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From presence to participation: the role of the juror reimagined

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Summary

This thesis is an interdisciplinary exploration of the role of the jury in the criminal trial in which I draw together three areas: law - specifically jury research; education - specifically Paulo Freire's critical pedagogy; and interactive theatre arts – specifically Augusto Boal's Theatre of the Oppressed. My vision is to develop a process which integrates the jury as meaningful participants in the trial and, to realise that, I have used the practical devices for communication in the work of Freire and Boal. My work is conceptual and so the ideas put forward in the thesis are meant to be read as ideological visions rather than proposals which are based on empirical research.

First, by mapping out the current research into juror understanding I make the claim that, as it currently stands, the jury do not participate in the criminal trial. Second, by using Paulo Freire's critical pedagogy as a catalyst, I begin to assess the issues of communication through a critical pedagogical lens which results in my opinion that there is a real need to focus more on how we communicate rather than persistently focusing on what is being communicated in a criminal trial. Finally, having developed heightened awareness of the need for being receptive to the methods of our communication I develop more practical solutions for integrated participation by looking to Augusto Boal's Theatre of the Oppressed in particular the use of his Joker as facilitator of communication.

By the end of the thesis I have reimagined trial by jury, moving from a structure which has little or no room for jury participation to one which recognises the potential of the juror as an autonomous, thinking, human being, capable of his task, and which treats him,[1] not as a subsidiary but rather as an integral part of the process. In doing that I challenge the fundamental validating factor so often associated with trial by jury: the belief that jurors actually participate in the trial. My research has dual benefits: first by using the methods developed by Freire and Boal I have expanded the boundaries in research techniques thus allowing us to come closer to the jury and, I argue, to understand them at a more genuinely nuanced level. Second, my research offers real tools for jurors to use, tools for communication through participation which allow them to gain clarification, when they feel they require it, as the trial is in progress.

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[1] I have chosen at random to default to the male pronoun throughout the thesis however 'he' should be read as 'he' or 'she' equally.

Ultimately, as I communicate my arguments, I hope that the reader can appreciate the shift from presence to participation as I reimagine the role of the jury in the criminal trial.

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There are some people however who have walked right beside me all the way. They never complained when I took yet another detour, they were always patient as I pondered tiny points for weeks and months and most importantly they were there to guide me and support me at the times when I thought the route I'd chosen had become a little too precarious even for my liking! So, as my name will travel along the path with this thesis so must theirs.

Fiona Leverick and Lindsay Farmer co-supervised this project and quite frankly, I couldn't have done it without you. It is as a direct result of your patience, your guidance and your never-ending support that I have been able to grow what was initially a little idea that I thought nobody would take seriously to the thesis that we have today. You are both unbelievably generous people – you have shared your wisdom, your insight and your incredible knowledge with me. You have shown me nothing but compassion, you gave me the time that I needed to develop my ideas and above all, you just let me be me as I insisted, at times, that we tramp through the boggy marshes searching for the best path. I feel deeply privileged to have met both of you and I hope always to include you in my future adventures even if that is just a little postcard sent to share the view! Thank you so much for everything.

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Declaration

I declare that, except where explicit reference is made to the contribution of others, that this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature

Jenny Scott

Chapter one

Introduction to the thesis

1.1 Introduction to chapter one

This is a conceptual thesis in which I present a reimagined picture of the role of the juror in the criminal trial. In the course of the work I explore the scope of the role of the jury by offering alternative ways to address issues of their understanding within the trial framework. In addition, I offer ideas which see the jurors as active participants in the trial process, able to voice their concerns when they do not understand certain terminology as it is presented within that process. My work is based in a concern for humanity and empathy and so in that respect the exploration is ethical rather than political. This is important to acknowledge early on as my reliance on the work of both Paulo Freire and Augusto Boal could be interpreted as meaning that my thesis is politically focused which is not the case. As I have just said, I advance ideas which allow for the jurors to have a voice in the trial and through that voice I empower them in their role as juror. Whilst these elements are obviously linked to politics, it is my personal belief that enabling a person to become empowered and to have a voice is deeply rooted in humanity, in empathy and in respect for another and it is on those elements that my thesis is built. I should say however that whilst I develop ideas which see the jury empowered to interact in the trial process I do not suggest that this is at the expense of the accused's right to a fair trial. Therefore, I make the suggestions to integrate Freire and Boal's theories into the trial process whilst simultaneously being mindful of the fact that the accused is, as he stands trial, in a vulnerable position and so to oppress him further by extending the trial for the sake of juror clarity should not be considered as a viable alternative to the current situation.

In attempting to integrate the theories from critical pedagogy and interactive theatre arts I am breaking away from the traditional norms seen in jury research methods and, whilst I acknowledge the place for social science research, I argue that unless we begin to diversify in our research methods in this area, we will be in danger of never really testing the boundaries both of the methods themselves, as well as the limits of juror capacity in a criminal trial.

The essence of my work is conceptual and ideological in equal measure and to communicate my ideas I have turned to the work of Paulo Freire and Augusto Boal because it is in their work that I have found practical solutions when barriers to understanding and communication arise. My research questions have developed to focus predominantly on juror communication and juror participation and my over-arching aim in the thesis is to develop an understanding of both of these aspects as I attempt to enhance juror understanding in, and of, the trial. Throughout my research I have questioned the way that we view the jury and so have challenged our perceptions of what jury participation is. It is frequently argued that jury participation is important because it brings legitimacy to the criminal trial. This may be true but it misses a crucial point because participation is frequently equated to physical presence which, when looked at in the broadest sense, is simply not the same thing. Indeed, this perception is misleading both in terms of conveying a real picture of the part played by jurors, as well as reflecting a realistic position from which to develop future research. Therefore, we must be sure that we are clear about what juror participation within that parameter means and be careful not to equate their presence in the courtroom with their participation in the trial. Thus, in this thesis I put forward suggestions to transform the situation as I believe it to be from one in which there is little or no room for the jury to participate to one which embraces it, 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 broader trial process.

Relatively early in my enquiry I was almost totally persuaded by the large body of existing research which indicates that the jury do sometimes struggle to understand for a variety of reasons. For example, they may find the legal language indecipherable or ambiguous, they may feel alienated in the process and as a result may default to relying on extra-legal influences, rather than focusing on the trial evidence when deciding their verdict, each element adding to the overall burden that they may find themselves under.[1] There was no doubt in my mind that there were problems for the jury within the current framework and that those problems could be narrowed down to the fact that there seemed to be, in part, a breakdown in the communication process as well as barriers - both literal and symbolic - to communication between the legal professionals and the jury. The other thing that caught my attention relatively early in the project was the language of the research and in particular the focus on participation. I became aware of the frequent reference to juror participation and questioned whether there is a genuine belief amongst researchers that there is such a thing or whether through time this terminology used in relation to the actions of the jury has become either a presumption in the research or a misplaced norm in the language. With the benefit of reflection I am inclined to suggest that it is a misplaced norm and so I challenge the fundamental assumption that the jury are participants in the trial as it is currently organised. Indeed, I maintain throughout that the jury do not, as it stands currently, participate in any way except in the sense that they turn up and deliver a verdict and, whilst I accept the argument that presence alone can be regarded as a form of

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[1] For example, in respect of comprehension of legal language I began my exploration with the early studies carried out by Kalven and Zeisel as part of the Chicago study – Kalven, H. Jr. and Zeisel, H. (1966), *The American Jury,* Boston and Toronto, Little, Brown and Company. In respect of the legal language I looked firstly to the research carried out by Charrow and Charrow - Charrow R. and Charrow V., (1979), 'Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions' 79 *Columbia Law Review,* 1306 and when referring to extra-legal influences I looked *inter alia* at the effect of pre-trial publicity and the internal dynamics which may affect the jurors in such studies as Finch, E. and Munro, V.E. (1995), "Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants," *Brit. J. Criminol.*, 45, 25-38 and Lloyd-Bostock, S. (2000), 'The effect on Juries of Hearing About the Defendants Previous Record: a Simulation Study', *Crim.LR*, 734. These studies are discussed at greater length in chapter two.

participation in other situations, I do not equate juror presence with their participation in a trial.[2]

As a result of my research I hope to have fostered renewed belief in a part of the legal system which continues to come under criticism, with those criticisms plain to see when we take a cursory glance at both the academic research and the populist opinions reported in the media.[3] I have attempted to shape a template for trial by jury which challenges boundaries in terms of research methods as well as offering tools for the jury to use in live trials and in that way I am confident that my thesis contributes something new to the current scholarship. Before discussing the journey that I took in researching my thesis I shall draw a brief outline of the emergence of the research questions.

1.2 The emergence of the research questions and the distinct components of the exploration

The primary aim at the start of my research was to deliver the elusive answer which would solve all of the questions in respect of juror understanding and thus bring to an end the constant analysis of the place, part and purpose of the jury within the criminal trial. To do that I began to place my attention, as those before had done, on the legal and social science research into juries with the intention of finding this 'solution.' I was soon to discover however that my initial aim was both naïve and limiting and as a result of this early realisation I changed course, this time hoping to identify the specific language that the jury found problematic. I felt at that stage that if I were able to identify the problematic language I could attempt to build a way around the problem(s) to enable the jury to better understand the trial with the idea that they would then

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[2] Chapter four is dedicated to the issues of participation and chapter five contextualises the concepts.

[3] See for example Darbyshire P. (1991), 'The Lamp that Shows that Freedom Lives. Is it worth the candle?' *Criminal Law Review*, 749; Darbyshire, P., Maughan, A. and Stewart, A. (2001), 'What Can the English Legal System Learn from Jury Research Published up to 2001?' Commissioned Research for the Auld Report; most recently the media coverage of the collapse of the Vicky Pryce trial indicated a lack of confidence in the capacity of the jury and called for more research into how juries come to their decisions see http://www.telegraph.co.uk/news/politics/9885066/Juries-could-be-open-to-more-scrutiny-two-top-lawyers-say.html cf. http://www.guardian.co.uk/uk/2013/feb/21/vicky-pryce-retrial-defence-jury-system [live at 02/07/2013]

base their verdicts on firm knowledge rather than supposition. Once more I realised that this perspective brought me back to what had already been researched thoroughly and contributing to the already large scholarship with an analysis of the minutiae of the existing research was not my aim.[4] Finally, I came to the conclusion that my intended aim was to create the space in the trial framework for the jury to act and react to the best of their ability in as normal a way as possible. By that I mean that I wanted to create a space where, if a juror did not understand a word or a phrase then that juror could, unapologetically, ask for clarification and thereafter the trial would move on. On understanding that I needed to enable a system where that type of normal communication could take place I turned to the work of Paulo Freire and Augusto Boal, neither of whom are commonly related to this field of research; however my choice was not without reason.

My background, prior to working in law, was as a performance arts practitioner and teacher and I have had years of experience applying the theories developed by Freire and Boal in a practical sense. I have seen first-hand how their work has the capacity to transform peoples' lives, and as a result of that experience their work continues to have a great deal of influence in the way that I view the potential of people in all situations. Thus, the lens through which I view the jury, and so the lens through which I have written this thesis, is in part an academic legal one but is equally one guided by my practical experiences of Freire and Boal's theories to act as catalysts for change and transformation, which have at their roots empowerment through communication and participation. It was at that point that I realised that I was questioning the role of the jury in the trial and from that point I realised one of the core research questions of my thesis was not so much about finding a 'solution', rather it was about rethinking my image of the extent of the role of the jury - in terms of their capacity to contribute in the criminal trial – and then reimagining a role which would see them as fully integrated, active and meaningful participants in the trial. Therefore, I began to

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[4] I discuss the existing research in chapter two.

question my own pre-framed image of their role, much of which was influenced by the role which is projected by the current research and the available literature as well as images amassed from popular culture. Through that process I began to challenge some fundamental ideas commonly associated with the jury, specifically, the idea that they are participants in the trial and so, to move productively on from those challenges, in the course of the thesis I advance ideas which can result in tangible juror participation.

I have written this thesis with the belief that my ideas could alter the way we think about the role for the jury not because I imagine that they may work in some ethereal way, but rather, as already noted, that I have practical experience of these ideas working in a variety of forums and I see no reason why they could not be as powerful in the criminal courtroom. I accept that what I suggest in the chapters to follow may require some substantial shifts in perspective; however, I argue that if we do not at least embrace the arguments – even if that is only a transient sceptical embrace – we may miss a real opportunity to look afresh, and from a different perspective, at the issue of jury participation in the criminal trial and by extension we may miss the opportunity to understand their contributions as integrated participants in the criminal trial process.

Against this backdrop I have aimed to develop awareness of the current trial communication and from there to expand the role for the jury to include their participation in that process. I have also attempted to demonstrate how, with the integration of the theories of Paulo Freire and Augusto Boal, we can develop a trial format which has at its core a place where each of the trial players is able to communicate, with the result that this thesis is a conceptual work which shifts the emphasis from juror presence to juror participation in the criminal trial process.

My starting point was to take the jury research which was specifically focused on juror understanding and to assess the findings in an attempt to understand better how juries

functioned.[5] Thereafter I would assess the existing proposals for improving juror understanding and hopefully move beyond those solutions to develop my own answers to the problems. One of the primary weaknesses in this early approach was that I kept losing sight of my primary aim which was to develop our awareness of the current trial communication before considering how the jury were able to function therein. In short, I was missing my own point because the longer I placed the focus only on the jury, the further away I drifted from considering them within the broader trial structure. This resulted in the research becoming mundane, repetitive and tired. I therefore reverted back to my original aims, I re-engaged with what exactly it was that I wanted to say and I realised that I needed to breathe new life into how I was going to go about saying it in order to communicate my voice in a way that felt real for me and therefore would enable others to hear the spirit in my ideas. I should say that the irony of consistently failing to communicate my ideas as clearly as possible did not escape me and it made it all the more acute and personal that I had to find a way to develop my voice, otherwise the thesis, in my opinion, would be futile. It was that part of the journey that underpins my argument which is carried throughout the thesis that it was communication *per se* that we should be concerned with and it was at that point that I realised that I had the tools to tackle this with a fresh innovative approach.

From that point I abandoned my search to identify the specific language which may have been problematic because I realised that it was not the substance of what was being said that was the problem, rather, it was the style of the communication of the information that was the biggest issue. It was at that stage that I realised that I needed to make a very dramatic alteration to the trial framework in order to accommodate the jury and I therefore, quite literally, made space for them in the trial structure. I should point out the obvious, i.e. that there is physical space in the trial for the jury, however it amounts to little more than an allocation of designed space both inside the courtroom

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[5] Which as I said earlier started in the US with Kalven and Zeisel's *The American Jury* above n.1 and in the UK with Baldwin, J. and McConville, M. (1979), *Jury Trials,* Clarendon Press, Oxford.

and in the ante-room for deliberation but very little else can be regarded as space for the jury and certainly a space that is equipped for them to function, to communicate normally, to participate is simply not there. My solution to this problem therefore is to integrate the theories and devices used by Freire in education and Boal in Forum Theatre, to create the space for participation in its myriad forms and to explore what positives could potentially arise from their integration into the current trial process.

The second strand of my research invites the reader to regard as potentially valuable the work of Paulo Freire as a way to enhance communication in the criminal trial. Freire was a teacher who believed that traditional or conventional teaching was oppressive and so in his problem-posing education we see a system for communication which empowers through student-centred dialogue. I use as my starting point of research his *Pedagogy of the Oppressed*.[6] I should say at this early stage that I am, of course, well aware of the political aspect of both Freire and Boal's work. In Freire's case his liberatory education was regarded as a way to ensure, or at least inspire, the idea in a person that freedom was possible. I have specifically chosen however to remain a-political throughout the thesis partly because there is not sufficient space to explore all aspects of his work but mainly because I am more interested in exploring the practical aspects of the work and so the possibility of integrating the tools he developed in his problem-posing education as tools for use in a criminal trial. Thus, I have integrated his problem-posing style of education which has at its core his use of codifications to inspire and instigate dialogue as a way to effect a change in the communication style of the courtroom and so to enhance understanding in the criminal trial.[7] In chapter three therefore I have embedded images which I hope will show clearly how, if we use such codifications in conjunction with the problem-posing, we may be in a better position to understand the jury and, most importantly, the jury will

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[6] Freire, P. (1970), *Pedagogy of the Oppressed*, translated by Myra Bergman Ramos, London, New York, Penguin.

[7] Problem-posing is central to Freire's critical pedagogy and I consider it in detail in chapters three and five.

be given the opportunity to engage with the trial in which they play a part. From that engagement there will hopefully come empowerment and already we begin to gain a picture more positive than the picture of juries past.

My third strand of research introduces Augusto Boal's Theatre of the Oppressed techniques with particular focus on the use of his Forum Theatre and Joker as a way to break the boundaries of understanding by way of communicative participation techniques. Boal was a theatre practitioner best known for his Forum Theatre which was a small part of the broader Theatre of the Oppressed. His theatre devices, which include the Joker and spect-actor, are devices used to empower and to generate communication through participation. Through using Freire's problem-posing pedagogy and Boal's Joker as ways to re-ignite our perceptions of what communication and understanding are, I have quite literally reimagined the role of the jury in the criminal trial. I have made space for it - something which I argue is lacking in the current framework - and I have enabled a system which sees the jury as actively involved, where communication is clear and where solutions to hurdles are facilitated by Boal's Joker at the point at which they arise. My work breaks new ground in that my reimagined trial regards the jury as an integral *and* equal part of the process situated in a conceptual framework which supports and enables dialogue between legal professionals and jurors during the trial. Moreover, my ideas transcend the boundaries often associated with barriers to communication and participation by integrating Boal's Joker. First the Joker enables us to see beyond physical barriers which may come in the shape of the segmentation and segregation of the courtroom interior design, and which are commonly associated with power imbalance or hierarchical status symbols. Second the Joker empowers us to overcome barriers to communication and reminds us that the ability to participate will always be available. In the fourth chapter I have recreated a segment of a fictitious trial in which I engage the reader in a mini-forum to attempt to demonstrate the potential of integrating Boal's theories.

Freire and Boal are considered both individually and together as people who can be linked because of their respective inspirations of each other. Whilst for most of their individual careers they worked separately, it was their work together, created in the latter parts of both their lives, which has touched, influenced, and broken boundaries in a variety of areas which include education, performance arts, and legislation in Latin America.[8] Indeed, part of the influence for Boal's *Theatre of the Oppressed* was his continued interest in, and exposure to, Freire's *Pedagogy of the Oppressed*. Boal first met Freire in the 1960s when he was working at the Arena Theatre, however it was not until 1973, when he was working, as part of a much bigger team in a large-scale literacy project in Peru, that he began to use Freire's ideas more explicitly. The project, which was run by Alicia Saco, was known as the *Operación Alfabetización Intergral* or ALFIN project and its aim was to eradicate illiteracy in Peru. The teams communicated through a range of 'artistic languages' such as photography, puppetry, journalism, music and theatre. Boal organised the theatre arm of the project and although Freire was not actually a part of the project when Boal was working on it, his vision and insistence on the necessity of *conscientização* were ever present and had a huge impact.[9] The primary aim of the ALFIN project was to enable communication in a range of languages, artistic as well as linguistic, so Boal worked with the participants and developed techniques from which they would be enabled to 'speak' theatre for themselves rather than continually being content only to watch performances which were already written and rehearsed. Boal and Freire *always* assumed that the people involved in the projects were intelligent people who deserved to be respected and not patronised, thus they had the understanding that the students were not ignorant, rather

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[8] For example as a result of the ALFIN project the face of illiteracy in Brazil changed within 85 days - this project was one in which both Freire and Boal played a part. Additionally, in Boal's *Legislative Theatre* we can see how he affected some laws in Brazil – Boal, A. (1998), *Legislative Theatre: Using Performance to Make Politics*, translated by Adrian Jackson, London and New York, Routledge.

[9] *Conscientização* is the process of developing a critical awareness of our social reality through praxis (action and reflection). Action is the key because it is the process of changing reality. Freire argued that we acquire social myths and that those have a dominant effect on our understanding and so developing a critical awareness through learning will enable us to become aware of real problems and actual needs. http://www.freire.org/paulo-freire/concepts-used-by-paulo-freire/ [live at 02/07/2013].

they simply did not have the tools that they needed to read and write and the core of their education therefore was dialogue which stemmed from understandings of their worlds. Their theories both in collaboration and individually have had huge impact on people around the world in projects where their theories are either at the forefront or they underpin the core teaching ethos in other spheres.

The final strand of my research touches on how we may be influenced by allocated space in both the courtroom and the courthouse and so I nod towards where I imagine my research will go post-thesis. I make a brief exploration of our subliminal deference to allocated space, to how the architecture of the courtroom and the courthouse has the ability to create illusions which could impact on those using the space.[10] This may result in jurors' normal senses being disrupted to suppress or confine their natural ability to participate thus calling into question the power of the architecture and interior design either to oppress or to liberate. In his Forum Theatre Boal shows us why we do not need to rely on traditional theatre spaces to communicate his theatre and this has inspired me to consider more deeply how we react to or are influenced by space. Thus, I draw in the visions of, among others, Peter Brook[11] whose observations on the influence of theatre space inspired me to consider how I could encourage the participants in the trial to understand and own their space, thereby gaining a sense of empowerment through their understanding of the impact of that space.[12]

To summarise, then, by introducing Freire's pedagogy I challenge the current norms surrounding juror understanding through oral communication. Rather than continuing to

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[10] In chapter five I take into consideration the work Claire Graham and Linda Mulcahy both of whom assess the impact of courthouse and courtroom architecture on those using the space. Graham, C. (2003), *Ordering Law: The Architectural and Social History of the English Law Court to 1914*, Aldershot and Vermont, Ashgate; Mulcahy, L. (2011), *Legal Architecture*, *Justice, due process and the place of law*, Oxon and New York, Routledge.

[11] Brook, P. (1972), *The Empty Space*, Middlesex, England and Victoria, Australia, Penguin.

[12] See for example Boal's *Games for Actors and Non-Actors* where he guides the user through a series of techniques to enable this awareness – Boal, A. (1992), *Games for Actors and Non-Actors*, translated by Adrian Jackson, London and New York, Routledge.

endorse the notion that jurors need to be taught I have shifted the focus to empower the jury to take ownership of their task through the integration of critical pedagogical techniques. Moreover, by integrating the work of Boal I have enabled jurors to communicate by participating in a clear and normal way by being able to stop the trial at points where they do not understand. Finally, by questioning the link that is often been made between criminal trials and theatricality and by demonstrating that the 'theatre' or 'theatricality' is far more nuanced than proscenium arch theatres and conventional plays (which is so often the default point for departure in this comparison), I have broadened images of both a trial and theatricality in a trial, thus disrupting the norms for both actors and audiences alike.[13]

1.2.1 Key concepts employed in the thesis

The key concepts that I focus on in the thesis are the use of communication in the form of dialogue, and participation as ways to empower the jury in the trial with the aim of developing a style of communication which sees the jurors as engaged participants in that process. I am unconvinced that there is participation by jurors in the trial as it is currently structured and so I question whether there is actually a belief amongst researchers that that is a practical reality for the jury. Indeed, it seems to me that through reliance on the fact that the jury are present in the courtroom – a point that surely cannot be contested regardless of the perspective from which we are looking – there follows the implication that those present are participants and with that implication comes the idea that jurors are treated with the same dignity, are afforded the same flexibility, or are permitted to interact as they see fit, just as the other participants in the trial are. Whilst I do accept that presence alone could amount to participation in certain circumstances, I stress that the presence of the jury – because it is an enforced presence – does not fall into that category. This is a point that was raised by Duff *et.al* when they argued that it is essential, when thinking about

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[13] I discuss this in chapter four.

participation to define what exactly that means, drawing our attention to questions such as "Is it a requirement, for participation, that a person speaks; or is contributing through representation adequate; or is it even sufficient that the person is merely present?"[14]

In their 2007 book Duff *et.al* 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."[15] When considering the question of what participation means in relation to the accused, the authors argue that at a very 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."[16] To do that, they make a very strong case for the defendant to be able to communicate all the time, regarding this communication as a form of participation in itself. However, 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."[17] Thus, on the one hand the ideal of participation is relatively straightforward, however the reality may be far from that ideal and so in order to give scope to my interest in juror participation, as well as to gain a clearer definition of what we mean by participation in the trial context we need to acknowledge that, in general, it can come in a variety of different forms.

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[14] Duff, A., Farmer. L., Marshall, S. and Tadros, V. (2007), *The Trial on Trial: volume three, Towards a Normative Theory of the Criminal Trial*, Oxford and Portland Oregon, Hart Publishing at p.201 (subsequently referred to as *Trial three*).

[15] Duff *et.al.* (2007), *Trial three* above n.14, p.13.

[16] Duff *et.al.* (2007), *Trial three* above n.14, p.203

[17] Duff *et.al.* (2007), *Trial three* above n.14, p.153

Broadly, the different forms of participation could be categorised 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 I illustrate this with an example made by Duff *et.al*. They make the point that it may not always be clear when people are participating, 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.[18] 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 may be no room for choice. I should therefore stress here that the difference with the passive juror is that he has come to the point of being the passive observer through no choice of his own and so in this sense we could say that this does not amount to a form of passive participation as I shall later demonstrate.

As we shall see in chapter four, Augusto Boal makes a similar observation when referring to the spectators in a Forum Theatre piece. 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 (or space

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[18] Duff *et.al*. (2007), *Trial three* above n.14, p.202.

where the piece is performed) is an indication of his proactive participation in itself. The same cannot be said of a jury 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 the trial by jury process thus calling to question the whole 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 in the context of the trial.

In their investigations, Duff *et.al.* defend a model of a criminal trial which "rests on the claim that the trial ought to *seek knowledge* through communicative participation."[19] They highlight that the (guilty) 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."[20] 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 practises whereby people hold each other responsible for their conduct."[21] Their observations, I would say, are not too dissimilar to those made by Boal in that his 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 and this is something that I look at in detail in chapter four however for the moment I shall pay particular attention to why participation – as a general concept – is important for the criminal trial.

Participation, in a general sense, is important for the criminal trial because it brings with it the sense that justice is being seen to be done. When considering why jury

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[19] Duff *et.al.* (2007) *Trial three* above n.14, p.199 [emphasis original].

[20] Duff *et.al.* (2007) *Trial three* above n.14, p.199.

[21] Duff *et.al.* (2007) *Trial three* above n.14, p.199.

participation is so important, we shall see in chapter two that one of the frequently cited explanations in their support, is that with their inclusion comes a legitimising of the trial process.[22] By extension therefore beliefs such as the belief that their participation is a reliable way of determining guilt, or that through their participation in the process, justice is seen to be fair, equitable and democratic, begin to emerge. Indeed, there is strong evidence in such studies as the Arizona Project,[23] the New Zealand Jury Project,[24] Thomas' *Are Juries Fair*,[25] and Heuer and Penrod (1996)[26] (all of whom have argued that the more active jurors were the better they understood the trial) to suggest that if the jury are participating in the trial they will encounter fewer obstacles in terms of their general understanding of it.

I suggest therefore that there are two ways in which meaningful jury participation is important in a criminal trial. First, that participation may offer a way for the jury to improve their understanding by allowing scope for them to take part through asking questions and second, that through actual, practical, juror participation comes a reinforced sense of legitimacy in the trial process. However, whilst there is a great deal of information which helps us to better understand participation in a trial in the general sense,[27] when trying to establish that same sense of clarity from a juror's perspective the scholarship is a little less rich. Thus, given the research which indicates

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[22] See Thomas, C. (2007), Diversity and Fairness in the Jury System, Ministry of Justice Research series 02/07 (subsequently referred to as Thomas (2007)); Bar Council (2002), 'Public backing for jury 'rock solid' new poll shows', Bar Council Press Release, 30 January 2002; IMC Research (2007), State of the Nation 2006, Summary Results, www.icmresearch.co.uk [live at 03//07/2013].

[23] Dann, B.M. and Logan III, G. (1996), 'Jury reform: the Arizona Experience,' 79 *Judicature*, Number 5, March-April, 280 (subsequently referred as Arizona Project).

[24] Young, W. Cameron, N. Tinsley, Y. (2001), *Juries in Criminal Trials*, Law Commission of New Zealand Preliminary Paper 37, Vol 2, Wellington, New Zealand (subsequently referred to in this chapter as the New Zealand Report 2001).

[25] Thomas, C. (2010), 'Are Juries Fair,' Ministry of Justice Research Series, 1/10, February 2010.

[26] Heuer, L. and Penrod, S. (1996), 'Increasing Juror Participation in Trials through Note-Taking and Question Asking,' 79, *Judicature* 256 and cf. with their earlier study Heuer, L. and Penrod, S. (1994), 'Trial Complexity: a Field Investigation of its Meaning and its Effects,' in Bull, R and Carson, D. (eds.), (1995) *Handbook of Psychology in Legal Contexts*, Chichester, Wiley in which they reported that when given the opportunity to take notes jurors preferred not to as they found it hampered their concentration.

[27] For example the *Trial on Trial* series.

that jurors may feel alienated by the system, I strongly suggest that it is crucial that the jury can see that they are being integrated into the trial system and in doing that we may make clear for them why their participation is so important.[28] Indeed, if they can see and feel that *they* are a valuable part of the system, and that what they do whilst in their role as juror is taken *as* seriously by the rest of the trial participants as it is by them, then their feelings of, for example, alienation, may be set aside. Indeed, I argue that developing an environment and process in which the jury really regard themselves as genuine participants in the trial, and that that feeling or sense is reciprocated, is a vital component and should not to be underestimated.

My position therefore is that participation is crucial and the more that it can be facilitated the better to enhance understanding in the trial generally. I acknowledge that my insistence that the jury participate as much as possible is open to a great deal of criticism not least because it could be construed as my inviting ad hoc interruptions from the jury and by extension, the fear that my suggestions could result in criminal trials becoming highly disruptive. My concept however, is a situation in which jurors can participate in a meaningful way so that they have the opportunity to clarify their own understanding of aspects of the trial. This would mean that the type of participation to which I refer is active: the juror will actively stop the process and will ask his question; this participation will be supported / facilitated / enabled by Boal's Joker.[29] Therefore I believe we will gain a sense of how important the chance to participate is when we are able to see the benefit (in terms of their enhanced understanding) that the jury gain from being actively included in the process. Moreover, I can see that that active involvement will bring with it tangible value for integrating participatory techniques to the criminal trial process. This belief is based not only in my understanding and experience of the positive effect of Boal's work, but also on what the established research indicates about juror attitudes to their

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[28] See for example Arizona above n.23 or NZ above n.24

[29] I demonstrate the practical application of the Joker in chapter five.

involvement in the trial. In that regard I stress again why it is vital that we truly understanding why participation in the trial is so important because without such a nuanced understanding my fear is that we will never really know what actual jurors' attitudes are towards their involvement in the trial.

Therefore, if we accept - as I do - that participation is important as a factor which supports the integrity of the trial, the questions then arise of who is regarded as eligible for participation, to what extent do parties participate and, if we mean that participation by the jury in the criminal trial is something which can add value to the overall process, then it is time to examine what that means in practice. I address all of these questions in chapters three, four and five of the thesis.

1.3   What I do and what I do not do in the thesis

I have said that my thesis is concerned with finding ways to enable jurors to be an integrated part of the trial process and through that integration they are able to communicate their concerns when they are faced with hurdles which may affect their understanding. I have chosen to use the work of Freire and Boal because it is in their work that we can see how, when people are integrated and given the tools to take part, they become empowered to take ownership of their tasks. Thus, I have used the practical elements of their work as a tool for discovery in my research into the jury and this is something that I hope could continue into future research in the field. Moreover, the practical elements of their work can also act as tools for discovery for the jury as they attempt to understand in live trials. In straightforward terms therefore I propose to develop a conceptual framework which makes space for the integration of problem-posing or participation facilitated by the Joker with the aim of improving juror understanding as and when that is necessary as the trial is in progress. Accordingly there are dual benefits in my research: first, by integrating the work of Freire and Boal I offer a way for us to improve juror understanding and participation in criminal trials by

providing alternative ways for the jury to seek clarity through heightened communication and participation devices; second, I might offer research insights which are currently lacking about where in the trial problems arise for the jury and what those problems amount to thus improving our understanding of how juries operate. From that point we may be able to develop responses to poor juror understanding which are more specifically designed to respond to clearly identifiable problems. Having set out what my thesis does do, I now make it clear what it does not, and was never intended to, do.

First, it was not my aim in the thesis to undertake a comprehensive review of the existing empirical research into jury comprehension. Whilst I have highlighted the core pieces of empirical research into the jury and have used the lessons learned in those projects to inform my project, I have not reassessed the minutiae of those projects in an attempt to either bring a fresh perspective to their findings or to undermine their conclusions. Moreover my analysis of the empirical research is not meant to be exhaustive and so I do not make reference to every aspect that has been covered to date. I acknowledge that the field is vast and dense and so my attention is only spent on those core empirical studies which lend scope and understanding to the points that I raise about how the jury currently carry out their role in the trial process. Second, my work is fundamentally conceptual therefore it is not linked to any one jurisdiction. I am however aware of the distinctions between the different adversarial / common law trial processes in terms of their use of the jury in respect of size, verdicts available, voting systems and so on.[30] Moreover, whilst in the thesis I am assuming a model of the trial that is adversarial, I am aware of the differences between different systems therefore many of the assumptions that I make about the trial procedure would not be true of an inquisitorial system.[31] Third, it is not my intention to make an in-depth exploration of

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[30] See King, N.J. (1999, Spring), 'The American Criminal Jury', *Law and Contemporary Problems*, Vol.62, No.2, 41-68 for discussion on the distinctions and difficulties in the American systems; Kiss, L.W. (1999, Spring), 'Reviving the criminal jury in Japan', *Law and Contemporary Problems*, Vol.62, No.2, 261-284; Vidmar, N. (1999, Spring), 'The Canadian Criminal Jury: searching for a middle ground', *Law and Contemporary Problems*, Vol.62, No.2, 141-172

[31] Jackson, J.D., Quinn, K. and O'Mally, T. (1999), 'The Jury System in Contemporary Ireland,' *Law and Contemporary Problems*, Vol.62, No.2, Spring, pp.203-232; Thaman, S.C. (1999),

the literature on the trial as theatre. Whilst I am aware of this vast body of literature, it is not that the body of literature that I wish to contribute to as I am doing something rather different in that I am using Boal's Forum Theatre techniques as a means to improving participation in the trial.

Fourth, I have already said that my thesis is at heart a conceptual one and when I started to write I presumed that my ideas should be reserved for theory alone however, I now believe that my ideas and arguments are valuable and if they are going to be tested in practice then perhaps my reimagining of the role of the jury will, in time, become a norm in the courtroom rather than just a vision for future trials. However, whilst I believe that the ideas could have a practical application I do recognise that this would require both changes in mind-set as well as changes in the rules of criminal procedure. Thus, because I am presenting a radical conceptual idea, not a detailed implementation plan, it was never my intention to engage with these practical details; however it is worth drawing a parallel to the work of Nils Christie who, in 1977, presented radical conceptual ideas about Restorative Justice and in so doing prompted people to question their assumptions about important issues in regard to models of justice.[32]

Finally, it is impossible within the confines of the written thesis to communicate it practically and so I ask that the reader imagines the potential of integrating the theories that I advance throughout. I hope to have demonstrated that in my work I can enable the shift from juror presence to juror participation and in that process I have offered a mode of communication, which will enable the jury to bring clarity in their own understanding in the trial to which they are a part. Moreover, in developing a new research method I hope to have provided a basis onto which we may view the role of

'Europe's New Jury Systems: The Cases of Spain and Russia', *Law and Contemporary Problems* Vol.62, Spring, pp.233-260.

[32] Christie, N. (1977), Conflicts as Property, *British Journal of Criminology*, Vol.17, pp. 1-15.

the juror not as a passive receptacle into which we pour trial evidence but rather as an active, engaged and able participant in the criminal trial process.

1.4   The overall arguments advanced in the thesis

Given this fresh approach and the potentiality of integrating the work of Freire and Boal, the overall aim in this thesis is to transform the current conceptual framework of trial by jury from a structure which has little or no room for the jury to one 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 of justice. I believe that this is possible and so I demonstrate how it may be achieved in the chapters to follow. I argue that through integrating the theories of Freire and Boal we can enable empowered and self-informed jurors and from that point I argue that the formulation of the verdicts will be based on a firm understanding of the trial process, the language that is used throughout the trial and their part within that process. Finally I argue that trial by jury *is* still a viable option for use in criminal trials; however I suggest that now is the time to reassess the way that people are enabled to communicate and participate in such trials.

I now invite the reader to consider my journey which re-invents the conceptual framework of trial by jury and within that reimagines the role of the juror. What I suggest some may find radical and others may not however I have not written the thesis in the hope that people will agree with it. Rather I have written the thesis in the hope that at the very least the reader will engage with the ideas put forward and recognise that in order to see real changes in this area, major alterations in respect of the structure of the framework and perhaps most importantly, major changes in people's mind-sets about the role of, and the ability of the jury within the framework need to take place.

The thesis proceeds as follows. In chapter two I do two things: first I examine the values that the jury brings to the criminal trial and second I map out the territory of existing empirical research into the jury. In chapter three I introduce the work of Paulo Freire and I consider in a theoretical sense how, through integration of his problem-posing pedagogy, communication during the trial could be altered to create space for an integrated and active jury. In chapter four I build on the ideas based on Freire's work by adding the work of Augusto Boal. I focus my attention, predominantly, on his Theatre of the Oppressed and I consider how, if we integrate his Joker, we may enable better juror understanding by allowing jurors to participate in the trial. In chapter five I first draw attention to the areas where Freire and Boal's work is used to effect positive change despite perceptions that there were barriers to participation. Thereafter I consider those barriers to participation in the courtroom when I focus my attention on the architectural and design elements of the trial. To end the chapter I contextualise the theories discussed in chapters three and four to demonstrate, as far as possible, their effect in a live trial.

The thesis concludes with chapter six in which I draw together the suggestions that I make in the preceding chapters and end by reflecting on the dual benefits of my suggestions: that they offer a way to improve understanding and participation by juries in criminal trials and, that they might offer some research insights into juries in that they may provide evidence that is currently lacking about where, during the existing trial format, problems might arise, thus potentially improving our understanding of how juries operate. Therefore, by introducing participatory theories from both interactive theatre and critical pedagogy to legal discourse I now demonstrate interdisciplinary research in action.

Chapter two

The jury in the criminal trial

2.1   Introduction to chapter two

In this chapter I aim first to use the existing research, both its substance and the language used to communicate its substance, to demonstrate that the idea that currently jurors participate in the trial is a misplaced assumption. Second, I look closely at the research methods which are typically used in jury research, which as we shall see, are mostly indirect, and consider their merits as a method for future research. By the end of the chapter I will have set out a picture of the existing research; identified the core reasons for continued use of the jury; and raised questions which challenge the fundamental presumption that the jury, as it is currently used, participates in the trial. I make this exploration as a way to learn lessons from the diverse and rich field and to locate my own voice, thus giving me a root for the arguments that I advance both in the course of the chapter and the remainder of the thesis. As I said in chapter one, I could not have written this thesis without learning from the research that is currently available on juries however, I maintain the opinion that, unless we diversify in our research methods, our capacity to understand the jury and how it functions within the criminal trial shall remain a little one dimensional. I therefore consider not only the indications from the research but the actual methods of the investigation process. Finally, I have written the chapter in two distinct, but related, strands. First, I examine the discussions and commentary which are concerned with the value that juries bring to the trial process. Second, I set out the territory of existing empirical research into the use of juries in criminal trials where I focus mainly, but not exclusively, on the studies which are concerned with juror decision-making and jury understanding of legal terminology.

As I have previously said, this is a dense field and as such I have chosen to focus on the

larger studies which have shaped the field in a general sense. I am thus going to focus

on large foundational research projects such as Kalven and Zeisel's *The American Jury*,[1]

Baldwin and McConville's *Jury Trials*,[2] Cheryl Thomas' *Are Juries Fair*[3] and Young

et.al's. Juries in Criminal Trials[4] as well as making reference to commissioned studies

such as the Runciman Report (1993),[5] which assessed the role of the jury in the criminal

justice system; the Auld Report (2001),[6] which re-examined the role of the jury with

particular focus on the summoning and selection procedures; the Morris Committee

Report (1965),[7] which highlighted the problems which can arise from status imbalance

amongst jurors; and the Roskill Studies (1986), which were the first empirical research

into the use of juries in complex fraud and lengthy trials.[8] It is not my intention to

assess the minutiae of each project. Rather my aim is to explore the different research

methods utilised as well as to analyse the various responses to juror (mis)understanding

in an attempt to better appreciate how we can move forward positively to enhance

both juror understanding of the trial as well as our understanding of juror

understanding. Thus, whilst I am concerned with the research methods, my concern is

with what these methods tell us about the assumptions the researchers make about

juries rather than the methods as such. Therefore, with clarity on these points, our

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[1] Kalven, H. and Zeisel, H. (1966), *The American Jury*. Little, Brown and Company: Boston, Toronto, (subsequently referred to in this chapter as Kalven and Zeisel (1966)). The American Jury formed part of a Kalven and Zeisel's larger project, which was known as the Chicago Project, in which other academics carried out subsidiary research which either informed *The American Jury* or were independently published articles based on the overall research carried out.

[2] Baldwin, J. and McConville, M. (1979), *Jury Trials,* Clarendon Press, Oxford, (subsequently referred to in this chapter as Baldwin and McConville (1979)).

[3] Thomas, C. (2010), 'Are Juries Fair', Ministry of Justice Research Series, 1/10, February, (subsequently referred to in this chapter as Thomas (2010)).

[4] Young, W., Cameron, N. and Tinsley, Y. (2001) New Zealand Law Commission, Report 69, 'Juries in Criminal Trials', Wellington (also published as Parliamentary Paper E3169, (subsequently referred to in this chapter as NZ (2001)).

[5] Zander, M. and Henderson, P. (1993), *Crown Court Study* Commission on Criminal Justice Research Study No.19, Cmnd.2263, London, HMSO - the Runciman Report.

[6] *Report of the Review of the Criminal Courts* (2001) Chapter 5 - the Auld Review.

[7] The Report of the Morris Departmental Committee on Jury Service, Cmnd 2627, (1965).

[8] The Roskill Studies - '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, (1986), London: Her Majesty's Stationery Office.

responses to future hurdles can be specifically focused to deal with clearly identified needs.

2.2 What values do juries bring to the trial process

One of the most commonly cited explanations documented in the academic research in support of jury trial is that with the inclusion of a jury comes a legitimising of the criminal trial process.[9] This is linked to a variety of beliefs, such as the belief that it is a reliable way of determining guilt or that the community should be involved in criminal justice. In addition, there is the belief that, through the inclusion of a jury, the process of justice is seen to be fair, equitable and democratic. This is clear to see when we look to the writing of Lord Devlin, who, whilst not referring specifically in the language he chose to democracy, was nonetheless a fervent admirer of the jury, who championed its ability to do justice "on the merits" and not merely in accordance to the law.[10] Depending on perspective, this statement may of course be interpreted as somewhat undermining the integrity of the jury at a fundamental level, however, I should make clear that Devlin was consistent in his support of the jury to act as reliable finders of fact in criminal trials. Indeed, as Roberts and Zuckermann more recently have observed, by using ordinary citizens as jurors, confidence in criminal trials may be reinforced because of the tangible link between the fact-finder and the fact-finding. Thus, by including the public in the criminal trial, the trial process itself seems to be more legitimate, as Lord Devlin observed:

> "the jury is the means by which the people play a direct part in the application
> of the law [...] Constitutionally it is an invaluable achievement that popular

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[9] See Thomas, C. (2007), Diversity and Fairness in the Jury System, Ministry of Justice Research series 02/07 (subsequently referred to in this chapter as Thomas (2007)); Bar Council (2002), 'Public backing for jury 'rock solid' new poll shows', Bar Council Press Release, 30 January 2002; IMC Research (2007), State of the Nation 2006, Summary Results, www.icmresearch.co.uk [live at 02//07/2013].

[10] Devlin, Lord Patrick (1956), *Trial by Jury*, Stevens and Sons, London, pp.151-158.

consent should be at the root not only of the making but also of the application of the law. It is one of the significant causes of our political stability."[11]

There is of course the obvious criticism of this description and that is, as Roberts and Zuckermann point out, that juries are not necessarily more suited to discovering the truth than their professional counterparts, they do not possess special qualities which make them any more (or less) suited to the part, and so to place them in an alternative category of more suitable fact-finder is, in my opinion (and in theirs), a little strange. [12] Nonetheless, the jury have consistently been celebrated as a valuable part of the trial system. When Devlin referred to them as a "little parliament" he was praising their role as, as Darbyshire describes it, "a symbol of participatory democracy,"[13] and we can see that opinion being echoed in the later work of, for example, Bankowski and Mungham.[14]

Public support for the jury is also evident in opinion polls which have shown strong support for jury trials. For example, a MORI poll conducted in 2003 which was focused on the public's opinion as to whether or not the jury trial was a fair system found that "both white and non-white members of the public had high levels of confidence in the jury system"[15] and in 2007 the Lord Chief Justice "called for the legal system to have confidence in the common sense of the jury."[16] As we shall see these opinions are very closely linked to images of the jury as a bringer of legitimacy which is rooted in several different but nonetheless related elements, including the fact that the jury represent the community, that they bring with them a diversity of knowledge and experience and that such experiences - applied practically through their participation in the trial -

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[11] Devlin, Lord Patrick (1981), *The Judge*, Oxford University Press, Oxford, p.127.

[12] Roberts, P. and Zuckermann, A. (2004), *Criminal Evidence*, Oxford, Oxford University Press p. 63.

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

[14] Bankowski, Z. and Mungham, G., 'The Jury as Process' in Carlen, P. (ed.) (1976), The Sociology of Law, Sociological Review Monograph 23, University of Keele, Keele, Staffordshire.

[15] Survey conducted on behalf of the Jury Diversity Project by MORI in its Omnibus survey of April 24-28, 2003 cited in Thomas, C. (2008), 'Exposing the myths of Jury Service' *Criminal Law Review*, Issue 6, pp.415-430, p.417, (subsequently referred to in this chapter as Thomas (2008)).

[16] Lord Phillips of Worth Matravers, 'Trusting the Jury,' Criminal Bar Association Kalisher Lecture, October 23,2007 cited in Thomas (2008) above n.15 at p.417.

support this democratic ideal. Therefore this idea that jury participation brings legitimacy to the criminal justice process is a widely held one, and that is evident when we look for example at the words of Zedner who describes the jury as the "beacon of participatory justice".[17] In this section I will first examine briefly the reasons why jury participation might be said to bring legitimacy to the criminal justice process, before questioning the very basis upon which these claims are made.

Various reasons have been proposed as to why jury participation brings legitimacy to the criminal justice process. The first is that juries are better fact-finders than judges because through their combined knowledge they are better able to understand a range of situations.[18] This combined knowledge is therefore considered to be more reliable than the knowledge of a judge sitting alone. When viewed objectively there is definitely the argument that a panel of 12 or 15 people will have a broader range of experience simply because of its size – a point made by Saks and Marti[19] or, as Redmayne points out, the social class of the jurors is likely to be different to that of the judge and so this may give them "better insight into the sort of situation which is the subject of the trial."[20] Indeed, in their 2001 study Young *et.al.* say, "the diversity of knowledge, perspectives and personal experiences of a representative jury enhances the collective competency of the jury as fact-finder, as well as its ability to bring common sense judgements to bear on the case."[21] Of course, what Young *et.al* are relying on here is that the jury are representative of the community, as well as relying on a situation which sees the jurors automatically bringing with them the levels of competency required to understand the evidence as it is presented throughout the trial.

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

[18] See for example, Redmayne, M. (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, (subsequently referred to in this chapter as Duff *et.al.* Trial 2, (2006)) .

[19] Saks, M. and Marti, M.W. (1997), 'A Meta-Analysis of the Effects of Jury Size,' 21, *Law and Human Behavior*, 451.

[20] Redmayne, above n.18, p.101.

[21] NZ (2001) above n.4, [133].

Not everyone however accepts the arguments advanced in favour of the jury and it is often the subject of debate in legal and political literature.[22] In her analysis of the jury Penny Darbyshire, for example, insists that for centuries the (English) legal system has relied on

> "no justification or spurious justification. It has fed public complacency with the English legal system and distracted attention from its evils: a systematic lack of due process pre-trial and post-trial and certain deficiencies in the trial process itself. It has distorted the truth. The truth is that for most people who pass though the criminal justice system this palladium is simply not available and for those who can and do submit themselves to its verdict; it will not necessarily safeguard their civil liberties."[23]

Additionally, Darbyshire *et.al* later point out one of the most prominent situations where the jury nullified was in the trial of Clive Pointing whom the jury acquitted for "breaches of the Official Secrets Act despite the judge's almost directing conviction" and this could be regarded as an example of 'positive' or 'good' jury nullification. [24]

A second reason why jury participation might bring legitimacy to the criminal trial is that, as Roberts and Zuckermann point out, they represent community standards, values and morality and can bring these to bear when deciding cases.[25] As Lord Devlin said in 1965 the "the juryman is in the eyes of the law the epitome of the reasonable man"[26] and this is particularly important given the legal tests that the jury is asked to apply. Moreover, he also highlights that "It is not a perverse acquittal that an innocent man is looking for when he asks for trial by jury, but a trial by men and women of his own sort."[27] Thus, as Roberts and Zuckermann make clear, the system of trial by jury seems to emit the sense that there is sensitivity, by the State, to "popular perceptions of right and wrong, and in this way criminal proceedings cultivate that public support which is

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[22] See for example Brooks and Doob (1975) "Justice and the Jury," *Journal of Social Issues*, 31(3), pp.171-182 at p.172.

[23] Darbyshire (1991) above n.13.

[24] Darbyshire, P., Maughan, A. and Stewart, A. (2001), 'What Can the English Legal System Learn from Jury Research Published up to 2001?' Commissioned Research for the Auld Report, p.32. [subsequently referred to as Darbyshire *et.al.* (2001)]

[25] Roberts and Zuckermann above n.12, p.64.

[26] Devlin (1956) above n.10.

[27] Devlin (1981) above n.11 p.141-142.

essential to their effective operation."[28] The community standards argument can be questioned on at least two fronts. First, that juries are not, in fact, representative of the community at all in terms of characteristics such as race or occupation. This is a point that has been made by for example Darbyshire *et.al*[29] in the UK, Fukuri in the US,[30] and Dunstan *et.al* in New Zealand who advised that unless geographical boundaries were extended there would be an increasing chance of unrepresentative juries across New Zealand.[31] However, other researchers, for example Cheryl Thomas, have suggested that juries are actually representative, at least in terms of their ethnic background.[32] Indeed, in her 2008 article - which is drawn from her 2007 empirical study - she concluded that the reports by others including Darbyshire, that argue that juries are unrepresentative of the community is a myth, and that the reality is that serving jurors closely reflect the diversity of their communities.[33]

The participation of the jury can also be seen as a tool with which to guard against the possibility of state oppression, a point made by Mungham and Bankowski,[34] Nicholas Blake[35] and Paul Byrne,[36] among others. For example, the sense that the jury may act as a barrier to oppressive state sanctions is rooted in the idea that it can, if it wishes, vote to acquit or nullify in cases where it does not approve of the use of the law in a certain way by the state, thus exerting its power over what it regards as unfair

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[28] Roberts and Zuckermann above n.12 p.64.

[29] Darbyshire *et.al* above n.33, appendix to the Auld Review who claimed that most people try to avoid jury service if summoned and that five-sixths of Londoners avoid or evade jury service.

[30] Fukurai, H. (1996), 'Race, Social Class and Jury Participation: New Dimensions for Evaluating Discrimination In Jury Service and Jury Selection,' *Journal of Criminal Justice*, Vol.24, p.77; Fukurai, H. (1999), 'The Representative Cross Section Requirement: Jury Representativeness and Cross Sectional Participation from the Beginning to End of the Jury Selection Process,' *International Journal of Comparative and Applied Criminal Justice*, Vol.23, No1, p.56.
[31] Dunstan, S., Paulin, J. and Atkinson, K. (1995), *Trial by Peers? The Composition of New Zealand Juries,* Department of Justice Policy and Research Division, Wellington, [6.4].
[32] For example Thomas (2008) above n.15.
[33] Thomas, C. and Balmer, N. (2007), 'Diversity and fairness in the jury system,' Ministry of Justice Research Series, 2/07.

[34] Mungham, G. and Bankowski, Z. (1976), 'The jury in the legal system,' in Carlen, P above n.14, pp.202-225.

[35] Blake, N. 'The Case for the Jury,' in Findlay, M. and Duff, P. (eds.) (1988), *The Jury Under Attack*, London and Sydney, Butterworths pp.140-160.

[36] Byrne, P. (1988), 'Jury Reform and the Future' in Findlay and Duff above n.35 pp.190-208.

procedure. Moreover, as Darbyshire points out, the jury can acquit in cases where it regards the law as unfair and so can demonstrate its sympathy with the accused in its verdict and in that way we can see that it has the capacity to act "as a democratic brake on the State."[37] Or, as in Abrahamson's *We, the Jury: the Jury System and the Ideal of Democracy*,[38] we see his defence of trial by jury in America as a system which is the epitome of democracy arguing that juries are not only the face of democracy but in many, if not all of its facets, it acts as democracy thus endorsing its place in the American criminal justice system. *We the Jury* was written at a time in America, where there was growing cynicism over the impartiality of the verdict of the jury where crimes were racially motivated. Abrahamson noted that, at a very basic level we could see that a jury could, if it wished, exert its power by nullifying or acquitting and in that regard we can see democracy in action – something which is unavailable, or at least not as overt, in trials without a jury. Equally however, Abrahamson points out that juries generally do not depend on race alone and so to suggest that race alone is an accurate predictor of a jury's verdict is to limit attitudes towards its capacity and integrity, ultimately urging the reader to see the positive aspects of continuing to use a jury, even where it first may seem that their verdict could be delivered contrary to the evidence.

The legitimacy of jury nullification as a means by which juries can guard against state oppression has however, frequently been questioned.[39] This however can be subject to criticism if we understand the rule of law as the legislature who make the laws and not the jury who make or adapt the law to suit themselves and to fit with their opinions and their moral or social standards. Moreover, this practice can be criticised on the basis that it could lead to inconsistency in the application of the law more generally. Finally, the point has also been made that even if it is accepted that the jury should be

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[37] Darbyshire (1991) above n.13.

[38] Abramson, J. (2000), *We, The Jury: The Jury System and the Ideal of Democracy*, Cambridge, Massachusetts and London, England, Harvard University Press.

[39] See for example, Winter, R.K. (1971) 'The Jury and the Risk of Nonpersuasion,' *Law and Society Review,* p.335; Kalven and Zeisel above n.1, chapter 15.

permitted to refuse to convict where it views the law as unfair, juries might equally refuse to convict for less legitimate reasons, such as sympathy for or prejudice against the accused.[40]

Others have highlighted that the notion or idea that the jury are participants in the trial may not transpire in the practical sense. This was a point that Tatjiana Hörnle questioned when she observed that whilst lay participation is a central part of the organisation of criminal trials in the UK, the jury's existence might be confined more to the theoretical than realised in a practical sense and that is to say that participation is frequently discussed but rarely are there practical ideas to support the theoretical analyses. Indeed, she points out that if we are to continue to rely on the link between legitimacy and lay participation as some kind of validating factor for retaining the use of the jury, we must then have some evidence of co-operation between the legal professionals and the lay jurors. Moreover, she speaks of the need to be sure that we know what we mean when referring to lay participation if we are relying on the "*strong claim* that lay participation is a *necessary condition* for a *legitimate conviction* (or a legitimate acquittal) in any democratic state."[41] She then goes on to highlight that if that is the case then "lay participation is crucial as the 'democratic backbone' of court proceedings in that it *supports and authorises the outcome*."[42] I agree with Hörnle that it is important that we understand what we are talking about when we constantly refer to lay participation, and this is especially important in respect of the jury who actually to have less of a participatory role than we may at first assume.[43]

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[40] See for example Cornish, W.R. (1968), *The Jury*, Allen Lane, London for his in-depth inquiry into the willingness (or not) of the jury to nullify. Also see Goff, R. (1988), 'The Mental Element in the Crime of Murder', *Law Quarterly Review*, Vol.104, p.30 for discussion of the juries refusal to convict despite evidence of intention to cause grievous bodily harm.

[41] Hörnle, T. (2006), 'Democratic Accountability and Lay Participation in Criminal Trials' chapter in Duff *et.al*. Trial 2 (2006) above n.18

[42] Hörnle above n.41, p.137. [italics in the original]

[43] http://www.justice.gov.uk/statistics/courts-and-sentencing/judicial-annual-2011 - in England and Wales the total number of trials heard was 1,734,579 of which 17,786 were trial by jury which is 1.25% of the overall trials heard. In Scotland the information suggests the figure was nearer 5% which reflects those proceeded against in the High Courts and Sheriff Court solemn proceedings http://www.scotland.gov.uk/Publications/2012/11/5336.

The points that I have just raised however can be questioned as there still seems to be a certain amount of disagreement amongst scholars. Indeed, underlying that disagreement is a general position of support for the jury and where that support is perhaps waning there does appear to be the will to correct identifiable failings rather than a drive to eliminate the jury altogether. On the fact-finding point, it has been questioned whether juries are better fact-finders at all[44] and a considerable body of empirical research has suggested that, even if they are, juries are nonetheless too easily swayed by factors extraneous to the case.[45]

It is not my intention here to enter into a lengthy discussion about the arguments for and against juries. This has been done elsewhere and it is not the main concern of my thesis. My point is a different one, which is that those who argue that jury participation brings legitimacy to the criminal justice process - whether they do so on the basis of its superior fact-finding ability, community standards and so on - make a major assumption: that juries do, in fact, participate in the criminal trial. From this perspective the value of the jury depends on its participation, thus in the absence of this the other arguments are worth little, hence the centrality of participation to my thesis. In addition I will question this assumption and will argue that while juries are clearly present during the trial, this does not, in fact, equate to their participation. The Oxford English Dictionary defines participation as "the process or fact of sharing …; active involvement in a matter or event." As later chapters of my thesis will demonstrate, the manner in which juries are presently used is far from "active involvement" and therefore the claims which are made about the legitimacy of the jury that rest on this assertion rest on a fragile foundation.

In the following section I draw a broad map of the existing research which has been undertaken into juries in order to establish a clear picture of what that research can

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[44] Darbyshire (1991) above n.13.

[45] I assess this in section 2.3.4 below.

tell us about the jury. I do this for two reasons. First, I shall use the findings from the empirical research to inform my discussion in chapter three which is focused on juror understanding in the trial. Second, I map the territory in order to make some overall observations about the nature of the actual research with specific focus on what the research tells us about the way that the jury is regarded by the legal researchers and social scientists on whose work much of our insights on the jury rely. In this respect therefore I shall show that where researchers talk about jury participation what they are referring to is jury presence which, as I have previously argued, is not really participation at all.

2.3   Empirical research into juries

In the paragraphs to follow I map out the overall territory of existing empirical jury research in the broadest of terms. The areas that I cover are jury decision-making, jury understanding of legal terminology which includes a section on complex trials, and the effect of extra-legal influences on a jury. Having previously discussed the values that juries bring to the trial I am now interested in the assumptions about the nature of participation which underpin the research. As I shall demonstrate, most of the interventions designed to assist the jury take the existing model of the jury and try to do things to it, they do not take a more holistic approach which could use as its starting point consultation with the jury, and most of the studies do not question the meaning of jury participation, with most appearing to assume that as a reality. I now demonstrate these points by looking first at the research which is concerned with decision-making.

2.3.1   Jury decision-making

The first thing to say here is that it is very difficult to research jury decision-making because the law prevents actual observation of juries thus, unless actual jury decision-making is made transparent, it is logically very difficult to measure. Nonetheless, this is a major area where in the empirical research we see that evaluation of

'performance.' But what is regarded as good decision-making 'performance' within these parameters? It is often taken to mean whether or not the judgments of the jury are legally correct, in the sense that they match up to some other assessment of the proper outcome. In the empirical work this is commonly measured by comparing the jury's verdict to that of the judge and this kind of approach can be seen in the seminal research which was carried out by Kalven and Zeisel.[46] Although this was not the first research of its kind – see for example the earlier studies which were carried out by Hoffman and Brodley,[47] Brand and Sieswerda[48] and Broeder[49] – Kalven and Zeisel's research had a significant influence because of its scale and its impact on subsequent research. Specifically, Kalven and Zeisel were concerned with the verdict of the jury based on juror comprehension of the trial and they addressed two issues: first they questioned whether the jurors understood the evidence and the judicial instructions[50] and second they considered whether, even if they did, did they base their verdicts on the evidence alone?[51] Kalven and Zeisel's research was the culmination of data collected from 3576 trials,[52] which consisted of questionnaires completed by the 600 judges who took part in trials with charges ranging from murder to forgery. Their primary research objective was to discover how both the judge and the jury would have decided the case and when the judge's hypothetical verdict accorded with the jury's verdict they considered this agreement to indicate understanding on the part of the

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[46] Kalven and Zeisel (1966) above n.1.

[47] Hoffman, H.M. and Brodley, J. (1952), 'Jurors on Trial,' *Missouri Law Review*, Vol.17, pp.235-51.

[48] Brand, G.W. and Sieswerda, R.E. (1947), 'The Jury Looks at Trial by Jury,' *Journal of the American Judicature Society*, Vol.31, pp.105-8.

[49] Broeder, D.W. (1965b), Occupational Expertise and Bias as Affecting Juror Behaviour: A Preliminary Look,' *New York University Law Review*, vol.40, pp.1079-1100.

[50] Early research, for example, Hervey, J.C. (1947), 'Jurors look at our judges,' *Oklahoma Bar Association Journal*, 18, (October) 25: 1508-1513 indicated that about 40 of the jurors in their project had understood the judge's instructions.

[51] Early studies showed that jurors had, at the very least, discussed extra-legal matters in the process of their decision-making see Wananmaker, L. (1937) 'Trial by jury,' *University of Cincinnati Law Review*,Vol.11 (March) 191-200.

[52] The first set of data was collected between 1954-1955 and the second in 1958. The second lot of data was based on a different questionnaire given to the judges and this in itself has been the root of much criticism.

jury.[53] Their method throughout was to compare the verdict of the jury with the verdict of the judge with the presumption that the verdict of the judge was the 'correct' one. Their crucial focus therefore was not the relatively high agreement rate (78%) but the 22% of trials where there was disagreement between judge and jury. Was this disagreement down to misunderstanding of the evidence, or the law, or both? Overall, the findings from Kalven and Zeisel's research indicated that the disagreements were *not* down to juror incompetence or unwillingness to follow the law but, rather that there was confusion over the evidence or confusion over the law.[54] This assumption however calls into question the purpose of the jury in the trial because if their verdict is only regarded as valid or 'correct' if it reflects that of a legal professional then the obvious question that that raises for me is why do we continue to have a jury in some criminal trials.

With a similar focus as Kalven and Zeisel's, the first major UK study into the ability of the jury to 'perform' well, i.e. to make a decision which reflected understanding of the trial, was carried out by Baldwin and McConville in 1979.[55] Their study, conducted as part of the Institute of Judicial Administration, began in 1974 and was completed at the end of 1976. It took into consideration 370 randomly selected cases from the Crown Courts in Birmingham and London and its primary objective was to try to evaluate jury

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[53] At a basic level the jury and the judge agreed in 78% of the cases and where there was judge / jury disagreement Kalven and Zeisel managed to find a "plausible explanation."

[54] See also, *inter alia*, Hannaford-Agor, P.L., Hans, V.P. *et.al.* (2002), 'Are Hung Juries a Problem,' National Center for State Courts http://www.ncsonline/org/WC/Publications/Res_Juries_HungJuriesPub.pdf; Garvey, S.P., Hannaford-Agor, P.L., *et.al.* (2004), 'Juror First Votes in Criminal Trials,' *Journal of Empirical Legal Studies*, Vol.1, p.371; Hans, V.P. and Hannaford-Agor, P.L., *et.al.* (2003), 'The Hung Jury: The American Jury's Insights and Contemporary Understanding,' 39 *Crim.L.Bull.*, 33; Eisenberg, T., Hannaford-Agor, P.L *et.al.* (2005), 'Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury,' 2 *Journal of Empirical Legal Studies*, 171.

[55] Baldwin and McConville (1979) above n.2 Theirs was not the first study with earlier research carried out by *inter alia*, Sealy, A.P. and Cornish, W.R. (1973b), "Juries and the Rules of Evidence," Crim.L.R., pp.208-23; McCabe, S. and Purves, R (1972), *The Jury at Work*, Oxford University Penal Research Unit, Blackwell; McCabe, S. and Purves, R, (1974), The Shadow Jury at Work, Oxford University Penal Research Unit, Blackwell; Sealy, A.P. (1975), "What can be Learned from the Analysis of Simulated Juries?" in Walker, N. (ed.), (1975), *The British Jury System*, Cambridge, pp.12-21.

performance in a series of criminal trials.[56] Their method was to take the verdict of the

jury and compare it with the hypothetical verdict of the other trial participants (who

included the trial judge, the prosecuting and defence solicitors and the attending police

officers) who had agreed to take part in the research by way of responding to the

questionnaires designed for the project. The questions that Baldwin and McConville

posed included "Did the participants think, for instance, that the jury had returned a

verdict in accordance with the weight of evidence? What factors in their view

influenced the jury in reaching its decision? Did they themselves agree with the verdict

of the jury?"[57] Thus, as a result of posing such questions they had hoped to assess juror

reasoning by comparing the verdict of the jury with the verdict - and the reasons for the

verdict - which were delivered by the research participants.[58] Whilst they found that,

in general, juries were not swayed by "emotional or other legally irrelevant

considerations"[59] they nonetheless found that one of the things that had a negative

impact on their decision-making was their problems understanding the legal

terminology, which included the judicial instructions.

Since then there have been numerous other studies of this nature and what links this

research is the method by which the decision-making is assessed.[60] This involves a

comparison between the verdict of the jury and the verdict of the professional legal

players, be that the judge or, as in Baldwin and McConville's research, the solicitors and

police who were also involved in the project. One of the strengths of this approach is

that it can instil in us a sense that the jury do in fact understand the substance of the

trial and that in turn may lead us to have more confidence in its verdict. Conversely

however this style of research is fundamentally indirect and with indirect approaches

we cannot really understand what the jury do and do not understand of the trial.

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[56] Baldwin and McConville (1979) above n.2, p.20.

[57] Baldwin and McConville (1979) above n.2, p.20.

[58] For a fuller discussion on this see Baldwin and McConville (1979) above n.2, pp.26-31.

[59] Baldwin and McConville (1979) above n.2, p.20.

[60] For example the impact of influences from sources such as the internet which I discuss in section 2.3.4 below.

Moreover, there appears to be a subliminal message in this type of research which tells us that the 'correct' verdict is the one delivered by the professional player which then raises the question of the view taken of the jury by the researchers. This constant need to measure the verdict of the jury against the verdict of the professional in the research seems to me to be a little odd given in reality the burden of accurate verdict responsibility lies squarely with the jury. Thus, I can see that in the research the jury are often regarded as an object for the researchers to assess their capacity as decision-makers rather than being regarded as equals and so learning *with* them about their capacity. I understand the restrictions in place which prevent research with actual jurors in live trials,[61] however, given that the majority of the research uses mock jurors in simulated trials, the benefits that could be gained by engaging with them on a face-to-face level rather than providing them with extrinsic aides could prove to be very insightful for both the juror and the researcher because the actual information would be gained in real time through dialogue.

2.3.2   Jury understanding of legal terminology

Another strand of empirical research is that which assesses juror understanding of legal terminology and such studies date back to the 1950s in the US and the 1970s in the UK. Most of this research has been carried out using mock juries, as we can see in, for example, the work by Elwork, Sales and Alfini;[62] some researchers have used jurors who have been cited but not selected, as we can see in, for example, Thomas 2010 which I discuss below and some have used real jurors as we can see in the New Zealand study, also discussed below.

One relatively early example of research carried out using cited but not selected jurors was that carried out by Steele and Thornburg in 1988, who reported that jurors do find

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[61] s.8 Contempt of Court Act 1981

[62] Elwork A., Sales B.D. and Alfini J.J. (1977), 'Juridic Decisions: In Ignorance of the Law or in Light of it?' 1 *Law and Human Behaviour*, Vol.1, p.163.

it difficult to understand the trial language, especially the judicial instructions within the scope of the trial process and trial communication structure.[63] This was one of the first studies which had assessed juror understanding of pattern instructions.[64] The earlier studies with a similar focus had assessed juror understanding when the instructions guided the jury one step at a time[65] others used 'special issue' instructions designed to guide only on individual points[66] and others assessed juror competence with rewritten instructions.[67] In their study Steele and Thornburg first examined the extent to which the jury understood the pattern instructions - with the presumption that if they understood the instruction they would understand more broadly how to apply it to their verdict - and second they surveyed actual jurors to determine to what extent they relied on the judicial instructions during the deliberation process. The subjects in their trial were recruited from those who had been called but who had not yet served on a jury in Dallas, Texas. Thus, they were keen to point out that the participants in their trial were actual and potential jurors, thereby distinguishing themselves from studies that had used paid volunteers. They used five actual written instructions and a corresponding five rewritten instructions (which had been written by the researchers for the purposes of the project) to try to determine whether the latter had any impact on juror understanding of the terminology. They used a testing method known as "paraphrase test," in which they asked the respondent to explain what they thought the instruction meant in their own words. They gave the instructions in oral (taped) form and when the rewritten instructions were given there was an overwhelming increase of 91% in the overall understanding.[68] Thus, only 12.85% had understood prior whereas

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[63] Steele, W.M. and Thornburg, E. (1988), 'Jury Instructions: A Persistent Failure to Communicate,' *North Carolina Law Review*, Vol.67, pp.77-115.

[64] Most states in the US employ pattern Instructions which are a set of model instructions designed to inform the jury of the charges against the accused.

[65] Strawn, D.U. and Buchanan, R.W. (1976), "Jury Confusion: A Threat to Justice," 59, *Judicature*, 478; Strawn, D.U., Buchanan, R.W., Pryor, B. and Taylor, K.P. (1977), "Reaching and Verdict, Step by Step," *Judicature*, 383, March.

[66] Strawn and Buchanan (1976) above n.65.

[67] Elwork, Sales, Alfini (1977) above n.62.

[68] Steele. and Thornburg (1988) above n.63.

24.59% understood afterwards. They found that when the instructions were only given in oral form the jurors found them very problematic and this was attributed largely to the unfamiliar language as well as the unfamiliar sentence construction.[69]

Another study which had a similar focus was Reifman, Guisick and Ellsworth's research carried out in 1992.[70] Their study consisted of recruiting participants from a pool of 558 Michigan State citizens who were called to serve as jurors over a two month period in February and March of 1992. Shortly after that time frame had elapsed they were sent a questionnaire which was designed to assess their comprehension of both the substantive and the procedural law. Of the 558 sent, 244 were returned and, of those, 144 of the respondents had served on actual trials within that time frame. The questions were designed to elicit the jurors' understanding of the judicial instructions as well as to establish in which form they had received the instructions, i.e. were they written or oral. In addition there were a series of statements to which the respondents were to answer "yes", "no" or "don't know" and these statements were taken from the standardised instructions in use at the time in the State of Michigan. They concluded from this research that whilst the jury may be perfectly competent at sorting out the facts in a trial they are less competent when it comes to understanding the law that they have been given by the judge.[71] Their observations are in line with many before who have also suggested that the ability of the jury to understand the judicial

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[69] Steele and Thornburg (1988) above n.63 at p.90 For similar findings see Heuer, L. and Penrod, S. (1988), "Increasing jurors participation in trials," *Law and Human Behaviour*, 12, 231-261; Heuer, L. and Penrod, S. (1988), 'Increasing juror participation in trials: A field experiment with jury note taking and question asking', 12 *Law and Human Behavior*, -430 (I discuss their work below); Sand, L.B. and Reiss, S.A. (1985), "A report on seven experiments conducted by district court judges in the second circuit," *New York University Law Review*, 60, 423-497; Flango, V.E. (1980), "Would jurors do a better job if they could take notes?" *Judicature*, 63, 436-443.

[70] Reifman, A., Guisick, S.M. and Ellsworth, P. (1992), 'Real jurors' understanding of the law in real cases,' *Law and Human Behavior*, Vol.16, No.5, pp.539-554.

[71] Reifman, Guisick, and Ellsworth (1992) above n.70, p.540.

instructions is, at times, little more than chance comparisons, with some research studies reporting jurors missing crucial distinctions in the legal language.[72]

More recently Cheryl Thomas carried out a large scale project in the UK, which assessed juror understanding of judicial instructions as a way of gauging whether or not juror decision-making was fair.[73] She used a multi-method research approach: case simulations with real juries in Nottingham, Winchester and Blackfriars Crown Courts which amounted to 797 juries on 68 different trials; analysis of all of the actual jury verdicts from 2006-2008 which amounted to 60,000 verdicts; and, post-verdict survey of 668 jurors in 62 cases. She was keen to point out that research of this nature - both its focus and its techniques - had never been carried out in the UK although there have been several projects along similar lines undertaken in the US.[74] This was an insightful project, in which Thomas reported on a variety of areas with the result that we are able to gauge better how the jury copes with its task, as well as what the jury understands its task to be. Indeed the jurors in her studies felt that they *did not* have difficulty understanding judicial instructions – something that was found in the earlier study conducted by Zander and Henderson;[75] 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 actual understanding.[76] Thus, in the simulated trials which involved 797 jurors at the three courts, over half of the jurors perceived the judge's instructions to be "easy to understand." For example at

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[72] See for example, Elwork, Sales & Alfini, (1977), above n.62; Heuer & Penrod (1989) above n.69; Tanford, J. A. (1990), "The law and psychology of jury instructions," *Nebraska Law Review, 69,* 71-111; Tanford, J. A. (1991), "Law reform by courts, legislatures, and commissions following empirical research on jury instructions," *Law and Society Review, 25,* 155-175.

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

[74] This is sometimes confused with her having used actual jurors in the study. She did not. She used the mock jurors in the simulated cases. Moreover, in relation to her claim that no previous research had been focused on whether jurors seldom convict in certain courts was misplaced given that Baldwin and McConville put high acquittal rates at the centre of their 1974 research. In regard to the first point made here – I discuss this in more detail in my critical reflection on research methods in section 2.3.5 below.

[75] The Runciman Report (1993) above n.5.

[76] Thomas (2010) above n.3 at vi.

Blackfriars and Winchester Crown Courts 69% and 68% respectively thought that they had understood the judge's instructions and at Nottingham 51% felt they had understood. Crucially, however, the responses from the questionnaires revealed that only 31% had actually understood correctly.[77] The jurors who took part were asked to identify the two questions that the judge had specifically directed them to answer to determine if the defendant had acted in self-defence (did the defendant believe it was necessary to defend himself and did he use reasonable force?) This research suggests therefore that uncertainty about juror understanding remains and despite some very carefully considered and innovative studies, there remain questions over how well the jury cope with understanding the legal terminology in the criminal trial. To conclude, therefore, it seems that the research which is currently available points towards more use of written instructions as well as the rephrasing of instructions. On the one hand this is positive for jurors because they would have access to information which may help them to overcome obstacles to their understanding in the course of the trial. On the other hand however, providing written instructions alone may only lead to more juror confusion because, where such instructions are provided without scope for jurors to clarify points, we may find that they are no better informed than they were without them. Finally, we should be careful not to equate the provision of written instructions with enhancing juror participation because however much we try, the one cannot lead to the other in a practical sense. [78]

I turn now to the research method which uses real jurors in real trials and one example of early work is the study carried out by psychologists Severance and Loftus in 1982.[79] I

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[77] Thomas. (2010) above n.3 at p.36.

[78] There are some states in the US that have adopted the use of written judicial instructions - for example, the Florida Supreme Court permit the use of written judicial instructions to be used at the deliberation stage of the process. They are not permitted prior to that stage; therefore if the jury are confused during the trial their scope for clarification is slim.

[79] Severance, L.J. and Loftus, E.F. (1982), 'Improving the ability of jurors to comprehend and apply criminal jury instructions,' *Law and Society*, 17, 153. They also found that the problems with juror understanding were magnified when there were no written instructions. See also Severance, L.J., Greene, E. and Loftus, E.F. (1984), "Toward criminal jury instructions that jurors can understand," *Journal of Criminal Law and Criminology*, Vol.75, 1, 198.

have chosen to focus on Severence and Loftus' study because of its size, its influence on later work and because they were able to work with actual jurors. In their study they assessed where, and in what instructions, the jurors had the most difficulty when it came to understanding the crucial points which were being conveyed. Their study took place with actual jurors, permissible in certain states of the US. They identified first that the convoluted linguistic construction of the judicial instruction led the jurors to become confused and this confusion was magnified with the inclusion of uncommon words that were used. This therefore led to a situation whereby the jurors found it increasingly difficult to understand what was meant by the instruction and so, when faced with something that was designed to help, they found that they were hindered in their attempts to make sense of the law applicable in each case. However, in the course of the research they found that when the instructions were reconstructed with the same information but using a more common linguistic structure (the syntax) i.e. one which sees the point that is crucial to overall understanding (the semantics) situated at the middle point of the sentence, the jurors found that their understanding was improved. This is unsurprising given that the ordinary linguistic construction of a sentence has at the centre the point that is being conveyed.[80] They also found that when the jurors were permitted to ask questions they had a far greater understanding of the instructions and so were able to follow them more easily.[81] Ultimately, their findings led in increased confidence in the verdict of the jury.

Another more recent major project which was focused on juror understanding of legal terminology and which used real jurors in their research was carried out in 2000 by Warren Young, Neil Cameron and Yvette Tinsley.[82] This was part of the New Zealand Law Commission Study which was based on the earlier research which had been carried

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[80] See Severence and Loftus (1982), above n.79 and McIntyre, D and Busse, B. (2010), *Language and Style: in honour of Mick Short*, Basingstoke, Palgrave McMillan

[81] For similar findings see also Heuer and Penrod (1988) above n.69; Heuer and Penrod (1989) above n.69; Heuer, L. and Penrod, S. (1994a), "Juror note-taking and question asking during trials: A national field experiment," *Law and Human Behavior*, 18, 121-150; Sand and Reiss (1985) above n.69.

[82] NZ (2001) above n.4.

out for two earlier unpublished papers[83] and was a project in which the researchers assessed jury functioning in 48 trials. Whilst the restrictions around jury secrecy normally make it difficult to have direct contact with jurors, in this study, the researchers were able to interview jurors directly after gaining permission from the Chief Justice, the Chief District Court Judge, and the trial judge in each case. Moreover their research was subject to strict procedures to protect jury secrecy, which included close oversight by an ethical committee. The project provided insightful and valuable indications on jury research. However, by their own admission, "it is necessarily limited because just 48 cases were investigated – while that is enough to get a good indication of trends, it is far from comprehensive."[84] In their research they assessed the jurors' understanding of the evidence as it was presented and, how they assessed it within the given framework that they work within by using simulated jury trials and mock jurors. First, unsurprisingly they discovered that jurors found the presentation of evidence difficult to understand because, on the whole, it was delivered orally and this difficulty was compounded by the fact that seldom were there audio-visual (or other) aids to understanding.[85] Second, the jurors found that the evidence was delivered so slowly that, once again, understanding was hampered.[86] Third, many of the jurors found that because there was no framework within which to place their decision, this added to the overall difficulty in their comprehension. Finally, whilst the jurors were able to understand, and most diligently tried to follow the judge's instructions, they had difficulty understanding various aspects of the law. For example, they often did not understand fully phrases such as 'beyond reasonable doubt', 'consent' or 'intent.'[87]

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[83] *Juries in Criminal Trials: Part One*, (published in July 1998) *("Juries I"*) and *Juries in Criminal Trials: Part Two* (published in November 1999) ("Juries II").

[84] NZ (2001) above n.4, [451].

[85] NZ (2001) above n.4, [18], [356] and [357].

[86] NZ (2001) above n.4, [360]-[362] for similar results see Heuer, L. and Penrod, S. (1988) above n.69.

[87] For similar findings see Darbyshire *et.al*. (2001) above n.24, p.27; Reifman *et.al* above n.70 especially at p.545 when they discuss the problems that the jurors faced when deciphering the pattern instruction for reasonable doubt.

Crucially some of the other research shows[88] that much of the time the jurors were not aware that the "quantum of proof does not vary with the seriousness of the crime and so would wrongly acquit those charged with very serious offences or wrongly convict in the case of petty offences."[89] However, Young *et.al.* found that these hurdles did not have any significant impact on the verdict. Indeed, they found that through the collective discussions, the problems with individual misunderstandings were usually teased out and their overall conclusion was that, whilst understanding was not necessarily unduly compromised it was never-the-less improved with the allowance of such discussions. There is no doubt in my mind that the work carried out in New Zealand was invaluable in both its research methods and its findings. Whilst the amount of trials was relatively small and so the amount of jurors assessed necessarily limited, nonetheless the lessons learned are important for furthering research in this area because we were able to get closer to the jury by being a party to their discussions thus beginning to actually hear where their understanding of the trial begins to become fragile or, conversely, where it is clear, concise and precise.

Having drawn a broad picture of the research and the methods in this area, the first thing to point out is that, however 'real' the research seems to be, the reality is that it is one step removed from a real jury, functioning in real time, in a real case and that of course brings with it a certain synthetic understanding of how the jury cope in a live trial situation. More importantly, as I noted in section 2.3.1 above, is that intertwined with the research method there appears to be a research mentality whereby a jury is regarded, overtly or subliminally, as an object which is only really able to function by responding to what has been provided for it, rather than being considered as able to contribute both positively and proactively in the process of the research. For example,

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[88] For example, Zander, M. (2000), 'The Criminal Standard of Proof – how sure is sure?' 150, *N.L.J.* 1517; Power, R.C. (1999), 'Reasonable and other doubts: The problem of jury instructions,' *Tennessee Law Review,*Vol.67, p.45; Saks, M.J. (1997), 'What do jury experiments tell us about how juries (should) make decisions?' 6, *Southern California Interdisciplinary Law Journal*, Vol.6, 1.

[89] Darbyshire *et.al.* above n.24, p.28.

in Thomas' research she gauges jury understanding on the basis of their responses to her questionnaires. At no point in this project does she seem to regard the jurors as a group of autonomous, thinking, capable people able to contribute throughout the research. I do understand that the bulk of the research projects, whilst perhaps using multi-method approaches as Thomas does, are not interdisciplinary and so do not attempt to engage the jury as a central part of the research process. I am also aware that I am looking through the eyes of someone who finds it quite normal to use interactive forms of communication and so perhaps my impatience with the methods we see here is rooted in frustration at the fact that I do not see active engagement styles in the currently available legal research or research carried out by social scientists. However, I do see that there is a massive benefit in engaging the jurors and so I argue that as a very basic starting point, a better way to understand a juror - from a research perspective - is first to shift perspective of the view of the jury and by extension shift research method to enter a dialogue with the juror as the primary point of the research. From that point we could use the dialogue which emerges between the juror and the researcher to guide the research and that way we could see juror- led jury research rather than research-professional led jury research. That, in my opinion could be very exciting because it would mean that by including the jury at the primary research point, we could quite literally begin to hear how they cope, we could begin to identify where they start to struggle and we could listen to their ideas for research in terms of what *they* would do to change things to affect *their* better overall understanding. Whilst my suggestion may at first seem to be slightly risky in that it may appear to be fundamentally unstructured, it is actually very structured, as I shall demonstrate in chapters three and four. Moreover, this type of approach certainly adds to the field in offering an alternative research method and perhaps most importantly, heightens the researchers' awareness of how he views the subject matter of his project, again therefore broadening both the research method and what we can learn from the research.

2.3.3 Jury understanding of complex evidence

Another major area of empirical research has been into juror understanding of complex evidence and one example of this are the studies carried out into complex fraud trials.[90]

In the UK, the Fraud Trials Committee Studies - subsequently referred to as the Roskill Studies - looked at jurors' ability to understand complex evidence and where difficulty was identified, to offer solutions in the form of external aids to understanding. Albeit limited by the constraints of time and cost, this research was the most intensive study into juror understanding of complex evidence and, to date, has not been rivalled in the UK. [91] Its main objective was to see where improvements could be made in the presentation of information to jurors in complex fraud trials. The research concentrated on "the effects of glossaries, the presentation of numerical information, the problem of concentration and the effects of summaries in improving comprehension."[92] Their method was a jury simulation which was focused solely on fraud trials and there were two simulations each using mock jurors.

First the jurors listened to a recorded summing up, either in a continuous 1.5 hour session or for four periods of 20 minutes with 5–10 minute breaks. They found that even although breaks were allowed for, this did not make much difference in juror recall of the information. Second, the focus of the study was to compare the effectiveness of summing-up by either presenting all of the points made by the respective speakers (of which there were two) or by presenting all of the points made by the respective speakers, but rearranging the information around the crucial points which were being communicated to the jury. In this experiment the first presentation style was found to be most effective in respect of juror recall and that was in line with other research, which suggests that if information is delivered in a chronological sequence it is easier to

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[90] Roskill Studies (1986), above n.8
[91] This study was the closest thing to a jury simulation experiment in relation to fraud trials. It involved showing a mock jury an edited one and a half hour summing up in a fraud case and thereafter asking questions about it in order to test understanding and recall.

[92] Roskill above n.8, p.iii.

recall the information.[93] Additionally, they found that the jurors' understanding of the

trial could be improved if they were provided with technical, financial or legal

information prior to the trial but which was designed to help during the trial. Thus

their findings indicated that glossaries of key terms that were forecast as being a part

of the trial vocabulary should be provided in everyday language. Moreover, these

glossaries should be given to the jurors before the trial began and that time should be

allotted for the jurors to study the document. Indeed, they recommended that 15

minutes should be given for every 10 words on the list. They also found that giving the

glossary to the jurors at the start of the trial without time for familiarisation was

unhelpful.[94] However, when they were given graphs and diagrams their recall was

increased by 20% and when the glossaries of terms were made available their recall

improved by 55%. Without such aides observers, who included Michael Levi noted that

they were able to remember "comparatively little and they found difficulty in

concentrating for even half an hour."[95]

Levi was amongst a number of observers who regarded the Roskill studies as unrealistic

for several reasons, which included that the testimony recreated for the mock jurors

was only oral, that the simulated transcripts were too short and were only from two

perspectives, that the study did not take into account such things as the composition of

the jury and, that there was very little done to recreate the solemnity of the task

placed upon the mock jury in the simulated trials.[96] He therefore maintained that the

studies "eliminated from the outset what one might term the 'contextualisation effects'

of improvements in understanding over the trial – whose existence is supported by the

difference made by the use of glossaries in the simulation – as well as enhanced thought

and recall due to the fact that one is actually charged with the responsibility of

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[93] I discuss the narrative of the trial in chapter three.

[94] The Roskill Study above n.8, p.58.

[95] Levi, M. (1988), "The Role of the Jury in Complex Cases," in Findlay and Duff (1988) above n.35, p.103.

[96] Levi, M. (1992), 'The Investigation, Prosecution, and Trial of Serious Fraud,' Royal Commission on Criminal Justice Research Study No.14, Draft Report, p.103.

determining someone else's fate."[97] Moreover, in a subsequent report prepared for the

Royal Commission, Levi stressed the importance of taking into consideration much more

than simply juror recall and / or understanding of the trial evidence in lengthy fraud

trials. He maintained that if accuracy were to be given to the question over juror

inclusion into such trials is to be found, then other factors which include the social class

of those on the jury needs to be taken into consideration because only then could social

inclusion begin to be assessed accurately . Thus by extension, we need to look to the

composition and representative nature of the jury in any given trial. Indeed, he noted

that in the Roskill Trials, the 'working class' jurors automatically assumed that middle-

class people did not commit crimes.[98]

This point was echoed 10 years later in the study carried out by Honess in which he

referred to the Roskill study as one that was "weak predominantly because it was an

unrealistic simulation of the actual Maxwell Trial."[99] In light of this, Honess' research,

which was also a trial simulation using mock jurors, was designed to be more robust and

realistic and as such his materials consisted of "verbatim transcripts of the charges read

by the court clerk, the judge's initial briefing to the jury, and the opening statements of

the prosecution and defence counsel in which they presented their main arguments and

evidence across four days."[100] Additionally, he reconstructed documentary evidence by

using "verbatim descriptions by counsel of material in the exhibits. Specifically, there

were seven sets of information, variously referred to by colour, number or type of file.

These made up over 100 items and each item was referred to at some time during the

opening statement from the prosecution. The shorter defence opening statement used

only a two-page document that summarised the key counter-arguments of the defence

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[97] Levi (1988) above n.95, p.104.

[98] Levi (1992) above n.96, p.121.

[99] Honess, T.M. (1998), 'Juror competence in processing complex information: implications from a
simulation of the Maxwell trial,' *Criminal Law Review*, 763, p.765.

[100] Honess (1998) above n.99, p.765.

case."[101] The entire video lasted for more than six hours and was shown to the mock jurors over a period of several sessions. The participants were paid volunteers who had been recruited through responding to notices which had been put up in colleges and job centres with the view that the resultant mock jury was a close representation of an actual jury in terms of "age, sex and economic status."[102]

The participants in Honess' study identified a number of areas which could have improved their understanding of the trial. First, they all suggested that the presentation of the evidence could have been improved and the most prominent suggestion for how to do this was to present it in a more "story-like" structure. As we have just seen, this is a contrast to the work of Levi who found the opposite to be the case.[103] In addition - and in concurrence with Levi and the Roskill studies - the participants in Honess' study suggested that frequent summaries of the key points be given, that there be more visual aids[104] and that the language be simplified.[105] Whilst these studies do give us some indicators as to juror comprehension, because the research methods are set up to test specific assumptions about the role of the jury, they do not give a more holistic understanding of the jury due to their specific research focuses and methods designed for those focuses alone. As I said at the beginning of the section, they were designed with the intention of testing juror understanding of fraud trials. They were dominated by testing juror comprehension by measuring juror ability to recall information or interpret the complicated terminology when using glossaries designed to assist on those points alone. At no point were the jury integrated to the trial and permitted to question as they began to become confused, indeed, the jury

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[101] Honess (1998) above n.99, p.765.

[102] Honess (1998) above n.99, p.766.

[103] I shall discuss the trial narrative and storytelling in chapter three.

[104] And Honess highlighted the need for the visual aids to be introduced very early in the trial.

[105] For recent developments in aids for juries in US state and federal trials see Mize, G.E. and Hannaford-Agor, P. (2008), 'Jury Trial Innovations Across America: How we are Teaching and Learning from Each Other,' *Journal of Court Innovation*, Vol.1, p.189 at p.211 see the advances in permissibility of note taking and at p.214 the permissibility of jurors asking questions to witnesses (in written form), discussion of evidence during the trial p.215, pre-instructions for jurors on substantive law, improving pattern instructions p.222 and so on.

were treated as a live jury would be treated for the purposes of the experiments. I understand that within the parameters of such experiments suggestions to integrate the jury would be irrelevant because the researchers were using as their point of departure the current institutional rules, however, it is the fact that they address the meaning of understanding within such narrow parameters that is most interesting for my research. Therefore, whilst the indications from their research may be positive in that one aspect, it could be outweighed because of their exclusive research focus. Moreover, whilst they may tell us about the ability of the particular volunteers in the study to follow (or not) the instructions, they do not tell us much more than that and they certainly do not lend any insight into when the juror may become confused, or indeed, when he copes very well without any aides or assistance.

To follow I turn to the research which has been concerned with the effect of extra-legal factors on the decision making of the jury. I consider this to be relevant to the question of juror understanding because what we may find is that, in certain circumstances, jurors will defer to elements outside the scope of the trial because they cannot understand their part and their place in the process.

2.3.4 The influence of extra-legal factors on jury decision-making

I shall now turn to the findings from some of the research which suggests that when jurors become confused or disengaged, they may resort to basing their verdict on extra-legal information rather than on the trial evidence. I consider this to be relevant for the purposes of my thesis because, as we shall see, there is research to suggest that when jurors become confused, frustrated or disinterested they will be more likely to default to relying on stereotypes, extra-legal information or defer to the stronger characters or opinions in the jury room. Whilst I acknowledge that there are countless elements which could be regarded as an extra-legal influence, for the purposes of this section I have chosen to include juror selection of the foreman; the knowledge of

previous convictions; pre-trial publicity and the effect of general media attention in certain cases. I acknowledge there is a wealth of information but I have confined my selection to those studies which have attempted to assess the functioning of the jury as the trial is in progress rather than those which are focused on the communication between the jurors at the deliberation stage, with the exception of looking briefly to research carried out on jury foreman selection because it is in that research that we can see that jurors will sometimes defer to what they regard, in the foreman, as a higher intelligence.[106] Essentially, I have confined my search to these areas, and not to the discussions in the jury room, because I believe that assessing what the jury do and do not understand at that point in the trial is way too late to respond meaningfully to any misunderstandings which they may have had and which accordingly could have been crucial for their understanding. I fully acknowledge however that even if my concepts were to be integrated as a part of the trial process, they could not possibly prevent extra-legal issues being a possible facet of the deliberations which take place in the jury room itself. With that said however I do believe that continuing to focus on their deliberations at the end of a trial is beyond the point where dedicated support could assist them.

One of the earliest pieces of research in this area was carried out by Bevan *et.al.* in which they recreated a trial and in the simulation actors took on the parts of various foremen.[107] The aim of the project was to determine whether or not the social status or the character of the foreman would influence the rest of the jury. Some of the actors were directed to be autocratic whereas others were to be democratic and the results showed that, generally the jurors were swayed by the character and nature of the foreman. In their small study, which was conducted as part of the Law and

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[106] See for example Dann, B.M. and Logan III, G. (1996), 'Jury reform: the Arizona Experience', 79 *Judicature*, Number 5, March-April, 280 [subsequently referred to as Arizona 1996]; Thomas (2007) above n.33; Thomas (2010) above n.3; Darbyshire *et.al* (2001) above n.24.

[107] Bevan, W. *et.al.* (1958), "Jury Behaviour as a Function of the Prestige of the Foreman and the Nature of his Leadership," *Journal of Public Law,* Vol.7, pp.419-449.

Behavioral Science Project at the University of Chicago, Strodtbeck, James and Hawkins reported a similar result when they assessed how the social status of the foreman affected the rest of the jury.[108] The source of their data was through assessing mock jury deliberations in which the participants were drawn from jury pools in courts in Chicago and St. Louis. The mock jurors listened to a recorded real trial in conditions set up to replicate a real courtroom. Their deliberations were then recorded and fully transcribed and "scored in terms of interaction process categories" which means that they were concerned with the *nature* of the interaction rather than the *content* of the interaction. It was found that generally jurors are swayed by the characteristics of the foreman with a tendency to agree with his opinions or decisions.[109] Baldwin and McConville carried out a similar study, in which they used the same research methods, into the impact of the foreman in 1980 and they found that the jurors in their simulation tended to agree with the foreman if he was perceived as being of a higher status than the rest. They also reported that men who seemed to be better educated were selected by the others to be the foreman and from that they noted that the other members of the jury tended to defer to the perceived intelligence of that person rather than asserting their own understandings of the process.[110] Thus, in this we can see that it is very difficult to assess whether or not the jury actually understand because their comprehension is being hidden behind their deference to a perception of a higher intelligence in the foreman.

In 1994, Ogloff and Vidmar compared the impact of, and reliance on, different types of publicity (in their study they compared television with printed media) on the Mount Cashel Orphanage Cases where members of the Congregation of Christian Brothers of Ireland were charged with physically and sexually abusing young boys at the Mount

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[108] Strodtbeck, F. L. and Mann, R. D. (1957), 'Social Status in Jury Deliberations' *American Sociological Review*, Vol.22, December, pp.713-719

[109] Strodtbeck and Mann (1957) above n.108, p. 714.

[110] Baldwin, J. and McConville, M. (1980), "Juries, Foreman and Verdicts," *British Journal of Criminology*, Vol.20, No.1, January, pp.35-44

Cashel Orphanage in St. John's, Newfoundland, Canada.[111] The primary focus of their study was the potential impact of the visual effects of television reporting on juror attitudes, perceptions and beliefs whilst continually reflecting on the ability of the juror to remain impartial in the face of, sometimes, harrowing imagery coupled with the hype generated through chat shows such as *Oprah*. They chose specifically explicit television excerpts in the control group to test whether the jury were affected and - unsurprisingly - found that they were.[112] Their study consisted of 121 participants (63 female, 58 male) who were students and staff at the Simon Fraser University in British Columbia. They deliberately did not select participants from the St. John's area because it was thought that those people would have been "contaminated by multiple sources of exposure" with their opinion that their experiments would have been compromised as a result.[113] Once selected, the participants were shown media stimuli with some of the most graphic sexual abuse testimony given by former Mount Cashel residents. The point of the study was to measure the relative impact of the types of media stimuli used (print v. video). Whilst the forum of presentation was different, Ogloff and Vidmar were at pains to stress that the content of the articles/VTs were almost identical. Overall their findings were unsurprising in that the participants were regarded as more biased when the testimony had been presented in televised form as opposed to written form and this was put down largely to the emotional involvement in engaging with the former.[114]

Another area of concern is the knowledge of an accused's previous convictions and this was something that was the focus of Sally Lloyd Bostock's study carried out in 2000.[115] In this study she was interested in the effect on the jury when they were aware of an

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[111] Ogloff, J.R.P. and Vidmar, N. (1994), 'The impact of pretrial publicity on jurors: A study to compare the relative effects of television and print media in a child sex abuse case, *Law and Human Behavior*, 18, 507-525 at 508.

[112] For examples of the content of the excerpts see Ogloff and Vidmar above n.111 at pp.509-511.

[113] Ogloff and Vidmar (1994) above n.111, p.513.

[114] For a detailed account see Ogloff and Vidmar above n.111, pp.513-521.

[115] Lloyd-Bostock, S. (2000), 'The effect on Juries of Hearing About the Defendants Previous Record: a Simulation Study,' *Crim.LR*, 734.

accused's previous conviction and in particular she was interested in seeing whether the jury would be more likely to convict if the previous conviction was similar to, or recent in time to, the current one.[116] Additionally, her study looked at the impact on the jury of introducing a previous conviction for indecently assaulting a child. The research method was "a controlled experiment in which simulated, or 'mock' jurors viewed videos of a condensed, reconstructed trial."[117] The subject matter of the reconstructed trials were typical of those predicted to be coming before the court in regard to the crimes charged. There were three: 1.) handling stolen goods; 2.) indecent assault on a woman and; 3.) a deliberate stabbing. In total 24 variations on the videos was shown to a group of 12 mock jurors who were all members of the public and all eligible for jury duty. Each of the videos introduced some, none or all of the previous convictions. Lloyd Bostock's study indicated that where a previous conviction was both recent and similar in nature to the current charges the jury would be more likely to place weight on the previous conviction and so the likelihood of a guilty verdict was high. If however the previous conviction was dissimilar and was an old offence, the likelihood of a guilty verdict where the previous conviction was relied upon was considerably weaker. These results were in direct contrast to the earlier studies carried out by Wissler and Saks[118] and Cornish and Sealy,[119] both of whose studies indicated that dissimilar previous convictions were more likely to be relied upon for the current charges. It is noted however that in both of their studies the dissimilar previous convictions were for rape and murder which calls into question the relevance of the severity of the previous convictions. It is clear that there is certainly evidence to suggest that the knowledge of previous convictions – especially of a same or similar nature – will impact on the jury with the result that they will be more likely to convict in such situations or, as Lloyd Bostock says, the knowledge of prior convictions evokes in the jury stereotypes of a-

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[116] Lloyd-Bostock (2000) above n.115, p.739.

[117] Lloyd-Bostock (2000) above n.115, p.739.

[118] Wissler, R.L. and Saks, M.J. (1985), 'On the Inefficacy of Limiting Instructions. When Jurors Use Prior Conviction Evidence to Decide on Guilt', *Law and Human Behaviour*, Vol.9, No1.

[119] Sealy and Cornish (1973) above n.55.

typical criminality, and "that caution over revealing a defendant's criminal record is well justified."[120] In Lloyd-Bostock's study we can see that the jurors were more likely to convict the defendants (regardless of the current charge) where the defendant had a previous conviction for indecent assault. I accept that previous convictions can be a relevant factor when determining guilt, indeed, if we have a person who has been convicted previously of a very similar offence perhaps using identical methods then this is evidence that suggests that he is guilty of the charge at hand. However, my point is not so much that juries are more likely to convict where there are previous convictions as such, but rather that juries place too much weight on previous convictions. Thus, what Lloyd-Bostock's study tells us is that, in regard to juror reasoning, there is a higher chance that a juror will rely on previous convictions, (which could be extra-legal information) thus rendering their verdict more open to question.

In 2010 Cheryl Thomas published research which was focused on the influence of the media on the jury. This research took place in three different courts and it included 62 cases and 668 jurors. Her sample covered a spectrum of different cases which included long, high profile and standard cases, with the latter lasting under two weeks with little or no media attention.[121] She reported that jurors who were sitting on cases which had been subject to high profile media coverage during the trial were 70% more likely to recall the media coverage of the trial than jurors sitting on less newsworthy cases who recalled only 11% of the media coverage.[122] She stressed that this finding was linked only to the media publicity which was communicated as the trial was in progress and that the jurors did not recall the pre-trial publicity. In this respect she argued that her study was the "first empirical evidence in this country of the 'fade factor' in jury trials (the further away media reports are from a trial the more likely they are to fade from

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[120] Lloyd-Bostock (2000) above n.115, 734.

[121] Thomas (2010) above n.3, p.v.

[122] Thomas (2010) above n.3, p.vii and pp.40-44.

jurors' memories)."[123] However, she went on to say that 35% of jurors on high profile

cases did recall pre-trial media coverage from a variety of forums which included

television (66%) and national newspapers (53%). Additionally, the jurors who recalled

this coverage did not recall it being persuasive in any one direction, however, to clarify,

she did report that, in high profile trials those jurors who did recall which slant the

media coverage took (20%), recalled it as indicating that the accused was guilty with

that figure falling to 15% in standard cases.[124] Thus, there is evidence to suggest that

jurors do sometimes look at information other than that provided to them during the

trial process and this is worrying. Moreover, if we are concerned (as Lloyd-Bostock was)

that jurors are too influenced by previous convictions then media attention pre and

during trials is one way that they could find out about them and so, I suggest, we are

right to be concerned.

In her 2010 report, Thomas also took into account jurors' proactive use of the internet

and the indications from her research raised a number of slightly concerning questions.

She first asked whether jurors knew that they were not supposed to make independent

internet searches. Second she assessed how the jurors used the internet – for example,

did they do general searches for information on the defendant or were their searches

more focused on the law, i.e. were they using the internet to expand their knowledge

of the evidence presented or did they make inquiries about the other trial participants

such as the Judge, the legal counsel or the witnesses. Finally, did they use forums such

as Facebook or Twitter to discuss the case and so were they in danger of being in

contempt of court? In high profile cases Thomas reported that 26% of the jurors saw

information about their case on the internet and 15% actively looked for something. In

standard cases she reported 13% and 5% respectively.[125] Finally, she reported that those

making internet searches were all over the age of 30. The implications from this

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[123] Thomas (2010) above n.3, p.vii.

[124] Thomas (2010) above n.3, p.43, fig.3.22.

[125] Thomas (2010) above n.3, p.43 figure 3.23.

research suggests that whilst jurors are likely to recall media reporting of their trials and the more high profile the case the more likely the recall of the reporting, it does not give clear indications on whether this impacts adversely on the verdicts in such trials. All the more reason therefore to consider using methods which actively engage jurors because through their being able to interact in the trial process we, as researchers, will come to gain a more accurate picture of what they rely on and what they do not.

Another area of research explored relatively recently has been the effect of extra-legal influences on jurors in rape trials, where the complainant has been intoxicated and the primary researchers identified in my exploration are Emily Finch and Vanessa Munro. In 1995 they carried out a pilot study to test the impact of such factors on the jury and they reported that jurors considered a "number of extra-legal factors when reaching a decision: rape myths, misconceptions about the impact of intoxicants and factors such as the motivation of the defendant in administering an intoxicant" were all a feature of the process.[126] In their pilot study they used two focus groups and single trial simulations to try to establish what the jury did and did not rely on in rape trials involving intoxicated complainants. Their aim was two-fold: first they wanted to assess the parameters that jurors place on drug assisted rape and second (and most important for our purposes), "what factors (extra-legal or otherwise) influence the attribution of blame and responsibility in sexual encounters involving intoxicants?"[127] The facts in the scenario remained constant throughout but different variants were introduced: the nature of the intoxicant; the means of administration and the level of intoxication. The simulation was enacted in real time and portrayed by trained barristers in the roles of legal counsel with volunteer student actors in the roles of witnesses. The mock jurors were volunteers and their deliberations were audio recorded and analysed. The

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[126] Finch, V. and Munro, V.E. (1995), 'Juror stereotypes and Blame Attribution in Rape Cases Involving Intoxicants,' *British Journal of Criminol*ogy, Vol.45, pp.25-38, p.25. [referred to subsequently as Finch and Munro (1995)]

[127] Finch and Munro (1995) above n.126, p.30.

indications from the pilot study were that jurors did rely on extra-legal information with four main areas identified: "the victim's responsibility; the defendant's intentions; the parity of the parties' intoxication; and the impact of intoxication upon the victim."[128] The findings from this study formed the basis of a larger scale ESRC-funded study which examined juror attitudes to intoxicated rape complainants which Finch and Munro undertook between 2004 and 2005.[129]

The research was carried out in two stages. First they assessed the decisions of focus groups and then they compared those findings with decisions in trial simulations.[130] Like their earlier project they used simulated trials although the number was increased to seven in the current study. Unlike most other studies of this sort however, this one was not designed "to test the efficacy of any particular hypothesis or theory, but rather to replicate as closely as possible, given the prohibitions on involving jurors in real cases, the environment in which jurors evaluate events and make determinations about liability."[131] In this case they analysed the juror deliberations and, taking everything into consideration, (the recreated environment: the modes of trial delivery and the insertion of extra pieces of information such as differentiations in the drugs ingested) they were able to report that jurors do work backwards from what they already know (an extra-legal element) and then use their knowledge in their formation of a verdict which uses the trial information. Thus, Finch and Munro used this research as fairly compelling evidence of jurors' tendency to rely on extra-legal information (whatever that may be) in their decision-making process. My initial reaction is to agree that this

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[128] Finch and Munro (1995) above n.126, p.30.

[129] 'From Sobriety to Stupefaction: Intoxication and Jury Decision-Making in Rape Trials,' ERSC References RES 000-22-0328 and the research culminated in the production of Finch, E. and Munro, V.E. (2008), 'Lifting the Veil: The Use of Focus Groups and Trial Simulations in Legal Research,' *Journal of Law and Society*, Vol.35, pp.30-51 [subsequently referred to as Lifting the Veil, 2008]; for further discussion on the indications from the pilot study see Finch, E. and Munro, V.E. (2006), 'Breaking boundaries? Sexual consent in the jury room,' *Legal Studies*, Vol.26, No.3, 303-320 [subsequently referred to as Breaking Boundaries, 2006] and Finch, E. and Munro, V.E. (2007), 'The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxication,' *Social and Legal Studies*, 15, 591 [subsequently referred to as Demon Drink, 2007].

[130] Finch and Munro (2007) (Demon Drink) above n.129, p.597.

[131] Finch and Munro (2007) (Demon Drink) above n.129, p.597.

model seems to allow for a fair understanding of how the jury get to their verdict and to identify which (extra-legal) elements they rely on along the way. However, on reflection I would say that their optimism over both their research method, as well as their findings is slightly misplaced. Not only do they seem to automatically view the jury as participants in their simulation - which I suggest is a misplaced presumption in itself because the jurors in their study are not actually participating - they also attempt to better understand the jury through comparisons alone.[132] Thus what they have done is they have taken the typical or existing model of the jury and assessed it in isolation through comparison methods as others before them had done. Whilst I accept that this would be a normal course of action in policy oriented research I argue that until such time as we are able to come closer to the jury by using research methods designed with interaction at their core, we may be in danger of learning very little more about them than we do currently.

2.3.5 Critical reflections on the research methods and the limitations of those techniques

I have previously suggested in this chapter that whether they use mock jurors, cited jurors or real jurors, there has tended to be a researcher mentality which has driven the majority of the projects. That mentality, I suggest, is one that places the jury in a passive or slightly disconnected stance (just as we see them in a live trial) in order to observe, in particular, how it (as an inanimate body or a receptacle into which evidence is poured) copes with the various aids given to it as part of the research project. I should clarify my position by saying that I am yet to see a research method which includes the jury right from the start, and so I argue without their inclusion they have been placed in a passive, disconnected (because the researchers have negated to connect with them) position. Regarding the jury as passive and disconnected however is perfectly understandable given that this is how they are understood by the trial system and so it should not be so surprising that this stance is adopted in the research.

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[132] I discuss the subject of participation in chapters four and five.

There are of course problems associated with suggesting, as I do, that there may be consultation with (mock) jurors prior to the commencement of the research with the most obvious being the financial burden which this would place on the projects themselves. However, I argue that unless we challenge the idea of the juror as passive, thereby perhaps stretching researchers out of their tried and tested comfort zones, we will not even begin to develop a more nuanced understanding of how the jury operates and which includes what it does and does not understand. Moreover, I accept that some may regard consultation with the jurors as naïve or pointless but I suggest that discussion with (mock) jurors could be invaluable because it is only through this early consultation that we have the chance of seeing the project through their eyes, hearing what their expectations of themselves are and dispelling, at the very earliest of stages, any myths on pre-framed notions that they may have of the criminal trial process and their part therein.

Another problem, as I see it, in the research methods themselves is that the majority have focused specifically on the language that the jurors hear rather than on the process of the communication of the language itself. For example, we saw in the Roskill trials that where the researchers foresaw jurors having difficulty understanding what *they* regarded as difficult language, we saw them pre-empting that problem with a glossary of terms and definitions. They did not actually confirm with the jury whether or not the area specific language had in reality been problematic in the first instance. What this also indicates is that in the large proportion of the studies the jury is, as I observed earlier, regarded as a unit as opposed to autonomous thinking individuals, and so the understanding, and then decision-making, seems from a research perspective to mean "how juries combine their sundry, individual perspectives into a single verdict."[133] Indeed, this attitude towards jurors is fairly evident when we look to studies such as those carried out by Hastie, Penrod and Pennington or Kassin and Wrightsman where we see their reference to the jurors as a reference to a group rather than to individuals and

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[133] Hans, V. and Vidmar, N. (1996), *Judging the Jury*, New York, Plenum, p.20.

so their individuality, in terms of their understanding is definitely a secondary concern to these researchers.[134]

Indeed, what most of these solutions have in common is first, that their primary focus tends to be trying to identify what language the jury find most problematic and second, giving things to the jury as a way to respond to the problems that they have identified. As we have seen from the research discussed thus far, the things 'given' to the jury include the option to note-take, glossaries of terms, computer animations, re-worded judicial instructions, re-timed judicial instructions, copies of written judicial instructions and the option to ask questions of the judge. All of these ideas have been regarded by researchers as beneficial for the jurors to enhance their understanding of the legal language, however most have been decided without any input from prospective, actual, mock or shadow 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, thus, from my perspective, undermining it greatly. Indeed, I would say that 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 the fact that jurors are ordinary human beings who have the capacity to think clearly for themselves in their private lives and so I fail to see why this is not factored into the research as it currently stands.[135]

Thus, in order to understand better how the jury operate we must develop a forum that accepts that the jury are a part of the trial and so communication with them and by them should be as natural as possible. As part of the transition towards that we also need to develop a research technique which treats the jury as thinking individuals and, where appropriate, allows them to lead in the process of the research as I have already

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[134] Hastie, R., Penrod, S.D. and Pennington, N. (1983), *Inside the Jury*, Harvard University Press, Cambridge, Massachusetts and London, England; Kassin, S.M. and Wrightsman, L.S. (1988), *The American Jury on Trial: Psychological Perspectives*, New York, Hemisphere Publishing.

[135] Here I am referring back to the core studies already discussed in chapter two and which includes Thomas (2010) above n.3; the New Zealand study above n.4 and Kalven and Zeisel (1966) above n.1.

discussed earlier in this chapter. Indeed, naïve as it may at first sound, if the jury simply indicated what they found problematic, and the researchers listened to that and worked with it, then perhaps some of the mystery around what they do and do not understand of the trial language would finally be laid to rest. I accept that this suggestion may at first appear to be simplistic especially when we consider the findings in Thomas' 2010 study where jurors did not accurately assess their own understanding, often thinking they had understood when in actual fact they had not. However, if we shift our mind-sets to accept that at the very least the jury are autonomous, thinking, capable people and from there to allow those people to be proactive in the process of the research, perhaps what has appeared to be so unfathomable would finally become clear. Thus, to be clear, when referring to the unfathomable, I am referring to the debate over which language, or what aspect of the trial process a juror finds problematic and so, rather than continuing to surmise what that could be I suggest we simply encourage the jury to indicate at which points their understanding becomes confused. In turn therefore, I suggest that in time if the same or similar barriers to understanding arose in mock or simulated trials, future research of a similar nature could be designed which clarified these points.

I have highlighted what are considered to be the most important research projects in this area, however I should acknowledge that there have been very many different studies which, when looked at collectively, cover just about every perspective and angle of the trial process, its timing and its content. Moreover the studies on the trial process are equally important in their discussions and indications. For example, as we have seen, some suggested that the order in which the evidence is presented affects the outcome of the verdict[136] and others maintained that the order in which the witnesses gave evidence was another factor which affected the verdict of the jury.[137]

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[136] Weld, H.P. and Roff, M. (1938), 'A study of the formation of opinion based upon legal evidence,' *American Journal of Psychology*, 51 (October), 609-628; Lawson, R.G. (1967-68), 'Order of presentation as a factor in jury persuasion,' *Kentucky Law Journal,* Vol.56, Spring, 524-555.

[137] Weld, H.P. and Danzig, E.R. (1940), 'A study of the way in which a verdict is reached by a jury', *American Journal of Psychology*, 53 (October), 518-536 *cf*. Hunter, R.M. (1935), 'Law in the jury

Others have questioned the ability of the juror to maintain and recall large amounts of evidence[138] with little or no support[139] and still more explored how discussions between the jurors in their decision-making process helped, or hindered, in understanding and recalling these masses of information.[140] Studies then began to emerge into the representative nature of the jury[141], the effect on the verdict of the composition of jury venires (or panels as they are more commonly referred in the UK)[142] and the impact of the status of the jurors on the panel.[143] Suffice it to say there have been myriad research projects viewing the jury from different angles but with the same primary question in mind, how well do juries make decisions and what factors are at play to disrupt or distort their decision-making process. The majority of the research places the focus firmly on the jury in isolation and considers the different ways in which its role could be made easier by providing for it a variety of solutions.

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room', *Ohio St.L.J.*, 2 (December), 1-19; Hovland, C.I. *et.al.* (1957), *The Order of Presentation and Persuasion*, New Haven, Yale University Press.

[138] Hoffman, H.M. and Bodley, J (1952), 'Jurors on trial,' *Missouri Law Review*, Vol.17, June, pp. 235-251.

[139] Here we can see the process of "banking" at work. I will discuss "banking" in detail in chapter three when exploring the core concepts of Paulo Freire's pedagogy.

[140] Daishell, J.F., 'Experimental studies of the influence of social situations,' chapter in Murchison, C. (ed.), (1935), *Handbook of Social Psychology*, Worcester Massachusetts, Clark University Press.

[141] For example, in 1911 Charles Wells highlighted the importance of the early juries being representative of their communities and concluded that the early petty jury replace the older forms of trial, e.g. the ordeal, because it represented the "common voice or the common sense of the community" – Wells, C.L. (1911), 'Origins of the petty jury,' *Law Quarterly Review*, Vol.27, July, 347-361. For early English commentary see Forsyth, W. (1852) *A History of Trial by Jury*, London, J.W. Parker; Pollock, F. and Maitland, E. (1898), *History of English Law*, Cambridge, England, Cambridge University Press.

[142] Mills, E.S. (1962), 'A statistical study of occupations of jurors in a (Maryland) United States district court,' *Maryland Law Review*, Vol.22, Summer, 205-214 showed, for example, that professional and technical workers, managers, officials, and proprietors are heavily underrepresented on venires. Holbrook, J.C. (1956), *A Survey of Metropolitan Trial Courts in Los Angeles*, Los Angeles, University of Southern California Press; Vanderzell, J.H. (1966), 'The jury as a community cross section,' *Western Political Science Quarterly*, Vol.19, March, pp.136-149.

[143] These studies explored, predominantly, the effect of a juror's occupation on the deliberation, and the other jurors. For example, Strodtbeck *et.al* and Simon found that there was a tendency for higher status individuals to be chosen as forepersons and those same status people tended to sit at the head of the table in deliberations – Strodtbeck *et.al.* (1957), "Social status in jury deliberations," *American Sociological Review*, 22 (December), 713-719; Simon, R.J. (1967) *The Jury and the Defense of Insanity*, Boston, Little, Brown at pp.116-119.

My review until now was not intended to be a comprehensive survey of jury research. My concern was primarily with research methods as the relevant substantive findings of the research will be discussed in more detail in chapter three. For the remainder of this chapter I am interested in reflecting on the research methods themselves and as I consider whether they in themselves may be limited, I raise questions over whether those methodological limitations - as I regard them to be - may contribute to what could be considered as limited responses to juror understanding. The main types of research methods considered here are: jury verdict comparisons with legal professionals which use either simulated trials and which are re-creations of actual trials; simulated trials using video re-enactments all of which use mock jurors who have either responded to advertisements, have volunteered, both of the aforementioned, some paid and some unpaid. Additionally, I assess the value of using shadow juries.

Thus, we can see a variety of different methods used in both the early and the contemporary jury research. For example, there are simulated trials which recreate an actual trial using documentation designed to replicate what was used in the actual trial.[144] There are simulated trials which use video re-enactments which have actors taking on the various roles in reimagined trials and there are simulated trials which use real trial transcripts which are portrayed by a variety of actors and legal professionals.[145] In such simulations mock juries are used and these juries come in a variety of shapes. For example, there are mock jurors who have been chosen from actual jury pools,[146] others are volunteers selected from responses to adverts,[147] some involve payment of the volunteers and some do not.[148] Moreover, there are shadow jurors who follow the jury in an actual trial but who at the decision-making stage retire alone to consider their verdict. Despite these different types there is a common aim

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[144] For example the Roskill Trials above n.8.

[145] I make reference to particular studies in the course of this section.

[146] as was the case in Cheryl Thomas' 2010 research above n.3.

[147] For example the Roskill Trials above n.8.

[148] Dann and Logan (1996), the Arizona Project above n.106 cf. NZ (2001) above n.4.

and that is to create a simulation which is both credible and provides an accurate basis upon which we can assess the jury. I mentioned earlier that Browning suggested in 1973 that the unique value in simulated trials lay in "their ability to reproduce observed behaviour, even of complex systems, with a high degree of precision."[149] The jury simulation paradigm has, however, been extensively criticised. Two of the most prominent critics have been Weiten and Diamond who, in a seminal paper, considered the issue of whether the jury simulation paradigm provides "an accurate basis for drawing conclusions about real jury functioning."[150] They selected as their criterion for a simulation, any study where the subjects had been asked to "act as jurors" in their research spanned 1969-1978 and they noted that, apart from the Chicago Study, there had been very few documented simulation studies prior to 1969.

Their opinion about the simulation studies was fairly damning as they identified a number of areas where questions about their validity could be raised. For example, they questioned those authors' whose work was based on the view that the simulation paradigm was a convenient way to test theory, asserting that if the results were never to have a practical application in the courtroom then the point of the study must surely be called to question.[151] Additionally, they identified a number of inadequacies in such areas as the sampling and the value of role-playing as well as scrutinizing the decision, in some studies, not to include group deliberation processes. Moreover, they questioned the value of the simulations where the authors included caveats that their results were "merely suggestive regarding the practicalities of jury functioning." Thus, in their questioning of the simulation model itself they highlighted that if progress were to be made to enable better understanding of how the jury functions in the trial

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[149] Browning, R.P. (1973), "Simulation: attempts and possibilities" in Knutson, J.N. (ed.), *Handbook of Political Psychology*, San Francisco, Jossey-Bass at p.348.

[150] Weiten, W. and Diamond, S.S. (1979), 'A Critical Review of the Jury Simulation Paradigm: The Case of Defendant Characteristics,' *Law and Human Behavior*, Vol.3, No1.

[151] See for example Boor, M. (1975), 'Effects of victim competence and defendant opportunism on the decisions of simulated jurors,' *Journal of Social Psychology*, 6, 301-2 who used the simulation method as a way to test theories about juror competence; Cornish and Sealy (1973) above n.55.

situation, then steps needed to be taken to design a research method which went beyond only assessing certain parts of its functioning. Therefore, they acknowledged the merit in making determinations about specific facets of the part of the juror – for example whether or not they would be swayed by defendant characteristics – but they concluded that the method of research must go beyond those specifics if it were to be deemed credible.[152]

Overall Weiten and Diamond concluded that the jury simulation paradigm fell short of its expectations as a vehicle to assess the jury. They were clear in their opinion that the external validity of the research method needed to be robust because it was on such methods that reliance was placed and future research developed. They noted that the simulation process had been used to assess a great many different aspects of the jury from its ability to remain impartial in its decision making and from there the variables which may affect it in this endeavour. In addition to questioning the method itself, they also questioned some of the actual simulations, first making clear that "one cannot carry out a jury simulation without some form of trial simulation."[153] In this respect they criticised much of the research for its brevity, in the sense that the simulations were cut down both in terms of their length and in their detail,[154] highlighting (as Finch and Munro most recently also did[155]) that lack of complexity in a simulation affects the jurors in that they will begin to fill in the gaps in information with their own irrelevant fillers.[156] For example, Weiten and Diamond expressed concern when the content of the simulation was pared down to exclude any extra-legal

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[152] For the defendant characteristics simulations see Mitchell, H.E., & Byrne, D. (1973), 'The defendant's dilemma: Effects of juror attitudes and authoritarianism on judicial decisions,' *Journal of Personality and Social Psychology,* Vol.25, 1, pp.23-129; Griffitt, W., and Jackson, T. (1973), 'Simulated jury decisions: The influence of jury-defendant attitude similarity and dissimilarity, 'Social Behavior and Personality,* 1, 1-7.
[153] Weiten, W. and Diamond, S.S. (1979) above n.150, p.77.

[154] for example in Landy and Aronson's 1969 research they note that the case summaries are only 400 words long, much shorter than the average case summary in an actual trial - Landy, D., & Aronson, E. (1969), 'The influence of the character of the criminal and his victim on the decision of simulated jurors,' *Journal of Experimental Social Psychology*, Vol.5, pp.141-152.
[155] Finch and Munro (2008), Lifting the Veil above n.129, 30-51

[156] See Bermant, G., McGuire, M., McKinley, W., & Salo, C. (1974), 'The logic of simulation in jury research,' *Criminal Justice and Behavior,* Vol.1, pp.224-233.

stimuli as this may have led to the jury relying on stereotypes to fill in the gaps and therefore leading to questions over the validity of the model itself. I should note however that this opinion is not universal. Indeed, Krammer and Kerr have suggested that trial complexity (or simplicity) in a simulation does not necessarily undermine the verdict delivered by the mock jury because "even highly artificial simulations are not *inherently* distorting and may actually inform us on relationships of real significance for law and human behaviour."[157]

This was a point that was raised and assessed in detail in Finch and Munro's 2008 study "Lifting the Veil"[158] in which they considered the findings of such simulations as those carried out by Weiten and Diamond. In their study, Finch and Munro reported that in their focus groups the discussants tended to default to stereotypes when the trial information had been pared down, but this was contrasted with the mock jurors in the simulated trials who, when faced with more complicated (but realistic and reflective of a real trial) information, found it much more difficult to separate out issues of "morally condemnable demeanour and guilt."[159] Linked to this is the issue of role playing in simulated trials. Finch and Munro's research seemed to indicate that when people are taking on the role of the juror in a simulated trial they are more likely to take seriously – or look forward to the consequences of their decisions – than they would in discussion groups. In that respect we can see the merit in this type of research. To counter the concerns over the use of undergraduate students, the participants in their trial were selected from the local population just as a real jury would be selected. Moreover,

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[157] Krammer, G.P. and Kerr, N.L. (1989), 'Laboratory Simulation and Bias in the Study of Jury Behavior,' 13, *Law and Human Behavior*, 89-99 at p.99 [emphasis original]. For similar research see Bray, R.M. and Kerr, N.L. (1979), 'Use of the simulation method in the Study of Jury Behavior,' *Law and Human Behavior*, Vol.3, 107-19.

[158] Finch and Munro, (2008), Lifting the Veil above n.129.

[159] Finch and Munro, (2008) Lifting the Veil above n.129, p.46.

they addressed the problems of minimal or abstract stimuli in the simulation by using "detailed, real-time and scripted mini-trial reconstructions."[160]

Finch and Munro concluded that there is a great deal of untapped potential in the jury simulation model as a way in which to assess juror understanding generally or specifically, in their case, when "assessing juror attitudes in rape cases involving an intoxicated complainant."[161] They were keen to stress that not all of the jurors in their study appeared to be engaged, indeed one spoke only four words throughout the entire process, however, they did not say that this "virtual silence" should equate to lack of interest or lack of understanding.[162] Therefore, they suggested that 'social loafing'[163] may be a feature of both simulated and actual trials but their point was that in their model for juror participation, participation itself could be assessed and addressed better than in group discussions where the facilitator prompted engagement. Finally, they acknowledged and accepted the limitations in the model. Whilst they did not agree with Vidmar that such models are reflective of "legal naivety" they did agree that there is cause for concern in the way that the model has been used in the current research. Therefore in their study they endeavoured to create a situation which was as reflective of an actual trial as possible, with the hope that the research design could yield insights into the functioning of the jury like none before, as well as being regarded as a valid model for future research. Thus, it is apparent that the simulation model, whilst a popular model for assessing the jury, does have problems of its own. Despite that, and leaving aside its synthetic nature for now, it is clear that it is considered by researchers in the field to be the best way in which to conduct research into the jury not least because some say that there is a "dearth of alternatives" available.[164]

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[160] Finch and Munro (2006) (Demon Drink), above n.129, p.311.

[161] Finch and Munro (2008) above n.129, p.30.

[162] Finch and Munro (2008) above n.129, p.48.

[163] Karau and Williams (1995), "Social Loafing: Research findings, Implications and Future Directions," 4, *Current Directions*, 134-9.

[164] Finch and Munro, (2008), Lifting the Veil, above n.129.

Another area of concern about the simulated trial and one which was identified by Weiten and Diamond was the lack of attention paid to the collective decisions of the jury, with much of the research seeming to focus on the verdicts from individual jurors. Whilst they acknowledged that some of the studies had factored in time to assess the group discussions, that time was often very limited and rarely exceeded 15 minutes of the entire research process.[165] They accepted that whilst there was obvious merit in assessing individual elements of how the jury functions and their individual decisions, overall they were of the opinion that if progress were to be made to understand the jury as a group then more time should be spent assessing the group deliberations which came after realistically developed trial simulations. This leads me to the final related point, which concerns the use of filmed or videoed trial enactments. There is a worry that using such a style of enactments only serves to enhance the idea of fiction with the possibility of diverting the jurors' attention away from the seriousness of the trial. Indeed, as Devine *et.al.* pointed out, if simulations are going to be used then they must be as realistic as possible;[166] however by using films or video-tapes this realism is diluted and constantly therefore "reiterates the fiction of the situation to mock jurors."[167]

One of the alternatives to simulated trials that has been used is the use of shadow juries. Just as the name suggests, shadow juries are those who are chosen to shadow actual juries, who listen to an actual trial and who retire to consider their own 'verdict' in tandem with the actual jury.[168] Indeed, this was a technique that Cheryl Thomas used in her 2010 research and whilst the findings in her study are fairly compelling, and I admit that the shadow jurors in her study very closely mimicked those of an actual

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[165] See for example Stephan, C. (1974), 'Sex prejudice in jury simulation,' *Journal of Psychology,* Vol.88, pp.305-312; Izzett, R.R., & Leginski, W. (1974), 'Group discussion and the influence of defendant characteristics in a simulated jury setting,' *Journal of Social Psychology,* Vol 93, pp.271-279.

[166] Devine, D.J., Clayton, L.D., Dunford, B.B., Seying, R. and Pryce, J. (2001), 'Jury Decision-Making: 45 Years of Empirical Research on Deliberating Groups,' 7, *Psychology, Public Policy and Law*, 622-727.

[167] Finch and Munro, (2008), Lifting the Veil, above n.129, p.34.

[168] McCabe and Purves (1974) (Shadow Jury) above n.55.

juror in an actual trial, there is no getting away from the problems with using indirect means of assessment. For example, one of the criticisms that has been made is that they are not realistic enough because the shadow juries know that they are not deciding on a real case or in simulated trials the mock juries, similarly, know that the trial is synthetic and so they may always have this subliminally acting as a barrier to their seriousness when contemplating their verdict. Added to that, if volunteers are being paid for their time then this too may act either as an incentive or a disincentive (if they feel retrospectively that they are not being paid enough for example) and so may impact on their seriousness or focus and as a result may influence their verdict. Thus, where such methods are used, the reports from the studies shall always remain just indications. However, we should not be too quick to dismiss them because the studies that use shadow jurors as the focus, and where the point of the study is judge/jury agreement/disagreement, tend to show high levels of correspondence between the verdict of the actual jury and the verdict of the shadow jury which would suggest that the shadow jury takes on its task seriously and that at least some weight should be placed on the findings of the studies. This was a point raised in McCabe and Purves' 1974 study in which they assessed the verdicts delivered in 30 cases. The shadow juries worked alongside actual juries[169] and in all but one of the cases, they reported that the shadow jury took its task very seriously and "there was little evidence of perversity in the final decisions of these thirty groups."[170] Sealy and Cornish's[171] earlier study showed similar results as those reported by McCabe and Purves and in 1991 Michael McConville reported on a televised study of five criminal trials which were heard by a shadow jury and he found that "overall, the quality and power of the argument within the shadow jury room, and the high level of correspondence between the verdicts of the real and shadow juries, suggests that confidence in the jury is well placed."[172] This finding was

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[169] McCabe and Purves (1974) (Shadow Jury) above n.55.

[170] McCabe and Purves (1974) (Shadow Jury) above n.55.

[171] Sealy and Cornish (1973) above n.55.

[172] McConville, M. (1991), 'Shadowing the jury,' 141, *New Law Journal*, Vol.141, pp.1588-1596, p.1595.

in contrast to his 1974 *Jury Trials* where he and John Baldwin were very clear that trying to assess the jury's performance through indirect means was an extremely difficult undertaking with the result that the indications from the studies should be viewed with caution.

Shadow jury research is less common than mock jury research and this is due in large part to the logistical complications of such projects. As Koski highlights, often such trials are problematic because several factors need to be taken into consideration and these include that "shadow juries require extensive cooperation from one or more courts, tend to involve small samples as a result, and the interpretation of their findings is often plagued by confounding variables."[173] Thus, what we can see happening is that on the one hand we have many simulated trials each utilising mock jurors who take part in a series of specifically designed tests, and on the other hand, the shadow jury who must take part in an actual trial and as MacCoun points out "this at best reverses the dynamic of simulation studies by purchasing external validity at the cost of internal validity."[174] To be clear therefore, more weight was placed on how the research project looked to the government funder than was placed on the efficacy of the results from the actual projects themselves. Moreover, these types of study rely on the shadow jury role-playing at the decision-making stage and so when there is a guilty verdict we actually have no idea about the reasons that led to it – was it based on the same considerations and information or was just a coincidence? This leads me to consider what defines the 'correct' verdict in jury simulations or shadow jury trials.

The way in which jury understanding is often assessed is by testing the verdict of the mock or shadow jury against the verdict of the judge. I have suggested what this does is to create a distorted image of the actual situation because there is the tendency to assume, as was seen in Kalven and Zeisel's study, that where the jury and the judge are

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[173] Koski, D.D., (2002), 'Jury Decision-Making in Rape Trials: A Review and Empirical Assessment, *Criminal Law Bulletin*, Vol.38 pp.21-159 at p.70.

[174] MacCoun, R.J. (1989), 'Experimental Research on Jury Decision-Making,' *Science*, Vol.233, pp.1046-50 at p.1048.

in agreement the verdict of the jury must have been correct. A similar situation was seen in *Jury Trials* where Baldwin and McConville's study indicated that the verdict of the jury was accurate because it was in the majority of cases the same as what the legal professionals in the trial would have delivered. Thus the primary problem with this sort of comparison is that the verdict of the judge or the legal professional is deemed to be the correct verdict and the concurrent verdict from the jury assumed correct if it accords with that of the legal professionals. Until such time as the method for research is significantly altered however, I can see limits in how to test the verdict of the jury without there always being doubt cast for one reason or another. I develop my opinion with concrete suggestions in chapters three and four.

I have identified a number of projects which have been focused on juror understanding. Working on the assumption that jurors bring with them a sense of legitimacy to the trial that it would not otherwise have, I have focused my attention on the research as a way to both clarify this perception for myself as well as seeking evidence in the research which support this claim. Of those projects that I have explored, the majority use as their research method mock juries in simulated trials or shadow juries in actual trials. Thus, the research carried out to date has been predominantly, but not exclusively, indirect. I argue that this is a problem with the current research methods but I shall argue later that it need not remain the case for future research by setting out my own ideas for development in chapters three and four.

Before concluding, I should note again that there has been limited research which has engaged with real juries who have served in real trials. As we have seen, that was the case in, for example, the New Zealand studies,[175] the study conducted by Reifman, Guisick and Ellsworth discussed in section 2.3.2 above[176] and in Severance and Loftus'

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[175] NZ (2001) above n.4.

[176] Reifman *et.al.* (1992), above n.70.

study which was undertaken in 1982.[177] Indeed, in the New Zealand study we saw the researchers engaged in assessing a number of issues which potentially could impact on the jury and which included such procedural issues as note-taking, question asking or selection of the foreman. They did this first by selecting the jurors from forty-eight different trials to complete a pre-trial questionnaire and then interviewing them after the trial. Their results indicated that despite the jurors being conscientious there were nonetheless problems with their understanding of the legal terminology used in the course of the trial. In Reifman *et.al's* research a similar method was used, however their questionnaire was only sent after the trial and was sent to actual and potential jurors. Whilst I can see merit in this sort of assessment to gain a very broad understanding of how the jury operates in the trial, I suggest that ultimately it is lacking because the engagement with the jury that we see is more often than not after the fact. Therefore I can see that this could turn out to be problematic for a variety of reasons which include that those people who had served on the jury may well have a distorted recollection of their time in court. They may not remember parts of the trial or they may remember incorrectly thus calling to question the validity of this method. Moreover, once again this method demonstrates a researcher-led approach, which asks the juror only to respond to what he has been asked to do rather than encouraging proactive engagement on the part of the juror or even to regard the juror as a participant in the trial.

The research to date appears to tell us, first, that there may be problems with juror understanding of legal terminology which I shall return to in detail in chapter three and second, that there are assumptions which social science researchers make about jurors which include that they appear to regard the jury as a passive 'object' to have legal information poured into, be experimented on and then surveyed rather than as a true participant in the trial. In response I argue that by developing a method which is both interactive and integrated we will come to understand the jury better because we will,

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[177] Severance and Loftus (1982) above n.79.

quite literally, be closer to them, and in dialogue with them. I suggest that there is a great deal more to be learned in this field and in the chapter to follow I develop ways in which we could understand both the jury and the research into the jury more clearly through integrating devices thus far untried in this field.[178]

2.4 Conclusion to chapter two

Having reflected on the current research, some common themes emerge. First, there is a presumption that the jury are participants in the trial therefore, many of the supposed advantages of the jury stem from the notion that its participation in the trial brings the sense of legitimacy to the trial process. But, as I demonstrated earlier, this is based on the assumption that the jury does, in fact, participate as opposed to simply being present. I have raised concerns about whether this can be properly characterised as participation – or at least that it is necessary to examine what is meant by participation in this context. I suggest that now is the time to re-think both of these assumptions. Indeed, I shall argue in the rest of the thesis – particularly in chapter four - that we should assume as our starting point that the jury are not participants in the trial as it is currently organised in common law adversarial systems. Second, the research methods that have been used to date are limited in that they have been assessing the jury indirectly through mock and shadow methods. Such methods have dominated the field predominantly because it has been said that there are very few other methods open to researchers.[179] Third, and possibly most important, is that the research into juror understanding largely assumes the passivity of the jury and this is something that I challenge because I do not regard this as the best framework within which to address issues of understanding. Thus, I ask the reader to embrace my ideas for change and to assume that there are other ways to assess a jury which involve direct, real-time, interactive methods. In the remainder of the thesis I demonstrate

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[178] For discussions of the publicity aspect of jurors giving reasons for their decisions, see chapter 9 of Duff, *et.al. Trial* 2, (2006) above n.18.

[179] Finch and Munro, (2008), Lifting the Veil, above n.129.

these ideas with the aim of developing new research techniques which will bridge the gap between the juror and the researcher and which may in turn narrow the gaps in understanding for all of those concerned in the trial.

I now propose that it is time to broaden both our understanding of the jury as well as our aims for the jury, by introducing, and then integrating the work of critical educator Paulo Freire and Theatre of the Oppressed founder and director Augusto Boal into the current trial by jury framework. In the remainder of my thesis I open up the scope for juror participation and communication through using techniques which are new to this field. I hope to demonstrate that we can begin to understand the jury more clearly simply by including them in the actual trial communication. Moreover, I shall demonstrate how to create a forum which will support the jury to be active participants in the trial.

Chapter three

Communication in the trial:

Paulo Freire's Pedagogy of the Oppressed

3.1 Introduction to chapter three

As we have seen in chapter two, much of the existing research is content with equating juror presence with juror participation. I have not however highlighted this as a criticism of the research or the researchers but rather as a crucial point of departure from which to develop the field by examining things from a different perspective. In this chapter I am going to develop this argument by introducing the educational theories of Paulo Freire as a way to help us alter our perspective on how we view issues of juror understanding. It seems that because there are so many concerns over juror comprehension, and that many of the solutions to date have as a central feature giving things to the jury, often referred to as juror education, then at the very least we should look to some education theory to help guide our perceptions in this regard. I have chosen to elucidate my work by using Freire's critical pedagogy because it is in his work that I see so many practical tools to aid or enhance understanding. The primary benefit of using Freire's theories is that he sees education as a participatory process and so through integrating his ideas we can begin to see the jury at work within the current framework. Therefore, as I stress the importance of taking juror participation seriously (in the practical sense) and, in chapter five develop actual ways to achieve this, I hold the jury up to the standards that its defenders claim on its behalf. Thus, through using his codifications and problem-posing we can engage, in real time, with the jury as they take their part in the trial and so, with the use of Freire's problem-posing pedagogy, we can begin to see how it may be possible to create an environment in which true communication and participation is possible. I should be clear however that I have not chosen to use Freire's theories as an alternative means to 'teaching' the jury; rather I

am using it as a way for us to open our perceptions and awareness of the lines for communication and understanding in the trial.

The crux of Freire's theory is that education is not about knowledge *per se* but it is about ideas, it is about engaging in dialogue to generate thought, explanations and understanding. He argues for "critical and liberating dialogue" between the teacher and the student but he rejects the status of the teacher as 'expert,' instead arguing that an exchange of ideas in which both parties benefit and develop is much more positive and productive. [1] Necessarily, therefore, the responsibility for ensuring understanding is placed on both the student *and* the teacher in equal measure. This immediately shifts the emphasis in terms of the student's sense of self in his own learning and so he is elevated to understand and be empowered in *his* own learning and this is fully acknowledged, encouraged and facilitated by the teacher in this situation. By attempting to integrate Freire's theories into the trial this shifts the emphasis for ensuring understanding on to all of the trial players and this in turn means placing more emphasis on *how* the information is communicated rather than, as is currently the norm, on just *what* is being communicated. Therefore I call for reconsideration and a radical transformation of the way that information is communicated in a trial and this requires that we reimagine the role of the jury within that process.

I am not suggesting alternative ways to teach a jury. Indeed, I do not consider that teaching the jury is the key to overcoming either the area specific hurdles or the more general issues which affect understanding and, even if I did, I do not think that legal professionals are best placed to take on the role of teacher. I do want to suggest however, that if Freire's theories were integrated as part of the trial communication then we would be in a better position to assess the jury's overall understanding of both the legal terminology and their part within the trial. I argue that, until we begin to

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[1] Freire, P. (1970), *Pedagogy of the Oppressed*, translated by Myra Bergman Ramos, London, New York, Penguin (subsequently referred to in this chapter as Freire (1970).

integrate the actual jury and so gauge its understanding within the trial through practical means and not simply through observation methods where they are the primary focus for research attention, we will neither really know where the hurdles to their understanding arise nor the true extent of their comprehension. Indeed, I demonstrated in chapter two how a large proportion of the empirical research is not only indirect but that it often assesses the understanding of the jury in isolation, either through the use of questionnaires or through consultation with them after the trial. This tendency to wait until the end of the trial and then to assess juror 'performance' is, in my opinion, too late to make any dedicated attempts to hone responses to problems because the point at which they arise has long passed. The jury therefore needs to be acknowledged as a working part which is integrated into the bigger whole and I suggest that only then can we begin to gauge its capacity as decision-maker in criminal trials.

In this chapter I introduce Paulo Freire's problem-posing education in order to encourage the development of engaged, proactive and critically aware jurors. I discuss the integration of his theories to demonstrate how we can move closer to more effective, participatory and, perhaps even a more legitimate institution of the jury and in chapter five I contextualise these theories by integrating them in a 'mock up' trial situation. As we shall see, Freire argued that a person cannot transform a situation by understanding it alone, instead he stressed that he must be an active part of the situation and in that regard he considered dialogue as the key. In this chapter I am particularly interested in seeing how, if we use Freire's techniques for learning, we can transform communication in the criminal trial. To be clear, however, I am not suggesting that future jurors will change the course of a trial but rather, by being aware of Freire's emphasis on dialogue as a way to understand, I explore the relevancy of his pedagogy in the criminal trial process both as a tool for, and an entry point to, enhanced participation.

The chapter proceeds as follows. First I examine Freire's theory of education - the dominant themes which make it a more adaptable and all-encompassing method for teaching and learning when compared with the more commonly used technocratic systems which are standard in most Western teaching. Second I look more closely at his pedagogy and how feasible it would be to integrate it into the courtroom trial by revisiting the elements of the trial process that I identified to be the most problematic for jurors - I include at that stage a more substantive discussion of the solutions which have been advanced to date to see whether Freire's work could be a valid solution in part or in whole. I conclude the chapter with an exploration of the trial as narrative as a way to demonstrate the difficulty with juror understanding if the form of communication is, as I argue, on-way. Thereafter I towards contextualising these theories in chapter five where I demonstrate how Freire's pedagogy could be integrated into the trial, highlighting the benefits as well as pre-empting some possible criticisms.

3.2   The life and work of Paulo Freire

> "If the dichotomy between teaching and learning results in the refusal of the one who teaches to learn from the one being taught, it grows out of an ideology of domination."[2]

Paulo Freire (1921-1997) was a "pioneer of education for social change" and one of the most influential educational thinkers of the late twentieth century.[3] He believed that education was a life-long process of growth and development, which was an intrinsic element in individual and social realisation.[4] Freire insisted that human beings act not only from habit, intelligence or creativity, but that they exist meaningfully in and with the world of history and culture, created before them but that they were empowered to continue to create and transform. He argued that if we failed to acknowledge the

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[2] Araújo, A. M. and Macedo, D. (eds.), (1998), *The Paulo Freire Reader*, New York, Continuum.

[3] Bell, B., Gaventa, J. and Peters, J. (eds.) (1990), *We Make the Road by Walking. Conversations on Education and Social Change. Myles Horton and Paulo Freire*, Philadelphia, Temple University Press p.xv.

[4] Freire (1970) above n.1 and Freire, P. (1974), *Education for Critical Consciousness*, London, Sheed and Ward (subsequently referred to as Freire (1974) *Critical Consciousness*).

historical, cultural and linguistic praxis which sets humans apart from the rest of the organic world, then we would be unable to transform our society towards a vision of justice and democracy.[5] Freire believed that conventional teaching was oppressive and so to nurture a democratic society the key was in a teaching method based on empowerment and communication through dialogue.[6] This belief was rooted in his early experiences of facing physical, mental, and emotional deprivation as a result of his social class, and was something that he continued to develop until his death.

Freire began his career by teaching Portuguese grammar in secondary schools. In 1946 he moved into adult education and became the Director of the Pernambuco Department of Education and Culture - the Social Service of Industry (subsequently referred to as SESI).[7] Here, he taught illiterate families, through what were then considered non-orthodox forms, how to read and write.[8] He worked at the SESI for ten years and in the *Pedagogía da esperança*[9] (*Pedagogy of Hope*) he notes how that experience formed the basis for his doctoral thesis.[10]

In 1961 Freire was appointed the Director of Cultural Extension at Recife University and here he applied his theories for problem-posing more practically in his work with farm-workers. In 1962 he utilised his problem-posing methodology when teaching 300 sugarcane workers how to read and write in only 45 days. This work involved forming culture circles, using coded pictures (subsequently referred to as a codification) and

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[5] This view is criticised in Bowers, C.A. (1983), "Linguistic roots of cultural invasion in Paulo Freire's pedagogy," *Teachers College Record*, 84(4), 935-953.

[6] Freire (1970) above n.1 especially chapter one.

[7] Gadotti, M. (1994), *Reading Paulo Freire: His life and work*, Albany, SUNY Press pp.5-6.

[8] The non-orthodox form was considered the Liberation Theology which is thought to have stemmed from the Roman Catholic church, in Latin America during the 1950s-1960s. It was known as the Liberation Theology because at the time only literate people were permitted to vote in the presidential elections in Latin America.

[9] Freire, P. (1998), *Pedagogy of Hope: reliving Pedagogy of the Oppressed*, (translated by Robert R. Barr), New York, Continuum Press (Subsequently referred to in this chapter as Freire (1998) *Hope*).

[10] His completed PhD thesis entitled 'Present Day Education in Brazil' (1959) formed the basis of his first book, *Education for Critical Consciousness*. above n.4.

using problem-posing to great success, with the result that the Literacy Programme was developed with the full backing of the Brazilian government in 1963, which saw thousands of culture circles for problem-posing teaching being created around the country.[11] To clarify, a culture circle was made up of a group of adult learners in which the focus of the learning was the world in which the learner lived. Therefore, the learning was developed on real experiences for the participants rather than pre-organised theoretical situations made up by the teachers. Learning based on dialogue was fundamental in the culture circles and formed the basis on which the skills in literacy, both oral and written, would be developed. Those taking art in the culture circles were people living in the community – often those communities were favelas or slums and the scope for inclusion was open to all. The culture circles were so called (rather than simply being referred to as groups) because the subject of the learning, as I have previously said, was developed from the culture of the person learning.

In 1964, following President João Goulart being overthrown by the Brazilian military, Freire was imprisoned as a traitor[12] for 70 days and after a brief exile in Bolivia he travelled to Chile where he lived in exile for five years. It was during this period that he wrote *Educacão como pratica da liberdade* (*Education, the practise of freedom*),[13] *Cultural Action for Freedom*[14] and his most widely known book *Pedagogia do Oprimido* (*Pedagogy of the Oppressed*).[15] *Pedagogy of the Oppressed* has been applied on every continent in different contexts. These have ranged from basic literacy programmes in kindergartens and schools (where Freire attempted to engage the students and parents in discussions about educational and societal matters) to national educational policies

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[11] Freire, P. and Macedo, D. (1987), *Reading the word and the world*, London, Routledge and Kegan Paul, chapter 4.

[12] He was considered to be a traitor for what was considered to be a dangerous and subversive literacy approach.

[13] Freire, P. (1976), *Education, the practise of freedom*, London, Writers and Readers Publishing Cooperative (subsequently referred to in this chapter as Freire (1976) *Freedom*).

[14] Freire, P. (1972), *Cultural Action for Freedom*, New York, Penguin (subsequently referred to as Freire (1972) *Cultural Action*).

[15] Freire (1970) above n.1.

which re-moulded attitudes to education.[16] In 1969 Freire moved to the US where he spent time as a visiting Professor at Harvard University before moving to Switzerland where he was the special education adviser to the World Council of Churches in Geneva.[17] Over the next ten years, he travelled extensively helping underdeveloped countries implement popular education and literacy programmes and as a result his work has had a huge impact in a variety of countries.[18]

In 1979 Freire was permitted to return to Brazil and from then on he worked tirelessly at improving the literacy of the oppressed. He often reflected on his formative years, the poverty of his youth and his surroundings and he never ceased in his search to "address the disenfranchisement of poor people."[19] He produced several books, many of which started out as spoken dialogues and thereafter were committed to the written word, he won the UNESCO Prize for Education for Peace (1986), and he received an Honorary Doctorate from the University of Nebraska at Omaha in 1996 along with Augusto Boal, whilst they were in residency at the Second Pedagogy and The Theatre of the Oppressed conference in Omaha.[20] Paulo Freire died on May 2nd 1997 but his "theory about the relationship between liberation and education has inspired and informed countless efforts to make life more humane for those oppressed by economic

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[16] Gerhardt, Peter-Heinz (1993), 'Paulo Freire', *Prospects: the quarterly review of comparative education* (Paris, UNESCO: International Bureau of Education), vol.XXIII, no.3/4, p.439-458. These policies included: The National Plan of Literacy Training (1963); the national literacy programme in the African State of São Tomé, where the result of the programme was that 55% of the students enrolled in schools were no longer illiterate and of those who had already graduated school, 72% benefited by transforming their illiteracy to literacy.

[17] http://www.pedagogyoftheoppressed.com/author/ [live at 03/07/2013]

[18] See for example Armstrong, George A.W. 'After 25 Years: Paulo Freire in New Zealand, 1974', in Roberts, P. (ed.), (1999), *Paulo Freire, Politics and Pedagogy: Reflections from Aotearoa-New Zealand,* New Zealand, Dunmore Press, pp.23-33 and Freire, P. (1978), *Pedagogy in Process: The Letters to Guinea-Bissau*, New York, Published in collaboration with the World Council of Churches by The Seabury Press (translated by Hunter, Carman St. John) (subsequently referred to as Freire (1978) *Process*).

[19] Williams, A.D. (2009), 'The Critical Cultural Cypher: Remaking Paulo Freire's Culture Circles Using Hip Hop Culture,' *International Journal of Critical Pedagogy*, Vol.2 (1), pp.1-29 p.2.

[20] I use Theatre of the Oppressed to support my arguments in chapter four.

and ideological structures that denied them their dignity, rights and self-determination."[21]

It was in the *Pedagogy of the Oppressed* that he introduced his problem-posing theory for education and it is to that theory which I now turn. In the next section I set out the key concepts of his theory which demonstrate the importance of understanding the environment in which we learn and the impact of dialogue as an enabler of critical understanding and analysis. In so doing I am laying the foundations for my argument of integrating those concepts as a way to reimagine both, how we communicate in the trial, and our image of the role of the jury in that communication. In that exploration I hope to alter existing perspectives on the depth and capacity for communication in a criminal trial.

3.3 Key concepts of Paulo Freire's critical pedagogy

When Freire said that "the more people become themselves, the better the democracy"[22] he was referring specifically to the way that education can subvert or compromise a person's learning because of the way that it is communicated. He said that "Education always implies program, content, method, objectives and so on" when making specific reference to the obviously oppressive facets of technocratic styles of teaching. [23] Whilst Freire was not opposed to set objectives or course content *per se* he was opposed to those points being dictated to the learner with little or no regard for their ability to understand, stressing that when this was / is the case the teaching falls into an undemocratic method for control rather than a situation whereby both the learner and the teacher are on a par, each respectful and respecting of the other. This formed the core inspiration for his critical pedagogy where we see him move the illiterate people of Northeast Brazil from, as Gadotti says, "a culture of silence" because, as a result of their illiteracy they did not have a voice, to a place where,

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[21] Glass, R.D. (2001), 'On Paulo Freire's Philosophy of Praxis and the Foundations of Liberation Education', *Educational Researcher*, Vol.30, No.2, pp.15-25.

[22] Bell *et.al.*, above n.3, p.145.

[23] Bell *et.al.*, above n.3, p.145.

through the power of a new found literacy they could be responsible for their own destiny.[24] Thus, Freire's problem-posing education gave them words and through those words they were able to move and to participate in their own lives and so contribute to the development of Brazil at that time. I now look in more detail at these key concepts.

3.3.1 "Banking" and problem-posing concepts of education

Where "banking" education treats students as vessels in which to deposit information, problem-posing encourages critical thinkers. Where "banking" inhibits creativity and domesticates[25] - although as Freire was quick to point out, it cannot completely destroy - problem-posing bases itself on creativity and stimulates true reflection and action upon reality.[26] In order to fully understand Freire's problem-posing approach it is necessary first to consider in more detail what exactly is meant by "banking."

"Banking" education is focused on depositing information into passive and inactive students. Freire regarded this way of teaching as an instrument of oppression, saying

> "in the banking concept of education, knowledge is a gift bestowed by those who consider themselves knowledgeable upon those whom they consider know nothing. Projecting an absolute ignorance onto others, a characteristic of the ideology of oppression, negates education and knowledge as processes of inquiry."[27]

If we agree with Freire, that libertarian education begins with the solution of the teacher-student contradiction and therefore we need to reconcile the "poles of the contradiction so that both are simultaneously teachers *and* students,"[28] we must look to "banking" with the necessary caution. Indeed, as Freire says, if the teacher regards

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[24] Gadotti above n.7, p.15

[25] Here he used the word domesticates because he saw, through illiteracy the inability for people to develop, to move and to grow.

[26] Freire (1970) above n.1, p.65.

[27] Freire (1970) above n.1, p.53.

[28] Freire (1970) above n.1, p.53.

himself as the opposite to the student and regards the students as ignorant, thus presenting himself as absolutely necessary for their learning, not only does he justify his own existence but he could also oppress or dictate to them thus stifling their will to learn.

Indeed, in Freire's terms "banking" was a reflection of an oppressive society and the "banking" approach, particularly in adult education, would never propose that the students critically consider reality. This leads to the question of the role of the teacher in the "banking" method. Essentially, this person teaches, he knows everything, he thinks, he talks, he disciplines, he chooses, he acts, he confuses the authority of knowledge with his own professional authority, he is the Subject of the teaching. Thus the role of the teacher in the "banking" method is to regulate the way that the world is introduced to, and enters into the student. The core of the "banking" method therefore sees a dichotomy between the human beings and their world. As Freire highlights, these students look *at* the world rather than being actively engaged in and with their world: "the individual is spectator and not re-creator."[29] Therefore the student is not consciously thinking and being encouraged to ask questions as he is learning, rather he is the possessor of *a* consciousness and so is regarded as able only to be 'filled' or 'deposited in' as he sits passively. "Banking" resists dialogue preferring to treat the students as objects, inhibiting creativity along the way and Freire stressed that "banking" domesticates "the intentionality of consciousness by isolating consciousness from the world…"[30]

What transpires is that through "banking" there is little room to develop a critical consciousness. Indeed, the more the students "accept the passive role imposed on them, the more they tend simply to adapt to the world as it is and to the fragmented view of reality deposited on them."[31] In this respect what we can see occurring is that

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[29] Freire (1970) above n.1, p.56.

[30] Freire (1970) above n.1 pp.64-65.

[31] Freire (1970) above n.1 p.54.

where students experience difficulty with a subject, rather than alleviating the problem immediately through dialogue, their problems are exacerbated by the model for communication. In this regard Freire said that "A careful analysis of the teacher-student relationship at any level, inside or outside the school, reveals its fundamentally *narrative* character."[32] This relationship is usually based on two things, the "narrating Subject (the teacher) and patient, listening objects (the students)" and so what we can see is that through this narrative process of education the information or contents of the course become one dimensional and static. [33] Freire suggested that education in this form suffered from narration sickness[34] something which, if not addressed, leads to a variety of emotions or opinions from those learning, including complete disinterest, confusion, detachment and apathy.[35]

The most prominent feature of this style of teaching is that the teacher "fills" the student with his narrative and often the narrative is completely alien to the students, with the result that, although *prima facie* "filled", actual understanding for the student is very likely to be lacking. This however is not a failing on the part of the student but rather is symptomatic of the "banking" system. Freire highlights that the outstanding feature of this narrative education "is the sonority of the words, not their transformative power."[36] Thus, the teacher who only narrates "leads the students to memorize mechanically the narrated content."[37] The teacher therefore is the depositor and the student the depository. The teacher does not communicate but rather "issues communiqués and makes deposits which the students patiently receive, memorize, and

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[32] Freire (1970) above n.1, p.52.

[33] Freire (1970) above n.1, p.52.

[34] *i.e.* that the information becomes lifeless and petrified.

[35] Freire (1970) above n.1, p.52.

[36] Freire (1970) above n.1, p.52.

[37] Freire (1970) above n.1, pp.52-3.

repeat. This is the "banking concept of education, in which the scope of action allowed to the students extends only as far as receiving, filing, and storing the deposits."[38]

Problem-posing education has its roots in the work of both Jean Piaget and John Dewey who encouraged "active, inquiring education, through which students constructed meaning in successive phases and developed scientific habits of mind."[39] Dialogue is essential in problem-posing, indeed it was regarded by Freire as "indispensable to the act of cognition which unveils reality"[40] and in Freire's pedagogy problem-posing is discussed in direct contrast to a "banking" style of learning.

Problem-posing involves all subject matter being questioned rather than accepted as *a* wisdom and so the problem-posing teacher should use the students' thought and speech as the basis for developing critical understanding. In this way, the teacher does not expect the students to "bank" information which is considered to be official knowledge.[41] So, for example, in a law course where murder was the subject of the lesson the teacher may put up a picture which shows a person lying in a pool of blood with a discarded dagger and in the background a person running away into the distance with blood dripping from his fingers. The question for the class would be "what do you see in the picture?" from which a dialogue between the students and the teacher could take place. In my own classes I would move around with the students, I would ask to take part in their dialogues and as a group we would come to the understanding of the subject. In doing this parity is achievable because the gap (both physical and metaphorical) begins to close. I as the teacher literally come close to the students and often I will invite them to take a direct part in their class by, for example, encouraging

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[38] Freire (1970) above n.1, p.53.

[39] Shor, I. (1992), *Empowering Education: Critical Teaching for Social Change*, Chicago, London, University of Chicago Press referring to Piaget, J. (1979) (originally published 1969), *Science of education and the psychology of the child*, New York, Penguin and Dewey, J. (1963) (originally published 1938), *Experience and Education* New York, Collier.

[40] Freire (1970) above n.1, p.64.

[41] Shor, above n.39, pp.32-33.

them to provide diagrams, (either with prior notice for the next class) or on the spot drawing as the class is in progress. Personally, I am perfectly happy to adapt my teaching style to suit the needs of the group being taught and I am unafraid of abandoning any pre-planned style to pick up on what I sense would be a better communication style for the students. This was the essence of Freire's problem-posing and is a style which I consider to be a very effective way to communicate information in any learning environment.

To be clear however, problem-posing is not suggesting that the students have nothing to learn from established knowledge, nor that those who have already acquired that knowledge are not worthy to share it, but rather that that knowledge should be reconstructed by the people learning. What then transpires is that the teacher and the students focus on the underlying assumptions of a course or a discipline and through questions and dialogue the knowledge is contextualised. Therefore, the students in problem-posing education are not reinventing their subjects but rather they are studying in a critical context *with* the teacher who, by listening to the discussion, should guide the learning using a subtle democratic authority. For example in any classroom, the student may ask why the standard textbooks and syllabus are organised in a certain way and the teachers should be willing to consider these not only to be valid questions, but also valuable questions for their own reflection on the way they have constructed their own courses. In the broader scheme this style of education, whilst it may be bound within a broader curriculum, is nonetheless fluid, it is free and, in my opinion, it is exciting because both the teacher and the students are concurrently guiding the learning. One of the keys to the success of the problem-posing method is the ability to find a language which is effective for the whole group, thus in each situation the teacher needs to be prepared to adapt, sometimes very quickly, to the given situation. In this respect the style is organic and evolves with the learners in real time

Thus, Freire's problem-posing education looks first of all for a shared language and from there a dialogue can emerge in which each person has the chance to contribute from his own point of understanding. In his early work, shared language was vital as a means to communicate because his literacy programmes were designed, as I discuss below, for illiterate peasants of North East Brazil. In those programmes the teachers did not pre-prepare material which they *thought* might apply. They did not impose reading books on the student, nor did they introduce standard texts.[42] Instead these projects developed curricula from student culture by researching local issues and language in the students' communities and so selected generative words[43] and phrases emerged.[44]

Thus, when problem-posing places itself in the language and perception of the students it allows for their understanding, their culture and their perception of situations to be built into the study process. From there the idea is that it is easier for the students to understand because they are able to contextualise the subject of their study using their own experience and culture. Whilst these methods may seem to be nothing out of the ordinary, they are certainly less ordinary in contemporary Western education where the emphasis is, as I have said on "banking" within a technocratic framework – very similar indeed to the system of communication that we see in the criminal trial.

From Freire's perspective, it is important to be sensitive to how different people perceive the complex processes of learning and teaching, because that is what both shapes and feeds our work as people who teach and communicate. Giroux said:

> "Critical pedagogy [...] signals how questions of audience, voice, power, and evaluation actively work to construct particular relations between teachers and students, institutions and society, and classrooms and communities [...] Pedagogy in the critical sense illuminates the relationship among knowledge, authority, and power."[45]

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[42] Whilst developments have been dramatic and currently reading books are produced to develop such things as phonemic awareness, fluency, comprehension, text and decoding they were not nearly as developed in the 1970s.

[43] The generative words used when working with the preliterate students in Brazil included slum, land, food, work, salary, vote, profession, government, brick, sugar, mill and wealth.

[44] Shor above n.39 p.46.

[45] Giroux, H.A. (1994), *Disturbing pleasures: Learning popular culture*, New York, Routledge.

There are three assumptions which serve as organising principles in critical pedagogy and they are: (1) Education is *not* neutral; (2) Society *can* be transformed by the engagement of critically conscious persons; and (3) Praxis connects liberatory education with social transformation. These things Freire regarded as crucial in his attempts to tackle the massive problem that Brazil had at the time and it was on principles similar to those that he built his culture circles. Through persistence in these beliefs we shall see how changes can emerge when we look at the transformations from illiterate to literate students that Freire made.

It was as a result of his experiences as the Coordinator of the Adult Education Project of the Movement of Popular Culture in Recife (*Movimento de Cultura Popular*) that Freire came to understand that education techniques needed to be accessible by the people who were using them. The culture circles were therefore created with the objective of offering a new perspective on learning. The relevant topics for debate were group-led and the information was presented at the culture circles with visual aids and the learning was through dialogue, which Freire maintained is a horizontal dialogue or relationship between the teacher and the learner and is the opposite to the anti-dialogue which sees a vertical situation - one in which party A is dominated by party B. The role of the Freire teacher therefore is to enter into the dialogue with the [illiterate] person about concrete situations and to offer him the "instruments with which he can teach himself to read and write."[46] The success of these culture circles was largely down to consistently returning to the basic tenet of raising critical consciousness and empowerment through dialogue.

In order to facilitate this learning Freire needed to transport the learner from the point of being the object (the adaptable malleable vessel) in the learning to the subject who was able to take ownership in his learning through a critical transmission of ideas and the way that he saw to do that was as follows:

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[46] Freire (1974) (*Critical Consciousness*) above n.4 p.48.

a) in an active, *dialogical*, critical and criticism-stimulating *method*;

b) in changing the *program content* of education;

c) in the use of *techniques* like thematic "breakdown" and "codification"[47]

Whilst I acknowledge that "codification" and "breakdown" are two central elements in student-centred problem-posing education, it is with the codification element that I am most interested for the purpose of enhancing juror understanding in the trial.

For clarity however "Breakdown" is the splitting of the themes into their fundamental nuclei and "Codification" is the representation of the theme in the form of an existing situation usually through the use of pictures.

Stage one of the literacy program was researching the vocabulary of the groups to reveal the commonly used words and phrases and in turn, *those* words and phrases were used as the basis of this stage of the program. Here we therefore see the words have meaning in the learner's world and this is conveyed in the codifications.

The codified situation would be projected together with the first generic word. The oral perception is thus reflected graphically / visually and this is followed by debate around the picture. After the situation has been decoded the facilitator encourages the participants to visualise the word and once this has occurred the semantic link between the word and the object to which it is linked is established. This is followed by a picture of the word but without a picture of the object that it is naming and the visuals would be showing the phonetic breakdown of the word. Given that my work is not concerned with teaching people how to read, write and spell, I have chosen to omit phonetic breakdowns that traditionally follow in Freire's work because they serve no purpose for our exploration.

Reading the word in the world was the essence of understanding as far as Freire was concerned, thus he put it at the centre of the students' learning environment. This

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[47] Freire, (*Critical Consciousness*) above n.4 p.45. [emphases in original].

however would challenge the teacher to adapt his communication style accordingly, something that I suggest is vital and so we would do well to give it due consideration when later we consider its application in a criminal trial. Indeed, it is one thing to enter a learning environment and say, for example, this is not working so we must change it, but it is another to be sensitive to those working, very often tirelessly in the field, and to embrace their needs, views, visions and experience. Freire was indeed sensitive to those already working in education. He was however unrelenting in his insistence that those teaching must engage with his ideas because, he argued, only through that integrated thinking could the student move towards a critical consciousness and it was through a mutually understandable communication that that could be achieved. On reflection I see that it is in the 'mutually understandable communication' that we can make progress with the jury.

In the *Pedagogy of the Oppressed* Freire reminds us that people are not supposed to live and grow in silence, but rather they move forward by using words as their communication platform: through words they can act and reflect and through that praxis[48] comes a critical awareness and consciousness.[49] Therefore by encouraging a critical consciousness a person is moved from passive to active and this is achievable through dialogue, where there is a shared respect and where the language is mutually understandable and understood. He taught that the essence of dialogue itself was through the word but that the words are meaningless unless accompanied with critical consciousness. This dialogue, Freire said, could not be reduced to the act of one person "depositing" ideas in another, nor could it become a simple exchange of ideas to be "consumed" by the discussants.

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[48] The characteristics of which are: self-determination (cf. coercion); intentionality (cf. reaction); creativity (cf. homogeneity); rationality (cf. chance).

[49] Freire (1970) above n.1, p.69.

Stage two of the programme saw the selection of the words which have phonemic richness,[50] phonetic difficulty[51] and pragmatic tone[52] and stage three saw the codification of these words. This meant that the words would become the representations of typical situations for the group. Thereafter these representations would function as challenges, "as coded situation-problems containing elements to be decoded by the groups with the collaboration of the coordinator."[53] Stage four of the program was the elaboration of the agendas and stage five was the breakdown, onto cards, of the phonemic families which corresponded to the generic words, as I demonstrate in chapter five when I contextualise the work discussed in this chapter. What should transpire from understanding the core principles of the five stages of the literacy programmes is the emphasis on the group led learning. The nuances of the production of sound and the ability to then write down that sound as a word is not nearly as important as understanding the key inspiration which was empowering people to learn through dialogue which stemmed from their lives and their experiences in their world. I shall now demonstrate how the codifications work in practice.

The "codification" in picture 1, entitled "Man in the World and with the World. Nature and Culture" was one theme which emerged from the early culture circles. From this picture the participants in the culture circle made the distinction between nature and culture. The questions that were asked in this situation included, "Who made the well?", "Why did he do it?", "How did he do it?" and "When did he do it?" From there the same questions were asked in relation to different elements in the picture and through that dialogue two basic concepts emerged – "that of *necessity* and that of *work*;

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[50] Phonemic richness refers to the variants or modifications made to a sound when it is influenced by its neighbouring sounds. Colson, G. (1973), *Voice Production and Speech*, third edition, London, Pitman.

[51] In phonetics the focus is with the *individual sounds*, whereas in phonemics the focus is with the *systems of sounds*.

[52] Pragmatic tone defines a particular standpoint, for example, hostility, tentativeness, happiness or sadness.

[53] Freire (1974) (*Critical Consciousness*) above n.4, p.51.

and culture becomes explicit on a primary level, that of subsistence."[54] Therefore the generative words begin to emerge. The man made the well because he needed water, the word 'water' therefore could be broken down phonetically, ("breakdown" stage) and through that codification (of the picture) and "breakdown" (of the word) we can begin to see how an illiterate person can, in the first instance become empowered to learn and take ownership of that learning. Additionally as the person moves from passive to participatory we can see the transition from illiterate to literate and able therefore to understand that through working the man made the 'house', he made the 'clothes', he made the 'tools' to make the 'house' and the 'clothes'. Each of these words (that I have put in inverted commas) can be broken down but, crucially for the illiterate participant, they have meaning because they have emerged through the dialogue which has at its centre the world of that participant.

Picture 1

"The codification functions as the knowable object mediating between the knowing subjects - the educator and the learners - in the act of knowing they achieve in dialogue."[55] It is in the culture circle that the codification is used in order to generate dialogue and it is the peer group that provides the "theoretical context for reflection

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[54] Freire (1974) (*Critical Consciousness)* above n.4, p.63. [emphasis in original]

[55] Freire (1972) (*Cultural Action*) above n.14, p.85.

and for transforming interpretations of reality from mere opinion to a more critical knowledge."[56] In the culture circles, the reasons for the situations that are depicted in the codifications are discussed. As a result, context is given to the word and the deeper the dialogue, the more reality is revealed. What transpires therefore is a gradual dissipating of the myths which may surround the situation in the image, enabling perceptions to be transformed from pre-conceived notions to critical knowledge of subject.

In 1987 Elsa Auerbach and Nina Wallerstein adapted Freire's use of codifications about daily life in order to develop language skills and critical thinking for work in English as a second language classes in the US.[57] The essence of their work is critical literacy however it offers clear insights into the benefits of student-centred problem-posing. They suggested three basic steps: listening to the students (here their goal is to learn about key issues in their community), dialoguing on these themes (here the goal is to include all of the students, hear all of their views, problems and so on), and thereafter working out ways to act on these problems. Thus we can begin to see how, by posing problems right at the start, the process of participation begins. It is important to highlight that it is the problem *posing* that is crucial, because in the *posing* of the problem we get to the key social and personal issues and not problem solving because problem solving does not necessarily invite a critical mind and, as Ira Shor says, "if problems are posed they are often met with resistance and boredom." [58]

Similarly, when Freire began to teach the illiterate children and adults in Brazil, what he saw was that a "banking" style of teaching as the default and dominant mode for education. Thus, in order to carry out the teaching, Freire needed to find teachers who

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[56] Heaney, T., 'Issues in Freirean Pedagogy'/Thresholds in Education/ 'Freire Issues' section, http://nlu.nl.edu./ace/Resources/Documents/FreireIssues.html.html.08/29/96 and 12/28/99. [live at 03/07/2013]

[57] Auerbach, E. and Wallerstein, N. (1987), *ESL for action: Problem-posing at work*, Reading Massachusetts, Addison-Wesley

[58] Shor above n.39 p.43

were able to deliver the courses using the problem-posing system for communicating the information and so the teachers needed to reassess their image of the role of the student from passive object to active participant of the learning. From that point the courses would be run by encouraging and respecting dialogue. I now put the work of Paulo Freire into the context of the courtroom as I explore its applicability as a means to overcoming barriers to understanding within the current framework.

3.4 The problems identified with juror understanding

In chapter two I argued that while there are good reasons for retaining the jury as decision-makers in criminal trials, researchers have pointed to problems over whether they truly understand the legal terminology and/or the judicial instructions. In this section I explore communication in the trial more closely by breaking down the areas where I consider that things begin to become problematic for the jury. I explore the different ways in which Freire's problem-posing could be integrated and will demonstrate how, through integration of his methods, we could see a trial which has at its core liberating communication which gives potential for each person involved to understand by participating in the process. At the simplest of levels I suggest that if a dialogue which includes, or at least has scope to include, the jury were one of the main communication devices in the trial process this would make us more aware of what jurors do and do not understand as the trial is in progress. Indeed, I argue that unless there is a departure from the traditional norms of research, as well as a change in our understanding of the role of the jury, which is followed by innovations in future research methods and responses, we will never really break boundaries in this area. If my ideas are embraced that would enable us to engage all of the trial participants and through that mutual engagement we would be able to see and hear at which points in the trial communication problems for the jury really do arise, as opposed to surmising

where they might arise and then, as is the case currently, deciding how to respond well after the point where the problem first arose.

As we have seen, there is a large body of research focused on juror understanding of legal terminology as well as significant numbers of projects focused on the impact that extra-legal influences may have on a jury.[59] What I shall later demonstrate is that what we have tended to see is that in the majority of the studies, once the problems have been identified, the response has generally been to implement some sort of method for teaching jurors to better understand the trial with suggestions tending to be centred on giving things to the jury in the form of glossaries, aides memoire or explanatory pamphlets. Whilst I accept that this is important, equally I suggest that this focus on the actual or perceived problems may result in diverting attention away from how the information in the court is communicated between the legal professionals and the jury. Therefore, it may be an idea for the future to adapt the research methods in order to ensure that when the problems are being identified, not only do they include the jury as a part of the equation, but that they respond meaningfully to the clearly identified needs with those responses being direct and immediate and not, as is currently the case, retrospective and often one step removed from the initially identified problem.

To test Freire's methods for enhancing understanding, I will first revisit those approaches which have looked at jury understanding of certain concepts or language in isolation, and then assess the measures that have been proposed or adopted in response. Second, I will move to look at a different approach to juror understanding which looks at how it is linked to narrative structure. This raises different sorts of issues in that it demands an exploration of the trial as narrative which then raises issues

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[59] As was discussed in for example, the rape trials studies carried out by Finch and Munro - Finch, E. and Munro, V.E. (2006), 'Breaking boundaries? Sexual consent in the jury room,' *Legal Studies*, Vol.26, No.3, pp.303-320; Finch, E. and Munro, V.E. (2008), 'Lifting the Veil: The Use of Focus Groups and Trial Simulations in Legal Research,' *Journal of Law and Society*, Vol.35, pp.30-51; Finch, E. and Munro, V.E (1995), 'Juror stereotypes and blame attribution in rape cases involving intoxicants,' *British Journal of Criminol*ogy, Vol.45, pp.25-38 and for the influence of a defendants past convictions see Lloyd Bostock (2000), 'The effect on juries of hearing about the defendants previous record: a simulation study,' *Criminal Law Review*, Sept., pp.734-755.

of the problems which may arise with the delivery of competing narratives. I address

this in section 3.6 below when I consider some of the early research carried out by

Bennett and Feldman[60] and Hastie, Penrod and Pennington[61] as well as some more

recent analysis by scholars such as Peter Tiersma or Brooks and Gerwitz.[62]

My primary aim in this part of the chapter is to assess the possibility of integrating

Freire's pedagogy as a valuable response to the issues of understanding which the jury

may face. In addition I am interested in testing Freire's problem-posing and his

insistence on dialogue when we explore, in section 3.6.1, the story telling theories and

the reliance on narrative in the trial more generally. Therefore, I am keen to test

Freire's problem-posing to see whether the dialogic element or, as Tiersma put it, the

"turn-taking" element of a conversation, can affect the overall understanding.[63]

I have already acknowledged many of the studies which have been focused on, and

attempted to solve, issues of juror understanding. However, I want now to argue that

the central issue is less that of understanding than it is of communication. For

example, Kalven and Zeisel's *The American Jury* assessed both the content and the

timing of the judicial instructions by comparing the verdict of the jury with the verdict

of the judge and measuring the jury's performance against that of "the judge as a

baseline." [64] What we saw was that, in Kalven and Zeislel's study, judge/juror

disagreements were not down to "juror incompetence or unwillingness to follow the

law" but rather were due to confusion about the law and the evidence delivered in the

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[60] Bennett, W.L. and Feldman, M.S. (1981), *Reconstructing Reality in the Courtroom: Justice and Judgement in American Culture*, New Brunswick, Rutgers University Press.
[61] Hastie, R., Penrod, S.D. and Pennington, N. (1983), *Inside the Jury*, Harvard University Press, Cambridge, Massachusetts and London, England; Hastie, R., Penrod, S.D. and Pennington, N. (2002), *Inside the Juror,* New Jersey, The Lawbook Exchange, Ltd.
[62] Tiersma, P.M. (2000), *Legal Language*, University of Chicago Press, Chicago and London; Brooks, P. and Gewirtz (1996), *Law's Stories: Narrative and Rhetoric in the Law*, Yale University Press, New Haven and London.

[63] Tiersma (2000) above n.62 chapter 9.

[64] Kalven, H. and Zeisel, H. (1966), *The American Jury*, Boston , Toronto, Little, Brown and Company, p.9.

trial. [65] This is a key point to consider but one that is easily overlooked when we consider the current responses to the problems in many of the projects highlighted. Moreover, it demonstrates my point that if we were to shift our focus to the means of communication of the information rather than the minutiae of the words used we may be better placed to gauge juror participation overall. Before going on to explore how shifting the focus to the mode of communication can alter our perspective and our understanding of the jury, I shall look back briefly to the key themes of the research discussed in chapter two which demonstrate the core areas where there may be legitimate cause for concern.

One of the core themes discussed was jury understanding of judicial instructions and a key finding in many of the studies was that jurors do find this area problematic. I demonstrated this with reference to a number of studies which included the early work of Steele and Thornburg who found through comparison with other mock juries that jurors did struggle to understand the pattern judicial instructions. [66] I also looked to the New Zealand study which was focused on concerns over juror understanding of legal terminology, in which the focus was on developing as many ways as possible to aid the jury given the concern over their understanding of the legal terminology during the trial process. Their key recommendation was that when the jurors were perceived to have misunderstood complicated evidence, or when they could not recall large amounts of evidence, that the focus should not be placed on the content of the information, nor should the "blame" be placed on the jury, but rather they suggested that more focus should be placed on the judge or legal counsel to see if there were improvements which could be made in respect of their modes of communication. [67] Additionally I looked to Thomas' 2010 study where we saw, again, that the jurors do interpret the instructions

[65] Vidmar, N. and Hans, V. (2007), *American Juries: the Verdict*, Amherst, New York, Prometheus Books, p.149.

[66] cf. Strawn, D.U. and Buchanan, R.W. (1976), Jury Confusion: A Threat to Justice, 59, *Judicature*, 478; Strawn, D.U., Buchanan, R.W., Pryor, B. and Taylor, K.P. (1977), "Reaching and Verdict, Step by Step," *Judicature*, 383, March.

[67] Young, W., Cameron, N. and Tinsley, Y. (2001), New Zealand Law Commission, Report 69, 'Juries in Criminal Trials,' Wellington (also published as Parliamentary Paper E3169), [95] p.37.

incorrectly and this concern was compounded by the fact that many of them did not actually consider their incorrect interpretations of the judicial instructions to be the case.[68]

What these studies highlight for me is that, first, we should be cautious of continuing to gauge juror competence, or assess their ability as fact-finders, by comparisons either with other mock jurors or judges. Second, it is not so much that we should be continuing to focus on the language itself but rather that we should be focusing on the process of communication of that language. If we do not begin to shift our focus, both in terms of our understanding of the trial communication as well as our understanding of the current responses to juror understanding of judicial instructions, we may be in danger of missing out on the opportunity for clarifying juror understanding in a more holistic way. Indeed the majority of the solutions to be found currently are rooted in giving things to a jury with a view to enhancing their recall or improving their understanding of the legal terminology but that is where I suggest that the research is lacking and where I propose ways to develop the field. I should also stress at this point that the existing trial communication and the current solutions to juror understanding are working on a "banking" style model whereas I propose moving more towards a problem-posing vision both of the communication during the trial as well as a possible solution where problems are identified. Therefore, I argue that our research methods need to be realigned in order to achieve the most in-depth understanding possible and our understanding of the role of the jury needs to be reshaped in order to expand our understanding of their limitations. I now expand on this in the following section as I advance some solutions to the problems faced by jurors.

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[68] Thomas, C. (2010), 'Are juries fair', Ministry of Justice Research Series, 1/10, February.

3.5 Solutions proposed

In this section, as I reflect on the solutions, I attempt to map out what is currently available for the jury when they need to gain clarification and as I do that I am looking out for gaps which could be filled with some solutions which have at their root Freire's pedagogy and which I shall later propose.

We have seen both in chapter two and in this chapter that the research suggests that jurors encounter hurdles which impact negatively on their understanding of both the judicial instructions and the legal terminology more generally, with the problems arising being compounded by the fact that jurors cannot seek clarification at the point when they arise. Indeed, as Jenny McEwan highlights, legal professionals have often been reluctant to allow jurors to ask questions during the trial and as Archbold highlights, "The practise [sic] of inviting a jury to ask questions is generally speaking to be deprecated. Jurors are not familiar with the rules of evidence and might ask questions which are difficult to deal with."[69] Thankfully not all those faced with the fact that there is a problem respond to it in such an unhelpful and limiting manner and one such example of a positive response is seen in the New Zealand project.

The New Zealand Project was focused specifically on developing as much assistance as possible for the jurors in criminal trials.[70] Their suggested solutions included note-taking and question asking during the trial, albeit with a caveat that their questions may not be answered, viewing a video which stressed the importance of decision-making, making clear the importance of selecting the foreman and for the foreman, making clear to him his duties.[71] Whilst they found that there was a slight increase in juror understanding when the judge gave a "plain English" response to their questions, overall the jurors struggled with the definition of the various offences, they went

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[69] Richardson, P. (ed.) (2001), *Archbold Criminal Pleading, Evidence and Practise*, London, Sweet and Maxwell, 8.250.

[70] NZ (2001) above n.67.

[71] NZ (2001) above n.67, pp.366-7.

completely off the point *i.e.* they began to construct their own definition of the crime charged, in thirty five out of the forty eight trials tested, and they were totally confused about what was meant by intention.[72] Moreover, in the majority of trials, the judge did not explain the definition of the offences clearly when the jury voiced their concerns and / or confusion and what this indicates to me is that simply reinterpreting the problem in terms of cognitive-cultural terms is not necessarily the answer for jurors who are struggling to understand the language of the trial.[73] Suggesting that judicial instructions are repeated or reworded was certainly not a new idea as we can see when we look to the early work carried out by Charrow and Charrow.[74]

Rather than simply repeating the judicial instructions, as the New Zealand study suggests, Charrow and Charrow proposed the more radical solution of re-writing them or integrating them at a different point in the trial. Thus in 1979 they re-wrote selected judicial instructions in an attempt to appeal more to the jurors' regular modes of understanding. In doing so, they simplified the language and they constructed the sentences in a more normal way, taking out the passive subordinate clauses which were known to cause a great deal of confusion. Having done that, they found that it was indeed the *structure of the language* in the instructions that caused the most problems for the jurors and not so much the conceptual complexity. The most prominent result of their study was that once the language had been simplified, there was a marked increase in juror understanding of the judicial instructions and they were able to recall the evidence more readily and from there they demonstrated a clearer understanding.[75] What these results confirm therefore is that it is not necessarily what is said but how it is communicated that is of vital importance.

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[72] NZ (2001) above n.67

[73] For a US comparison on judicial instructions specifically see Tanford, J.A. (1990), 'The Law and Psychology of Jury Instructions', 69 *Nebraska Law Review*, 71 where the indications from the research were similarly negative.

[74] Charrow R. and Charrow V., (1979), 'Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions' 79 *Columbia Law Review,* 1306.

[75] Charrow and Charrow above n.74.

In the Arizona project we can see some relevant and important suggestions for improving juror understanding. In 1993 the Arizona Supreme Court called for a review of juror comprehension and as a result of that call and the subsequent growing concerns over the comprehension of jurors Judges B. Michael Dann and George Logan III began an investigation into the workings of jury trial at the Arizona Supreme Court.[76] In their project we can see interventions such as video-taping and analysis of jury room discussions being used for the first time in US juror deliberation rooms with the intention of developing understanding of the jury, which would see more democratic and better educated juries. [77] Essentially, their aim was to "assist jurors in organising and understanding the evidence as they hear it, improve their recall, and reduce the chances of their applying an erroneous rule to the evidence"[78] and their main suggestion to enable that to happen was to permit jurors to take notes, ask questions (in written form) and to provide each juror with a copy of preliminary instructions.[79] Their other main suggestion was that jurors be allowed to discuss the evidence amongst themselves whilst the trial was in progress, and where it was deemed to be necessary, for the judge to be a part of those discussions. Their reason for making this suggestion was to try to guard against there being a hung jury in trials where they had misunderstood the evidence.[80]

Whilst Dann and Logan were at pains to stress that this suggestion was to guide the jury discussions rather than to force a particular verdict it seems to me to be a very strange

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[76] Dann, B.M. and Logan III, G. (1996), 'Jury reform: the Arizona Experience', 79 *Judicature*, Number 5, March-April, 280 (subsequently referred to as the Arizona Project).

[77] Hans, V. (2001) 'Inside the Black Box: Comment on Diamond and Vidmar', *Virginia Law Review,* Vol.87, 2001, 1917-1932, p.1917.

[78] The Arizona Project above n.76, p.281.

[79] Despite having read and re-read this point it remains unclear as to whether the said written instructions were judicial instructions or more general instructions for jurors which would help them to orient themselves within the courthouse environment. *cf* the New Zealand study, above n.69, which indicated specifically that jurors became confused by the trial evidence when they tried taking notes because they were unable to keep up with the pace of the oral communication when note-taking. See also Jackson, J. 'Juror Decision-Making in the Trial Process' in Davies, G *et.al.* (eds.) (1996), *Psychology Law and Criminal Justice*, Berlin, de Gruyter, where they discuss the situation in Northern Ireland where note-taking is not advised because it is felt that the jurors would miss vital signs from the trial lawyers as well as the witnesses demeanour.

[80] This discussion was aimed at *guiding* the jurors in their deliberations *not* forcing a verdict.

suggestion indeed. Indeed, if the discussions were only to guide understanding then, it is my opinion that the judge need not have been included in the equation. My position on this point may understandably be regarded as slightly odd given that the thrust of my argument is for dialogue. It is not the suggestion in itself that I am unconvinced by but rather the problems that I foresee if there are no protections in place to prevent the possibility of the judge controlling the process. Research both in the US and the UK indicates that jurors will look up to a judge and so if we transfer this favourable assessment as Heffer refers to it, to a jury room where the judge is party to the decisions there would always be the concern that the jury would defer to his knowledge however impartial he may in fact be.[81] Indeed, by allowing the judge to be a part of the jurors' discussions could easily disempower them whilst at the same time completely undermining the expectation that the jury are impartial. Therefore, without autonomy, I would argue that impartiality in a situation such as the one just described would be very difficult to achieve.

Whilst I have no doubt that the intention at the start of the project was laudable I am unconvinced by the recommendations of the study. I acknowledge that it is 20 years since the project and that we must consider the developments made within the scope of the technological and social advances at the time, nonetheless, I do feel that more could have been achieved if a few more boundaries had been challenged. Whilst I acknowledge that permitting jurors to take notes or encouraging them to ask questions appears to include them and encourage their participation, which could ultimately enhance their overall understanding, all things considered I argue that it is little more than a glorified façade with very little substance. Finally, but most importantly, Dann and Logan, like many before them and even more since, used language which includes "teaching" and / or "educating" the jury. I strongly suggest that using such language as

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[81] Heffer, C. (2005), *The Language of Jury Trial. A Corpus-Aided Analysis of Legal-Lay Discourse*, London and New York, Palgrave MacMillan p.158. For juror deference to Judge's knowledge or status see Zander, M. and Henderson, P. (1993), *Crown Court Study*. Royal Commission on Criminal Justice Research Study No.19, London, HMSO [The Runciman Commission].

well as likening the courtroom to a classroom exacerbates the problems of

understanding rather than alleviates them, especially where the mode of "teaching"

emerges as "banking" style. Second, isolating the jury in the research process only tells

us what the *jury* does which is limiting given that their task is not done in a social or

legal vacuum.

Another type of solution which has been advanced is to provide the jurors with aides in

the form of computer generated information. For example, in 2006 Dunn, Salovey and

Feigenson examined the influence of computer animations compared to diagrams on

juror decision making.[82] As was demonstrated in their study, computer animations are

becoming increasingly popular in US courtrooms and have been used in a range of cases

from vehicle crashes to murder. The animations are offered as demonstrative evidence,

similar to charts or diagrams, and their purpose is to illustrate witness testimony or aid

the jury in understanding the testimony.[83] Thus we can see here that another way to

improve juror understanding of the evidence is to provide animations; however the

associated problem with that is that the animated evidence could turn out to be

regarded as too persuasive by virtue of the fact that it is animated. In their research

Dunn *et.al* found that whilst there was no direct research to suggest that jurors would

be more persuaded by computer animations, there was a very strong possibility that

they would be. This opinion they based on similar research where evidence included

such visual aids as videos or photographs. Additionally, they found that the more

visually impressive the evidence, the more persuasive the jury found them. Therefore

problems arise with such visual aids because the evidence that is given by a witness,

and which is accompanied by an animation, is then regarded as more persuasive

evidence than that given by the other witnesses. I accept that in the study just

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

[83] Dunn *et.al* (2006) above n.82, p.229.

discussed the focus was on enhancing understanding of evidence and not of legal terminology however, I am keen to document it as an example of research which uses a variety of visuals in an attempt to address hurdles which could arise for the juror.

There have been many studies carried out using visuals, be they photographs, video-tapes or diagrams but they are mainly focused on gauging the jurors understanding at the decision-making stage.[84] The problem with this type of analysis as I see it is that the researchers *do not* engage the jury when the jury is examining the visual but rather wait until the end of the trial to assess the verdict against a verdict which has had little or no visual aids. What seems significant here is that so much weight is placed on the deliberation process and, as I have previously suggested, that is far too late to respond to the problems. Moreover, when dealing specifically with the use of visual aids or aide memoires generally, the trend seems to be to introduce them part-way through the trial. Whilst this may work for some people, it may be interesting to see how, if we were to introduce them right at the start of the trial, the jury would fare in terms of their overall understanding. Indeed, as we saw in section 3.3 above, Freire introduces the codifications right at the start of the process to *enhance* and *guide* understanding rather than in the middle or at the end thus giving both scope and clarity from the beginning.

Along similar lines, what we can see in the current research is the jury being treated in Freire's words, as a receptacle to be filled with information which they later should be able to recall and the aides given to them are meant to enhance that recall but at the same time keep the jury contained, as a unit, passive and mute throughout the trial. To my knowledge, no researcher has yet suggested that the jury be encouraged to interact actively in the trial as it is in progress and so in order to understand the view of the role of the jury a little more deeply, in the section to follow I explore the trial as

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[84] See for example, Bell, B.E. and Loftus, E.F. (1988), "Degree of Detail of Eyewitness Testimony and Mock Juror Judgements," *Journal of Applied Social Psychology*, 18, 14, pp.1171-1192.

narrative as another way to understand the part that the jury play in the trial whilst concurrently reflecting on the view taken of the jury by the researchers themselves.

3.6 The trial as narrative

So far I have addressed the key areas identified in the research as problematic for jurors in terms of their understanding of the judicial instructions. In order to gain a deeper insight of how juries understand evidence and argument in the criminal trial, thereby broadening our perspective on the trial more generally, I turn now to the body of literature that is concerned with the trial as narrative. My goal at this stage is not to try to identify any more deficits in juror understanding but rather to allow us to try to understand through the mediums of narrative and storytelling, why and how they come to the decisions that they do. This is an important aspect in jury research because it highlights clearly how, if left to their own devices, jurors will default to systems that they are *comfortable* with in order to make some order out of the trial process. Whilst I acknowledge that autonomy of thought is a good thing, I would say that a framework which has room for unguided or chaotic thinking - which may result in complete misinterpretations of the trial evidence or the judicial instructions - needs serious reassessment. I accept that narrative, as a form of communication, is neither unguided nor chaotic. I also acknowledge the research which explains that lawyers and judges use narrative techniques as a way to try to guide the jury and that narrative has a particular kind of inner structure. I argue however that within the basic narrative structure there is no room for anyone other than the narrator himself and so in that respect, where the narrator conveys information which is for example, confusing, unrepresentative of the truth, vague or a little dull, there is no room for the listener to interject for clarity or interact for discussion. Thus, in the trial we can see a situation whereby the narrator (whoever he may be) guides (or controls) the story on his terms to the exclusion of all others for as long as he has the stand. Therefore, my objection is not so much to the narration itself but rather to its exclusivity in terms of its scope for

interaction as well as the power it affords the narrator to take control of the listener. In short, I would much rather develop a forum on which, if narrative is a part, it is not to the exclusion of all other forms of communication.

3.6.1 The story model

Bennett and Feldman showed in their 1981 study that legal judgement is much more complex than a formal set of rules, processes and procedures, by arguing that those formalities must engage at some level with the parallel social judgment that anchors legal questions in everyday understandings. Their study represents the most influential and important study carried out in this area and so I now explore it further with the aim of understanding the jury in more detail as a result.

Bennett and Feldman's *Reconstructing Reality in the Courtroom: Justice and Judgement in American Culture* focused on how justice is done by ordinary people, sitting as jurors, in criminal trials. They concluded that the [American]

> "criminal trial is organized around storytelling[….] The story is an everyday form of communication that enables a diverse cast of courtroom characters to follow the development of a case and reason about the issues in it. Despite the maze of legal jargon, lawyers' mysterious tactics, and obscure court procedures, any criminal case can be reduced to the simple form of story. Through the use of broadly shared techniques of telling and interpreting stories, the actors in the trial present, organize, and analyse the evidence that bears on the alleged illegal activity."[85]

Therefore, as Bennett and Feldman point out, the significance of the storytelling in the criminal trial should not be underestimated because it is through stories that people can begin to shape the trial evidence into something tangible for them. Insofar as the jury is concerned, Bennett and Feldman highlighted that it is through the structure of the stories that the jury can begin to make comparisons between different versions of

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[85] Bennett and Feldman (1981) above n.60, p.3

events and so can make value judgements on such things as reasonable doubt. Thus, through these comparisons with elements that were familiar to them (i.e. their stories), the jury begin to formulate for themselves levels and standards onto which to compare the standards as they see them revealed in the trial process. Moreover, Bennett and Feldman demonstrate that it is through the use of the story that the jury are able to make order out of the often unstructured evidence, retain the information, solve the problems, organise the information and so on. They acknowledged that this form of information retention and organisation is a common feature of everyday life, thus the effect was made more potent as they explored its application in the legal setting of the criminal trial.

The way that Bennett and Feldman demonstrated the jurors' construction of stories from adversarial presentations of the facts was through analysis of the trial of Patricia Hearst, a story which dominated the news headlines in the 1970s.[86] Hearst was kidnapped by a terrorist group calling itself the Symbionese Liberation Army - the kidnap became international news and attention remained as her kidnappers continued to send messages with demands, to the press. Several months later, Hearst was identified on videotape carrying a gun as she entered a bank with members of the group and stood guard as the group robbed the bank. At the trial both the prosecution and defence agreed that she had been kidnapped so the issue was whether she was a willing participant or was displaying signs of Stockholm Syndrome.[87] If Stockholm Syndrome was a relevant factor then the jury needed to address several normative questions, *inter alia*, if she had been in fear of her life, could she be found not guilty or at least be regarded as less responsible than if she had acted of her own free will.[88] Throughout the trial the defence tried to establish, as an explanation of Hearst's behaviour, threat

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[86] Hearst was the daughter of a wealthy newspaper magnate and was kidnapped at a time of great political and social upset over the Vietnam War and the alleged role of capitalism in creating unjust conditions in society see Vidmar and Hans (2007) above n.65.

[87] Thus, the question would be did she identify with her captors as a reaction to terror and abuse experienced at their hands?

[88] Vidmar and Hans (2007) above n.65, p.133.

and coercion, whereas the prosecution put forward stories that, at the time of the robbery, she had become a loyal member of the group, highlighting that there were ample opportunities for her to escape if she was genuinely in fear of her life, none of which she took.[89] Hearst was found guilty and Bennett and Feldman suggested that the verdict of the jury may have been quite the opposite if the defence had tried to establish that she had been brainwashed rather than coerced, the former presumably prompting the jury to consider a different set of societal norms and human emotions, designed to prompt the jury to be compassionate or sympathetic towards her. Instead, what Bennett and Feldman argued was that the story from the defence was only persuasive as long as the jurors accepted the view that Hearst would have followed similar rules to those that members of society follow when they are in similar coercive settings. Conversely the prosecution delivered a story which had at its core that Hearst had not adhered to the accepted rules of society.[90] What this shows clearly is that the conflicting narratives can have a very powerful effect on the jury. For example, the prosecution will construct the 'he is guilty' story and may do so by developing the facts in an order which creates a compelling story. The defence on the other hand constructs the 'he is innocent' story, developing their information in such a way as to compete with, disrupt or undermine the prosecution's story. Endless possibilities could emerge as the respective sides vie with the other to capture the attention of the jury and so long as that is a feature of the trial there will always be room for the jury either to be so captivated by one of the narratives that they base their judgement on it or, become so confused, or remain so unconvinced that instead they begin to fill in the gaps (in the competing narratives) to make the story fit for themselves. As a result what then emerges is a subsidiary story that may not be grounded in the trial evidence but the extent to which it is removed from the evidence will remain a mystery within the communicative confines of the current framework. When the jury begin to experience

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[89] For example they put forward instances where she was in a car with keys in the ignition therefore suggesting that she could have driven off or that she regularly went jogging on her own, again demonstrating that if she had wanted to, she could have escaped.

[90] Vidmar and Hans (2007) above n.65, p.133.

problems or they become confused and so begin to fill the gaps in the narrative with their own schemata or elaborate enhancements, it is at precisely those points that I suggest the jury are able to enter dialogue making provision to prevent the emergence of subsidiary stories. I do not suggest that these subsidiary stories are in themselves bad, nor do I suggest that there is only a single narrative that is the 'correct' one. I do however suggest that in order to guard against jurors empathising with one narrative over the other, for the sake of the narrative and at the expense of the careful consideration of the trial evidence, we may be wise to enter in a dialogue with the jurors in an attempt to address what of the trial they have really heard and whether that is shadowed by the narrative that the lawyers wish them to hear. Therefore, as long as the trial process remains as it is, with the jury ostensibly excluded and silent, the possibility for clarity emerging from dialogue is slim. Indeed people intuitively use scripts or schemas[91] to make sense of situations and so to expect a jury to do otherwise is unrealistic.

The first thing to say is that I acknowledge that narrative theory does not suggest that there is a pre-framed understanding of the trial and I understand that narrative structures understanding, enabling the jury to make sense of the facts of the trial, without which they may find very difficult. Thus, in any one trial there will always be competing narratives and juries will judge according to which one they find most coherent or convincing and this may be consistent with the evidence to a greater or lesser degree. However, from my point of view, this reliance on or judgement of, competing narrative does not enable a clear distinction for the jury between fact and fiction –which is at the heart of most understandings of the jury – but instead suggests

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[91] A cognitive framework which allows the person to filter, often large amounts of information for interpretation purposes. When using schemas people tend to conform to stereotypes thus making it difficult for the person trying to organise the information if the said information does not fit with the stereotype or norm. Schemas can usually be categorised as "nonspecific but organized representation of prior experiences" – Neisser, U. (1967), *Cognitive Psychology*, New York, Appleton Century-Crofts. One of the primary functions of the schema is "to provide an answer to the question: 'what is it?'" - Taylor, S. and Crocker, J. (1981) 'Schematic bases of information processing', chapter in Higgins, T. and Zanna, M. (eds.) (1981) *Social Cognition: The Ontario Symposium*, Vol.1, Hillsdale, New Jersey, Erlbaum, at pp.89-134.

that this kind of separation cannot easily be drawn by a juror in the context of the trial as it is currently organised. Thus, whilst I do not regard the competing narratives as necessarily problematic, I suggest that if there were a device for clarification available for when those narratives may become problematic this could be regarded as a useful device for the trial communication. This is also linked to Freire's understanding of learning when he suggests that it does involve a kind of narrative but that narrative should not be the dominant communicative method, preferring as he does to promote the use of dialogue.

After Bennett and Feldman's research, there have been a number of similarly focused studies. Reid Hastie *et.al* for example carried out a study which had at its roots the impact of narrative. They concluded that, where the verdict of the jury was considered to be deviant, because it was not in accordance with the verdict of the judge,[92] this was associated with poor comprehension of the facts of the case, the legal definitions of the crimes and the details of the evidence of individual witnesses which became poorly understood and confused as a result of the competing narratives which did not necessarily make any sense for the jurors.[93] This was followed in 1991 by a series of studies in which Pennington and Hastie built on the premise that jurors rely on competing narratives in constructing the grounds for their verdict.[94] They based their hypothesis on the idea that jurors "impose a narrative story organization on trial information"[95] and they considered that juror decision-making consists of three stages: developing stories from the trial evidence, considering the verdict alternatives from the legal instructions provided by the judge (e.g. murder, manslaughter, self-defence) and

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[92] In this context Hastie *et.al.* (1983) above n.61, mean that the verdict of the jury is not in accordance with the opinion of the judge. They base this finding on the research conducted by, *inter alia*, Kalven and Zeisel above n.64; Chabereski, G. (1973), "Inside the New York Panther Trial," *Civil Liberties Review*, 1, 111-155; Ostrom, T.M. *et.al.* (1978), "An integration theory analysis of jurors' presumptions of guilt or innocence," *Journal of Personality and Social Psychology*, 36, 436-450; Diamond, S.S. (1974), "A Jury experiment reanalysed," *University of Michigan Journal of Law Reform*, 7, 520-535.

[93] Hastie *et.al.* (1983) above n.61.

[94] Pennington, N. and Hastie, R. (1991), "A Cognitive Theory of Juror Decision-Making: The Story Model," 13 *Cardozo L.Rev.* 519.

[95] Pennington and Hastie (1991) above n.94, p.521.

then matching the various stories to these verdict categories.[96] Thus, they suggest that the verdict of the jury is the narrative that best fits the verdict category.

As part of their large-scale study into the functioning of the jury, Hastie, Penrod and Pennington assessed the idea that jurors had already formed their opinion, sometimes prior to hearing the evidence. Indeed their studies revealed that jurors tended to rely on storytelling models which lend themselves well to being reinforced by pre-trial publicity and so when evidence was introduced that did not fit with their preconceived ideas, they would distort it to fit instead.[97] Hastie *et.al.*'s research was built in part on the work carried out by Bennett and Feldman[98] who have argued that the verdict of the jury was based in part on relying on the storytelling aspect of the narrative which they understood (for example, a "detective" story that they were familiar with) rather than the trial evidence as it was delivered in court and which they did not understand. Thus the detective stories were the representation of what the jury had understood whereas the trial evidence was what they had misunderstood because of, *inter alia*, its convoluted delivery.

An almost identical conclusion was reached in the study carried out by Kurt Carlson and Edward Russo.[99] In 2001 they carried out two experiments in which they analysed whether jurors distorted new evidence in order to fit it into the verdict which is primarily favoured from the start. Whilst I acknowledge that this may not be directly related to the trial narrative it is nonetheless important because from studies such as these we can gain a better understanding of what is likely to disrupt a juror's focus on the trial. The point of the experiment was to see whether instructions from judges

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[96] Hastie *et.al.* (1983) above n.61, p.135.

[97] Hastie, Penrod and Pennington, (2002), *Inside the Juror,* above n.61 put forward the idea that jurors are more likely to adopt the story-telling model when trying to make sense of the evidence and the trial process.

[98] Bennett and Feldman (1981) above n.60.

[99] Carlson, K.A. and Russo, J.E. (2001), "Biased interpretation of Evidence by Mock Jurors," *Journal of Experimental Psychology: Applied*, June, Volume 7, No.2, 91-103.

would prevent pre-decisional distortion[100] or whether their study would reveal similar results to those indicated by Hastie *et.al* (1983) or Bennett and Feldman. Like Hastie *et.al*, Carlson and Russo found that jurors did tend to distort new information, moulding the evidence through the trial into their pre-decisional opinion. Their ability therefore to listen and to evaluate objectively was formed at the start rather than throughout. Therefore, returning to the issues over their ability to act as impartial fact-finders it seems that there is now a fair deal about which doubt could be cast.

Like Bennett and Feldman, Pennington and Hastie applied the knowledge and research which suggests that people base their interpretations of situations on schemata (topics that they are familiar with) and scripts (information delivered in a coherent form) and alarmingly what this suggests is that when jurors struggle to follow or understand the evidence in the order that it is presented to them, they will resort to relying on schemata and superimpose *their own* narrative on the trial which, as should be clear by now, does not necessarily accord with the actual evidence being presented. Given that stories generally are open to subjective interpretation - and whilst subjective interpretation is not a bad thing per se, indeed, one of the roles of the jury is to give a subjective interpretation - the room for misinterpretation of the events in the trial (both the speeches and questions that are delivered by the legal players and the descriptions in the trial which includes descriptions of what happened when the crime was committed) is high. Thus, I suggest we begin to challenge the generally accepted method of one-way communication in a courtroom by importing Freire's communication devices. In doing that we would be in a position to see and hear the process, or path to the verdict to see whether it is more focused and is based on the evidence in the actual trial rather than a mixture of extra-legal information, stories or schemata. I suggest that predominantly because, whilst I accept that accounts such as those made by Bennett and Feldman or Pennington and Hastie are fairly accurate, they nonetheless

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[100] This means the jurors biased interpretation of new evidence to support their preconceived or favoured verdict.

raise further questions because they could causes problems for the trial as I shall now discuss.

One problem with this kind of account is that it mixes up the delivery of the story with its performance and in so doing the core power of storytelling, as an autonomous communicative device, is firstly missed and secondly becomes confused as it is merged with elements of performance.[101] Therefore, the essence of the story could become distorted if its performance is designed to shift attention, to draw the listener into an alternative or sub-plot, or simply to mislead. Thus, to be clear, when thinking about storytelling it is crucial to understand that art as an art in itself which is driven, first and foremost, by the message in the story and not by dramatic performances of the story. Indeed, I suggest that we separate the two in order to gain a more holistic understanding of their respective core points thereby understanding more clearly their respective power in a trial situation. Indeed, stories come in myriad shapes and sizes and are conveyed through a variety of descriptive mediums which includes oral and visual. Regardless of their medium however, what links stories is that they are recognisable by people generally, and, as Bennett and Feldman point out the story "is an everyday form of communication"[102] contending that, through the use of storytelling techniques, employed by legal professionals, jurors are able to construct their own versions of events, for better or for worse. But, what Bennett and Feldman, and the others here mentioned, do is to draw a link between the story and the telling of that story, hence merging the story with the storyteller and this I suggest is slightly misleading if we are to consider the power of both within the criminal trial. For example, if we automatically link the story with the storyteller we may then produce a false image of what the trial narrative actually is, because we may be in danger of superimposing the skills of the storyteller onto the substance of the story and, as I later argue, we should try where possible to detach the act of storytelling from the story

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[101] Brooks and Gewirtz, (1996) above n.62.

[102] Bennett and Feldman above n.60, p.4.

itself. In reality, a skilled storyteller has the capacity to enhance the substance of any story which could, in turn, persuade or alienate the jury but this does not help us to understand a jury and nor does it help a jury to understand the legal language in the trial and in that sense it could be fair to say that this is a little misleading. This may be regarded by the reader as a little pedantic, however I see that the sense that a juror may have about his task, the picture that popular culture portrays about the criminal trial and so the general impression of the trial may be significantly altered if we are to assume that the narrative of the trial is in some way transformed into a performance of sorts. To do that is to misinterpret the core essence of storytelling.

It is true to say that the narrative is a powerful medium through which stories are told; however I suggest that, if stories are regarded as a platform for imparting information within a criminal trial, then there is scope for manipulation on the part of the narrator or misinterpretation on the part of the listener. We could recognise manipulation as greater emphasis on certain details or as vocal inflections in the form of volume, tone or timbre used deliberately by the narrator as a device to draw the listener in or to divert the listeners attention or focus to the story that he wishes them to hear. Additionally, the research indicates that the jurors create their own narratives from the evidence and so it would be fair to say that different jurors create different narratives but this can be manipulated in the ways just highlighted. Where there are strong disagreements about how to interpret the evidence, the jurors are then forced to reconcile these differences in the deliberation room[103] and that could lead to jurors deviating completely from the trial evidence and so may result in the opinion of the strongest characters underpinning the verdict. When put like that, the introduction or integration of Freire's methods seems to me to be increasingly logical and appealing.

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[103] Holstein, J.A. (1985), "Jurors' Interpretations and Jury Decision Making," 9, *Law and Human Behaviour*, 83.

This very problem was the subject of research by James Holstein in which he presented 48 groups comprising five or six former jurors with a 20 minute video-taped simulation of a trial which involved stealing bricks. During the deliberations Holstein's jurors focused on different interpretations of "what really happened." Using their own experiences and norms the jurors in this study came up with 15 different versions of what happened as they tried to develop a coherent narrative that would justify the verdicts, thus demonstrating realistic and serious problems with continuing to use juries within a framework which sees them defaulting to their own interpretation of the stories which emerge throughout the trial.[104] Indeed, one of the immediate problems identifiable is that the jurors interpret the evidence in story order and not witness order in an attempt to make sense of the information. What transpires however is that the facts may become confused and this is due largely to the jurors organising their own stories in story order rather than witness order.[105] In such cases the jury are apt to confuse fiction with fact and from that point we "endanger the truth-finding function of the adjudicative process."[106] So with all of this information, it is not surprising that there continues to be a scepticism or a lack of confidence in the verdict of the jury. In that respect therefore, I should clarify that this is not necessarily a negative of the story *per se* but we must be aware of the problems which could arise when juries rely on narratives, especially if those narratives are ones that they have created themselves. I discuss this in more detail now, with specific reference to critical pedagogy.

I have previously made clear that discussions of story-telling or trial narrative are fairly often referred to by researchers and theorists when considering the validity of trial by jury and juries' ability to understand the trial in its present structure. By studying the trial narrative we consider the communication aspects and exchanges that take place

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[104] See also Feigenson, N. (2000), *Legal Blame, How Jurors Think and Talk About Accidents*, Washington DC, APA Books, especially chapters 2 and 3 which look at how jurors make decisions.

[105] Kassim, S.M. and Wrightsman, L.S. (1988), *The American Jury on Trial: Psychological Perspectives*, New York, Washington, Philadelphia, London, Hemisphere Publishing Corporation
[106] Dershowitz, A.M. 'Life Is Not a Dramatic Narrative', in Brooks and Gewirtz above n.62, pp.99-105 at p.101.

therein and, as noted by Paul Gerwitz, the trial is "an arena of speakers and listeners, that the trial's search for truth always proceeds by way of competing attempts to shape and present narratives for particular audiences..."[107] Where the scholarship however is lacking is in consideration of how people tell the stories, how they are listened to and how they are interpreted as I highlighted above. For example, if we consider that a fundamental component of critical thinking pedagogy is the relationship between facts and values, we can see why jurors may emerge with several different interpretations of the same story if those facts and values are narrated using performance devices aimed at subverting attention and so on. How those individuals select, arrange and sequence the information in order to construct their picture is, as Henry Giroux points out, more than a cognitive process.[108] On this point therefore I am convinced that there needs to be a communication device, such as dialogue, which can clarify the narrative or at least sit side by side with it in an attempt to re-address the default devices for communication in the criminal trial. Dialogue is therefore a means of communication which sees those involved engaged at a common level and it is through the dialogue that we can see and hear the thoughts, ideas and opinions of the other and in that sense, a transparency emerges. Therefore, in a trial we can identify clarity and precision in the thought processes of the jurors, something which I argue is a vital component for a verdict. It follows therefore that we can also identify where there are misunderstandings, misinterpretations and clouded understanding. I believe that it is possible to create an environment where dialogue is central to the critical learning process and this I demonstrate below when I explore alternative ways to create a trial which sees all trial participants communicating in a way which is conducive to understanding of the trial.

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[107] Paul Gewirtz, 'Victims and Voyeurs: Two Narrative Problems at the Criminal Trial', book chapter in Brooks and Gewirtz above n.62, p.136.

[108] Giroux, H.A. (1978), "Writing and Critical Thinking in the Social Studies", *Curriculum Inquiry*, 8:4, 291, p.299.

Up to this point I have established that stories are very important devices for sorting information which could otherwise become confused or forgotten. Bennett and Feldman have highlighted for example that stories allow the jurors to keep track of the information[109] and more importantly they allow them to interpret the central issues in the cases by identifying them as central *actions* in the stories.[110] They stress that for justice to have meaning, "it *must* reflect the social understandings common in society…"[111] Thus, in this section I am not criticising Bennett and Feldman's theory but I am stressing that having established, as they do, that everyday knowledge is extremely important in the role of juror, that everyday knowledge, or put differently, a person's pre-framed idea of a given situation, must be monitored to lend credence to the verdict. Indeed, if we recall the other studies that I have identified in chapter two which suggest that jurors fail to understand evidence of key legal terms together with the suggestions that jurors may default to their own schemata when trying to decipher the trial evidence, there may emerge justification for monitoring and dialogue in the course of the trial. In this respect therefore I argue that we would do well to pay close attention to Freire's work when he stresses the importance of reading and understanding the word within the persons' world. To clarify my point at this stage, I do agree that to acknowledge communication mediums such as stories is useful for all trial participants not least because they are accessible to all. Bennett and Feldman recognised that stories are judged by a combination of elements and so ultimately the listeners[112] asked "did it happen that way?" and "could it have happened that way?" and they concluded that the structural characteristics of the story are often critical in determining its truth or not. [113]

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[109] Bennett and Feldman (1981) above n.60.

[110] Bennett and Feldman (1981) above n.60, p.19 (emphasis added).

[111] Bennett and Feldman (1981) above n.60, p.21 (emphasis added).

[112] In their study the listeners are the other people in the courtroom and include the people watching from the public gallery or spectators as they refer, the judge, the clerk of the court and so on.

[113] Bennett and Feldman above n.60, p.33.

To conclude, therefore, if we accept the story model, there are two obvious problems that it creates in the trial. First, the narratives are just that – narratives. Therefore, as I highlighted at the start of section 3.6 above, there is little or no interaction, instead the narrator *assumes* the attention of the listener and the listener has little option but to conform to the passive stance of the hearer. The mode of communication therefore is one-way and that is problematic in terms of juror understanding of the judicial language and our understanding of juror understanding. The second problem which I also identified above is that in the criminal courtroom the storytellers have the opportunity to control the central action, animate the central characters and guide the listener through clever narrative, in the way *that they have designed*. Whilst I have set out an argument which says that the true essence of storytelling should be detached from the notion of performance, or at least that the two should not automatically be regarded as one, it is nevertheless the case that the legal professionals do develop stories for the jury and the jury listen to them as if they are stories. One way to address these issues is to integrate Freire's theories for understanding into the trial, thus disrupting the communication as we know it and replacing it with a communication which has at its core problem-posing methods and which sees the jurors move from being only present in the courtroom to being participants in the trial. I shall demonstrate those ideas in chapter five when I contextualise the concepts that I develop through the thesis however, for the moment I have chosen to reserve this chapter to description alone.

3.7 Conclusion to chapter three

I said at the beginning of this chapter that I would develop an argument for integrating Paulo Freire's theories for understanding to demonstrate that, through putting dialogue at the root of the mode for communication in the trial, it may be possible to alter our perspectives on how we view issues of juror understanding in the future. Throughout the chapter I have introduced the core theories in Freire's critical pedagogy and I have

argued for their use as a default communication device in my concept of a criminal trial process. I have given scope to what inspired Freire to develop a system of communication which was inclusive of those on the edges of society with the result that illiteracy was transformed within months and in doing so I have demonstrated the power of integrating a person's world with his learning process. I then introduced the core elements in his pedagogy before identifying the problems with their use in a criminal trial, placing much focus on the problems which may arise if the trial communication is regarded predominantly as a narrative. In chapter five I shall contextualise these ideas to demonstrate how, if we shift our mind-sets, a new way of communicating could be possible for trials in the future. I do that by demonstrating how my concept for a trial communication could work by embedding codifications into the trial dialogue and from there reflect how understanding could be transformed. In the chapter to follow I shall introduce the work of Augusto Boal partly because his work is regarded in small part as a practical manifestation of the work of Freire but predominantly because it is in his theories for communication through participation that we can see empowerment in action and through that empowerment of people a stronger sense of understanding and empathy occurs.

Chapter four

Participation in the trial:

Augusto Boal's Theatre of the Oppressed

4.1   Introduction to chapter four

In chapter three I argued that if we incorporate elements of Paulo Freire's critical pedagogy, especially his problem-posing theory, into the system of trial by jury, there would be enormous benefits in terms of enhanced communication which could bring with it more clarity in understanding for jurors in the trial. In this chapter I suggest that if we add to Freire's work some of the practical communication devices developed by Augusto Boal, this would further develop the potential for understanding, by engaging with elements of space and structure in the criminal trial. The changes that I suggest in this chapter build on the suggestions put forward in chapter three and are based predominantly on devices for communication through participation, which are rooted in Boal's Theatre of the Oppressed. Theatre of the Oppressed is the amalgamation of the various ideas and techniques that Boal developed in his lifetime, some of which include: Legislative Theatre; Aesthetics of the Oppressed, Games for Actors and Non-Actors and Forum Theatre. Of all his work, Boal is undoubtedly best known for his development of, and work in Forum Theatre, and it is on Forum Theatre that I concentrate most in this chapter. What underpins much of this work is Boal's emphasis on communication through participation as a means to empowerment, to a sense of inclusion, or to enhanced understanding of any given situation. In this next step in my exploration of the role of the jury I argue that if we truly understand the difference between presence and participation in the courtroom, we will come to realise - in a practical sense - the untapped potential of both the jury and the spaces within which it currently functions. Additionally, at this stage I draw on my practical experience of working in performance arts and so view the possibilities for the jury from

an artistic perspective, thus drawing into the exploration the diversity of ways that the jury can be integrated into the trial as it progresses, as well as demonstrating in my work another research method for use when trying to understand the jury. By using Forum Theatre as the method through which people are empowered to communicate and to participate, I aim to highlight the points in the trial where the jury could participate meaningfully and I offer practical ways to make that happen. Thus, whilst I do challenge the presumption that the jury, as it currently stands, participate in the trial, I do not make the challenge as a negative but rather I use the current presumption as our starting point as I refocus our image of the role of the jury to broaden further our expectations of its capacity in the criminal trial.

Thus, at the centre of this chapter I draw out the dominant aspects of Forum Theatre,[1] which include the Joker and the spect-actor, because it is through these vehicles that I propose change, not only by re-thinking communication through participation but also by re-thinking how we respond to or regard the space in which that communication takes place. I do not propose to alter the structure of the courtroom because I believe that my aims can be achieved through alternative communication styles that are based in participation thus avoiding the need for architectural or interior design alterations. I do however make a brief exploration towards the end of the chapter into the impact of architecture where I place my focus on the subliminal influence of allocated space on those using it. I do that to emphasise the way that people, often unconsciously, defer to allocated space with that deference serving only to hinder their sense that they are able to or even allowed to participate, so subconsciously undermining their inherent abilities. Therefore, in this chapter I introduce methods which encourage active participation in our communication, and in so doing I am opening the space to enable or encourage as many of the jurors as possible to take their part in the process.

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[1] Which I discuss throughout the chapter.

Boal did not develop his Theatre of the Oppressed from purely artistic decisions or experiences but rather it "grew out of a determined battle to make socially engaged, life-affirming theatre in a climate of extreme repression" with the participatory theories and techniques being developed over time.[2] He did this through collaboration with other theatre practitioners and educators, creating something which had, as he saw it, real tangible value for the people with whom he worked. His Forum Theatre techniques have at their core participation by both actors and spect-actors[3] and it is this aspect of his work I am most interested in exploring. By discovering the power of his method in other spheres I propose to apply it within the criminal trial process.

In chapter three my research was driven by inspiration taken from the work of Paulo Freire but I made it clear from the start that I was not using his critical pedagogy as my basis for 'teaching' the jury; rather I used it for opening our perceptions and awareness of the lines for communication and understanding in the trial proper. Along similar lines, therefore, whilst I have chosen to draw on Augusto Boal's Theatre of the Oppressed, I am not suggesting that the future for trial by jury is to elaborate on its already perceived theatrical dimensions by imposing some Forum Theatre techniques. Indeed, I should say that the links thus far drawn in the literature between the theatre and the criminal trial are rooted, mainly, in their similarities in terms of aesthetics and dramatic performance and should not be confused with my use of Boal's work.[4] Therefore, I do not rely on the trappings of the theatre and by that I mean the tip-up seats, the scene changes or lighting designs and nor do I rely on theatricality or spectacle derived from directorial opinions and styles found in the imagery, sound, and stylistic decisions each designed to affect an audience either by drawing them in or forcing them out to draw links to or advance my ideas for using Boal's form of theatre

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[2] Babbage, F. (2004), *Augusto Boal*, London and New York, Routledge p.2.

[3] The spect-actor is the term used to refer to the spectator when he interacts at the intervention points in the Forum piece. I discuss the role of the spect-actor in more detail in section 4.2.2 below.

[4] I discuss this in more detail below in chapter five when considering aspects of theatricality and ceremony.

practise in the criminal trial. Indeed, the aesthetic space of the theatre – the platform – in my opinion only serves to create separation and division between the space of the actor and the space of the spectator. My work is focused on drawing the two together, not endorsing the gap between them, and so my primary purpose is neither to describe the current system nor to draw out the similarities between theatrical and legal performance. Therefore, examples such as Howard Zehr's comparisons of the administration of criminal justice as, "a kind of theatre in which issues of guilt and innocence predominate. The trial or guilty plea forms the dramatic centre, with the sentence as the denouement"[5] I find to be fairly limiting in terms of broadening our understanding of how information is conveyed. He draws a parallel with a traditional 'play' where the story arches around the central character(s) and makes a link between a criminal courtroom and a theatre – not at any point acknowledging the rich diversity in theatre practice, not unsurprisingly because he is viewing the issue ostensibly from a socio-legal background. This link is tenuous because it relies heavily on theatre *performances* of 'straight' plays as well as assuming that the 'stories' told in court are structured, either into a coherent story form, or at least a recognised dramaturgical form. We know from the discussion in chapter three that the stories told in court are far from coherent for jurors and I would go so far as to argue that reference to theatre performances is, in this instance, a little clichéd. Moreover, in terms of staging, the kind of productions to which Zehr refers are, to the great extent, created to be performed traditionally in conventional theatres to passive and mute audiences sitting in their allotted space observing the acting from the stage afar.[6] It is clear then that drawing distinctions with jurors who are passive and, to the greater extent, separated from the rest of the trial players, is easy to do. In general, little more than lip service is given to the needs of either the actor or the audience in the theatre and this is typical of many of the comparisons between the courtroom and the theatre which rely

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[5] Zehr, H. (1995), *Changing Lenses: New Focus for Crime and Justice*, Scottdale, PA, Herald Press p.77.

[6] Indeed, if theatre were *only* about such performance styles and spaces then perhaps the link would be more authentic.

on the theatre in the stereotypical sense as though this was the very definition of theatre and nothing more. Moreover, often these comparisons rely on the "face-to-face encounters in the courtroom" as a kind of drama thus endorsing the trial as some sort of theatrical performance.[7] These points are made more acute when we consider that Boal's work does not rely on theatre buildings or stages, or indeed any of the trappings commonly associated with theatricality and performance, to have a direct and lasting impact on its audiences.[8] Additionally, a cursory glance at theatre performance today demonstrates that seeing the performance does not necessarily require us to attend a theatre. For example, Catalonia's La Fura dels Baus stage their macro-performances outdoors not least because their sets prohibit performance inside any space let alone a purpose built theatre space[9] and Edinburgh's site responsive theatre company Grid Iron sees audiences attend such venues as a disused paediatric hospital,[10] airports,[11] anatomy departments[12] or public houses[13]. Or when we do visit a theatre, what we see on the stage may be communicated in ways designed to disrupt or distort our ideas of convention. For example in Robert Lepage's *The Seven Streams of the River Ota* we can see both the direction and the design activating simultaneity in the performance itself with the effect on the audience of seeing thousands of stampeding actors with the employment of three people and a bank of ingeniously staged mirrors.[14] Thus, whilst this image of the theatre (be that a proscenium arch, a studio, a black box) may well be

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[7] Mulcahy, L. (2011), *Legal Architecture*, *Justice, due process and the place of law*, Oxon and New York, Routledge, p.176.

[8] Boal's work is not the exception and so for other examples we can look to theatre directors Robert Lepage or Ben Harrison for inspiration on the use of a variety of theatrical conventions.

[9] See for example their first macro-performance *Pepsìclope* watched by 10,000 http://www.lafura.com/web/eng/obras_ficha.php?o=62 or their 2004 macro-performance of *La divina comèdia* http://www.lafura.com/web/eng/obras_ficha.php?o=79 [live at 03/07/2013].

[10] *Ghost Ward*, Directed by Ben Harrison for the National Theatre, location disused paediatric ward in disused hospital (2005).

[11] *Roam*, Grid Iron Theatre Company, location airside Edinburgh Airport (2008).

[12] *What Remains*, David Paul Jones and Ben Harrison for Grid Iron, location Edinburgh University Anatomy department, 2012.

[13] *Barflies*, David Paul Jones, locations various public bars in the UK.

[14] Robert Lepage is considered as one of the most visually inventive theatre directors and The Seven Streams of the River Ota was the first piece created for his own company Ex Machina http://lacaserne.net/index2.php/creation/ [live at 03/07/2013]

the point of the comparison, what life shows us is that *that* is not the case and so I demonstrate briefly in this chapter and more closely in chapter five, that, certainly in part, these comparisons may well be out-dated.

What would it be like if we began to integrate some of the elements of Theatre of the Oppressed into trial by jury? What would the trial look and sound like if Boal's theories were central to the criminal trial framework? Would that bring us one step closer to understanding all of the trial participants, as well as making participation possible for all participants? In this chapter, then, I shall attempt to show how the trial might look or sound different if elements of the Theatre of the Oppressed were integrated into its framework. As a by-product of that investigation I shall show how, in my exploration of the trial 'theatricality', Forum Theatre could be a way in to broaden our perspectives on what 'theatricality' really is and so demonstrate the tremendous power of a different style of theatre when we consider whether or not it (theatre performance) "is a mirror in which may be seen the true image of nature, of reality."[15]

Augusto Boal believed absolutely in the power of drama to change society and transform lives. Through his Theatre of the Oppressed he gave voice to the oppressed and through his life he continued to so do maintaining until his death that "all forms of expression and communication are in the hands of the oppressors" and so to offer tools or avenues for expression which bypassed or surmounted those was his primary aim.[16] He argued that "theatre is the human language *par excellence*"[17] and in that he meant that using theatre as a form of communication, human beings are able to observe their own capacity to witness the "possibility of our being simultaneously Protagonist and

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[15] Shakespeare, W. (1600) *Hamlet*, III.2.20-24.

[16] Boal, A. (1998), *Legislative Theatre, Using performance to make politics*, translated by Adrian Jackson, London and New York, Routledge at p.7 (subsequently referred as Boal (1998) (*Legislative*)) p.21.

[17] Boal (1998) (*Legislative*) above n.16, p.7.

principle spectator of our actions…to reinvent the past and to invent the future...[and] therein lies the immense power with which theatre is endowed."[18] I do not agree completely with Boal when he refers to the language of the theatre as the ultimate mode for clear communication and as a forum through which to alter situations because it is only one mode of communication, and one which may or may not be accessible to many. It should not be elevated to the level of the ultimate because in that perspective we may lose sight of other opportunities for change. I have, however, chosen to integrate the work of Boal for a variety of reasons, not least because I believe that there is certainly a place for practical experience alongside theoretical enquiries as a way to understand better how to integrate jurors practically. Boal's work has the power to break and / or transcend barriers to transform situations which have hitherto remained static for centuries. Thus, through integrating his work as part of my investigation into trial by jury I aim to develop bridges of dialogue between all of those involved in the criminal trial. In this respect, the exploration of Boal's work builds on the work already undertaken in chapter three, as I depart from focusing only on the spoken word to demonstrate how physical interaction can also play a part in enhancing understanding and participation through overcoming barriers to communication.

The chapter proceeds as follows. First I chart the life of Augusto Boal and I illustrate the significance that his early work at the Arena theatre had on his later Theatre of the Oppressed. Thereafter, I consider the potential of the Theatre of the Oppressed as a device for enhancing participation in the current trial. Subsequently I assess the impact of the courtroom architecture and the staging of the trial on all of the trial participants. In so doing I shall look at the extent to which clear communication currently exists between the legal professionals and the jurors and where Boal's techniques might offer possibilities to improve or transform that capacity for communication. The chapter concludes with the script of a short trial that I have created for the purposes of

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[18] Boal (1998) (*Legislative*) above n.16, p.7.

demonstrating Boal's Forum method at work. While the limitations of the PhD thesis in written form prevent me on this occasion from physically showing the work in action, I do the very best that I can to communicate its power within those parameters. Thus, my trial has Forum devices intercut with trial dialogue and where I expect the interventions to be I have 'rough-cut' them to include Joker/Spect-actor or Spect-actor/Actor dialogue. This hopefully allows the reader to assess the effect of the interventions, the use of the Joker and the transformation from passive observer (spectator) to active participant (spect-actor) in a criminal trial.

4.2   The life and work of Augusto Boal

Augusto Boal (1931-2009) was born in Rio de Janeiro, Brazil and grew up under the dictatorship of Getúlo Vargas.[19] In 1952, after graduating with a chemistry degree, he spent a year studying theatre at Columbia University, New York.[20] At that time Boal was influenced by a variety of artists and playwrights who included Abdias Nascimento, founder of the Teatro Experimental de Negro, who introduced him to the black literature and theatre of Harlem, and through those meetings and his subsequent work at the Teatro de Arena São Paulo his own techniques and theories began to take shape.[21] Following his studies in New York he returned to Brazil in 1955 and took up the post of in-house director and writer at the Arena. It was this work, and his experimentation with different theatre techniques that would eventually lead to his Theatre of the Oppressed and it was in this early work that the foundations for the Joker as we now know him were laid.

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[19] For an in-depth look at the political climate of the time see Bethell, L. (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.

[20] At the time the Brazilian government discriminated against the Arts and so for Boal to study in this area he needed continue his studies in science in order to be supported financially, thus he concurrently studied a postgraduate degree in chemistry.

[21] The Teatro de Arena was founded by José Renato. The importance of the work at the Arena has been widely recognised as contributing to the development of Brazilian theatre. (Subsequently referred to as the Arena).

Undoubtedly, the work that was done at the Arena was amongst the most influential at the time in Brazil. When it opened in 1955 it did so as a theatre-in-the-round with the intention that the company would create Brazilian theatre.[22] The creation of such theatre was not the case for several reasons which included the lack of Brazilian scripts and an influx of foreign plays which were better suited to traditional proscenium arch theatres.[23] In 1958, following a period of financial and artistic uncertainty the then artistic director, José Renato took a chance in directing a new play written by Gianfrancesco Guarnieri who was one of the young actors in the company. The piece, *Eles não usam black-tie* (They Don't Wear Black Tie) became synonymous with the change of direction at the Arena and it was shortly thereafter that Guarnieri and Boal collaborated on *Zumbi* which I discuss in more detail below.[24] Essentially there were five stages of work for Boal at the Arena, each distinct in their style but it is with the fourth and fifth stages that I am most interested because it is there that we see the emergence of Boal's Joker and his Forum Theatre.[25]

In the fourth stage a series known as *Arena Conta* shows (*Arena tells of…*), also known as the *Coringa* plays (Joker plays), were produced. The most important in terms of its communication of the text to the audience was *Arena tells about Zumbi*.[26] This was written in 1965 by Guarnieri and Boal with music by Edu Lobo, was first performed in São Paulo in the same year.[27] *Zumbi* was the piece that is intrinsically linked with the

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[22] See for example Boal's own account of his aspirations at the Arena in Boal, A. (2001), *Hamlet and the Baker's Son: My Life in Theatre and Politics*, translated by Adrian Jackson and Candida Blaker, London and New York, Routledge at pp.141-157 (subsequently referred to in this chapter as *Bakers Son*).

[23] Boal (2001)(*Bakers Son*) above n.22.

[24] Boal (2001) (*Bakers Son*) above n.22.

[25] Stage one was the *Realist* (1956-8) stage where the work of Stanislavsky was explored in-depth. Stage two was known as *Photography* (1958-64) because the productions largely reflected the political climate on the streets of Brazil. Stylistically, Stanislavsky was still the main influence. The third stage at the Arena was known as the Nationalization of the Classics.

[26] Subsequently referred to as *Zumbi*. This was a story which was based on an episode in seventeenth century Brazilian history when a colony of escaped slaves in Palmares, who resisted the Portuguese-Dutch troops trying to prevent a rebellion, were attacked and subsequently slaughtered by federal troops.

[27] *Zumbi* was followed in 1967 by *Arena Conta Tiradentes* and in 1971 by *Arena Conta Bolivar*.

work of Boal at the Arena at that time and it is in the development of the piece that we see the destruction of known theatre conventions and the development of both the Joker and the spect-actor. The primary aim of *Zumbi* was the deconstruction of *all the theatre conventions* that had come to represent *obstacles* to the aesthetic development of the theatre. It challenged theatre conventions by quite literally breaking down the barrier between theatre performer and theatre spectator through the integration of the Joker. To that point the full integration of the Joker had not been experienced and as a result the developed integration of theatre spectator to become spect-actor had not yet been an experience of the theatre audience. Thus, *Zumbi* destroyed empathy and identity with the character(s), and challenged audiences to become *emotionless* observers of the action. Boal wanted to tell the story in *real time* and from the perspective of the Arena, its performers and its audience. Crucially, therefore, the story was not narrated as if it already existed, it was narrated solely in relation to the narrator and, as we shall see when we look at the Joker in more detail below, it was the Joker who was the original narrator (although in Forum Theatre the scope for narration comes from each person in the theatre or playing space, because of the invitation to interact which is crucial in Forum pieces). Thus, in terms of narration in relation to the narrator what I mean is that however many times the piece has been performed it will always, in Forum, be different and this is largely due to the re-acquaintance with performativity in the moment of the piece, by all of those in the room. So, to be clear, through the Joker as the 'embodiment of performativity' we can see the spect-actors and the audience aware that they too are in the performance and so the meaning in each show is a different meaning for each person in that moment and, as Schutzman says, "across time."[28] The use of the Joker as a technique of performance, to my knowledge, is still only used in Forum Theatre performances and should not be confused with productions where there is a narrator who acts as communicator of information but as a third party only.

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[28] Schutzmann, M. 'Joker runs wild' in Cohen-Cruz, J. and Schutzman, M. (eds.) (2006), *A Boal Companion, Dialogues on theatre and cultural politics,* New York and Oxon, Routledge p.144.

Zumbi was without doubt the Arena's greatest success, not only from an artistic and production viewpoint but also in terms of its impact on the audience.[29] It was in *Zumbi* that we see a member of the audience become frustrated with the actor who – at the point of intervention – did not carry out her idea the way she wanted it and so she (without prompt) got up and came to the playing area to physically show the actor what she meant him to do. At this point Boal recognised the need for the Joker as the person or device that could offer a solution to the challenges of creating a revolutionary theatrical aesthetic. This was so because it was the Joker who would act as the vehicle through whom the spectator could voice his reaction to what was happening on stage (to the Protagonist) and as a result, alter the path more positively for the Protagonist. Thus, developing the Joker as an autonomous participant allowed for a more nuanced development of the form we now know as Forum Theatre as well as greater clarity in terms of understanding. With the emergence of the Joker came the emergence of the spect-actor and these two characters form the basis of a Forum Theatre piece. Before looking in more detail at those elements, and to add a little more depth to the nature of his work, I now draw a brief picture of the core works in Boal's scholarship.

In the 1960s Brazil endured two military juntas, the first in 1964 and the second in 1968. By 1967 many people working in the Arts in Brazil "had become targets of aggression and censorship enforced by the military and its sympathetic right-wing groups."[30] In 1971 Augusto Boal was arrested by the military in São Paulo who cited his theatre work as "crimes against Brazil."[31] As a result the Department of Political and Social Order imprisoned and tortured him for three months before he was released, thanks "in part to the outcry from many artists around the world who signed a petition against his imprisonment."[32] On his release and despite being acquitted of the charges against him, Boal was forced into exile in Argentina and it was during this time that he

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[29] See Boal (2001) (*Bakers Son*) above n.22, p.241.

[30] Babbage (2004) above n.2, pp.14-15.

[31] Babbage (2004) above n.2, p.15.

[32] Babbage (2004) above n.2, pp.15-16.

developed his understanding of power relationships between the performers and the audience in a theatre. From that understanding came his development of the dialogue between performer and audience member, a fundamental strand of his Theatre of the Oppressed, an interactive theatre style which, as we have seen, encourages communication through participation. Just as Freire argued for dialogic education as an essential element for the emancipation from the oppression of hierarchical education, so too did Boal argue for dialogic interactive theatre as a means to empower the oppressed of Brazil through action and interaction. It is from that political climate that I now contextualise his key texts starting with *The Theatre of the Oppressed*.

Boal argues in *Theatre of the Oppressed* that "all theatre is necessarily political," and in this context Boal is using the word political more fundamentally than that of party politics. [33] For him 'political' "implies not a specific position or set of attitudes but the fact of *connectedness* to the system by which a society is organised and governed."[34] Thus, his reference to all theatre being necessarily political is meant to convey the idea that theatre *affects* the way that society could be organised as well as *reflecting* the way that it is organised and this is possible through dynamic engagement with the systems underpinning it. In *Theatre of the Oppressed*, Boal is trying to show both an analysis of the historical journey of theatre as a process of domination as well as to set out a "manifesto" for a new type of theatre. [35] His argument is not that theatre is necessarily an instrument of propaganda, as I said earlier, but that it is "a training ground for action."[36]

Following the publication of *Theatre of the Oppressed*, Boal spent twelve years teaching the approach to theatre practitioners in Paris and in so doing he established a number of centres for the Theatre of the Oppressed. In 1986, following the removal of the

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[33] Boal, A. (1979), *Theatre of the Oppressed*, translated by Charles A & Maria-Odilia Leal McBride, London, Pluto Press (subsequently referred to as *Oppressed*).

[34] Babbage (2004) above n.2, p.39 [emphasis original].

[35] Babbage (2004) above n.2, p.40.

[36] Babbage (2004) above n.2, p.40.

military junta in Brazil, Boal returned home to Rio de Janeiro where he lived and worked until his death in 2009. In that time he established the major Center for the Theatre of the Oppressed as well as establishing over twelve companies which developed community-based performances. The vehicles through which these community performances were presented were Forum Theatre and Image Theatre. Where the centre point of Forum Theatre is the presentation of a short scene which represents problems reflective of a given community, Image Theatre uses the individuals involved to sculpt relationships between people, emotions or situations which are sometimes accompanied by a narrative and which is developed ostensibly in a workshop setting. Finally, Boal ran as a candidate for Vereador of Rio de Janeiro, similar to the seat of City Councillor. He won the seat in 1993 and whilst in office he integrated Theatre of the Oppressed into the political arena and from that came his Legislative Theatre. When he was in office he used the theatre as his method for effecting change, thus by using Forum Theatre he was able to let the constituents express their feelings about what was wrong in their communities and it was those representations and discussions that formed the basis of the legislation and as he said in Chambers:

> "Hamlet says in his famous speech to the actors that theatre is a mirror in which may be seen the true image of nature, of reality. I wanted to penetrate this mirror, to transform the image I saw in it and to bring that transformed image back to reality: to realize the image of my desire. I wanted it to be possible for the spect-actors in Forum Theatre to transgress, to break the conventions, to enter into the mirror of a theatrical fiction, rehearse forms of struggle and then return to reality with the images of their desires. This discontent was the genesis of the Legislative Theatre, in which the citizen makes the law through the legislator.[37]

I now move on to explore the key concepts of his Theatre of the Oppressed and I begin with his Forum Theatre.

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[37] Boal (1998) (*Legislative*) above n.16, pp.9-10.

4.2.1 Key concepts of Theatre of the Oppressed

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 made up of people from those communities. For example, Headlines Theatre's latest production was focused on people living with homelessness and was the biggest piece of interactive Forum Theatre that has ever taken place, with on-line Jokers facilitating interactions from spectators (and spect-actors) participating on-line around the globe.[38] In a Forum Theatre piece, which is also known as the Model, the central character, (or Protagonist) starts off in a good place, that is to say he is in a positive position in his life. As the piece unfolds he meets a series of obstacles. At each of the obstacles he makes decisions which are negative for him with the result that by the end of the piece he is in a very negative position. For example, the piece may have as its subject drug addiction. The Protagonist starts in a place where he is not a drug user, he has a job, he has a house and so on. In the course of the piece he makes a series of decisions which see him move towards an end in which he is addicted to a substance and to feed the habit he has sold everything he owns, he has lost his house, he has alienated himself from all support networks and, put bluntly, he has nowhere else to turn. Boal is keen to point out that at that end point the Protagonist should be left with no options whatsoever. 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. Boal introduced the term spect-actor to demonstrate his passion for teaching people to act as well as to draw together any gaps in status that may be at play by the use of

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[38] http://www.headlinestheatre.com/pastwork.htm [live at 03/07/2013].

engagement in the issues as well as a critical analysis of them. The spect-actor then improvises with the other actors with his idea to deal with the obstacle more positively. This is known as the Anti-Model. Throughout all of this the Joker is the facilitator, whose role is to enable the dialogue between the spect-actor and the other cast members. His role is also to keep the spect-actor on point and to guard against him going off on an irrelevant tangent.

Thus 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 needed for the spect-actors.[39] The Joker both instigates and facilitates dialogue and, just as Freire put a great deal of emphasis on the importance of praxis, so too did Boal see the real benefit in acknowledging "the inseparability of reflection and action, theory and practice."[40] This is clear to see in his use of the Joker as both the narrator who addresses the spect-actor directly, and also a 'wild card' who is able to jump in and out of character, in any role, at any time, thus the versatility of this person should not be underestimated. It is essential that Jokers remain impartial at all times when participating in the Forum scene and people trained as Jokers expect and accept this as an integral part of their task. There is always scope however to perceive the role of the Joker as a negative one, being regarded as, for example, the manipulator able to abuse his skills and so use them to negative effect. I discuss this later when forecasting the objections to my suggestions.

The Joker should not be the controller of the Forum piece – he is only the facilitator of the interventions.[41] Therefore, he takes control of the situation only in so far as he is

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[39] 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 which directly impacts on the spectator and is directly influenced by the spectator.

[40] Schutzman (2006) above n.28.

[41] Boal (1979) (*Oppressed*) above n.33, p.178 and Schutzmann above n.28, pp.143-5.

sensitive to, and reflective of, the spect-actor's voices.[42] He does not at any point

intervene in the Forum piece and so, if the spectators do not intervene, the piece will

progress to its original conclusion. Finally, he should be acting in accordance with the

ethos which underpins Boal's Forum Theatre which is that in situations where people

are oppressed, lines of communication are opened, thus enabling the oppressed to have

a platform on which their voice can be heard and their opinions taken on board when

considering their path forward.[43]

Whilst each Joker may have his own personality and way of approaching the various

interventions, it is nevertheless imperative that they adhere to the unspoken, but

obligatory rules of responsible Jokering.[44] First Jokers should avoid *all* behaviour which

could manipulate or influence an audience. They should not draw conclusions and they

must always open the possible conclusions to debate. They should avoid 'yes'/'no'

answers, instead enabling debate by the use of open questions in the third party.[45]

Second, Jokers should *never* give their personal opinion and should not make any

judgements or decisions.[46] The Joker should constantly relay any doubts which arise on

the stage[47] back to the spectators by asking such questions as "does this work or not?"

or "Is this right or wrong?" so that it is the spectators that will always make the final

decision at the intervention points. This principle is especially important when the

Joker deals with spect-actor interventions because without sensitive jokering the

interventions could turn into debates which, as I have already said, are neither the aim

nor the recommendation for a Forum scene. Jokers should also be on the look-out for

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[42] See for example Diamond, D. (2007), *Theatre for Living the art and science of community-based dialogue*, Trafford Publishing from p.172. (subsequently referred to in the chapter as *Living*)

[43] See for example Boal (1979) (*Oppressed*) above n.33, when he discusses the need for the Joker in chapter 5 pp.174-6.

[44] The information on the skills of Jokering has been developed through talking directly with a practising Joker who learned her skills in workshops with Augusto Boal and Adrian Jackson therefore to give precise citations is not possible however, for the standard theory see Blatner, A and Weiner, (editors) (2007), *Interactive & Improvisational Drama: Varieties of Applies Theatre and Performance*, Lincoln NE, i.Universe Books, chapter 21.

[45] Discussion with practising Joker and see also Boal (1979) (*Oppressed*) above n.33, chapter 5.

[46] Discussion with practising Joker.

[47] Or in the game if it is a Theatre of the Oppressed workshop.

'magic' or 'inadequate' solutions. For example, sometimes the spect-actors will stop the action and offer solutions which are unrealistic and / or unattainable.[48] In such situations the Joker should step in and crucially first ask the audience what they think rather than highlighting that the spect-actor has intervened with a 'magic' or 'inadequate' solution as clearly this may only serve to undermine the confidence of the spect-actor.[49] The conduct and physical stance of the Joker are also very important factors in the communication. Whilst he may be tempted to sit next to the spect-actor, this should be avoided because it can be intimidating or demobilizing and could be extremely counter-productive when trying to encourage interaction, communication and participation. Finally, the Joker is there to help the spectators gather and formulate their thoughts and through question asking and addressing their doubts he can guide them to their actions which, ideally, can see new lines of communication and ways forward *for them*. The training for the Joker is, by-and-large, transmitted orally through work-shopping with other Jokers and Theatre of the Oppressed practitioners. As such there is no official rule book or guidelines to which Jokers must adhere. Like many things, the learning and teaching of such skills comes from building relationships with practitioners in the field and working with the skills at a practical level rather than theoretic discussion of the sort which may be more likely in other fields.

In Mady Schutzman's analysis of the Joker she highlights that there is no place in Theatre of the Oppressed for a trickster who is disguised as a Joker.[50] She argues that this type of character, who remains on the periphery, acts only for his own gain, is loyal only to himself, and acts for political gain rather than common beliefs should be avoided. This is so because it is Boal's Joker who has learned the rules and should therefore adhere to them in order to avoid any negative outcomes. Schutzmann also

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[48] Boal, A. (1992), *Games for Actors and Non-Actors*, translated by Adrian Jackson, London and New York, Routledge, p.234 (subsequently referred to as *Games*) and discussion with practising Joker.

[49] For a more in-depth discussion of the nuances of the magic solutions see Boal, (1992) (*Games*) above n.48, p.233.

[50] Schutzman (2006) above n.28, pp.133-145.

suggests that there is no place for the Joker who stands on the periphery and refuses permanency, but I would argue that *that* is not such a bad thing, and certainly in a criminal trial I would argue that this could prove to be invaluable. Overall, the Joker reminds us that the situation we are trying to function in cannot be understood in isolation and, as I shall demonstrate, this may be very pertinent and applicable in a criminal trial as we see him building bridges of dialogue to enable clear understanding for all of the trial players. On that note then, I move now to consider the function of the spect-actor before assessing the relationship between him and the Joker.

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."[51] Therefore, Boal believed that the key to enabling non-actors to use language to their advantage was in teaching them. This is the practical root of the Theatre of the Oppressed techniques, particularly those used in the workshops which include Forum Theatre. Boal says that there are no passive spectators in the Theatre of the Oppressed, arguing that people are active in the fact that they have come to take part and that participation is up to them.[52] Crucially for our purposes when thinking later about the trial, the difference between the passive juror and the passive Boal spectator is that the former does not have the option to become active whereas the latter is positively encouraged to act. Indeed when interviewed Boal said, "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

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[51] Boal (1992) (*Games*) above n.48, p.xxx.

[52] Boal (1992) (*Games*) above n.48, p.238.

spectator."[53] The word "spect-actor" should therefore be understood both in practical and theoretical terms. With reference to its practical application we see it as a feature of Theatre of the Oppressed workshops as well as Forum pieces – when the spectators enter at the intervention they become the "spect-actor" – the term based on the words spectator and actor. In theoretical terms the "spect-actor" is an acknowledgement by Boal of Freire's critical pedagogy. Based in the development of the critical consciousness, with the result that as the "spect-actor" is encouraged to engage in the action he, or the other participants, may enact, he is also encouraged by the Joker to be critical and to analyse the action. Therefore he steps back and sees the whole picture and not simply the part that he is involved in at that particular moment. 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 later in the chapter) full engagement occurs when the spectator is actively engaged in the action of the Forum or the games or structured exercises of the workshop techniques. When the Joker is included in the scene the dynamic is once again changed; indeed he, by virtue of his commentary and interviews (in the workshop), disrupts conventions or norms by switching roles. I discuss this in more detail in the section to follow but, to clarify, the emergence of the "spect-actor" is a demonstration by Boal of his deep passion that every person should be taught to act and the way that he saw to do that was through full and frank engagement in an issue and then a critical and self-reflexive analysis. This issue of the spectator being encouraged to act and actively participate in the action is something that I address later in the chapter, when I consider the possibilities for and the attitudes towards participation in the courtroom. I should highlight at this stage however that the critical difference as I see it between the criminal trial and the Boal Forum is that in the former there is

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

currently very little room for participation whereas in the latter it is very clear that there is every opportunity for participation within the limits of the Forum itself. In many ways it is safe to say that the Joker and the spect-actor each rely on the other to function properly. Ostensibly the Joker lies redundant until the spectator takes on the role of the spect-actor and only then can we see the transformations occurring, but also begging the question – what if the spectators never stop the action?

Boal was very clear that people cannot remain spectators when in a Forum Theatre session and he agreed with Cuban poet José Julián Martí Pérez (1853-1895) who said "*Doing* is the best way of saying."[54] He was not saying that participation should only be regarded as such if it is demonstrated overtly and as such he recognised that those taking the time to attend a Forum Theatre piece were participating by virtue of that attendance alone. Indeed he said of Forum Theatre audiences that no-one could:

> "remain a 'spectator' in the negative sense of the word. It's impossible. In Forum Theatre, all the spect-actors know that they can stop the show whenever they want. They know that they can shout 'Stop!' and voice their opinion in a democratic, theatrical, concrete way, on stage. Even if they stay on the sidelines, even if they watch from a distance, even if they choose to say nothing, that choice is already a form of participation. In order to say nothing, the spect-actor must decide to say nothing – which is already acting."[55]

Having thus far drawn a broad picture of the work of Boal and the key concepts in his Theatre of the Oppressed, I now consider some of the limitations and developments of his work.

4.2.2 Limitations and developments of Augusto Boal's work

So far I have identified the key techniques in Forum Theatre and I have shown how they can be used to transform communication in a theatre setting first, by breaking down the barriers between the spectator and the actor and second, by facilitating the input from the spectator, we can see a transformation at the end of the Forum piece.

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[54] José Martí (1985) *Poesía completa. Edición crítica* (emphasis added)

[55] Boal (1992) (*Games*) above n.48, p.244.

Additionally, by using Boal's techniques we see the transition from passive spectator to active, engaged and involved spect-actor. Whether or not the barriers discussed so far are actual or perceived is a matter of subjective opinion or interpretation, but the fact remains that through Boal's methods we see a coming together of the two and as a result the meaning of participation changes from something that someone else may do, to something that everyone can do if they wish to. By looking now at some of the limitations and subsequent development of his work I aim to give as broad a perspective as possible of it, before proposing to integrate it into the criminal trial. I begin with the limitations that Boal saw *of* and *in* his own work before looking to some of the constraints observed by others of his work. I have already highlighted that Theatre of the Oppressed encompasses all of Boal's work, however, given that my thesis is concerned predominantly with his Forum method, I have contained the discussion at this point to focus on that aspect alone.

First, Boal recognised that Forum will not be appropriate in every single situation. He cites a variety of examples where it would not be appropriate, each one Forumed in an actual workshop situation: where a man is trapped in a gas chamber moments from his death and the executioner opens a cyanide capsule; when a young girl is raped by four men when standing alone in a deserted subway station; or when a woman is beaten by her husband. In such situations Boal is clear that there is practically nothing that can be done to bring a different ending. "The girl can run and call the station-master. The woman can scream. The man can call for help. Then what?"[56] Essentially, what differentiates these stories from Forum scenes is that these are about physical aggression and so the solutions in the Forum scene primarily lie in physical responses. Thus, such situations are not fitted to Forum Theatre because they "do not present *oppression* against which one can struggle but *aggression* which one cannot evade."[57] This is a very important point to clarify given that in section 4.5 below the reader will

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[56] Boal (1992) (*Games*) above n.48, p.225.

[57] Boal (1992) (*Games*) above n.48, p.225.

see that I have chosen a murder as the subject of my fictitious trial which, by any standards involves physical aggression. In this respect, it would be understandable to challenge my choice of crime, indeed, to challenge my entire argument for using Forum and the Joker in the trial process. However, my point is not to ask the jury to participate in changing what has already happened (or not) in the crime charged. I am not suggesting that the jury deliver the 'magic' answers, but rather I am asking them to participate in real time in the trial and where they have difficulty in understanding, that they are empowered through Boal's theories to participate with the point of enhancing their own understanding of the language that, hitherto they may have found difficult.

The next thing to consider is whether it is necessary to come to a solution when in a Forum scene, something that Boal was undecided about. Essentially the solution is not the primary objective, but rather, as Boal was keen to highlight, it is better to have a good debate than to come to a good solution. Thus through the dialogue came the debate and the critical analysis of the peoples' situation by the people. In turn came real understanding and real solutions for action and progress which were rooted in those peoples' ideas rather than rooted in what was being told or dictated to them.[58] I acknowledge, of course, that the trial must come to a solution, however I would argue that through integrating these methods we can develop a system whereby jurors are given the opportunity to clarify their understanding before coming to their conclusion.

One of the most important problems encountered when using Boal work is that in the Forum pieces there is usually only one protagonist and therefore the scope for intervention is necessarily limited. This is something which is discussed and thereafter developed by David Diamond. Whilst Diamond is renowned for his Forum Theatre productions, with the influence of Boal very plain to see, he is nonetheless critical of some aspects of Boal's work, viewing the world from a social systems theory lens as

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[58] Boal (1998) (*Legislative*) above n.16, especially p.19 where he refers to the idea of 'transitive' or 'participatory' democracy.

developed by Niklas Luhmann.[59] In this regard therefore systems theory "recognises that the binary poles of oppressor and oppressed are actually part of the same large organism living in some kind of dysfunction."[60] What Diamond is saying, then, is that people are not prisoners of the structures in which they live. "Nature teaches us that structure is created in patterns of behaviour – not the other way round. Working politically to alter the structures in which we live without changing the behaviour that creates those structures is futile."[61] Diamond in his *Theatre for Living* sees the communities that he works with as living organisms, and so when they create the plays they do so not just to challenge and change the structure (as Boal's work does predominantly) but to change the *behaviour which creates the structure*. In this respect Diamond challenges Boal at a fundamental level. He stresses the need for multiple interventions thus allowing for a greater scope for the spect-actor. This is very different from Boal's Theatre of the Oppressed, where Boal stressed that the "spect-actor" should be a person who has had the same, or similar, experience as the character, either by identity or by analogy. As a result then, in Diamond's Theatre for Living, he literally "broadens out the invitation of who can replace who in a Forum Theatre event."[62] Probably the most obvious example of this broadening out is seen in Theatre for Living's 2004 production *Practising Democracy* which was created and performed by people living in chronic poverty. The entire play was structured to have no obvious oppressors or oppressed, thus the interventions could be with anyone, by anyone and about anything. What this does therefore is it breaks the boundaries of Boal's work quite significantly, taking it to a new level in which all of those involved could be challenged, perhaps to levels that they had not expected.

If we consider the broadening aspect of Diamond's work as a further way in which to engage jurors in the courtroom I suggest that we could, ideally, develop communication

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[59] Luhmann, N. (2012), *Introduction to Systems Theory*, (translated by Peter Gilgen), Polity Press, London

[60] Diamond *Living* above n.42, p.38.

[61] Diamond *Living* above n.42, p.38.

[62] Diamond *Living* above n.42, p.39.

around a hybrid of the work of both Boal and Diamond as a starting point. I have continually suggested that lines for communication must be enabled to facilitate clarity of understanding by jurors whilst a trial is in progress, therefore, by using Diamond's extended Forum style we may be able to encompass more individuals into the communication of the trial thus allowing for multiple points for intervention which could lead to enhanced understanding. I have already indicated that I do not suggest extending the interventions to include questioning the accused because, in my opinion, that would undermine the ethos of Boal's work. Indeed, if we accept at the most basic of level that an accused person is innocent until proven guilty, together with the idea that justice is achieved through a trial process, then essentially the accused is in a position of oppression as he stands trial. Thus, if we were to open the floor to investigations and / or questions from the jury this could be regarded as further oppressing the accused, something which undermines the work of both Boal and Diamond and is something that I am keen to avoid.

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 opens 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 the on-lookers, for example, the researchers or analysts can see and hear where these things are understood and where the understanding strays from the legally expected and accepted norms. Whilst part of the role of the jury 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, but I do believe that the process through which the jury 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 just that. 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 part, and so the subsequent participation between the other trial players, may aid in the creation of a fresh new perspective in his part of the justice system which has been the subject of debate for several decades.

I have already demonstrated in chapter two that participation by the jury has long been regarded by many as crucial for a variety of reasons which includes that they bring a sense of legitimacy to the trial that it would not otherwise have.[63] I have suggested that this might be due to a variety of reasons which includes their ability to reflect community standards or their superior fact-finding ability. Whilst these arguments are valid in themselves they none-the-less hinge on the assumption that the jury *are* participants – in real time - in the trial process, something that I do not believe to be the case. Indeed, I have argued from the start of this project that whilst the jury are undeniably present in the trial process their presence does not equate to their participation within the current trial format. Thus, to make my position very clear I shall now unpack the concept of participation before drawing a picture of what I forecast it could look like and why I suggest that, with the inclusion of Boal's Theatre of

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[63] See chapter two sections 2.2 and 2.3.

the Oppressed, my ideas could amount to true and meaningful participation for the jury as the trial progresses.

4.3   To what extent do the parties participate currently and what solutions for enhanced participation have been advanced to date?

In chapter one I drew attention to the different forms of participation in a very general sense and then to the types of participation which, I argue, are a feature of the trial as it is currently structured. In this section I look more closely at the different parties in the trial and to the scope for their participation before then looking to the ideas which have been put to enhance juror participation within the criminal trial.

"When an accused is charged with a criminal offence [...] he is called to answer a criminal charge brought against him, and if he is criminally responsible, to account for his conduct."[64] This model of the trial dictates the format of the proceedings and entrenched within that are the places for the different voices to be heard through participating in oral form. 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 but as we have come to understand their scope to so do is limited. The witnesses must wait their turn and their participation is pared down to answering carefully constructed lines of questioning, delivered in closed-question format, thus 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 outwith of the procedural norms. I should remind the reader however that this is a conceptual thesis and so I do not claim to offer ideas which I foresee being implemented practically anytime soon.

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[64] Duff A., Farmer L., Marshall S., and Tadros V. (2007), *The Trial on Trial, Volume Three: Towards a Normative Theory of the Criminal Trial,* Oxford and Portland, Oregon, Hart Publishing, p.149

In this format we can see clearly that whilst it is in progress, the legal professionals are obviously participants in the trial and not only is their participation active, we can also see them control the participation of the others through their choices in 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 with his role in an adversarial system often defined as the non-partisan over-seer or umpire. It is also fair to say that the accused may choose to be a proactive participant, as I have highlighted in reference to Duff *et.al's* 2007 *Trial on Trial* above, although, more typically we see him participating in a rather limited way by only giving evidence in his trial – this is not essential but it is certainly an option should he choose to take it. Members of the public and members of the press participate proactively in asserting their choice to attend the trial for their own reasons which may range from general interest to securing a broadsheet headline. Those latter categories of people are only able to participate passively, but their presence is nonetheless considered as participation in the general sense and their choice to so do is a proactive one. What links the accused and the members of the public and press is that whilst they may not 'be heard' in the courtroom, their participation in the process is self-evident. Generally, then, it is my opinion that those who actively participate in the trial process can be narrowed down to the legal professionals acting on behalf of their clients, the judge and the witnesses. I have mentioned that the public and press may too proactively participate but this does not bear any relation to the verdict and there is a very strong argument to say that - like the jury - their participation can be pared back to mere presence.

When looking now to the extent of juror participation, first I reiterate my opinion that whilst it is so often assumed that the jury are participants in the trial, I do not consider this to be so because I do not equate their physical presence with their participation in the process. Indeed, in my opinion, the current level of their participation does not reflect the importance of their role causing me to question why their positive and

fruitful participation seems to be regarded as a norm within the current process. However, if it is argued that that is not the case in a practical sense, we cannot avoid it being so as a reference in the language of the research as I have continued to stress throughout this thesis.

The first thing to say is that contemporary juries are, ostensibly, reactive participants in the process and this is clear from the start when a prospective juror must react to their summons. 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 of the process over which they have little or no control. At this stage therefore the extent to which they can participate meaningfully is severely limited.

Second, when empanelled as members of the jury, their part is most definitely passive and once again I argue here that what we see is not meaningful participation but rather a state where the jury are merely present in a passive role. In chapter two I highlighted the core research projects which suggest that there are several failings in the system of trial by jury if when it comes time for them to retire to consider their verdict they are unclear about such fundamental aspects as the meaning of the instructions or what to base their verdict on and I argue that this may be down to the fact that they are in this reactive, passive role. I argue therefore that if jury understanding is to be brought to the attention of the court, it should be the jury who instigate that and they should be permitted to so do as the trial is in progress. 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.

Of course, at the crucial moment when they must deliver their verdict we see one of them at least in an active position but as a general rule their part, as a unit, could not be considered as anything other than passive / reactive and even when the foreman

actively delivers the verdict, he does so from a reactive standpoint. Thus, when we strip everything away and consider the extent of jury participation, I suggest that there is very little to persuade that juror participation is a practical reality of the trial.

Indeed, none of the material that I have explored has made suggestions which amount to true juror participation as I have just described. Moreover, I have said that I can see a contradiction at play in the trial and its analysis in as much as, if there is any participation by the jury I regard it only as reactive participation. Thus, currently we see 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 the legal professionals, or perhaps more accurately, a legal protocol which is seldom questioned. I do not regard this as true participation on the part of the juror because, by definition, they adopt a static and passive stance until they are told that they can react otherwise. I have also argued that I do not believe that the mere inclusion of lay people, in the form of these reactive, passive players either contributes to a sustainable system of trial by jury and nor do I believe it is enough to placate with the notion that without it, the system would be regarded as unfair. I regard such arguments both as futile and limited. Indeed, I say that whilst there is a wealth of critical literature on the subject of participation within a criminal trial, there is actually very little by way of practical, down-to-earth solutions to what appears to be a shared and real concern. Therefore, I suggest that the jury be regarded as just one part of the whole with the acknowledgement that gaps in understanding should be an inevitable result of involving the public in a legal environment. The participatory models that I suggest would therefore be equipped to support each situation and each juror and so aiming for a fixed or static model which could be compartmentalized or case transferable in its entirety is not only limiting in terms of expanding understanding for all involved but is also a little dull in terms of re-imagining the trial process. Rather, what I regard as more interesting for our purposes is to reconsider our understanding of juror participation and in that journey to reassess the juror's status, or position, or of

our assumptions of that person and how they may be altered in an instant with the use of the Joker within the parameters of the criminal trial. These are points that I consider in more detail in chapter five.

To clarify, my vision is not so much about seeing juror participation as a means to validate or justify individual trials or trials by jury more broadly, but rather to create a forum or framework within which each person who is required to be involved, both the professional and non-professional actors, are given every opportunity to participate with the collective focus of open understanding and clarity of thought throughout. Thus, before moving on to demonstrate my ideas for what participation could look like - first in respect of reimagined human interactions and second in regard to the physical interior designs and architectures of the courtroom space as something that is as malleable or adaptable as the human form itself - I shall conclude this section with looking to the solutions which have already been offered to enhance juror participation in criminal trials.

In chapter three I argued that the proposals made, to date, to improve juror understanding all have weaknesses because the majority have tended to regard giving things to the jury in the form of glossaries of terms as adequate to enhance their understanding of the trial language. Here I argue the same can be said of those proposals that have been made to try to improve juror participation primarily because they tend to endorse the stance that jurors are passive reactors by catering for a reactive style of participation (if indeed we can call it that) – one in which the legal professional or the researchers will provide the jury with, for example, an aide memoire or a glossary of terms. Whilst I understand that some people may well respond to such solutions if they require them, they are nevertheless not proactive and nor are they all encompassing in that they only cater for those people who gain from such types of interaction. Moreover, I question these types of responses because, whilst they may enhance understanding for some jurors and by extension be regarded as a solution to

juror understanding, they do not encourage or make space for proactive participation. Indeed, continuing to provide such extrinsic aids could result in pushing to the periphery, further alienating, or excluding entirely the jury because it could turn out that with ever more extrinsic aids, designed to promote participation for the jury in future could in fact be hampered rather than enhanced. I do not mean however that providing for extrinsic aids should be disregarded altogether; on the contrary, as I have said in chapter three, I would argue that in an ideal situation a variety of provisions should be made available to suit all learning types and not just those who respond well to, for example, note-taking. With that said however, it is very important to draw a distinction between supplying extrinsic aids for, for example, memory recall and presenting a framework or model within which all the trial participants can participate – the two, I have argued, both in chapter three and earlier in the current chapter, are very different and so care should be taken not to confuse them.

I suggest that the importance of participation lies in the ability to take control of our 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."[65] Indeed, if we dwell for the moment on the emphasis on the participatory process, we have already seen in my discussions in chapter three that the major inadequacy in the current solutions is that they are pre-designed, and given to the jury when the legal professionals or administrators of the trial process see that they are necessary. Therefore, we must call to question these processes which are regarded as being able to enhance juror participation because if they are one-sided then in my opinion they are doomed to fail. Thus, until such time as there is a simple way for jurors to communicate - in as normal a way as possible - within the scope of the trial as it progresses, we will continue to struggle to understand both what they know and how they came to know it. My position now is that the time has come to re-think those values on which we seem to keep relying and begin to

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[65] Duff *et.al.* (2007) *Trial three* above n.64, p.199.

acknowledge new ways to participate for the future. I suggest that we aim for a position where there are a variety of forums for participation which are adaptable to each situation and where there is not the presumption that the mere act of providing extrinsic aids is the signal that participation has been achieved. I now consider the ways in which my vision could become a reality.

4.3.1 How can we achieve meaningful juror participation?

I have made a case for why I think that meaningful participation is important, and now I consider how we could achieve that by exploring both what it could look like and who would be involved. 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 we will hopefully be drawn away from continually gauging juror participation in terms of what aides they have been given and how they coped with them, or from being satisfied with the fact that they are, in theory at least, given the opportunity to ask questions, with that opportunity being regarded as participation in itself. Rather, my position is that we could learn much more about the jury if we consider, as valuable, practical and realistic solutions, 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 realise their own potential and second to empower them to speak out when they do not understand the process or proceedings. This is a technique that we saw in Freire's work and which I discussed in the introduction to chapter three and which I discuss in more detail in chapter five when I contextualise the work discussed only in theory to that point. Ultimately jurors have the capacity to understand in their everyday lives and when they do not understand the automatic and normal course of action is to seek clarity. The same scope should be enabled in a criminal trial with the first step being to integrate the jury and regard them as active participants in the process rather than, as now, using them as an extra part of the process. Thus if my suggestions were to become a part of criminal trials in the future

the benefit would be two-fold: first, we may begin to understand the jury more fully and second, by providing a space for them (i.e. by drawing them in), the jury may understand the language of the trial with a little more clarity.

I acknowledged earlier that I understand fully that the fact that jurors may ask questions is regarded by many as a form of participation and I agree with that in principle. However, it should be clear from what I have just said that I question the way in which this process occurs, the circuitous route that must be taken to gain clarity,[66] and I conclude that there must be a way to integrate them in a more down to earth and normal way. Therefore, I continue to argue that the participation which is currently available to jurors is not participation, but rather a complicated way of asking questions which serves only to exclude or demean them further because they are forced into a subservient situation where they must, quite literally, wait until they have permission to speak. Whilst I am not advocating a 'free-for-all' in terms of people asking questions, I am saying that if there really is to be meaningful participation by the jury that there needs to be a seismic shift in the mind-set around what participation is. The jury are told by a judge at the beginning of a trial that they play a very important part in the process, but until such time as there is space for them to 'play' in the sense that they actively participate, then those words, in my opinion shall remain just words with little or no substance.

What then do I propose to tip the balance in favour of true 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. In a criminal trial my idea for the jury is that when they have a question to ask of a legal practitioner, a question which they regard as pertinent in their understanding of the testimony or the judicial instructions, there should be a forum in which they can do

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[66] Currently in the UK if a juror wishes to ask a question he must first wait until there is a break in the proceedings. He then asks the clerk of the court who then (when appropriate) will relay the question to the judge who then will return an answer via the clerk to the juror.

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 which 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 as we shall see when I contextualise my ideas in chapter five. I acknowledge that this idea may not be viewed by all as a positive move and I anticipate that there may be several objections. For example, interruptions by jurors could break the flow of the argument or the presentation by legal counsel; juror questions may be about inadmissible evidence; jurors may ask questions that they do understand but go to the substance of the offence charged or question the conduct of the case by challenging why counsel are / are not pursuing a certain line of questioning. In response to that I would say that we need first to recognise that juror questions should not be regarded as an interruption in a negative sense. Rather, juror question asking should be regarded, as a positive means to gaining clarity as early as it is required. Questions directed at the legal professional from a juror should in my opinion be regarded as important and should therefore be afforded the same respect as, for example, a question from the judge or legal counsel. Indeed, if the jury in the recently publicised case against Vicky Pryce were to have voiced their questions as they arose then the reported situation whereby "fundamental deficits in understanding" were discovered and a retrial ordered may never have arisen.[67] And, perhaps more importantly, if those reported questions had been asked as they arose we may not have seen a situation whereby the collective 'intellect' of jurors was subject to ridicule with the result that the entire system of trial by jury was called into question again.

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[67] Caroline Davies, The Guardian, February 20th 2013, http://www.guardian.co.uk/uk/2013/feb/20/vicky-pryce-retrial-jury. The case against Vicky Pryce (*R v. Huhne and Pryce*), charged with perverting the course of justice, collapsed on February 20th 2013 after it was discovered the jury had fundamental deficits in their understanding of both the trial language and the part they were to play and the information upon which they should base their verdict. Judge the Honourable Mr Justice Sweeney dismissed them and the case was re-tried on February 25th which ended in Pryce's conviction on March 7th 2013.

In order to facilitate juror question asking, it is necessary to provide clear guidelines and parameters which are regarded as acceptable and logical for the trial to progress and the person to voice these guidelines would, in my vision, 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 be set aside permanently. 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 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 language rather than questioning the course of the trial or targeting specific individuals in the trial 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, indeed, as I said previously, be regarded, 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 manoeuvre 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.

We have already seen that Jokers for Forum Theatre productions or Theatre of the Oppressed workshops 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 living rough or having to fight for safe, clean accommodation, 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. I have given a great deal of thought to who the trial Joker could be and remain undecided at this stage as to who would be best suited to the role. Indeed, on the one hand I can see that a Boal-trained Joker could take on the role very successfully with no legal training whatsoever; however on the other hand, I can see that there are obvious benefits to be had if the Joker has an understanding of law or perhaps even has a legal background. Just as the Joker in the Forum piece on homelessness does not need to have first-hand experience of living rough, my instinct tells me that the trial Joker does not need to have first-hand experience of legal education because it is not the Joker's background that is important, rather it is his ability to skilfully guide and support the dialogue between the juror and the legal professional that is the crucial point to bear in mind.

As I have already highlighted, in their idea of participation, Duff *et.al* suggests that a trial which "encourages active decision makers who ask questions of the accused and respond to evidence during the trial"[68] 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.[69] 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. Indeed, I acknowledged earlier in this chapter the arguments made by, *inter alia*, Schäfer and Weigend[70] who suggest that active fact-finders are more

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[68] Duff *et.al.* (2007) *Trial three* above n.64, p.201

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

[70] Schäfer, B. and Weigend, O.K. (2006), 'It's Good to Talk-Speaking Rights and the Jury,' in Duff A., Farmer L., Marshall S., and Tadros V. (2006), *The Trial on Trial, Volume Two: Judgement and Calling to Account*, Oxford and Portland, Oregon, Hart Publishing (subsequently referred to as Trial two; McEwan, J. (2003), *The Verdict of the Court: Passing Judgement in Law and Psychology*, Oxford and Portland, Oregon, Hart Publishing.

effective fact-finders but equally I say that some people cope much better in the passive stance and so should be allowed to carry out their task in that position. Ideally therefore, I would like to see a forum which allows for all types of participation and not one which only caters for static passivity for the jury.

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 intent 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. Thus I am suggesting the jury's inclusion to enhance understanding en route to verdict deliberation. I see a situation whereby 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 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.

I see that it is important to understand why juror participation is seen as such an important element of the criminal trial and how participation might work. As I have said previously, the principal reasons given for this include: jurors bring with them a sense of fairness and their presence in the justice system seems to enhance the legitimacy of the trial process. Whilst I do not wish to undermine the importance of those arguments, I suggest that it is equally as important to understand, from the juror

perspective, why their participation is so important and I strongly suggest that this latter perspective has suffered from a lack of attention until now. Thus, until such time as we are in a position to have a face-to-face dialogue with the jury about their feelings about their role, we will not be in a position to develop ways forward for their inclusion and participation. However, if we were able to have a face-to-face dialogue with the juror and understand his view of his role from his perspective then I argue that we would be in a much better position from which to start to respond directly to his hurdles as and when they arise in the course of the trial.

I fully acknowledge, that in certain situations people may be fearful of others and so the scope for participation should be monitored; however I do not think that that should act as a barrier to breaking new ground for participation *per se*. Indeed, I have already argued that I do not think that there should be interventions between the jury and the accused as this may lead to negative manipulation both of the trial process and of Boal's participation techniques being used in that process. Whether certain types of participation are pre-framed as potentially negative, manipulative or aggressive would be a matter for each individual trial and so all the more reason that those involved are in the moment, they are relying on their integrity, their wisdom and their ability to communicate clearly thus taking control of a potentially negative situation and turning it into a useful dialogue through actual participation. If trials were to proceed on that basis then there would be ample opportunity for negative communication to be identified and dealt with as and when it arises as I discussed earlier in this section.

The model that I imagine is one which takes account of all of the trial participants, allows for autonomous participation which is facilitated by the Joker within the trial proper. 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. Therefore I propose shifting the onus of speech from the professional actors to create parity across the board. 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 professional and non-professional in equal measure. Whilst I do not argue for a return to the historical jury nor do I advocate a move towards a more inquisitorial system to replace the adversarial model, I do contend that the current framework needs to be re-thought dramatically to accommodate a more participative jury or at the very least to allow space for more active participation than is currently possible. If we agree for the moment that one of the core values of the jury is that it "manifests the 'sense of justice' of the community […] that it represents not some community, but the community of the *defendant*" then perhaps the time has come to make space for that essential part in the process of justice and to allow the jury into the trial proper by allowing them autonomy to participate as and when they feel it necessary to clarify their understanding of the trial in their journey to delivering justice.[71] For as long as we have a framework which keeps them on the periphery and predominantly mute, then the 'sense of justice' will surely remain just a sense and the participation that is defended in the research and literature, whilst both encouraging and enlightening as far as it goes, remains only a vision with no practical application. I hope that in this section I have demonstrated how my ideas could transform our understanding of the scope of the role of the jury in the criminal trial.

In chapter five I attempt to demonstrate how these ideas could work in a practical sense by using a fictitious criminal trial. I aim to show how, if we shift our mind-sets to understand the capabilities of those involved in the trial, as well as to understand that the architecture and interior design of the courtroom space need not act as a barrier to interaction, then communication and participation may be enhanced and improved for future trials.

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[71] Dubber, M.D. (2004), 'The Criminal Trial and the Legitimation of Punishment' in Duff A., Farmer L., Marshall S., and Tadros V (2004), *The Trial on Trial, volume one, Truth and Due Process*, Oxford and Portland, Oregon, Hart Publishing at p.98 (subsequently referred to as *Trial one*).

4.4　Conclusion to chapter four

At the beginning of this chapter I said that I would put forward suggestions to improve juror understanding through integrating devices for participative communication which are found in Augusto Boal's Theatre of the Oppressed. I was particularly keen to highlight his Forum Theatre and the use of his Joker as a way to demonstrate the shift from juror presence to juror participation in the courtroom. Indeed, I hope that up to this point in the thesis I have communicated the heart of Boal's work: his emphasis on participation as a means to empowerment, to a sense of inclusion, or to enhanced understanding of any given situation. I have argued that this was important because it may allow us to understand better the difference between juror presence and juror participation in the courtroom and from that point to recognise the untapped potential of both the jury and the spaces within which it currently functions. In the chapter to follow I shall contextualise the ideas to demonstrate how the trial may proceed if we were to integrate these theories and, as I said at the beginning of the chapter, I shall do that by relying on my own experience of working in performance arts. In that regard we can see me moving away more deliberately from the social science research method which places emphasis on pre-arranged questions, interviews and testing, to a method which places emphasis on artistic devices as a way to develop knowledge. Therefore, I suggest a 'hands-on' approach where each person involved starts, and ends, on exactly the same footing and so there are no power imbalances which (however much we may try to avoid them) are inherent in social science research methods. In the chapter to follow therefore I present an imagined trial communication and, to reiterate my position, this is advanced as a concept alone and should not be read as a practical solution to the issues which surround the use of juries in criminal trials currently.

Chapter five

Communication and participation in the trial contextualised

5.1 Introduction to chapter five

In chapter three I argued that if we integrate Paulo Freire's problem-posing into the trial process we may see benefits in terms of enhanced communication for jurors and in chapter four I suggested that if we add to Freire's work some of the practical devices for communication found in the work of Augusto Boal, this would further develop the potential for juror understanding, by engaging with elements of space and structure in the criminal trial. In this chapter I shall contextualise the concepts that I have thus far advanced to try to bring to life in a tiny way the work thus far only discussed in a theoretical sense. Before doing that however, I shall look briefly at some examples of where the work of Freire and Boal is integrated into projects, in life today. As we shall see, these projects see groups of people able to communicate through a variety of participatory forms with the result that, in some cases, they have had their voices heard for the first time in their lives. There are many projects like the ones I shall draw attention to and which span a variety of areas each reflecting the importance of finding ways for every person to hear, and be heard thus reinforcing my argument that it is not so much what we say, but how it is communicated that is the most important element when considering how people learn in any given situation.[1] In the projects that I highlight we shall see that the challenges to participation – and so integration into communities in some cases - have been overcome through the integration of Freire and Boal's devices for communication and it is that aspect of the work which I suggest is fundamental for this thesis. Thereafter I turn my attention to the challenges found in

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[1] Other projects include Headline Theatre, *Meth*, Directed and jokered by David Diamond – the piece explored the root causes of addition in Vancouver. Creative Training Unlimited, *The Cynthia Show*, directed and jokered by Amy McDonald – the piece explores the impact of mental ill health in the workplace. Cardboard Citizens, *Navigation*, devised by a group of unaccompanied asylum seeking children, the piece was jokered by Adrian Jackson and explored the needs, desires, fears and expectations of these people.

the architecture of the trial before ending the chapter with examples of how my ideas could play out in a trial setting. The overall aim of this chapter is to demonstrate how effective the work of Freire and Boal has been in areas outwith of the trial setting as a way to encourage the idea that their theories may be valuable in furthering our understanding of the jury as well as offering tools to enhance communication through participation for the jurors in future trials.

The chapter proceeds as follows. First I present a small 'crowd of witnesses' whose work presents a supportive platform and environment for my own thesis. Thus, as I have said previously, I look to the work of El Sistema and Headlines Theatre to explore how Freire and Boal's theories translate in daily life to positive effect for countless people around the world. Thereafter I reflect on the barriers to participation that are currently found in the courtroom with the aim of demonstrating that, whilst there may be physical barriers contained therein, those need not present as actual barriers to communication in the trial. Moreover, I am keen to consider our deference to space and to explore the parameters of the architectural and interior design of the courtroom as factors which are perceived to prevent participation by jurors in the current trial process. Following that, I test Freire's problem-posing by considering how his codifications could work to build bridges of dialogue in the trial communication. Thereafter I introduce a mock trial in which we can see where the Joker may aid understanding through allowing for jurors to enter dialogue with legal professionals during the trial process. As I contextualise Freire and Boal's work I reflect on the objections which may arise and I address concerns which I foresee may be made in opposition to their integration into the trial communication.

5.2 Contemporary applications of Paulo Freire and Augusto Boal's work

As I have previously said, the work of both Paulo Freire and Augusto Boal is seen in a variety of guises in contemporary society – too many to mention in this thesis so, for our purposes I have chosen to look to the El Sistema Project to the work of David Diamond

and Headlines Theatre and to the work of the Cardboard Citizens because it is in those projects that we can see clearly how, though engagement at a grass roots level with disenfranchised groups of society, those groups become empowered to take control of their own lives, something that many had never ever thought could be possible.

The El Sistema programme is a programme which is designed to encourage communication through dialogue in areas of high social and economic deprivation. What distinguishes El Sistema is that the method for dialogue is through the learning, and then playing together, of musical instruments within an orchestral setting. The programme for children which was started in a parking lot in Venezuela almost 37 years ago is a project in which we can see Freire's methods for understanding through dialogue at work. El Sistema's founder, Dr Jose Antonio Abreu, believed that symphony orchestras, like society, can enrich, can support and can nurture one another to make for a community where respect and understanding are at the roots. Its current musical director, Gustavo Dudamel himself a product of the music education system is devoted to the belief that classical music is a vehicle for social change. El Sistema is firmly based in the philosophical frameworks of Paulo Freire and Lev Vygotsky, and so we see at the roots the comprehensive education of *the individual* and the collective nature of learning. El Sistema is known in Scotland as the Big Noise project which has been on-going for the past four years. It started in the Raploch Estate, Stirling and there are now projects emerging throughout Scotland each of which sees children on the periphery of society given the chance to grow and learn in an environment which, in the end *they have created* with the support of people passionate about using critical pedagogues such as Freire's to empower with the view that that empowerment will actually grow those people who otherwise may not have *their opportunities* fostered. Thus, in the El Sistema projects we can see Freire's pedagogy being used to cross divides in society, to break boundaries in understandings, to alter peoples' negative pre-framed notions of what is possible in such areas and, most importantly, to demonstrate the flexibility of his theories to create an impact by enabling, through

tools designed to empower, the oppressed to act and own *their lives*. I see such projects as crucial because in them we see people become empowered through programmes which have been born out of from respect, humanity and integrity. Moreover, in such projects we can see barriers to participation overcome because the foundations are set up to include all of those who wish to take part without exception. Since its inception, the El Sistema programme teaches music to over 500,000 of Venezuela's most vulnerable children and there are several such programmes available throughout the US[2] and now, developing steadily, in the UK with Scotland's The Big Noise an example of that development.

Turning now to the work of Boal, Headlines Theatre in Vancouver and Cardboard Citizens in London are two of the very few companies dedicated to producing Forum Theatre which crosses boundaries and so enables those on the periphery to overcome barriers and participate.[3] Their work is devised by people living on the boundaries of society and so sees dialogues with those people with the result that voices which ordinarily are disregarded or thought not worthy of hearing are central in the action. For example, in 2004 Headlines Theatre produced *Practising Democracy* which was a Forum piece designed to enable the people of Vancouver to voice their reactions and opinions in the face of proposed benefits cuts which could have resulted in those already living in deprivation to be rendered, in many cases, as homeless and penniless.[4] Through creating the piece we can see Forum theatre in action because we are able to see those sections of society given a voice and perhaps most importantly, the chance for those voices to be heard with the result that the proposed benefits cuts were not sanctioned by Vancouver City Council.[5]

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[2] See for example El Sistema USA at http://elsistemausa.org/ or The Big Noise, Sistema Scotland at http://makeabignoise.org.uk/big-noise-raploch/

[3] www.headlinestheatre.com; www.cardboardcitizens.org.uk

[4] Headlines Theatre, *Practising Democracy*, Directed and Joked by David Diamond, Vancouver 2004

[5] For an exploration of the piece see http://www.headlinestheatre.com/past_work/pd/how/index.html

More recently Headlines produced *Us and Them* (the inquiry) and *Us and Them* (the play.[6] The project was 5 years in the making and culminated in a live, on-line, interactive production which questioned and explored people's responses to social, class, and political divides. What is very exciting about this piece in particular is that we can see the work of Boal expanded to include several on-line Jokers each facilitating dialogue between people from around the world who wished to have their voices heard in response to the subjects explored in the piece. Thus, we can see in *Us and Them* the potential for Boal's theories for participation to be accessible by many people with the result that people are empowered to act in, and react to, issues which are central in their lives. What this also demonstrates is that, by and large, there are no boundaries to participation even when at first glance we may think otherwise.

Boal's devices for communicative participation are often used outside of the theatre genre and one good example of this is CTU's *Cynthia Show* which, for the past five years has enabled dialogue about Mental Ill-Health in the workplace to be addressed in a mock up talk show situation. The work is designed using Forum Theatre and Theatre of the Oppressed techniques, it is performed by people who have personal experience of mental ill-health and so their experiences informed the initial formation of the work and it has, to date, enabled issues of mental ill-health to be the subject of discussion and reflection in several workplaces in the UK. At the time of writing this thesis the work is being developed to go on-line, thus demonstrating that boundaries to participation may not be relevant where Boal's devices for communication are central in the focus and drive of any piece of work be that in a theatre or outside it.

In all of the work mentioned in this section we can see that with the integration of the devices for communication and participation found in the work of Freire and Boal that there is a great deal of potential for enhanced understanding and participation in a

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[6] Headlines Theatre, *Us and Them*, directed by David Diamond and Kevin Finnan, jokered by David Diamond, Vancouver 2011

variety of different situations. I have demonstrated in the example given that barriers to participation can be overcome through integrating Freire and Boal's work and I argue that the same is possible in the criminal trial. Before going on to demonstrate how I suggest that may be possible it remains for me to address what barriers to participation there could be in the criminal trial and so in the section to follow I look to the design and architectural aspects of the courtroom.

5.3 Barriers to participation

In chapter one I highlighted that, despite being aware of the vast body of literature which explores the trial as theatre, I would not consider that area in any detail because it is not the body of work that I wish to contribute to, nor is it the body of work which adds to the arguments that I have put forward in my thesis. Indeed, as should be clear by now, Boal's Forum Theatre is a specific theatre technique which does not rely on the trappings of theatrical performance – an element which dominates the trial as theatre literature – nor does it rely on the use of a 'traditional' theatre space for the work to be communicated as I have just demonstrated in drawing attention to the work in the section above. I am however more interested in considering what barriers to participation might be perceived within the courtroom and so in the paragraphs to follow I consider the aspects of theatricality and the links with the architecture in more detail.

First I assess the impact that the architecture and interior design of the courtroom may have on all of the trial players. More specifically I am interested in the in-built barriers which are perceived to prevent participation within a courtroom. I assess the impact of those barriers and I consider how, if at all, Boal's Joker could override those perceived barriers to participation and understanding within that space. In this respect I am interested in how, if those physical designs were altered, trial participation could be altered. Thereafter I consider the staging of the trial from the various different

perspectives, drawing particular attention to how each person regards his role. For example, I draw on the professional roles and the imposed roles which are unavoidable in a criminal trial, assessing how communication between those roles could be made clearer with the help of Boal's Joker.

> "I can take any empty space and call it a bare stage. A man walks across this empty space whilst someone else is watching him, and this is all that is needed for an act of theatre to be engaged."[7]

> "And this, surprisingly enough gets me straight to *The Connection*. When you go to *The Connection* in New York you are aware, as you enter the building, of all the *denial aspects* of the evening. There is no proscenium – (illusion? Well yes, insofar as the stage is arranged like a squalid room, but it is not like a set; it is more as though the theatre were an extension of this room) – there is no conventional playwriting, no exposition, no development, no story, no characterization, no construction and, above all, no tempo. This supreme artifice of the theatre - this one god, whom we all serve, whether in musicals or in melodramas or in the classics – that marvellous thing called pace – is there thrown right out of the window. So, with this collection of negative values, you seem to have an evening as boring as life must seem to a young reluctant devotee sitting on the banks of the Ganges. And yet, if you persevere you are rewarded – from the zero you get to the infinite."[8]

In the same way as it has been argued that theatre architecture and interior design can inhibit an audience, it has also been suggested that the physical architecture of the courthouse and courtroom can act as a barrier to participation. Indeed, Linda Mulcahy argued that contrary to the space of the courtroom being regarded as neutral, we should look more closely to try to understand "the factors which determine the internal design of the courtroom" as that is a crucial element in gaining a "broader and more nuanced understanding of judgecraft."[9] She highlights how the design of the courtroom has changed over time with fluctuating space allocation and specifically she focuses on the space for the 'spectator' arguing that over time this has been reduced, therefore calling into question the notion of the public trial.[10] Thus, in so doing she draws attention to the effect of sightlines, of the segregation and segmentation and of the

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[7] Brook, P. (1972) *The Empty Space* Middlesex, England and Victoria, Australia, Penguin p.11.

[8] Brook, P. (1987), *The Shifting Point: Forty Years of Theatrical Exploration*, 1946-1987, London, Methuen p.27

[9] Mulcahy, L. (2007), 'Architects of Justice: the Politics of Courtroom Design,' *Social and Legal Studies*, Vol.16(3), pp.383-403 p.383

[10] Mulcahy (2007) above n.9, p.383

various other aspects of interior design which could be used (or seen) as forms of hierarchical power. In 2010 she again assessed the impact of architecture in a person's image of the law in *Legal Architecture*.[11] She explored how the architecture of the courthouse and the courtroom can impact on a person's ideal image of justice when she questioned, specifically, the impact of the interior design of the courtroom on peoples' ability to participate. First she suggested that a person's image of justice is based on what he sees at the material time - no more and no less - and so the historical path of the architecture is a reflection of societal ideals, and second that his ability to participate, or his presumption on his ability to participate, is intrinsically linked to the interior design of the courtroom.

This is a similar argument to the one made earlier by Clare Graham when she assessed how the English criminal trial came to be housed in the "purpose-built accommodation and what made that accommodation architecturally distinctive."[12] In her study she claims that we react, consciously and unconsciously, to our setting in its entirety, the interior design, the furniture, the other users of that space, their clothing, their gestures and so on and she says, of the courtroom specifically, that "it is a setting for a tense, tightly organized and complex drama."[13] She draws a distinction with the early trials which were not held in purpose-built courthouses, where the interior design was makeshift thus leading to less visually hierarchical spaces and so arguing that in those trials there were fewer barriers to communication because there were fewer visible barriers. Both Graham and Mulcahy therefore share a similar view on this aspect of the impact of the architecture of the court. I should note however that their views are slightly different in respect of the specific interior design of the courtrooms. Whereas Graham is of the opinion that the interior design is less significant than the exterior of

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

[12] Graham, C (2003), *Ordering Law. The Architectural and Social History of the English Law Court to 1914*, Aldershot and Vermont, Ashgate, p.2.

[13] Graham above n.12, p.2.

the building and that it is the exteriors therefore that have the lasting impact on those using the court, Mulcahy considers that the interior designs of the courtrooms impact dramatically on the individuals who enter them. Indeed, Mulcahy devotes much space in *Legal Architecture* to considering the nuances and influence of the segmentation and segregation of the criminal courtroom, in the end arguing that the architecture and interior design of the courthouse and the courtroom does impact on the ability to communicate and participate. She argues that the interior designs, whilst preventing or inhibiting these aspects of the trial, in tandem, are set up to control and whilst that may not always be so obvious in modern architecture (which sees courtrooms 'flattened' and so less hierarchical at first glance) there are nonetheless features – such as glass exterior walls, atriums and camera surveillance – that add up to the courtrooms being places of control and which, by virtue of their controlled zones, inhibit participation by groups such as jurors.[14] In that respect therefore Mulcahy infers that participation is hampered by the internal barriers of the space, whether those barriers are as obvious as those seen in the old Victorian courtrooms or whether they are more contemporary with clean lines and minimalist furniture as we can see in the images 1 and 2 below.

I agree that there are clearly issues with the traditional courtroom architecture in terms of the perception that participation is possible, or not. The internal physical barriers do act as inhibitors and as long as there is segregation and segmentation in the courtroom it could be thought that there would continue to be such barriers to participation. I do not agree with this argument, however, because we do not really understand fully what hampers a person's ability to participate and that, I argue, is due in part to the focus to date on what words the jury do and do not understand to the neglect of other aspects of the trial such as the interior design of the courtroom.

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[14] Mulcahy (2007) above n.9, p.398

For example, it may seem obvious to think that the juror may be intimidated by the more grandiose interior of the Victorian courtroom as depicted in image 1 below, and less so by the notably contemporary interior of the courtroom in image 2. This is, however, no more than a subjective interpretation of how a person may react and not an indication of how he will act.

Image 1

Image 2

My idea is a very simple one. If we have Boal's Joker as an integrated part of any jury trial - there to facilitate dialogue between the juror and the legal professional - then I argue that physical barriers to participation and communication can be overcome. This is possible in the theatre where Forum pieces are performed and I see no reason why, in theory at least, the same cannot be the case in the courtroom.

With the help of the Joker, a juror who otherwise may be inhibited by the physical space can use as his intermediary the stance of the Joker. He can speak in the first case to the Joker – thus immediately fostering confidence in his own ability – and from that point can open his questions for the court in respect of his understanding of the legal terminology. The result would be that however hierarchical (or not) the courtroom is, the juror need not be intimidated by it. Therefore, I do not see any immediate need to restructure existing courtrooms because I believe that communication through participation can take place despite the interior designs of the courtroom. I acknowledge completely the tendency to defer to allocated (or the perception that it is allocated) space however I argue that Boal's Joker can transcend those physical boundaries and barriers.

Whilst I do not contest the notion that physical barriers can, and do, affect a person's ability to participate, I argue that relying predominantly on this alone is a little limiting. Indeed, if any person feels unable to participate or the framework is such that he is prevented from so doing then this aspect of the justice system is in need of reform, however I think that a redesign needs to go beyond the scope of interior design alone to create a trial framework which is truly innovative. Indeed, perhaps we need to use as our starting point an exploration of what Pat Carlen referred to as the temporal and spatial conventions when assessing the staging of the trial before suggesting some alternative ways to view its future.[15]

For the moment however I refer back to Mulcahy's *Legal Architecture,* in which we can see her raise a number of questions in relation to the use of the different spaces in the

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[15] In *Magistrates Justice* Pat Carlen made observations which took account of the participants in magistrates courts in which she highlighted that the interior design of the courtroom disrupts the normal methods for communication and participation with many of the participants in her study complaining of the "sterile theatricality of the courtroom in which temporal and spatial conventions were successfully manipulated to produce a disciplined display of justice in which alternative performances evocative of unpermitted social worlds' were suppressed. Carlen, P. (1976), *Magistrates' Justice*, London, Martin Robertson.

courtroom. She draws our attention to the segmentation and segregation of the courtroom and raises questions over whether the space allotted to the different user groups dictates to the user of that space his *part* in the action. Ultimately she argues that it does and that those in their allotted zones defer to acting as they think they ought to within that zone. Thus, in respect of the jury, she says that they act and react only according to their confined box in the courtroom. Moreover, she is sceptical about the ability to transcend space in the way that has been attempted in the theatre context. However, I argue to the contrary, as Boal and Brook have, by suggesting that we *can* transcend the allotted space of the courtroom. I argue that the jury can transcend their architectural box, that they can physically move if they want to or, that their voices can be carried to the central 'playing area' by integrating Boal's Joker who will facilitate that communicative participation. In doing that we can begin to see that the actual space does not need to be the primary dictator or motivator for involvement or participation in a trial. If we view the courtroom from this angle therefore we can see how Graham's argument that the "'theatre'" of the courtroom is set out in such a way as to encourage those involved to recognise its authority, a point which is echoed by Mulcahy in *Legal Architecture*, can be altered dramatically. Indeed, the presence of the Joker allows for the barriers, both physical and metaphorical, to be dissolved thus creating a trial situation where there is no room for segregation and segmentation, where people feel able to move from their allocated zones to areas which they had hitherto been unable to enter physically and metaphorically. Therefore what we can see is that the dialogic techniques integral to Theatre of the Oppressed may offer a communication device to those participants who would otherwise feel excluded or alienated, because the integration of the Joker *may* enable those who are ordinarily reticent to come forward, and participate in a way which otherwise would not have been open to them. Additionally, what may transpire is a move away from overt or subliminal deference to self, and system controls. I suggest that these controls are inherent in the courtroom currently however through integrating Theatre of the Oppressed techniques we may find that their structural constraints be diminished

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significantly. Indeed, Boal argued that the potential of Forum Theatre was situated in its ability to create space where it is possible for people to "transgress, to break conventions, to enter into the mirror of theatrical fiction, to rehearse forms of struggle and then return to reality with the images of their desires."[16] In this respect therefore I argue that integrating Boal's Joker to the trial optimises the chance for participation and this could result in the verdict of the jury being based on understanding and empathy rather than misunderstanding and apathy. Moreover, I suggest that this can be done regardless of the physical architecture of the courtroom.

> "Audiences crave for something in the theatre that they can term 'better' than life and for this reason are open to confuse culture, or trappings of culture, with something they do not know, but sense obscurely could exist – so, tragically, in elevating something bad into a success they are only cheating themselves."[17]

The 'trappings' of a criminal trial mean that the jury may come to the courtroom with a preconceived idea of justice and so may have an image in their minds both of what that will look like and how their part in the story will play out. Thus jurors may rely on what they think might occur, rather than concentrating on what is occurring. As we saw in chapter two, for example, Ellison and Munro found that jurors frequently relied on what they thought should be the backstory rather than concentrating on the evidence as delivered throughout the trial.[18] In terms of the staging of the trial, I have already said that the architectural hierarchy of the courtroom and the position of the participants therein only serves to feed that anticipation, craving, and excitement for the drama. When a stage is set, an audience is expectant. The structure of the courtroom encourages the jury to want an interesting, possibly even an entertaining experience and so they may be apt to 'elevate' the proceedings into something that they are not, their judgement swayed simply by the 'culture' of the courtroom and their vision more

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[16] Boal, A. (1998), *Legislative Theatre, Using performance to make politics*, translated by Adrian Jackson, London and New York, Routledge p.142.

[17] Brook (1972) above n.7.

[18] See for example, Ellison, L. and Munro, V.E. (2010), 'Getting to (not) guilty: examining jurors' deliberative processes in, and beyond, the context of the mock rape trial,' *Legal Studies*, Vol.30, No.1; Holstein, J. (1985), 'Jurors' interpretations and jury decision making,' 9 *Law and Human Behaviour*, pp.83-98.

expectant of the theatre we see in image 3 below rather than the courtrooms we saw above.

Image 3

In chapter two I identified that there are a variety of influences which could affect the jurors ability to remain focused solely on the evidence and those included the effect of extra-legal influences. I have drawn out here, albeit briefly, the possible issues which could arise when jurors expect certain things from the trial: when they expect something interesting or exciting or intriguing all set within a space which exudes splendour and grandeur. Indeed, in a courtroom the jurors are assembled side by side, their sightlines are not obscured; indeed they have a clear view of all the action and all of the 'characters'. As they take *their* place, they assume the part of the audience and just as the traditional theatre audience assume a passive role, so too do the jury.[19] The critical difference, however, is that if the theatre audience found the story confusing or boring, or if they found the performances to be encapsulating to the point that they were swayed along with the drama and excitement, when the stage lights fade to black or the curtain falls, they are not bound to act on these emotions, interpretations and opinions. The jury on the other hand are, and this is where the danger lies if their verdict is based on these subjective interpretations and emotions. In the sections to follow therefore I test the idea that if we disrupt the process of the trial with the

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[19] It would be a very interesting exercise to test the sense of ownership of space and empowerment generated by that ownership if the various participants 'invaded' the space allowed for the others and vice versa

introduction first of Freire's problem-posing pedagogy to enable dialogue between the juror and the legal professional and second by adding to that Boal's the Joker to enable the transformation from passive spectator to spect-actor, that all of the trial participants engage to the point that there is little or no dubiety over their understanding of the trial language.

5.4 Testing problem-posing as an integral part of the criminal trial communication

I have argued that the current system of trial by jury, and all of the solutions proposed to date in relation to juror understanding, are based more on the "banking" concept of teaching and communication than they are on a problem-posing system. I now wish to shift emphasis towards a problem-posing style and so shall now explain, in detail, how I propose to do it by showing how these kinds of insights might be applied more systematically to an analysis of the criminal trial.

What I propose therefore is that we integrate Freire's problem-posing as the default trial communication and I shall show that his pedagogy can enable the shift from the current one-way ("banking") communication to a communication method which is based in critical dialogue (problem-posing). By doing that I trace the shift from passive players to active and engaged trial participants, each able to identify and express when either the points in questions or the lines of communication themselves have become cluttered or confused.

To do that I will integrate six stills (codifications) (pictures 2-7 below) - each one meant as a topic for dialogue - and I propose their use at: the point of citation; the judge's opening speech and three images meant as examples for discussions on trial specific

language such as *mens rea*, 'consent' and 'intention.'[20] By developing a forum which supports clear lines of communication I hope to show that I can create critically conscious participants in a trial, which sees jurors building their verdicts on realised wisdom rather than relying on myths or clichés, opinions or received wisdom. Whilst I acknowledge that relying on opinion can be a positive, for example, assessing what evidence is most persuasive, equally I say that caution should be adopted if opinions prevail to the detriment of basing the verdict on clear understandings throughout the trial.

When thinking about who would be present at these discussions, my instinct is that all of those who would usually be there would be present: the jury, the judge, the legal counsel, the witnesses and the accused. This of course causes problems at the point of citation in terms of gauging a person's thought processes and feelings because he is usually in private in his own home. Thus, I ask the reader to adopt, as I have, a little creativity and imagine the dialogue that you would have when faced with a citation – how do you feel? What impact will it have on you and the others around you? At the other points where I have suggested codifications, we can assume that those ordinarily present would be present thus the discussions are taking place, at times, in open court. Where necessary therefore the trial would be stopped to make space for the discussions.

The facilitator of the discussions would be an impartial mediator, whose job it would be to guide the discussions to the point where each person involved has a good understanding of their part at the relevant points. Ultimately I would suggest the integration of a Boal Joker who is focused on supporting dialogue between parties – he is not a jester or comic character, sometimes also referred to with the same name, nor is he an ethereal or imaginary character. He is a trained professional with skills in

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[20] Whilst I acknowledge that the prospect of a Judge using Latin terminology is slim it is nonetheless possible.

facilitating dialogue between diverse parties. Finally, the codifications should provide a framework within which the juror can function as a truly integrated part of the bigger picture and so, having listed them earlier, I shall now examine those points in more detail. I begin with the citation as this is the logical first contact that a potential juror will have with the criminal trial process.

Citation

There is evidence based research to suggest that on the one hand there is a high propensity to try to avoid jury duty[21] and on the other that there is not.[22] How then could problem-posing bring us closer to *hearing* what the prospective jurors think about the citation process and what lessons may we take from those dialogues in order to improve the system for future juries? In Scotland for example the citation for jury duty consists of a letter telling the person when they should attend the court and a booklet entitled *Jury Service*[23] that gives the potential juror information which includes: preparing for jury service; what happens when they arrive in court; the trial and the role of the judge; the role of the juror, and so on. There is also a glossary of terms which curiously does not contain any interpretations of legal language such as *mens rea*, *actus reus*, or *beyond reasonable doubt*, some, or all of which could be used in a criminal trial and whilst I have already highlight that the use of Latin terminology such as this is unlikely, it is nonetheless possible. [24] In the rest of the UK the citation process is very similar. The prospective juror receives a citation letter which is accompanied by

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[21] See for example, Darbyshire, Penny *et.al.* (2001), "What Can the English Legal System Learn from Jury Research Published up to 2001?" Commissioned Research for the Auld Report in which she indicates the various reasons for non-attendance includes problems with childcare or care for the elderly, ignoring the summons, not getting the summons. On this point see "Reducing the Trials of Jury Service, 31st August 2000, Lord Chancellors Department Press Release in response to the proposals for the new Central Summoning Bureau.
[22] Thomas, C. (2008), "Exposing the myths of Jury Service," *Criminal Law Review*, Issue 6, pp.415-430 says 85 percent of prospective jurors do reply to summonses.
[23] *Jury Service*, issued by the Scottish Court Service with the approval of the Lord Justice General.

[24] I acknowledge that it would be very difficult to provide an exhaustive glossary of terms however I do think that the current glossary could be improved with the inclusion of such words and phrases – after all, they are terminology which will be used in a criminal trial and so their inclusion would seem to be no more than logical.

the *Jury Summons Booklet*.[25] In addition there is a video which is accessible online and which acts as an introduction to the court and the expectations of the potential juror. [26]

I shall now move on to talk about the first codification and it will be based around picture 2. I have chosen the image because of its familiarity and that means that most potential jurors will identify with feelings when they receive it through the post, thus the image is supposed to inspire straightforward dialogue about how potential jurors *feel* and what they *think* on receipt of their citation.

Picture 2

Additionally, picture 2 reflects, or has the potential to reflect, what the research indicates about how some people feel on receipt of their letter of citation. For example, the feelings may include annoyance because you are being compelled to do something against your will, the pressure associated with *having* to take time out of work or having to find extra child-care for an indefinite period or excitement and anticipation at the prospect are all factors which could feed into the overall attitude of the assembled jurors.

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[25] http://www.hmcourts-service.gov.uk/docs/infoabout/juryservice/jury_summons_guide09dec.pdf [live at 03/07/2013]

[26] http://www.hmcourts-service.gov.uk/infoabout/jury_service/your_role_vid.htm [live at 03/07/2013]

The questions that follow could be used for any codification in any situation. The aim of the questions is to generate discussion of the jurors' understanding of the image in order to hear what they understand first-hand, thus giving scope to respond where problems arise. I acknowledge that questions such as those suggested at level 1 below may at first seem a little patronising, however, the point of asking what a person sees in the picture immediately tells us something about their attitude in certain situations i.e. how they feel about be called for jury duty can tell us a lot about how they might perform. For example the question at level 1 below may be met with such responses as "jury duty how exciting I wonder if it's a murder!" or "jury duty what a pain, I am booked up work wise, this could cost me thousands of pounds, I need to get out of it."

Level one

What do you see in the picture?

Level two

What do you understand your responsibility to be?

Level three

Do you think you will be able to carry out that task?

Level four

What do you understand the rules of jury duty to be?

How important do you think it is to understand the trial?

Do you know what to do if you do not understand?

Having explored how a potential juror may feel on receipt of his citation I now move on to look in more detail at how we could begin to understand what jurors' understand at the judge's opening speech.

The opening speech

First, I propose to include two codifications to base the discussion on the language which could be found in the judge's opening speech.[27] In an earlier draft of the thesis, I had also included codifications for the verdicts but on reflection did not keep in the final draft as they would always include assumptions about the jurors' thoughts about the implications of his verdict which, in the starkest sense, is not a part of his duty. Having such a dialogue at this early point in the trial however means that there should be less doubt over what the burden or the standard of proof is and more context given to the legal terminology which otherwise, could become very confusing.

In picture number 3 we see the traditional image of justice, the subtext of which is that a person accused is innocent until proven otherwise. The purpose of the codification is therefore for the jury to come to their own understanding of the gravity of this expectation, thus, guiding them away from their preconceived notions, to focus on the trial evidence alone. The questions could be as follows:

Picture 3

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[27] I am aware that not all jurisdictions have opening speeches – i.e. Scotland do not but this is unusual and so I have decided to assume here that there is one and remind the reader that this is a conceptual piece of work that is rooted in ideas rather than the procedural rules of any particular jurisdiction.

Level one

What do you understand the picture to mean and what responsibility (if any) is conveyed by it?

Level two

What is your understanding of justice and can you think of a time when you have had to think about it or act to do something about it?

Level three

Are certain people better at delivering justice than others? If there are then what factors contribute to their elevated capacity? Their education? Their social status? Their ability to retain and then recall information?

Next I turn to a brief exploration of how to tackle issues which may arise in relation to issues of 'reasonable doubt.' In picture number 4 we can see a prison cell. I have chosen the image as a way to generate discussion on the importance of trying to understand what is meant by 'reasonable doubt.' When thinking about an appropriate image I encountered some difficulty and my current choice is not without a certain degree of reservation because, whichever way we view it, there will always be a degree of subjective interpretation in selecting an appropriate image. However, I have chosen to keep it in with the hope that it can generate discussion about the seriousness of the task for the juror and where there is doubt in their minds that that should be taken extremely seriously.

Picture 4

I propose the following questions:

Level one

What can you see in the picture?

Level two

What do you understand of the expectation that has been placed upon you in regard to your duty as juror?

Level three

As a juror, are you wholly responsible for whether or not the person ends up in the cell?

If so, why?

If not, why not?

I suggest that the discussions about what 'beyond reasonable doubt' actually means for the accused and the juror are exceptionally valuable because not only will they enable a better understanding of the phrase, but such discussions may also guard against issues of nullification which could be used to act counter to the democratic principles underpinning the system. Moreover these discussions should act as a stark reminder of the seriousness of the task, thus reinforcing the need to ensure clear, sharp and considered thought processes especially against a backdrop of empirical evidence some of which suggests that jurors do find it difficult to quantify such phrases as 'beyond reasonable doubt.'[28] I acknowledge that quantifying what in essence is an abstract phrase is extremely difficult – all the more reason therefore to try an alternative communication technique to bring some sort of cohesion to an area which is clearly in need of some. The questions attached to the codification at this stage would follow the pattern that I have already established with the point being to try to verbalise the actual legal benchmark required thus avoiding verdicts based on a lesser, or greater

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[28] See for example Darbyshire *et.al*. (2001) above n.21; Zander, M. (2000), "The Criminal Standard of Proof – how sure is sure?," 150, *New Law Journal* 1517; Power, R.C. (1999), "Reasonable and other doubts: The problem of jury instructions," 67, *Tenn.L.Rev.* 45; Saks, M.J. (1997), "What do jury experiments tell us about how juries (should) make decisions?" 6, *S. Cal Interdisciplinary L.J.*, 1; Thomas (2010) 'Are juries fair', Ministry of Justice Research Series, 1/10, February.

standard. Following this dialogue the hope is that the jurors are very clear about the impact of their understanding of this legal standard.

Legal terminology

Having established the importance of the codifications and subsequent dialogues to this point I move on to demonstrate why it is as important to carry those through to the close of the trial. It is crucial that the jury are engaged as early as possible, indeed, if they become disinterested, confused or disempowered at the start it may be very difficult to try to re-engage them later in the process. If, as I suggest, they are fully engaged, and by that I mean that they see themselves as a valid and valuable part of the process right from the start, then the hope would be that that engagement, in the form of dialogues, will pave the way for a more consistent and rational trial process where we see jurors who are active, thinking participants and who are empowered to act with a real understanding of the seriousness of both the situation and their part in that.

Picture 5

To finish this section, I include three examples of codifications which could be useful for jurors when trying to decipher the legal terminology sometimes used in the course of the criminal trial. I should say, as I did earlier, that a judge is unlikely to use such Latin terminology as *mens rea* or *actus reus*, however despite the improbability I argue it is important to demonstrate how, if it were to be a feature, we could aim to build a way to dialogue thereby supporting jurors in their understanding is actually meant by the phrase(s). Thus in picture 5 I have chosen an image which I hope will instigate discussion on what *mens rea* means. Images such as this one – but focused on different terminology – could be introduced at points in a trial that are forecast (based on past research) to cause confusion for jurors or could see them becoming disengaged.

This could include terminology that is fraught with difficulty because it is alien to most of the jury but equally could include terminology that seems at first familiar for a juror but in its normality or familiarity problems arise because the terminology is understood outwith of its legal context. For example codifications could be centred on the word *consent* as it is meant to be understood in a rape trial or intention as the *mens rea* for homicide and so on and the images I have chosen (pictures 6 & 7) would be used in the same way as the one in picture 5 above.[29] The point of that would be that through the dialogue the jury would be able to clarify the *legal* definition of the word and so the necessity to understand that expectation rather than relying on their own subjective understandings of the word consent. Against a backdrop of research which indicates that there are myriad misconceptions about rape, about consent, about what consent means within the legal framework[30] and so on, integrating codifications on the subject could break new ground in our understanding of the way jurors think in such trials as well as clarifying for the juror the context of the terminology that is being used. I have included here some examples of what those images might look like. I suggest that they are relevant for discussions on such issues because they contain within them obvious triggers for discussion – for example, what did the person holding the gun intend to do; what is the signal post trying to tell us? Are we clear on the incentive behind the image?

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[29] For example, in Scotland juries were previously told to give consent a common sense meaning whereas now consent is defined in the Sexual Offences (Scotland) Act 2009, Part 2, s.12

[30] For example Finch, E. and Munro, V.E. (2006), 'Breaking boundaries? Sexual consent in the jury room,' *Legal Studies*, Vol.26, No.3, pp.303-320; Finch, E. and Munro, V.E. (2008), 'Lifting the Veil: The Use of Focus Groups and Trial Simulations in Legal Research,' *Journal of Law and Society*, Vol.35, pp.30 51; Finch, E. and Munro, V.E (1995), 'Juror stereotypes and blame attribution in rape cases involving intoxicants,' *British Journal of Criminol*ogy, Vol.45, pp.25-38.

Picture 7

Having said all of that I acknowledge that jurors often try diligently to follow the legal instructions however, that does not mean that they necessarily understand them.[31] Indeed, judicial instructions are currently composed with a firm eye on the letter of the law and so in this respect, their comprehensibility can often be a secondary consideration which obviously will impact on the jurors to whom they are directed. I do not suggest here that jurors should employ their own standards in order to understand the law but there is some evidence to suggest that this may be what they currently do.[32] What I am suggesting is that if Freire's problem-posing were central to the mode of communication then any juror bias, misconceptions, misinterpretations and so on could be both identified and overcome.

5.4.1 Testing problem-posing more generally in the trial

There are other parts in the trial where problem-posing could be used with decision-making being one of the more obvious places. Whilst I have chosen not to place much emphasis on that part of the trial in this thesis I acknowledge that it has attracted much interest, with volumes of literature and research available on what influences a jury in the decision-making stage of the trial.[33] Indeed, there appears to be an almost insatiable fascination surrounding juror decision-making which is based partly in the

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[31] Steele, W.M. and Thornburg, E. (1988), 'Jury Instructions: A Persistent Failure to Communicate' 67, *North Carolina Law Review*, 77-115.

[32] For example see Thomas, C. (2010), 'Are juries fair', Ministry of Justice Research Series, 1/10, February; Darbyshire *et.al*. (2001) above n.21.

[33] See chapter two, section 2.3.4.

fact that the decisions are made behind closed doors. Until such time as the restrictions in the Contempt of Court Act 1981 are lifted, it will not be possible to observe actual jurors as they make their decisions but does this really matter? As I suggested in section 2.3.4 above, if the stages thus far explored are put into practice there will be less need to be concerned with what does or does not happen in the jury room because, through the dialogues, any misunderstandings, confusion or reliance on extra-legal factors which may have formed the basis of the verdict would have been identified much earlier in the process. I do not suggest that the inclusion of codifications will somehow eradicate from the process those jurors who are prejudiced and who may therefore have acted inappropriately, however, what I do hope is that through open dialogue, in open court, we are at least able to see and hear the jury in action and with that insight comes a more focused future research method as well as much more clarity on how verdicts are formed. Finally, I do not suggest that Freire's pedagogy has the ability to prevent those who wish to behave inappropriately from so doing but I do suggest that with his ideas integrated into the criminal trial process we will first be able to get a little closer to hearing the jury function and second, begin to understand them a little better by providing a way for them to communicate which allows them scope to take control of their part in the process – a control that I argue is currently lacking.

To this point I have identified the parts in the criminal trial that could potentially be troublesome for the jury, I have acknowledged them as such and I have tackled them in a way that has not until now been tested. These points are based predominantly on the indications from the research but also, in small part as I said earlier, from my personal experience testing the system in a conference setting where I reconstructed a trial for the purposes of testing these concepts. I have demonstrated the questions that could be posed using the codifications and these are designed to appeal to all individuals involved as jurors and so acknowledge the different abilities for understanding and perspectives of their part in the trial setting. Acknowledging these different

relationships as well as teasing out the various possibilities to allow for better communication in the trial is only the start in my search to find a model for communication that sees the jury shift from merely being present in the courtroom, to being participants in the trial process.

Using codifications, I argue, is a positive way to engage all of the trial participants in dialogues which should prove to be invaluable in gaining a better overall understanding of both an individual's part and an individual's understanding of the trial. I accept however that these ideas may not be met with such positive opinion from everybody and so in the section to follow I address what I foresee as the most obvious criticisms to using Freire's theories in the trial before ending the chapter by contextualising Boal's theories and addressing the possible objections to integrating those into the trial process.

5.4.2   The objections to integrating problem-posing into the criminal trial

I accept that the introduction of these ideas may be met with resistance on several levels which may include: the perceived disruption to the trial generally; the added costs involved in teaching people the methods; the extra time and cost needed to complete the trial; the possible juror resistance to having to take extra time off work, find extra childcare and so on; and the perception that my ideas contravene the restrictions in the Contempt of Court Act1981 because juror anonymity could be regarded as becoming seriously compromised. I shall now try to respond to these points by looking first to the objections which may be made against integrating Freire before ending the chapter with the objections which may be voiced in opposition to Boal's theories. In terms of the objections relating to the perceived disruption to the trial, I would say that, yes, the process of the trial will be disrupted but that disruption need not be seen as a negative. Indeed I prefer to see it as a positive opportunity for participation which is important because – as we have seen – the arguments in favour of

the jury are all based on the premise that the jury is allowed to participate. Therefore, as an extension of the arguments which defend lay participation, I have tried to explore what exactly that means, specifically in relation to juror understanding, by advancing some practical solutions. Whilst admittedly I have disrupted the status quo with the introduction of Freire's codifications (and later the introduction of the Joker), I have done so with positive motivation rather than negative. I foresee that in terms of the disruption those most affected will be the legal professionals. The jury should be less affected because their time in court is usually isolated to one trial, thus the communication of the trial is something that they are entering into for the first and (in theory) the last time. In that respect therefore their patterns for communication in the trial situation have not become embedded and so do not need to be unpacked or relearned. The legal professionals on the other hand would need to re-learn their communication style, or even become mindful of it for the first time, and in this respect Freire challenges them the most in my ideas for change. I do not however regard this as a negative point, indeed, if legal professionals were given tools which allowed them to reflect on their communication styles and from that point we began to see a shift away from a "banking" style communication to a problem-posing dialogue with the jurors then I would regard that as progress which has unmeasured potential for future trials.

In respect of the objections to the added time and cost I acknowledge that if trials run for slightly longer than they presently do then the automatic reaction by many would be disgruntlement with worries over money being wasted and time being misused. I counter that argument by highlighting that if the verdict of the jury is rooted in informed, critical thought and understanding then that is time and money which is well spent. Moreover, if it takes a few days longer to get to the end of a trial but in that time we can see and we can hear that each person involved has understood each step of the way then surely that has to be regarded as a better use of time and money than the alternative which is a trial in which the jury are to all intents and purposes excluded, their questions go un-asked and their verdict therefore may be based on spurious

foundations. I know that in other situations Freire's work has had a dramatic impact on those learning.[34] I have for example direct experience of using Freire's pedagogy in my work as a teacher and so I know the positive impact that it has on those learning. Finally, it goes without saying that the transformations for thousands of people in Latin America and beyond can only encourage us to at least try to see beyond the obvious negatives which at first occur. I should say however, that despite the obvious benefits of using Freire's pedagogy in other spheres I would not insist that it were used if the result was extended trials which saw the accused being put into a more oppressive situation than he already is. Indeed, whilst my thesis is reserved to theory alone at this stage, if the ideas were to be introduced as practical solutions for the future I would argue that they be used with discretion, empathy and respect for all of those involved in the trial with the accused's well-being regarded as important as the other trial players.

I have maintained throughout this chapter that until we can create a trial framework which supports dialogue as a form of communication as the trial is in progress we will never really know where in the process difficulties arise, who experiences them and why they encounter such problems. Indeed, one of the most repeated arguments against the use of the jury is that it is impossible to tell what they have based their verdict on. This worry is based on the fact that we do not know whether they really understand and apply the judicial instructions, whether they only take account of the trial evidence or whether they rely on speculation or stereotypes in their verdict formulation. This is then compounded by suspicion by some who feel that the only way to get to the root of the problem is to see inside the jury room. I have maintained throughout that concerning ourselves with what happens in the jury room is misplaced because if misunderstandings have arisen in the course of the trial then ideally they should be addressed at that point in the trial and not later in the jury room. I have also highlighted that some of the research has tackled the issue of juror understanding of

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[34] I discussed this in chapter three.

judicial instructions with the provision of written instructions, changed timing of the said instructions and having pre-deliberation discussions as we have seen in chapter two (2.3.2). On this last point Michael Dann suggested, in light of the assumption that the jurors have come to their decision before all of the evidence is heard through having discussions with their fellow jurors, which are not permitted, that it would be better to structure said discussions and have them be judicially controlled. [35] Whilst I agree with Dann's point about facilitating the discussions, I do not agree that they should be judicially controlled. In chapter four I discussed who, from my position, would be the best person in this role: skilled enough to drive the dialogue; sensitive to the needs of those in the discussion; and, engaged enough to gauge a situation and act on the unsaid as well as the said. By using Freire's theories I hope that I have demonstrated, in theory at least, that *it is* possible to develop a form of communication which sees the jury as actively engaged in the trial process.

I now come to the issue of my ideas contravening s.8 of the Contempt of Court Act 1981 in relation to juror anonymity because I foresee that that could be a point of real resistance from critics of my concept. Put concisely, if the trial were opened up to the ideas that I put forward, then there would be concerns both for legal professionals and for jurors at the prospect of their anonymity being compromised. I completely understand this objection and I agree that each person involved may feel compromised. However, I would say first that when the jurors are in discussion/dialogue about the codifications, they are focused on the difficulty with the language as their primary point of discussion. They are not therefore required to reveal their own personal opinions on whether the accused is guilty or innocent and nor are they revealing anything about themselves which is superfluous to the trial.

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[35] Dann, B.M. (1993), '"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries', 68, *Ind. L.J.* 1229.

The second thing to say is that the ideas that I advance in this chapter, and perhaps more challengingly in chapter four, are not designed to undermine the core aims of the criminal trial. I am not making provision to empower the jurors so that they themselves can instigate some sort of trial within the trial. Indeed, to so do would be to undermine the principles on which both Freire and Boal's work was based. Thus, to be very clear, any objection which may be directed at worries over the jury running wild in the trial, questioning and cross questioning witnesses and the accused is unfounded.[36] Indeed, at this stage in my research I do not recommend that the jury are permitted to ask questions of anybody except the legal professionals and I mean them to so do only within the broader Forum Theatre rules. The other thing to highlight here is that my ideas may be criticised for appearing to suggest that the legal professionals enter discussions about legal terminology which, if they are not careful, could give grounds for appeal. I remind the reader that I am viewing things first and foremost through a conceptual lens and so do not consider the idea that a judge may contravene the rules of criminal justice procedure as sufficient grounds for not re-assessing what they say, and how they say it, when trying to lend clarity to juror understanding. Finally, whilst I understand that there may be genuine concerns from both jurors and criminal justice professionals, I believe that creating transparency in the trial will alleviate such concerns rather than exacerbate them.

I shall build upon the ideas for integrating Freire's problem-posing into the trial by adding Boal's Joker to the process of communication. Thus, in the section to follow, I test out how the trial may proceed if Augusto Boal's Joker were an integrated part of the process.

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[36] I discuss this point in section 5.5.2 below.

5.5 Testing Forum Theatre as an integral part of the criminal trial

Having discussed, in chapter four, the theory of integrating Boal's techniques into the trial as a way to enhance juror understanding though participation and facilitated by the Joker, I now attempt to enact that theory in as practical a sense as is possible in the theoretical form and to do that I have written a short script of a fictitious criminal trial. I have chosen not to place the trial within any particular procedural setting and that is done deliberately to reflect the fact that I have not chosen to confine the research in my thesis to any one jurisdiction. As such I start the trial with a judge's opening speech which is an amalgam of different systems of criminal law. The reader will see that I have used names which are slightly caricatured – this is deliberate to make clear the fiction in the script but also to guard against any links being made with actual trials and which could therefore generate pre-framed ideas about the outcome.

I have set the scene by embedding mock-up newspaper articles designed to prompt the reader to consider his or her prejudices, pre-decisional notions or pre-framed ideas as they read. The reader is invited, if he or she wishes, to read the following pages from the perspective of a juror, thus getting the sense of how the different pieces of language in the trial come across to them as jurors.

What I propose in the following pages is to demonstrate how, when we integrate the Joker, the lines for communication and participation are opened and facilitated. What I see happening therefore is that, at the points in the trial where the problems begin to arise for the jurors they, quite simply, stop the action by shouting STOP. They are then approached by the Joker who will ask them who they would like to address (having made it clear from the start that they may only address the legal professionals) and from that point the juror may speak directly to the person whose language it is that has become confusing for them and for the purposes of this explanation I shall proceed by using the Judge as the example. The Judge will then respond and the Joker will then

clarify whether clarity has been achieved. If it has then we move on if it has not then it is up to the Judge to make himself clear. Thus, if the Judge simply repeats verbatim what he has said previously that will clearly not be helpful and so I would expect to hear language which is adapted to suit the needs of the juror. I should point out that I am well aware of the rules of evidence and the need for Judge's directions not to err from their point and which could result in a misdirection, however, as should be clear from what precedes, this is a theoretical investigation – not to be judged initially on its practical workability, but rather, on its potential for reimagining the role of the jury. Thus, when I say the Judge should adapt his language so that it is understandable I am not suggesting he dumbs it down to the point that he is departing entirely from the relevant legal test, nor is he deliberately using language which undermines their intelligence or patronises the jury. With that said, what I would expect to emerge from the interventions is that each person should become acutely aware of the impact of their words and actions on those around them, hence, over time, developing a sense of direct, sensitive, clear communication and for that to become the norm rather than the exception.

The principles which underlie the Theatre of the Oppressed are designed to awaken people to their own potential by empowering them to take control of situations, rather than assuming that they will be the passive subjects in the action. I have already highlighted, and agreed with some the research which indicates that jurors have difficulty understanding certain elements of the trial but I have not been content with the idea that this difficulty in understanding is necessarily *their fault*.[37] Indeed, my aim has never been to apportion blame where perceptions of misunderstanding arise, but rather to clarify understanding, for all concerned, in as unambiguous a way as I can manage. Finally, in terms of furthering our theoretical reimagining of the practice I argue that through integrating Boal's Theatre of the Oppressed, we may gain a more

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[37] Whilst apportioning blame has not been the focus of the majority of the jury research there are subtle undertones in the early work carried out by Kalven and Zeisel and the Chicago project more generally.

holistic understanding of the jury in the trial process. On that point I now move to demonstrate the ideas in the form of a mock trial which integrates Boal's Forum Theatre methods with particular emphasis on the use of the Joker as facilitator.

5.5.1 Integrated participation – the Forum trial

First in this section I give a brief background of the crime, attached to which are a selection of newspaper headlines and snippets of news. I then begin the dialogue of the Forum trial and I intercut that with interventions which are, largely, Joker-led. The Joker is therefore seen using his discretion to intervene with the STOP device. I have chosen STOP to demonstrate the transformation from passive onlooker to active participant as I evidence the positive results from that participatory aspect of the Forum Trial. The other reason for the interventions being predominantly Joker-led is more practical than anything else. At this stage in my assessment I think that it could be either too chaotic or too static if the interventions were jury led. If, for example, my ideas were ever to make it to the courtroom, and if the interventions were jury-led, my worries would be two-fold. First, there is a strong possibility that the jury would not shout STOP, even at points where it could be expected they would have difficulty, thus undermining the whole exercise. Second, if the jury constantly shout STOP, there is a chance that it could become extremely chaotic and possibly a little too overwhelming for all the other trial participants as I have already discussed. That having being said, it *would* be an interesting exercise to allow for predominantly jury-led interventions for no other reason but to experience, first hand exactly what causes them the most difficulty in a live trial.

For the purposes of the Forum trial, the reader should assume that the action takes place in a traditional courtroom with its inherent segmentation and segregation. Initially I had imagined it in-the-round, thus removing all physical barriers and levels which could invoke status imbalance, however I have opted for the traditional

courtroom because I have argued that Boal's Joker has the ability to overcome those hierarchical barriers and so allow the trial players to participate despite their thinking or assuming otherwise. Indeed, it would have been easy, in addition to opting for a set in-the-round, to remove ceremonial clothing for the purpose of creating as equal a platform as possible, but hindsight told me that that would have actually undermined the core of my argument at this point by suggesting that we remove the barriers that I have argued can be overcome through the use of Forum methods.

Images 4 & 5

Radio _Mix_1.mp3

To follow is the Forum Trial with interventions built in. In an actual Forum piece, whilst there would be intervention points written into the script they will not be set and so the cast would be ready to react to any STOP in the process from a spectator. I have obviously had to place them into the script at pre-determined places otherwise my point would be entirely lost.

[Back story]

A young homeless man is charged with the crime. The story has been broadcast on all platforms for the national media which includes internet, newspapers television, radio and so on. Newspaper headlines and articles such as the ones above (images 4 and 5) and radio and television broadcasts are seen and heard on a daily basis.

(Mock script to demonstrate the Forum)

HM.Advocate v. Haggis

The High Court in Glasgow September 2012

Court number 1

Judge: Hamish Haggis, you are here today accused of the murder of Ceilidh Dancer. It is alleged that on the day of 20th January 2012 you did stab Mrs Dancer on her body and neck with a knife and that you did intend to kill her. You are therefore charged here with the common law crime of murder. Do you understand the charge against you?

Hamish Haggis: Yes.

Judge: How do you plead? Guilty or not guilty?

HH: Not Guilty.

Judge opening speech to the jury

Judge: Ladies and Gentlemen of the jury the starting point in this trial is to make clear the presumption of innocence. Hamish Haggis is to be presumed innocent at this stage in the case and this is particularly important given the very high profile media attention that this case has had. Ladies and gentlemen it is your duty to make a fresh start. Any knowledge that you

have of the story which surrounds this trial must be set aside. Whilst there may have been unprecedented press coverage you, on taking the oath or affirmation to try the accused on the basis of the evidence, have assumed both an autonomous and a collective responsibility to put any prior knowledge to one side. Your duty carries with it enormous power, profound responsibility and it is your obligation to see that *that* is not abused.

The onus to prove the allegation of murder rests on the Crown prosecutor. It is therefore the Crown who must prove the charges against the accused and it must do so to the criminal standard that is beyond reasonable doubt, which, as you would expect, is a high standard. The main question for the Crown prosecutor is what was Mr Haggis' intention and did it fit with the legally required intention to constitute the crime of murder. And ladies and gentlemen, for you to return a guilty verdict the Crown must prove beyond reasonable doubt that to be the case, that Mr Haggis' intention was that required for the criminal standard. If you think, based on the evidence, that the law of this country has been violated and that *that* violation is to the criminal standard then you must deliver a verdict of guilty. If you have even the slightest doubt in your mind then it is up to you to return a verdict of not guilty.

JOKER: **STOP!**

At this stage the Joker stops the proceedings and asks the jury if there is anything that needs to be clarified or that they are not clear about so far.

Bearing in mind as I said in section 4.2.1 above, the Joker should try where possible to pose open questions, a sample question might be:

Joker:	What is your understanding of the judge's directions so far?
Juror #1:	I don't understand what he means by reasonable doubt being a high standard – that could mean anything couldn't it?
Joker:	Judge, can you explain that point further?
Judge	Reasonable doubt means that you, members of the jury must be sure in your own minds, on the basis of the evidence presented, that the accused, Mr Haggis did intend to kill Mrs Dancer.
Joker	Juror #1 does that clarify your question?
Juror #1	Yes.

What we can see from the above is that almost immediately, the jury are given the opportunity to participate. They are presented with a platform on which to be heard and so any early misunderstandings are identified and addressed. Almost immediately the jury are transforming from passive onlookers to active participants, or in Forum language, spectator to spect-actor.

The trial has been continuing for three weeks and in that time there has been relentless media coverage on all news forums.

Police testimony October 16th 2011

Crown :   At what location and at what time did you find the accused?

Police: Mr Haggis was found in the park behind the house where the deceased lived with her husband Barra and twin toddlers, Harris and Lewis.

Crown: Can you tell us what state he was in?

Police: He was very disorientated, a little tearful and a little aggressive. There was blood on his face, hands and clothes.

Crown: Was he carrying anything?

Police: He was carrying a knife.

The examination in chief is over and now the defence take the stand

Defence: Can you tell the jury what you were doing on the day in question?

Haggis: I was in the park which backs onto the house that she lived in. I was having a drink at the kid's play-park and all of a sudden I heard screams from the house. I thought oh no, I jumped the fence and I ran over to the back garden, the door was open which led into her big kitchen and I saw her lying there, blood everywhere, slashed all over, it was a total mess. First I tried to help her, got down on the floor and I pressed my ear to her mouth to see if I could feel her breathing and… and… and… then I panicked 'cos I heard some old woman shouting from in the house and I thought - no-bodies going to believe me, everyone's going to think it was me but it wasn't me…it wasn't me...I was just there having a drink…I didn't kill her... I didn't kill her.

Defence: Did you have anything when you ran from the house?

Haggis: Yes, I had a knife.

Defence:	Was the knife *your* knife Hamish?
Haggis:	No…I lifted the knife from her when I tried to help her and it must have still been in my hand when I ran out…I panicked… I tried to help her…I didn't kill her…I didn't but nae' body'll believe someone like me…I'm scared….

in the Forum cut to here and assume now we have heard from the defence and the Crown take the stand for cross-examination

Crown	Mr Haggis, you told my learned friend and this court that the knife that the police found you holding at the scene of the crime was not your knife. Do you honestly expect this jury to believe that you are an innocent man? Do you honestly think this jury are so stupid as to believe that someone like *you* would try to help anyone? That someone like you would have run to help Mrs Dancer? Mr Haggis, have you got a job?
Haggis:	No.
Crown:	Have you ever had a job?
Haggis:	No.
Crown:	I have a statement here from your registered doctor which says that you are dependent on the drug Diacetylmorphine Hydrochloride. (**STOP** – Juror's may stop to clarify what this is, when asked to respond class-A drug heroin)
Haggis: (confused).	*What*?
Crown:	And, how do you get money for your heroin Mr Haggis? It's quite expensive isn't it Mr Haggis? I say to you Mr Haggis that you went out on the day in question, armed with your knife and with the sole intention of getting money to feed your pathetic habit. I would suggest that you either intended to kill Mrs Dancer or you had a complete and utter disregard for her life. Your *mens rea* therefore was *intention* to kill when Mrs Dancer stopped you in your tracks. Isn't that right Mr Haggis? Don't we concur on those points Mr Haggis?

JOKER – STOP!

A sample question at this stage could be:

Joker:	Jury, what do you understand of the story so far?
Juror #2	He is definitely guilty. We have him in the house, we have him with the knife, we have him needing to get her money to get his drugs. We have just about everything that the papers have been going on about from the start.
Joker:	Judge would you like to clarify any points for the jury at this stage?

Judge: Ladies and gentlemen, may I remind you that you have sworn an oath of affirmation to try the accused on the evidence only. It is your responsibility to cast side all other information which you may have heard prior to the trial and it is also your responsibility not to pay attention to media coverage of the trial.

Trial continues and cut to closing speech

Judge closing speech to the jury

Ladies and gentlemen of the jury I thank you for your attention during this trial. Please pay attention to the instructions that I am about to give you. It has been for the Crown prosecutor to prove that the victim was killed by Mr Haggis. The Crown prosecutor must therefore have satisfied you, from the evidence brought to court in this trial, that Mr Haggis did kill the victim. Ladies and Gentlemen of the jury, if a reasonable doubt exists in your minds as to the accused's guilt, he must be acquitted. As I said at the beginning of this trial, you must make your decision based on the evidence that you have heard throughout the trial and you must decide the verdict based on the criminal standard which I shall remind you is beyond reasonable doubt. If there is doubt amongst you, then that will constitute a level of responsibility below the criminal standard and in that event you must return a verdict of Not Guilty.

[end of mock script]

The Forum Trial would continue in this way until the end with the Joker coming in and out of the action at his discretion. This is only a sample of how a trial could run as there are myriad possibilities in terms of dialogue between participants. Above all, what I hope to have demonstrated is that by using Boal's devices, participation can be enabled in a criminal trial. Thus, with the inclusion of the Joker the passive jurors are transformed into active participants and through their interaction we can actually see and hear what they do and do not understand. Where there are barriers to understanding, each trial participant is made aware of those barriers and so can adapt his communication skills accordingly. In addition, if jurors do not want to participate then, as I have previously argued, they should not be compelled to so do, however I argue that the seriousness of their task is magnified by the presence of the Joker and so

the scope for apathy or disengagement, I argue, is greatly reduced. Overall, I hope to have shown that through the use of these techniques meaningful dialogue is enabled which in turn should lead to verdicts based on thoughtful consideration.

My aim at the beginning of this section was to re-create a snippet of a Forum Theatre criminal trial to demonstrate how Forum and the Joker could work to enable actual true participation by the jury during the trial. In the final section of this chapter I address the possible objections to the ideas that I put forward.

5.5.2 Objections to integrating Forum Theatre into the criminal trial

I now come to the criticisms which could be raised in opposition to Boal's theories. As with Freire's theories, I would not dispute that a number of practical objections might be made to the proposals to integrate some of Boal's Theatre of the Oppressed devices into trial by jury and I am quite sure that they would be met with resistance from some both inside and outside of the legal profession. Before addressing what I anticipate will be the stiffest resistance, I should point out that the traditional trial has already been challenged, as well as its scope widened with the rise of alternative forms of adjudication such as mediation, restorative justice or Children's Hearings (in Scotland). Additionally, we see more frequently the dissemination or fragmentation of the courtroom with the use of video links to transmit evidence from remote witnesses or the rise of specialist courts designed to deal with specific issues such as domestic violence or drug related offences. Against this background, introducing Forum Theatre techniques such as Boal's Joker would not represent quite as radical a shift as it would once have done and may provide an effective means to break down barriers to participation without having to engage in a wholesale redesign of courtroom architecture. I anticipate that the most resistance to my ideas will be based in fear of change and the perceived threat that Boal's work brings to the status quo of trial by jury. This is understandable given that fear is a dominant factor in preventing or

obstructing changes in mind-set or perspective on a daily basis and so to make an exception in this field seems to me to be unrealistic.

To this point I have set out my reasons for making Augusto Boal's Theatre of the Oppressed an integral part of the trial process in an attempt to see if it would be possible to create a forum in which the jury could be supported in meaningful participation in the trial. I have drawn out the key points of his work and I have demonstrated why I think that Theatre of the Oppressed, particularly Forum Theatre and the Joker, would be valid for use in a courtroom. When reflecting on Freire's work, my ideas may be met with some resistance and I accept that the same may be so with moves to integrate Boal's techniques. Indeed, I suspect that the introduction of Boal's techniques may be more challenging at first glance than Freire's because it is in Boal that we can see the physicality of participation coming to life whereas with Freire there may have been a sense of security in that, up until that point, I was putting forward ideas which, *prima facie*, could have seemed more contained. With the integration of the Joker however there may be a more immediate sense of disruption which may provoke more resistance. Indeed, as with Freire, I accept that the introduction of Boal's techniques may see the same or similar opposing arguments as were highlighted in relation to Freire's problem-posing and which include the perceived disruption to the trial; the added costs involved in allowing for the extra time needed to complete the trial; the possibility that jurors might want to ask questions of the witnesses or the accused and, the questions over the Joker more generally.

I have indicated previously that I only envisage that the jury would be permitted to ask questions of the legal professionals and that in itself may be regarded by critics as a point to question. Indeed, I accept that a jury may become frustrated when, on the one hand they are given scope to participate (and so they may have the impression that they will be able to ask any question, of any person involved in the trial), but on the other their participation is restricted when they are told to whom they may direct their

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questions and the scope of content for those questions. I also accept that this restriction alone could be regarded as rendering the jurors capable only of reactive participation and so, whilst I have already discussed my reasons for limiting the scope for juror participation in respect of the scope of their questions, I shall clarify my position once more. The first thing to say is that the person in the Joker role would, ideally, be sensitive to the motivation underpinning juror questions – that is to say, that juror participation is to be enabled in order for a juror to clarify his understanding of the legal language, thus creating a forum which sees jurors able to base their verdicts on clearly understood information rather than possible misunderstandings or confusion. The second thing to say is that I see the integration of Boal's Joker as a positive element for all of those involved in a trial and not just the jury. Thus, to be clear, I do not suggest that a Joker be integrated into the trial to act on behalf of the jury and to allow them to create their own rules to the detriment of the other trial participants and so, in reality, can see their questions being limited to asking questions which allow for their clarity of understanding. Finally, with the benefit of reflection as well as practical experience of the transformative potential of Boal's work, I believe that my vision for future trials could be possible and effective for enhancing communication which then leads to clarity in understanding despite what might appear to be radical suggestions. I now discuss in more detail those possible objections to my proposals.

The first issue to address is the use of theatre devices in a criminal trial. As I have previously said, Forum Theatre is a form of participatory theatre: an opportunity for creative community-based dialogue, culminating in the theatre being performed, predominantly, by the people living with the issues which form the heart of the Forum piece. The Forum stories build to a crisis and stop at the crisis, with no options or alternatives available to the protagonist. The piece is re-run, this time with the Joker who facilitates the interventions with the protagonist and spect-actor and, through dialogue, the piece ends on a more positive note than in the initial run. There are several problems if this format were to be integrated into the trial. First, in traditional

Forum the invitation is to replace an oppressed character and "do battle with an oppressor, to experiment with ways to break the oppression"[38] is in itself, as David Diamond points out, limiting as it only allows for one protagonist and one oppressor at any one time and this, I argue, is unrealistic if we try to transfer to a criminal trial. Indeed, by the very nature of the trial set-up, it could be argued that there are several oppressors and only one oppressed, whoever we choose to regard as the latter, is dependent on our subjective interpretation of individuals in discrete trials. However, the Forum style would be very difficult to integrate because a trial is not a piece of theatre, there is no rehearsal and there is no chance to change the ending once it has been realised, raising the obvious question over why we should consider its application in the first place. I should be clear therefore that I am not suggesting the full integration of Forum Theatre into the trial situation but rather that the core principles - meaningful dialogue which is facilitated by a Joker - are integrated. I argue that these are key to moving trial by jury from the static confined framework that we have become accustomed to, to a flexible and reflexive framework which is able to support such interactions which enable dialogue with jurors.

This leads to the second, and what I consider may be the most crucial point of resistance to my ideas, the use of the Joker *per se*. Ideologically Boal's Joker is the impartial facilitator of the action, he is skilled in his position and he is ever astute in remaining on the periphery of the interactions. Indeed, I suspect that most Jokers would say that they do not influence the process, that they are wholly selfless and that their vision is for the group or individuals involved in the interaction. But, can this ever be the case if the Joker is a living person? If looked at closely, the Joker can surely never be truly impartial because it is the Joker who asks such questions as "what is your experience of hurt" or, "what is your understanding of the words just spoken." These questions are then followed up with questions of cause and effect. Thus, what Boal

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[38] Diamond, D. (2007), *Theatre for Living: the art and science of community-based dialogue*, Trafford Publishing, p.40.

does in the Joker is he encourages us to "engage in the tough and courageous act of contact"[39] therefore he becomes partial and if taken a step further, how can a Joker who has faced same or similar situations that arise in the Forum remain on the periphery? We must therefore ask whether in this we see a transition from witness to subject and if we do then the idea that the Joker is the animator of the complexities of being both the subject and the object is problematic for our purposes. For example, if we then transfer this to the courtroom situation, the list of objections to integration of the Joker becomes both obvious and endless. He could manipulate the trial process to negative gains, he could oppress certain witnesses, he could be bribed prior to a trial to act for one side, he could use his skills to sway the jury and so on. Whilst there is always the possibility that a Joker could act for these negative gains as Schutzman suggests when she refers to him as the 'trickster,' I argue that the chances of this becoming a reality are far less than the possibility of the legal profession achieving these ends of their own accord.[40] Fundamentally, if, as Mady Schutzman says, the Joker runs wild, then he is not the Joker in the construct of Boal and should be treated with caution.[41] Moreover, I suggest that to focus on an argument based in what the Joker could do in the negative sense is a futile argument predominantly because it is based in nothing more than negative speculation which leads nowhere unless substantiated one way or the other.

With focus on the Joker as a way in which clarity could be facilitated in the course of the trial, it could be argued that the authority of the Judge may easily be undermined and this may emerge as a very strong point of resistance to the ideas that I put forward. I acknowledge this point, but would stress again that the object of integrating the Joker is not to undermine authority or place in the trial, but rather to open up the lines for

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[39] Salverson, J. 'Witnessing subjects. A fool's help' in Cohen-Cruz and Schutzman, M. (eds.) (1996), *A Boal Companion, Dialogues on theatre and cultural politics*, New York and London, Routledge

[40] Cohen-Cruz and Schutzmann above n.39, p.141

[41] Cohen-Cruz and Schutzmann above n.39, p.133.

communication between all the parties. I accept that the idea of the Joker may seem to disrupt the trial at its very core, thus affecting, at a fundamental level, the expected norms from a variety of parties, not least the legal professionals. Indeed, having spent a great deal of the thesis discussing and highlighting the benefits which could emerge from the integration of the Joker, I am nonetheless sensitive to his effect on the legal professionals in particular. Indeed, it would be naïve of me to think that the introduction of this character would be accepted easily by legal professionals, who have been working in an environment of familiarity both in terms of the rules that they adhere to and the rules that they make in the duration of a criminal trial. I should be clear when making reference to rules and what I am pointing at in particular are those rules of narrative which could be used in the delivery of evidence, used to manipulate or cajole or disorientate – subliminal unspoken rules but rules nonetheless and ones which may be challenged when the Joker takes his place as facilitator of the communication of the trial. I remind the reader however that I have already drawn out very clear guidelines on the conduct of the Joker and I would expect that any person jokering would respect and adhere to those guidelines. This is a given and, of course, if a Joker were to abuse his position then obviously there would be negative effects such as the possibility of integrating Boal into the live trial being completely undermined.

Another argument against the integration of Boal's devices would be over the extended amount of time that a trial could command. Indeed, if we allow time for the Joker to facilitate dialogue throughout, trials could obviously last longer than they do currently, thus raising such concerns as financial and time burdens for jurors and other trial players. In that respect therefore my ideas could come under pressure from those concerned with the efficient running (both financially and time-wise) of the trial. I accept this and I do see the flaw in my own argument. That is, if each trial takes longer because of the extended time needed for clarification of understanding, that the integration of the Joker could actually be a contributory factor in further oppressing those alleged and suspected offenders who may, as a result, need to wait unduly for a

trial date.[42] Moreover, I accept that the added time which may be required could be

seen as running counter to the aims of running trials efficiently so that the wider

criminal justice system of which they are a part can run more smoothly. I do however

argue that if we are looking for legitimacy in a verdict as a means to play out justice,

then we must allow time for that clarity to be gained by the jury. Indeed, if the

participants can see that their part is valid and that the jury especially can see that

they are regarded as a vital part of the system, then the extra time needed for trials

should not be considered overly problematic. Moreover, when we recall the latest

statistics for the number of jury trials[43] we see that they contribute to a tiny fraction of

the overall trials heard in any given year. Thus, arguments over the added costs

incurred are brought into perspective and, I argue, should not be given prominence

because the benefits gained by enabling jurors who can make clearly informed verdicts

outweighs any financial burden.

Finally, the autonomy of the jury could also be called into question in this new

structure. Indeed, some may argue that making what the jury say and do visible may

compromise their position entirely. I would tend to agree with this fear if it transpired

that the jury really are incapable of carrying out their task as some sceptics maintain.

If however that turned out to be the case then there would be a strengthening of my

argument because as a result of my vision we would be able to see and hear all of the

communication and where that is made possible renewed faith in the system of trial by

jury may begin to emerge. Finally,

> "The "world's most famous court trial" attracted media attention and headlines
> around the globe. Radio and print journalists, photographers, and movie camera
> crews swelled the crowd and provided economic benefits to the community,
> since they needed hotel rooms, food services, and sundries. Potential jurors

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[42] Duff A., Farmer L., Marshall S., and Tadros V. (2007), *The Trial on Trial, Volume Three: Towards a Normative Theory of the Criminal Trial,* Oxford and Portland, Oregon, Hart Publishing, p.61.

[43] http://www.justice.gov.uk/statistics/courts-and-sentencing/judicial-annual-2011 - in England and Wales the total number of trials heard was 1,734,579 of which 17,786 were trial by jury which is 1.25% of the overall trials heard. In Scotland the information suggests the figure was nearer 5% which reflects those proceeded against in the High Courts and Sheriff Court solemn proceedings http://www.scotland.gov.uk/Publications/2012/11/5336. [both sites live at 07/07/2013]

> vied with one another for a coveted place on the panel and hence in the spotlight. Many testified that despite all the publicity they knew nothing about the affair that could prejudice them."[44]

Indeed, most of the jurors on the venire testified to not having heard anything about the Scopes trial, one amongst several in the past to have been dubbed "the trial of the century."[45] These few words sum up the confusion and difficulty which I have attempted to tease out in the course of this thesis. On the one hand we have indications that the amount of apathy which weighs on jurors outweighs their attempts to engage in the trial. There is information that suggests that jurors rely on spurious information in their journeys to their verdicts and here we have an example of the glorification of the criminal trial enticing potential jurors to get the central part and do their duty for the sake of a kind of justice.

The impact of the glorification and glamour of the trial should not be under-estimated when it certainly is a large part of popular culture today. This glorification and glamour could metamorphose the trial into something that it is not and so I argue that the integration of Boal's Forum Theatre and his Joker will make in-roads to de-cluttering these distorted images of an almost Victorian theatricality currently attached to the trial. As I have said before, but I feel it is worth mentioning a final time, in Boal we do not see the trappings of the theatre: there are no grand set designs, no elaborate costumes, soundscapes and music scores are, in my experience, kept to the minimum for nuance effect rather than elaborate accompaniment or creation of another voice and, most importantly, the work is accessible by everyone often in outdoor areas, streets, arenas and so on. Moreover, in the template for a future trial that I have created we can still see the trial but not as a theatrical spectacle only to be watched but rather as something to be respected and guided through our own integrity – each

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[44] Garber, M. 'Cinema Scopes: Evolution, Media, and the Law' in Sarat, A. and Kearns, T. R. (eds.) (1998), *Law in the Domains of Culture: The Amherst Series in Law, Jurisprudence, and Social Thought*, University of Michigan Press, Michigan p.121.

[45] Others include the O.J. Simpson trial (1994); the Nuremberg war-crimes tribunal (1945-46) which I acknowledge did not have a jury, and the Leopold and Loeb trial (1924).

one is accessible but the latter I argue more realistic. And it is this last point on which I shall dwell for a moment before concluding.

The accessibility of the trial is, we must not forget, regarded by many as a fundamental principle of the law in contemporary society, but identifying exactly why and for whom is, as Duff *et.al* highlight, quite difficult to establish.[46] There are the obvious arguments which include that justice must be seen to be being done, that verdicts should be delivered in public when people are called to account in criminal proceedings and it follows, as Duff *et.al*. highlight that the "'Guilty' verdict constitutes a condemnation of the defendant as a public wrongdoer."[47] There are also the less obvious images of the public side of the trial: the ceremony; the ritual; and the spectacle.[48] All of the images of the trial can, in some guise or another be linked with theatricality, the more traditional norms of the world of theatre.

I have argued throughout this chapter for integration of Boal's Joker as a way to enhance participation in a trial. I believe that these techniques can make a difference because through enabling meaningful participation jurors may be able to take control when they do not understand what certain language means. Moreover, by developing a forum where participation is central then from a research perspective we can begin to quite literally hear what the jury do and do not understand. However, given that what I am suggesting are interactive theatre techniques I am keen to stress that they must not be confused with somehow making the trial process more theatrical. Boal developed his Theatre of the Oppressed as a way to give voice to those who otherwise could not be heard and I suggest similar for the jury as a way to enhance their understanding in the criminal trial.

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[46] Duff *et.al* 2007 (*Trial three*) above n.42, chapter 9.

[47] Duff *et.al* 2007 (*Trial three*) above n.42, p.268.

[48] McEwan, J. (2003), *The Verdict of the Court: Passing Judgement in Law and Psychology*, Oxford and Portland, Oregon, Hart Publishing.

5.6 Conclusion to chapter five

In this chapter I have demonstrated how, if we integrate the devices for communication and participation found in Freire and Boal's work, the trial communication between the jury and the legal professionals could be altered with the result that jurors may be better informed as the trial is in progress. I have discussed the core methods used in both Freire and Boal's work and I have argued that they would be valid for use in a courtroom to enable jurors who are empowered to act proactively in their roles. The aim of this chapter was to consider the possibilities for improving juror understanding of the judicial instructions and legal language used throughout the trial, with particular focus on the benefits of dialogue as the primary communication device. I turned my attention to the work of Paulo Freire in the first instance because I believe that through his problem-posing method we can enhance communication in the courtroom and by extension we should be able to enhance understanding. I have explored the possibilities of using dialogue as the primary communication method maintaining that it is through dialogue that real understanding can occur. Moreover, I have stressed that it is through dialogue that we are able to see and hear what really happens for the jury in the trial and from that point we can thus build our understanding of their part in the trial. I have also maintained that dialogue empowers and that it is an avenue for integration – I have demonstrated therefore how, with the use of Freire's problem-posing and Boal's Forum method, we can physically see the jury involved in the process to which they play a crucial part. In putting forward these ideas for change I have invited the reader to shift perspective on what he considers a trial by jury to be. I have disrupted some of the norms commonly associated with this system and I have put forward ideas for change which do require quite major shifts in both the way that the trial should proceed, and the way in which we choose to take on those changes.

Chapter six

Conclusion to the thesis

6.1 Introduction to chapter six

At the beginning of this thesis I claimed that I would explore alternative ways to address the issue of juror understanding in an attempt both to shift our own perspective of the scope of the role of the jury, as well as developing alternative research methods which may result in our enhanced understanding of what the jury do and do not understand in the course of a criminal trial. I now argue that I have achieved what I set out to do and that in the course of the thesis I have developed our understanding of the extent or the scope of the role of the jury by advancing a concept which imagines communication and participation by the jury taking place at the point in the process where intervention is required for their clarity of understanding. By remaining a conceptual thesis, I have challenged traditional conceptions of the role of the jury, with the result that the focus shifts from a passive jury to one who, given the scope to participate, may interact with the legal professionals. Ultimately I have transformed the course of the trial from one in which there is very little space for the jury to participate to one which - as a matter of course - places the jury on an equal footing with the other trial players, treating it not as a subsidiary but rather as an integrated part of the overall process.

I assessed the jury within the broader framework of the criminal trial to see when and where their problems arose and very quickly I concluded that in order to make that exploration I would need first to *make space* for the jury within that framework. Therefore I have maintained throughout the thesis that in the current system, whilst there is obviously a space for the jury, this amounts to little more than an allocation of physical spaces within the architectural interior design of the courtroom. First, we see the jury box within which they must function in the course of the trial and second we see the jury room, an ante-room within which they are to come to their decision – in

both they are contained until they have completed their task to the level expected by the justice system. Space for them to function I have argued is seriously lacking which, given that the entire trial rests on the verdict of the jury, is an area in need of reassessment. Additionally, most of the research and literature on the jury takes participation as given, without exploring the nature of that participation. I have however challenged this perception and have shown that presence in the courtroom is not the same as participation in the trial.

I also highlighted in chapter one that I would offer practical ideas to heighten our awareness of juror understanding and in the course of the research I have drawn on my experience of working in both theatre arts and critical education to achieve this. In that respect alone I am confident that my work is truly interdisciplinary, both in the combination and scope of the research areas as well as in its capacity for alternative forms for presentation of the ideas.[1] I chose to look to Freire and Boal, whose work is not ordinarily associated with jury research, but whose theories for communication and participation, I felt, could bring clarity to understanding the role of the jury by transforming the way in which people are permitted to participate in the trial. Thus, by considering the lessons to be learned from Freire's critical pedagogy and the different perspectives of participation inspired by Boal's Theatre of the Oppressed, I have argued for a forum in which *space is made* for the jury and from that point I have introduced options which allow for both them and the legal players to communicate as openly and unambiguously as possible. This type of open, unambiguous communication between these players is not a part of the current trial process.

In chapter two I looked to the existing jury research and it was against that background that I began to look more closely at the scope of the role of the jury in the trial. My

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[1] At the time of writing confirmation of full funding has been granted and the ideas contained in the thesis will be developed for a staged production to be performed at a site specific venue with Grid Iron Theatre Company. This therefore is an example of my interdisciplinary research being realised practically with the dialogue that I have started being made available to a far wider audience.

primary focus therefore was to look at the kinds of problems identified in the jury research and literature and to look at the conception of understanding and participation that underlay this. From that point I was able to gain a clearer picture of the reasons underpinning continued use of the jury and from there was able to develop both my own understanding of the jury in the trial, as well as to expand my ideas to advance the practical solutions that I do.

I have set my ideas within the current procedural and architectural structures of adversarial trials. However I have been clear from the start that, given that my work is conceptual, I do not always adhere to the procedural rules because it was never my intention for the ideas here to be considered as either realistic or workable for currently running criminal trials. I should also say that in the future I would like to spend more time assessing the impact of space on the trial players and in that respect I would consider such things as deference to allocated space, the effect of environment on a persons' willingness to participate, and the subliminal control factors at play in the very fabric of the courthouses which host trials today. Therefore at the end of this chapter I point towards what could be a more nuanced exploration of those areas by discussing some of the work briefly mentioned in the thesis, including that of Peter Brook, Robert Lepage, Grid Iron and La Fura dels Baus.

Before drawing the conclusions relating to the dominant themes of the project I should clarify for a final time where I consider my thesis sits in relation to other jury research, and why I think that my ideas represent a fresh perspective within this increasingly vast scholarship. My thesis represents a conceptual exploration of the jury within the three disciplines of law, critical pedagogy and interactive theatre arts and in that respect it is both novel and innovative. I have placed the understanding of the jury centre stage and I have attempted to treat the jury as a valid and valued part of the trial process. In so doing I have not examined it in isolation, rather, where possible, I have considered its part and its place within the overall criminal trial process. I now draw the conclusions

to the dominant themes that I discuss in the thesis. Thereafter, I look briefly at how both jury research and our image of the scope of the role of the jury could be reimaged further as a result of my ideas.

6.2 Conclusions relating to communication and juror understanding of legal terminology

On the basis of the current research into juror comprehension, I would say that there is no doubt that the communication between all of the trial players in criminal trials currently is compromised. Therefore, I suggest that there is a very real need to enable a more fluid and open communication style. I have highlighted, for example, the research that indicates that when jurors become confused, frustrated or disinterested they will be more likely to default to relying on stereotypes, extra-legal information or defer to the stronger characters or opinions in the jury room. These tendencies are exacerbated when, as it certainly seems to be the case currently, there are no clear avenues for clarification when confusion or ambiguities do arise, or if some argue that those avenues are available, I suggest that they are nonetheless ineffective. I cite for example the permission to ask the judge for clarification of judicial instructions which *prima facie* is an avenue for jurors to clarify their understanding, however when we consider that their questions must be asked in writing, through the clerk of the court and only at an interval in the proceedings which is dictated by procedure, the moment for clarification may well have long passed for the juror. Additionally, I have indicated that the general responses to poor understanding borne out of inadequate communication have tended to be focused on providing the jury with more aids to understanding rather than truly integrating them into the process. I discussed this at length in chapter three, when highlighting the differences between critical pedagogy and traditional technocratic pedagogy, as well as drawing parallels with both the current communication, and the responses to poor understanding in the court. I said also that I considered the responses to the hurdles that jurors experience to be

traditional and technocratic. Indeed, I am surprised that despite the volumes of research in this area, the expectation is still that the jury will sit and listen passively and then recall the evidence in preparation of the verdict. The various aide memoires available do not, in my opinion, detract from the fact that this is still a very technocratic system with very technocratic responses to problems and hurdles arising out of that system.

In order to address this general problem, my responses, as I have demonstrated, have not been in line with the majority to date. I did not isolate the jury in my research but rather I integrated them and viewed them as part of the bigger structure. Indeed, in this respect alone my approach has been consistently different because I have always argued that to address the issue to find a long-term solution we must first look at all of the trial players, not just the jury.

Probably the way in which my approach is most different from the majority is that I have chosen to offer solutions from the perspectives of critical pedagogy and interactive theatre arts and, whilst those solutions are confined to the written form in this thesis, they can be easily realised practically and, I argue, are most powerful when communicated in interactive, physical forms. Indeed, in chapter five I demonstrated that if we communicate the trial information using Freire's *Pedagogy of the Oppressed,* in particular his problem-posing and codifications, the basic communication in the trial is immediately altered. Additionally in that same chapter I developed Freire's pedagogy by introducing the work of Boal and showed that through the use of his Theatre of the Oppressed techniques, communicative participation can be achieved. I have stressed throughout my work the importance of clear, unambiguous communication in the trial and I chose to enable that through integrating the work of Freire and Boal. I chose to address these issues through the eyes of Freire and Boal predominantly because I have first-hand, practical experience of their work. Indeed, I have experienced the potent effects of integrating their work in life, and so I am confident that the situation in a

courtroom could be altered dramatically if their work were integrated in the ways that I have described throughout this thesis. Indeed, I suggest that the results could be far-reaching both in terms of our understanding of juries and juror understanding *per se*. To follow therefore I draw my conclusions on how effective the theories of Freire and Boal could be in the system of trial by jury.

There can be no doubt whatsoever that there is a great deal of information - both in the form of research and commentary - on which to develop our understanding of the system of trial by jury. I have demonstrated this to be the case and have highlighted that the information is mainly in the form of mock, shadow and simulated jury trials where the results from such studies can only be regarded as strong indications, nothing more and nothing less. This research method however is limited and limiting for a number of reasons, with possibly the most important being that in such trials the attention is placed on the jury in isolation and I have argued throughout that unless we consider the jury as part of the bigger framework we will continue to be confused by its processes and its understandings. Similarly, there is no doubt that progress has been made in recent years in regard to trying to provide jurors with up-to-date and relevant extrinsic information designed to aid their part as the decision-makers in the trial. Once again I have taken issue with this, not because of the types of aids offered, but rather at the insistence on giving things to the jury rather than integrating them into the process proper. Indeed, I maintain the opinion that until such time as we make space for that jury and support them in their role as jurors we will never really move beyond what we already know. I conclude therefore that the current research is lacking in vision and until that is rectified we will always lack progress in this area. As I claimed at the beginning of the thesis however, my proposals do offer research insights into juries by speaking with jurors as the trial is in progress.

6.3 Conclusions relating to Freire's pedagogy as a communication device

In chapter three I put forward the arguments for integrating Paulo Freire's pedagogy into the current system of trial by jury and in chapter five I contextualised these theories in a mock-up trial. I said at the beginning of the chapter that I was drawn to his work because of, *inter alia,* his ability to empower and through empowerment comes a type of learning which is sustainable, something which I suggested was vital if reform in trial by jury is to work. I identified the core of Freire's education not as a means of getting education *per se*, but rather about engaging with one-another through dialogue to generate thought, explanations and understanding and I referred most specifically to his rejection of the teacher as the expert and pointed the reader to his insistence that education should be about exchanging ideas, which in turn leads to positive and productive learning. As such, the essence of Freire's pedagogy is about emphasising understanding for both the teacher and the student in equal measures. Thus in chapter three I adopted this principle and I placed the emphasis for understanding on all of the trial players, drawing away from placing the emphasis on the jury alone. Essentially, Freire *identifies* the problem and second he responds to it in a way that places the student at the centre of the learning – I have done the same with the jury.

In order to explore how Freire's theories could theoretically develop juror understanding I firstly needed to assess the current trial communication and try, as Freire does, to *identify* where the problems or hurdles arise and from that point work on responding to them. I therefore dissected the process of communication as it currently stands in the trial, highlighting what I regarded as the primary weak points at which communication breakdown could conceivably occur. I made a detailed analysis in section 3.3 of the thesis and I stressed that, unless we can create dialogue, or at least clear communication between the jury and the legal professionals, there will always be

doubt cast over the legitimacy of the verdict. Moreover, unless the hurdles can be identified and addressed as they arise, there is always potential for confusion.

In response to that in chapter five I demonstrated how, by integrating Freire's codifications and by using as the core communication style his problem-posing, communication by all of the trial players could be enhanced with the result that any misunderstandings are identified and responded to immediately and not at the end of the trial. This marks a sea-change in response to juror understanding, because my suggestions involve working together during the trial rather than relying on both providing and using effectively aides memoire prior to and post-trial.

I suggested that the main justification for integrating Freire's work into the trial was that it offers a real opportunity to understand better how verdicts are formed and perhaps more importantly, where the challenges arise for the jury and ways in which we can respond immediately to those challenges. I conclude this section by reiterating that if we employ Freire's methods in the trial we will most likely see very tangible changes in juror understanding in future. Indeed, I would go so far as to argue that if we continue to try to reform the system of trial by jury through regarding the jury as a separate entity we will continue to misunderstand their potential for the trial process.

6.4 Conclusions relating Boal's theories to participatory communication

In chapter four I introduced the work of Augusto Boal, fundamentally because I felt that through the use of his Theatre of the Oppressed techniques we could come closer to improving participation in the trial. Thus, by enhancing communication through participation, which is integrated into the trial process and facilitated by Boal's Joker, I have developed a conceptual trial framework which, I suggest, is not only robust enough to enable *and* support trials which *see* and *hear* clear, concise and precise

communication between legal professionals and jurors but also to withstand criticism from those perhaps a little less open to the changes that I propose.

To contextualise Boal's work, in chapter five I put forward a number of ideas which I suggest could enhance participation during the trial through various participatory techniques but I think, on reflection, the key to much of the progress in this area is seen in Boal's Joker. I said that Boal's Joker asks for a problem to be investigated *through* performance: he does not regard the problem as a truth which is to be demonstrated in the performance and so the integration of the Joker to enable the investigation to take place and this, I regard as one of the keys in this investigation. Indeed, in chapter five I highlighted the scope for the integration of the Joker as a means to enhancing participation: he opens the way to interaction, both physical and oral, for the jury and the legal professionals and so can empower the jurors to clarify their own understanding whilst in dialogue with legal professionals as the trial is in progress. Indeed, I highlighted in chapter two that one of the justifications for continued use of the jury is that its participation in criminal trials brings with it legitimacy, democracy and fairness. However, on these points I have stressed that these ideals can only really be a reality if there is true participation and the way that I have addressed that issue is to suggest the use of Boal's Joker as a facilitator to enable such participation. I said in chapters four and five that I thought Boal's Joker could ideologically be the key to breaking new ground in jury research – I conclude that Boal's Joker is a very realistic way to develop both our understanding of the jury and the jury's understanding of its task. I should say that I do not presuppose that simply by allowing space for the Joker all of the doubts, fears or questions in regard to the jury will suddenly disappear. However, I do argue, first, that Boal's Joker can improve participation and understanding of the jury in trials and, second, that it could improve our understanding of juries by providing a research technique which offers insights into juries that are currently lacking.

6.5   A vision for the future?

> "It seemed to me that what happened inside the picture frame had to be made as fascinating as possible. So, from the very start my biggest interest was on the design. It seemed to me that the image that you saw through the picture frame was the image of another world [...] it had to be exciting because it was unexpected."[2]

In chapter five I discussed how the architecture of the courtroom can inspire expectations of theatricality or performance in a jury and I punctuated my discussion with reference to, *inter alia*, Clare Graham's observations of the ceremony which attaches to the trial and her opinion that the courtroom itself is "a setting for a tense, tightly organized and complex drama."[3] I concluded the chapter observing that there is no doubt that with a criminal trial comes some sort of theatricality, whether that is necessarily a tightly organized and complex drama is a moot point but there is no doubt as to the presence of *a* theatricality. This theatricality is also a dominant factor in peoples' perceptions or preconceived notions of what a criminal trial is about. Indeed I have also mentioned that a person's immediate image of justice is often an exciting one, unravelling week after week in television dramas or hyped in the media during particularly horrific, but nevertheless captivating, criminal trials. Therefore I suggest that we undermine at our peril the potent effect that these images *have and carry to* the jury especially as these exciting images are readily available in daily life. At this stage in the thesis I am not so interested in re-assessing the theatricality as it is played out in the course of a trial but rather I am interested in pointing forward to how I believe the space, interior design, architectural layout, colours, lights and so on affect the jurors' capacity to act as autonomous thinking human beings by suggesting that, as a result of these design techniques, coupled with our innate instinct to defer to space,

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[2] Peter Brook interview on design for his 1946 production of *Love's Labour's Lost* in Moffitt, D. (ed.), (1999), *Between Two Silences: Talking with Peter Brook*, Great Britain, Methuen, p. 76.

[3] Graham, C. (2003), *Ordering Law: The Architectural and Social History of the English Law Court to 1914*, Aldershot and Vermont, Ashgate, p.2

our judgement of our own abilities in our part as jurors in the trial may be subliminally controlled or compromised.

This is something which Linda Mulcahy touches on when she implies that a person's image of justice is based on what he *sees* at the material time, no more and no less.[4] An almost identical scenario is seen in the stereotypical theatre show, which perhaps explains why parallels continue to be drawn between the two. Normal stage actions will appear real to the audience if the portrayal is convincing and so audience members are inclined to accept it – maybe only temporarily – as an objective truth. The same is implied by Mulcahy's perception of how the criminal trial is interpreted and through the image comes the truth and, from there, the ideal image of the trial. But what if that objective truth is misplaced? Has the initial image of justice become distorted by the trappings of justice, and by what means can we redress the balance to produce a more accurate picture of this increasingly elusive image of justice? I have suggested ways to do that throughout, in respect of the participatory aspects of the trial however I now point out that we should also be aware of how the actual space affects those using it. Some argue that the jury is hampered in its ability to participate because of the segmentation and segregation of the courtroom – I have demonstrated how this need not be the case by introducing Boal's Joker.

Bertold Brecht introduced the distanciation effect in theatre and in an area of research that I would like to pursue in the future, I wonder how, if we were to introduce such a device to the trial, the participants' image of their part may be altered.[5] The fundamental point of the alienation device is to appeal to the audience member to work for himself, thus becoming more responsible for accepting what he sees. Normal stage action will appear real to the audience member if it is portrayed in a convincing way,

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[4] Mulcahy, L. (2011), *Legal Architecture: Justice, due process and the place of law,* Oxon and New York, Routledge, esp. chapter 2.

[5] Brecht, B. (1964), *Brecht on Theatre*, edited and translated by John Willett, New York, Hill and Wang.

and the same can be said of testimony in a trial. But what if our initial perceptions were altered - if the immediate action were followed by Brecht's Clown, whose job it is to displace the initial emotional reaction?[6] This distanciation device challenges our initial response to the situation, thus forcing us to reconsider *where* our sympathies lie, and *why* they lie there, calling into question our initial assumptions about the situation. The use of this device could alter dramatically the way in which people view their part in the trial and so challenge their image not just of justice but of the part they play in that justice thus instilling in them the importance of their part. Add to the Clown, the Joker and what emerges is a participation which transcends architectural barriers ultimately freeing the trial participants from deference to their allocated space and enhancing their part in the trial by making space for them to communicate. Moreover, and perhaps more subtly, the use of the Joker or the Clown could enable the barriers, both physical and metaphorical, to be dissolved, so creating a trial situation where there is no room for segregation and segmentation, where people feel able to move from their allocated zones to areas which they had hitherto been unable to enter physically and metaphorically. Indeed, these devices reinvent the idea of physical space because they allow people to move in and out of their allotted zones, to act and react to the action, and to take ownership of a situation which otherwise they could not. I discussed this in greater detail in chapter five but I feel it worthy of a reminder at this stage as I draw to a conclusion by looking to the future for trial by jury. I should also mention that not only do Boal or Brecht offer alternative ways to communicate through participation but also the Joker or the Clown have the capacity to disrupt people's expectations of the norm, altering or challenging their perspective of 'their space' and how they should perform within it.

Finally, as I have made clear in reference to his Theatre of the Oppressed, Boal did not rely on theatre buildings or stages for his work to have significant impact. He played

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[6] Brecht's Clown was a device used to disrupt or alienate the passive audience members. Alienation is a technique to halt the process, to interrupt the action, to make us look again at a situation we *thought* we had understood.

with the use of space in these genres and in his Theatre of the Oppressed workshops to distort, to displace but ultimately to encourage the participant to *understand* and *own* the space, thereby gaining a sense of empowerment through *their understanding* of the impact of *that* space.[7]

Similarly I do not necessarily envisage the need for the architecturally traditional courtrooms with their inherent segmentation and segregation for my vision of future trials. Whilst in this thesis I have offered alternatives for communication within the traditional courtrooms I now say that a great deal more could be learned about our attitudes to the power of space division if we view it from a different perspective entirely. Consequently, if we move the process from its traditional place then we may see that the inherent design barriers, often associated with self and system controls, are not necessarily confining and that they *are* able to be overcome provided there are valid channels for communication available to support that journey. Thus, as a development of this journey I would propose to examine the implications of the work of theatre director Peter Brook, particularly in *The Empty Space*[8] where he challenges a person's perspective of *their* place in *any* space, be that an arena or a pit theatre or the work of theatre companies Grid Iron or La Fura dels Baus, as I have already mentioned, whose productions transcend physical barriers completely. They are both site specific and site responsive companies, who develop work outside in swing-parks, stadiums, fields, hospital wards and public bars and their performance styles quite literally go beyond those which are considered to be traditionally theatrical.[9]

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[7]See for example Boal, A. (1992), *Games for Actors and Non-Actors*, translated by Adrian Jackson, London and New York, Routledge where he guides the user through a series of techniques to enable this awareness.

[8] Brook, P. (1968), *The Empty Space*, Middlesex, England and Victoria, Australia, Penguin.

[9] For example, in La Fura's *La divina comèdia* - macro-performance in which large staging elements would become integrated into the whole piece. These elements would later become a feature of La Fura's work and cannot work without the integration and participation of the audience. www.lafura.com/web/cat/obras_ficha.php?o=79 Similarly Grid Iron's "Decky does a Bronco" (2010) was set in a children's play-park; Barflies (2009) was set in Edinburgh's Barony Bar and their first full-scale site specific piece "Bloody Chamber" (1997) was set on the landside and airside areas of Edinburgh International Airport.

6.6 Conclusion to chapter six

The idea that the continued use of the jury is justified on the basis that its participation brings a legitimacy to the criminal trial was one of the core building blocks of my thesis. This notion, as I have highlighted throughout, is premised on the fact that the jury do, in fact, participate in a meaningful sense, something which I have challenged in the course of the project, maintaining that, as it currently stands, there is no space in the trial framework for the jury to participate meaningfully. Thus, the over-riding aim of my research 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 for determining guilt. 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. Indeed, I proposed right from the start that the notion of participation is just that, a notion with no substance whatsoever. I have demonstrated why I regarded this to be the case and I have made provision to tip the balance in favour of meaningful juror participation. Whether the actual participation is obviously 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 the juror chooses to be involved.

I felt that to understand participation was to understand where not just the jury, but all of the trial players, are challenged by the trial process. I have re-imagined a trial structure which has built bridges of dialogue and from that dialogue I have argued that better understanding of legal terminology - which is rooted in empowered people who have both wisdom and integrity - can be achieved. In that respect alone I suggest that I have enabled a more nuanced, but at the same time refreshingly broad understanding of the system of trial by jury in the ideas put forward in this thesis.

I have invited the reader on a journey which reimagines the role of the jury 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 in my thesis demonstrate that it is possible for the jury to make the transition from merely being present in the courtroom to being meaningful participants in the trial. I remind the reader for the final time that I have undertaken this whole process of investigation from both an ideological and a conceptual perspective. I have a theoretical understanding of the law and I have practical experience both as a performance artist and a teacher. I bring all of these experiences together and the thesis is thus a reflection of those ideas.

The ideas that I have developed in this thesis have their roots in theories which were developed to support and enable active and positive communication in the face of extreme oppression. As Paulo Freire and Augusto Boal presented their theories and techniques to empower, so I present their theories 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 he has developed *his knowledge* in the process.

I argued at the beginning of this thesis that my ideas have dual benefit: that they offer a way to improve understanding and participation by juries in criminal trials and that they might offer research insights into juries in that they may provide evidence that is currently lacking about where during the trial problems might arise thus potentially improving our understanding of how juries operate. When I began writing I did so from an ideological perspective and I thought that my ideas and visions would remain only as ideas and visions. As I end the project I now see how valuable and valid the ideas are and so I hope that they may be developed in future and may one day may be tested in reality and not reserved to concepts and theory alone.

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