

Lawyering with Heart: A Warrior Ethos for Modern Lawyers Reviewing Allan C. Hutchinson, *Fighting Fair: Legal Ethics for an Adversarial Age*

W. Bradley Wendel
Cornell University

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>

 Part of the [Law Commons](#)

Book Review



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Wendel, W. Bradley. "Lawyering with Heart: A Warrior Ethos for Modern Lawyers Reviewing Allan C. Hutchinson, *Fighting Fair: Legal Ethics for an Adversarial Age*." *Osgoode Hall Law Journal* 54.4 (2017) : 1371-1380.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol54/iss4/16>

This Book Review is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

Lawyering with Heart: A Warrior Ethos for Modern Lawyers Reviewing Allan C. Hutchinson, *Fighting Fair: Legal Ethics for an Adversarial Age*

Abstract

Prolific legal theorist Allan C. Hutchinson offers a provocative critical perspective on the relationship between law, the public interest, and lawyers' practices. His recent book, *Fighting Fair*, seeks to ground legal ethics in the principles regulating one of the most universal and characteristic of all human activities—warfare. Readers of *Candide*, *All Quiet on the Western Front*, or *Catch-22*, or viewers of *Gallipoli*, *Apocalypse Now*, or *Hacksaw Ridge* may be excused for thinking that all we have learned about war is that it is senseless, brutal, dehumanizing, and in all ways an unmitigated ethical catastrophe. Hutchinson, however, is perfectly serious about the comparison. The adversarial system of dispute resolution is not going anywhere in the common-law world. So rather than seek reform of the “sporting theory of justice,” Hutchinson recommends that lawyers understand their professional role as analogous with that of the warrior. Importantly, a warrior is not a “hired gun,” that familiar target of critics of the adversary system. Warriors are not indifferent to the justice of their employer's cause. They fight fairly, accept the possibility of defeat as the price of fighting with honour, are committed to a greater good over mere victory, and never lose the connection with their humanity, even in the heat of battle. Warriors also respect their enemies, rather than adopting a “consistently bellicose or thoroughly hostile stance” toward adversaries.

Book Review

Lawyering with Heart: A Warrior Ethos for Modern Lawyers

Reviewing Allan C. Hutchinson, *Fighting Fair: Legal Ethics for an Adversarial Age*¹

W. BRADLEY WENDEL²

PROLIFIC LEGAL THEORIST ALLAN C. HUTCHINSON offers a provocative critical perspective on the relationship between law, the public interest, and lawyers' practices. His recent book, *Fighting Fair*, seeks to ground legal ethics in the principles regulating one of the most universal and characteristic of all human activities—warfare.³ Readers of *Candide*, *All Quiet on the Western Front*, or *Catch-22*, or viewers of *Gallipoli*, *Apocalypse Now*, or *Hacksaw Ridge* may be excused for thinking that all we have learned about war is that it is senseless, brutal, dehumanizing, and in all ways an unmitigated ethical catastrophe. Hutchinson, however, is perfectly serious about the comparison. The adversarial system of dispute resolution is not going anywhere in the common-law world. So rather than seek reform of the “sporting theory of justice,”⁴ Hutchinson recommends that lawyers understand their professional role as analogous with that of the warrior. Importantly, a warrior is not a “hired gun,” that familiar target

1. (New York: Cambridge University Press, 2015).

2. Professor of Law, Cornell University.

3. Hutchinson, *supra* note 1 at 4.

4. See Deborah L Rhode, *In the Interests of Justice: Reforming the Legal Profession* (New York: Oxford University Press, 2000) at 81-115.

of critics of the adversary system.⁵ Warriors are not indifferent to the justice of their employer's cause.⁶ They fight fairly, accept the possibility of defeat as the price of fighting with honour, are committed to a greater good over mere victory, and never lose the connection with their humanity, even in the heat of battle.⁷ Warriors also respect their enemies, rather than adopting a "consistently bellicose or thoroughly hostile stance" toward adversaries.⁸

While some Canadian legal ethics scholars are dissatisfied with the shopworn images of lawyers as zealous advocates, soldiers of the law, and fierce, fearless, resolute partisans,⁹ Hutchinson accepts that lawyers share with soldiers the experience of being subject to role-differentiated moral demands.¹⁰ "Both lawyers and soldiers are not only expected, but also occasionally obliged to do things that might not be considered ethical in a private capacity."¹¹ A significant insight of military ethics, however, is that role-differentiated morality does not mean the absence of restraint. There is a long realist tradition in international relations, running from Thucydides, through Hobbes and Machiavelli, to modern realists like Hans Morgenthau, which emphasizes the tension between morality and political action. The realist tradition only asserts that statecraft and ethics are governed by separate normative principles, not that one is precluded from evaluating an act of state aggression as just or unjust, or identifying some acts of soldiers as beyond the bounds of permissible conduct in war.¹² The major thrust of Hutchinson's argument is that lawyers have a great deal to learn from the way warriors think about the justice of the ends of war and the means of war-fighting.

Fighting Fair explores two different ways that military ethics can provide a template for the reconstruction of legal ethics. The first is to tap into the rich resources of just war theory and the international law of armed conflict.¹³ The

-
5. Hutchinson, *supra* note 1 at 45-46. See e.g. Robert W Gordon, "Why Lawyers Can't Just Be Hired Guns" in Deborah L Rhode, ed, *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (Oxford: Oxford University Press, 2000) 42.
 6. Hutchinson, *supra* note 1 at 75-76.
 7. *Ibid* at 65.
 8. *Ibid* at 102.
 9. Trevor CW Farrow, "Sustainable Professionalism" (2008) 46:1 Osgoode Hall LJ 51 at 56-57.
 10. Hutchinson, *supra* note 1 at 13-14.
 11. *Ibid* at 58.
 12. Steven P Lee, *Ethics and War* (Cambridge, UK: Cambridge University Press, 2012) at 22.
 13. See e.g. Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009); CAJ Coady, *Morality and Political Violence* (Cambridge, UK: Cambridge University Press, 2008); George P Fletcher & Jens David Ohlin, *Defending Humanity: When Force is Justified and Why* (Oxford: Oxford University Press, 2008); Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 5th ed (New York: Basic Books, 2015).

just war literature nicely inverts the usual criticism that litigation is too much like combat. It is combat, Hutchinson concedes, but that does not mean it exists outside of ethics. Centuries of profound reflection, by thinkers from Augustine to Michael Walzer, have brought even the most violent of human interactions within the constraints of morality. Just war theory therefore offers the model of combat comprehensively regulated by norms against cruelty, deliberately harming innocents, and the indiscriminate use of force.¹⁴ The second, and in many ways more interesting approach, is to seek a return to a very different style of doing ethics, the modern revival of the Aristotelian virtue ethics tradition.¹⁵ Virtue ethics centers on agents and their dispositions to behave, feel, and think in particular ways. An honest person, for example, does not merely refrain from lying or cheating, but is disposed to act in a particular way—“readily, eagerly, unhesitatingly, scrupulously, as appropriate”—and reliably displays attitudes of disapproval toward dishonesty, admiration for honesty, and a particularly acute sensitivity in situations in which honesty is an issue.¹⁶ Looking to the warrior ethos as a model for ethical lawyering, Hutchinson approvingly notes the virtues of a wise and responsible warrior. For good soldiers, “ethical theory does not reduce ethical behavior to a list of prohibitions.”¹⁷ Instead, warriors fight “with a genuine reluctance” and with a “deep commitment to acting honorably.”¹⁸ In contrast with mercenaries, “warriors are as much concerned with honor and moral worth in *how they go about their tasks* as anything else.”¹⁹

Hutchinson’s references to warriors have a tendency to invoke a bygone era of chivalry. “Warriors strive to be dignified in all they do and to work for a greater

14. Lee, *supra* note 12 at 155-57.

15. See e.g. Timothy Chappell, “Virtue Ethics in the Twentieth Century” in Daniel C Russell, ed, *The Cambridge Companion to Virtue Ethics* (Cambridge, UK: Cambridge University Press, 2013) 149; Rosalind Hursthouse, *On Virtue Ethics* (Oxford: Oxford University Press, 1999); Alasdair MacIntyre, *After Virtue*, 2nd ed (Notre Dame: Notre Dame University Press, 1984); Philippa Foot, *Virtues and Vices and Other Essays in Moral Philosophy* (Berkeley: University of California Press, 1978). For applications to legal ethics, see Heidi Li Feldman, “Codes and Virtues: Can Lawyers Be Good Ethical Deliberators?” (1996) 69:3 S Cal L Rev 885. For a critique of the approach as applied to professional ethics, see Tim Dare, “Virtue Ethics and Legal Ethics” (1998) 28:1 VUWLR 141. *Fighting Fair* does not engage with technical issues in virtue ethics, so for the purposes of this review I will not consider alternatives to neo-Aristotelian theories. See e.g. Robert Merrihew Adams, *A Theory of Virtue: Excellence in Being for the Good* (Oxford: Oxford University Press, 2006); Christine Swanton, *Virtue Ethics: A Pluralistic View* (Oxford: Oxford University Press, 2003).

16. Hursthouse, *supra* note 15 at 10-12.

17. Hutchinson, *supra* note 1 at 57.

18. *Ibid.*

19. *Ibid* at 65 [emphasis added].

good than temporary success; they are in the game of glory, albeit more humbly pursued.”²⁰ Some readers may therefore dismiss the warrior archetype as unsuited to a modern age in which knights-errant no longer roam the countryside seeking adventure. It may be possible, however, to recover a realistic and unromantic conception of the warrior ethos. Some modern writers draw a contrast between warriors and warfighters who fail to possess the requisite traits of character. For example, in a fascinating book on the ethics of warfare by a United State Air Force fighter pilot turned military ethicist,²¹ the contrast is between humans and machines with varying degrees of autonomy and artificial intelligence. A warrior is one in the profession of arms who views what he or she does as a craft, and who “is technically proficient but views war more philosophically ... [someone who is] more artisan than technocrat.”²² Readers who dislike what sometimes feels like the glorification of war in Hutchinson’s book may prefer the analogy offered by two Australian theorists of professional ethics of being a jazz pianist.²³ Common to the warrior and pianist analogy is the centrality of craft. While it may be possible to give an external account of good jazz playing, the content of this ideal can be fully grasped only from within, by one who is immersed in the activity itself. There is no Archimedean point, “outside all our knowledge and belief ... to which even the amoralist or the skeptic is committed.”²⁴ Hutchinson is attracted to this anti-foundationalist approach to ethics. Like the jazz pianist, ethical standards for warriors do not come from “some grounded position outside the contested area.”²⁵ Rather, one only knows how to behave ethically when one commits to participating in a practice and living by its norms—*being* a warrior is prior to knowing how to act as an ethical warrior. “The ideal of ‘natural’ or ‘fair play’ is itself part of the argumentative contest over what it means to *play the game*.”²⁶ The objectivity of the virtues of a practitioner is therefore secured

20. *Ibid* at 66.

21. M Shane Riza, *Killing Without Heart: Limits on Robotic Warfare in an Age of Persistent Combat* (Washington, DC: Potomac Books, 2013).

22. *Ibid* at 84.

23. Justin Oakley & Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge, UK: Cambridge University Press, 2001) at 25-29.

24. Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, Mass: Harvard University Press, 1985) at 28-29. See also Hursthouse, *supra* note 15 at 240 (“The sorts of facts [virtue ethics] appeals to are not all ‘empirical’ and accessible from ‘a neutral point of view’”).

25. Hutchinson, *supra* note 1 at 92.

26. *Ibid* [emphasis in original].

by consideration of the end of the practice itself.²⁷ This is a significant insight of Alasdair MacIntyre's, developed in *After Virtue*, and has the meta-theoretical advantage of avoiding some of the most deeply contested questions in philosophy, along the lines of "what are human beings for?" or "what is the ultimate good for humans?"²⁸ MacIntyre's account of practices grounds evaluative standards in reflection on the point and purpose of an activity that progresses toward various types of excellence.²⁹

A tension runs through *Fighting Fair* which limits its power as a critique of existing practices and a vision for a reconstruction of professional ethics. The tension is between Hutchinson's subjectivism about values and the strongly objective normative commitments underlying both just war theory and virtue ethics. By "objective" or "objectivity" here I do not mean any strong ontological thesis about the relationship between facts and values. Rather, the issue is whether a disagreement in ethics implies that one of the parties can be in error.³⁰ You say po-tay-to, I say po-tah-to; you like American double chocolate fudge ice cream, I'm partial to hokey-pokey ice cream from New Zealand. These are not matters about which someone can be mistaken. In ethics, however, one does not assert positions about what is right, good, decent, just, and honourable as a matter of what one personally happens to value or desire. In just war theory, on one account, liability to attack in war depends on whether the target of the attack bears "moral responsibility for an objectively unjustified or wrongful threat."³¹ And on neo-Aristotelian virtue theory, for something to be a virtue, it must be the case that it benefits its possessor, *i.e.*, enables him or her to flourish, and that it makes its possessor good *qua* human being, *i.e.*, to live a characteristically good human life.³² For neither just war theory nor virtue ethics is the evaluation of goodness, rightness, or justice merely a matter of preference or belief. On the blend of just war theory and virtue ethics that is the unique methodological

27. MacIntyre defines a practice as "any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity..." MacIntyre, *supra* note 15 at 187.

28. See *e.g.* Philippa Foot, "Does Moral Subjectivism Rest on a Mistake?" (1995) 15:1 Oxford J Leg Stud 1 at 8 ("[H]uman defects and excellences are ... related to what human beings are and what they do"); Martha C Nussbaum, "Human Functioning and Social Justice: In Defense of Aristotelian Essentialism" (1992) 20:2 Pol Theory 202.

29. MacIntyre, *supra* note 15 at 189.

30. See Bernard Williams, *Making Sense of Humanity, and Other Philosophical Papers 1982–1993* (Cambridge, UK: Cambridge University Press, 1995) at 145.

31. McMahan, *supra* note 13 at 38.

32. Hursthouse, *supra* note 15 at 167.

contribution of this book, the existential nature of the warrior ethos provides a standpoint from which combat or adversarial litigation can be evaluated.

I do not believe Hutchinson thinks ethical evaluation is nothing more than an assertion of preference or subjective judgment. He lists criteria from just war theory for both the evaluation of the justness of a conflict (*jus ad bellum*)³³ and the conduct of hostilities (*jus in bello*),³⁴ and argues that the virtues of warriors benefit their possessor and make him or her good as a warrior.³⁵ But the idea of the public interest in legal ethics creates difficulties for his position. He wants lawyers to represent clients consistently with the public interest, he resists the reduction of the public interest to the content of positive law, but he is also wary of investing the public interest with sufficient objectivity that it can override the legal entitlements of clients. Much of the argument in *Fighting Fair* resonates with an older conception of lawyer professionalism in which lawyers have considerably more responsibility for the ends of the representation. On this view, associated with sociologists like Émile Durkheim and Talcott Parsons and lawyers like Louis D. Brandeis, the role of the legal profession is to discern, internalize, and act on the general moral norms of their society.³⁶ But this conception of professionalism collapsed in the United States, and possibly to a lesser extent in Canada, by the end of the twentieth century. The cause of that collapse, according to a recent article by a legal historian, is the rise of public-choice theory and ethical pluralism, both of which express considerable skepticism (for very different reasons) concerning the possibility of justifying government action with reference to the public interest.³⁷

Hutchinson does allude to the contestability or indeterminacy of what the public interest requires,³⁸ but gives it relatively little weight in his account. Models of legal ethics grounded in political liberalism, which are the main target of Hutchinson's arguments in this book, contend that the indeterminacy of the public interest is not the result of the subjectivity of values, but the objective fact of value pluralism.³⁹ As Isaiah Berlin argued, "the belief that some single formula can in principle be found whereby all the diverse ends of men can be harmoniously

33. Hutchinson, *supra* note 1 at 73-74.

34. *Ibid* at 89.

35. *Ibid* at 68-69.

36. See William F Simon, "Babbitt v. Brandeis: The Decline of the Professional Ideal" (1985) 37:2 *Stan L Rev* 565.

37. Rebecca Roiphe, "The Decline of Professionalism" (2016) 29:3 *Geo J Leg Ethics* 649.

38. Hutchinson, *supra* note 1 at 11.

39. See *e.g.* John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 54-58.

realized is demonstrably false.⁴⁰ The frequently-voiced concern that lawyers may become gatekeepers before the law, to which Hutchinson refers,⁴¹ is best understood against the backdrop of Berlin's warning that tyrannical governments as well as progressive ones believe that they have discovered the correct ranking of ends, so that the pursuit of one may be demonstrated to require the subordination of others.⁴² The point is not that an ethically-motivated decision not to represent a particular client is tyrannical. Rather, it is that, if fully rational people acting in good faith can disagree about "choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others,"⁴³ then in a liberal political community, the responsibility for making decisions about the justice of a cause belongs to the client, not the lawyer.

Hutchinson argues for the inverse position. He quotes the radical American legal theorist Duncan Kennedy's view that it is ethically wrong for a lawyer to argue a case or a cause that will do more harm than good, or to represent a client that the lawyer believes should not be in court in the first place or who deserves to lose.⁴⁴ There is something interesting going on in Kennedy's argument—it is a subtle point, and I worry that Hutchinson did not emphasize it enough. Kennedy and Hutchinson are not making the error Berlin warns us about. That is, they do not contend that there is an objective truth of the matter concerning what is in the public interest. Instead they argue that it is up to each lawyer to articulate an ethical justification for why she intends to represent this particular client, well aware that a different lawyer may reach the contrary conclusion. Here is Kennedy:

[I]t is wrong to represent an abortion clinic that's trying to lease a new building to expand its operations, *if you are pro-life*. And it's wrong to represent a landlord who has been intimidated into trying to evict an abortion clinic *if you are pro-choice*. It's wrong to work against unionization *if you believe everyone should have a labor union*; and wrong to work for union rights to picket a shopping center *if you think unions are generally evil*. It's wrong to lobby for the postponement of environmental controls *if you think they should be imposed right now*; and wrong to do antitrust work against a corporate merger, *if you believe mergers are good for the economy*.⁴⁵

40. Isaiah Berlin, "Two Concepts of Liberty" in Henry Hardy & Roger Hausheer, eds, *Isaiah Berlin: The Proper Study of Mankind* (New York: Farrar, Straus and Giroux, 1998) 191 at 239.

41. Hutchinson, *supra* note 1 at 78.

42. Berlin, *supra* note 40 at 218, 222-39.

43. *Ibid* at 239.

44. Hutchinson, *supra* note 1 at 78.

45. Duncan Kennedy, "The Responsibility of Lawyers for the Justice of Their Causes" (1987) 18:4 Tex Tech L Rev 1157 at 1159 [emphasis added].

What is really wrong, for Kennedy, is acting in bad faith—that is, against one’s sincerely held ethical commitments. The italicized passages are crucial to his argument. He is unwilling to say that abortion is or is not immoral, so the most he can say is that a pro-life lawyer should not represent an abortion clinic.

Hutchinson agrees. He says each lawyer must “develop an ethical standard against which to evaluate whether the objective of the case or cause is worthy.”⁴⁶ That is a cop-out. As discussed below, the just war tradition from which he draws his warrior ethos does not defer the analysis of *jus ad bellum*—the counterpart of the decision whether to represent a client—to the beliefs or the conscience of individual political leaders, generals, or lower-ranking soldiers. Rather, actors seek to determine whether a cause is, in fact, sufficiently justified by moral reasons.⁴⁷ Similarly, a lawyer who refuses to represent a client because the client’s cause is unworthy owes the client an explanation of why the client’s cause is actually unworthy. What animates liberal accounts of legal ethics is the recognition that reasonable people can disagree about the justice of a client’s cause, and as a result, the political community has established the institutions and procedures of the legal system to establish a social settlement. Lawyers serve clients, but they also serve the community by contributing to the functioning of the legal system. This in turn gives effect to the great ethical insight of Berlin and others, namely that human lives and ends are multifarious and incapable of being reduced to some single master value to which rulers can force everyone to conform. Liberalism in legal ethics is committed to the liberty of clients to make their own decisions about whether their cause is worthy. Lawyers are technicians, not Platonic guardians.

On a personal note, Hutchinson is almost apologetic for his vigorous criticism in chapter three of my position regarding moral pluralism and political liberalism.⁴⁸ While the critique was bracing and strongly argued, Hutchinson’s arguments were entirely fair and, moreover, aimed at a real weakness, not only in my own account, but in any ethical theory grounded in the political-moral values

46. Hutchinson, *supra* note 1 at 77.

47. Lee, *supra* note 12 at 73.

48. Hutchinson, *supra* note 1 at 37.

of liberalism and legal positivism.⁴⁹ He rightly notes that my aim was to provide a better explanation and justification for existing practices.⁵⁰ The existing practices in question are, as noted, the standard conception, which maintains that the lawyer's professional role is primarily that of an expert technician, providing assistance to individuals and entities who seek to act within the rights allocated to them by the law, and defend them if necessary from interference by others. That means that a pro-life lawyer like the one in Kennedy's example may have a professional obligation to lend support to an abortion clinic. (Or vice-versa, a pro-choice lawyer may have an obligation to represent a Catholic hospital seeking an exemption from a requirement that it provide abortion services.) The implication is, as Hutchinson rightly notes, that the lawyer's universe can seem uncomfortably narrow. At least in the United States, it is clear that, as legal agents for their clients, lawyers have an obligation to "proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation."⁵¹ The normative division of labour between lawyer and client permits the client to determine the ends of the representation. Correlatively, it is the client, not the lawyer, who bears moral responsibility for those ends. The lawyer's role is therefore that of an expert assistant, who provides the tools needed by the client to accomplish *the client's* objectives. There is sometimes little room for "moral sensitivity, moral judgment and moral conviction"⁵² within a practice that is fundamentally technical. But Hutchinson's romanticized image of warriors fighting with honour seems to motivate him to invest the lawyer's role with more nobility and grandeur than it may support. My views on legal ethics are sometimes criticized as reducing lawyers to the status of mere plumbers.

-
49. Hutchinson's argument that the law is insufficiently determinate to support an evaluative judgment that a lawyer has interpreted it in good faith or not in ascertaining the content of the client's legal entitlements is important, but I have dealt with it at length elsewhere. *Ibid* at 26-34. See W Bradley Wendel, "The Craft of Legal Interpretation" in Yasutomo Morigiwa, Michael Stolleis & Jean-Louis Halpérin, eds, *Interpretation of Law in the Age of Enlightenment: From the Rule of the King to the Rule of Law* (Dordrecht: Springer, 2011) 153. In any event the interpretive problem is peripheral to the principal argument in Hutchinson's book and to his critique of my position, which is that ethical lawyers must develop moral sensitivity and judgment in their practice, taking into account values and interests in a domain considerably wider than that of positive law. On that point he has stated my position fairly, and his model is a serious alternative to the much thinner, technocratic conception of professionalism I have defended.
50. Hutchinson, *supra* note 1 at 2.
51. American Law Institute, *Restatement (Third) of the Law Governing Lawyers* (2000) s 16(3). See also, American Bar Association, *Model Rules of Professional Conduct* (2013) r 1.2(a).
52. Hutchinson, *supra* note 1 at 37.

I respond that anyone who disparages the value of plumbers' services has never had a clogged toilet! But in all seriousness, there are a great many worthwhile callings in life that involve the provision of services requiring years of training and experience, but which do not carry with them the responsibility of making moral judgments on behalf of another competent adult.

Fighting Fair is decidedly not part of the "strong positivist strain" supposedly permeating Canadian legal ethics,⁵³ in which law-society codes of conduct and other aspects of the law governing lawyers are the subject matter. On Hutchinson's account, it is the element of public interestedness that sets the legal profession, or any profession, apart from a mere business or trade.⁵⁴ It is also clear from his sharp criticism of my position that he rejects the identification of the public interest with the content of positive law. A lawyer must always, on Hutchinson's view, independently determine whether the rights and duties allocated to the client under positive law are consistent with the public interest. Because this is a deeply human, non-technocratic undertaking, I can see why Hutchinson is so attracted to the idea of warfare as described by Colonel Riza, in which it "transcends the cold rationality of performing a mission, completing an objective, taking a hill. ... It sees combat as the ultimate and artistic expression of a life performed in its preparation."⁵⁵ But ethical norms for warriors are internal to the craft of war-fighting. They do not reach outward to engage with the definition of the public interest which is Hutchinson's principal concern. While there is much to admire in this book, the positive arguments for the warrior ethos seem to be a prescription for solving a different problem than the one identified in the critical arguments against liberal approaches to legal ethics. The fusion of just war theory, virtue ethics, and left critiques of liberalism makes for a fascinating book, but one which cannot address the problem it sets for itself.

53. Adam M Dodek, "Canadian Legal Ethics: Ready for the Twenty-First Century at Last" (2008) 46:1 Osgoode Hall LJ 1 at 5-6.

54. Hutchinson, *supra* note 1 at 10-11, 14-15, 38, 68.

55. Riza, *supra* note 21 at 88.