



ethical dilemmas unit 7

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Theft and giving in the business arena

ONE of the ground rules without which the business arena would not function is that you do not take what is not yours to take. If I want something then I must be prepared to pay, or else trade something of equivalent value. If there were no need to strike a bargain, if one could just take the thing anyway, then the very possibility of trade is undermined and all meaningful business activity would cease. It is a rule which we honour in the breach – for example, when we boast about paying much less than the market value of a particular item, or selling it for much more than it is 'worth'.

However, the idea that it is *wrong* to take a thing unless you pay for it does not go without saying. It begs the question: Why would anyone want to take something that didn't belong to them against the owner's wishes? Why do we need the commandment, 'Do not steal?'

In the festival of the *potlatch*, once widely practised by indigenous American peoples along the North Pacific Coast, prominent families who hosted the sacred ceremonies competed with one another to show who could give away more of their goods and wealth. The practice was considered by nineteenth century Canadian missionaries so contrary to Christian values that they successfully sought to have it banned by legal statute. Yet the idea of competing to 'give the most' is not unknown amongst business people. Consider for example the charity luncheon, where rich guests take turns to announce proudly the value of the cheque that they are donating to the worthy cause.

What a strange inversion of the business arena it would be, if the aim of trade was to give as much as possible with the aim of receiving as little as possible in return! Yet it is worth while asking why we are so keen to ensure that trade is equitable. Where did the idea arise of *economic thinking*, where each party in a negotiation seeks to gain their objective with the least investment of money, time or effort? Is this an essential part of human rationality as some would claim it to be? To what extent is economic thinking the *sine qua non* of the business arena?

However much we may prize economic thinking as the model of rationality – or at least one of the basic forms of rationality, if one also grants the rationality of ethical thinking – it is widely recognized that unforced generosity oils the machinery of the business arena. Reformers who seek to have the practice of giving gifts curtailed or even banned miss the obvious point that giving – not only of one's time or expertise or resources but personal gifts to those with whom you have formed a close business or working relationship – helps to create an atmosphere of optimism and good will. Who doesn't love receiving a gift? When you give praise, that costs something too. But you don't normally stop to ask – unless you are someone who is highly manipulative – how much you had to pay, or whether the 'deal' was worth it.

The difficulty, of course, in the case of material gifts is distinguishing a genuine gift from a bribe which is a form of illicit trade, the very opposite of gift giving. That is not something we will be looking at here. The point to remember is that in the interest of rooting out bribery and corruption, we should not get so carried away that we view all gift giving in the business arena with a jaundiced eye.

But what about theft? Before we can define theft, we first need to grasp the nature of property. The aim of a definition of property is not a defence of the institution of private property – as Locke famously attempted – nor indeed is it an attack, as in Marx's critique of private property. We need to be clear from the start that any such analysis – supposing this to be possible, which as we will see is very much a matter of debate – must be *ideologically neutral*. To understand what it is to possess property, to own an object is in principle neither to approve nor criticize.

Varieties of ownership

People love their possessions. This is a remarkable fact about the natural history of human beings that requires not a little explanation:

Philosophers, so quick to analyse, look at an object as a mere bearer of physical properties, or as a tool with a function, or, possibly, one of those rare objects that attains the status of a 'work of art', a bearer of sheer disinterested aesthetic value. None of these ways of analysing an object explain *why we love things*. All parents know how children lust for toys. We grow up. We put away childish things. We do not lose that lust, we merely look for different things to attach ourselves to, to project our emotions onto. This is normal, not pathological behaviour.

Object-love is one of the most profound facts about our human relation to the world. That is something Freud saw.

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Theft and property are not simply correlative notions. For example, suppose I have my favourite place at the conference table. A newcomer unknowingly sits down in my place. This is perceived, not as taking away something that is my 'property', something I own, but more like (although by no means equivalent to) a disconcerting invasion of my personal space, albeit innocent and unintentional.

While the denotation of the term, 'property' shades in to that of personal space, at the other end of the spectrum, the idea of what is my property shades in to what is physically part of me, a limb for example. Yet we also identify certain precious or indispensable objects as 'part of us', and when these are taken we feel a special sense of grief or loss. This applies not just to objects of sentimental value – which have an essential reference to others and in particular those we love – but also the possessions which in

some sense shape our sense of who and what we are. The conscientious workman *loves* his tools.

Not all the things that are mine are my property. My wife and my child, for example. A kidnapper might take my family and hold them captive. They would then be in the possession of the kidnapper. But they would not thereby become the kidnapper's 'wife' and 'child'.

To lose one's reputation and good name can be a great loss. Yet the person who takes them – through libel or slander – does not thereby acquire them. On the other hand, the successful impersonator acquires – as it were, through illicitly borrowing – a reputation and a name which nonetheless remain wholly mine, not theirs.

There are many things I own whose value to me is purely functional, a matter of convenience. Yet the seemingly neutral term 'convenience' speaks volumes. My old PDA, with all extra data and software which I have uploaded over many months would cost a great deal of effort to replace, even though the thief is unlikely to get much money for it. I can buy another identical PDA cheaply on eBay, but nothing will make up for the time that I spent in customizing it, or the aggravation of having to search for the various disparate bits of information which I had so carefully gathered together.

Defining 'property'

I am walking through the woods with a party of hikers and come across a broken bare tree branch which is perfect for a walking stick. After we have stopped a while for a rest, one of the members of the party, too lazy to find a walking stick of his own, cheekily picks up the walking stick intending to use it. When I protest that it's 'mine', the lazy hiker replies that the stick was lying there on the path, anyone could have picked it up. 'But I was the one who picked it up not you!'

What mistake is the lazy hiker making? It seems clear from this example that at least in some cases, finding an object that doesn't belong to anyone is sufficient to make it yours. 'Finders keepers.' I didn't have to 'work' to

find the stick or make it usable (as in Locke's paradigm of private property as an object with which I have 'mixed my labour'). It was just lying there, no-one's, ready to be used. Now the stick is mine, to keep or to give away as I see fit.

To nudge our intuitions the other way, let's say I make a living selling coloured stones and sea shells which I find in a secluded cove. One day, I find another swimmer scuba diving in 'my' cove. Do I have any valid basis for protest? 'Go find your own cove!?' But suppose there was just one, and I was the one lucky to find it. That doesn't make it mine. It ceased to be mine the moment my secret was discovered.

After a heavy thunderstorm, a racing pigeon with a tag on its leg lands on your lawn and after two or three days still shows no interest in flying away. The bird is clearly lost. Is the pigeon now yours? A household being 'adopted' by an absent neighbour's neglected cat is a familiar enough phenomenon. But the cases are not the same. If you don't make an effort to find the pigeon's owner – for example, by contacting a national racing pigeon association – then your inaction is tantamount to theft, whatever the law may say. This is something you would know, if you knew about the sport of pigeon racing.

It should be clear by now that usage and custom play a significant role in determining whether something is someone's 'property'. Here is an example which is especially relevant to the business world: A busker will get very aggravated if you 'steal my pitch'. Lucrative pitches in the centres of big cities are shared by the street musicians on a strict schedule while newcomers are often harassed and excluded. There is no legal or ethical basis for this practice. In the UK, unlicensed busking is illegal anyway. And yet we can clearly perceive the *point* of the practice. Without a negotiated agreement there would be war on the streets.

In a not dissimilar way, companies will honour implicit or explicit agreements not to trespass on one another's turf or 'steal' their customers. These agreements, which have no legal force and which at the limit effectively become price fixing hardly seem in the interests of the customer. The companies would argue that they have a *right to survive*. In a price undercutting war the consumer wins, but they lose. The

clinching argument, however, is that if no company finds it profitable to trade, then everyone loses.

If we accept the clinching argument, at least in certain circumscribed cases, does it follow that a company in some sense 'owns' their customer base? If two companies have made an agreement not to poach one another's customers then this defines a form of 'ownership', based on a written or unwritten contract. On the other hand, to the extent to which the location of *potential* customers is knowledge which one has researched or paid for, it comes under the heading of trade secrets. In unit 5 I argued that, 'keeping trade secrets – concerning methods of manufacture, or the availability of goods, or potential customers – would be impossible in a totally transparent business arena.'

As the example of the secluded cove demonstrates, knowledge can make all the difference to ownership. If I am the only one who knows about the location of a company or individual who is willing to buy my product, then that customer is 'mine' and I am not required to divulge my knowledge. But once the knowledge is out in the open – by whatever means the information got there – then I have to work as hard as my competitors are prepared to work in order to keep that customer's business to myself.

Stealing and lying

One question we need ask is whether the injunction, 'Do not steal' has the same unequivocal *force* as the injunction, 'Do not lie.' We have seen that a lie can never be justified (notwithstanding the paradoxical admission that we are sometimes 'forced to tell a lie'). Can the same be said about theft? Can theft ever be justified in a way that lying cannot? Is it just something that is *bad to do*, all things considered, or is the traditional view – expressed in the eighth commandment – correct: it is always and without exception wrong to steal?

The complexity of the notions of 'property' and 'possession' belie any such claim, at least in its strongest sense. The possibility of telling a lie is linked in the most direct way to the very notion of assertion and our implicit

trust in the language we use to communicate with one another. That is why the argument for the claim that it is always wrong to tell a lie is so unequivocal. By contrast, if the notions of 'property' and 'possession' are complex, then we should expect the considerations on theft to be no less complex. That is not to say that there is not, at bottom, any *principle* at stake here. Only, if there is a principle, it is one that is far more difficult to state clearly, without hedging or qualification.

Ethics and the law have different things to say about theft. The law encapsulates our ethical view of theft on the basis of what is reasonably enforceable in a free society. In the case of physical items, 'possession is nine points the law', although there are recognized grounds on which this can be contested; e.g. if you can prove that you had the item first and it was taken from you.

In the case of intellectual property, there is a widely recognized prohibition in the academic world against plagiarism, where this is well defined – by those who have the expertise to recognize it – yet by no means legally enforceable. I can't be prosecuted for writing an article presenting your idea or concept as if I were the one who had thought it up, yet there are sufficiently strong sanctions within the academic world against this practice which obviate the need to go to law.

Other examples of intellectual property which have the full sanction of law – for example, using melodic elements from another musical composer's song – can often raise difficult questions of what is legitimate influence or inspiration as opposed to illicit copying, as the famous law suit over George Harrison's 1970 release, 'My Sweet Lord' demonstrates. Two of the main melodic themes of the song were strongly reminiscent of the 1962 Chiffons hit, 'He's So Fine', even though Harrison's song also contained original, and very beautiful, melodic elements of its own. Harrison was eventually found to have infringed copyright through 'subconscious plagiarism'. The subsequent legal dispute over damages dragged on for over twenty years.

In the software industry, reverse engineering software in order to illicitly use the source code for one's own software product is illegal, yet reverse engineering in order merely to *study* the source code can be perfectly

within the law. (The principle is the same as taking a manufactured item apart to see how it is made.) But what if in the process of 'studying' the code you discover a solution to a problem which you have been working on for a long time? This is one of the ways in which programmers develop their knowledge and skills. There is not always a sharp dividing line between illicitly using someone else's fragment of code and merely 'learning' from it.

The upshot is that we can only be clear about whether an action is theft in cases where a sufficiently compelling case has been made for prior ownership. By contrast with the case of telling a lie, there is a significantly large area of differing shades of grey where there simply is no answer to the question whether a person 'owns' an item as their 'property' or not, and consequently whether taking it was indeed a case of theft.

Theft, punishment and self-protection

The crime of theft calls up deep emotions. It may seem incredible to us now that at the time of Dickens a child could be hanged for stealing a loaf of bread. Today, we express righteous condemnation of the use of the death penalty in China for a wide range of crimes – including common theft – which in other countries would receive a much lesser punishment. In Dickens' day, the baker felt it was right and proper that this attack on his livelihood should be paid for with the young culprit's life. It is a debatable question to what extent what seems to us the disproportionate use of capital punishment is merely ruthless expediency, or is viewed by the state and judiciary as justly deserved.

Is it wrong to steal a paperclip? (cf. the case of 'Margaret the unrepentant thief' in unit 3). The simple example of a paperclip is a good way to open up the question of theft. Consider an analogous case with lying: Is it wrong to tell a *little* lie? Yes. There is no lie which is so small as to be inconsequential. (I am not talking about so-called 'white lies' intended for the benefit of the recipient, although I would argue the conclusion must ultimately be the same.) If you tell me an untruth, where truth was indeed

expected – whatever benefit you may gain, or even none, then you have *used* me. It is equivalent to a slap in the face, an aggravated insult.

But isn't it the same with a paperclip? If I don't mind your taking paperclips from my desk then it isn't theft. But if I do mind, then what you did was wrong. But, then, under what circumstances do I have a *right* to mind – isn't that the question? With lying my right to be told the truth does not need to be defended, whereas in the case of the paperclip more justification is needed before we can say that the action was definitely a wrong thing to do.

In order to *get* the paperclip, you had to go to my desk. That is potentially an egregious invasion of my personal space. There is no telling what personal items you might have come across rifling through my drawers. On the other hand, if the paperclip was on the desk, in a large transparent plastic pot labelled 'paperclips' it is difficult to see how I could reasonably object. If I didn't want anyone to take any of my paperclips I should have put them away in the drawer!

Today, millions download music and films illegally according to the letter of the law, convinced that they are 'doing nothing wrong'. Are they deceiving themselves? Have they just failed to think their actions through? Or is there any plausible case for saying that the claims by the 'injured' parties have been overstated and that the law should be more lenient?

All theft is not ethically the same. Our intuitions tell us that taking something you need or covet for your own personal use is not the same as stealing in order to profit from the sale of the stolen item. It is true that the tenth commandment says, 'Thou shalt not covet' so it would seem that in the former case, two offences are committed – theft and coveting – rather than only one. Yet we readily understand that it is a natural human emotion to be envious of another person's possessions, whereas the professional thief who steals in order to sell does so cold-bloodedly – viewing the victim as nothing more than a resource to use and plunder – and that is the source of the victim's resentment.

The emotive aspect of theft goes some way to accounting for the unnecessary lengths that both individuals and companies go to in order to protect their property. It seems clear in many cases that the deterrent effect of countermeasures goes well beyond what would be required from a purely pragmatic point of view. It is in the gap between reasonable and prudent protection and the vengeful desire to pay the thief back for arrogantly daring to take what is not theirs that there is genuine room for ethical debate over what is a reasonable punishment or indeed what are acceptable measures for self-protection.

It was not until 1861 that the British government passed the Offences Against the Person Act which prohibited what up until that time had been the common practice of landowners protecting their property from poachers by setting hidden spring-loaded ankle traps or 'man traps' which caused serious injury to any poacher unlucky enough to be caught by them, not to mention those who died of exposure before they could be released. Another item which the Act chillingly mentions is the 'spring-loaded gun' designed to go off automatically when a hidden lever or wire is tripped.

Today, we flatter ourselves that we no longer engage in such primitive practices, yet companies employ armies of wheel clampers, as well as guard dogs bred for their ferocity often with the full blessing of the law, indifferent to the inconvenience or harm caused to persons who are innocent of any crime.

Software and drugs corporations are two examples of companies who are widely perceived – correctly or incorrectly – to hike their prices far beyond what is a reasonable return on their investment in development. In the case of software, this is the most frequently given excuse for piracy and illegal downloading. Yet the measures taken against piracy often cause considerable inconvenience to innocent consumers – for example, lengthy and sometimes unreliable online registration processes, or the need to repurchase the software when your computer breaks down or needs replacing which many would regard as contrary to common sense.

Spreading the wealth

Yet the pain could be so easily avoided, as Sun Microsystems has shown: they make their proprietary operating system 'Solaris' freely available, but charge business users for support packages. There are a number of other creative solutions arrived at by the more progressive software companies; the most simple being to allow those who are unwilling to pay for the latest upgrade to freely download obsolete versions. Of course, as always, there are marketing considerations to take into account. But in most cases, companies know that they would still make a healthy profit from purchasers of the latest upgrade.

'It's ours, therefore you must pay,' is an outmoded, reactionary concept in a world where so much of the available wealth, in the form of information and expertise is shared not owned. We all benefit from spreading the wealth, not only the consumers but also the producers. It is not charity, but foresight and prudence to cast your bread upon the waters.

One of the most striking examples of this phenomenon are the rock bands who make their recordings available free for download. Traditional popular music marketing would view this as a wasted opportunity; but in reality this turns out to be a far more effective way of getting their work known and building a following than the traditional methods of paying for advertisements in the music press or trying to persuade DJ's to play the group's latest offering.

By contrast, potentially one of the greatest boons to mankind – the genetic engineering of crops to create strains which produce higher yields or which survive in conditions where existing crops fail – has become a new instrument of commercial imperialism, with Western companies denying customers in the third world who have purchased their designer seeds the right to sow the very seeds that their crop has produced. Repugnant as it seems to all notions of fairness, the practice is simply a logical consequence of the idea of intellectual property, no less than in the case of resentful purchasers of software who are legally barred from using their CDs to install the software on a replacement machine.

Like the drugs companies who defend their high prices on the grounds that they need to recoup their heavy investment, the genetic engineering companies argue that if they are denied the opportunity to make sufficient profit from the sale of their seeds then there would be no incentive to do the research in the first place. If the farmers become self-sufficient with the second crop then the seeds can only be sold once. This is a short-sighted view, which is sadly out of touch with contemporary notions of justice and fair play.

In poorer countries, where the cost of original software is light years ahead of what users can afford, it is common knowledge that 'illegal' copying and downloading is practised as a matter of course, as indeed is the production of generic medications with the same chemical composition as the much more expensive original product. It is a matter of sheer survival. The continued insistence by producers that they are still searching for ways to enforce their 'legal right' is hypocrisy on a truly massive scale.

Companies need to bring in revenue. That is their *raison d'etre*. But there are two points that are easily overlooked. The first is that there are many more ways of bringing in revenue than the traditional, 'We make the product, you pay for it' model. When the 'product' in question is so easily reproducible, it makes far more sense to develop the service side, where the investment in time and human resources corresponds more equitably to the revenue brought in. The spectacular growth of the internet has shown how many unforeseen ways there can be to generate revenue from web sites which apparently give so much away for free.

The second point may require a certain amount of biting the bullet, because it seems to go against the grain of economic rationality, yet it is indeed a *fact* as opposed to mere ideology – what most companies actually practice contrary to the belligerent capitalist propaganda: that enough profit is *enough*.