

[3]*Attis* v. *Board of Education District 15* (1991), 121 N.B.R. (2d) 361 (Q.B.).

[4]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

Although the ruling and appeal raise many interesting and important questions, this comment will concentrate on a single, troublesome theoretical issue: Can sanctions *at work* for activities which occur *outside of work* ever be justified? The worry, of course, is that once we open the door to what amounts to on-duty regulation of off-duty activities, our hard-won freedom to live our personal lives as we choose will be eroded, and narrow-minded, illiberal sentiments will gain public muscle. If Malcolm Ross can be turfed out of the classroom for what he writes during his off hours, are gays and lesbians, unwed mothers, adherents of unusual religions, and so on, in danger of being forced to conform or lose their jobs? In the following discussion I shall assume, without argument, that the Inquiry was correct in finding Ross' books and views to be anti-Semitic. The argument, however, is concerned generally with teachers expressing anti-Semitic views and is directed at Malcolm Ross only in so far as the judicial system was correct in its finding of fact.

In his Board of Inquiry ruling, Chair Bruce entered the contested area. He removed Ross from the classroom for his anti-Semitic writings, and would remove him completely from his job for similar behaviour in the future. Creaghan J. was less bold, preserving Ross' employment security if not his classroom assignment. While these judgments show courage in taking the first steps into a very controversial area, in the end they are disappointing in their failure to recognize the full extent of the grounds for regulating Ross' outside activities while employed by the School Board.

In essence, Bruce and Creaghan J. both accept something close to what was originally an American approach: limitations on constitutionally guaranteed rights such as freedom of speech are justified only by a "clear and present danger" of serious, legally recognized harm. In the Canadian context this has become the requirement that laws which violate *Charter* rights may nevertheless be valid if they are "proportional" to a "pressing and substantial objective." To use the classic example, we feel fully justified in restricting the freedom of an individual to shout "Fire!" in a crowded theatre because such exercise of speech creates a clear and present, or pressing and substantial, danger of serious bodily harm to others. The danger is apparent and beyond reasonable dispute, standing near the 'certain' end of the foreseeability scale, and the threatened harm is legally recognized and attaches to identifiable individuals. In the *Ross* case, Bruce relies on the pressing and substantial danger of failing to provide Jews with an equal opportunity in the school. The danger was pressing and substantial because of the atmosphere created by Ross' presence in the classroom, and the endangered interest was legally recognized in the *Human Rights Act*[5] of New Brunswick. This explains why so much of the hearing was devoted to the atmosphere in District 15 schools. It also explains why Creaghan J. was unwilling to go beyond removing Ross from the

[5]R.S.N.B. 1973, c. H-11.

classroom, although the reason he offers is purely technical. It is widely assumed that once Ross is removed from the classroom, his opportunity to affect the atmosphere, and hence the protected interest, through providing an anti-Semitic role model for students will be significantly diminished.

Is there anything wrong with this reasoning? Surely we do not want to interfere with fundamental freedoms of speech and religion whenever it is even *possible* that exercise of the freedom might harm someone. If we want to be free, we must pay the price. And the price is accepting some degree of risk. As a society we balance the risks against the benefits gained from that degree of freedom. The Board and Court in effect decided that the risk or danger must be pressing and substantial. Just as surely, we do not want to limit fundamental freedoms whenever they interfere with just *any* interest. The interest must be one important enough to be recognized by the legal system, perhaps through a protected individual right.

Few would deny the value of freedom of speech, religion and the like, but at the same time few would think these freedoms can be absolute. The only viable question is how much rein they should be given or, alternatively, what restrictions should be placed on their exercise. In a relatively liberal society such as Canada, we begin with the assumption that that which is not prohibited is permitted. This liberal vision is strengthened and protected by the *Charter*, which guarantees certain freedoms generally and places the onus of demonstrable justification on those who would limit them. Much of the work of providing these demonstrable justifications for limiting liberty has already been done in the long common law tradition. Freedom of speech is regulated by the law of defamation, contracts, nervous shock, assault, fraud, threats, and many other areas. Freedom of religion is controlled through the *Criminal Code*,[6] drug laws, and so on. The tradeoffs implicit in the law have for the most part been so thoroughly absorbed into our thought processes and institutions that most people do not feel that their speech or religious freedoms are unduly restricted, or perhaps even restricted at all. For example, the law's restriction on homicide is so closely interwoven with the dominant values of our society that its clear interference with the religious freedom to offer human sacrifices is hardly noticed, let alone disputed. Similarly, our common understanding of the usefulness of honesty and commercial predictability paves the way to general acceptance of much of contract law and the law of fraud, even though these laws massively regulate our freedom of speech.

Malcolm Ross' activities can be described in such a way that they fit within the established, widely accepted system of tradeoffs. He was teaching mathematics, apparently quite well, and he was publishing books, written on his own time, which expressed his beliefs on matters of politics, history and religion. Described in this

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[6]R.S.C. 1985, c. C-46.

way, there seems no reason to complain. Indeed, we would probably rejoice if there were more competent teachers who wrote with such passion and dedication. As a society we have generally accepted the notion of a 'free marketplace of ideas' in which truth, beauty and other values emerge by a kind of Darwinian process from the interplay of freely expressed ideas. In the *Ross* case the judicial system was willing to tamper with this idyllic picture only because his activities combined with the specific circumstances to interfere (demonstrably) with a right to equal education guaranteed each student by statute. Taking Ross out of the classroom in effect sanctioned him for expressing his beliefs, but this was justified to the extent that his presence in the classroom created an atmosphere posing a pressing and substantial danger to the students' rights. It was, in the end, individual right versus individual right: Ross' right to freedom of expression and religion, and the students' right to equal educational opportunity. Bruce's judgment clearly showed there was ample evidence of a 'dangerous atmosphere' amounting to a pressing and substantial danger to students' rights. Creaghan J. apparently accepted this as demonstrably justifying restrictions on Ross' rights as long as the danger persisted. But since the evidence of dangerous atmosphere was largely restricted to role modelling and Ross' visible presence to students, there was insufficient evidence that the danger would continue if Ross were removed from teaching.

Viewing Malcolm Ross as an individual performing isolated acts of speech, religion and so on, the Bruce-Creaghan approach is probably the strongest official response we can expect. But Ross' extra curricular activities cannot be understood merely as isolated individual acts. This is not simply a man expressing idiosyncratically unreasonable ideas. Given the findings of the the Board of Inquiry, this is a man taking part in, and furthering, a social *practice* with a long and dishonourable history.[7] That practice is anti-Semitism. It feeds on ignorance and fear, and has at its core a profound disrespect, and even hatred, for others. It has been legally embodied in Canadian immigration policy as well as Third Reich Aryanization laws, and expressed in the mindlessness of innumerable jokes and expressions as well as the monstrousness of "the Final Solution". It is found in graffiti as well as high art, and Christian writings as well as Nazi propaganda. It has been carried out with the cold efficiency of the Wannsee Conference as well as the wild savagery of countless pogroms. Western civilization has been, and continues to be, deeply anti-Semitic. If the Board of Inquiry's findings are correct, Malcolm Ross' writings are clearly part of that tradition. When, in his polemical writings, he broadly questions mainstream historical accounts of the Holocaust, or alleges a conspiracy to undermine and destroy Christianity, furthered by Jewish/"Zionist" control of the news media and publishing, he is not merely expressing unusual, perhaps unreasonable, views of history and politics. He is

[7]The importance of evaluating individual acts of oppression as expressions of broader social practices was brought home to me by Catherine MacKinnon's analysis of pornography. See, for example, *Feminism Unmodified* (Cambridge: Harvard University Press, 1987) Part III.

promoting that set of beliefs, values and practices which we all recognize as anti-Semitism. Indeed, anti-Semitism is constituted by the small acts of numerous Malcolm Rosses as well as the historically pivotal acts of the mercifully few Adolf Hitlers.

The Bruce-Creaghan approach makes no use of this larger context. It looks for provable harm to the complainants in the present context: Did students feel afraid, were they singled out, shunned or made to feel different, etc.? These are harms that may be caused by the presence of an anti-Semite in the classroom, and their reality and importance should not be minimized. But we need not cross examine children to find all the harm we need. Anti-Semitism has amassed a body count equalled by few other belief/value systems. Even the most rudimentary knowledge of modern history can leave no doubt about the harm anti-Semitism has done and the ongoing threat it poses. It is threatening not by accident or ignorance; the Holocaust did not occur because well-meaning people were mistaken. It is threatening because at its heart lies an arrogant assertion of the right to brutally dominate people perceived as different or inferior. In this it shows a complete rejection of the most abiding premise of Western morality and law, the fundamental equality of all people. In its formal aspect, this assumption of equality arose from the Greco-Roman tradition, and generated such notions as the rule of law, inalienable human rights and democracy. In its substantive aspect, it can be traced to the prophetic tradition of the Bible, and perhaps to pre-patriarchal social systems, and finds expression in mercy, equity, social justice, compassion and the "other voice" of feminist moral theory. Anti-Semitism is not the intellectual rejection of these ideals; it is *a **practice** of inequality enforced through violence and hatred,*[8] and thus the active violation of those ideals.

If someone engages in a practice which has led to millions of deaths in the past and continues to threaten the lives and well-being of others, should we hesitate to stop that practice? If that practice were an alternative system of medicine we would have no doubt. We would not worry that this or that practitioner harmed few or no patients, or that someone supplying instruction or drugs to the practitioners was not directly harming patients. Individual causation would not be a necessary condition for remedial action. The extreme danger of the practice itself, on the whole, would justify a ban or at least careful regulation.

But surely, the objection goes, something more is at stake here. Regulation of Ross' activities would necessitate restrictions on rights fundamental to our very

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[8]It is not, of course, the only such practice, as victims of racial, sexual and heterosexual hatred can attest. This is not the place to discuss the relationship between the various practices of inequality, although it is tempting to look for common denominators. Most of the argument presented in this paper can be used, with only small changes of wording, in the context of sexist, racist and homophobic 'expression.'

legal and political system: freedom of thought, expression and religion. Surely it makes a difference that Ross' activities were verbal, that he never raised a fist, let alone a gun. We can safely control the fist and the gun but not the thought and the word, for our society is based on the latter in a way it is not based on the former (or so we would like to think). This is not a trivial objection. Our society is to a considerable extent derived from Greek and Roman Stoic ideas of rationality and individual autonomy, which are meaningless without freedom of expression. But do we, in fact, endanger the foundations of our social system[9] when we restrict anti-Semitic speech? The Bruce-Creaghan approach says no, as long as we draw the line at the point of demonstrable, immediate threat to legally recognized rights of other individuals in the context. But this is not the only point at which we can justifiably draw the line. Viewing the individual instances of speech as part of a practice of anti-Semitism, the harm of the individual act is seen for what it is: an attack on some of our most basic moral and social assumptions, a direct threat to Jews and an indirect threat to everyone else. The individual act has disproportionate power because of the larger social practice, so the harm it does through demeaning, defaming and endangering Jews can only be fully appreciated when we keep the death camps, pogroms and centuries of hatred and discrimination foremost in our minds. To be willfully ignorant of other times and other places is to blind ourselves to enormously dangerous cultural systems or practices. The question is not *whether* society should take steps to blunt and eliminate this evil, but *how* it can best be done.

Disrespect and hatred for others is not an accidental result of anti-Semitism; it is at its very heart. When we say that engaging in this practice is irrelevant to one's employment as a public servant as long as these views have no direct impact on the job, we are refusing to take the threat, the harm and the evil seriously. Teachers and other public servants are given positions of privilege and power. With that privilege and power goes the possibility of influence, social standing and validation. The price of freedom is the validation and influence of views, values, qualities and lifestyles that we do not like. All things considered I may prefer that my children not be taught by heterosexuals, men, football players, conservatives or people who wear polyester leisure suits. But I recognize that these characteristics or activities must be tolerated as the price of freedom, for there are others who would probably prefer that their children be taught by just these kinds of people. In general, the liberal vision of society, in which state power is neutral between various conceptions of the good life, is very appealing. But the benefits of liberalism need not be sacrificed to deal effectively with the anti-Semitic teacher. Practicing anti-Semitism is not at all like being a football player, a

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[9]I leave aside the question of whether we ought to change some of the bases of our system, although like most feminists I believe there is much to criticize. For the purposes of this short paper I shall assume without argument that the ideal of equality of all people can be given a benign interpretation that would survive a feminist transformation of society.

conservative or wearing polyester. It involves in its essence disrespect and the promotion of hatred for others. Being a conservative or a football player or a wearer of polyester does not. As a result, the practice of anti-Semitism is easily distinguished, for example, from homosexuality, which at its core is about love and connection, not hatred and disrespect. Homosexuality does not threaten our basic values, the educational process or students, even though some people may feel uncomfortable about gay or lesbian teachers in the classroom. The presence of known homosexuals in the classroom may, indeed, validate the 'state' of being homosexual or the 'practice' of homosexuality. But that is quite different from validating anti-Semitism. The former is perfectly consistent with society's core values of equality and respect; the latter is patently repugnant to those values.

In Western society anti-Semitism has two other features which help distinguish it from other controversial beliefs and practices. First, it is a political ideology or world view, and second, this world view is closely associated with the dominant culture. Its various elements cohere in a system of thought and behaviour which has a long history, deep cultural roots, and widespread currency among groups in a position to translate its ideas into power. An anti-Semitic book or speech invokes, and resonates with, a deeply entrenched cultural set of beliefs, values, feelings and practices among those with power to make real the disrespect, inequality and violence of that tradition. It thus constitutes a real threat to Jews in a way that Jewish prejudice cannot threaten Christians, probably even in Israel. Not only are Jews rarely in secure positions of power from which systematic dominance can be imposed on others, but because historically Jews have been victims of powerful Christian societies, Jewish culture on the whole has developed as one of survival and accommodation, not domination and suppression. Western societies come 'loaded for anti-Semitism', so to speak. Anti-Semitism's thought patterns, symbols, beliefs and so on are always at hand for an explosive outbreak of bigotry. In North America probably only sexism, heterosexism and white racism have such depth of ready cultural materials.

Anti-Semitism, then, is a *system of domination* which is so deeply and widely rooted in the dominant cultures of North America and, indeed, the world that it presents a practice of outstanding danger to individuals and to the foundations of our moral and political order. This system involves a set of beliefs, social ideals, personal values, symbols, archetypal stories, heroes, villains, behaviour and other cultural elements. The various elements combine in easily recognized rituals of denigration and patterns of violence, arrogance and disdain. Like most ideological systems it is both invisible and self-perpetuating. Those who participate in its forms of life view the world and construct their knowledge through its veil, seeing only 'the truth' as so constructed. At the same time it presents a pattern of beliefs and values which hides, or at least purports to justify, disregard for fundamental respect and equality. Its stories and symbols give meaning and value to rituals of denigration: violence and discrimination become heroic as the practitioner finds

her or her behaviour echoing the archetypes of its myths. The ready supply of these symbols, stories and ritual patterns in the broader society provides instant meaning and validation for anti-Semitic acts by *anyone* steeped in the dominant culture. It is like the image of Jesus in a pattern of ink spots; it was there all the time, but only at certain moments do people 'see' Jesus, their perception suddenly reorganized with a new meaning. Anti-Jewish elements are everywhere in our culture, ready at any time to suddenly produce the organizing image or principle of anti-Semitism, giving new meaning to old things. Even if there were no practicing anti-Semites in the world, the danger would remain as long as the values, stories, symbols and so on remained woven into our culture. Anti-Semitism probably uses many of the patterns, values, rituals, etc. of other powerful systems of domination such as sexism, white racism and heterosexism. This is one reason why the struggle against any one of these forms of oppression must be in concert with struggles against all the others, and why resistance to progress in one liberation struggle is so often accompanied by heightened oppression in other areas.

Flagrant and extended anti-Semitic, sexist, heterosexist or racist activity by a teacher or other public servant falls into a demonstrably different category than other kinds of undesirable or controversial activities and lifestyles. The danger and harm to individuals and society must be evaluated differently, with the larger context in view. While provable harm to individuals from specific acts by the public servant is, of course, important, it is only part of what should be considered. Beyond such specific, provable harm lie the harm and danger inherent in the general *practice* of anti-Semitism, sexism, or whatever. These systems and practices of oppression degrade and dehumanize individuals and groups and are destructive of the most fundamental ideals of our moral, political and legal systems, namely the rights of equality and respect or, as Ronald Dworkin put it, the "right to equal concern and respect."[10] There is no clear reason why public servants should not be expected to show respect for the deepest ideals of our moral and political system. We can easily tolerate rejection of many other less fundamental, and more controversial, ideals such as capitalism, constitutional monarchy, and Christianity. But since these other ideals depend at least in part for their existence and social significance on the acceptance of *some* conception of equal respect for all people, the latter ideal must be accorded a degree of respect not accorded the former.

A liberal society can and should, of course, tolerate discussion of the value or acceptability of even its most basic values and rights. But it is far from clear that it can or should freely tolerate wide-spread, systematic practices repugnant to those ideals or foundations. Liberalism is *not* a value-free system at its base. We seek to make our society better, or at least acceptable, according to an ideal of

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[10]R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978) c. 6 and 7.

what human society can be if everyone is accorded equal concern and respect. In seeking to make our society *this* way rather than *that*, we automatically take sides, regulate, prohibit and foster. The only question is *how* we can foster equality and respect, and eliminate fundamental inequality and disrespect, not *whether* we should do so.

Can we afford to support, condone and validate deep, *systematic practices* of inequality enforced through violence and hatred?[11] Should we elevate to coveted, honoured positions of public service people who knowingly, deliberately and publicly engage in, support or further these practices? In the end there can be no general rule, no sweeping "yes" or "no". Our considerations must include (but not necessarily be limited to) the following:

1. The individual and social harm (including risks of harm) resulting from limiting the freedom(s) in question;
2. The harm to identified individuals of the acts in question, *viewed in isolation*;
3. The harm to identified individuals of the acts in question, *viewed as part of a cultural and historical practice*;
4. The harm to *all members of the targeted group* of the acts in question, viewed as part of a cultural and historical practice;
5. The individual and social harm of condoning or validating the practice in general, including the harm of *maintaining the cultural elements or tools of a system of violent domination*.

This is not the place to analyze all of these factors in the *Ross* case. A few general observations can be made, however. First, because the Board of Inquiry and the Court of Queen's Bench confined themselves almost exclusively to the first two items, they did not adequately take into account the fact that Ross' activities

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[11]The Supreme Court of Canada has recently considered *Charter* challenges to *Criminal Code* provisions dealing with hate literature (*R.* v. *Keegstra* [1990] 3 SCR 697) and obscenity (*R.* v. *Butler* SCC File No. 22191, February 1992). In both cases the Court found that the *Criminal Code* violated the *Charter* right to freedom of expression, but that such violation was reasonably justified, and thus saved by s. 1 of the *Charter*. Both judgments recognized that the fundamental objective of the provisions was the avoidance of harm, either directly to members of the targeted group, through the threat to self-dignity, or indirectly, through the effects on the attitudes and behaviour of others. In neither case, however, did the Court explicitly recognize the importance of viewing individual acts as parts of *practices of inequality*. Much of the harm of hate literature, in fact, comes from its use of, and place in, practices of racism, anti-Semitism, sexism and heterosexism. Pornography's harm, too, centrally involves the practice of enforced inequality known as sexism. As courts struggle with the "community standard" test of whether publications have "the undue exploitation of sex" as a dominant characteristic, and thus satisfy the *Criminal Code* definition of obscenity, we can only hope that they will become more sensitive to the relationship between individual acts or 'expressions' and the general, immensely harmful practice of sexism.

were not isolated acts but part of a social practice known as anti-Semitism.[12] They looked only at the specific harm and risk to the immediate parties, ignoring the more general context. Condoning or validating individual acts such as publishing insulting or offensive books would probably be quite harmless were it not for their part in a much more dangerous and general social practice. The harm of the individual act can only be understood in the broader context. And once that broader context is appreciated, one cannot fail to see how the individual act transcends the immediate complainant and attaches to every member of the targeted group. Contributing to the practice of anti-Semitism endangers not just the Jews in the same school, office or district; it endangers Jews everywhere.

Secondly, the Bruce-Creaghan approach fails to adequately appreciate the significance of the deeply rooted nature of anti-Semitism in our culture. The practice is woven into the fabric of our society, so in evaluating the danger and the harm of individual anti-Semitic acts we must be cognizant of the power those cultural elements hold for motivating, justifying, directing and catalyzing discrimination and violence. Cultural items and individual behaviour which appear innocuous or only mildly offensive have the power of crystallizing into a practice which is anything but innocuous. While we should not be paranoid about our heritage, we cannot ignore its dangers either.

Finally, the reluctance of many people to support the removal of Malcolm Ross from his position of privilege stems from a fear that this would put us on a slippery slope to the *Brave New World* or *1984*. When the loss of his job is the price of his freedom to speak, are not all of our freedoms in danger? The short answer is no. Anti-Semitism and similar culturally deep systems of belief and practice are, in general, readily distinguishable from other controversial or even undesirable practices or conditions. Being based on inequality, domination and violence, they are repugnant to our most basic values or ideals. Few tolerable lifestyles, beliefs or activies satisfy this description. Being an unwed mother, publishing wacko books about alien abductions, and most other things we do or we are, do not foster culturally entrenched patterns or practices of violently enforced inequality. The offence, and even danger, of lifestyles and activities we would want to protect from social sanction are shallow in comparison to the dangers of anti-Semitism, sexism, heterosexism and racism. Removing the anti-Semitic teacher from her or his post does not open the door to the tyranny of 'political correctness' from the left *or* the right.

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[12]This may be an inevitable result of our current laws and jurisprudence, with their individualist heritage. What we need to do is begin to expand our understanding of what constitutes harm and how harm can be caused. This short paper suggests that an adequate analysis of causing harm must take into account the social and historical context of the individual act, and in particular the practices of which the individual acts may be part. This has far-reaching implications for the legal response to oppression. See, for example, Catherine MacKinnon's analysis of pornography, *supra*, note 2, which provided the inspiration for this commentary.