TEST YOUR LEGAL LITERACY BY ANSWERING ONE QUESTION

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THE QUESTION

Here is the question:

Is a motorist permitted to go through a green light?

The question seems easy. Without hesitation, we answer, "Yes, of course, a motorist is permitted to go through a green light." Although counter-intuitive, the answer is wrong.

THE LOGIC THAT TOOK US TO THE WRONG ANSWER

As we search for solutions to problems, along the way we develop techniques that point us in the right direction. Their development, however, costs us time, energy and effort. Being by nature thrifty, we do not discard them after a single use. Instead, we save them to handle new problems that may arise. Thinking becomes easier and cheaper when we recycle the techniques we already have developed instead of developing new ones from scratch.

One of our problem solving techniques segregates negative from affirmative objects. Suppose an object is not green. Not green - the negative - suggests red, yellow, blue, etc. which are affirmative color possibilities. It is this technique we use to answer the question of our legal literacy test.

We reason that either

1. a motorist is permitted to go through a green light (the affirmative) – or,
2. a motorist is not permitted to go through a green light - (the negative).

Of the two alternatives, the answer that better comports with our experience as a driver and a passenger is 'Yes, a motorist is permitted to go through a green light'. The alternative, 'No, a motorist is not permitted to go through a green light' is rejected. It is at odds with our experience. We pick the best answer that this thinking technique offers us.

WHY THIS LOGIC TOOK US TO THE WRONG ANSWER

Segregating negative from affirmative objects presupposes the objects we want to segregate already exist in our minds. If they don't, this thinking technique will not work. We understand our colors so we can segregate not green from green objects. But, do we understand our laws as well as our colors? When the negative is a law that is not a permission, what are the affirmatives? In trying to answer the question, Is a motorist permitted to go through a green light?, we encountered a negative, a law that is not a permission, and an affirmative, a law that is a permission. Unfortunately, our understanding stops here at the technique and goes no deeper to its universe of possibilities. There is a
disconnect between the technique and the possibilities upon which the technique is to be applied. Segregation cannot work on a universe of possibilities that is empty.

We flunk the legal literacy test because our law schools have failed to teach us a simple legal principle:

   a law that is not a permission is a command and a law that is not a command is a permission.

As simple as this sounds, most lawyers don't get it.

How about you? Did you pass or did you flunk? If you flunked, the next section is a short tutorial on commands and permissions. Then, in the section following the tutorial, having been enlightened, we run through the logic again.

A LAW IS EITHER A PERMISSION OR A COMMAND

A permission is a law by which a lawmaker gives a source of conduct the choice about whether or not to engage in a course of conduct. The 'whether or not' part is important. Without a choice, there is no permission. If there is a choice, a source of conduct has the option to follow a course of conduct or refrain from following it. To do or not to do - that is the choice before a source of conduct in possession of a permission. A permission indicates not only that a lawmaker has no objection to the conduct expressly specified in the permission but also has no objection to the opposite or negative course of conduct – which is often only implied.

A command, however, is a law that deprives a source of conduct of the choice of whether or not to engage in the conduct. With a command, the choice belongs to the lawmaker not the source and a lawmaker expects a source of conduct to accept and abide by the lawmaker's choice. Toward the course of conduct expressly specified in a command, a lawmaker has no objection and desires it to come into being. Toward the opposite or negative course of conduct, the lawmaker has an objection.

In summary, a lawmaker who scrutinizes a flow of conduct from its source to its recipient in circumstances can hold three opinions about it:

1. a lawmaker who likes conduct wants the source to do the conduct and, therefore, issues a command to the source to do the conduct (*a command for affirmative conduct*),
2. a lawmaker who is indifferent to conduct does not care whether or not the source does the conduct and, therefore, issues a permission to the source allowing the source to do the conduct or not do the conduct as the source sees fit (*a permission for affirmative or negative conduct*)
3. a lawmaker who dislikes conduct does not want the source to do the conduct and, therefore, issues a command to the source not to do the conduct (*a command for negative conduct*),

These are the three permutations of a law. There is no other. Unlike ice cream that comes in a variety of flavors, a law comes in only three.

Just as red, green, blue, etc inhabit the universe of possibilities for colors, inhabiting the universe of possibilities for laws are a command for affirmative conduct, a permission for either affirmative or negative conduct, or a command for negative conduct.
THE LOGIC THAT TAKES US TO THE RIGHT ANSWER

A thinker enlightened by a rejuvenated understanding of commands and permissions gives a different answer to the question, Is a motorist permitted to go through a green light? Permitting a motorist to go through a green light is rejected because a lawmaker who permits a motorist to go through a green light is also permitting a motorist to stop and a lawmaker does not want a motorist to stop at a green light. Of the three permutations, the permutation that best comports with a thinker’s experience as a driver and a passenger is now, ‘A motorist is commanded to go through a green light.’

At a red and at a green traffic light, motorists do not have a choice. The choice about going and stopping belongs to the lawmaker not to the motorist. A lawmaker signals that he reserves the choice to himself with a command. A permission would signal that a lawmaker has delegated the choice to the motorist. The deregulation of the movement of motorists at traffic lights, however, is unwise as it invites collisions between motorists traveling in conflicting directions in possession of permissions. This is the situation at a yellow traffic light. A yellow traffic light warns a motorist about an imminent change in the law from a command to go to a command to stop. During a yellow traffic light, a lawmaker permits a motorist to go or stop. The decision belongs to the motorist. That a yellow traffic light signals a permission explains why a yellow traffic light only appears when a traffic light changes from green to red not from red to green. If it also appeared when a traffic light changed from red to green, yellow traffic lights would invite collisions between motorists permitted to go in conflicting directions at the same time.

A LAWYER HAS NO EXCUSE

If you answered the question, ‘Is a motorist permitted to go through a green light?’ incorrectly but are not a lawyer you have an excuse. There is no excuse for a lawyer.

Although the answer is counter-intuitive to the non lawyer, your law school ought to have taught you the simple legal principle that:

a law that is not a permission is a command and a law that is not a command is a permission.

Since misery loves company, I tell you that you are not alone. Most lawyers - even the most successful - flunk this rudimentary legal literacy test.

Let me end with a caveat. If you flunked the test, do not be lulled into minimizing the magnitude of your misunderstanding by this article's fact pattern. Your misunderstanding is not confined to traffic lights. Unless corrected, your misunderstanding will metastasize into whatever fact pattern that becomes the subject of your legal thinking.

FOR FURTHER READING