

No book can do all things. This volume is an extremely important one—one of the very best on Christian economic ethics. It is a model for engaging such issues in a manner that affirms the best of markets and the insights that economists have about them while at the same time remaining rooted in the justice concerns of the biblical and later theological traditions. So few books in the area do both. Much of Barrera's commitment comes out of Catholic social thought, but other Christians will nonetheless find his careful biblical analysis a real contribution. His argument concerning pecuniary externalities as causing economic compulsion will be an important contribution to everyone interested in economic ethics regardless of faith commitment.

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## The Consciousness of the Litigator

**Duffy Graham**

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In *The Consciousness of the Litigator*, Duffy Graham concludes that litigators rationalize their morals to advance their fee-paying clients' positions. In the eyes of society, litigators become hired guns—immoral professionals who act in response to payment and think solely to advance and see “right and wrong as a function of,” their clients' interests (7–8).

In the first part of his book, Graham tries to place the litigator's role in context. A democratic society necessarily results in immorality: greed and selfishness. Graham discusses how Alexis de Tocqueville and his contemporaries grappled with how to organize society in a way that minimizes this immorality (18). Graham admires how Tocqueville “embraced notions of public service and public morality” but doubts that today's lawyers would permit similar concerns to guide their conduct rather than self-interest (16).

Graham explains that this sense of nobility began evaporating from the legal profession around 1870 as society began recognizing a distinct legal profession with practice standards and when the profession became specialized and fragmented (25–27). With these changes, the legal profession began developing what Graham describes as a “crisis of conscience.” Lawyers narrowed their public role and began serving corporate interests without respecting contrary public interests (28). This crisis continues today (29–30).

In part 2, *The Moral Consciousness of the Litigator*, Graham intermixes his analysis with interviews he conducted with practicing litigators. He asserts that the back-office witticism known as the two-rules of practice reveal the truth about the lawyer-client relationship and the litigator's moral consciousness. The two rules are: “The client is the enemy,” and “Don't forget the first rule” (55).

Graham states that notwithstanding this professional antipathy toward clients, lawyers want to believe—and generally do believe—that the positions they advance on behalf of their clients are moral (83). In this way, Graham says, litigators justify professional practice as being moral regardless of how society would regard it:

The litigator ... needs ... only the narrowest opportunity to find some moral basis for proceeding with the representation. Each case, however, usually presents the litigator with ample space and opportunity for moral justification. Almost every case presents some combination of potential unfairness, debatable legal issues, ridiculous demands for money, and questionable conduct by the other side (107).

Graham's explanation makes sense, and it is not surprising that lawyers behave this way. Leading jurists such as Justice Oliver Wendell Holmes and Judge Richard Posner have long advocated it, and the casebook method that law schools use to teach future lawyers emphasizes form over substance and eliminates their moral compass. We teach that "thinking like a lawyer" means acting as an amoral technician. Indeed, the surprise is not that lawyers practice without morals but that the profession has actively pursued that outcome. This outcome shatters a simple moral standard such as the Ten Commandments.

Consider Graham's the-client-is-the-enemy ethic. He illustrates it with the interview of a litigator who describes the true purpose of the law firm's client-first seminar as learning how to generate millions of dollars in fees (56). The economic component of practicing law cannot be denied, but this litigator's tunnel vision does not reflect the complexity of law practice. This vision is sin. It immorally disregards the value of the justice the client seeks and the sanctity of the attorney's oath to serve honorably. It shows an ethic based not on the value of the attorney-client relationship but on the fees the relationship would generate. In moral terms, the litigator makes a god of money and coveting, thus breaking the first and last Commandments.

Graham then discusses how clients commonly make the lawyer's life miserable by making unreasonable demands, misunderstanding instructions, making mistakes, and micromanaging a case (59–73). Certainly, clients make unreasonable demands, and there are occasional headaches, but a client has a legitimate interest in participating in its own lawsuit. These problems are anomalies, like getting a flat tire on the way to the courthouse. To allow rare or even frequent challenges to define one's conscience toward a client is simple laziness. In moral terms, Graham's interviewee harbors false enmity, thus breaking the sixth commandment.

Indeed, Graham contrasts the story of a client whose refusal to follow advice lost the case with another client whose refusal had a salutary effect (75–81). Tension arises when one party unduly emphasizes that party's own expertise and interest. In conventional terms, the interviewee is right that such an attitude is arrogance. In moral terms, Graham makes an idol of the lawyer's expertise, thus breaking the second commandment.

Finally, Graham explains that “distaste for opposing counsel is common,” and that enough litigators take advantage of the system solely for personal riches to support the most cynical stereotypes of the profession (102–3). Graham discusses how many litigators try to obfuscate issues, oppose legitimate requests, make misrepresentations to the court, and are driven to make life and work difficult for opposing counsel. He illustrates with an interviewee’s account of meritless suits brought by a firm for little or no purpose other than to generate substantial fees, in response to which jaded defense counsel simply rationalize away concerns over the process (105–6).

These illustrations, however, are not of moral complexity or enforced realism. They illustrate immorality. Lying to the court breaks not only the rules of professional conduct but the ninth commandment, and stealing through sham suits breaks the eighth commandment.

Graham acknowledges that other litigators “take to heart their professional identity and take pride in helping clients” (57). Indeed, some reject the two rules and resolve the tension that they suggest through good communication (68). He cautions: “The two rules do not circulate simply for their shock value. They refer, if obscurely and humorously, to the truth about the relationship between the lawyer and the client. The truth is that, inherent in the relationship, there is a tension” (59).

This tension, though, is created by the litigator’s view that client service is just generating fees. There is no tension in earning reasonable fees for competent service until the litigator shifts from the truth that law is a public profession to the fallacy that it is all about fee generating.

Like Graham, we have seen lawyers exhibit straightforward immorality. These are lawyers who accept the world’s typical ethics that “no one will find out” and “everyone does it” and substitute them for the Ten Commandments’ ethics to rest, respect, and eschew other gods, idols, profanity, murder, adultery, stealing, lying, and coveting.

Indeed, Graham’s interviews show us that

- lawyers are as likely as anyone to make a god of mammon and an idol of their expertise—breaking the first and second commandments;
- some lawyers profane the justice system with sham suits and give no honor to those who bequeathed that system to them—breaking the third, fourth, and fifth commandments;
- lawyers too often hate one another, misuse their clients, and steal and lie their way to riches while still coveting the riches of others—breaking the sixth, seventh, eighth, ninth, and tenth commandments.

Graham publishes our sins to the public, calling them the consciousness of the litigator when, really, he documents the absence of conscience.

Perhaps what Graham shows us best is that one cannot substitute processes, no matter how precise, for values. Though thinking like a lawyer necessarily includes the economics of the profession, it should also include thinking about ethics. Indeed, just as the Ten Commandments give us a traditional ethical measure, there are traditional ways

in which lawyers can develop suitably sensitive and directed consciousness. Those who gave us this justice system understood and accepted that offer of a moral consciousness. We should not reject or misinterpret it. Our complex work is built and depends on an ethic as real as the printed words of Graham's *The Consciousness of the Litigator*, though far more meaningful and infinitely more satisfying.

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## The Ethics of the Market

**John Meadowcroft**

Basingstoke, United Kingdom: Palgrave Macmillan, 2005 (175 pages)

John Meadowcroft's *The Ethics of the Market* is a truly valuable contribution to a literature that, rather than merely emphasizing the efficiency benefits of the capitalist system, defends the market economy on purely ethical grounds. Perhaps more of a primer than a work of original research, Meadowcroft's book, however, offers an immense service by wrestling with the most popular arguments in political philosophy and debunking them, following the footsteps of an impressive number of mentors—from John Locke to Friedrich von Hayek, from Adam Smith to Robert Nozick.

Going back to the basics of classical liberalism is necessary in the contemporary era especially because of the common yet mistaken view that there is no longer a war of ideas to be fought. As Meadowcroft writes in the very first page, "It is now widely held that the central debate in political economy has shifted from the question of whether capitalism is the most efficacious economic system to the question of how the state should manage and regulate a market economy" (1). However, "while it is undoubtedly true that the state socialist alternative to capitalism has withered away, it is nevertheless the case that many of the regulatory measures implemented in contemporary liberal democracies impose equal if not greater restriction on economic freedom and individual liberty than the direct interventions that were undertaken during the post war consensus" (2). Meadowcroft clearly has a point here, and perhaps it is so exactly because of the apparent general consensus over the comparatively higher benefits inherent in a market arrangement of the economy.

Such a consensus, however, confronts us with at least two perils. The first is the technocratic attitude toward the market's regulation—an attitude that is predominant among the Western elite and that sees in the free economy nothing but an instrument to be twisted to obtain any desirable social end via an appropriate setting of rules. Social engineering in market's clothes is by no means less harmful than its collectivist twin brother. The second is the general shift of the debates in social sciences from highly theoretical (albeit sometimes ideological) discussions to the technicalities of public policy. These latter are certainly well worth studying, but the proper task of political philosophy, at least, should be looking to ideas at the highest possible degree of generality.