

Political Liberalism and the False Neutrality Objection

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Abstract: One central objection to philosophical defences of liberal neutrality is that many neutrally justified laws and policies are nonetheless discriminatory as they unilaterally impose costs or confer unearned privileges on the bearers of a particular conception of the good. Call this the false neutrality objection. While liberal neutralists seldom consider this objection to be a serious allegation, and often claim that it rests on a misunderstanding, I argue that it is a serious challenge for proponents of justificatory neutrality. Indeed, a careful examination of recent French and Canadian laws which impede the members of cultural minorities from freely practising their religion reveals that the state can hide its discriminatory aims by cloaking the policies it enacts in neutral language. In order to avoid the problem of false neutrality, I contend, liberal neutralists should defend a combination of neutrality of justification and neutrality of aim, and operationalize neutrality of aim through a practical test that has been a defining feature of American jurisprudence on religious freedom in the last thirty years: the general applicability requirement.

Keywords: Liberal Neutrality; Religious Diversity; Reasonable Accommodation; General Applicability; Jurisprudence

Since the concept of liberal neutrality has emerged in the contemporary literature on political liberalism, it has been argued that neutrality is a myth (Nieguth 1999). According to Charles Taylor (1994, p. 43), for instance, ‘the supposedly neutral set of difference-blind principles of the politics of equal dignity is in fact a reflection of one hegemonic culture’ and in the liberal state, ‘only the minority or suppressed cultures are being forced to take alien form.’ In a similar fashion, Iris Marion Young (1990, p. 169) has argued that liberalism’s ‘formally neutral rules and policies that ignore differences often perpetuate the disadvantage of those whose difference is defined as deviant.’ In her view, many laws and policies have a discriminatory character even if they are neutral on their face. Let us call this argument the false neutrality objection.

Typically, proponents of liberal neutrality have not regarded the false neutrality objection as a genuine problem. In fact, they often claim that it rests on a misunderstanding. In his recent book

Respecting Toleration, for instance, Peter Balint (2016, p. 54) argues that philosophers who claim that the state cannot be substantively neutral simply fail to see neutrality as a political ideal: ‘Ideals are ideals because they are never fully realized,’ he contends, and rejecting neutrality on the ground that the state can never be fully neutral would amount to ignoring that unachievable goals can productively guide our behaviour even if they elude us.

In this article, I argue that there is more to the false neutrality objection than meets the eye. More specifically, I contend that laws and policies that are justified in neutral terms are indeed discriminatory when they are intended to impose costs or confer unearned privileges on the bearers of a particular conception of the good. In other words, neutrality of justification as it currently stands is vulnerable to the problem of insincere (or ‘pretextual’) justification. My proposed solution to this problem is twofold. First, I contend that neutralists should defend what I define as substantive neutrality, which comprises both neutrality justification and neutrality of aim. This will prevent states from enacting neutrally justified laws and policies the intent of which is nonetheless discriminatory. Second, endorsing substantive neutrality gives rise to the epistemological challenge of identifying situations where the neutral justification of laws and policies conceals their non-neutral aim. To efficiently identify cases of false neutrality, I therefore propose to operationalize neutrality of aim through a heuristical device that can be extracted from American jurisprudence on religious freedom: the general applicability requirement. To ensure that a specific law or policy is substantively neutral, indeed, we must establish that it is both (i) neutrally justified and (ii) compatible with the general applicability requirement.

As we will see below, my proposed interpretation of the general applicability requirement is slightly wider than the one customarily used by judiciary officials. On my view, a philosophically improved version of this requirement ensures that:

If a state outlaws action A on the grounds that it threatens state interest B, it must prohibit all similar actions that equally threaten this same interest.

To make these claims plausible, I first clarify the nature of the false neutrality objection by showing that it does not rest on a philosophical misunderstanding, and by giving concrete examples of French and Canadian laws that critics correctly argued were falsely neutral (Section 1). By analyzing a landmark case of American jurisprudence – *Church of the Lukumi Babalu Aye v. City of Hialeah* – I will then argue that the general applicability requirement is an efficient tool to identify and prevent situations of false neutrality (Section 2). The third and last section of the paper is proleptic: it answers two foreseeable challenges to my proposed interpretation of liberal neutrality which encompasses both neutrality of justification and neutrality of aim operationalized through the general applicability requirement.¹ The first objection is that my view is too demanding, as it commits the state to unattractive forms of compensation. Conversely, the second objection is that such view is not demanding enough: undoubtedly, laws and policies that are justified in neutral terms can impose unfair costs or confer unearned privileges on the bearers of a particular conception of the good even when they are not intended to do so, but the general applicability requirement does not efficiently protect us against such cases. Answering these objections will allow me to specify the relationship between the general applicability requirement and a well-known interpretation of the neutrality principle: neutrality of effect.

1. The False Neutrality Objection

In increasingly diverse societies, democratic states face the challenge of justifying their policies to segments of the population holding conflicting views. What seems like an admirable

¹ In this paper, I use the following expressions interchangeably: (1) neutrality of effect, neutrality of outcome and consequential neutrality; (2) neutrality of intention and neutrality of aim; (3) neutrality of justification and justificatory neutrality.

piece of legislation to the bearers of a specific conception of the good is the object of severe criticism from the proponents of another. In fact, we may be inclined to think that it is impossible for governments to draft legislation which will be acceptable to all citizens, even if these citizens are generally disposed to live in harmony with others. Neutrality is contemporary liberalism's answer to this challenge. Given that a wide range of rational disagreement is – as Rawls (1995, p. xviii) suggested – the ‘normal result of the exercise of human reason,’ one way to minimize disagreement is to ensure that states remain neutral, that is, refrain from enacting policies which are grounded in a comprehensive conception of good.

One of the earliest critiques of the liberals' discourse on neutrality came from philosophers who argued that it is simply impossible for the state to be neutral. Yet, such thinkers sometimes failed to pinpoint the philosophical view that is defended by liberal neutralists. In *Whose Justice? Which Rationality?*, for instance, Alasdair MacIntyre (1988, p. 345) argues that one central caveat of the neutralist's response to the plurality of conceptions of the good is that liberalism's starting points are ‘never neutral’ as between these conceptions.² In his view, ‘they are always liberal starting points’ and this demonstrates that liberalism's pretension to neutrality is flawed from the outset. It may be possible for the state to enact neutral policies, but the very idea that states should behave in such way is itself not neutral: it is rather part of a liberal *Weltanschauung* that is not any less comprehensive than non-liberal political doctrines.

The point missed by such an argument is that neutralists do not in fact argue that liberalism's starting points are neutral. Rawls acknowledges as much in *Political liberalism*, stating that justice as fairness rests on substantive moral principles. Dworkin (1990) underlines this idea even more

²For discussions of MacIntyre's criticism of liberal neutrality, see Barry 1995 and Kuna 2005.

clearly by grounding his own defence of liberal neutrality in a comprehensive conception of the good that he terms the ‘challenge model’ of ethics. Yet, the fact the liberalism’s starting points are not neutral does not entail that liberals who defend neutrality are philosophically inconsistent. Indeed, critics of liberalism will only be inclined to think so if they fail to distinguish – as MacIntyre does – legislative neutrality from philosophical neutrality. Legislative neutrality is the view according to which (at least some) laws and public policies should not favour or promote a controversial conception of the good over others, or give greater assistance to those who pursue it. By way of contrast, philosophical neutrality is the claim that the philosophical grounding of legislative neutrality should itself be neutral, that is, rest on premises that do not belong to a controversial conception of the good that some citizens may reasonably reject. When proponents of the false neutrality objection ignore this distinction, they often forget that one can coherently endorse legislative neutrality while rejecting philosophical neutrality. Legislative neutrality only entails that laws and policies should be neutral, not that the philosophical argument on which it rests also ought to be. In fact, liberals seldom defend neutrality on both levels.³

Moreover, not all proponents of legislative neutrality defend the same philosophical view as many disagree about its possible scopes. Proponents of *wide* neutrality contend that all laws and public policies must be neutral. Conversely, advocates of *narrow* neutrality such as Rawls argue that only laws and public policies which touch upon constitutional essentials and matters of basic justice must be neutral. They are therefore likely to be unimpressed with the claim that it is impossible for the state to ensure that all laws and public policies are neutral.

³One notable exception is Larmore 1987.

While a distinction between the possible scopes of neutrality allow us to determine *which* laws ought to be neutral, it does not tell us *in what way* they should be. A last relevant distinction therefore concerns the possible meanings of liberal neutrality. One of its clearest expression is given by Richard Arneson (2003, p. 193), who differentiates between the three following interpretations of neutrality:

1. **Neutrality of aim** requires that no actions or policies pursued by the state should aim at promoting one controversial way of life or conception of the good over others.
2. **Neutrality of effect** requires that the policies pursued by the state should not bring it about that any controversial way of life or conception of the good is advantaged over others. Nor should state policy bring it about that adherents of any controversial way of life or conception of the good are advantaged by comparison with adherents of other ways and conceptions.
3. **Neutrality of justification** requires that any policies pursued by the state should be justified independently of any appeal to the supposed superiority of any way of life or conception of the good over others.

As Simon Clarke (2014, p. 110) rightly underlines, neutrality of justification (or justificatory neutrality) ‘is the conception accepted by almost all defenders of liberal neutrality.’⁴ This is mainly due to the fact that neutrality of effect is usually considered to be too demanding and that it is often difficult to judge a state’s aims or intentions independently of the way it justifies its laws and policies. As we will see in the next two sections, proponents of the false neutrality objection challenge the hegemony of justificatory neutrality over alternative interpretations by arguing that distinguishing between aims and justifications is crucial. For the moment, let us keep in mind that the cost of failing to differentiate between the many possible levels, scopes and objects of neutrality is high for its critics. If they ignore the relevant distinctions, they risk challenging views that are not actually defended by neutralists. In order to hit the target, the false neutrality objection must

⁴For recent defences of neutrality of justification, see Gaus and Vallier 2009 and Cordelli 2017.

challenge the view that is the most frequently defended by liberal neutralists and arguably the most difficult to defeat: narrow scope justificatory neutrality at the legislative level.

Keeping this fact in mind, I propose the following restatement of the false neutrality objection:

Many neutrally justified laws and policies that touch upon constitutional essentials or matters of basic justice are intended to impose costs or confer unearned privilege on the bearers of a particular conception of the good. Such policies are falsely neutral.

The false neutrality objection is often formulated in legal contexts where a neutrally justified piece of legislation is considered to unfairly burden the practices of a given religious community.⁵ One defining feature of such cases is that they undoubtedly involve laws which touch upon constitutional essentials and which are therefore subject to the neutrality principle according to proponents of both narrow and wide conceptions of legislative neutrality. For this reason, much of the subsequent discussion focuses on cases that concern religious difference. Surely, if laws and public policies regarding religious privileges and religious freedom turn out to be falsely neutral, no liberal neutralist could reasonably deny that this represents a major problem for political liberalism.

Consider first the following scenario discussed by Alan Patten. A state enacts a law that confers some advantage on a majoritarian religion that it does not confer on religious minorities. To justify its behaviour, the state refrains from passing any judgment on the relative worth of the majoritarian religion compared to the religions embraced by minorities. Rather, it underlines that the establishment of the majoritarian religion ‘will bring desirable social consequences’ such as the enhancement of the ‘authority and perceived legitimacy of the state in the eyes of many citizens,

⁵One implicit but reasonable assumption behind philosophical discussions of such cases is that there are strong ties between an individual’s religious practices and the conception of the good that she endorses.

thereby making it more effective at pursuing its other objectives' (Patten 2012, p. 255-256).⁶ In Patten's view, proponents of justificatory neutrality will have to admit that the justification offered by the state in such case is neutral. After all, the legislation's aim is to promote a political goal that all reasonable citizens could endorse: living under a state which is perceived to be legitimate, and which efficiently pursues its many objectives. Yet, the policy clearly 'involves an official state preference for one particular religion and would strike many people as plainly non-neutral in character.'

Patten's hypothetical scenario is interesting, but there are reasons to think that it is not the best illustration of a law that is falsely neutral. In this case, both the justification and the aim of the law appear to be neutral and there is no indication that the state's latent intention is to discriminate against a particular group of citizens. Yet, I will be arguing that paradigmatic cases of false neutrality involve such hidden intentions. To see this, let us examine two real-life examples of situations in which states proposed or implemented highly disputed albeit neutrally justified laws. The first piece of legislation was implemented in France in October 2010 under the government of Nicolas Sarkozy. It stipulates that 'no one in the public area may wear an outfit designed to conceal his or her face.'⁷ This law is phrased in neutral language as it does not appeal to the supposed superiority of any way of life or conception of the good over others. As we will see below, it would also be easy to justify such a law by appealing to neutral reasons, thus ensuring that it respects neutrality of justification. However, by adding numerous exemptions to the law in question, the Sarkozy government revealed its true intent, which was to ensure that it would

⁶Patten 2014 expands upon this argument.

⁷My translation of the 'Loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public (1)'.

essentially prohibit Muslim women from wearing burqas in the public sphere. Indeed, the 2010 law prohibiting citizens to conceal their face ‘does not apply if the dress is prescribed or authorized by legislative or regulatory provisions, if it is justified on grounds of health or professional reasons, or if it is part of sports, festivals or events of an artistic or traditional nature.’ In the end, it turns out that nearly everyone may wear an outfit designed to conceal his or her face, just not Muslim women. Note that contrary to Patten’s imagined piece of legislation, the French law does not even mention religion. In fact, it seems that this omission was deliberate: by phrasing a law which does not seem to concern religion at first glance, the state more efficiently pursued its undisclosed objective, which was precisely to target particular religious practices.

The second law worth examining was proposed in 2013 by the provincial government of Quebec. It prohibited employees of the civil service from wearing conspicuous religious signs such as Muslim headscarves and Sikh turbans. It did not, however, proscribe the wearing of discreet religious symbols such as necklaces with small Christian crosses or rings engraved with a Star of David. As the principle of *laïcité* is arguably endorsed by a majority of Québécois, it was out of the question for the government to justify the ban by championing the value of the historically dominant religion: Christianity. Instead, Bernard Drainville, the state minister who was responsible for the law, argued that banning the wearing of conspicuous religious signs would foster public confidence in employees of the civil service, showing that agents of state are themselves neutral. In his view, both laws and administrative bodies ought to be *laïcs*. Yet, even though the law did not contain official exemptions, the prohibition of *conspicuous* religious signs *de facto* exempted believers who are not required to wear discernible signs by their faith – most notably Christians – from the official forbiddance.

Interestingly, neither of the two examined laws would have failed the neutrality of justification test as it is most commonly understood by liberal neutralists. Yet, both were discriminatory. In both cases, indeed, the state's hidden aim was to impede members of religious minorities – especially Muslim women wearing headscarves or burqas – from dressing in religious clothing.

As Patten convincingly argues, one central problem of neutrality of justification is that it *overreaches*, that is, it allows states to enact neutrally justified laws which are clearly intended to discriminate against the bearers of a particular conception of the good. An equivalent way to express this idea is to say that neutrality of justification is *underinclusive*. Indeed, neutrally justified rules often prohibit the members of a group from behaving in certain ways without forbidding the members of other groups from behaving in comparable ways ('You may conceal your face for the carnival, but not for religious purposes!'; 'You may wear a cross at work, but not a headscarf!'). While philosophers like Patten speak of the overreaching character of justificatory neutrality, legal scholars and judges customarily allude to its underinclusive nature. For the sake of the argument, it will be useful to keep in mind that both ways of speaking refer to the same objection.

One possible response to the claim that situations of false neutrality represent a significant problem for liberal neutralists is to distinguish between the proffered justification and the 'real justification' of laws and state policies.⁸ Faced with examples of discriminatory policies such as the ones discussed above, a philosopher defending neutrality of justification could indeed reply that she is not interested in the justification of laws and policies that are actually shared by state representatives in the public sphere, but only in the concealed justification that often lies behind

⁸I would like to thank an anonymous reviewer for drawing my attention to this point.

official discourse. Such a philosopher would then underline that the proffered justification of the French and Québécois measures are not their real justification, and that the latter are not neutral. Understood in this way, neutrality of justification would signify. Understood in this way, neutrality of ('real') justification would rule out the problem of false neutrality from the outset.

Here, two remarks are in order. The first is that neutrality of justification has traditionally been interpreted as neutrality of actually preferred justification as opposed to hidden or 'real' justification. For instance, Steven Wall (2017) describes neutrality in the following way:

...some have thought that it is more promising to apply the neutrality constraint not to the aims of state officials, but rather to the justifications they give in public for the decisions they make. This yields the third formulation of the neutrality constraint. Defenders of state neutrality often defend the doctrine by appealing to the ideal of public reason. Public reasons, they argue, must be shareable in a way that excludes appeal to controversial ideals of the good. Thus, state neutrality and public justification in politics emerge as different sides of the same coin.

Note that the focus here is on justifications actually shared by states with the public, not on concealed justifications. The second remark is that distinguishing between neutrality proffered and 'real' justification would essentially amount to differentiating between neutrality of justification and neutrality of aim, as political philosophers interested in neutrality customarily do (Arneson 2003, Patten 2012, Merrill 2014). As I have suggested, the French government enacted the 2010 law on face concealment because it intended to impede the Muslim women to wear burqas in public. If we distinguished between this 'real' justification and proffered justifications of the law (e.g., "we want to help police officers identify offenders more easily"), this would amount to underlining the aim of the law concealed by its insincere justification.

If this is the case, the neutralist who focuses on 'real' justification is claiming that substantive neutrality must encompass neutrality of aim. I agree with this statement, but such a philosopher will then face an epistemological challenge. The false neutrality objection amounts to

the claim that the discriminatory aims of laws and state policies are often cloaked in neutral language, but how can we know when this is indeed the case? How can philosophers interested in evaluating the normative legitimacy of concrete policies successfully establish that a neutrally justified policy x has been motivated by the intent to discriminate?⁹ In the next section, I submit that they should rely on the general applicability requirement to do so. In other words, I propose to conceive of the general applicability requirement as a heuristical device or practical test that efficiently operationalizes neutrality of aim and allows us to identify situations of false neutrality.

2. The General Applicability Requirement

Sharing Patten's concern over the overreaching character of justificatory neutrality, we may be tempted to adopt his own solution to this problem. Patten rejects the idea that the state should be neutral with regard to justification. Rather, he defends neutrality of *treatment*, which requires the state to be equally accommodating of all reasonable conceptions of the good. This amounts to the claim that 'when the state pursues a policy that is accommodating (or unaccommodating) of some particular conception of the good, it must adopt an equivalent policy for rival conceptions of the good' (Patten 2012, p. 9). To illustrate this view, Patten gives the example of a philanthropist who is faced with a decision of allocating money between two worthy projects. In this case, a proponent of neutrality of effect would seek to bring the projects as close as possible to equal levels of success. If one of the two projects requires more funding to be equally successful as the

⁹Does the political philosopher who attempts to operationalize neutrality of aim oversteps the boundaries of its discipline? The task of political philosophy, one could claim, is to establish the general conditions that must be met in order for state policies to be considered legitimate, not to wonder how we can efficiently determine whether a specific state policy is legitimate or not. It should be clear from the preceding discussion that my conception of political philosophy is broader than this. In my view, establishing the conditions of normative legitimacy and answering the epistemological challenge of knowing whether or not a given concrete policy is legitimate are both legitimate philosophical aims. Just like a virtue ethicist may wonder whether person x is virtuous, a liberal neutralist can attempt to determine if policy x is substantively neutral. I would like to thank an anonymous reviewer for inciting me to make this methodological clarification.

other, the former should receive a greater amount of money. By way of contrast, neutrality of treatment seeks to equalize the *inputs* of policies rather than their *outputs*. According to Patten, it entails that the best decision for the philanthropist is to privilege evenhandedness, that is, to give each project equal amounts of money.

The strength of Patten's position is to broaden the liberal neutralist's narrow focus on justification, but the cost of ignoring the justification of policies entirely may be too high. In fact, as Chiara Cordelli recently argued, replacing justificatory neutrality with neutrality of treatment is not the most efficient strategy to overcome the problem of overreach. Consider, for instance, a thought experiment that Cordelli (2017, p. 38) labels *divine egalitarianism*:

Citizens of a state hold a plurality of conceptions of the good, religious and non-religious alike. According to one of these, call it Divine Egalitarianism, all conceptions of the good ought to be treated equally because this is what God, who is infinitely charitable and forgiving, demands. The state passes a policy of equal accommodation – it provides all religious and non-religious conceptions of the good with equivalent forms of assistance – on the grounds that Divine Egalitarianism is the only true religion.

Such a policy is evenhanded as it provides all religious and non-religious conceptions of the good with equivalent forms of assistance. It therefore respects neutrality of treatment. Yet, it is clearly biased as it involves an official preference for one particular religion. Interestingly, divine egalitarianism would unambiguously be ruled out by neutrality of justification: in this case, equal accommodation is justified by an appeal to God's demands, which surely do not count as reasons that all – including atheists – can regard as their own. Here, Cordelli's intention is to show that liberal neutralists lose too much when they renounce justificatory neutrality as Patten does. Any plausible interpretation of the neutrality constraint should rule out cases like *divine egalitarianism*, but neutrality of treatment does not. In her view, it 'suffers from the very same weaknesses that Patten attributes to its alternatives.'

In Cordelli's view (2017, p. 38), an examination of *divine egalitarianism* allows us to conclude that neutrality of justification 'provides a more promising account of the sense in which a liberal state ought to be neutral.' Yet, in the last section, we saw that a narrow focus on justification is vulnerable to the false neutrality objection. As the French and Québécois laws prohibiting individuals from concealing their face or wearing conspicuous religious signs illustrate, neutrally justified laws can still be discriminatory. To avoid this problem, what one must do is elaborate a philosophical position that avoids the pitfalls of both neutrality of justification and neutrality of treatment. There are indeed two categories of laws against which citizens should be protected: laws that are neutral in treatment but non-neutral in justification, and laws that are neutral in justification but not neutral in treatment. Yet, Cordelli's view only rules out the first category of laws, not the second.

Instead of simply reverting to justificatory neutrality, a more promising strategy would be to identify a principle – or a set of principles – which rules out both laws which are evenhanded yet non-neutrally justified (e.g. *divine egalitarianism*) and neutrally justified laws which are intended to impose costs or to confer unearned privilege on the bearers of a particular conception of the good (i.e. falsely neutral laws). To do so, the solution I advocate is to supplement neutrality of justification, which efficiently protects us against evenhanded policies that are not neutrally justified, with a practical requirement that efficiently operationalizes neutrality of aim and rules out falsely neutral laws.¹⁰

As I have suggested in the introduction, the 'general applicability requirement' has been a defining feature of American jurisprudence on religious freedom in the last thirty years. It was

¹⁰In response to Cordelli's objection, Patten himself recognized that "neutrality of *treatment* [...] could be supplemented with additional principles." See Patten 2017, p. 132.

introduced in *Employment Division v. Smith*, a legal case in which the Supreme Court of the United States denied unemployment benefits to a Native American man who worked at a drug rehabilitation clinic in Oregon. Alfred Leo Smith, a member of the Native American Church, was fired after using peyote for sacramental purposes, but the Court ruled that the state of Oregon's ban on the possession of peyote was a 'neutral law of general applicability' that did not violate the Free Exercise Clause of the First Amendment.¹¹ Yet, the most thorough discussion of the general applicability requirement can be found in a second Supreme Court case – *Church of the Lukumi Babalu Aye, Inc. v. Hialeah* – in which municipal ordinances prohibiting members of a Santeria church from committing sacrificial rituals were judged unconstitutional.¹² Santeria (or Lukumi) is an Afro-American religion of Caribbean origin which syncretizes elements of the Nigerian Yoruba religion with Roman Catholicism. It developed in the Spanish Empire amongst West Africans who came there as slaves and spread in Southern Florida with the arrivals of exiles after the Cuban Revolution of 1959. As Paula Casal (2003, p. 6) notes, 'Santeros worship orishas, living spirits of African origin which, they suppose, can help people fulfil their destinies' and whose survival 'depends on animal sacrifices.'

In the city of Hialeah, in Florida, thousands of animals were sacrificed annually to feed the orishas. In response, the city enacted ordinances which prohibited its inhabitants from killing animals for sacrificial purposes. For instance, resolution 87-52 stipulated that it shall be unlawful for anyone to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual

¹¹See *Employment Division, Department of Human Resources of Oregon v. Smith* (1990).

¹²See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993). This U.S. Supreme Court decision has been discussed by political philosophers in the past, but not in the context of a reflection on the problem of false neutrality. For instance, Paula Casal 2003 discusses the case at length in the context of her reflection of the relationship between multiculturalism and animal rights, and Walter E. Schaller 2004 mentions it in his discussion of the relationship between neutrality and egalitarianism.

or ceremony not for the primary purpose of food consumption.’ Phrased in slightly broader terms, resolution 87-72 prohibited the same persons, corporations and associations from the ‘slaughter any animal on any premises in the City of Hialeah, Florida, except those properly zoned as a slaughter house, and meeting all the health, safety and sanitation codes prescribed by the City for the operation of a slaughter house.’

All ordinances enacted in Hialeah were motivated by appealing to neutral reasons. For instance, it was claimed that animal sacrifices posed substantial threat to public safety and violated the state’s interest in preventing animal cruelty. Yet, in *Lukumi*, the Court applied a stricter neutrality test than the one conceived of by Cordelli and Patten. According to Justice Anthony Kennedy, who wrote the majority opinion, a law is not neutral ‘if it refers to a religious practice without a secular meaning discernible from the language or context.’ In other words, notwithstanding the *reasons* used to justify a law, such law can be deemed non-neutral if its *phrasing* explicitly targets religious practices. In *Lukumi*, many ordinances lacked neutrality in this sense. Indeed, ordinance 87-52 forbade the mistreatment of animals ‘in a public or private *ritual or ceremony* not for the primary purpose of food consumption.’ Notice, however, that ordinance 87-72 did not fail the strict neutrality test applied by the Supreme Court by itself.¹³ Neither the justification nor the phrasing of that ordinance explicitly targeted religious practice. As we have seen, it simply prohibited ‘any person, persons, corporations or associations to slaughter any animal on any premises in the City of Hialeah, Florida, except those properly zoned as a slaughter house.’ This ordinance was neutral, but it still failed to meet the general applicability requirement. Let us examine why.

¹³The Supreme Court did rule, however, that such ordinance could not be considered neutral if we envisioned it as functioning in tandem with the other three ordinances.

When judges invoke general applicability, they seldom take the trouble to offer a precise definition of this requirement. To avoid confusion, it is therefore important for legal and political philosophers to do so. On its widest possible interpretation, the general applicability requirement can be defined in the following way:

If a state outlaws action A on the grounds that it threatens state interest B, it must prohibit all similar actions that equally threaten this same interest.

General applicability therefore ensures that actions with equivalent consequences obtain the same legal status. If, for instance, the consumption of substance X is prohibited on the grounds that it endangers the health of citizens and it can be shown that substance Y does so in a comparable way, the general applicability requirement ensures that the consumption of both substances is either permitted or prohibited. In the context of American jurisprudence on religious freedom, the general applicability requirement is usually interpreted as ensuring that no behaviour will be prohibited simply because it is motivated by religious considerations. If two actions equally threaten an important state interest, but only one is committed for religious purposes, the law must prohibit both to be generally applicable.

One important consequence of this requirement is that it prevents the state from using exemptions to ensure that a neutrally justified law only targets the bearers of a specific conception of the good, such as the practitioners of a given religion. As Richard Duncan (2001, p. 862) writes, ‘if a state agency grants *ad hoc* exemptions, waivers, or variances in even a few cases involving secular claims, it may not refuse to grant similar exemptions, waivers, or variances in cases of “religious hardships”.’ In *Lukumi*, only some of the ordinances lacked neutrality, but all ordinances contained exemptions which infringed the general applicability requirement. For instance, Hialeah’s officials argued that the corpse of sacrificed animals posed a significant threat to public

health, but they did not prevent hunters from bringing their kill to their houses even though such practice was known to be as unsanitary as ritual killings. With regard to animal cruelty, the officials legislated against sacrifices, but not against regular slaughterhouses, kosher slaughterhouses, the eradication of pests and insects and the euthanasia of ‘excess’ animals. As a result, most animal killings were allowed (including very painful ones), but not Santeria sacrifices.

It is my suggestion that the French and Canadian laws discussed in the previous section would also fail to meet the general applicability requirement. In order to see this, remember first that the French law is phrased in neutral language and can easily be justified neutrally. As I have suggested, one could argue, for instance, that ‘*no one* in the public area may wear an outfit designed to conceal his or her face’ so that police officers can more efficiently identify offenders. A second feature of the French law is that it contains many exemptions. Indeed, an individual may conceal her face if her behaviour is ‘justified on grounds of health or professional reasons, or if it is part of sports, festivals or events of an artistic or traditional nature.’ Yet, no similar exemptions are granted to individuals who want to conceal their face for religious motives. For this reason, we may conclude that the law in question fails to be generally applicable. If we interpret liberal neutrality as solely ensuring that laws are neutrally justified, such law remains unproblematic. Contrariwise, on my proposed interpretation, such a law ought to be considered discriminatory.

The Quebec case is similar, but slightly more complex. The law prohibiting state personnel from wearing conspicuous religious signs was also justified with appeal to neutral reasons. Indeed, the Minister of Democratic Institutions argued that the proposed ban would foster public confidence in the civil service, showing that agents of the state are as neutral as the state itself. If we apply the strict neutrality test used by the Supreme Court in *Lukumi*, however, the law would be considered to lack neutrality as its phrasing explicitly refers to the wearing of conspicuous

religious signs. Of course, a more skilful legislator than the aforementioned minister could have cloaked the law in neutral language by prohibiting state personnel from wearing all conspicuous *ideological* signs of either religious or secular nature. However, it is still my contention that such a modified law would have failed to meet the general applicability requirement.

The difficulty in this case is that such a modified law would not contain any *explicit* exemption. For this reason, we may be inclined to think that it passes both the neutrality and the general applicability tests. After all, it would not outlaw religiously motivated actions while allowing comparable actions to be committed on secular grounds. Yet, I mentioned earlier that broadly conceived, the general applicability requirement forbids state agencies from outlawing particular actions which endanger a legitimate state interest while allowing other actions that represent an equivalent threat to this same interest. On this wide interpretation of the requirement, the law would have to be ruled out. Indeed, the argument according to which a civil service employee who wears a small but visible ideological sign appears more neutral or impartial than an employee who wears a larger one (e.g. a hijab) is unconvincing. Moreover, and perhaps more importantly, the very tailoring of the ban functions as an exemption. Were it implemented, it would not forbid all state personnel to wear religious signs, but only those whose religion places a high value on the wearing of conspicuous signs such as Islam and Sikhism.

The takeaway point of the previous discussion is that a neutrally justified law may, as Dilhac (2014, p. 12) notes, define ‘a class of prohibited acts in such a way that only the practices of a particular religion’ – or a small group of religions – ‘are actually targeted.’ As we have seen, it is fairly easy for a state official to offer a neutral justification of a policy the concealed aim of which is to impede a specific group of individuals from freely practising their religion. False neutrality

relies on such insincere justifications, of which the French law prohibiting all citizens to wear an outfit designed to conceal their face is a paradigmatic example.¹⁴

If neutrality of justification does not efficiently protect us against such laws, we need additional principles to prevent cases of false neutrality. I have argued that the general applicability requirement allows us to do so or, more precisely, that the combination of neutrality of justification and neutrality of aims operationalized through the general applicability requirement will more efficiently rule out falsely neutral laws than neutrality of justification alone. Indeed, such a requirement ensures that the *aims* of laws and policies – which should not be conflated with their justification – are neutral. To put it simply, it protects us against a form of state hypocrisy that neutrality of justification cannot adequately counter by itself. If a state agency succeeds in pursuing non-neutral aims, it will be a poor consolation for the members of the negatively affected group to know that the law which impedes them from realizing their conception of the good has been phrased and justified in neutral language. In opposition to false neutrality, substantive neutrality comprises both neutrality of justification and neutrality of aim, and the general applicability requirement serves as a practical test that allows us to verify that the latter is respected.

3. Applicability, Aims and Outcomes

Does the general applicability requirement ensure that the policies pursued by the state never create a situation in which any controversial way of life or conception of the good is advantaged over others? It does not. Indeed, this would amount to neutrality of *consequences* or *effects*, not of aims. Such a clarificatory remark is necessary given that one possible objection against my

¹⁴For an interesting discussion of this problem, see Gregory Whitfield, “Complex Neutrality,” unpublished paper. Although I agree with Whitfield that neutrality of justification alone is not sufficient, we advocate different solutions to what I termed the false neutrality objection.

proposed interpretation of liberal neutrality is that once we take aims into account, what we are really evaluating are effects.¹⁵ The aim of laws and public policies is always to produce specific outcomes, and it is often these outcomes that strike us as unfair. For example, one of the consequences of the French law discussed above is that Muslim women are most affected by the interdiction to conceal their face, and this very fact may spark moral anger¹⁶. Yet, if it is true that evaluating the aims of policies amounts to assessing their consequences, the distinction between neutrality of aim and neutrality of effect will collapse, and my view will be vulnerable to the traditional objections directed against the latter.

Consider for instance Richard Arneson's claim that nobody who endorses liberal neutrality would want to defend neutrality of effect as this would oblige the state 'not to do anything that makes it more likely that individuals accept any particular conception rather than another unless steps are taken to cancel, or compensate for, the effects of policies that do this' (Arneson 2003, p. 193). In Arneson's view, a state which takes such steps will have to endorse excessive demands. For example, if a religious sect does not fare as well as others under a regime of freedom of religion, it will be entitled to a form of compensation from the state. Yet, few liberals (if any) would want to argue that unpopular religious sects should be compensated for their lack of popularity. Indeed, many people would agree that the growth and survival of a religious group is the responsibility of its members, not that of the state. As neutrality of effect commits the state to such unattractive forms of compensation, Arneson contends, liberals should abandon it without hesitation.

¹⁵I would like to thank Angie Pepper for bringing this objection to my attention.

¹⁶In its current form, such law prohibits women wearing burqas from entering shops, train stations, parks and public institutions including state universities. It thus impedes Muslim women's access to education, travel and leisure.

Note, however, that neutrality of aim will only collapse into neutrality of effect if we fail to consider the distinction between the *intended* and *unintended* consequences of a state's intervention (or failure to intervene when it could have prevented these consequences).¹⁷ Indeed, neutrality of aim only commits us to the view that the *intended* results of the state's behaviour must be neutral and it is unclear that such view forces us to endorse overly demanding policies. The same goes for the general applicability requirement, which practically ensures that the aims of policies – not only their justification – are neutral. If there is no reason to believe that the state intends to penalize particular religious sects by enforcing freedom of religion, for instance, these sects will not be entitled to any compensation under such regime, and Arneson's objection will not apply.

A more promising objection to my view is that an account of liberal neutrality which builds on both neutrality of justification and neutrality of aim operationalized through the general applicability requirement is not demanding enough. We can indeed conceive of neutrally justified policies which are not intended to discriminate against the bearers of a particular conception of the good but which still impose unilateral costs on these individuals. Indeed, at least some policies will pass both the neutrality test and the general applicability test even though they make it more difficult for the members of religious minorities to fulfil the requirements of their faith. To illustrate this point, let us consider the following hypothetical scenario:

Soccer: In state *s*, a soccer association implements policy *p* according to which all soccer players under eighteen years of age must refrain from wearing clothing which is likely to cause injury. No exceptions are granted and a serious study just found that wearing head covers significantly increases the chances of injury to the head or neck. The government of state *s* decides not to intervene in this affair and policy *p* remains effective.¹⁸

¹⁷On this point, see Wall 2001.

¹⁸In fact, this scenario is not purely hypothetical. The Fédération Internationale de Football Association (FIFA) banned the wearing of head covers until 2012, claiming that they posed too great of a risk of injury to the head or neck. Yet, there were no extensive studies who demonstrated this and after a two-year test period, FIFA lifted the ban.

In this case, the state's decision not to intervene can be neutrally justified with appeal to reasons which all citizens could regard as their own. The soccer association acted to promote the well-being of all children, and the security of children is a collective interest that all reasonable citizens can be expected to endorse. The enacted policy also passes the general applicability test as there is no indication that it was tailored to impede the members of a religious minority from participating in recreational activities: it applies equally to all children who want to wear a head cover of any kind. Yet, it would be difficult to deny that policy *p* imposes more costs on girls who would like to play while wearing a hijab than on the average child. Should the state demand that the soccer association modify its dressing code?

Situations like *Soccer* must be handled on a case-by-case basis. On my view, all laws which fail to meet neutrality and justification and neutrality of aim ought to be considered discriminatory, but not all laws which satisfy both philosophical principles are necessarily just. In other words, such principles are necessary (albeit not sufficient) conditions of normative legitimacy. When a prohibitive law meets both justificatory neutrality and neutrality of aim but still unilaterally imposes costs on the bearers of a specific conception of the good, additional questions need to be answered before we can reach a conclusion. Officials should try to determine, for instance, if the state truly has a compelling interest in enacting such law and, when this is the case, if proscribing a specific religious practice is the least restrictive mean to further this interest. As Kevin Vallier (2016) has recently suggested, they should also assess if a religious exemption would impose costs that require redress on parties other than the exempted group. In addition to neutrality of justification and neutrality of aim, there may be other normative principles which allow us to reduce the costs imposed by restrictive policies on cultural, linguistic and religious minorities.

By way of contrast, traditional defences of neutrality of effects do not allow us to handle hard cases with such flexibility. On this interpretation of liberal neutrality, if a law disadvantages the bearers of a particular conception of the good in any way, it must be invalidated (no matter what can be gained from its enactment). A liberal truly committed to consequential neutrality will therefore have to conclude that a soccer association cannot legitimately ban the wearing of dangerous head covers as it unilaterally imposes costs on Muslim players. Contrariwise, my view allows one to conclude that the costs implied by such ban are legitimate. Although we may feel empathy for Muslim players, one may reasonably be inclined to think that the imposition of such costs is accidental, and that our empathy should not lead us to compromise the security of children. Of course, such costs may also incite us to imagine less restrictive solutions than a ban. If a hijab specifically designed to play sports became available and we could show that its wearing did not significantly increase the chances of injury, there would be no legitimate reason for the soccer association to prohibit players from wearing it. If it did, the state should then intervene.

To sum up, *Soccer* reveals what critics of consequential neutrality such as Arneson have long argued: it is sometimes legitimate for the state to enact a policy or allow a civil society organization to do so even though such policy advantages some individuals or groups over others. To borrow an imaginative example construed by Gregory Whitfield, ‘if a group of Wiccans were the only people whose comprehensive conceptions required open indoor flames,’ the state may still enact a building code that prohibits lighting fires inside apartments even if the negative consequences of such code are greater for Wiccans than other citizens. Yet, if the view I am advocating is plausible, no policy must be intended to impose costs on the bearers of a particular conception of the good, and an efficient way to verify if they do is to apply the general applicability requirement. If

Wiccans are not allowed to light fires indoors, then no one should be, and all actions that are as likely to generate conflagrations should also be prohibited.

I should concede, however, that more flexible interpretations of neutrality of effect than the one discussed in the philosophical literature on neutrality are possible. An alternative proposal to the one defended here, for instance, would consist on defending all three types of neutrality, albeit on pluralist grounds. Considering *Soccer*, a philosopher defending such a view would reason in the following way. *Soccer* violates neither neutrality of justification nor neutrality of aim, but it does violate neutrality of effects. This gives us reason to oppose the state's policy according to which all soccer players under eighteen years of age must restrain from wearing clothing which is likely to cause injury. Yet, another important good – the security of children – is at play here, and it seems adequate to give priority to our societal desire to protect the well-being of children over our desire to respect neutrality of effects. In this case, we therefore ought to violate neutrality of effects. In this philosopher's mind, neutrality of effects would represent an important normative requirement, but it would not be a systematically overriding one and it could be 'balanced' against of normative principles that we deem philosophically important¹⁹.

To conclude, I have proposed to supplement neutrality of justification with neutrality of aims operationalized through the general applicability requirement, but I see no need to deny that other normative principles – such as a more flexible 'reconstructed' neutrality of effects – may be added to my account. Although it goes beyond the scope of this article to inventory them all, the very

¹⁹In a similar manner, a philosopher who considers that a strict implementation of the general applicability requirement risks levelling with respect to liberty by prohibiting legislators from making judgment calls could balance this requirement against other normative principles. Although I am sceptical of the claim according to which the general applicability requirement envisioned as a universal rule truly endangers liberty, using it in such a pluralist way remains a reasonable philosophical option.

idea that political philosophers should supplement neutrality of justification with complementary principles does not. Traditionally, proponents of liberal neutrality have each favoured a single normative principle that they deem superior to others, but it has been my suggestion that there are reasons to abandon this strategy. The most frequently defended interpretation of the ideal of neutrality – neutrality of justification – should be combined with neutrality of aim operationalized through the general applicability requirement as this requirement ensures that the intended effects of state policies are not discriminatory. As we have seen, the false neutrality objection need not rely on a philosophical misunderstanding. In fact, it should not be dismissed too quickly as it reveals that a failure to distinguish between intention and justification renders citizens vulnerable to state hypocrisy. Hidden motives are a defining feature of political life and yet, proponents of liberal neutrality paid little attention to this fact. The general applicability requirement is not a miracle cure, but it is a strong remedy to the problem of false neutrality.

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