Book Review

Julie Macfarlane
The New Lawyer: How Settlement Is Transforming the Practice of Law¸ 2nd edition
Vancouver, Canada: University of British Columbia Press, 2017

Reviewed by Howard A. Doughty

1.

Think of it in terms of raw numbers. There are close to seven million academics teaching at colleges and universities around the globe. Many of them either have or are seeking permanent positions in higher education. That's a world in which "publish or perish" is still a serious challenge for people wishing to get or to keep full-time employment. One result is that about 2.5 million peer-reviewed articles are published annually in journals running for the prestigious and the venerable to the disreputable and the predatory. Meanwhile, a few massive international corporations have taken over a tremendous number of the legitimate and credible publications and jacked up the subscription prices so that even well-endowed libraries, to say nothing of individual scholars and students, can no longer afford to put them on their shelves or secure access to online editions.

Something similar is happening in book publishing. The academic press was never (and was never intended to be) a big money maker. If garrulous professors with half-bright ideas want to gain fleeting fame and potential fortune as "public intellectuals," there are companies prepared to promote smooth-talking, photogenic pundits. The prizes include getting on the *New York Times* "best-sellers" list, appearing on the Sunday morning television chat shows, and riding the grueling but lucrative public speaking circuit for a few years. For most professor/authors, however, their serious/pedantic treatises of transitory/enduring intellectual value have press runs of only a few thousand copies and, though they might be well known to leaders in their various fields, their public impact is, at best, second-hand. Given, however, the glut of imprints, the crisis in overproduction, the rising costs of production and the shrinking library acquisitions budgets, even the former giants of university presses and well-meaning private sector trade publishers are having a tough time staying in business, never mind embarking on major publishing ventures intended to bring broad ancient wisdom and/or up-to-date research to comparatively narrow audiences.

Accordingly, those honourable private publishing firms and university presses that do undertake major commitments in the full knowledge that their efforts may not break even on the financial bottom line are to be applauded. Too often, however, once-good publishers—many of which have been swallowed up by mergers and acquisition managers in massive international communications corporations—are generally reluctant to take risks and are absolutely unwilling to sustain losses in any good cause that cannot dance to the merry jingle of the cash register. There are mitigating circumstances. They live in shark-infested waters.

Now, I have not done and I have no intention of doing the research necessary to learn if the University of British Columbia has backed a collection of winners or is merely doing a commendable public service in supporting its seventeen-year-old project, the "law and society series." Even so, I doubt if it has hit the jackpot. Rather, the stated aim of this virtuous collection of (so far) ninety-six books is to overcome the "conventional division of law from society." It is a noble ambition and the UBC Press is taking it seriously. It has published works about everything from corporate criminal liability in industrial accidents (the Westray Mine disaster in Plymouth, Nova Scotia in 1992) to religious freedom and pluralism, from the "Charter Rights" of organized labour in Canada to male homosexual pornography, and from border security to the parole system. Its authors are uniformly credible; their writing is generally engaging; and their accounts and arguments are well received inside and outside the legal community. They do very good work. They and the UBC Press are to be highly praised.

The importance of this series to the public sector and public sector innovation should be obvious. Government policy generation, implementation and administration are nothing if not matters of the lawful regulation of private activities, intergovernmental relations and public policies and programs. Not for nothing did Max Weber refer to bureaucracy as the quintessential "rational-legal" system of authority, perhaps with the preferred emphasis on the "legal." So, when there are discernible changes in the law—not just in specific statutes, precedents or principles, but in fundamental legal organization and process—it is prudent for people employed in the public sector to take notice.

2.

Julie Macfarlane is acutely aware of changes that are taking place in the practice and, if it is not too grand a term, the "philosophy" of law today. Dr. Macfarlane has made quite a name for herself in legal circles. The first edition of *The New Lawyer* (2008) was a best-selling textbook used extensively in law schools in Canada, the United States and elsewhere. She followed that success with a four-year empirical study of Islamic divorce in North America (Macfarlane, 2012), which predictably won a good deal of public attention. Then came an influential study of self-represented litigants (Macfarlane, 2013). The latter project has led to the establishment of The National Self-Represented Litigants Research Project, which she currently heads. Her academic accomplishments have been duly rewarded in, for example, being named a Distinguished University Professor—the highest award that the University of Windsor has on offer—in 2014.

> The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defense authorized by law.

In *The New Lawyer*, Dr. Macfarlane focuses on the trend away from the image and professional identity of lawyers as zealous advocates for fees-paying clients whose main objective is to win their cases in court. She discounts a view of the law which holds documented law (statutes and judicial decisions) in the highest esteem, accepts the notion of the inherently adversarial nature of legal disputes, and regards legal proceedings—not the writing of wills,

contracts and so on, but the quarrels over their binding interpretation—as conflicts of wit and will wherein one party's interest is at odds with and destined to prevail over another's in a harsh game of "zero-sum" winners and losers (my win is your loss, and *vice versa*). Though I will later be critical of her views, I give her full marks for presenting a compelling critique of what she deems to be an antique and no longer serviceable legal paradigm.

Macfarlane is a zealous advocate of an approach to the law which she sincerely believes (and she may be mostly right) is wrong-headed because it is excessive in its commitment to conflict over compromise. She is right to think that this well-staged dramatic setting is tremendous for popular entertainments in film and television. She is also right to say that it remains the dominant exemplar of the criminal justice system for those who understand the law through the filter of popular entertainment.

In legal reality, however, while we know that between 7% and 10% of charges against the criminally accused are dropped. We also find out that only about 3% of the remaining cases actually go to trial. Instead, such matters are typically resolved through plea bargaining which is likely to give the accused a lesser sentence in exchange for the prosecution getting an all but guaranteed "win." Of course, abuses of these pre-trial procedures often lead to innocent people being punished for crimes they did not commit because they are bullied into pleading "guilty" on the threat that a trial would result in a harsher penalty.

Likewise, as Macfarlane points out, litigation also involves regulatory matters outside of the *Criminal Code*, where public servants other than crown prosecutors, district attorneys and the like are professionally involved. Similar data show that only about 3% of cases in civil disputes go to full trials or even to pertinent administrative tribunals. Almost all disputes involving government authorities, corporations or individual citizens are "settled out of court" and are never decided by a judge, jury or binding arbitral tribunals; rather, they are mainly resolved through negotiation and mediation, increasingly assisted by the "new lawyers" of Macfarlane's title.

3.

The new normative structure of the legal profession is not just an interesting anomaly or a curious innovation. It represents what is sometimes rather sloppily called a "paradigm shift" in the nature of law enforcement and adjudication. So, although tough, agile, clever and generally highly principled litigators remain robust role models for legal heroes (Canadian names such as Marie Henein, James Lockyear and the late Eddie Greenspan come quickly to mind), it must be acknowledged that the familiar image of lawyers as court-room warriors is fading and may soon be relegated to a small (but still vital) niche in the vast temple of the law. In their place, Macfarlane shows in persuasive detail that professional legal advice is shifting from court room confrontations among barristers to settlement-oriented problem solving by mediators. The (post)modern goal of the lawyer is less and less zealous advocacy and more and more conflict resolution and consensus building." Legal advisors are learning to play nicely together and are encouraging their clients to do likewise.

Since my personal experiences as a client and an uncertified advocate (Union Steward) have largely involved quasi-judicial bodies such as the Ontario Labour Relations Board and the

Ontario Municipal Board—and then only after mediation and other low-energy paths to mutual accommodation have been already and quite predictably closed—I confess to being a little "old school" when faced with the prospect of the inclusive practices described and rather enthusiastically endorsed by Macfarlane.

> In reality, many disputes are brought to lawyers that simply do not require, and are not suitable for, a rights-based argument or solution, and may escalate unnecessarily if viewed exclusively through this prism.

I am prepared to concede that Macfarlane presents a compelling case that the business of law is now turning to "affective" (not merely "effective") lawyering. Yet, there are, I think rightly, still venues where judicial proceedings more closely resemble gladiatorial combats rather than therapy groups. So, while phrases such as "cooperative bargaining" seem somewhat oxymoronic to me and although I am a bit impatient with time spent on the "emotional dimension" of lawyer-client relations, I do agree that professional norms are changing as a point of fact, and that there is a plausible case to be made for what Penn State Professor of Law Nancy A. Welsh calls "the pragmatic nobility of the legal profession."

In the new normative structure, there is an emerging emphasis on the preference for mutually agreeable settlements and even for the therapeutic role of legal counsel. A potentially disturbing feature, however, remains the implicit view that it is the task of the lawyer to manage client expectations and to downplay what she calls a "rights-based" view of a problem. Such an approach, she insists, leads to intransigence and "zero-sum" attitudes. She says it precludes empathy and generosity. It encourages litigants to demand more when they might have been satisfied with less. It promotes extremism and it always tends toward the selfish and the punitive. In its place, Macfarlane sees and is pleased to say that we are moving away from retribution and toward restoration and reconciliation. This new conciliatory model will, she hopes, reduce lasting resentments and foster a more compassionate and "rational" legal system. Thus, it will advance something closer to the "good society." How could anyone disagree?

4.

It is here, however, that I reserve the right to worry about legal counsel too closely overlapping psychological counseling. While I am always happy to see fruitful negotiations lead to mutually agreeable and mutually beneficial settlements, I remain convinced that a lawyer should always put the interests of the client first. Having more often been than not been on the side of the "underdog," I am wary of procedures in which the primacy of the (psychological) health and happiness of all sides remains the primary goal. Rather, I have learned, through often bitter experience, that anything less than precise outcomes leave "underdogs" yelping as ambiguity is almost always resolved in the interest of the more powerful.

I am more than willing, of course, to support the early modern ideals of Immanuel Kant who set out some pretty decent universal rules of fairness. I am even more willing to embrace neo-Kantians and charming pragmatists. So, the legal philosophies of proceduralists whose expectation is that all parties to a dispute should be committed to agree from the outset that they shall negotiate in good faith toward a solution that is in the best interest of all, that each

participant will be afforded equal access to expert advice, and that no form of intimidation or coercion will be tolerated (Doughty, 2014). That ideal, however, exists only as a sort of Platonic form against which we may measure the equity in our own procedures. As a practical matter it remains outside our experience.

I am also a little concerned about Macfarlane's overall approach to describing and explaining the changes she documents and supports. It is true that she opens her book by acknowledging that "the business model [of the law] has altered dramatically" and that "legal practice is now dominated by large firms and corporate customers." So, just as academics and publishers of high principles and undoubted integrity are having to adapt and reconcile themselves to the recalibration of excellence in institutions of higher education and academic publishing, so also lawyers are finding themselves is a rather ambiguous and timorous new world of legal organization.

Macfarlane does not adequately explore the changes in the political economy of law. She does not inquire sufficiently into the changes in the "labour process" of law firms that are engaging in the transformation of the legal workplace that are arguably just as revolutionary as the changes in education and publishing or, for that matter, as the changes that occurred as artisans were dispossessed by industrial machinery two centuries ago and devastation clerical workers resulting from computerized offices in the past half-century.

Instead of taking issues such as automation and deskilling to their inevitable conclusions, it seems to be Macfarlane's inclination to seek "social" and even "ethical" reasons for the shift in the theory and practice of the law. So, in my view, it may not be merely the demographic (younger, more diverse and inclusive lawyers), or the ideology of market efficiency generated by corporate enterprise and its interest in low-cost, low-skill services that truly guide the path to the "new lawyer." It may be that these considerations are only the cultural expressions of deeper patterns of social evolution hidden in innovative technology and social relations that flow from it.

In education, publishing, law and soon enough in medicine where robotics and diagnostic algorithms are taking the place of doctors, there is a drift toward the discount department store model. Associate Professors and Associate Editors are being transformed into the functional equivalent of Walmart Associates, and law, which has always relied of its firms' "Associates" to do the grunt work for the partners in the LLP, there is now an oversupply of entry-level workers. Something serious is afoot.

5.

Meanwhile, until critical analysts explore fully the production and distribution of legal goods and services, "the new lawyers" will enjoy the opportunity to serve their purposes.

Macfarlane is clearly concerned with the norms, values and mores of these lawyers. She is a reformer singing with the better angels of her profession. And, she is plainly aware of the technical processes that "reinforce internal hierarchies [while labour-intensive] litigation moves along at a sluggish pace."

> Adversarial advocacy offers the seductive clarity of remaining inside a 'bubble' of positional argument and justification. Consensus building bursts this bubble since the other side takes on far greater strategic and practical significance in attempting to resolve conflict rather than in fighting." -

She also knows that the profession is plainly in for qualitative change and that such change is already underway; but, I am not sure that the kind of critique of antique methods and arcane language that she offers will achieve much in the interest of the "little people" who already cannot gain access to legal services. While her reformist impulses are intended to raise our standards out of the era of contesting legal champions and into a better age of equitable representation, the fate of people who must rely on such mechanisms as the US Public Defender system and Canada's Legal Aid programs are not obviously improved and it need barely be said that both systems exhibit serious though somewhat different inadequacies.

So, it is possible to grant that there are changes taking place in the legal mind-set and that there is a swing toward what many would regard as a more humane attitude toward legal education, legal socialization and legal collaboration. Furthermore, it is also possible to grant that a host of specific and quite fascinating ethical dilemmas face lawyers—whether new, old or at the peak of their professional energy—that arise out of the norms of collaborative advocacy. Yet, it is my view that many of these ethical dilemmas and conundrums can (or should be) fairly easily resolved without addressing the deeper social implications of the kind of change that most concerns Macfarlane. Therein lies my problem, the problem of structural social power.

Regarding, for example, "good-faith bargaining," I completely concur with Macfarlane's view that lawyers who are constantly calculating exactly how much deception, misdirection, misrepresentation, obfuscation and intimidation they can get away with while remaining barely but technically within the rules probably have an ethical problem. Moreover, lawyers for whom such considerations do not even exist most assuredly do. When, however, the "new lawyer" begins to question whether duty to the client should be modified by a moral duty to seek the "best" solution for all parties even if it is not optimal for their client, some serious reflection is plainly in order. Julie Macfarlane's years of research and deliberation over the profound changes in legal thinking can help, but the transition from "hired gun" to social worker/group therapist isn't apt to be easy. Some clients may not approve of paying their lawyer to be a peacemaker when they consider themselves to be at war with their opponent. Some hideously treated victim may wonder at the desirability of meeting an oppressor half-way.

6.

Scepticism aside, however, Macfarlane's approach has much to recommend it. Public sector administrators, negotiators and legal advisors have no shortage of problems to address in which the pure gladiator model is not only inappropriate but positively counterproductive. Trade negotiations, interprovincial negotiations, aboriginal negotiations, social planning initiatives, development proposals, health care program development, prison reform, and harm reduction programs are just areas in which the collaborative approach has a far greater chance of success than the adversarial model.

For the most part, for example, environmental activists don't really want to destroy the resource industries and fossil fuel industries don't really want to destroy the natural environment. Each, however, may believe that they have legitimate interests and regard their opponents with jaundiced eyes. Each may seek legal assistance in the fight to defeat their perceived foe or, at least, to protect their own interests. In just this kind of conflict, a government lawyer schooled in Macfarlane's methods can conceivably enlist the opposing sides in the quest for a satisfactory outcome for all.

Still, not all conflicts can be reduced to questions of communication, tone and attitude. And we should not lose sight of the reality of essential social cleavages and economic schisms that require material change and not just interminable polite and mutually respectful conversations, no matter how solicitous the communications consultants and care coaches may be. Sometimes your gain is my loss. Sometimes my gain is your loss. And, sometimes, when one of us loses, the other can never quite come back again. Where then is the case of the permanently defeated to be heard?

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