Title: From presence to participation – the role of the juror reimagined.

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Abstract

This article raises new questions about the meaning of juror participation in a criminal trial. Through an interdisciplinary exploration I not only theorize the position and potentiality of the jury, but I also reflect on the process of working with a theatre director to create work which is both academic research and public theatre performance in equal measure. By looking through a dual lens of criminal justice process and interactive theatre arts I challenge the reader to reconsider the current assumptions that equate juror presence in the courtroom to their participation in the trial. By drawing on participatory techniques found in Augusto Boal's Forum Theatre and my current collaboration with site-specific theatre company, Grid Iron, I reimagine to role for the juror in the criminal trial.

Key words

Augusto Boal, Forum Theatre, jury trial, participation, site-specific theatre.

1 Introduction

It is frequently argued that juror participation is important because it brings legitimacy to the criminal trial. Early commentators such as Lord Devlin linked the use of the jury with a democratic criminal justice system[1] and contemporary opinions such as Lucia Zedner's[2] or Mike Redmayne's[3] confirm this ideal of legitimacy.[4] Indeed, as a way to support the ideal of juror participation, a cursory glance at recent research suggests that jurors have an equal chance to participate in the trial process with their chance to participate being regarded as a given.[5] This ideal however is not held by all and that is clear when we read, for example,

* Thanks to the anonymous reviewer for earlier comments, to Lindsay Farmer and Fiona Leverick for always believing in my ideas and to Poppy Kohner for being an ace reader.
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[1] Lord Patrick Devlin, (1956), *Trial by Jury*, Stevens and Sons, London, pp 151-158.

[2] L Zedner, (2004), *Criminal Justice*, Oxford and New York, Oxford University Press, p 16.

[3] M Redmayne, (2006), 'Theorising Jury Reform' in Duff, *et.al*. (2006), *The Trial on Trial, Volume 2, Judgement and Calling to Account*, Oxford and Portland Oregon, Hart Publishing (at p.101).

[4] see also M Saks and MW Marti (1997), 'A Meta-Analysis of the Effects of Jury Size,' 21, *Law and Human Behavior*, 451 and related to this last point, see P Roberts and A Zuckermann, (2004), *Criminal Evidence*, Oxford, Oxford University Press p 63 who argue that the jury represent community standards, values and morality all of which they could bring to bear when deciding cases.

[5] for example, C Thomas, and N Balmer, (2007), 'Diversity and fairness in the jury system,' Ministry

Penny Darbyshire who suggests that juror presence is nothing more than "a symbol of participatory democracy."[6] Given that the continued use of the jury is often justified on the basis that their participation brings legitimacy to the trial it may be worth reconsidering the extent of their participatory role in contemporary trials. Indeed, if the criminal trial *is* to secure legitimacy through participation – and juror participation in particular – now may be the time to reassess its structure and look forward to ideas that enable the embodiment of meaningful participation.

To that end I do a number of things in this article. First, I consider what participation has meant in historical trials. I highlight the transition from the altercation where, as Langbein says, "jurors had often joined the conversation, to ask questions or to make observations"[7] to the current trial which sees jurors in a passive role and not, as Sandra Marshall points out, "taking part."[8] I then question whether jurors *can* participate within the current trial structure and I do that by drawing attention to the potential for participation that is afforded to the other trial players, thereby demonstrating why I do not think the same scope is extended to the jurors. Having done that I highlight some of the key research projects and I explore what solutions for increased juror participation have been advanced to date. In that journey I look not just to the language or narrative of the trial but also to the physicality of the trial i.e the geography of the space and the place allotted for the jury within that. Thereafter I introduce Augusto Boal's Forum Theatre to bring to the dialogue an alternative view of what participation can be and its subsequent effect within the trial process. To make a good case for the integration (or at the very least, consideration) of Boal's work I guide the reader briefly through who he was, why I regard him as a vital voice for shifting our mind-sets to the possibilities of participation generally and how his work could alter our perspective on the scope for juror participation in contemporary trials. I then reflect on the possibilities for increased juror participation if we were to integrate Boal's Joker[9] as facilitator in the trial

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of Justice Research Series, 2/07; C Thomas, (2008), 'Exposing the myths of jury service' *Criminal Law Review*, Issue 6, pp.415-430; Thomas, C. (2010), 'Are juries fair', Ministry of Justice Research Series, 1/10, February; BM Dann, (1993), '"Learning Lessons" and "Speaking Rights": Creating educated and democratic juries,' *Indiana Law Journal*, Vol.68, Fall, pp.1229; BM Dann and G Logan III, (1996), 'Jury reform: the Arizona Experience,' *Judicature*, Vol. 79, No. 5, March-April, pp 280-286 (subsequently referred as the Arizona Project).

[6] P Darbyshire, (1991), 'The Lamp that Shows that Freedom Lives. Is it worth the candle?' *Criminal Law Review*, 749, p.745.

[7] JH Langbein, (2003), *The Origins of Adversary Criminal Trial*, OUP, London and New York, p 319.

[8] S Marshall, It Isn't Just About You', Victims of Crime, their Associated Duties, and Public Wrongs' in RA Duff, L Farmer, M Renzo and V Tadros, (2014), *Criminalization, The Political Morality of the Criminal Law*, OUP, London and New York, pp 291-306.

[9] The Joker in Boal's Forum Theatre is the facilitator or 'difficultator' – I discuss this in detail in sections five and six.

proper. To finish I talk about my current work with Grid Iron Theatre Company as I begin to draw a picture of how, if we carry out embodied research, we may develop a more nuanced understanding of the jury in the criminal trial.[10]

2 What is participation and why does it matter?

The Oxford English Dictionary defines participation as "the process or fact of sharing …; active involvement in a matter or event." I am keen to see whether this is a reality for the jury and so first I look to the lessons learned from Duff *et.al's Trial on Trial* because it is in their analysis of the trial that we can see participation examined from a variety of different angles. Thereafter I track the shape of juror participation from their part in historical trials as I consider how that part has changed over time.

Broadly, as Duff *et.al* explain in the *Trial on Trial*[11], the different forms of participation could be categorized as proactive, reactive, active and passive – all of which feature in daily life and equally all feature in the criminal trial to varying degrees, depending on who the participant at a particular point is. In general, proactive participation takes the form of, for example, the Olympic athlete choosing to take part for himself and / or his team in his particular sport. These athletes participate in their sports with the aim of winning both for themselves and for their teams and so it would be fair to say that they are actively involved with the aim of achieving a positive end. Reactive participation takes the form of taking part but only after instruction or permission from another, sometimes an authority figure, sometimes not. Reactive participation is different from passive participation and reactive participation is not always easy to identify. Duff *et.al.* make this point by using as their example those people who are a part of an electoral system where voting is compulsory but who choose to abstain from casting their vote. They are inactive or passive but nonetheless they are participants because their abstention still acts as a form of communication.[12] This clearly marks the difference between passive forms of participation, opposed to reactive forms of participation: in the inactive or passive situation I have just described we can see that choices are still being made whereas in the reactive there appears to be no room for choice. If we use those examples as foundations upon which to measure the scope for juror participation (and if we

[10] *Jury Play* is the name of a large-scale multidisciplinary project, led by me, which is being carried out in part with Grid Iron Theatre Company (www.gridiron.org.uk). *Jury Play* (the play) will premier in Edinburgh in 2017.

[11] A Duff, L Farmer, S Marshall and V Tadros, (2007), *The Trial on Trial, Volume Three: Towards a Normative Theory of the Criminal Trial,* Oxford and Portland, Oregon, Hart Publishing, p 217 (subsequently referred to as Duff *et.al*, (2007).

[12] Duff *et.al*. (2007), above n 11, p.202.

assume for the moment that juror participation is a form of communication) it is quickly apparent that there is little room for the their participation except to do so reactively. What emerges then is a strange dichotomy where we see, that on the one hand there is at best reactive participation and on the other hand there appears to be a heavy reliance on the fact that jurors do participate with this participation regarded as important, even key, in a criminal trial. [13] To try to clarify this point I look more closely at *why* participation is regarded as so important for the trial process and I begin by looking at the juror in history.

The passive and muted juror of today is relatively new and in stark contrast to their earlier counterparts. In history we see that the jurors were active, often chosen because of their relationship to the accused, a group of men whose task it was to ask questions, to seek out truths and all done in a way that saw them as a central part of the process both physically and orally. Indeed, as Farmer reminds us, jurors were summoned from the locality of the crime because it was on that local knowledge that they would base their decisions. This was inextricably linked to the fact that crime was viewed as a local issue and so summoning people as jurors was regarded in the community as being taken care of by the community.[14] This of course is seen in the much earlier work of Stephens who points out that,

> the jurymen were still mere recognitors, giving their verdict solely on their own knowledge of the facts, or from tradition, and not upon evidence produced before them […] ancient jurymen were not impanelled to examine into the credibility of the evidence; the question was not discussed before them; they the jurymen were the witnesses themselves, and the verdict was, in reality, the examination of these witnesses, who of their own knowledge gave their evidence concerning the facts in dispute to the best of their belief. [15]

The early jurors were overtly participative during the trial where they remained in court throughout and did not retire to a private space to discuss the verdict.[16] This is in stark contrast to the anonymity for contemporary jurors. By the fifteenth century we can see that

[13] Lord Devlin above n 1 championed juror participation as a demonstration of a democratic trial system cf. Darbyshire's claims that jurors are merely the façade or face of democracy rather than a practical reality above n 6, p 745.

[14] L Farmer, (2016), *Making the Modern Criminal Law, Criminalization and Civil Order*, OUP, Oxford and New York, p 124.

[15] JER Stephens, 'The Growth of Trial by Jury in England', *Harvard Law Review*, Vol.10, No.3, Oct 26, 1896, pp 150-160 at p 158.

[16] see for example P Pole, (2002), 'Representation and moral agency in the Anglo-American Jury' in J Cairns and G McLeod, *The Dearest birthright of the people of England: The jury in the history of the common law*, Hart Publishing, Oxford.

the jurors had become more physically contained and by the middle of the seventeenth century we understand that, in the Old Bailey, they were first positioned on either side of the accused and later grouped together to the right of him or her.[17] Space for the jury however was not consistently found and, as Graham says, often the courts were crowded and so their earlier distinct grouping, and allocation of space was not universally adopted.[18] What is clear is that by the end of the seventeenth century their role had changed and, as they were compelled to deliver verdicts after each trial[19], we begin to see specific areas of the court building allocated both for them to listen to the trial and then to deliberate their verdict.[20] Thus, there was a move away from their interaction and the gradual rise of the silent and passive juror which could be attributed to the increased lawyerization of the trial. Indeed, as the trend towards the adversarial process grew, so the legal professionals became more dominant, both in their command of the court space and their use of narratives throughout the trial.[21] With this change of dynamic we see *decreasing* opportunity for the jury to participate: as the lawyer-dominated trials became the norm the part for the jury was pared back to the point that their meaningful participation can surely be called to question. Thus, as faith in the part of the juror diminished, or, we could say, faith in the part of the lawyer increased, this is reflected in the trial process – both in the architectural boundaries of the court space as well as the boundaries afforded the participants therein.[22]

Currently what we have is a framework that gives jurors permission to participate only in so far as they are allowed to ask questions at specific points in the process with those points dictated or directed by a legal protocol that is seldom questioned. This surely cannot be regarded as proactive participation because the jurors adopt a static and passive stance until they are told that they can act otherwise. I suggest that the importance of participation lies in the ability to have agency in a process of understanding and so in a trial, if the verdict of the jury is to be indicative of knowledge, then I agree with Duff *et.al* who argue that *that* "knowledge is gained through a proper participatory process."[23] Therefore, an essential part

[17] P Gale, (2006), *Pride of place, the story of Abingdon's County Hall*, Trafford Publishing, Oxford.

[18] C Graham, (2004), 'The history of law court architecture in England and Wales; The institutionalization of the law', pp 36-47 in SAVE Britain's Heritage, *Silence in Court: the future of the UK's historic law courts*, London: SAVE Britain's Heritage.

[19] rather than after small batches of trials – see Graham above n 18

[20] L Mulcahy, (2011), *Legal Architecture, Justice, due process and the place of law*, Routledge, Oxon and New York, p 46.

[21] Mulcahy (2011), above n 20 and see also Langbein's commentary on the increased lawyerization in Langbein, above n 7, p.319.

[22] Mulcahy (2011), above n 20.

[23] Duff *et.al*. (2007), above n 11, p 199.

of understanding and enabling juror participation is first, to understand, at a more nuanced level what participation means in the trial and this is something that has been explored in detail by Duff *et.al*.[24] In their *Trial on Trial* (2007) they explore issues of participation as a way to develop a normative theory of the criminal trial "based on an account of its central communicative purpose as a process through which citizens are called to answer charges of wrongdoing."[25] When considering the question of what participation means in relation to the accused, the authors argue that at a basic level there should be "recognition that the defendant at trial is not to be treated as a mere object of investigation, but rather as a citizen who is called to answer a charge and, if he is criminally responsible, to account for his conduct."[26] To do that, they make a strong case for the defendant to be able to communicate all the time, regarding this communication as a form of participation in itself.

In that regard I agree that the defendant should be given every opportunity to participate by communicating in the way that he feels best conveys his story.[27] Indeed, the defendant has a right to participate, to be treated as a moral agent, as both an addressee and addressor of the norms of the trial with justification for his participation resting on these presumptions and so is very clear to see in this context. What may be less clear, given that their liberty and freedom are certainly not at stake, is my idea that the jury are afforded a similar autonomy to participate as the others in the trial. Thus, I shall make the point briefly now before developing by demonstrating theory in practise in section five.

As we look at Duff *et.al's* investigations we can see a strong narrative arguing for the defence of a model of a criminal trial which "rests on the claim that the trial ought to *seek knowledge* through communicative participation."[28] They highlight that the verdict of the court should be an expression, not only of truth, but also of knowledge gained throughout the process and that *that* knowledge would be based on a "proper participatory process."[29] This model is based in the normative concerns that arose in their investigation of the criminal trial in England and Wales "and in an investigation of the appropriate processes and claims that are central to the general practices whereby people hold each other responsible for their conduct."[30] We can see a similar call in the work of Albert W. Dzur who suggests that juries

[24] Duff *et.al.* (2007), above n. 1, p 201.

[25] Duff *et.al.* (2007), above n 11, p 13.

[26] Duff *et.al.* (2007), above n 11, p 203.

[27] the male pronoun should be read as he or she or they equally

[28] Duff *et.al*. (2007), above n 11, p 199 [emphasis original].

[29] Duff *et.al*. (2007), above n 11, p 199.

[30] Duff *et.al*. (2007), above n 11, p 199.

give representation, and voice, to community members who are better able than judges to grasp the individuating factors, and community sense, of each case.[31] And a similar call is seen in the work of Marshall when she calls for the court to enable jurors "to perform the task and not be obstructed."[32]

I argue for a similar process as I extend the call to a trial that seeks knowledge and delivers a verdict, to the jury. This is so because, without their clear engagement with the trial, their verdict will continue to be called to account on the basis that their knowledge may be below what is expected by legal professionals, lay bystanders or researchers searching for the ideal process of justice. In section five I suggest a system that sees the jurors as active participants within the physical and metaphorical space. I argue for jurors who are engaged actively as the trial progresses and I base my ideas on those made by Augusto Boal. Boal's Joker wants problems or points of view to be investigated *through* the Forum performance rather than those points being *assumed* to be actual or real and therefore demonstrated as truth(s) *in* the performance. I see that this concept could work with jurors in a criminal trial.

Before demonstrating my vision in action I now reflect a little on the point made that knowledge (or the verdict) should be based on a "proper participatory process" and see first whether jurors can proactively participate in the current trial framework and second, if they cannot then what solutions can we current find to enhance their participation.

3 Can jurors participate in the current trial framework?

To begin I look briefly at the interior design of criminal courtrooms as I try to understand what aspects may be regarded, by jurors, as barriers to their participation.

Clare Graham tells us that the earliest images of the English courtrooms show that there were four types of participant in the trial: the judiciary; the court officials; the litigants and the spectators, however, the *Whaddon Illuminations*[33] suggest that there were a number of different zones with those zones being designated by court staff.[34] Linda Mulcahy highlights that, in the course of history, we have seen consistent segmentation and segregation of courtroom interior design with the resultant design reflecting the most dominant voices of the

[31] see AW Dzur, (2012), *Punishment, Participatory Democracy and the Jury*, Oxford: Oxford University Press.

[32] Marshall (2014), above n 8 at p 301.

[33] also referred to as the *Whaddon Manuscripts*.

[34] Graham (2004), above n 18.

trial.[35] So, as I said above, with the increased lawyerization of the trial came the increased space for the lawyer and simultaneously the confinement of the jury. Whilst this may not even feature in the work-life of the lawyers who are familiar with their surroundings it undoubtedly may cause problems for jurors who first, are not familiar with the court set up and second, may find it very difficult to participate meaningfully from the confines of the jury bench.[36] What is clear to see in regard to the jury is that we have gone from their being able to take a place almost anywhere in the court to being confined to a small seating area from which they cannot move until directed by the court. In that regard it becomes apparent that their ability to participate proactively is hampered both physically and metaphorically. Indeed, even if they are not troubled by having to conform to the court's rules and regulations, they may unwittingly *feel* prevented from meaningful participation on account of the subliminal messages contained within the court design. In the sections to follow I put forward some ideas that may support jurors to transcend the barriers to participation however to finish this section I turn my attention to the trial narrative and to how – if at all – the jurors can interact in that process

The adversarial trial format sees the rules of evidence and procedure dictating the order and style in which people may present themselves throughout the process. The rules of procedure currently dictate that the prosecution makes its case and the defence then follows with its account. As part of the trial, the judge may interject as can the jury, however, it is fair to say that the scope for the jury is very limited. Witness participation is pared down to answering carefully constructed lines of questioning, delivered in closed-question format, thus often forcing little more than single word answers. There is no room for spontaneous dialogue, no scope for auditory clarification and very little space for communication out-with of the procedural norms.

In this format it is possible to see, that whilst it is in progress, the legal professionals are clearly participants in the trial. They participate actively and through their participation they have the capacity to control the participation of the others through their choice of narrative. Their intentions for taking part may be different at a nuanced level but, *prima facie*, the point of their participation is to win the case. The Judge is also an active participant in the trial

[35] Mulcahy (2011), above n 20, p 39

[36] see Mulcahy's discussion on the continued use of the dock in UK courtrooms L Mulcahy, 'Putting the defendant in their Place. Why do we still use the dock in criminal proceedings?', *Brit. J. Criminol*., (2013), 53, 1139-1156 at p 1140. see also 'In the Dock. Reassessing the use of the Dock in Criminal Trials', a report by JUSTICE, 2015

with his role in an adversarial system often defined as the non-partisan over-seer or umpire.[37] It is also fair to say that the accused may choose to be a proactive participant however the reality is that more often than not they are encouraged to transfer their part to the legal professional working on their behalf. Members of the public and members of the press participate proactively in asserting their choice to attend the trial however, the reality of their participation can only be passive. Generally, then, it is my opinion that those who actively participate in the trial are the legal professionals acting on behalf of their clients, the Judge and the witnesses. Thus, in direct reference to the jury, it is my opinion that their participation in the trial can be pared down to presence alone thereby calling to question the foundational roots of democracy and fairness that their use is built upon. To understand this last point more clearly I shall now look more closely at the scope for juror participation in the trial.

The first thing to say is that contemporary juries are, ostensibly, reactive participants and this is clear from the start when a prospective juror must *react* to their citation. They must appear at the courthouse and they must adhere to the rules of that process. Except in certain circumstances, they must wait to be called and if empanelled they must then play their part, passively, according to the rules over which they have little or no control. I suggest then, that the extent to which a juror can participate meaningfully is seriously limited and I would go on to assert that their presence cannot be regarded as passive participation. With passive participation there is often free will or autonomy but with the current citation process I do not see that there is a space for that. Thus, in order to develop their role to one that allows for autonomous participation, I suggest that we consider ways in which the jury might be included as an active part in the trial process. Only then may we begin to see the transition from juror presence to juror participation and only then may we see the ideal of participation realised in a practical sense. Indeed, I should highlight that when jurors do react to the trial in the form of independent (and extra-legal) searches – this self-driven participation is absolutely forbidden by the court and the penalties can be as severe as imprisonment.[38] My point here is not to engage in the dialogue which is focused on the impact of extra-legal information on jurors but rather it is to stress the importance of creating a trial process which makes space for jurors to be active and engaged thereby avoiding instances where verdicts

[37] cf. with the judge in Diplock trials who was more of a fact finder than a non-partisan umpire, J Jackson and S Doran, (1995), *Judge Without Jury: Diplock Trials and the Adversary System*, Oxford, Clarendon.

[38] 'Juror jailed over online research' - https://www.theguardian.com/law/2012/jan/23/juror-contempt-court-online-research [live at 15.8.2016].

may be based on extra-legal information.[39] If we do not begin to create an alternative trial discourse then we may be in danger of presuming what the jury do and think rather than understanding first hand how they process the trial. This is something that Robbie Manhas highlights when he says that it is not so much curiosity about the accused that prompts the extra-legal search but rather confusion about the trial; either the language or the instructions, or both.[40]

To clarify the position for the juror and perhaps to unpack a little more my assertion that juror participation is a myth, it is worth returning to Duff *et.al* to see what more we can learn from their exploration of the issues of participation when they focus specifically on the accused. As they examine what this actually means for the accused they draw our attention to when the ideal of participation for an accused is undermined in the current trial framework. For example, they highlight that the accused may be prevented from participating when he does not understand what is going on; when his counsel "exclude his voice…[or]…the language and atmosphere of the trial might be alienating or intimidating in ways that effectively undermine the defendant's participation."[41] When we look then to the position that the jurors are in, in terms of their ability to participate, we can see that it is very similar to that of the accused. Their voices are excluded, they are unable to be proactive and they are, as I have already suggested, virtually devoid of autonomy. Whilst I do not make comparisons between the role of the accused and the role of the juror I do make the point that the accused can always resort to self-representation and reclaim his voice – a device which is simply not available for the jury with the result that we never really know how their interpretation the proceedings feeds into the formulation of their verdict. To understand these points in a little more detail, I shall now look at what ideas for juror participation have thus far been suggested and whether those ideas have led to actual juror participation or whether they are more rooted in theories or ideals about different forms of participation.

[39] See for example, JG Browning, 'When All That twitters is not Told: The Dangers of the Online Juror', 73 *Tex. B.J.*, 216, 217-18, 2010, where he discusses one case where a juror sent a Facebook 'friend' request to two of the plaintiff's and then learned of their 'party animal' ways online. See also Thomas (2010), above n 5 where indications suggested that 12% of jurors in high profile cases carried out internet searches (compared to 5% in regular cases) and 26% of jurors in high profile cases saw media reports of the trial on the internet (compared to 13% in regular cases); D Bell, 'Juror Misconduct and the Internet', 38, *Am. J. Crim. L*, 81, 83, 2010

[40] Manhas, R. 'Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms', Michigan Law Review, Vol. 112, Issue 6, 2014

[41] Duff *et.al.* (2007), above n 11, p 153.

4 What solutions for enhanced participation have been advanced to date?

The research that is focused on developing juror understanding, through increased juror participation, is vast. With dedicated studies beginning in the 1960s[42] in the US, the 1970s in the UK[43] and on-going with the most recent large-scale project carried out in the UK in 2012-13 we can see the function and role of the juror explored from various angles.[44] There have been many projects designed to enhance juror participation in the trial proper with several of those resting on the notion that the jurors do actually have a reasonable chance to participate and so the onus in those studies is not so much on making juror participation a reality but rather on developing juror participation with the assumption that it does actually exist currently. This is clear to see in, for example, the Arizona project[45] where the researchers were at pains to promote the idea of enhanced juror participation but when we look closely we find that that amounts to little more than supplying the research participants with flow charts, glossaries of terms and the chance to take notes. It does not offer any scope for practical participation predominantly because there was a tacit presumption of participation.

We can see a similar tacit presumption that the jurors do participate in Cheryl Thomas' project which assessed juror understanding of judicial instructions as a way of gauging whether or not juror decision-making was fair.[46] This was an insightful project in which she developed solutions in a variety of areas with the result that we are better able to gauge how the jury copes with its task, as well as revealing, in the research, what the jury understands its task to be. Her project however assumed a standard of juror participation that does not currently exist thus contributing to the presumption of their participation. Interestingly however, the jurors in her studies felt that they *did not* have difficulty understanding the judicial instructions – something that was found in the earlier study conducted by Zander and Henderson;[47] however when she looked more closely, she found that jurors are often more optimistic about their own understanding of the judicial instructions than is reflected in their

[42] H Kalven and H Zeisel, (1966), *The American Jury*, Little, Brown and Company: Boston, Toronto.
[43] J Baldwin and M McConville, (1979), *Jury Trials,* Clarendon Press, Oxford.

[44] Jury research carried out in Crown Courts and which built on the 2010 project carried out by Cheryl Thomas https://www.ucl.ac.uk/news/news-articles/0513/150513-jury-profect-internet-use-cheryl-thomas, above n 5.

[45] The Arizona Project, above n 5.

[46] At the time she undertook the study the number of cases heard by juries was less that 1% in England and Wales.

[47] M Zander and P Henderson, (1993), *Crown Court Study*. Royal Commission on Criminal Justice Research Study No19, London, HMSO [The Runciman Commission].

actual understanding.[48] In the follow up project carried out by UCL in 2012-13 (and which was based on Thomas' 2010 research), indications were that, of those who did not receive written instructions, 85% said they would have liked much more information to inform their deliberation process. This clearly raises concerns about the actual trial structure and process rather than juror competence *per se* and is something that I suggest needs attention now (both in the research and in practise) if we are ever to gain clarity on the extent to which jurors cope with their duty. What Thomas' research suggests is that uncertainty about juror understanding remains and despite some very carefully considered studies, there persist questions over how well they cope in the criminal trial. Such concerns, I suggest, could be clarified with a radical research methodology designed to *talk with* and so *hear first hand* from potential jurors.[49] Finally, Thomas' study showed, like the studies before, that one of the most commonly used solutions to perceived juror incompetence is to provide supports such as written instructions and aides memoire all of which add up to creating a picture of increasing provision for juror participation but which I regard to be little more than creating the illusion of increased participation.

So, as we begin to reflect on the solutions to perceived juror difficulty, we see solutions that are, ostensibly, rooted in the idea that if we give the jury something this will solve their problems. We see them being given glossaries of terms[50], computer animations[51], re-worded judicial instructions[52], re-timed judicial instructions, copies of written judicial instructions and the option to ask questions of the judge[53] as ways to respond to the problems that have been identified with these being regarded as beneficial for the jurors. The trouble with this approach is that it reduces the jury to a kind of inanimate object which can only really function if it is given things to help it; by continuing to view the jury as a body which is only capable of reacting or understanding when given things, we are in danger of losing sight of

[48] Thomas (2010), above n 5, p vi.

[49] See also the New Zealand report which can teach us about juror understanding of legal terminology – W Young, N Cameron and Y Tinsley, (2001), *Juries in Criminal Trials*, Law Commission of New Zealand Preliminary Paper 37, Vol 2, Wellington, New Zealand (subsequently referred to as the New Zealand Report 2001).

[50] Roskill Studies (1986), 'Fraud Trials Committee: Improving the Presentation of Information to Juries in Fraud Trials,' A Report of Four Research Studies by the MRC Applied Psychology Unit, Cambridge, London: Her Majesty's Stationery Office.

[51] MA Dunn, P Salovey and N Feigenson, (2006), "The Jury Persuaded (and Not): Computer Animation in the Courtroom," *Law and Policy*, Vol.28, No.2; S Kassin and MA Dunn, (1997), "Computer-Animated Displays and the Jury: Facilitative and Prejudicial Effects," *Law and Human Behaviour*, 21: 269-81; KA Kemper, (2003), 'Admissibility of Computer-Generated Animation,' *American Law Reports*, 111: 529.

[52] New Zealand report above n 49.

[53] The Arizona project above n 5.

the potentiality of the proactive jury and so we are in danger of misusing them to the point that their part is reserved for history.

Whilst I acknowledge the lessons and insights from the vast research available I believe that there is more that could be done to see juror's *actually* participating in criminal trials. I propose therefore to introduce the work of Augusto Boal in the first instance to challenge presumptions of what it means to participate. Thereafter I introduce my own practical research which sees me in collaboration with Grid Iron Theatre Company as we develop, by 'playing' in the 'space' of the 'court', *Jury Play*, which is a piece of research and a public site-specific theatre production in equal measure which is designer to challenge pre-framed ideas of the role of the juror in the trial which simultaneously pushing the boundaries of research in the field.

So, through introducing my current research I hope to demonstrate the importance of meaningful participation when we are able to see the benefit that the jury gains from being actively included in the process. Moreover, I highlight how active involvement can bring with it tangible value for integrating participatory techniques to the criminal trial process. In the section to follow I explore how the role of the juror could be transformed with the inclusion of Boal's Forum Theatre techniques and particularly the support of his Joker.

5 Who was Augusto Boal and what is Forum Theatre?

Augusto Boal (1931-2009) was born in Rio de Janeiro, Brazil, grew up under the dictatorship of Getúlo Vargas[54] and was the creator and director of Theatre of the Oppressed which is the broad term encompassing his various different forms of interactive theatre communications which includes Forum Theatre, Legislative Theatre, Aesthetics of the Oppressed, Rainbow of Desire and Paper Theatre. Forum Theatre is an interactive style of theatre where there are both actors (those taking the roles in the playing arena) and spectators (those watching the piece from the surrounding area). The subject of the piece is usually centred on people who are living in some sort of oppressive situation and the cast are usually made up, partly or wholly, of people from those communities.[55] In a Forum Theatre piece, the Protagonist starts off in a positive position in his life. As the piece unfolds he meets a series of obstacles. At each of the obstacles he makes damaging decisions with the result that by the end of the piece

[54] For an in-depth look at the political climate of the time see L Bethell, (1994), *On Democracy in Brazil Past and Present*, London, Institute of Latin American Studies generally and more specifically at pp 7-11 for particular reference to the Vargas government.

[55] Sometimes casts comprise 100% those with lived experience and sometimes only a proportion have.

he is in a very negative position. Then the Joker steps in and addresses the spectators. He tells them that the piece is going to be re-run and he tells them of their options in the re-run. He makes clear to the spectators that they have the chance to shout STOP when they have an idea for a more positive outcome for the Protagonist. When a spectator shouts STOP, the Joker steps in to facilitate the spectator's transition from spectator, to spect-actor.[56] The spect-actor then improvises with the other actors with his idea to deal with the obstacle more positively. Key in this transition is the Joker whose role is to enable the dialogue between the participants as well as to keep the issues on point. The Joker is the person who, on the one hand, performs the commentary for the production spontaneously and, on the other, and probably more vitally for our purposes, stitches the scenes together, facilitates interventions, and offers supplementary information where / if needed for the spect-actors.[57] Thus, because the Joker both instigates and facilitates dialogue we see Boal acknowledging "the inseparability of reflection and action, theory and practice."[58] It is therefore important to note that in theoretical terms the "spect-actor" is encouraged to engage in the action and to analyse that action. Therefore as he steps back and sees the whole picture what we can see begin to emerge is a very interesting dynamic whereby the "spect-actor" is being fully encouraged to *commit* to his part as the actor, whilst simultaneously he is mindful of his spectator status. Ideally, the participant would give equal weight and commitment to both of his roles, however, in practical terms (very important for our purposes) full engagement occurs when the spectator is actively engaged in the action of the Forum.

Boal was passionate about creating democracy and the way that he saw to do that was by empowering the oppressed. To this end, he viewed the theatre as a language that every single person, both actors and non-actors, has the right to use and, just as "actors talk, move, dress to suit the setting, express ideas, reveal passions […] so too do everyday people in their everyday lives. The only difference is that actors are conscious that they are using the language of theatre, and are thus better able to turn it to their advantage."[59] Therefore, Boal believed that the key to enabling non-actors to use language to their advantage was in

[56] Spect-actors reflect the transition from passive spectator to active player. This also addresses issues of status in the gap between audience member and actor. For a contrasting view of the role of the spectator which sees him as incapable of engaging in the piece see J Ranciere, (2008) *The Emancipated Spectator*, (trans. Gregory Elliott), Verso Books, London

[57] The spontaneity in Forum is what distinguishes it from other theatre forms. Moreover the un-rehearsed element both adds to the dynamic and is one of the few styles of performance art that both directly impacts *on* the spectator and is directly influenced *by* the spectator.

[58] M Schutzman, (2006), 'Joker runs wild', chapter in Cohen-Cruz and M Schutzman, (eds.) (1996), *A Boal Companion, Dialogues on theatre and cultural politics*, New York and London, Routledge.

[59] A Boal, (1992), *Games for Actors and Non-Actors*, translated by Adrian Jackson, London and New York, Routledge, p.15. [subsequently referred to as (*Games*)

teaching them. This is the practical root of the Theatre of the Oppressed and are the tools that I suggest for use with jurors in criminal trials. Boal said that there are no passive spectators in Forum Theatre, arguing that people are active in the fact that they have come to take part and that participation is up to them.[60] I make the claim that the same could be true for jurors in a criminal trial and so the next question to consider then, is whether or not Boal's Forum Theatre can transform the role of the juror as we currently recognise it – I explore that idea now.

6 How might Boal transform jury trials?

"I want the spectator to act not watch. It is obscene for a human being who is fully capable of *doing* to merely watch. The first principle in my Theatre of the Oppressed is liberation of the spectator."[61] Using this same principle, it should be clear by now that I think that it is strange that jurors on the whole watch the criminal trial and so now put forward some ideas to tip the balance to a situation which sees them actively participating in the process.

I have already said that Boal's Joker asks that a problem be investigated *through* performance rather than as a truth to be demonstrated *in* performance and the integration of his Joker as facilitator enables that investigation. I suggest that we integrate the Joker in this way to develop scope for juror participation and I argue that the beauty of the Joker in this context is two-fold. First he enables avenues for interaction, both physical and oral for all of the trial participants. Second, not only can those trial participants test their own understanding of the proceedings or clarify their interpretation of the evidence and legal terminology as and when they need to, but at the same time it becomes clearer to identify when understanding strays from the legally expected and accepted norms because we are actually *hearing* the juror's thought or interpretation processes first hand. Whilst part of the role of the juror should perhaps be to challenge these norms and their application, there still remains the issue of when their attention in the trial, or their understanding of it, becomes so detached as to render serious concern over the formulation of their verdict. I should however point out that I do not see that there is one right way or one right decision that the jury should be expected to achieve. I do believe however that the process through which they formulate their verdict should come from a positive point where they are able to participate rather than a negative or neutral point whereby either they are not, or they perceive the situation to be that they cannot.

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[60] Boal (*Games*) above n 59, p 238.

[61] J Selman, (1978), 'Augusto Boal's Theatre of the Oppressed,' *Canadian Theater Review*, Vol.19, summer, 113 [emphasis original].

I have made a case for why I think that meaningful participation is important, and so I now consider how we could achieve that by exploring what it could look like and sound like in an ideological world.

I suggest the first thing to do is to try to change our mind-sets to consider what shape(s) participation should or could take in the trial process. In that shift, my position is that we could learn much more about the jury if we consider, as valuable, practical and realistic solutions, some more proactive forms of participation, perhaps even being so bold as to suggest placing the onus for understanding on the jury and by that I mean to encourage them first to realize their own potential and second to empower them to speak out when they do not understand the process or proceedings. Ultimately jurors are human beings and generally, human beings have the capacity to understand in their everyday lives. When they do not, one course of action is to seek clarity. The same scope should therefore be enabled in a criminal trial with the first step being to integrate them and regard them as active participants in that process.

What then do I propose to tip the balance in favour of juror participation? Put very simply, my idea of participation, based on Boal's theories is that, where a person wishes to be actively involved in the process he should have the chance to so do. So, when a juror has a question to ask of a legal player, a question which they regard as pertinent for their understanding of the testimony or the judicial instructions, there should be a forum in which they can do that. So, to be clear, I imagine that the forum for their inclusion would, in time, be a normal part of the trial process and not something that is tagged on as just another attempt to 'help' them or 'aid their memory.' Moreover, within this forum there would be space for a Joker to instigate clarification with the jury.[62]

In order to facilitate juror question asking, it is necessary to provide clear guidelines and parameters that are regarded as acceptable and logical for the trial to progress and the person to voice these guidelines would, in my re-imagined trial, be the Joker. I suggest that this happens in open court and so questions in relation to the capacity of the jury to understand may either be set aside permanently or, if it transpires that the jury are not equipped for the trial then the process can begin to alter to accommodate. With clear guidelines for communication as a norm, the worry that the jury would be permitted to ask ad hoc questions whenever and to whoever they wished, would hopefully be set aside. Therefore in the first

[62] I acknowledge that this may be considered as far from positive in that there could be concerns raised over the substance of juror questions. I accept this is a line for further dialogue and consider therefore that this is an area that could be expanded in future.

instance the Joker would be on hand to state clearly the rules of the court and to whom questions should be directed, making clear that the substance of the questions should be about aiding the jurors' understanding of the trial rather than questioning the course of the trial or targeting specific individuals in it for negative gain. In this respect I acknowledge the argument that my ideas for participation should not be regarded as anymore real for the juror than those suggestions we have had previously. I would say however that my ideas do create a more participatory forum because they do allow for the jury to act and react when they feel that they need to. Crucially, and in direct contrast to the current position, they should be able to participate at the point that their question arises for them. Critical in this is that the participation should be viewed as normal, and in time, as a norm of the criminal trial process. Ultimately, a criminal trial involves real people, be they the accused, the jury, the witnesses or the legal practitioners. In that respect therefore, there is a very strong argument for carrying out the trial in as real a way as is possible and the starting point for that is a tangible method for communication, which very basically is a normal everyday communication.

What I propose therefore is to establish a forum where at the core there is mutual respect for all parties involved in a trial. I suggest that we aim for a process which has at its core clear and open channels for communication with the combined aim of making the trial as easily accessible - both in respect of the language used and the scope for participation - for both the jurors and the legal professionals. So far I have suggested that the jury is permitted to ask questions when they arise; however I accept that there may be times when those questions are regarded as being irrelevant or interpreted as having been designed to undermine, disrupt or distort the process. This is where the Joker would come into his own, as it would be his responsibility to step in and to maneouver the question asking and subsequent dialogue back on track. There may be obvious questions arising from this suggestion, for example, some may ask who the Joker would be. Would he be a legal professional? Would he be an expert in the laws surrounding the case being tried and so able to spot rogue questions? How would this work? Would that mean there were several Jokers on hand, each an expert in a specific crime: the culpable homicide Joker; the rape Joker, the fraud Joker? Or, would he be a member of the court administration who would have as part of his job the remit of jokering jury trials, in which case is he a Joker with no specialist knowledge but rather an all-rounder, able to turn his hand to individual trials? To answer these questions we need to understand the heart of the Boal Joker.

Jokers for Forum Theatre productions are specifically trained as facilitators, they are prepared to be fully aware of all possible lines of questioning and through their experience they are able to spot rogue or unrelated lines of questioning or dialogue, in the situations in which they

are jokering. To be clear, a Joker jokering a Forum Theatre piece about homelessness does not need to have first-hand experience of homelessness to joker the piece effectively and with empathy. What he does need to have is the ability to remain completely impartial. To listen intently, to be aware of all of the participants in the space and to act and react to situations as they arise in order that the piece reaches its conclusion in the Forum with each person involved having been heard and understood and, most importantly for our purposes, that he has enabled all of those who wish to, to participate. In other words, the key for the Joker is to make absolutely sure that what a person wants to convey is conveyed and where there is dubiety or confusion to enable enough dialogue to reach mutual clarity.

As I have already highlighted, in their idea of participation, Duff *et.al* suggest that a trial which "encourages active decision makers who ask questions of the accused and respond to evidence during the trial"[63] is a positive step to a more participatory process. I agree with what they suggest, especially when we understand that their context is focused on positive communication, by legal professionals, and that they highlight the obvious concerns which could arise if negative communication were permitted.[64] In terms of the actual participatory element I should also say that, in principle at least, I see no harm in allowing those who wish to participate passively to so do, however I should be clear that there is a marked difference between creating a forum in which they can choose to be passive and one where they have no alternative but to be so.

So, how does my ideal image of the trial participation manifest practically? The short answer is to say that it would work in a similar way to a Forum Theatre piece, with two obvious differences: one being that I do not intend the end verdict to be altered and the other that I do not intend for the trial to be re-run as in a Forum piece, but rather I am using the intervention points in the live trial to clarify understanding as and when challenges arise. I am suggesting the jury's inclusion to enhance understanding en route to verdict deliberation. I see a situation wherein, if a juror is unable to understand as I have thus far described then he will simply stop the trial by raising his hand. From that point the Joker would facilitate the discussion between the juror and the legal professional whom he is having difficulty understanding. The trial would essentially be in a suspended state until such time as clarity is achieved and then the process takes off from where it was halted. In a Forum piece the spectator would shout STOP from the auditorium and at that point the Joker steps in to

[63] Duff *et.al.* (2007), above n 11, p 201.

[64] Referring specifically to the points that they raise at pp 201-202 (2007), above n 11 in relation to mutual respect between the parties being expected.

facilitate the dialogue between spectator and actor, or to allow for the spectator to become the spect-actor by physically going to the playing area and taking the part of the actor and moving the story to its anti-model. As in a Forum piece, I suggest that there is a trained Joker in the courtroom ready to facilitate as and when he is needed. Boal considers each person in a theatre attending a Forum piece as a participant, indeed, he makes the point that just because the spectator does not interact in the forum does not mean to suggest that he is not participating meaningfully for himself. The act of attending the theatre is an indication of his proactive participation in itself. The same cannot be said of a juror who, whilst they are in the courtroom may look like they have a similar role as the theatre audience but with the crucial distinction that they did not choose to become a part of process thus, as I have previously suggested, calling to question, the notion that they are participating at all. I suggest that it is useful to draw these distinctions because it allows us to reflect a little more on what we mean by participation generally and, when thinking about juror participation we may be inclined to consider more deeply what that means both in the context of the trial and in the language of the research.

Ultimately therefore, the integration of Boal's Joker could be a key to breaking new ground both in the way that we carry out future research as well as a device for use by juries in live trials. For example, not only could integrating a Joker be the key to understanding better how the criminal trial works more generally, it could also enable the jury to understand the trial in a more organic and critically reflective way. Finally, the Joker could turn out to be the link to understanding, with a little more clarity, what works, and what does not in respect of advancing research in this area. Therefore, in an ideal situation, his or her part, and so the subsequent participation between the other trial players, may aid in the creation of a fresh new perspective in this part of the justice system which has been the subject of debate for several decades.

I am often asked who precisely the Joker would be in the trial process and my primary answer is that, at this stage, I am not absolutely sure. However to try to give a little more clarity in this enquiry, I reflect on my current collaboration with Grid Iron theatre company because it is in this project that I can understand a little more about how, in practice, the Joker could work for every person in the trial proper. In the paragraph to follow I introduce my current collaboration with them. The discussion is brief predominantly because the work is currently in pre-production and so my reflections on the entire process will be reflected post production in spring 2017.

The model that I imagine is one that takes account of all of the trial participants and allows for autonomous participation, facilitated by the Joker or a joker-type figure within the trial proper. At the time of writing this article I am developing the ideas discussed throughout this article with Grid Iron Theatre Company's Artistic Director, Ben Harrison. Grid Iron are one of the few dedicated site specific theatre companies in the world and my collaboration with them has been on-going for around two years. The work will culminate in performances of *Jury Play*, a large-scale site-specific theatre production based on the research that I have carried out both with Harrison and independently for several years. This means that in *Jury Play* we will have the opportunity to *see and hear* embodied jury research. The end result of the collaboration sees the production of *Jury Play* however the research and development for that has seen me carrying out my research not in a linear book/computer driven process but rather in a rehearsal space, working with actors, and making in-depth real-time inquiries into what it is really like to be a juror in a criminal trial. So, we take into consideration the view of the jury, not just from the juror's perspective but also from the inner (or more accurately, real) thoughts of the legal professionals. Moreover, by working within theatre conventions commonly used to develop theatre productions I am able to push the boundaries of jury research as I actually 'experience' the effect of the trial in a variety of ways. Thus, by working in an embodied process the aesthetics of the trial are central and so the impact of, for example, the interior design, the zone markers, the architecture, feature as central points of reference for me in my journey to understand the idea that there is juror participation in a criminal trial.[65] This work therefore marks a departure from the more traditional forms of research process and possibly creates a new forum within which we can begin to understand a jury at a more nuanced and embodied level. Moreover, this process certainly demonstrates that by working on a multidisciplinary level, we can quite literally see the transformation from mute and passive jurors to active and engaged participants in the trial process.

Therefore, in respect of the jury, they shall be transformed from passive on-lookers to active participants able to communicate with legal professionals at regular points within the trial. My vision demonstrated through Jury Play and illustrated in this article is to move away from the structure of the passive, mute and static juror to something much more fluid. I propose shifting the onus of speech from the professional actors to create parity across the board as I argue that each person who has a right to be involved in the process of the trial should have a right to participate – both legal professional and non-professional equally. Whilst I do not

[65] *Jury Play* develops beyond my work with Grid Iron and the next stage sees me working with designers, architect and industrial artist to build and interactive courtroom where anyone who wants to can have the chance to experience a courtroom and trial process that reflects peoples lived experiences.

argue for a return to the historical jury nor for a move towards a more inquisitorial system to replace the current adversarial model, I do contend that the current framework needs to be re-thought dramatically to accommodate a more active and participatory jury. [66]

Finally, I return to such work as Linda Mulcahy's *Legal Architecture* in which she attempts to discover how "the design of the courthouse and courtroom can be seen as a physical expression of our relationship with ideals of justice" as I consider more deeply how we can reconcile the rising worry or distrust of the use of the laity in the trial with my own ideals that rest in a firm belief that using them is, fundamentally, a good thing but that the way that they are included certainly needs to change.[67] Thus, before concluding it is important to remember that pressure to revive or rethink the jury is not new, indeed, in the US there have been increasing calls over two decades with those concerns being based in the low response rates to summonses, failure to appear rates rising and constant discussion of juror comprehension in complex trials where their verdicts have been considered to be controversial.[68] For example, the acquittals in such trials as King and Powell (1992) and OJ Simpson (1995) led many, both in the public eye and in academic circles to wonder whether juries were best equipped to serve in such trials.[69] Thus, it is important to remember that the image that is portrayed in the media and popular culture of a jury trial may not translate in reality and so, we may be wise to consider deeply the "concern that the jury no longer serves as an access point to the criminal justice system and fails to constructively link the public to the complex issues handled by it[…]" and in that way it may be time to reassess the system to make sure that the part the jury play is as meaningful as it possibly can be.[70]

7 Conclusion

My over-riding aim in this article was to consider the scope for transforming the institutional framework of trial by jury from a structure which has little or no room for jury participation to a structure which embraces the jury, makes space for it to be an equal part of the process and treats it, not as a subsidiary, but rather as an integral part of the system. In order to achieve that conceptual aim I challenged one of the fundamental validating factors that has been attached to trial by jury for decades: the belief that jurors actually participate in the trial.

[66] Jurors in history were the primary fact-finders in the criminal trial and their role was most definitely regarded as active.

[67] Mulcahy (2011) above n 20, p 12.

[68] GC Lilly, 'The Decline of the Jury', *University of Colorado Law Review,* 72, (2001), 53.

[69] see for example, G Appleson, 'King Verdict Shakes Faith in Jury System', *Reuters* May 3rd 1992.

[70] Dzur, (2012), above n 31, p 126.

Indeed, I proposed right from the start that the notion of participation is just that, a notion with little or no substance and I have demonstrated why I regarded this to be the case by exploring the barriers to participation contained within the current trial structure. Additionally, I have suggested practical provisions to tip the balance in favour of meaningful juror participation. Whether the actual participation is overtly active is a matter of personal preference of interaction from the individuals involved, however, I have made provision for active participation should that be the way that a juror considers most beneficial for his understanding or clarification of the trial. This of course raises questions over whether the participation would be contingent on the jury's choice and so I should remind the reader that the ideas put forward here are based in positive action which sees jurors able to participate meaningfully with the aim that they are able to fully understand the trial and so base their verdicts in clarity and knowledge. Of course one may construe that we could force juror participation of the kind discussed throughout this paper – this is something that I would reject as it would then undermine both Boal's theory for empowerment and my own views that the participation ought to be self-driven.

I have invited the reader on a journey that reimagines the role of the juror in the criminal trial. Along the way I have challenged core elements of the current system and I have made suggestions for reform which some may find too radical or just too impractical. Regardless, I hope that the ideas advanced demonstrate that it is possible for the jury to make the transition from being present in the courtroom to having the chance to be meaningful participants in the trial. I have undertaken this whole process of investigation from both an ideological and a conceptual perspective and I have looked through a dual lens of criminal justice process and interactive theatre arts. The ideas that I have developed in this article have their roots in theories that were developed to support and enable active and positive communication in the face of extreme oppression. As Augusto Boal presented his theories and techniques to empower, so I present his theories here as ideas for a system of trial by jury for the future which has at its roots fundamental recognition of the ability of the person to undertake the task of juror, to understand the trial, and to deliver a verdict which is based in the knowledge that they have developed their knowledge in the process.