JURY SELECTION IN CRIMINAL TRIALS: SKILLS, SCIENCE AND THE LAW. By David M. Tanovich, David M. Pacciocco & Steven Skurka. Toronto: Irwin Law, 1997.

Books like *Jury Selection in Criminal Trials*, by David M. Tanovich, David M. Pacciocco, and Steven Skurka are a useful addition to the Irwin series of practical, general interest texts for practitioners. They are, however, somewhat difficult for an academic to review. Like most of the works and monographs in this series, *Jury Selection* does not attempt an academic task, such as a critical or analytical discussion of juries or their selection for example. This choice appears to leave only the question of scope and accuracy of coverage available for a reviewer's comments. On that score, however, this monograph succeeds admirably, which was to be expected given its authorship.

Jury Selection's three authors are individually and collectively highly skilled, thoughtful and innovative criminal lawyers, with a commitment to teaching and to good clear doctrinal writing. Two, David Tanovich and Steven Skurka, are practitioners first, teachers and authors second, while David Pacciocco is a full time law professor with a counsel relationship to a criminal defense firm and was at one time a full time crown attorney. Their approach to a question of great significance in any individual criminal prosecution — "who will decide this case?" is accordingly also careful, thoughtful and helpful. I expect that like Earl Levy's excellent book on cross-examination, *Jury Selection* is destined to become an essential part of any criminal lawyer or criminal court judge's library. Whether challenging the array (and thus the representative nature of the jury), or, with more chance of success, seeking to challenge individual jurors for cause, this book provides a clear, comprehensive review of the issues, jurisprudence, secondary and social science literature and tactical considerations that these issues pose. Counsel and judges alike will find it useful.

As the introduction notes, the jury landscape has changed profoundly in recent years and the comfortable assumption that a juror's oath would serve to remove bias in all but the most unusual of circumstances has been recognized for the myth that it is. Once it has been acknowledged that systemic biases and stereotypes are pervasive in any society and may be too entrenched in some persons to be easily set aside, the selection of a jury becomes a more complex task than Anglo-Canadian law has been hitherto prepared to accept. That American law has recognized this reality for years was until recently, almost irrelevant to Canadian trials. Courts were deeply resistant to embarking on the American way of jury *voir dire* or screening and persisted in the myth of inherent neutrality of jurors ensured by the juror's oath. That reluctance has not disappeared, but as *Jury Selection* demonstrates, there is today in Canada a broader scope for counsel to influence jury selection than was even conceivable 20 years ago.

The book is clearly and logically organized. It begins with an introduction and overview chapter which sets out the common law and constitutional dimensions of the right to a trial by jury along with the characteristics of the contemporary jury. These general points are followed by a brief but clear description of the actual steps involved in a jury selection, coupled with the popular wisdom of some experienced lawyers about the various tactical decisions involved, which will be of enormous benefit to junior lawyers and others new to the topic.

This is the structure throughout, as chapters on the jury panel ("the array"), judicial pre-screening and peremptory challenges (challenges to prospective jurors as of right)

frame the heart of the book - the challenge to prospective jurors "for cause". The cause that has recently been defined more expansively[1] is bias, expressed as partiality, a recognition that has changed jury selection fundamentally. A range of important questions about the challenge for cause are examined in considerable detail and with some care, from the evidence and legal arguments that must be marshaled before counsel will be permitted to challenge prospective jurors for cause, to the process itself. The range of circumstances, inherent in the characteristics of the accused or the witnesses, or, more rarely, in the offence itself, where challenges have been permitted are summarized. A very helpful pair of chapters dealing with the mechanics of the determination of the challenge itself, round out this section. Once again, the structure is to provide an introduction which references the historical rationale for the procedure along with the statutory provisions and case law which govern. The legal framework is then fleshed out with a discussion of tactical approaches along with other factors which will ultimately determine the positions counsel will take. In effect, the text serves both as senior counsel who has the time and inclination to discuss every aspect of an important decision with a junior and as a well informed colleague for reasonably experienced lawyers who have not had time to consider the issue in the depth demonstrated here. The fairly dry doctrinal sections segue smoothly into anecdotal and experiential comments from experienced counsel, primarily Ottawa based, about how they recommend dealing with particular questions.

However, to someone interested in a different look at the terrain of criminal trials, *Jury Selection* indirectly offers some insights into what is seen as important, or possible, to some members at least of the criminal bar — and thus what does not. Such insights may be instructive to appreciating how the criminal law progresses and how it achieves the increasingly weighty mandate imposed upon it. That is, the mandate of demonstrating that the law and law's agents are operating to protect citizens from crime both fairly and effectively. Indeed, in the "law and order" climate of Canada in the 1990's it may be enough to demonstrate efforts to ensure effectiveness, without much concern for fairness. In this context it is interesting to consider how the authors deal with issues of some current urgency — the representative (or not) nature of juries and the potential for bias against the accused in certain classes of cases, specifically sexual assault prosecutions. As with most of the questions addressed in the text, the issue of the representative (or not) nature of the jury is handled in a straightforward, essentially neutral fashion. The courts have so far rejected challenges to the array based on claims for a jury of cultural peers and the text discusses the question by relying on the language of the judgements themselves, thus staying "inside the box" as it were. The latter issue receives considerably more attention and a critique which draws widely on social science — thus looking "outside the box" of traditional legal analysis.

The promise of an impartial jury has been taken by some to embody the *Magna Carta* promise of a trial by a jury of ones "peers," which in turn, has been taken to include representatives of one's actual or cultural peers. The troubling vision of an all

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[1] In cases such as *R. v. Parks* (1993), 84 C.C.C. (3d) 353, 24 C.R. (4th) 81 (Ont. C.A.) which recognized the pervasive nature of systemic racism in Ontario, and *R. v. Williams*, [1998] 1 S.C.R. 1128, 3 C.N.L.R. 257 which acknowledged racism nationally in a case arising in British Columbia.

white jury deciding the fate of an African-Canadian or aboriginal accused illustrates the point. At some intuitive sense, there is a perception that such a jury cannot be fair. The law, however, has been deeply resistant to claims that either the array or the jury itself is defective because it contains no one of the racial or cultural background of the accused. The *Canadian Criminal Code* provisions concerning partiality in the array have been narrowly construed and to date, no *Charter* based challenge has succeeded either. With almost willful blindness to the reason that there is something inherently wrong with choices that virtually guarantee an all white jury to judge an aboriginal person, for example, the courts have ignored challenges to this complaint. The reasoning of the court is that to make the jury at all, is to seek a *partial*, not an *im*partial jury.

In setting out this argument, the authors quote U.S. jurist Irving Kaufman, head of the U.S. Federal Judiciary Committee on the Operation of the Jury System on the point:

> If the law is to reflect the moral sense of the community, the whole community - and not just a special part - must help to shape it. If the jury's verdict is to reflect the community's judgement - the whole community's judgement - jurors must be fairly selected from a cross-section of the whole community, not merely a segment of it.[2]

Noble sentiments reflecting America's struggle to free itself from the injustice of the condemning and racist white jury judging blacks - whether accused, victims, or witnesses. The problem, not identified by the authors, is that Stach J. of the Ontario General Division [3] is using these arguments *against* an aboriginal accused. The accused, a First Nations man from a community in northern Ontario, was being tried hundreds of miles from his home, by an inevitably all-white jury in the legal centre of the judicial district, the city of Kenora. Not only are there no reserve based, traditional First Nations people in Kenora or region, the city is singular for having a reputation for extreme anti-aboriginal bias. This all-white jury was an inevitable product of requiring all jury trials to be held in the south. In effect, a "special part" of the community - the urban, white, part, would be allowed to judge another - a rural, aboriginal man who spoke almost no English, as if their judgement constituted the universal. The reasoning which rejected a motion to hold the trial in the northern aboriginal community where the alleged crime occurred, ignored the discriminatory impact of the choice. Instead, the issue of representativeness was framed as if the accused was seeking special exemption from the "normal" (and implicitly neutral) jury selection process which theoretically drew prospective jurors from the entire district, but which inevitably excluded its northern, aboriginal, citizens. The authors are disappointingly silent on the bias inherent in this analysis which they describe as "considered" while citing the British Columbia position that counsel should educate the non - representative jury about the cultural and other characteristics of the accused, the victim and all the witnesses as a "cure" for the "feeling" of discrimination such an accused might well feel.[4] All of the insights into the

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[2] David M. Tanovich, David M. Pacciocco & Steven Skurka, *Jury Selection in Criminal Trials:Skills, Science and the Law* (Toronto: Irwin Law, 1997).

[3] In *R.. v. F. (A.)* (1994) 30 C.R. (4th) 333 at 364, 22 C.R.R (2d) 82 at 108.

[4] *Supra* note 2 at 63-64.

pervasive and indeed unrelenting nature of systemic racism identified in *R. v. Parks* and *R. v. Williams* are somehow lost from the equation.[5]

An understanding of racism must surely support the holding of trials in the community which generated the events in question and where a representative jury drawn from that community will *not* be fundamentally biased. If some forms of bias are so deeply entrenched as to be literally systemic, surely systemic remedies are called for. The courts have clearly acknowledged the depth of the problem. As Madame Justice McLachlin put it in *Williams*:

> Racial prejudice and its effects are as invasive and elusive as they are corrosive. We should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of jurors. Rather, we should acknowledge the destructive potential of subconscious racial prejudice by recognizing that the post-jury selection safeguards may not suffice. Where doubts are raised, the better policy is to err on the side of caution and permit prejudices to be examined.
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> Only then can we know with any certainty whether they exist and whether they can be set aside or not. It is better to risk allowing what are in fact unnecessary challenges, than to risk prohibiting challenges which are necessary: see *Aldridge* v. *United States*, 283 U.S. 308 (1931), at p. 314, and *Parks*, supra note 1."[6]

Given this understanding, it is curious that remedies which address it systemically, rather than individually through the cumbersome process of challenging individual jurors for cause, are rejected by the courts, and essentially unchallenged by these knowledgeable lawyers.

In contrast, the general reluctance of courts to permit a challenge for cause based on the nature of the offence[7] — in particular sexual assault- is vigorously critiqued. These challenges are based on the proposition that widely held deep aversion for a particular act will colour the attitudes of jurors when trying a particular accused, a position supported by this work. The inconsistencies in the jurisprudence which disallows this ground, a wide review of cases where such challenges were allowed, along with a discussion of the literature on jury bias are persuasively argued. Indeed, the affidavit of psychologist Neil Vidmar and a chart setting out the numbers of jurors found to be partial in sexual assault cases where some form of challenge for cause was permitted are included in an appendix.

Of course part of the disproportionate attention is a matter of convenience - using what one has. At least one of the authors has been deeply involved in efforts to challenge jurors for cause in sexual assault cases and thus had access to the charts and affidavits he had filed in support of the motion. Making such material available to a wider audience is important. Indeed, the inclusion of the appendix provides lawyers and others with not just a precedent, but an illustration of the type of analysis and the sort of supporting expert opinion that will be necessary in support of a novel or difficult

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5 *Supra* note 1.

6 *Williams, supra* note 1 at 1143.

7 The position is articulated in the Ontario Court of Appeal decision in *R. v. Betker* (1997) 115 C.C.C. (3d) 421, *supra* note 2 at 121- 133.

argument. However, similar material was filed in the *F.(A)* case[8] and considerable *opposing* expert opinion has been relied on by crowns who argue *against* offence based challenges for cause. Neither are included, or, more seriously, even referenced. That said, it is a markedly naive reader who will not understand that other arguments and expertise are available on both of these issues, and perhaps it is unnecessary that the authors say so explicitly.

Ultimately, books should be judged for what they are and claim to be, not for what they have no intention of being. *Jury Selection* is not a study of bias in the criminal justice system, nor is it in any sense self- aware about the construction, acceptance and dissemination of legal argument. Rather, it is a lucid and timely exposition of the changing and evolving process of jury selection, designed for the criminal bar and as such it is highly successful. That it also demonstrates a range of tactics and techniques for advancing difficult legal arguments makes it more than usually helpful.

Dianne L. Martin*

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8 *Supra* note 3.