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Accommodation Without Compromise: Comment on *Alberta v. Hutterian Brethren of Wilson Colony*

Richard Moon*

I. INTRODUCTION

The regulations in Alberta dealing with driver's licences were amended in 2003 to require that all licence holders be photographed. The licence holder's photo would appear on his or her licence and be included in a facial recognition data bank maintained by the province.¹ Prior to this change, the regulations had permitted the Registrar of Motor Vehicles to grant an exemption to an individual who, for religious reasons, objected to having her or his photo taken. Members of the Hutterian Brethren of Wilson Colony, who believe that the Second Commandment prohibits the making of photographic images, had been exempted from the photo requirement under the old regulations, but were required under the new law to be photographed before a licence would be issued.²

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¹ *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567, at para. 6 (S.C.C.) [hereinafter "*Hutterian Brethren*"]. Driver's licences in Alberta are governed by the *Traffic Safety Act*, R.S.A. 2000, c. T-6, and regulations made pursuant to the Act. The power of the Registrar to grant exceptions to the photo requirement contained in the *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, was eliminated in May 2003 (*Operator Licensing and Vehicle Control Amendment Regulation*, Alta. Reg. 137/2003, s. 3). Under the current regulations the Registrar "must require an image of the applicant's face, for incorporation in the licence, be taken". The regulations also provide that the photo may be used for "facial recognition software for the purpose of the identification of, or the verification of the identity of, a person who has applied for an operator's licence": *id.*

² The members of the Colony considered photographs to be "likenesses" within the meaning of the Second Commandment (*Exodus*, 20). A member who allowed his or her photo to be taken might be censured by the community (*id.*, at para. 29, *per* McLachlin C.J.C.). In response to the Hutterian Brethren's objection to the new regulation, the province proposed a compromise: while a photograph would be taken of each licence holder and entered into the facial recognition data bank, it would not be included on the actual licence. The non-photo driver's licence would be marked as

The members of the Wilson Colony challenged the constitutionality of the photo requirement, arguing that it breached their section 2(a) and section 15 rights under the *Canadian Charter of Rights and Freedoms*³ and could not be justified under section 1. They argued that no one from the Colony would be able to obtain a driver's licence and that this would affect the Colony's ability to purchase and sell goods, which was necessary to the maintenance of its agrarian and communal way of life. Enforcement of the new regulation would require Colony members to choose between two elements of their religious commitment, respect for the Second Commandment's prohibition on the creation of images and conformity to a way of life based on collective ownership and community independence and self-sufficiency.

A judge of the Court of Queen's Bench held that the universal photo requirement limited the Colony members' right to freedom of religion under section 2(a) and that the province had not demonstrated that this limit was justified under section 1. While the judge thought that the objective of preventing identity theft was pressing and substantial, he found that the restriction did not meet the minimal impairment requirement, since the province had not accommodated the "distinctive character of the burdened group ... to the point of undue hardship".⁴ This, the judge noted, was the standard applied by the Supreme Court of Canada in *Multani v. Commission scolaire Marguerite-Bourgeois*.⁵ A majority of the Alberta Court of Appeal agreed with the trial judge that the province had not demonstrated that the universal photo requirement was justified under section 1. Justice Conrad for the majority held that the universal photo requirement did not reasonably accommodate the sincerely held religious belief of the Colony members.

The decision of the Alberta Court of Appeal was overturned by a majority of the Supreme Court of Canada in a judgment written by Chief Justice McLachlin (Binnie, Deschamps, and Rothstein JJ. concurring). Dissenting reasons were given by Abella J. and by LeBel J. (Fish J. concurring). The majority judgment of McLachlin C.J.C. accepts that the photo requirement breaches the section 2 (a) rights of the Wilson Colony members, but finds that the breach is justified under section 1. When

"Not to be used for identification purposes." The province's proposal was rejected by the members of the Wilson Colony, who insisted that they could not be photographed.

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

⁴ *Supra*, note 1, at para. 16 (quoted by McLachlin C.J.C.).

⁵ [2006] S.C.J. No. 6, [2006] 1 S.C.R. 256 (S.C.C.) [hereinafter "*Multani*"].

considering whether the restriction of the religious practice is justified under section 1, McLachlin C.J.C makes two general observations that are noteworthy. First, she insists that the minimal impairment component of the *Oakes*⁶ test does not involve the balancing of competing interests — that any balancing should be deferred until the final step of the *Oakes* test when the court weighs the costs and benefits of the restriction. This view has been expressed by the Chief Justice in previous decisions. The second and more significant assertion is that “reasonable accommodation analysis” is not appropriate when the court is considering whether a law that restricts a religious practice is justified under section 1. According to McLachlin C.J.C.: “A law’s constitutionality under s. 1 of the *Charter* is determined not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact.”⁷

The Chief Justice insists that the issue for the Court when determining whether a restrictive law is justified under section 1 is whether the law meets the requirements of the *Oakes* test, and most significantly the requirement that the benefits of the restriction outweigh its costs. But what does this proportionality analysis involve, if not a judgment about the reasonable balance or trade-off between the competing public and religious claims? It is possible that in repudiating “reasonable accommodation analysis”, the Chief Justice intends to exclude court-created exceptions to general statutory rules. The Court will not consider whether an exception should be made to the law for a religious practice, but simply whether the law is justified and should be upheld. Yet it is difficult to understand why the Court would rule out the creation of an exemption, but contemplate the striking down of the law (in whole or in part), on the basis that it interferes with a religious practice. The creation of an exception would compromise the law’s effectiveness to some degree, but striking down the law would completely prevent the government from pursuing its policy. Despite her formal repudiation of reasonable accommodation analysis, the Chief Justice frames the issue at the final stage of the *Oakes* test, as whether an exception to the photo requirement should be made. She considers the impact of a religious exception on the realization of the state’s policy and finds that an exception would compromise the policy. She concludes on this basis that the state is

⁶ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

⁷ *Supra*, note 1, at para. 69, *per* McLachlin C.J.C.

justified in not recognizing such an exception. The other possible understanding of the Chief Justice's repudiation of reasonable accommodation is that the courts should not require the state to compromise its policy to accommodate the spiritual needs of a particular individual. The difficulty with this is that the courts have interpreted section 2(a) as an individual right that protects any practice that the individual sincerely believes has spiritual significance, whether or not this belief is shared by others.

The Chief Justice's rejection of reasonable accommodation analysis signals a shift, however oblique or ambiguous, to a weaker standard of justification for state limits on religious practice. Chief Justice McLachlin follows the steps of the *Oakes* test and frames the issue as the balancing of competing state and religious interests. Adherence to the steps of the *Oakes* test gives the appearance of a rigorous justification process. However, she is not, as she claims, directing the Court back to the potentially rigorous requirements of the *Oakes* test, but instead creating an entirely formal test that lacks clear content and real substance. While the Chief Justice keeps open the possibility that a restrictive law may be struck down at the final stage of the *Oakes* test (because the costs to religious freedom outweigh the benefits of the law), the consequence of her rejection of "reasonable accommodation" may be that state law will invariably prevail over religious practice in the "balancing" of interests. A restriction will be justified as long as the law has a legitimate purpose and the restriction is necessary to advance that purpose. The scope of a law may be tailored to "exempt" a religious practice, if this can be done without compromising the law's purpose, in other words if it is not really an exemption at all, and the restrictive law would otherwise fail the minimal impairment test. The state will not be required to compromise its policies in any meaningful way to make space for a religious practice.

In rejecting the reasonable accommodation standard, the majority judgment in *Hutterian Brethren* appears to diverge from the Court's previous section 2(a) decisions. This divergence, however, may not be very dramatic. In very few cases have the Canadian courts held that the law should accommodate a religious practice. These include cases in which the objective of the law could be achieved without restricting the religious practice in any significant way (*i.e.*, when the minimal impairment test is failed); the law's objective is paternalistic so that no one other than the religious adherent is directly affected by the exemption; and the "secular" law reflects and advantages the cultural or religious practices of the majority community.

The Chief Justice's reasons reveal an ambivalence about the state's duty to compromise its policies to make space for religious practice and an uncertainty about the place of religion in the public life of the community. In a democratic community, individuals are often subject to laws with which they disagree and which limit their activities. The argument that religious beliefs and practices should be insulated or protected from public action rests on an assumption that they are different from other beliefs and practices, that they are deeply rooted and tied to the individual's identity. The individual may experience the restriction of her or his practices not simply as a rejection of her or his views or values, but as a denial of her or his equal worth. Moreover, religious beliefs and practices may be treated as a private matter towards which the state should remain neutral, because we know through experience how difficult it is to reconcile competing religious views within a democratic political community.

However, the difficulty with treating religion as a private matter that should be insulated from public action is that religious beliefs involve truth claims that are contestable and that often have public implications. Most religions have something to say about how we should act towards others and the kind of community we should work to create. State neutrality towards religion, and more particularly the insulation of religion from public decision-making, is workable only if we imagine that religion operates in an entirely separate sphere from politics. The Chief Justice's reservations about reasonable accommodation rest on a concern that the Court's subjective understanding of religion (a practice will fall within the protection of section 2(a) if the individual has a sincere belief in its spiritual significance) means that state law may conflict with religious practice in a myriad of ways that cannot reasonably be predicted in advance. However, the larger difficulty with the subjective understanding of religious belief is that it makes the distinction between religious and other beliefs and practices, and the insulation of religious practices from public action, more difficult to justify.

While it may sometimes be useful to treat religion as separate from politics, the insulation (and exclusion) of religion from public decision-making will inevitably be partial and pragmatic. Accommodation will occur at the margins of law, and will involve only minor trade-offs that do not significantly affect the advancement of democratic policies. It will not involve a full-blown balancing of competing public and religious interests (in which the state's objectives might sometimes be subordinated to the needs or interests of a religious community). Religious

practices will be protected or given space when it is possible to treat them as “private”; most notably when the practice does not directly conflict with public policy and other means may be adopted by the state to advance its objectives that do not interfere with the practice, and perhaps also when the religious practice is viewed as a personal matter of limited public interest and involves risk or harm only to the actor.

II. THE JUDGMENT OF THE SUPREME COURT OF CANADA

Chief Justice McLachlin draws from the Court’s earlier decisions in *Syndicat Northcrest v. Amselem*⁸ and *Multani*⁹ a two-part test for determining whether section 2(a) has been breached. The issues for the Court are (1) whether “the claimant sincerely believes in a belief or practice that has a nexus with religion”; and (2) whether “the impugned measure interferes with the claimant’s ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial”.¹⁰ Chief Justice McLachlin notes that there was no dispute in the courts below that the photo requirement breached section 2(a). She wonders whether the government should have so readily conceded the breach of section 2(a) (and in particular that the interference was not trivial), but nevertheless addresses only the section 1 issue and the proper application of the *Oakes* test to the photo requirement.

Chief Justice McLachlin finds that the purpose behind the photo requirement (of reducing the risk of identity theft by ensuring the integrity of the driver’s licence system) is pressing and substantial.¹¹ She accepts that the inclusion of driver’s licence photos in a digital data bank will “ensure that each licence in the system is connected to a single individual, and that no individual has more than one licence”, which in turn will help to prevent the fraudulent acquisition of driver’s licences.¹² In addressing the rational connection and minimal impairment tests, the Chief

⁸ [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (S.C.C.) [hereinafter “*Amselem*”].

⁹ *Supra*, note 5.

¹⁰ *Supra*, note 1, at para. 32, where she continues noting that “[t]rivial or insubstantial” interference is interference that does not threaten actual religious beliefs or conduct.”

¹¹ *Id.*, at para. 4:

The goal of setting up a system that minimizes the risk of identity theft associated with driver’s licences is a pressing and important public goal. The universal photo requirement is connected to this goal and does not limit freedom of religion more than required to achieve it. Finally, the negative impact on the freedom of religion of Colony members who wish to obtain licences does not outweigh the benefits associated with the universal photo requirement.

¹² *Id.*, at para. 42.

Justice reiterates a view she has expressed in other Charter cases, that these tests are concerned simply with the relationship between the law's restrictive means and its pressing and substantial ends, and do not involve the balancing of competing interests.¹³ The Chief Justice insists that the balancing of competing interests (the importance of the law's objective versus the value of the right) should be deferred until the final part of the *Oakes* analysis. In her view, the universal photo requirement advances the law's objective rationally and without unnecessarily restricting the right.¹⁴ She considers that any alternative to the universal photo requirement would compromise the government's objective: the prevention of identity fraud.

In the course of her discussion of the minimal impairment requirement, the Chief Justice argues that minimal impairment and reasonable accommodation are conceptually distinct and should not be equated. Reasonable accommodation analysis, which is drawn from human rights statutes and jurisprudence, “envisions a dynamic process whereby the parties — most commonly an employer and employee — adjust the terms of their relationship in conformity with the requirements of human rights legislation, up to the point at which accommodation would mean undue hardship for the accommodating party”.¹⁵ In her view, “[t]he relationship between the legislature and the people subject to its laws is entirely different.” Because “[l]aws are general in their scope and cannot simply be tailored to the needs and circumstances of a particular individual”, the legislature cannot be expected to engage in such an “individualized determination”.¹⁶ Indeed, given the many ways in which laws may restrict religious practice (or the many ways in which religious practices may conflict with law) the legislature could not possibly tailor its laws to every sincerely held religious belief. The justification of a law under section 1 depends not on “whether it is responsive to the unique needs of every individual claimant”, but instead on whether it advances a substantial and pressing purpose and is proportionate in its overall impact.¹⁷ She acknowledges that “the law's impact on the individual

¹³ See, for example, *R. v. Lucas*, [1998] S.C.J. No. 28, [1998] 1 S.C.R. 439 (S.C.C.).

¹⁴ *Supra*, note 1, at para. 35 where McLachlin C.J.C. notes also that [the Court] has recognized that a measure of leeway must be accorded to governments in determining whether limits on rights in public programs that regulate social and commercial interactions are justified under s. 1 of the *Charter*. Often, a particular problem or area of activity can reasonably be remedied or regulated in a variety of ways.

¹⁵ *Id.*, at para. 68, *per* McLachlin C.J.C.

¹⁶ *Id.*, at para. 69.

¹⁷ *Id.*

claimants” may be an important consideration in the court’s judgment concerning the justification of the law at the final stage of the *Oakes* test; but the issue for the court is “whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned”.¹⁸ The Court must decide whether the law should be struck down as unjustified, because its public benefits are outweighed by its costs to a religious practice, and not whether a particular individual or group of individuals should be exempted from its requirements. According to the Chief Justice, the appropriate standard at the final balancing stage of the proportionality analysis is not the human rights standard of undue hardship. In her view, this “pivotal concept in reasonable accommodation, is not easily applicable to a legislature enacting laws”.¹⁹ “It is better,” says McLachlin C.J.C., “to speak in terms of minimal impairment and proportionality of effects” rather than undue hardship.²⁰

Chief Justice McLachlin observes that the reasonable accommodation standard may be appropriate when “a government *action* or administrative *practice* is alleged to violate the claimant’s *Charter* rights”.²¹ In such cases, says McLachlin C.J.C., “the jurisprudence on the duty to accommodate, which applies to governments and private parties alike, may be helpful ‘to explain the burden resulting from the minimal impairment test with respect to a particular individual’.”²² An individualized remedy in the form of accommodation may be appropriate in a case such as *Multani*, when the claim concerns the impact of an administrative decision on a particular individual and a personal remedy is sought under section 24 of the Charter. In such a case, the claimant does not challenge general legislative policy but claims simply that the state actor failed to perform its duties in a way that took into account the religious beliefs or practices of particular members of the community.²³

According to McLachlin C.J.C., “the decisive analysis” in the *Hutterian Brethren* case occurs at the final stage of the *Oakes* test: “whether

¹⁸ *Id.*

¹⁹ *Id.*, at para. 70: While the standard of “undue hardship” may be interpreted broadly to encompass “the hardship that comes with failing to achieve a pressing government objective, this attenuates the concept”.

²⁰ *Id.*, at para. 70.

²¹ *Id.*, at para. 67 (emphasis in original).

²² *Id.*, at para. 67, quoting from Charron J. in *Multani*, *supra*, note 5, at para. 53. But in that paragraph from *Multani*, Charron J. refers to the adverse affect on an individual of “a policy or rule that is neutral on its face”.

²³ As noted below, this is not how the *Multani* judgment describes the issue.

the ‘deleterious effects of a measure on individuals or groups’ outweigh the public benefit that may be gained from the measure’.²⁴ Chief Justice McLachlin finds, “on the evidence that the universal photo requirement enhances the security of the licensing system ...”.²⁵ She accepts that requiring all licence holders in the province to have their photo included in a digital photo bank “will accomplish these security-related objectives more effectively than would an exemption for an as yet undetermined number of religious objectors”.²⁶ Any form of exemption would detract from the effectiveness of the system, because it would “undermine the certainty with which the government is able to say that a given licence corresponds to an identified individual and that no individual holds more than one licence”.²⁷

When considering the “cost” of the regulation, McLachlin C.J.C. is clear that the Court must look at its real impact on the individual’s ability to practise her or his religion.²⁸ In this case, says McLachlin C.J.C., the photo requirement does not compel the individual Colony member to have her or his photo taken.²⁹ She accepts that the law does make

²⁴ *Supra*, note 1, at para. 78, *per* McLachlin C.J.C.: The issue is “whether the deleterious effects are out of proportion to the public good achieved by the infringing measure”.

²⁵ *Id.*, at para. 80: “The photo requirement ensures both a ‘one-to-one’ and ‘one-to-many’ correspondence among licence holders. This makes it possible, through the use of computer software, to ensure that no person holds more than one licence.”

²⁶ *Id.*

²⁷ *Id.* She continues at para. 81:

Though it is difficult to quantify in exact terms how much risk of fraud would result from permitted exemptions, it is clear that the internal integrity of the system would be compromised. In this respect, the present case may be contrasted with previous religious freedom cases where this Court has found that the potential risk was too speculative.

²⁸ When determining the negative impact of the measure on the religious freedom of the members of the Wilson Colony, McLachlin C.J.C. says, *id.*, at para. 90, that while the court should consider “the perspective of the religious or conscientious claimant”, it must do so “in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs”. From the perspective of the religious community, any law that restricts or impedes its religious practices is unacceptable. The restrictive law, however, may advance a legitimate public policy — a policy that from a secular perspective is unobjectionable, or at least the only objection to it is that it interferes with a practice that matters deeply to some members of the community.

²⁹ *Id.*, at para. 93. The Chief Justice distinguishes the claim in this case from that in *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713 (S.C.C.) or *Multani*, *supra*, note 5, “where the incidental and unintended effect of the law is to deprive the adherent of a meaningful choice as to the religious practice” (at para. 96). The contrast is with a situation in which the government measure is “compulsory” so that “the adherent is left with a stark choice between violating his or her religious belief and disobeying the law” (at para. 94). The question not clearly answered by McLachlin C.J.C. is when is a constraint so significant that it removes the individual’s choice? The majority cites *Multani* as an example, although perhaps one could argue that there was an alternative available in that case which the family followed, and that was to send their child to a private school. Is the constraint less significant in this case?

adherence to the practice more onerous, but she does not consider the cost of not being able to drive on the highway to be significant, and suggests that the Colony members could hire others to do their necessary driving.³⁰ She acknowledges that relying on outsiders might also detract from the community's "traditional self-sufficiency"; however she seems to exclude this from her calculation, perhaps regarding it as a cultural "tradition" rather than a religious practice.³¹ Chief Justice McLachlin also downplays the significance of the restriction by describing the acquisition of a driver's licence as a "privilege" rather than a right.³² In her view, the costs of the regulation do not seriously affect the claimants' right to pursue their religion and do "not negate the choice that lies at the heart of freedom of religion".³³

Chief Justice McLachlin concludes that the benefit of the law outweighs its negative impact on religious practice. The law has an important social goal: to maintain an effective driver's licence scheme and so minimize the risk of identity fraud. She accepts that the universal photo requirement "will reduce the risk of identity-related fraud, when compared to a photo requirement that permits exceptions".³⁴ On the other side, while the photo requirement does make the religious practice of the colony members more costly, it "does not deprive members of their ability to live in accordance with their beliefs". Its deleterious effects "fall at the less serious end of the scale".³⁵

The majority judgment requires the state to justify under section 1 any non-trivial restriction on a religious practice, but rejects "reasonable accommodation" as the standard of justification. While reasonable accommodation may be the appropriate standard in the case of a restriction on religious practice that is imposed by a private actor, such as an employer, or by a government actor in the exercise of her or his discretion, McLachlin C.J.C. insists that it should not be applied to statutory and

³⁰ *Id.*, at para. 97: "Many businesses and individuals rely on hired persons and commercial transport for their needs, either because they cannot drive or choose not to drive."

³¹ *Id.*

³² *Id.*, at para. 95:

Many religious practices entail costs which society reasonably expects the adherents to bear. In this case, the inability of the claimants to access a conditional benefit or privilege, a driver's licence, is such a cost. A limit on the right that exacts a cost but nevertheless leaves the adherent with a meaningful choice about the religious practice at issue will be less serious than a limit that effectively deprives the adherent of such choice.

³³ *Id.*, at para. 99. She also observes that while the Charter guarantees freedom of religion it "does not indemnify practitioners against all costs incident to the practice of religion".

³⁴ *Id.*, at para. 101.

³⁵ *Id.*, at para. 102.

other legal restrictions on religious practice. Laws are general in their scope and so religious practices may conflict with them in many ways. The legislature could not possibly tailor its laws to every sincerely held religious belief. The issue for the Court, according to McLachlin C.J.C., is not whether an exception should be made to the law for the religious practice of a particular individual or group, but whether the law is justified under section 1 and the *Oakes* test — and in particular the final step of the test, which involves the balancing of competing religious and state interests.

III. IF NOT REASONABLE ACCOMMODATION?

The Chief Justice accepts that section 2(a) is breached any time the state restricts a religious practice in a non-trivial way. Even if it is pursuing a legitimate public objective, the state must justify the restriction under section 1. The justification issue turns on the appropriate balance between competing state and religious interests. The restrictive law will be struck down if its costs to religious practice outweigh its benefits to public policy. But how is this balancing of interests different from reasonable accommodation?³⁶

Perhaps the Chief Justice means only to preclude an individual claim to an exemption from a general law, but not more general claims or a claim made by a religious group. Individual claims to exemption are potentially unlimited and, as the Chief Justice observes, may impede the state's ability to advance important public policies. The problem with this reading of McLachlin C.J.C.'s test is that the Court has interpreted freedom of religion as an individual right and defined the activity protected by section 2(a) in subjective terms: an activity is religious and *prima facie* protected under section 2(a) if the individual actor has a sincere belief in its spiritual significance, whether or not anyone else also holds this belief. Viewed from this perspective, the claim by the Wilson Colony is

³⁶ *Id.*, at para.66:

In my view, a distinction must be maintained between the reasonable accommodation analysis undertaken when applying human rights laws, and the s. 1 justification analysis that applies to a claim that a law infringes the *Charter*. Where the validity of a law is at stake, the appropriate approach is a s. 1 *Oakes* analysis. Under this analysis, the issue at the stage of minimum impairment is whether the goal of the measure could be accomplished in a less infringing manner. The balancing of effects takes place at the third and final stage of the proportionality test. If the government establishes justification under the *Oakes* test, the law is constitutional. If not, the law is null and void under s. 52 insofar as it is inconsistent with the *Charter*.

really a series of identical claims made by a group of individuals who share a particular belief. Indeed, in rejecting the argument that the creation of an exception to the photo requirement for the Wilson Colony members will have a minor impact on the government's policy, the Chief Justice notes that we simply do not know how many other individuals may come forward to claim an exemption.

Another possible reading of the Chief Justice's test is that while the Court may strike down the restrictive law, if it fails any part of the *Oakes* test, the Court will not create an exception to the law. The Court's role, says the Chief Justice, is to determine the constitutionality of the law and not to work out a fair or appropriate compromise between the law and the religious practice. The reason the Chief Justice gives for rejecting "reasonable accommodation" is that it is impractical. She observes that religious practices may conflict with law in countless ways. The government's ability to pursue its different policies will be severely impeded if it is required to accommodate a wide range of religious practices, particularly if the standard of accommodation is whether the government would experience undue hardship. Yet it is difficult to understand why the Court would rule out the creation of an exemption, but contemplate the striking down of the law (in whole or in part) because it interferes with a religious practice and its costs outweigh its benefits. Creating an exception to the law might compromise the state's ability to pursue a particular policy, but striking down the law would prevent the state from pursuing that policy entirely. If the Chief Justice believes that the Court should balance or trade off competing state and religious interests, it is difficult to understand why she believes that an exception to the law should not be granted in a case in which the purpose of the law is important but the impact of an exception would be relatively minor, as in the *Hutterian Brethren* case. It makes little sense to say that a law may be struck down because it interferes with a religious practice but that it must never be tailored — compromised in some way — to create an exception for a religious practice. Indeed, when considering whether the photo restriction is justified under section 1, the Chief Justice frames the issue as whether an exception to the photo requirement should be made. She considers both the cost of an exception to the realization of the state's policy and the cost of law to the religious practice and decides that the province is justified in not permitting any exceptions to the requirement.

I suspect that Chief Justice McLachlin's rejection of the "reasonable accommodation" standard amounts to a rejection of any real "balancing" of competing religious and public interests, and of a duty on the state to

compromise its policy to make space for religious practices. I say this even though the Chief Justice insists that the significant analysis in the *Hutterian Brethren* case occurs at the final stage of the *Oakes* test and engages in something resembling balancing, when she considers the competing state and religious claims.³⁷ She assesses both the costs and benefits of the restriction and decides that the public policy benefits outweigh the costs to the religious practice (and that the benefit of creating a religious exception to the law is outweighed by the cost of such an exception). However, this balancing appears to have little substance and to involve an entirely formal adherence to the *Oakes* test. Even though the majority judgment keeps open the possibility that a law might be struck down if its costs to religious freedom outweigh its salutary effects, the reasons that lie behind its rejection of reasonable accommodation analysis make it unlikely that the Court would ever strike down a law at this stage of the analysis, as the outcome of interest balancing. As I will suggest below, there are other impediments to a general balancing of competing interests that relate to the Court's capacity to determine the value or weight of the particular religious practice and compare it to the value of the state's policy.

When deciding in this case that an exception should not be made to the law, the Chief Justice seems to overstate the impact of a religious exemption on the effectiveness of the law, and understate the impact of the requirement on the Colony's practices, and in particular its commitment to communal self-sufficiency. The impairment of the religious practice in this case gives way to what the dissenting judges regard as a minor cost to the efficiency of the photo identification system. It appears that the majority would be prepared to exempt the members of the Wilson Colony from the photo requirement only if this could be done without compromising the law's purpose in any meaningful way — that is to say, only if it is not truly an exception but simply a more careful tailoring of

³⁷ I note here a matter worth exploring: In *Hutterian Brethren, id.*, McLachlin C.J.C. at para. 108, adopts a narrow approach to the s. 15 claim — analogous to her s. 2(a) analysis:

Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2(a). There is no breach of s. 15(1).

She seems to say that as long as the law rationally advances a legitimate public policy and does not involve any stereotyping, there will be no breach of s. 15. Such an approach would seem to exclude a wide range of constructive discrimination claims.

the law to meet its objective without interfering to the same degree with the Colony's religious practice. While the Chief Justice describes the issue as the balancing of competing interests (the state's interest in preventing identity fraud and the freedom of Colony members to adhere to their religious beliefs), she seems to give complete priority to the legislative policy, and refuses to require the government to compromise its policy in any way to make space for the Colony members' religious practice. The government's objective is the standard against which the restriction is judged as reasonable.

The practical effect of McLachlin C.J.C.'s rejection of the "reasonable accommodation" standard is that the state has no constitutional duty to compromise its policies to make space for religious practices.³⁸ The court may find that the law fails the minimal impairment test, because it restricts the religious practice unnecessarily. In such a case the court may define the scope of the law more narrowly so that it does not restrict the practice. This might even be described as creating an exception to the law, but the recognition of such an "exception" is not the outcome of "balancing" and does not involve any real compromise of the law's purpose.

IV. THE DISSENTING JUDGMENTS

There are two areas of disagreement between the majority and dissenting judgments. The first concerns the structure of Charter analysis, and in particular the *Oakes* test, and more particularly the minimal impairment component of that test. The second concerns the proper reading of the facts, both the necessity of the photo requirement to the realization of the government's objective, and the impact of the requirement on the religious life of the members of the Wilson Colony.

In their separate dissenting judgments, Abella J. and Lebel J. affirm that the state has a duty to make reasonable accommodation for minority religious practices. The dissenting judges believe that the state must sometimes compromise the pursuit of an otherwise legitimate public policy to make space for religious practice.³⁹ In their view, an exception

³⁸ The state may accommodate religious practices, but it is not constitutionally required to do so. This means, of course, that the religious practices of mainstream or politically influential groups will be accommodated — if they are not already built into the general norms and expectations of the community.

³⁹ *Supra*, note 1. Justice Abella stated, at para. 134:

should be made for the practice of a religious group, if this can be done without significant cost to the advancement of the legislative goal. They consider that, because of the relatively small size of the Wilson Colony, the creation of an exemption from the photo requirement would have a minor impact on the law's policy. To the dissenters this seems even more obvious given that there are many adults in Alberta who do not hold a driver's licence and so will have no photo in the data bank.⁴⁰ Finally, the dissenting judges place greater emphasis on self-sufficiency, as an element of the Hutterite belief system that will be significantly affected if the community must rely on outsiders for their driving needs.

Beneath these disagreements between the majority and the dissenters, about the facts of the case and the form of the analysis, lies a more general disagreement about the foundation and substance of the state's duty to accommodate religious practices. The majority judgment gives priority to the state's policy and little substance to the justification requirement, while the dissenting judgments expect the state to compromise its policy to some extent to make space for the religious practice. The deeper issue for the Court concerns the relationship between law and religion and whether religion can and should be treated as a private matter that is both excluded and insulated from public decision-making.

V. THE *OAKES* TEST

While the majority and dissenting judgments in *Hutterian Brethren* disagree about the proper application of the different elements of the *Oakes* test, each assumes that there is a single (and correct) approach to the assessment of limits and seeks to fit the issue of religious restriction into this generic approach. The adjudication of rights claims under the Charter involves two steps. The first step is concerned with whether a Charter right has been breached by a state act. The court must define the

The purpose of the *Oakes* analysis is to balance the benefits of the objective with the harmful effects of the infringement. The stages of the *Oakes* test are not watertight compartments: the principle of proportionality guides the analysis at each step. This ensures that at every stage, the importance of the objective and the harm to the right are weighed.

⁴⁰ *Id.*, at para. 115:

Unlike the severity of its impact on the Hutterites, the benefits to the province of requiring them to be photographed are, at best, marginal. Over 700,000 Albertans do not have a driver's license and are therefore not in the province's facial recognition database. There is no evidence that in the context of several hundred thousand unphotographed Albertans, the photos of approximately 250 Hutterites will have any discernable impact on the province's ability to reduce identity theft.

protected interest or activity and determine whether it has been interfered with by the state. The second step in the adjudicative process is concerned with the justification of limits on Charter rights. The limitation decision is described by the courts as a balancing of competing interests or values — the individual Charter right balanced against the rights or interests advanced by the restrictive law.

The *Oakes* test has several components.⁴¹ The court asks whether the restrictive law has a substantial and pressing purpose, advances this purpose rationally, impairs the freedom no more than is necessary, and is proportionate to the impairment of the freedom. The first step of the *Oakes* test involves a judgment about the significance of the law's general purpose — whether the purpose is substantial enough to justify the restriction of a fundamental freedom. The next two steps involve an assessment of the means chosen to advance that purpose. The rational connection test asks whether the means (the restrictive measure) “rationally” advance the law's substantial and pressing purpose. The minimal impairment test asks whether the measure restricts the protected activity more than is necessary to advance its purpose. The rational connection and minimal impairment tests are closely related. A law that does not rationally advance the pressing and substantial purpose for which it was enacted can be seen as unnecessarily restricting the right or freedom. Similarly, a law that restricts the right or freedom more than is necessary to advance its pressing purpose (that does not minimally impair the freedom) is to that extent irrational or ineffective. At the final stage of the *Oakes* test, the court compares or balances the restrictive law's benefit or value with its actual costs to the right.

In those cases in which the court finds that a restriction is not justified under section 1, the decision is often based on the minimal impairment test, and sometimes on the rational connection test. Undoubtedly these tests have come to play a central role in the courts' assessment of limits under section 1 because they appear to involve nothing more than a technical assessment of legislative means. A law may be struck down by the court not because its purpose is objectionable, or because the constitutional values it impedes outweigh the values it advances, but simply because the means chosen to advance that purpose are ineffective or will impair the protected freedom unnecessarily.

⁴¹ The discussion that follows draws on Richard Moon, “Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights” (2002) 40 *Osgoode Hall L.J.* 337 [hereinafter “Moon, ‘Justified Limits’”].

However, in practice, these tests often involve more than simply an assessment of the effectiveness of the law's means, divorced entirely from any judgment about the significance of the law's purpose or the value of the restricted activity. They often involve an element of balancing or trade-off. The rational connection test must require something more than that the law's means not be wholly irrational to its ends, or wholly ineffective to achieve those ends. Indeed, it would be difficult to attribute to a law a purpose that seemed unconnected to its provisions. Instead, the rational connection test involves a decision about whether the law reasonably advances the pressing and substantial purpose for which it was enacted — whether it meets some form of effectiveness threshold.⁴² If this is a relative judgment, it seems likely that it will be affected by considerations such as the value of the restricted activity or the significance of the law's objective.

Similarly, it will be very rare that an alternative measure that is less rights restrictive will advance the law's substantial and compelling purpose as completely or effectively. It appears that a law will fail the minimal impairment test when the court considers that a small decrease in the law's effectiveness in achieving its pressing and substantial purpose will significantly reduce its interference with the protected right. Chief Justice McLachlin recognizes this but insists that a more general or open balancing of interests should not occur at this stage of the analysis: "The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner."⁴³ According to Chief Justice McLachlin, the issue

⁴² *Supra*, note 1, at para. 48, *per* McLachlin C.J.C.: "The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily. The government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so."

⁴³ *Id.*, at paras. 54-55:

[T]he minimum impairment test requires only that the government choose the least drastic means of achieving its objective. Less drastic means which do not actually achieve the government's objective are not considered at this stage. ... I hasten to add that in considering whether the government's objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal impairment stage.

And at para. 53:

The question at this stage of the s. 1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal.

for the court at this stage is whether the law's purpose could be achieved just or almost as effectively without impairing the right or freedom to the same degree. In her view, the balancing between competing interests — between the detrimental impact of the restrictive law on the right or freedom and the public benefits of the law — should be deferred until the final stage of the proportionality analysis. Justice LeBel, in contrast, believes that the “court's goal” at both the minimal impairment and contextual balancing stages of the *Oakes* test “is essentially the same”: “to strike the proper balance” between the state's objective and Charter rights.⁴⁴ Justice Abella agrees that the different stages of the *Oakes* test are not “watertight compartments” and that “at every stage, the importance of the objective and the harm to the right are weighed”.⁴⁵

The idea that there is, or could be, a single approach to the justification of limits on Charter rights rests on an assumption that the rights protected in the Charter have the same basic structure, each right protecting an aspect of the individual's liberty from state interference. The court must define the scope of the protected right, and determine whether the state has interfered with its exercise. Since these rights may sometimes conflict with other valuable interests, the court must also determine the proper and just balance between these competing interests. Yet many or most Charter rights do not fit this individual liberty model and are better understood as relational or social in character, as protecting some dimension of the individual's interaction or association with others. If the rights protected by the Charter are diverse in character, and concerned with different forms of individual involvement in community, then the nature or character of their limits may differ in significant ways.

I have argued elsewhere that because freedom of expression rests on the social character of human agency and identity (or a recognition that agency and identity are realized in communicative interaction), it may not fit easily into the Charter's two-step adjudicative process, which separates the individual's interests from those of others.⁴⁶ In the leading Canadian freedom of expression cases, the issue for the court is not the correct or reasonable balance between separate but competing interests. In cases dealing with picketing, advertising, hate speech and pornography the

⁴⁴ *Id.*, at para. 191, *per* LeBel J.

⁴⁵ *Id.*, at para. 134, *per* Abella J. At the conclusion of her discussion of minimal impairment Abella J. seems to suggest that even if a law does not pass the minimal impairment test, it may be upheld if it satisfies the final step of the *Oakes* test (at para. 119).

⁴⁶ See Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000), c. 2 and Moon, “Justified Limits”, *supra*, note 41.

argument for limitation is based either explicitly or implicitly on the irrational appeal or manipulative character of the expression. The critical issue for the court seems to be whether the form or instance of expression in the particular context contributes to insight and understanding, or whether it manipulates or appeals to the irrational and “leads” to significant harm. When the court assesses the manipulative impact of expression, it is not simply balancing the distinct interests of separate individuals — the interest of the speaker in communicating information and ideas against the interest of the audience in not being manipulated or deceived. Instead the court is making a contextual judgment about the relative value/harm of expression, or about the character or quality of the communicative relationship — about the realization of individual agency and identity in community life. In these cases, the “value” and “harm” of the expression are not distinct issues, but rather two sides of a single but complex issue. The court seeks to draw a line between expression that appeals to conscious reflection or autonomous judgment and expression that seeks to manipulate. But there is no bright line to be drawn. Where the court draws the line will depend on contextual factors and their impact on individual judgment and on the seriousness of the harm that will occur if the communication is effective.

Other constitutional rights may not fit easily into the two-step structure of constitutional rights adjudication. Certainly, it is difficult to see the right to equality under section 15 as simply a liberty or freedom from external interference. The state breaches section 15 when it fails to show the individual the respect or recognition that he or she is owed as a member of the community. The right to equality rests on a recognition that when the members of a group are treated by the state as less worthy or deserving than others, their sense of identity or dignity may be negatively affected. The state does not discriminate against the individual or interfere with her or his dignity simply because it withholds a benefit or imposes a burden on the individual. Nor does it discriminate against an individual simply because it has made something less than a fully rational policy choice. The Court has held that when determining whether a state act is “discriminatory”, it must ask whether the act rests on an unfair stereotype or contributes to the systemic exclusion or disadvantage of the members of a particular identity group. These are questions about larger social practices or circumstances, about the context of the particular state act.

Given the relational character of the right to equality and the requirement that the courts look to the larger context to determine

whether an act is discriminatory, it is not surprising that the courts have struggled to develop a coherent approach to section 1 limits on section 15 rights. In equality cases, the court's section 1 analysis repeats in a fairly perfunctory way, the considerations that led to its decision that the state act is discriminatory contrary to section 15. While the significant analysis by the court in freedom of expression cases takes place at the section 1 stage, the focus of the court's analysis in equality cases is at the first stage of the adjudication, the issue of whether the right has been breached. In both cases, the analysis takes place at one stage of the adjudication, because the court is addressing a single, complex question about the individual's connection with the community. It is not simply balancing separate and competing interests, as contemplated by the two-step structure of adjudication.

For similar reasons, freedom of religion claims may not fit well into the two-step structure of Charter adjudication, which separates issues of breach and justification. In a case such as *R. v. Big M Drug Mart Ltd.*,⁴⁷ where a law is found to breach section 2(a) because it compels citizens to follow a particular religious practice (or because it actively supports the practices of one religious group over those of another), it will invariably fail the "pressing and substantial" purpose component of the *Oakes* test.⁴⁸ As McLachlin C.J.C. in the *Hutterian Brethren* judgment notes, a law that compels a religious practice "will fail at the first stage of *Oakes* and proportionality will not need to be considered".⁴⁹

At issue in the *Hutterian Brethren* case is the other dimension of religious freedom — the freedom to practise one's religion without state interference. Because the Court has defined the scope of section 2(a) broadly, to encompass any practice that has spiritual significance for the individual, the focus of the Court's analysis is on the justification of the restriction under section 1.⁵⁰ The issue, according to both the dissenting

⁴⁷ [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

⁴⁸ For a discussion of religious compulsion cases, see Richard Moon, "Government Support for Religious Practice" in R. Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: U.B.C. Press, 2008) [hereinafter "Moon, *Law and Religious Pluralism*"].

⁴⁹ *Supra*, note 1, at para. 92.

⁵⁰ Benjamin L. Berger, in his contribution to this volume, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*", observes (at 27) that "this test has made section 2(a) protection so capacious as to be largely analytically vacant". His paper offers a valuable discussion of some of the implications of this focus on justification (at 28): "[w]hat is difficult about freedom of religion is the sheer scope of possible conflict between religion and government objectives combined with the enormous challenge of adjudicating the internal meaning and significance of a given religious practice or belief not shared by the secular state."

and majority judgments, is the appropriate balance between the individual's freedom to practise her or his religion and the state's ability to pursue a particular public purpose. The majority and dissenting judgments appear simply to disagree about where this balancing should occur in the *Oakes* test. However, behind this apparently minor dispute about the form of the test, lies a more fundamental disagreement about the substance of the balancing between competing state and religious interests. Chief Justice McLachlin, in her judgment, does not simply defer the balancing of competing interests to the final stage of the *Oakes* test; she employs a very weak standard of justification for a state restriction on a religious practice. This is obscured by her formal adherence to the *Oakes* test, which is understood as a framework for the balancing of competing interests. While the dissenting judges in *Hutterian Brethren* assume that the state must make some effort to accommodate a religious practice, even to the point of compromising its pursuit of a legitimate public policy, McLachlin C.J.C. appears to give priority to the state's policy and demands only that the state make space for a religious practice, if it can do so without in any real way compromising this policy.

VI. THE REASONABLE ACCOMMODATION OF RELIGIOUS PRACTICES

It is not obvious that religious practices should be accommodated — that the state should be required to compromise its policy to make space for a religious practice. Why should the negative impact on a religious practice, of an otherwise legitimate law, not be viewed as simply a consequence and cost of the individual's religious commitment? In a democratic community, individuals are often subject to laws with which they disagree. The values, preferences and practices of some citizens will sometimes prevail over those of others. While the state should protect the individual's liberty to think and act as he or she chooses, it is not required to compromise legitimate policy to accommodate an individual's values and practices. If the state is pursuing a legitimate public purpose, the detrimental impact of its actions on the practices of an individual or group may be viewed as simply a cost they must bear as members of a democratic community. The obligation of the state (or the general community) to treat citizens with equal respect may be satisfied as long as each person is able to participate in democratic debate and decision-making, whether or not her or his views are adopted.

Locke in his defence of religious tolerance did not argue that religious practices should be insulated from legal restriction.⁵¹ He took the position that the state should not restrict a religious practice, simply because the practice was thought to be erroneous. However, he accepted that when the state is advancing public policy — addressing civic issues — it may restrict a religious practice. In Locke's view, the state has no duty to compromise its policy to accommodate a religious practice.

The Canadian courts purport to apply a more demanding standard.⁵² Freedom of religion precludes the state from restricting a religious practice, because it is mistaken or because it is the wrong way to worship God. But the freedom is thought to prohibit more than this. According to the Canadian courts, any time the state restricts a religious practice in a non-trivial way, it must justify the restriction under section 1. The Chief Justice accepts that to justify a restriction the state must satisfy the different elements of the *Oakes* test, including the proportionality requirements. However, she does not believe that the state has a duty to modify its law to reasonably accommodate a religious practice, and so it is unclear exactly what the justification process involves. The position of the dissenting judges is that even when a law advances a legitimate public purpose, such as the prevention of identity fraud, some attempt should be made to accommodate religious practices that are impeded or restricted, and this may involve some compromise of the law's purpose.

According to the Canadian courts, the protection or insulation of religious practice from state action stems from the state's more general duty to remain neutral in matters of faith and take no position on the truth

⁵¹ John Locke, *Letter Concerning Toleration*, ed. by J. Tully (Indianapolis: Hackett Publishing, 1983 [1689]). This was also the view of the U.S. Supreme Court in *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990). The government is precluded from acting to suppress religious practices that are mistaken but is free to restrict the same practices when advancing secular government policy. Justice Scalia seemed particularly concerned about the innumerable forms of religious practice and the unlimited ways in which the law might restrict religious freedom. The same concern surfaces in McLachlin C.J.C.'s decision.

⁵² The Court's approach to the state's restriction of a religious practice was shaped by earlier private sector religious discrimination cases. The seminal Canadian case was *Ontario (Human Rights Commission) v. Simpsons Sears*, [1985] S.C.J. No. 74, [1985] 2 S.C.R. 536 (S.C.C.), in which the Supreme Court held that under provincial anti-discrimination legislation, a private employer had a duty to accommodate the religious practices of an employee unless doing so would cause undue hardship to the employer. In this case, an employee had converted to Seventh-Day Adventism and as a consequence was no longer able to work on Saturdays. Saturday, was Simpsons Sears' busiest day and the store had a policy that all full-time retail employees must work on that day. The store's policy was not meant to exclude those who kept Saturday as their Sabbath and it was not arbitrary; nevertheless, Simpsons Sears was required to accommodate her — to exempt her from the Saturday work requirement.

or falsity of spiritual beliefs.⁵³ But, as Locke's account of religious freedom illustrates, the claim that religion is a private matter with which the state should not interfere, is not sufficient to justify a duty on the state to accommodate religious practices. The protection or insulation of religious practice from state action that advances an otherwise legitimate public purpose must rest on more than the Lockean assertion that religious matters are private and distinct from civic concerns.⁵⁴ It must rest on a normative claim that religion should be protected as "private", even when it touches on matters of public concern or conflicts with law.

Underlying the neutrality requirement, and the insulation of religious beliefs or practices from public decision-making, is a conception of religious belief as a deeply rooted element of the individual's identity. Religion orients an individual in the world, shaping his or her perception of the social and natural orders and providing a moral framework for his or her actions. Because religion is deeply rooted, when the state treats the individual's religious practices and beliefs as less important or less true than the practices of others, or when the individual's religious community is marginalized by the state in some way, the individual adherent may experience this not simply as a rejection of his or her views and values, or a repudiation of the truth, but as a denial of his or her equal worth, or at least as something that affects him or her very personally.⁵⁵ There are additional and related reasons supporting a duty to accommodate. Because religion is a private matter, it may easily be lost sight of in the formulation of public policy. In pursuing a particular public objective the state may fail to recognize the negative impact of its actions on the practices of a minority religious community. The duty to accommodate

⁵³ The commitment to state neutrality in religious matters, is most clearly affirmed in the case of *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] S.C.J. No. 45, [2004] 2 S.C.R. 650 (S.C.C.) by LeBel J., who asserts: "This fundamental freedom imposes on the state and public authorities, in relation to all religions and citizens, a duty of religious neutrality that assures individual or collective tolerance, thereby safeguarding the dignity of every individual and ensuring equality for all" (at para. 65). Justice LeBel continues: "The concept of neutrality allows churches and their members to play an important role in the public space where societal debates take place, while the state acts as an essentially neutral intermediary in relations between the various denominations and between those denominations and civil society" (at para. 67). See also Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship" in Moon, *Law and Religious Pluralism*, *supra*, note 48.

⁵⁴ Central to Locke's defence of religious tolerance was the distinction between spiritual and civic concerns. This distinction is even more problematic today, as a consequence of the growth of religious diversity and the expansion of state power.

⁵⁵ *Corbiere v. Canada*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203, at para. 13 (S.C.C.). Religion may be treated as a matter of identity that should be treated with equal respect, simply because we have no other conceptual framework within which to fit it.

may rest on an awareness that the religious practices of historically dominant groups have shaped social interaction and have already been factored into public policy. It may also rest on a desire to avoid the alienation of minority religious communities and the possibility of civil disobedience.

Yet the insulation of religion from public action is difficult to maintain consistently. The problem is not simply that religious beliefs involve claims about what is true and right that must remain open to contest. The more fundamental problem is that religious beliefs often have public implications. They often have something to say about the way we should treat or interact with others and about the kind of society we should work to create. The individual may believe that she or he has a religious duty to work for social justice or to build God's Kingdom on earth. The state may adopt policies that are inconsistent with what some religious adherents understand to be just. The religious beliefs of some in the political community may be repudiated by state action or their religious purposes or practices may be restricted by the state as harmful or contrary to the public interest. Even if the state seeks to avoid passing judgment, at least directly, on the truth or falsity of a spiritual belief, it will sometimes pursue goals that are inconsistent with particular religious practices.

When the religious practices of an individual or community affect the interests of others, they cannot simply be insulated from public action and treated as private. Religions that emphasize the individual's direct and personal relationship with God or the supernatural — that focus on otherworldly matters — will seldom come into conflict with state action. As well, mainstream religious practices that have shaped the social life and public values of the larger community are less likely to conflict with the law. Conflict may occur more frequently in the case of "lived" religions that put greater emphasis on ritual or that govern significant elements of the individual's life. An insular religious community, that follows a religious way of life and seeks to separate itself from the larger community, raises particular accommodation issues. The members of the Wilson Colony argued that the photo requirement prevented them from driving and that the inability to drive compromised their self-sufficiency, an important element of their spiritual way of life. The difficulty for the courts in dealing with a claim to accommodate a "way of life", rather than a discrete practice, is not just the likelihood or frequency of conflicts with law, but more fundamentally the collapse of the distinction between religion and non-religion — upon which the special treatment of religion depends. Moreover, if self-sufficiency is understood to mean

independence from the larger community, the claim to accommodation may sometimes take the form of a general rejection of state authority — a claim the courts cannot contemplate.⁵⁶

Chief Justice McLachlin observes that:

Because religion touches so many facets of daily life, and because a host of different religions with different rites and practices co-exist in our society, it is inevitable that some religious practices will come into conflict with laws and regulatory systems of general application.⁵⁷

Her concern is that “the broad scope of the *Charter* guarantee [means that much of the regulation of a modern state could be claimed ... to have more than a trivial impact on sincerely held religious belief”.⁵⁸ She notes that as a consequence of the test set out in *Amselem* for determining whether a practice or belief falls within the scope of the freedom’s protection — that the individual has a sincere belief in its spiritual significance — a wide range of practices may conflict with state law.⁵⁹ However, the majority’s adoption of a weak standard of justification rests not simply on the practical concern identified by McLachlin C.J.C. that, given the innumerable ways in which religion may conflict with law, a duty to accommodate would severely limit the state’s ability to act in the public interest. It reflects also, and more significantly, an ambivalence about the specialness of religion — about whether religious beliefs and practices are different from other beliefs and practices in a way that justifies their insulation from public decision-making. The real problem with the courts’ reliance on a subjective test is that it undermines the claim that religious beliefs are special and should be treated differently from other beliefs — from other “choices” or “personal commitments”.

Sometimes the conflict between law and religious practice is direct, *i.e.*, the law’s purpose is directly at odds with the religious practice. A direct conflict occurs, for example, when a religious group believes that

⁵⁶ See, for example, *R. v. Jones*, [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284 (S.C.C.).

⁵⁷ *Supra*, note 1, at para. 90. The Chief Justice observes, at para. 36, that:

Freedom of religion presents a particular challenge in this respect because of the broad scope of the *Charter* guarantee. Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs, including the attempt to reduce abuse of driver’s licences at issue here, to the overall detriment of the community.

⁵⁸ *Id.*, at para. 36.

⁵⁹ Robert E. Charney, in his contribution to this volume, “How Can There Be Any Sin in Sincere? State Inquiries into Sincerity of Religious Belief”, discusses the problems in (dis)proving sincerity.

children should be physically disciplined in a way that is contrary to child welfare law. More often the conflict between law and religious practice is incidental — the result simply of the manner in which the state has chosen to advance a particular goal. In such a case, it may be possible for the state to advance the law’s purpose in a different way — through different means — so that it does not, at least to the same degree, interfere with the religious practice. But the adoption of different means will in most cases detract from the law’s effectiveness in advancing a particular policy. In other words, the state’s purpose will be compromised to some extent. In the case of either a direct or an indirect conflict, it is difficult to see how the courts are to determine the appropriate “balance” or trade-off between the law’s objective and the religious practice. If public decision-makers have decided, for example, that corporal punishment of children is wrong or that sexual orientation discrimination ought to be proscribed or that the inclusion of a photo in a facial recognition data bank is necessary to prevent identity fraud, how is a court to decide whether an exception to these norms or requirements should be granted to a religious individual who believes that corporal punishment is mandated by God, or that homosexuality is sinful, or that God has commanded him or her not to have his or her photo taken?⁶⁰

There is simply no basis for the courts to compare a religious practice’s importance or weight, which is based not on its truth or utility but simply on its significance to the individual, with that of a democratically-selected public policy or value and determine the fair or appropriate balance or trade-off between them. From a secular/public perspective the religious practice has no intrinsic value; indeed the court is to take no position concerning its truth. The court recognizes that the practice is significant to the individual, as something he or she believes is required by God or will bring him or her closer to the divine, and that it governs his or her actions and underpins his or her worldview. A judgment about the relative value of a religious practice will be based either on the individual’s report of its importance (and it will invariably be of vital importance to that person) or on a judgment by the court about the place of the practice within a religious tradition, which is exactly the kind of judgment the Supreme Court sought to avoid in *Amselem*.

⁶⁰ When the legislature decides that corporal punishment is wrongful and should be prohibited, they do not frame their judgment as a rejection of a religious view. They do not address the issue in terms of what God has or has not commanded. But unless we hold to an entirely artificial separation of law and religion — or public and religious morality — the legislature’s judgment must be understood as a repudiation of the religious view that corporal punishment is right or moral.

If a law that is pursuing an otherwise legitimate objective, restricts a religious practice, the court must decide whether the government's policy should be compromised to accommodate the practice. But it is not clear how a court is to compare and balance these competing claims. It is one thing for the court to decide that a law should be compromised in some minor way to make space for a religious practice — to consider whether the law might be advanced almost as effectively if an exemption were granted. Such a judgment may be based on a determination that the law's purpose is minor or the impact of accommodation will be small. It is quite another for the court to engage in a more general and open form of balancing of interests, which would require the court to assess the significance or weight not just of the state's policy but also of the religious practice. The problem of "balancing" points us again to the more fundamental issue of why religious beliefs and practices should be insulated from democratic decision-making — of why democratically selected policies should be compromised to make space for practices that are publicly valued simply because they matter deeply to the individual.

VII. THE CANADIAN RELIGIOUS ACCOMMODATION CASES

The *Hutterian Brethren* judgment may not represent a break from the pattern of the Court's previous religious restriction cases. Despite its formal commitment to accommodation, the Supreme Court of Canada in previous decisions has employed a weak standard of justification for the restriction of a religious practice. In earlier cases, the Court has been willing to uphold a restriction on religious practice, if the law has a legitimate objective (*i.e.*, an objective other than the suppression of erroneous religious practices) that would be compromised if an exception were granted. The Court has been willing to accommodate the religious practice only if this could be done without compromising the state's purpose in any meaningful way.

In *Edwards Books*, several retailers challenged the constitutionality of an Ontario law that prohibited retail stores from operating on Sunday, unless they were under a certain size and were closed on Saturday.⁶¹ A majority of the Court, in a judgment written by Dickson C.J.C., accepted that the purpose of the law was not to enforce Sunday as the Sabbath (to enforce a religious practice) but was instead to create a common pause day, enabling retail workers to be with their families at least one day

⁶¹ *Edwards Books*, *supra*, note 29.

during the week. The Court held that even though the law did not compel anyone to engage in a religious practice, it *indirectly* restricted the religious practice of those who regarded Saturday as the Sabbath, and so breached section 2(a). The law made it very difficult for Jewish and Seventh-Day Adventist retailers to close their stores on Saturday, and so amounted to an indirect restriction on their religious practice. The Court recognized that if a retailer was required by law to remain closed on Sunday, he or she would find it very costly, perhaps commercially unviable, to follow his or her religion and remain closed on Saturday as well. However, a majority of the Court in *Edwards Books* upheld the restriction under section 1, as reasonable and demonstrably justified. The majority accepted that the law had a substantial and compelling purpose and impaired the freedom no more than was necessary, since it permitted smaller retail operations to open Sunday, if they were closed on Saturday.⁶²

Chief Justice Dickson, for the majority in *Edwards Books*, accepted that minor or trivial burdens on religious practice would not breach section 2(a), but had no difficulty finding that the Sunday closing requirement represented a significant burden on the religious practice of Saturday Sabbatarians. The provincial government had argued that any harm to the business interests of Saturday Sabbatarians was the consequence of their religious practice rather than of the law. However, Dickson C.J.C. distinguished between a “natural disadvantage”, which is the consequence of the religion, and a “purely statutory disability” and held that the burden on religious practice in this case was the consequence of the Sunday closing law, and was, therefore, a purely statutory disability:

I agree ... that the state is normally under no duty under section 2(a) to take affirmative action to eliminate the natural costs of religious

⁶² *Edwards Books, id.*, at paras. 121-151, *per* Dickson C.J.C. Justice Beetz, in his dissenting judgment in *Edwards Books*, argued that religious commitment sometimes involves costs or burdens, for which the state could not be held responsible. He noted that s. 2(a) prohibits the state from restricting religious practices (from imposing burdens or penalties on particular practices) but does not require the state to facilitate or support such practices. And, in his view, state support for religious practice was what the retailers in this case were seeking. He observed that if the government had not established a common pause day (Sunday or otherwise), and had permitted stores to remain open every day of the week, then anyone who wanted to keep either Saturday or Sunday as the Sabbath would be at a competitive disadvantage. For religious reasons they would have to close on Saturday or Sunday, one day of the week, while other retailers could remain open the whole of the week. For Beetz J., the fact that observant Jews (and others) would be at a relative disadvantage, even if there was no Sunday closing law, made clear that the disadvantage or burden at issue arose from their religious commitment and not from the law, which advanced a legitimate public policy.

practices. But ... [the Act] has the effect of leaving the Saturday observer at the same natural disadvantage [as the Sunday observer] relative to the non-observer and adding the new, purely statutory disadvantage of being closed for an extra day relative to the Sunday observer. Just as the Act makes it less costly for Sunday observers to practice their religious beliefs, it thereby makes it more expensive for some Jewish and Seventh-day Adventist retailers to practice theirs.⁶³

Even though the government was pursuing a legitimate objective, the creation of a common pause day, Dickson C.J.C. found that the relative disadvantage experienced by Saturday Sabbatarians was a statutory disability rather than a cost of their religion.

The Chief Justice's determination seems to be based the presence of an identifiable state act that has a differential impact on a particular religious group. In the courts' equality rights jurisprudence, the issue is whether the law has a disadvantaging impact on the members of an identity group or a group that historically has been subjected to stereotyping or systemic disadvantage. It does not matter that the state is pursuing a legitimate public purpose. The state is expected to compromise the pursuit of that purpose and make reasonable accommodation for the minority group and so avoid contributing to its further marginalization. The Court noted that the Sunday closing requirement did not simply impose a burden on the religious practice of those who would keep Saturday as the Sabbath. It also gave Christians, who honour Sunday as the Sabbath, a relative advantage over Saturday Sabbatarians. Even if the law was not intended to favour or support *Christian* practice, that was its effect. Moreover, the choice of Sunday as the common pause day, was not accidental. It reflected the Christian history/tradition of the community, and so may be seen by non-Christians as support for the Christian faith. While the Court was unwilling to see the law as compelling a religious practice, the Christian roots of the law (and its favouring of Christian practice) seemed to play a role in the Court's determination that the law indirectly restricted the religious practice of Saturday Sabbatarians. The differential impact of the law on Sunday and Saturday Sabbatarians led the Court to conclude that the burden on the latter was not simply a natural cost of their faith, but was instead the consequence of the law. Indeed, in the later Supreme Court decision of *Adler v. Ontario*, Sopinka J. clearly stated that the unequal treatment of different

⁶³ *Id.*, at para. 114.

religious practices was critical to the finding of a breach of section 2(a) in *Edwards Books*.⁶⁴

While Dickson C.J.C. found that section 2(a) had been breached because the law indirectly restricted the religious practice of Saturday Sabbatarians (and perhaps also because it favoured the religious practice of Sunday Sabbatarians), he was prepared to uphold the restriction under section 1. It had been argued that the exception included in the law (that enabled smaller retail operations to open on Sunday if they closed on Saturday) should be enlarged to include all retail stores, regardless of size, operated by Saturday Sabbatarians. In holding that the narrow exception did not fail the minimal impairment test, the Chief Justice was clear that the state should be given considerable latitude in deciding both the necessity and scope of an exception. He noted that a larger exception would detract from the effectiveness of the law's policy, the creation of a common pause day.

In *Syndicat Northcrest v. Amselem*, the Supreme Court of Canada held that a condominium association's refusal to permit Orthodox Jewish unit-owners to construct succahs on their balconies, as part of the Jewish festival of Succot, breached their freedom of religion under the *Quebec Charter of Human Rights and Freedoms*.⁶⁵ Because the restriction on religious practice was imposed by a non-state actor, the *Canadian Charter of Rights and Freedom* was not applicable. However, the majority judgment of Iacobucci J. was clear that "the principles ... applicable in cases where an individual alleges that his or her freedom of religion is infringed under the *Quebec Charter*" are also applicable to a claim under section 2(a) of the *Canadian Charter of Rights and Freedoms*.⁶⁶ It is noteworthy, however, that in *Hutterian Brethren*, McLachlin C.J.C. indicated that these principles may not be interchangeable: that "reasonable accommodation" analysis may be applicable to private sector restrictions but not to legal restrictions.⁶⁷

In holding that the condominium association had violated the appellants' freedom of religion, the majority judgment of Iacobucci J. in

⁶⁴ This enabled Sopinka J. to distinguish the situation in *Edwards Books* from that in *Adler v. Ontario*, [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609 (S.C.C.). Justice Sopinka rejected the argument of religious parents that the non-funding of religious schools in Ontario placed a burden on them, compared to those parents who sent their children to funded public schools, and so breached their freedom of religion under s. 2(a) of the Charter.

⁶⁵ S.Q. 1991, c. 64.

⁶⁶ *Amselem*, *supra*, note 8, at para. 37.

⁶⁷ This observation is also made by Robert E. Charney, in "How Can There Be Any Sin in Sincere? State Inquiries into Sincerity of Religious Belief", which is included in this volume.

Amselem made two significant determinations concerning the scope of the freedom. First, Iacobucci J. held that freedom of religion under section 2(a) protects practices that are not part of an established religious belief system. A spiritual practice or belief will fall under the protection of section 2(a), even though it is entirely personal, and not part of a more widely held religious belief system. Second, a practice will be protected under section 2(a) even though it is not regarded as obligatory by the individual claimant. Freedom of religion protects cultural practices that have spiritual significance for the individual, “subjectively connecting” that person to the divine. According to Iacobucci J., “[i]t is the religious or spiritual essence of the action, not any mandatory or perceived as mandatory nature of its observance, that attracts protection.”⁶⁸ As long as the individual has a sincere belief in the spiritual significance of the practice, any restriction on the practice, direct or indirect, will breach the freedom of religion right. Even though not all of the appellants regarded the practice of erecting, and residing in, a succah on their own property as a religious obligation, the practice was protected as a matter of religious freedom, because it connected them with the divine. It had for them a “nexus with religion ... either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of the individual’s spiritual faith”.⁶⁹

Justice Iacobucci held that preventing the appellants from erecting their own succahs amounted to a non-trivial interference with their religious practice. He went on to hold that the condominium association had not established the need for restriction under the limitations provision of the Quebec Charter. In response to the safety concerns raised by the association, Iacobucci J. noted that the appellants had agreed to set up their succahs so that they would not obstruct the fire escape routes. The association’s interest in the aesthetic appearance of the building, he regarded as a minor and private concern. He noted that only a small number of succahs would be erected for nine days in the year. Moreover, the association could require that the succahs be constructed so as to blend in, as much as possible, with the general appearance of the building. Justice Iacobucci concluded that:

In the final analysis ... the alleged intrusions or deleterious effects on the respondent’s rights or interests under the circumstances are, at best,

⁶⁸ *Amselem*, *supra*, note 8, at para. 47.

⁶⁹ *Id.*, at para. 56.

minimal and thus cannot be reasonably considered as imposing valid limits on the exercise of the appellant's religious freedom.⁷⁰

In *Multani*,⁷¹ the Supreme Court of Canada held that the decision by a public school authority to prohibit a Sikh student from wearing a kirpan to school, breached section 2(a) and was not justified under section 1. The school did not dispute that the student had a sincere belief in the spiritual significance of the kirpan, and indeed that he considered himself bound to wear it at all times. The position of the school was that the kirpan was a weapon, and so was caught by the school's general ban on weapons. According to the Court, the school had a duty to make reasonable accommodation for the religious practice of minorities and so could ban the kirpan only if it represented a threat to school safety. The Court found, however, that the safety of the school would not be compromised if the kirpan was exempted from the ban on weapons. First, the Court took the view that the kirpan was not a weapon but rather a religious symbol. Second, the Court noted that there were no recorded incidents in Canada of a Sikh student drawing his kirpan in a public school. Third, in contrast to an airplane and even a courthouse, where a ban on the kirpan might be justified, the school had an ongoing relationship with its students and so could monitor their actions and assess the risk of violent behaviour. Finally, the Court thought that if the kirpan was sewed into the clothes there would be little or no risk of it falling out or being taken by anyone else and used as a weapon. The Court held that the kirpan should be exempted from the weapons ban, only after determining that it was not in fact a weapon and presented no real risk to school safety.

In *Trinity Western University v. British Columbia College of Teachers*, the issue was whether the British Columbia College of Teachers ("the BCCT") had acted outside its powers when it refused to accredit the teacher training program of a private Evangelical Christian university on the grounds that the program taught or affirmed the view that homosexuality is sinful.⁷² According to the BCCT, an institution that wishes to train teachers for the public school system must "provide an institutional

⁷⁰ *Id.*, at para. 84.

⁷¹ *Supra*, note 5.

⁷² *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772 (S.C.C.) [hereinafter "*TWU*"]. For a critical discussion of this case, see Richard Moon, "The Supreme Court of Canada's Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality in the Public Schools" in D. Rayside and C. Wilcox, eds., *Politics Religion, and Sexuality in the US and Canada* (Vancouver: UBC Press, in press).

setting that appropriately prepares future teachers for the public school environment, and in particular the diversity of public school students”.⁷³

The majority of the Supreme Court of Canada, in a judgment written by Iacobucci and Bastarache JJ., held that the decision of the BCCT to deny accreditation to TWU’s teaching program should be overturned. For the Court, “[t]he issue at the heart of this appeal is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.’s public school system.”⁷⁴ The Court found that, while the BCCT acted properly in considering whether the TWU program might contribute to discrimination against gays and lesbians in the public schools, the college should also have taken account of the religious freedom rights of TWU and its graduates. The Court noted that the BCCT decision meant that TWU would have to abandon its religiously based “Community Standards”, if it were to run a program that trained teachers for the public school system. Graduates of TWU “are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers”.⁷⁵

The Court in the *TWU* case accepted that freedom of religion is “limited by the rights and freedoms of others” and does not protect religious practices that are harmful, including explicit acts of discrimination against gays and lesbians.⁷⁶ However, it found that in this case the limitation on the religious freedom of the staff and graduates of TWU (the denial of accreditation) was imposed in the absence of any evidence that the program had a detrimental impact on the school system. According to the Court, the TWU Community Standards simply prescribed the conduct of members while attending TWU and so gave no reason to anticipate intolerant behaviour by TWU-trained teachers in the public schools. The Court concluded that in the absence of any concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the BCCT had no grounds to deny accreditation to TWU, and interfere with the religious freedom of TWU instructors and students to hold certain beliefs. The Court found no conflict in this case between religious freedom and sexual orientation equality. If a teacher engages in discriminatory conduct, he or she “can be subject to disciplinary proceedings before the BCCT”.⁷⁷ But, said the Court, the right of

⁷³ *TWU*, *id.*, at para. 11.

⁷⁴ *Id.*, at para. 28.

⁷⁵ *Id.*, at para. 32.

⁷⁶ *Id.*, at para. 29.

⁷⁷ *Id.*, at para. 37.

gays and lesbians to be free from discrimination is not violated simply because a teacher holds discriminatory views.

While the majority judgment in *Hutterian Brethren* seems to diverge from these earlier decisions, particularly in its repudiation of “reasonable accommodation” analysis, the result in that case is not out of line with these decisions. In these earlier cases, when the Court decided that accommodation should be made, it did so only because, in its view, the exception would not compromise the law’s purpose in any meaningful way. According to McLachlin C.J.C. in these cases, the Court “found that the potential risk [to public policy] was too speculative”.⁷⁸

Yet, as these cases illustrate, even a weak standard of justification that focuses principally on the minimal impairment requirement opens up some room for accommodation — for the Court to decide that a minor compromise of the law’s objective should be made to create space for a religious practice. Indeed, as LeBel J. observes in *Hutterian Brethren*, the Chief Justice’s statement of the minimal impairment test, which requires that the state employ less restrictive means if these will achieve the state’s objective “in a real and substantial manner”, “appear[s] to signal that, even at the minimal impairment stage, the objective might have to be redefined and circumscribed”.⁷⁹ If a law will fail the minimal impairment test simply because its purpose could be advanced *substantially* or *almost* as effectively in another way that did not impair the religious practice, then there will be some degree of religious accommodation. The courts may protect religious practices from state restriction at the margins, requiring the state to compromise its objectives in minor ways to accommodate practices that matter deeply to their adherents. These are pragmatic decisions though, that do not fit with the Court’s aspiration to resolve rights issues in a principled way. And indeed, McLachlin C.J.C. appears to be unwilling to relax the minimal impairment test in any significant way.⁸⁰

⁷⁸ *Hutterian Brethren*, *supra*, note 1, at para. 81.

⁷⁹ *Id.*, at para. 197.

⁸⁰ In the *Hutterian Brethren*, *id.*, case an exemption to the photo requirement might have been made with little cost to the law’s objective. Chief Justice McLachlin rejects the argument that the creation of an exception to the photo requirement would have a minor impact on the law’s policy, because only a small number of individuals will claim the exemption. She observes that we cannot know in advance how many individuals might ultimately claim the exemption. But this will always be the case, since the test for determining whether a religious practice falls within the scope of s. 2(a) is subjective: that an individual has a sincere belief in its spiritual significance. Following the Chief Justice’s approach, an exception to the policy could never be treated as minor, since it is always possible that the number of individuals falling within the exception will be so great that the policy is completely undermined.

There is no clear or principled way for the courts to determine the fair and appropriate trade-off between a religious practice and a democratically selected public purpose. However, a flexible approach to the minimal impairment test may permit minor and pragmatic compromises of state policy to create space for religious practices. There are a few other situations in which the courts may decide that a compromise of the law's purpose is appropriate. Accommodation may be granted to minority practices, when state law reflects and advantages the practices of a historically dominant religious community, for example in the creation of statutory holidays. But, as noted earlier, the Court in *Edwards Books* was not prepared to enlarge the statutory exemption that had been written into the statute. Accommodation may also be appropriate in the case of paternalistic laws — for example, an exception for a Sikh man from a law that requires all persons to wear a helmet when riding a motorcycle or bicycle. Paternalistic laws are intended to protect individuals from their own bad decisions. A commitment to religious freedom, or state neutrality towards religion, may at least limit the state's ability to treat self-regarding religious practices as unwise — as something against which the individuals needs to be protected.⁸¹ Yet, even in the case of apparently paternalistic laws the courts have been hesitant to recognize exceptions. The reluctance to recognize a religious exception in such cases appears to be based on a recognition that no law is simply paternalistic and that any time an individual is injured there will be an impact on others, including friends and family members, employers or co-workers, and of course the general public, which must cover the injured person's medical costs.

VIII. CONCLUSION

Section 2(a) is breached any time the state restricts a religious practice in a non-trivial way. The state must justify the restriction under section 1 and the *Oakes* test, and this is said to involve a balancing of competing interests, the individual's freedom to practise his or her religion and the state's ability to advance the public good. But in practice, the courts have been unwilling to require the state to compromise its policy in any significant way. The legislative objective is given priority and is not "balanced" against the religious practice. An exception to the law

⁸¹ "Self-regarding" from a secular perspective, of course. The adherent may understand his or her practice as connecting him or her to God.

will be made for a religious practice only if this can be done without detracting from the effectiveness of the law. Or, put another way, the practice will be accommodated if it can be viewed as private, as separate or distinct from public concerns.

I have argued that the Court's adoption of this weak standard of justification under section 1 reflects an ambivalence about the nature of religious commitment and its place in the public life of the community. Because religion is deeply rooted, a matter of identity that shapes the individual's worldview at a fundamental level, the restriction or marginalization by lawmakers of an individual's religious practices may be viewed as a denial of her or his equal worth. Yet at the same time, because different religions make claims that can be described as right or wrong and that sometimes address or affect the rights or interests of others, they cannot simply be insulated from public decision-making. The requirement that the state remain neutral in matters of faith rests on the idea that religion and politics are separate spheres of life. But in reality, religion and politics overlap in a variety of ways.

There is no principled way for the courts to balance democratically selected public values or purposes against the spiritual beliefs and practices of a religious individual or community and decide that one should prevail over the other in the circumstances. At most, the courts can protect religious practices from state restriction at the margins, requiring the state to compromise its objectives in minor ways, to create space for practices that matter deeply to their adherents. This type of pragmatic decision-making, however, does not fit with the Court's aspiration to resolve rights issues in a principled way. The majority decision in the *Hutterian Brethren* case sought to determine the justification of a restriction on religious practice using the *Oakes* framework for the balancing of competing interests. The result in that case was that the state was found to have no duty to compromise its policy, in even the most minor way, to accommodate a religious practice.