

Are Network Neutralists Legal Positivists? (Part I)

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It sounds fairly eloquent to say that Internet Service Providers should not discriminate packages of data according to their source, content, or destination, and to call this network “neutrality”. It seems almost as a truism, which everyone who cares for the value of openness deems to be self-evident. Dare to be against it and be prepared to be cursed by the [Googlesphere](#).

Less eloquent is to say, in normative terms, what network neutrality amounts to. Christopher Yoo [synthesizes](#), in a very felicitous expression, that network neutrality is a “naked normative commitment”.

I will not mention here how has the opinion of some notorious network neutrality advocates evolved through time to become less faithful to an unfettered end-to-end principle; to the idea of an “unfettered medium”, as the New York Times put in its [editorial](#) some weeks ago. I will not discuss how more fettered have contemporary perceptions of network neutrality become.

I will here make a simple claim; a claim which network neutralists will probably find extremely offensive. And they will find so both because of their lack of a normative investigation about what a “principle of neutrality” means, and because of their lack of a more defined understanding of what such a claim may amount to. The former, actually, derives from the little importance that they normally seem to assign to the academic realm that focuses on matters of the latter kind [1].

Network neutralists are legal positivists.

I will adopt a very basic understanding of what legal positivism means. I will take it from a claim Prof John Gardner believes to be common to all legal positivists. Neither less, nor more than this.

Legal Positivists

Legal positivists adopt the sources thesis. They believe that “[i]n any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources)” (John Gardner, [“Legal Positivism: 5 1/2 Myths”](#), 46 Am. J. Juris. 199).

Keeping within the levels of depth one can expect from a blog, let me here say very briefly that legal positivists are not the child-eating monsters that people normally tend to think they are. Legal positivists do not deny that legal norms may have special and distinctive moral

imperatives. They just deny that these imperatives can be understood as a condition of validity of a legal norm. You need not resort to them to identify what a valid law *is*.

Razian legal positivists would say that, though we indeed resort to evaluative judgments in identifying what a law is, such evaluative judgments are merely ones of importance, not of moral merits. That is to say, legal theory will look into the important characteristics that make of a law what it is — one of them being that law consists of authoritative claims; other being that such authoritative claims provide reasons for action; other still being that such reasons, once you accept them, exclude other reasons you may had originally chosen to act upon.

Natural lawyers of a Finnisian style, on the other hand, would “wave deep into the waters of moral evaluation”, as Julie Dickson puts in her [great little essay](#). For Finnis, to identify what the law is in its central cases, in its focal meaning, one needs to necessarily justify the law according to the requirements of practical reasonableness. As he explains in his *Natural Law and Natural Rights*,

“the central case viewpoint itself is the viewpoint of those who not only appeal to practical reasonableness, but also *are* practically reasonable, that is to say: consistent; attentive to all aspects of human opportunity and flourishing, and aware of their limited commensurability; concerned to remedy deficiencies and breakdowns, and aware of their roots in the various aspects of human personality and in the economic and other material conditions of social interaction. What reason could the descriptive theorist have for rejecting the conceptual choices and discriminations of these persons, when he is selecting the concepts with which he will construct his description of the central case and then of all the other instances of law as a specific social institution?”

So, if you are a good-hearted network neutralist, and not a mean person that dislikes knowledge, openness, and all the other values thought to be inherently associated with the end-to-end principle, you will probably side with Finnis, if only because you are good-hearted and think that to identify something so important as the law cannot be a merely descriptive enterprise, or at least it cannot be evaluative in a sense that disregards your moral perceptions. You must feel it!

You will tend to think that laws such as intellectual property laws in their contemporary form, which do not promote openness and knowledge, are just evil standards that infringe human rights. Intellectual property laws, for you, are definitely not the picture we have of law in the practical viewpoint. They may be law in the sense that the legal positivists assign to it, but they are certainly not what law means in its central cases.

But the end-to-end principle, if framed in the law, would be different from the matter of intellectual property laws. It would be plentiful of moral reasons. It would be law as it is and as it ought to be. And you would hold it close to your heart, light a candle for it every night, and dream of the beautiful stories John Finnis tells in his book. End-to-end, for you, is the way to moral perfection.

Network Neutralists

How so do you claim to be neutral — or, actually, how do you expect Internet Service Providers to be neutral when identifying the law? For do not you want to enforce a law pontificating the end-to-end principle and want the ISPs to apply such law when dealing with their customers? Do not the Internet Service Providers need to grasp what such commitment

means, in understanding what the law is? Does not this involve some sort of moral evaluation, according to the theory of law you embrace?

You will say: “No, no. Do not you notice the difference? I do not claim that Internet Service Providers should be morally neutral when identifying the law. I mean they should be neutral when routing packages of data around. They should not be neutral about the law. They should just be neutral about those packages of data. It is precisely because they accept the moral propositions embedded in a law that they identify using their most acute moral senses that they will be neutral with regard to the flow of information in the Internet. If you do not agree with me, you are a legal positivist!” — i.e. an evil legal theorist.

Brave, but too quick. Let me throw two options at you.

In the first of them, you believe the end-to-end principle to be a rule without exceptions. You are fully committed to the value of equality... between packages of data. You are not so much concerned about what this implies with regard to the idea of [priority of persons](#) — when your concern is with equality amongst things. You also understand equality as a formal commitment, and not a substantial and circumstantial achievement in a world full of deep inequalities. It is ex-ante equality amongst unequals that matters. For to pursue a substantial rule of equality in the Internet, to assign a role to ISPs in remedying circumstantial cases of inequality, this would be paralyzing. The fact that the current Internet is a second-best infrastructure — that the best one would be that based on the spectrum commons that Prof Benkler [proposes](#) —, that it has finite resources that need to be adequately managed, does not seem to matter so much, if it matters at all to you.

If this full-blooded understanding of the end-to-principle holds you would conceive of ISPs that are not only neutral with regard to packages of data, but that are also neutral with regard to the law. Law for them would be something they would identify only by looking at its sources, not at its merits. They would not attempt to morally evaluate or justify the law, and thus they would not attempt to morally evaluate or justify the end-to-end principle. Of course, all of us think that censorship is bad, and that the value of life is good. But ISPs should not think; they should not reason in practical terms. Between bittorrents and heart surgery bitstreams there should be no preferences. They must assign the same priority to BitTorrent.com and CornellHeartSurgery.org. Dare they to charge one more than they charge the other; dare they to mitigate the end-to-end principle to meet their or *any* principle of justice.

But then you would say that this is not true; that I am mischaracterizing your view. For you are the good-hearted one, and not the legal positivist. That is probably me, if I am against a principle of network neutrality. Your view is now not that extreme any more. You and the also good-hearted people from the [FCC](#) believe that “[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of her choice; [...] consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement” etc. You also believe that “these principles [...] are subject to reasonable network management”. And then I am quite at loss as to what you believe.

Because to identify what the lawful is or what the needs of law enforcement are, or to place both issues in the context of reasonable network management, this could make us “wave deep into the waters of moral evaluation”. But perhaps this is not exactly what you want ISPs to do — perhaps you may think ISPs are inherently immoral; or at least not the ideal locus for moral

evaluation. You would quickly add to your understanding, then, with commissioner [Copps](#), that “[t]hese are evolving technologies and sometimes the line between reasonable network management and outright discrimination can be less than crystal clear. But that’s why we need a **for-sure enforcement process**, to sift through complaints, to make the judgment calls, and, over time, to compile some case law and precedent so things become clearer”.

Commissioner Copps does have a nice name to enforce the rule of law. And you believe, as I do, in all the power of the rule of law. You believe it is an achievement of democracy that we accept the exclusionary reasons provided by the rule of law, and that stable institutions must be in place to enforce it. That only then we do have a free society. And precisely because you trust the rule of law so much, you want to diminish the leeway for decision of Internet Service Providers. This is the direction we should walk towards: the direction of a **for-sure enforcement process**. Your image of heaven is one in which ISPs should not have any moral role in identifying the rule of law. It should be there, majestic, surrounded by waters of crisp certainty, or at least subject to disagreements that do not involve their moral perplexities. No zones of penumbra; no hard cases; a for-sure enforcement process.

And then we are back at our point of departure.

In short, if network neutralists believe ISPs can treat packages of data with a for-sure equality (an equality they should actually be assigning to persons), that ISPs must understand the law only by looking at its sources, without resorting to morally evaluating the law according to standards of practical reasonableness which ISPs themselves judge to be sound — if you believe so either because the law embraces a full-blooded end-to-end principle or because the FCC provides for a for-sure enforcement that fills in the blanks of such principle —, then the underlying assumption of network neutrality is not too different from the sources thesis. Network neutralists are legal positivists. And, worse than this, should we conclude that the end-to-end principle, if taken without a grain of salt, is actually an unfair principle, network neutralists of the first sort would be actually going even beyond anything that is meant by legal positivists.

For, let us remember, legal positivists do not advocate that laws should not pursue moral purposes. They just believe the identification of law’s inner morality is not necessary to grasp the existence and validity of a legal norm. So, after all, perhaps network neutralists should not feel so bad for being legal positivists. Or they may get rid of the tag by blaming ISPs. They may say: “it is not that we are legal positivists; we just happen to think that ISPs themselves should be legal positivists”; or, else, “it is not that we are neutral; we just happen to believe ISPs themselves should be neutral”.

And states that advocate a principle of network neutrality could then also join the bal masqué. As if to enforce a principle of network neutrality — when state A tells ISP B he must be neutral between X and Y — did not mean that state A is, himself, neutral between X and Y. Or network neutralists may finally attempt to get rid of the tag by saying that network neutrality is “just an ideal”.

A positivist theory of law may very well be the perfect image of such an ideal.

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[to be continued]

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(1) Let me be truthful and note, though, that to perceive that the intersection between legal philosophy and the regulation of the Internet is an area of uncomfortable scholarship is not a characteristic which belongs exclusively to either side of the debate. This is, very unfortunately, a widespread belief amongst some cyber-scholars. But this should actually prompt us to ask ourselves: is it not a role of scholarship in general exactly to be uncomfortable; to revolve the very bases of our settled understandings? Unless we focus on the many problems that are posed in this area to our accepted paradigms of the institutions of law, and that we do so beyond storytelling, in light of established debates in legal theory which are very worth being revisited, the thing some use to call the cyber-law will unfortunately continue to be perceived, by legal scholars that (rightly) revere tradition, as a kind of peculiar field — a “law of the horse”. And we will not solve this problem by merely trying to explain the horse. The horse, in itself, does not illuminate the law.