Jack of All Trades, Masters of None: Giving Jurors the Tools They Need to Reach the Right Verdict

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Introduction

If trials exist to develop truth,[1] then jurors, as the final arbiters of that truth, should be allowed to ask clarifying questions of witnesses whose credibility they are judging. This procedural courtesy[2] is not a recent phenomenon.[3] Although still systemically underutilized and primarily discussed under the genre of "juror innovations," the practice of allowing

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1 Addington v. Texas, 441 U.S. 418, 425 (1979) ("[T]he function of legal process is to minimize the risk of erroneous decisions."); Tehan v. United States, 382 U.S. 406, 416 (1966) ("The basic purpose of a trial is the determination of truth . . . ."); United States v. Callahan, 588 F.2d 1078, 1086 (5th Cir. 1979); Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 289–90 (2013) ("The Supreme Court has often stressed the primary importance of 'arriving at the truth in criminal trials.'" (quoting United States v. Havens, 446 U.S. 620, 626 (1980))).

2 *See Callahan*, 588 F.2d at 1086 & n.2 ("There was no error committed in allowing the question to be asked, and the procedure employed of requiring jurors to put their questions in writing and clear their relevancy with the court was not an abuse of the court's discretion to conduct the trial fairly."); *see also* 29 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE EVIDENCE § 6235 (2d ed. 2020) ("Exercising discretion in favor of permitting juror questioning may be most appropriate where the facts are so complicated or the witness' testimony so confusing that the jury will substantially benefit from the opportunity to pose questions."); 28 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE EVIDENCE § 6164 (2d ed. 2020) ("Rule 611(a) also gives courts power to deviate from normal witness-examination procedures in order to promote discovery of the truth.").

3 *See* Eugene A. Lucci, *The Case for Allowing Jurors to Submit Written Questions*, JUDICATURE, July–Aug. 2005, at 16, 16 ("Juror questioning of witnesses is neither a new nor an innovative concept in the common law and American jurisprudence." (citing MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 164 (Charles M. Gray ed., Univ. of Chicago Press 1971) (1713) ("[B]y this Course of personal and open [E]xamination, there is Opportunity for all Persons concern['d], *viz.* The Judge, or any of the Jury . . . to propound occasional [Q]uestions, which beats and boults out the Truth . . . .")).

jurors to ask questions of witnesses during trials ("the practice") was once "familiar at common law" until eventually falling into mysterious "disuse."[4] Even so, fast forward two centuries—four decades of scholarship and empirical data largely debunk the most commonly held beliefs and concerns against using the practice. Judges, jurors, and practitioners experienced with the practice seem to overwhelmingly support its use, with the inverse being true of those lacking familiarity.

I have spent the last two decades collaborating with lawyers and judges around the world[5] who are actively transitioning from an inquisitorial system of justice to an adversarial system that closely resembles ours.[6] My front row seat in these historic efforts—not only to build a system of justice from the ground up, but to fulfill constitutional promises

[4] Shari Seidman Diamond, Mary R. Rose, Beth Murphy & Sven Smith, *Juror Questions During Trial: A Window into Juror Thinking*, 59 VAND. L. REV. 1927, 1929 (2006) ("Current general practice in jury trials is to limit juror questions to those submitted to the judge during deliberations.").

[5] My journey mentoring lawyers and judges around the world began in 1999 during my tenure as an Assistant United States Attorney ("AUSA") under the Department of Justice's Office of Overseas Prosecutorial Development Assistance and Training program, whose comprehensive mission statement can be found at *Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT),* U.S. DEP'T OF JUST., https://perma.cc/GN25-LBAX. Since 1999, I have been privileged to share my legal expertise and experiences as a former AUSA, defense attorney, and now federal judge with our corresponding counterparts in countries including Colombia, the Dominican Republic, Mexico, Paraguay, Argentina, and Spain.

For specifics on programs geared toward assisting foreign prosecutors, judges, and investigators throughout Latin America during their transition to the accusatory system, see *Western Hemisphere,* U.S. DEP'T OF JUST., https://perma.cc/37AH-DMJB. For additional examples of historical accounts of Latin America's bold legal reforms and transition to an accusatory system, see generally Andrés Torres, *From Inquisitorial to Accusatory: Colombia and Guatemala's Legal Transition* (Bos. Coll. L. Sch. L. & Just. in the Ams., Working Paper Series No. 4, 2007), https://perma.cc/9T5D-TLAE; Thea Johnson, *Latin Justice: A New Look*, WORLD POL'Y (Sept. 12, 2013), https://perma.cc/NKY5-FMR4.

[6] Interview with Andrés Harfuch, Vice President, Arg. Trial by Jury Assoc., in Buenos Aires (Nov. 21, 2019). Harfuch, known colloquially as the "founding father of the jury trial movement in Argentina," has worked extensively through non-profit organizations like the Instituto de Estudios Comparados en Ciencias Penales y Sociales ("INECIP") in ensuring the wide-spread implementation and adoption of jury trials throughout the various provinces in Argentina. Harfuch is currently employed as the Public Defender for the San Martin District in Buenos Aires and as an adjunct Law Professor at the University of Buenos Aires.

During my interview with Harfuch, he explained:

> From a more technical or legal standpoint, jury trials have amply shown that they are very useful, that they can work perfectly well, and have been adapted to a country with another legal tradition, such as Argentina, and they have also slowly gained support in the courts, from judges and from appeal courts, and above all from the Inter-American Court of Human Rights, and the national Supreme Court of Justice, where a trial by jury has been seen not merely as another procedural approach but one that offers constitutional protections equal to those offered by the accusatory system.

Id.

that, in some countries, have been pending for centuries[7]—has prompted a closer look at our own system of justice and its essential building blocks like the right to trial by jury. Although juries are rightfully recognized as the purest expression of democratic governance,[8] our deeply engrained systemic preference for the status quo jeopardizes our opportunity to have jurors' full and complete engagement.[9]

With a mandate to render a true and correct verdict in the case before them, jurors raise their right hand, swear an oath, and in a matter of mere seconds are figuratively robed as the judges of the facts. And it is with this interim judicial title that jurors are entrusted to separate the wheat from the chaff as they meticulously cull through the evidence before them. Even though judges routinely ask questions of witnesses during trials, jurors are not afforded the same professional courtesy. As such, it is time for judges to reevaluate our practices in order to foster a more juror-centric approach, given the importance of the burden placed upon jurors as the final decision makers.

On this backdrop of introspection, this Article analyzes the benefits of allowing jurors to ask clarifying questions during trial—a practice which periodically resurfaces as *innovative* judges,[10] practitioners, or even

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[7] Argentina's Constitution has provided for trial by jury for over 150 years but only recently trial by jury has been implemented in several of its provinces. Art. 24, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); *id.* art. 75; *id.* art. 118; CONSTITUCIÓN DE LA PROVINCIA DE CÓRDOBA (Arg.) art. 162. The reasons for the delay are unknown and largely attributed to political volatility, economic instability, and increased crime. *See* Paul Edwards-Kevin, *The Emergence of Trial by Jury in Argentina*, 11 GONZ. J. INT'L L. 1, 1 (2008) (noting that even Argentine legal experts admit that they are unsure as to why the country's national assembly has chosen to ignore constitutional mandates for over 150 years).

[8] Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 69 (2006) ("The most stunning and successful experiment in direct popular sovereignty in all history is the American jury."); *see also* Mark W. Bennett, *Reinvigorating and Enhancing Jury Trials Through an Overdue Juror Bill of Rights: A Federal Trial Judge's View*, 48 ARIZ. ST. L.J. 481, 485–90 (2016) (expressing surprise that jurors do not yet have something akin to a widely adopted "Bill of Rights" given how deeply enshrined they are in the US Constitution and our system of justice, and highlighting the uphill battle to make any innovative changes to improve the quality of the jurors' experience).

[9] *See* Bennett, *supra* note 8, at 488 (advocating for a jury-centered approach to judging because judges are seldom "accused of being progressive" and "as members of a tradition-driven institution, [judges] embrace what has been done before and are sometimes skeptical of new approaches").

[10] There are many illustrious judges who have contributed to the field of juror innovations. I will endeavor to name only a few who, in my opinion, have pioneered the charge. On the federal level, former US District Judge Mark W. Bennett is credited for inspiring three decades' worth of studies and changes in asking the WWJW ("What Would Jurors Want") question, which has promoted judicial awareness in improving overall juror experiences and satisfaction. On the state level, former Judge B. Michael Dann is credited for serving as the impetus for many of the juror improvement efforts implemented in both state and federal courts following an Indiana Law Journal article published in 1993. *See* PAULA HANNAFORD-AGOR, NCSC CTR. FOR JURY STUD., BUT HAVE WE MADE ANY PROGRESS? AN UPDATE ON THE STATUS OF JURY IMPROVEMENT EFFORTS IN STATE AND FEDERAL COURTS 1 (2015),

jurors question whether it is allowed. Those familiar with the practice report great satisfaction and advocate strongly for its expanded use. Those unfamiliar with the practice remain vocal opponents whose primary concerns appear to be rooted in instinctive fear and speculation of the "parade of *hypothetical* horrors" that could possibly manifest.[11] And to the extent the practice is allowed in either state or federal courts, it is predominately utilized in state court and in civil trials.[12]

While the perceived pros and cons appear to remain somewhat constant, we now have the benefit of empirical data and studies, which not only seem to debunk the most commonly held beliefs and concerns but also confirm that the benefits far outweigh the dangers.[13] Consequently, the goal of this Article is simple: to demystify the practice of allowing jurors to ask clarifying questions in trials by expanding upon the descriptive, analytical, and normative discussions surrounding the practice. This Article addresses the efficiency of allowing the practice, given its minimal impact on the length of a trial, and the fairness of allowing the practice, given jurors' increased job satisfaction and comprehension of the evidence presented at trial.

This Article proceeds as follows: Part I examines the participatory nature of juries and explores the lost opportunity for jurors to be fully engaged as factfinders. It elaborates on the absence of a doctrinal reason not to allow the practice. Part II provides a historical background. It briefly discusses the two most renowned empirical studies that show the practice is efficient, effective, and highly favored by those familiar with it. Part III addresses the primary objections, such as the potential effect on the adversarial system. It offers empirical and theoretical support to counter the most commonly held concerns. Part IV provides a descriptive analysis of a

https://perma.cc/K6DB-R3K6 (crediting Judge Dann's article for inspiring two decades of concerted efforts by bench and bar organizations across the country to study and implement best practices in jury trial procedure).

11 *See* Bennett, *supra* note 8, at 514 ("[J]udges and lawyers who used the practice overwhelmingly supported jurors asking questions of lawyers. However, those that do not have experience were fearful of a *parade of horribles* that never materialize." (emphasis added) (footnote omitted)). Judicial opinions have also contributed to negative propaganda with no empirical support for fears raised. *See* United States v. Johnson, 892 F.2d 707, 713 (8th Cir. 1989) ("[J]uror questioning is a course fraught with peril for the trial court." (alteration in original) (quoting DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 517 (4th Cir. 1985))).

12 *See, e.g.*, Bruce Pfaff, John L. Stalmack & Nancy S. Marder, *The Right to Submit Questions to Witnesses*, CBA REC., May 2009, at 36, 37 ("[T]he ABA, whose motto is 'Defending Liberty, Pursuing Justice,' issued a publication summarizing the results of its American Jury Project. In *Principles for Juries and Jury Trials*, published in 2005, the ABA recommended that jurors should ordinarily be permitted to submit written questions of witnesses in civil cases [in accordance with Principle 13C].").

13 *See, e.g.*, Diamond et al., *supra* note 4, at 1931–34 (providing an in-depth review of claims made by supporters and opponents of the practice).

five-week criminal trial in which I successfully employed the practice. It explores the effect on trial length and deliberations. Part V summarizes survey data to support the value of the opportunity for jurors themselves who report not only greater job satisfaction, but greater confidence in ultimate verdicts rendered. Part VI acknowledges the potential pitfalls and explains how they can be mitigated through judicially enforced protocols. It provides a comparison of two trials where I allowed the practice without the benefit of carefully crafted procedures with one that did. Finally, because research shows that experience with the procedure results in greater enthusiasm and overall approval ratings, I provide a procedural and substantive roadmap for judges to follow in the hopes of encouraging expansion of the practice to criminal jury trials.

I. Juries Are an Essential Part of Our Democracy

"I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[14]

The desire to be free from tyranny and oppression served as the primary catalyst for the American Revolution, which resulted in the creation of a nation that would be governed by the people and for the people.[15] A nation where ordinary citizens would be given a voice and the ability to directly participate in government.[16] The right to trial by jury was so important to our founding fathers that it was provided for in our Constitution.[17] Unsurprisingly, our founding fathers were not alone in envisioning this type of government. In 1853, Argentina's founding fathers also

[14] Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *in* 3 THE WRITINGS OF THOMAS JEFFERSON 69, 71 (H.A. Washington ed. 1854).

[15] Thomas Jefferson cited the importance of trials by jury as a central grievance against King George III and the English government. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776). *See also* Bennett, *supra* note 8, at 485 ("Trial by jury has a rich tradition in our country in no small part because the framers of our Constitution understood the importance of jury trials to our new nation. They mention juries three times in the Constitution and Bill of Rights—with no fine print or expiration date. Thus, jurors were a central institution 'in the creation of America.'" (footnote omitted)); Andrew Guthrie Ferguson, *Jury Instructions as Constitutional Education*, 84 U. COLO. L. REV. 233, 243 (2013) ("Trial by jury was considered such an important natural right that a restriction on the use of jury trials during the colonial period helped ignite the American Revolution.").

[16] *See* Young, *supra* note 8, at 69 ("The most stunning and successful experiment in direct popular sovereignty in all history is the American jury.").

[17] U.S. CONST. art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."); *id.* amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

provided for the right to trial by jury in their Constitution.[18] Only recently has Argentina begun implementing trials by jury, in an earnest attempt to pay back a 150-year-old constitutional debt to its citizenry.[19] I have borne witness to Argentina's meticulous structuring and implementation of jury trials one province at a time and to the people's passionate embrace of this gift[20]—one that Americans have lived with for so long that, perhaps, we have unwittingly taken it for granted.

Argentina's veneration of juries and what they represent—freedom from government oppression, transparency, accountability, and direct participation in government[21]—has prompted my review of the United States justice system, which at times seems to be in auto-pilot mode given the perception that it is generally working as it should be. And most of the time it is, given the numerous procedural and substantive safeguards, vigilant oversight, and participation of all the parties. However, this does not relieve us of our duty to continuously reevaluate our trial processes and procedures to ensure their fairness and compliance with constitutional guarantees. This is particularly relevant considering advances in technology and the evolving generational culture from which jurors are and will continue to be selected.[22]

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[18] During my interview of Andrés Harfuch, he noted:

> Jury trials in Argentina have been a welcome and important innovation; the verdicts in the most publicized and notorious trials have been praised by ordinary citizens, while at the same time, and incredibly, they have been criticized by judges who did not agree. However, people generally praised the verdicts of juries, and that is very important because it is a new institution. Even though it has long been in the Constitution, it has only recently been put into practice. We are seeing that it has already been shown to enjoy a growing level of public support.

Harfuch, *supra* note 6.

[19] Harfuch also noted:

> [J]ury trials in the Republic of Argentina have been [a] breath of fresh air in a very controversial judicial system. Serious questions have been raised about its lack of independence, lack of transparency, and lack of open records. And the jury trial has [addressed] exactly this. It has been the greatest contribution in terms of our democracy and Republican [form of government] for our judicial system.

Id.

[20] *See id.* ("The right to trial by jury is much more than a procedural guarantee. It is a [c]onstitutional right belonging to the community and its members have the right to directly participate in the administration of justice.").

[21] Jennifer McNulty, *Juries Bring Transparency and Accountability to Trials in Argentina*, UC SANTA CRUZ (June 7, 2019), https://perma.cc/7SZG-54B5 (expanding upon interview with international expert on jury systems and Professor of Sociology Hiroshi Fukurai). According to Professor Fukurai, who has studied jury systems for thirty-five years, not only do jury trials "give people power against tyrannical structures," but "[d]emocracy gets a boost as jurisdictions transition from judge to jury trials." *Id.*

[22] James F. Holderman & S. Ann Walls, *As Generations X, Y, and Z Determine the Jury's Verdict, What is the Judge's Role?*, 58 DEPAUL L. REV. 343, 343–44 (2009) ("The next generations of jurors are a

A. *Juries as Participatory*

"The jury system is about people having the power to make decisions about their lives in their own communities . . . ."[23]

While we may feel more comfortable thinking of jurors as nothing more than "blank slates"[24] or passive observers,[25] the fact is that our system of justice demands their *active* participation from the moment they receive a jury summons to appear in a court of law. Literally plucked from their daily lives and obligations to fulfill their civic duties[26]—people walk in as ordinary citizens and emerge as the most powerful figure in the courtroom. Summoned on a random basis, most jurors do not possess any legal background or training, yet they are placed in a position as the final decision makers in complex legal disputes.[27] Despite the ad hoc jury selection process and the lack of formal legal training, studies confirm that jurors possess a genuine desire to learn and reach the correct verdict.[28]

tech-savvy people . . . accustomed to receiving news and information on demand . . . [who] will grow increasingly impatient with the traditional lecture-narrative format that has historically been accepted as proper trial procedure. To allow these jurors to gather and process information during trial in ways that are familiar to them, judges and trial lawyers must implement procedures that use the jurors' information-gathering and decision-making experiences prior to entering the courtroom.").

[23] *See* McNulty, *supra* note 21 (recounting interview with Professor Fukurai).

[24] *Contra* Shari Seidman Diamond, *How Jurors Deal with Expert Testimony and How Judges Can Help*, 16 J.L. & POL'Y 47, 51 (2007) ("A jury is not a blank slate that merely absorbs trial evidence and instructions on the law before applying the law . . . [a]ll human decisionmakers (judges as well as jurors) find it necessary to draw on their prior experiences to make sense of what they see and hear."); Sara Gordon, *What Jurors Want to Know: Motivating Juror Cognition to Increase Legal Knowledge & Improve Decisionmaking*, 81 TENN. L. REV. 751, 753 (2014) ("[T]he social science research on both jurors and other human decisionmakers does not support [the traditional view that jurors are blank slates]. Instead, as with all people, motivated cognition affects the way jurors acquire knowledge and make decisions about information." (footnotes omitted) (citing Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 519 (1991))).

[25] Mark A. Frankel, *A Trial Judge's Perspective on Providing Tools for Rational Jury Decisionmaking*, 85 NW. U. L. REV. 221, 222 (1990) ("[T]he reluctance to expand the powers of totally passive and unenlightened juries stems from three sources: (1) the tremendous inertia of long-standing legal tradition; (2) a basic distrust of juries; and (3) trial attorneys' and judges' fear of loss of control of the trial process.").

[26] *Cf.* Alayna Jehle & Monica K. Miller, *Controversy in the Courtroom: Implications of Allowing Jurors to Question Witnesses*, 32 WM. MITCHELL L. REV. 27, 28 (2005) (noting that although jury duty presents a challenge, "eighty-four percent of adults polled believe jury service is a civic duty to be fulfilled despite its possible inconvenience").

[27] *See id.* at 29 ("In order to encourage jurors to fulfill the constitutional role set out by the Sixth Amendment, courts should provide jurors with the best experience possible . . . .").

[28] Diamond, *supra* note 24, at 64; *see* Gordon, *supra* note 24, at 770–71 (explaining that jurors possess a desire not only to understand the law and the facts in a trial but also to be accurate);

Studies also confirm that judges can help jurors by giving them the necessary tools to do the job they have been called to do.[29]

Unfortunately, jurors are sent mixed signals as to their proper role. On one hand, during the voir dire process,[30] they are encouraged to be openly vocal, to the point of erring on the side of caution by sharing *more* rather than *less* information regarding a myriad of topics and subject areas designed to expose preconceived notions and biases. They are instructed to openly, and even privately at the bench if necessary, discuss their views as the judge and the lawyers question them extensively.[31] Those surviving elimination ultimately comprise the jury who is administered a final oath to follow the law.

From this point on, a switch in permissible dialogue and interaction occurs. The once open, frank discussion between jurors, judge, and lawyers is permanently closed as jurors are instructed to now sit back and assume the role of passive observers throughout the entire trial.[32] This role requires that jurors wait until the close of the case before they may ask any questions during the deliberation process.[33] But as required by law, deliberations are conducted by the jurors in secret, and once commenced, judges may not provide jurors with any additional evidence.[34] Nor is it permissible or advisable to clarify evidence, even if these clarifications may

Holderman & Walls, *supra* note 22, at 343 ("[J]urors overwhelmingly take their role as the judges of the facts very seriously.").

[29] *See* Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not to Ask, That Is the Question,"* 78 CHI.-KENT L. REV. 1099, 1102–06 (2003) (underlining the empirically supported and practical benefits of permitting jurors to ask questions of witnesses); Stephen D. Susman & Richard L. Jolly, *An Empirical Study on Jury Trial Innovations*, CIV. JURY PROJECT 12–15 (Oct. 2016), https://perma.cc/6J4W-YTAM (noting that common sense, experience, and social science tell us that jurors allowed to ask questions of witnesses will better understand the evidence).

[30] Voir dire in Latin is verum dicere, or "to say what is true." It is a commonly utilized phrase that describes procedures associated with the process of jury selection where jurors must provide truthful answers to a series of questions. This question and answer process helps the parties effectively exercise their peremptory (no reason must be given) and for-cause (specific reason(s) must be given and approved by the court) challenges or strikes to members of the jury panel. *See* HON. GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 27, 29 (2007), https://perma.cc/5QLH-DRVN. Although referred to as jury *selection*, in actuality, voir dire is a process of *elimination* as the lawyers challenge or strike potential jurors through the use of both peremptory and for-cause challenges. *Id.*

[31] *See id.* at 28–29.

[32] Valerie P. Hans, *Empowering the Active Jury: A Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 39, 45–46 (2008) ("[T]he adversary system of jury trial both presumes and reinforces juror passivity . . . [which is] supposedly essential to maintaining neutrality . . . .").

[33] *Id.*

[34] *See, e.g.*, FED. R. CRIM. P. 6(d)(2).

otherwise have been relevant had the practice been allowed during the trial.[35]

Consequently, as judges we must ask ourselves whether we are truly providing jurors the necessary tools to do their jobs to the best of their ability.[36] Toward that end, it is imperative we adjust the jury's long-perceived role as a "passive receptacle of information, to a more involved and interactive participant" that is equipped to resolve factual disputes at trials with the proper judicial oversight.[37] Interactive participation does *not* equate to jurors usurping the role of the parties. It simply means jurors may seek clarification of the evidence already before them in order to improve their comprehension and competence as the ultimate fact finders.[38]

B. *Juries as Trustworthy Judges*

"The search for truth is central to the legitimacy of a trial's function. If the trial does not effectively develop the facts and comprehensibly present them to the factfinder, justice is serendipitous."[39]

From the moment jurors are empaneled, we implicitly trust their ability to follow every legal instruction from the presumption of innocence to the requisite burden of proof and every admonishment and cautionary instruction given to them throughout the trial.[40] We expect jurors to use common sense and be true to their oath to serve as impartial, neutral judges in an adversarial system of justice.[41] We further highlight the

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35 *See* Bennett, *supra* note 8, at 515–16 (noting that jurors can look at the evidence presented at trial but may not ask clarifying questions).

36 *See* Holderman & Walls, *supra* note 22, at 345 ("To ensure that jurors are able to reach a fair and just verdict, judges must provide jurors with tools that improve their comprehension of the evidence and their competence as decisionmakers.").

37 *Id.* at 343.

38 *See* Stephen D. Susman & Thomas M. Melsheimer, *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, 32 REV. LITIG. 431, 449 (2013) ("In an age of instant feedback by inquiries via Google and Twitter . . . allowing jury questions can be critical to engaging jurors . . . [from] 'Gen X' and 'Gen Y,' both demographics accustomed to receiving information, and assessing it, in ways far different from so-called 'baby-boomers.'").

39 Lucci, *supra* note 3, at 19.

40 *See* Gordon, *supra* note 24, at 755 ("The right to a jury trial is a fundamental part of the American democratic ethos, and much of the trust we place in jurors is based on our belief that they will infuse the decisionmaking process with a common sense approach and community values." (citing VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 31 (1986))).

41 *Id.* at 755 n.13 ("[C]ommon sense is '[a] primary justification cited for entrusting jurors with the task of deciding criminal verdicts.'" (quoting DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 184 (2012))).

importance of their role as the ultimate finders of fact in contrast to the judge's allegedly *limited* role as the legal arbiter.[42]

Yet, even though judges will neither deliberate nor render a verdict during jury trials, judges are authorized to and routinely ask questions of witnesses under the auspice of seeking clarification in order to help the jury better understand the evidence.[43] Given the basic, uncontested premise that understanding the evidence is essential to not only making the best decision but also the right one, it makes little sense to prevent the actual decision makers from seeking their own clarification of evidence that everyone (lawyers and the judge) has agreed is properly before them.[44]

History has long demonstrated the need for judges to reevaluate and adapt trial procedures to accommodate changing times and jurors' needs.[45] For example, the long-held tradition of prohibiting jurors from taking notes during trial is now *almost* universally rejected and for good reason—the lack of doctrinal support for the prohibition and the positive effects of allowing jurors to take notes during trials, which vary in length and complexity.[46] Another significant procedural trial change, now mostly seen as commonplace, is a judge's provision of legal instructions to jurors both at the *beginning* and end of the case in order to initially help guide jurors as the evidence is being presented.[47] A final example is a judge's

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[42] *See* Holderman & Walls, *supra* note 22, at 345.

[43] *See* Jehle & Miller, *supra* note 26, at 30 ("If the judge is allowed to play an active role and ask questions of witnesses [during jury trials], then should jurors be allowed to do the same when they are the decision-makers in the case?").

[44] Hon. Thomas D. Waterman, Hon. Mark W. Bennett & David C. Waterman, *A Fresh Look at Jurors Questioning Witnesses: A Review of Eighth Circuit and Iowa Appellate Precedents and an Empirical Analysis of Federal and State Trial Judges and Trial Lawyers*, 64 DRAKE L. REV. 485, 487 (2016) ("Common sense, experience, and social science tell us that jurors allowed to ask questions of witnesses will better understand the evidence."); *see also* Mott, *supra* note 29, at 1102–06 (discussing the empirically supported and practical benefits in permitting jurors to ask questions of witnesses).

[45] *See, e.g.*, Susman & Melsheimer, *supra* note 38, at 449 (addressing the common objections and further noting "[t]he notion of not providing the opportunity for jury trials to be conducted with questioning by jurors, when an increasing number of jurors will be in the Generation X and Y profile, strikes us as myopic in the extreme").

[46] *Compare* Holderman & Walls, *supra* note 22, at 344 n.4 (observing that forty years ago, jurors were prohibited from even taking notes during trials), *with* Hans, *supra* note 32, at 55–56 (elaborating upon the "widespread use, general support and little current opposition" to jurors taking notes and noting that most judges and jurors who are asked about their views about jury note-taking expressed support for the practice). *But see* Hans, *supra* note 32 at 52 (concluding, however, that despite widespread support, "it would be a mistake" to conclude that the practice of jury note-taking is nearly universal).

[47] *See* Gordon, *supra* note 24, at 756 (perceiving jury instructions as the "crucial link" between how jurors understand and use the facts and the law to reach a verdict); *id.* at 782–83 ("The timing and form of jury instructions . . . about the applicable law can have a profound impact on juror comprehension of the law. Some courts have begun to pre-instruct jurors about the substantive law, giving

decision to allow jurors to take a copy of the final legal instructions, which even in the simplest of cases routinely exceed thirty pages, into the deliberation room in order to assist them with the application of the law to the particular facts of each case.[48] Given the confirmed benefits of[49] and common sense approach to these procedural trial modifications, it is my hope that the practice of jurors asking questions will one day gain the same conventional acceptance as allowing jurors to take notes.

II. The History of Juror Questioning

There are recorded incidents of jurors asking questions during trials dating back to the 1800s. A review of the oldest recorded published case, *State v. George,*[50] suggests that the brevity of the discussion by the Iowa Supreme Court is indicative that the practice was, at that time, commonplace or at least not an oddity.[51] It is unknown, however, why the practice did not continue or why it did not become a part of regularly accepted courtroom practice and procedure. To date, only a small number of states have changed their laws and court rules to allow jurors to ask questions, with only a handful of states actually requiring it.[52] Although the practice

jurors an overview of the relevant black letter law and general legal principles *before* the introduction of evidence, and eight states currently require pre-instruction." (footnote omitted)).

[48] Cases vary in complexity. While there may be a single-defendant, single-count case, some cases involve multiple defendants, multiple counts, and lengthy, complex legal instructions. Even the most skilled, experienced lawyers do not have the legal instructions committed to memory. It is, therefore, irrational to expect jurors to memorize legal instructions they hear for the first time and then apply these same instructions to the facts.

[49] *See* Gordon, *supra* note 24, at 786 ("Allowing jurors to ask questions allows them to reason, to understand, and to learn." (citing Ashwin Ram, *A Theory of Questions and Question Asking*, 1 J. LEARNING SCI. 273, 273 (1991))).

[50] 18 N.W. 298 (Iowa 1884).

[51] There are many other recorded incidents of jurors asking questions during trials, including Abraham Lincoln's representation of a criminal defendant charged with homicide in a trial that took place in 1859 before Lincoln became President. *See* Bennett, *supra* note 8, at 511 (providing a description of the trial); Stephen R. Kaufmann & Michael P. Murphy, *Juror Questions During Trial: An Idea Whose Time Has Come Again*, 99 ILL. BAR J. 294, 295 (2011); *see also* Waterman et al., *supra* note 44, at 502 n.108 (detailing history of the practice dating back to the 1800s and discussing cases documenting the practice).

[52] For the most current overview of courts allowing the practice, see MIZE, et al., *supra* note 30, at 34–35. In a survey of 11,752 trials in all fifty states and the District of Columbia, 15.1% of state court trials allowed juror questions of witnesses, and 10.9% of federal court trials allowed the practice. *Id.* at 4, 32. The Federal Rules of Evidence do not prohibit or permit the practice. Rule 611(a) provides that "[t]he court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment." FED. R. EVID. 611(a).

was once thought to be a topic that would garner intense Supreme Court scrutiny,[53] it has largely avoided the limelight. Instead, it continues to prompt mostly introspective curiosity, given the results of empirical studies which demonstrate the practice is efficient, effective, and highly favored by those familiar with it.[54]

Pioneers in the field of juror innovations have spent decades studying the role of jurors and best practices in jury trial procedures. Former Judge B. Michael Dann is one of those pioneers. His scholarship is credited for "revolutioniz[ing] contemporary thinking within the legal community about juror decision-making and the court's obligation to facilitate the ability of jurors to fulfill their role in the American justice system."[55] Judge Dann's article, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*,[56] provided the impetus for many of the jury improvement efforts implemented in both state and federal courts.

Originally published in 1993, Judge Dann's article inspired and continues to inspire concerted efforts by bench and bar organizations across the country to study and implement best practices in jury trial procedures.[57] The results of these studies provide empirical support for the proposition that there is no doctrinal reason not to allow the practice.[58] Judge Dann's article challenged the traditional view of jurors by using his research results to show that many in-trial juror restrictions (e.g., prohibiting jurors from taking notes and asking questions of witnesses) "not only failed to preserve juror impartiality, but actually interfered with jurors' ability to remember and understand evidence presented at trial and to render informed decisions in jury verdicts."[59]

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[53] *See* Kara Lundy, Note, *Juror Questioning of Witnesses: Questioning the United States Criminal Justice System*, 85 MINN. L. REV. 2007, 2008–09 (2001) (opining that the practice of allowing juror questions conflicts with constitutional values fundamental to the criminal justice system, equating impartiality with complete passivity by the decision maker, and expressing surprise that the Supreme Court has not addressed the issue).

[54] *See, e.g.*, Holderman & Walls, *supra* note 22, at 350–53.

[55] HANNAFORD-AGOR, *supra* note 10, at 1.

[56] Hon. B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229 (1993).

[57] *See, e.g.*, HANNAFORD-AGOR, *supra* note 10, at 1 (highlighting efforts such as the ABA House of Delegates *Principles for Juries and Jury Trials* "as aspirational standards for conducting jury trials in both civil and criminal cases" and the National Center for State Courts ("NCSC") *State-of-the-States Survey of Jury Improvement Efforts*, which surveyed "[n]early 12,000 judges and lawyers from all 50 states" and remains "the most comprehensive picture of jury trial procedures ever compiled").

[58] *See* MIZE, et al., *supra* note 30, at 28, 31–35.

[59] HANNAFORD-AGOR, *supra* note 10, at 1.

A. *Noteworthy Empirical Studies*

Undoubtedly, state courts have led the charge in jury trial innovations,[60] serving as the primary laboratories for the practice and the impetus for a number of important research projects; however, federal courts have also made important contributions.[61] Scholars widely agree that the two most renowned studies in this area are the Arizona Jury Project and the Seventh Circuit Bar Association American Jury Project ("the Seventh Circuit Project").[62] Both are discussed below, specifically as they pertain to the practice.

1. The Arizona Jury Project

The Arizona Supreme Court created the Arizona Jury Project in 1993 with the principal goal of improving juror comprehension and increasing juror participation in their process of factfinding.[63] The Arizona Jury Project was tasked with responding to three principle concerns: "The lack of jury representativeness in an increasingly diverse society, enforced jur[y] passivity during trials and unacceptably low levels of juror comprehension of the evidence and of the court's instructions."[64]

The result of the Arizona Jury Project was a report consisting of fifty-five recommendations, of which fifteen were ultimately adopted by the Arizona Supreme Court.[65] It included a detailed analysis of 829 questions submitted by jurors in fifty civil trials, for which comprehensive results found:

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60 *See* Bennett, *supra* note 8, at 514 ("Juror questioning of witnesses in civil cases has risen nationally from sixteen percent in 2005 to twenty-five percent in 2015. State trial courts (twenty-eight percent) are significantly more likely to allow juror questioning of witnesses than federal courts (eighteen percent)." (footnote omitted)).

61 During his twenty-five-year tenure as a judge in the Northern District of Iowa, former US District Judge Bennett presided over jury trials in five federal jurisdictions spanning from the District of the Northern Mariana Islands to the Middle District of Florida. Judge Bennett is considered another pioneer in the field of juror innovations who has provided extensive scholarship which continues to inspire judicial reflection as to best practices.

62 Bennett, *supra* note 8, at 490–91 (providing a comprehensive analysis and discussion of both projects and stating that "no article about the rights of jurors or jury trial innovations would be complete without discussing the Arizona Jury Project and the Seventh Circuit Bar Association American Jury Project (Seventh Circuit Project)" (footnote omitted)).

63 THE ARIZ. SUP. CT. COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12, at 2 (1994).

64 *Id.*

65 Bennett, *supra* note 8, at 491.

> [T]hat juror questions generally do not add significant time to trials and tend to focus on the primary legal issues in the cases. Jurors not only use questions to clarify the testimony of witnesses and to fill in gaps, but also to assist in evaluating the credibility of witnesses and the plausibility of accounts offered during trial through a process of cross-checking. Talk about answers to juror questions does not dominate deliberations. Rather, the answers to juror questions appear to supplement and deepen juror understanding of the evidence. In particular, the questions jurors submit for experts reveal efforts to grapple with the content, not merely the trappings, of challenging evidence. Moreover, jurors rarely appear to express an advocacy position through their questions.[66]

The success of the Arizona Jury Project is credited to the Arizona Supreme Court's directive to the Committee (made up of former jurors, lawyers, academics, and judges) "to think outside the traditional jury box" as they consulted current social science studies without being "bound by traditions and myths" previously defining the jury trial process.[67]

2. The Seventh Circuit Project

The Seventh Circuit Project is the federal equivalent to the Arizona Jury Project. It, too, examined the practice of allowing juror questions for witnesses during trials.[68] Although published over a decade ago in 2008,[69] it currently represents the most comprehensive study done at the federal level: "Twenty-two federal district judges participated in the fifty jury trials that formed the basis for the Project. In total, four hundred and thirty-four jurors, eighty-six lawyers, and twenty-two federal district judges completed questionnaires."[70] The results showed that the vast majority of judges believed that juror questions increased the fairness of the trial.[71] And while the perspective of judges is important, most important was the fact that the vast majority of jurors themselves confirmed that their ability to ask questions increased or helped them better understand the evidence.[72]

Former US District Judge James F. Holderman, a participant in the Seventh Circuit Jury Project and a self-proclaimed great admirer of the US jury system who has "observed thousands of jurors striv[ing] mightily to

66 Diamond et al., *supra* note 4, at 1931.

67 Bennett, *supra* note 8, at 491 (citing Hon. B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 280 (1996)).

68 *Id.* at 513.

69 SEVENTH CIR. BAR ASS'N AM. JURY PROJECT, SEVENTH CIRCUIT AMERICAN JURY PROJECT: FINAL REPORT 9 (2008).

70 Bennett, *supra* note 8, at 492–93 (footnote omitted).

71 *See* SEVENTH CIR. BAR ASS'N AM. JURY PROJECT, *supra* note 69, at 22.

72 *See* Bennett, *supra* note 8, at 514.

discern the facts from the evidence in all types of federal jury trials,"[73] expanded upon his experience. His findings validate the following significant concepts seen throughout the studies:

> 1. [M]ost of the jurors' questions sought information to clarify evidence that had been presented during the lawyers' questioning of the witness.
>
> 2. Rarely did the jurors' questions seek testimony on a subject that was inadmissible, and when such questions were submitted, [the judge] explained to the jury why the question could not be asked and brought the jurors' focus back to the pertinent evidence.
>
> 3. The jurors' questions provided a window into the jurors' thinking and areas of interest, which allowed the lawyers beneficial insights during the trials that the lawyers would not have otherwise had.
>
> 4. The jurors appreciated the opportunity to inquire. They were more engaged and attentive to the evidence presented by the lawyers. Any confusion they had about the evidence was dispelled by the answers provided to the jurors' questions.
>
> 5. After the jurors reached a verdict, they appeared to be more confident of the correctness of their decision because they were confident that they had understood the evidence.[74]

All in all, the Arizona Jury Project and the Seventh Circuit Project confirm that "[j]urors tend to be enthusiastic about the opportunity to submit questions during trial."[75] Jurors also "rated themselves as better informed than those who were not permitted to [ask] questions."[76] And "in a Colorado field experiment involving 239 criminal trials, jurors who were permitted to submit questions were more likely to agree that they had sufficient information to reach a correct decision."[77]

The findings from these and the most recent study from 2015[78] soundly "support the view that juror questions serve [an important]

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[73] James F. Holderman, *Trying the ABA's Principles for Juries and Jury Trials*, LITIG., Spring 2007, at 8, 8 ("In case after case, I have watched those jurors apply the law to the facts and return appropriate verdicts.").

[74] *Id.* at 10 ("Other trial judges who in the past have employed the juror questioning procedures have reached the same conclusions that I reached based on my experiences with the Seventh Circuit Jury Project's seven-month test . . . ." (citation omitted)).

[75] Diamond et al., *supra* note 4, at 1972 ("As one of the jurors from the Arizona Filming Project commented to other members of her jury, 'I think it's good that juries can ask questions because they are the ones that have to decide.'").

[76] *Id.* at 1932.

[77] *Id.*

[78] *See* Waterman et al., *supra* note 44, at 489 (analyzing surveys "from a diverse pool of 166 federal and state trial judges and 203 attorneys" and concluding that "most judges and attorneys with

clarifying function."[79] The reported benefits—increased comprehension of the evidence, greater juror attentiveness and participation, overall greater job satisfaction, more efficient deliberations, and confidence in the ultimate decision rendered—far outweigh any hypothetical dangers or concerns.

III. Objections to Juror Questioning

Various objections to the practice have been raised through the years, most based on speculative fears and all seemingly lacking in empirical support.[80] Nonetheless, because widespread adoption of the practice would still, to this day, represent a significant change in trial procedure, neither "predictions" nor "discussions" should "be sufficient to determine its merit or lack thereof."[81] Instead, we must carefully consider the studies which have statistically tested the practice and have discussed the purported advantages of allowing juror questioning, as well as the disadvantages of allowing this questioning if it is not managed correctly via judicial protocols.[82]

The primary concerns surrounding the practice seem to revolve around six hypothetical effects on the adversarial system including, but not limited to, the following: "interference with trial strategy[,] loss of control over witnesses,"[83] distortion of the juror's role as a neutral fact-finder, jurors usurping the prosecution's role, jurors asking inappropriate questions, and undue delays. Each concern will be addressed in turn below.

'experience' in allowing juror questions favor the practice, while most of those unfamiliar with the practice do not").

79 Steven D. Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 PSYCH., PUB. POL'Y, & L. 259, 274 (1997) (emphasis added).

80 *See* Jehle & Miller, *supra* note 26, at 47 (referencing Mott's analysis of 2271 juror questions during trials and her findings that juror "questions pose no real threat to the adversary system, and [are] instead . . . used to advance [jurors'] role as neutral decision-makers").

81 *See* Mitchell J. Frank, *The Jury Wants to Take the Podium—But Even with the Authority to Do So, Can It? An Interdisciplinary Examination of Jurors' Questioning of Witnesses at Trial*, 38 AM. J. TRIAL ADVOC. 1, 11–12, 22 (2014) (stating that the first research on juror questioning is believed to have been performed in 1983).

82 *See, e.g.*, Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985) (study of 100 jury trials overseen by twenty-eight judges in the Second Circuit).

83 JURY SUBCOMM., N.J. SUP. CT. CIV. PRAC. COMM., REPORT ON PILOT PROJECT ALLOWING JUROR QUESTIONS 1 (2000) (pilot program on juror questioning involving 272 attorneys).

A. *Interference with Trial Strategy*

Allowing jurors to pose clarifying questions to witnesses during trial does not change our basic adversarial system. Trial lawyers in the case remain the sole presenters of the evidence and advocates for their respective clients. Jurors may not solicit or in any way request additional evidence. They may only seek clarification of the evidence that the parties, and ultimately the judge, have previously vetted in accordance with the rules of evidence and decided is ripe for their consideration.

Judicial protocols can further help eliminate concerns by providing jurors with clear and precise instructions as to the type and permissible scope of the questions they may ask. Judges should also require that jurors write their questions down instead of asking the witnesses directly. Judges familiar with the practice agree that this process allows the judge and the parties ample time to screen the questions at the bench and rule on any objections outside the presence of the jury.[84] Allowing the practice may also provide limited insight into jurors' thinking, which may assist lawyers in fine-tuning their trial strategy by highlighting or focusing on areas that seem important to the jury.[85]

B. *Loss of Witness Control*

Another concern is that "witnesses, especially expert witnesses, may take advantage of the opportunity to expound, knowing that counsel may be more hesitant to object during a response to a juror's question (as opposed to one from opposing counsel)."[86] However, judicial oversight can also solve this concern. Judges must maintain control of the questions posed and the answers a witness gives so that no party is disadvantaged. Judges set the tone in their courtrooms and have a duty to intervene if it becomes apparent that the witness is going outside the scope of the question posed or is proceeding in an improper narrative fashion. Loss of witness control applies in every case irrespective of the practice and it is an issue that is dealt with when and if it occurs. Besides, counsel remain free to object, as they do in every case, to inappropriate questions or answers and may do so at the bench, if necessary.

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84 *See* Holderman, *supra* note 73, at 11.

85 *See, e.g.*, Frank, *supra* note 81, at 47 (explaining that during a trial, defense counsel objected to the striking of a juror because he found the juror's "questions [as] relevant and 'insightful'" (quoting Hinton v. United States, 979 A.2d 663, 669 (D.C. 2009) (en banc))).

86 Holderman, *supra* note 73, at 11.

C. *Distortion of Jury's Role as Neutral Factfinder*

Jurors walk into a court of law with their own preconceptions and knowledge of the world and "are likely to construct a story to fit the evidence regardless of whether they are permitted to ask questions."[87] Studies confirm a cognitive predisposition on behalf of jurors to embrace a "story model" line of thinking in which they are actively constructing narratives and stories in order to help makes sense of and process the evidence as it is being presented. Like other decision makers, jurors "adopt an active approach to their task. The preconceptions and existing knowledge they bring with them to the jury box help to shape the interpretations of the evidence presented at trial."[88]

Furthermore, "[e]mpirical evidence does not validate [the] fear" that jurors will become advocates if allowed to ask questions.[89] The concern that a jury's role as neutral factfinder will be distorted "rests on the erroneous premise that one must be passive to be impartial."[90] Jurors, like any other human being, do not check their common sense or life experiences at the courthouse door.[91] In fact, they are encouraged to use their common sense during deliberations in order to properly weigh all of the evidence and extrapolate conclusions in an attempt to reach a verdict.[92] Allowing jurors to ask questions and seek clarification of evidence assists not only with overall comprehension but with the ability to apply the law aptly and fairly to the particular facts of each case.

> Any concern[] that jurors might become advocates for one party or another [is] alleviated by the . . . judge who decides whether the question should be asked, and if so, then how the question should be asked . . . The fact that the question originated with

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87 Susman & Melsheimer, *supra* note 38, at 450–51 ("[Although jurors] may well keep an 'open mind' . . . [it] is a far cry from saying they are not making decisions about the evidence and the witnesses as the case proceeds. Concerns about jurors failing to keep an open mind can be dealt with as they are in every trial—with repeated cautionary instructions from the court to withhold judgment until the deliberation process.").

88 Hans, *supra* note 32, at 46 ("From the start, jurors process information and testimony with the goal of arriving at a narrative account or 'story' of the case . . . to make sense of the evidence . . . [and] then select the verdict option that provides the closest match to the stor[y] they have developed.").

89 Susman & Melsheimer, *supra* note 38, at 450–52 (first citing Paula L. Hannaford, Valerie P. Hans, Nicole L. Mott & G. Thomas Munsterman, *The Timing of Opinion Formation by Jurors in Civil Cases*: *An Empirical Examination*, 67 TENN. L. REV. 627, 630 (2000); and then citing DENNIS J. DEVINE, JURY DECISION MAKING: THE STATE OF THE SCIENCE 26 (2012)).

90 State v. Fisher, 789 N.E.2d 222, 229 (Ohio 2003).

91 *See* Diamond, *supra* note 24, at 52 ("Jurors apply commonsense norms of behavior to evaluate the reasonableness of behavior and to sort out competing claims." (citing NORMAN FINKEL, COMMONSENSE JUSTICE: JUROR'S NOTIONS OF THE LAW (1995))).

92 *See* Peter Tiersma, *Asking Jurors to Do the Impossible*, 5 TENN. J.L. & POL'Y 105, 117 (2009).

> a juror is less important than the fact that the judge deems the question worthy of being asked.[93]

D. *Usurping the Prosecution's Role*

Permitting jurors to ask clarifying questions about properly admitted evidence does not allow them to request *additional* evidence. The prevailing philosophy is correct: lawyers in an adversarial system are in the best position to forge trial strategy and decide which evidence they will present in their respective cases. Jurors should not usurp the role of the advocates. However, jurors should be allowed to seek *clarification* of evidence that the parties have chosen to introduce during the trial. The evidence has already been prescreened by a judge for relevance and other evidentiary objections and it has either been admitted with or without objection from the parties. Seeking clarification by jurors of this previously screened, admitted evidence only helps ensure greater understanding. And one can only hope that greater understanding will lead to a more accurate, fair, and, by extension, true and correct verdict.

E. *Asking Inappropriate Questions*

Judges do not relinquish the ordinary control they exercise in the courtroom by allowing jurors to ask questions. Instead, "[b]y guiding jurors with clear instructions on the procedures that will be used and the kind of questions that are permissible, courts can both promote juror satisfaction with the trial process and encourage informed decision making."[94] Judges experienced with the practice agree that juror questions do not have a prejudicial effect to any of the parties.[95] Although most jurors are laypersons who are not familiar with the rules of evidence, studies confirm that, with the proper judicial guidance, supervision, and intervention, jurors tend to ask mostly appropriate questions.[96] It is, therefore,

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93 Lucci, *supra* note 3, at 19.

94 Diamond et al., *supra* note 4, at 1971.

95 *See* MIZE, et al., *supra* note 30, at 34–35 ("A substantial and growing body of empirical research has found that this practice, if properly controlled by the trial judge, improves juror comprehension without prejudicing litigants' rights to a fair trial.").

96 *See, e.g.*, Jehle & Miller, *supra* note 26, at 51 (reporting results of empirical research showing that "jurors did not ask inappropriate or frivolous questions, nor did they give more weight to their questions than [to] other evidence"); Penrod & Heuer, *supra* note 79, at 276.

incumbent upon judges to set and enforce boundaries as to the types of permissible questions.[97]

To the extent opponents are concerned that jurors may ask impermissible questions, judicially enforced protocols have proven to alleviate these concerns:

> On the rare occasions that a juror submits an argumentative question, the judge should either rephrase the question or should not ask it . . . Jurors are always told at the beginning of the case that some of their questions may not be asked and they generally accept it philosophically when the question is not asked.[98]

The mechanism for dealing with inappropriate juror questions is no different than the mechanism to deal with inappropriate questions posed by trial counsel where the court either sustains or overrules objections and instructs the jury accordingly.[99]

F. *Unnecessarily Cumbersome Process and Undue Delays*

In practice, the entire process—from jurors writing down their questions to ruling on objections at the bench, rephrasing questions when necessary, and asking them of the witness—does not result in a cumbersome process or undue delays. I concur with my judicial colleagues who have experience with the practice that the delay concern is greatly "overblown"[100] and attributable to the fear of the unknown. Obviously, the practice does take some time, but the actual reported time is nominal, and the benefits are well worth both time and effort.[101]

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97 *See* Diamond et al., *supra* note 4, at 1970. Diamond et al. adapted language suggested by the Honorable David Hamilton, Southern District of Indiana, and the Honorable William Donnino, Nassau County, State of New York, and proposed the following language:

> During the trial, you may find it useful to submit a question for a witness to clarify or help you understand the evidence. You should always phrase any questions in a neutral way that does not express an opinion about the case or a witness. Remember that at the end of the trial, you will be deciding the case. For that reason, you must keep an open mind until you have heard all of the evidence and the closing arguments of counsel, and I have given you final instructions on the law.

Id.

98 *Id.*

99 Pfaff et al., *supra* note 12, at 37 ("A juror's question for a witness should be treated no differently than if a lawyer's objection to his opponent's question is sustained. While jurors might ask improper questions, so do lawyers. A judge's job is to rule on them.").

100 *See* Susman & Melsheimer, *supra* note 38, at 451–52 (citing Nancy S. Marder, *Answering Jurors' Questions: Next Steps in Illinois*, 41 LOY. U. CHI. L.J. 727, 733–34 (2010) (discussing a New Jersey pilot program which found that "permitting jurors to ask questions added thirty minutes to the trial")).

101 *See* Holderman, *supra* note 73, at 10–11 ("In the trials over which I presided, I found that the handling of the jurors' written questions worked rather smoothly. The jurors did not have questions

Judges and scholars familiar with the practice agree that the procedures employed by the judge are important given jurors' predisposition to "look to the court for guidance throughout the trial."[102] With the proper procedures and instructions as to the permissible type and scope of the questions, courts can facilitate juror participation and discourage juror inquiries that exceed the permissible bounds. The key is for judges to provide clear, simple instructions for jurors throughout the trial.[103] Judges interested in implementing the practice must be committed to active involvement and oversight.

IV. Descriptive Account of a Criminal Trial Successfully Employing the Practice

The thought of jurors asking questions first piqued my interest when I noticed a recurring pattern of jurors sending out notes during deliberations asking for clarification of evidence.[104] As prescribed by law and customary trial practice, these inquiries were substantively left unanswered. That is, jurors did not receive the requested clarification for the otherwise relevant and legitimate questions posed.[105] Instead, they were provided the

for every witness and typically submitted questions for only those witnesses whose testimony needed further clarification. I did not find it to be an undue burden.").

102 Diamond et al., *supra* note 4, at 1967.

103 *Id.*

104 During my eight-and-a-half-year tenure on the federal bench, I have presided over thousands of cases, including sixty-four criminal jury trials. I acknowledge that my own experience with the practice is limited and meant to complement the other extensive empirical studies in this field. It is also meant to show how a judge who is not otherwise experienced with the practice can implement the practice in a fair, efficient, and effective manner.

105 Jurors not allowed to ask witnesses questions during trials will nonetheless make their concerns known during deliberations via jury notes. Although I do not believe there is a direct correlation between jurors seeking clarification of evidence and reasonable doubt, my former law clerks, Eduardo Mendoza and Ross Mazer, and I nonetheless embarked on a review of jury notes in 100 criminal trials from the Southern District of Texas, spanning a period of eight years. The jury notes from these trials were divided and catalogued into four distinct categories:

(1) administrative and miscellaneous questions (e.g., logistical questions and requests for equipment): fifty-three notes;

(2) requests to examine admitted evidence (e.g., exhibits and testimony): forty notes;

(3) questions about the applicable law: sixty notes; and

(4) requests for more evidence or clarification of the evidence: fifty-three notes.

Jurors made at least one request for more evidence or clarification of the evidence in forty-three of the trials examined. Of those trials, twenty-eight (or sixty-five percent) resulted in a verdict

standard, agreed-upon response by all parties that they (the jury) had been given all the evidence they could lawfully consider and should rely on their own independent recollection and interpretation of the evidence.

And with these brief and arguably not entirely helpful marching orders, jurors were sent back to their job of rendering a *true and correct verdict* according to the law and the facts (even if those facts were not entirely clear). The frustration on the faces of trial counsel, each operating under the faulty assumption they had adequately, if not masterfully, explained the evidence, was palpable as the parties and the Court were left dumbfounded by the legal and procedural roadblock at this late juncture in the case. This preventable phenomenon propelled me to think of possible solutions to jurors' inability to ask clarifying questions as the evidence is being presented throughout the trial. Whether or not consensus exists as to the true purpose of a trial—search for the truth versus a test to see if the government can meet their burden of proof—neither side should take issue with jurors fully understanding the evidence. After all, comprehension of the evidence should go hand-in-hand with jurors making the best possible decision, whatever that decision may be.

A. *Notice to Parties and Implementation*

Research as to best practices and individual tailoring by each judge is a must.[106] Fortunately, three decades of studies and scholarship have yielded helpful roadmaps and step-by-step guidance by judges and practitioners familiar with the practice. Following a detailed review and comparison of multiple sources, I compiled my own set of preliminary, cautionary, and final jury instructions.[107] I also selected a complex criminal

of guilty on all counts; nine (or twenty-one percent) in a verdict of not guilty on all counts; and six (or fourteen percent) in a mixed verdict. Given the number of variables and unknowns and the secret nature of deliberations, further research in this area would be interesting and advisable. What can be argued from this data though is that an overwhelming majority—sixty-five percent—of jurors requesting clarification of evidence still returned verdicts of guilty on all counts.

106 As I delved into extensive research of the practice, I was initially surprised to learn that it is neither novel nor new. As discussed in Part II, it has existed for two centuries and provides the perfect solution to judges' inability to clarify the evidence at the conclusion of the case and during the deliberation process. Although some of the rhetoric surrounding the practice is still phrased in terms of judges not committing error when allowing it, the fact is that there is no legal or procedural impediment to the practice. A word of caution though: there is a monumental leap from simply thinking about the practice to actually implementing it. Even the most brilliant, competent trial judge should not implement the practice without carefully crafted judicial procedures and protocols. Judges must also be willing to invest the time to educate jurors about the process and the jurors' proper role. Active judicial oversight is essential to ensure compliance. Otherwise, the hypothetical concerns raised by opponents may outweigh the numerous benefits to allowing it.

107 *See infra* Appendix.

trial expected to last over a month, involving six defendants, ten lawyers, interpreters in two languages,[108] and a myriad of out-of-the-ordinary charges against each defendant.[109]

The first step toward successful implementation was to provide the lawyers with an advisory giving them ample advance notice of my intention to allow the practice. The advisory described in detail how the practice would work and also included copies of the proposed jury instructions. The advisory referenced existing caselaw and rules allowing the practice. It further encouraged the parties to conduct their own research and raise specific legal objections by a certain date. A pretrial hearing was held to consider any objections, to talk through the mechanics and envisioned practical application of the practice, and to hear suggestions from the parties.[110] Ultimately, all parties agreed that the extensive procedural protocols and active judicial oversight should remedy any hypothetical concerns.[111]

The second step toward successful implementation was to instruct the jurors as to the purpose behind the practice and the appropriate parameters. The list of permissible dos and don'ts was explained to the potential jurors during the voir dire process to ensure not only understanding of the parameters but a willingness to comply if ultimately selected to serve. The parties were also allowed to conduct their own voir dire examination as to all relevant topics.[112]

The third step toward successful implementation involved continued education of the jurors. Once empaneled, the jurors were reminded of their role as neutral factfinders and judges of the facts. Each juror was provided with a clipboard containing the top ten list of cautionary instructions, which were repeated during the preliminary instructions and

108 Simultaneous translation was required for Spanish and Hindi languages.

109 The defendants were charged with multiple counts in a complex Black-Market Peso Money Laundering scheme involving two countries, multiple participants, cooperating individuals, and expert testimony.

110 While opponents of the practice commonly assume that the defense will object given unproven potential disadvantages, defense counsel in my case were the first to acquiesce. It was the Government who seemed a bit wary; yet it only raised some of the general objections discussed in Part III. In the end, both sides acknowledged the Court's discretion to allow the practice. Defense counsel's only request, which was agreed to by the Court, was that all objections to the jurors' questions be raised either at the bench or outside the presence of the jurors.

111 There was an express acknowledgment that if the practice became unnecessarily cumbersome or if there were any signs of abuse or failure to carefully follow the Court's instructions by the jury, the practice would be discontinued. The Court agreed to assume responsibility for discontinuing the practice and to provide jurors with an adequate explanation as to the reason(s) why. Jurors would also be instructed to not hold the decision against the parties.

112 Each attorney was given ample time to conduct voir dire; I do not recall them asking any additional questions pertaining to the practice.

throughout the trial. The list of cautionary instructions in bullet point format was prominently displayed at the top and was followed by blank sheets of paper they could use to write down any clarifying questions. Jurors were reminded that the Court would have to vet each question at the bench after hearing legal objections from the lawyers. They were also instructed that they should not be concerned if a particular question was not asked, should not speculate as to what the answer would or could have been, and—most importantly—should not hold the failure to ask a particular question against any of the parties. Neither should they give more weight to an answer to a question simply because a juror posed it.

B. *Trial Length*

Indisputably, allowing jurors to ask questions was the smoothest part of the entire five-week trial, which from start to finish, took a total of 152 hours and 23 minutes.[113] Law clerks punctiliously kept time of previously identified categories.[114] The first category measured the amount of time it took for jurors to formulate questions after the witness had been fully questioned by all the parties: 18 minutes, 6 seconds. This brevity can be attributed to the fact that the jurors did not pose questions to every witness; nor did every juror ask a question. Jurors asked questions of only fourteen of the twenty-eight witnesses. They submitted a total of thirty-five questions, of which only six were not asked, and only three were asked over objection from counsel. The remaining twenty-six juror questions were asked without any objections from counsel.

The second category measured the amount of time it took the Court to ask the witness the questions: 26 minutes, 14 seconds. This was followed by the amount of time it took the parties to ask any additional follow-up questions based solely on the jurors' questions: 12 minutes, 29 seconds.

Assessing juror questions and fielding objections at the bench predictably accounted for the longest amount of time, and even that took only 44 minutes, 21 seconds. All things considered—this was also a remarkably brief period of time given the ten highly zealous, competent

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[113] The jury returned verdicts of guilty against each defendant on every count. Defendants have been sentenced and appeals are pending. It is worth noting that a review of the appellate briefs confirms that the defendants are not appealing the use of the practice throughout the trial. It is not a point of contention.

[114] Hon. Marina Garcia Marmolejo, Jury Question Timesheet (2019) (on file with Author). Thank you to my former law clerks, Christopher C. Cyrus and Kelsey J. Curtis, who, alongside US District Judge Diana Saldana's former clerk, Kayla Oliver, assisted the Court not only with the time-keeping functions described but with the numerous other tasks incumbent upon judicial law clerks during trials.

advocates involved in the case and the sheer amount of time it took for everyone to simply congregate at the bench.

In sum, allowing the practice did not unnecessarily prolong the trial proceedings. It accounted for less than one percent of the total trial time (1 hour, 41 minutes out of the 152 hours, 23 minutes). The benefits of allowing the practice were also readily observable by all. Not only were jurors uncharacteristically attentive and alert during long trial days in the midst of winter,[115] but they heeded the Court's instructions and asked mostly relevant, clarifying questions.

If a juror submitted an irrelevant question, the Court did not ask the question of the witness and the jury was reminded of the Court's role as gatekeeper. The jurors did not pose argumentative questions or request additional evidence. Nor did they ask a question that could tip the Government off as to a missing element.[116] Moreover, none of the jurors' questions revealed an intent to usurp the role of any of the parties. In fact, the opposite was true: the questions posed by jurors reflected an understanding and acceptance of their limited role and the importance of not shifting the burden or improperly commenting on the credibility of any witness, including several defendants who opted to testify on their own behalf.[117]

C. *Jury Deliberations*

The length of trial deliberations varies from case to case. Even the simplest one-day, one-defendant trial may result in extended, prolonged deliberations. Multiple juror notes are also quite common and may range from mundane administrative requests for notepads and writing utensils to substantive inquiries seeking clarification of evidence or legal instructions. Jurors often request additional evidence or the playback of tape recordings, videos, or other trial testimony. And at times jurors, after deliberating for a period longer than the trial itself, will express an inability to reach a unanimous verdict.[118]

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[115] Trial hours were from 8:30 a.m. to 6:00 p.m. with a thirty-five-minute lunch break for jurors who remained in the jury room.

[116] If a juror had posed a question which dealt with a missing element of proof, not only would I not have asked the question, I would not have advised the parties. The particular question would have been placed under seal and been made part of the appellate record.

[117] Interestingly, jurors did not ask any questions of the defendants following their testimony. In any criminal trial, a defendant enjoys not only the presumption of innocence but the right to remain silent. Defendants do not have the burden of proof and do not have to present any evidence whatsoever. However, if a defendant chooses to testify on his or her own behalf, the jury is instructed that the defendant's credibility is to be evaluated in the same way as any other witness.

[118] The Court may exercise discretion to provide jurors with additional charging instructions (known as an *Allen* charge) when the jurors express an inability to decide on a verdict. In *Allen v. United*

Given the number of defendants involved and the various charges, deliberations in this case were extremely brief. In total, deliberations took only 6 hours, 38 minutes. To put things in perspective, the closing arguments delivered by the parties took longer than the time spent by jurors deliberating and reaching a verdict as to each defendant on every single count. Importantly, the jury did not send any notes requesting additional evidence. Nor did they send notes seeking clarification of any evidence or requests to playback any portion of the trial testimony. The one question posed by the jury during deliberations involved clarification of a legal instruction provided by the court.

From these facts alone it would be fair to surmise that the practice gave jurors the confidence to apply the law efficiently and intelligently to the evidence pertaining to each defendant during their deliberations. The ability to ask clarifying questions eliminated any doubt as to the evidentiary value of a particular piece of evidence. It did not, however, appear to benefit either side or provide an unfair advantage. In the simplest of terms, the practice helped the jury understand the evidence, nothing more and nothing less. The post-verdict juror polls and juror interviews confirm this same conclusion.

V. Survey Data Confirms Jurors' Positive Experience

A. *Poll Results*

After the verdicts were rendered by the jury and accepted by the Court, the jurors voluntarily participated in a ten-question poll regarding their overall experience with the practice. Each question was prefaced with the following statement: "As the judges of the facts in this case, did the ability to ask clarifying questions of testifying witnesses . . . ?" Ten

States, the Supreme Court approved the use of a jury instruction intended to prevent hung juries by encouraging jurors to continue deliberations in an attempt to reach a verdict. 164 U.S. 492, 501–02 (1896). Since then, courts have adopted their own versions of the *Allen* charge. However, when all is said and done, if jurors continue to manifest an inability to reach a unanimous verdict, judges are left with no choice but to declare a mistrial.

different categories[119] were explored with the complete results of the poll depicted in the graphs below.[120]

As reflected in the graphs, every category enjoyed a positive response from the jurors, some evoking a higher consensus than others. This Article will discuss three categories with the highest consensus beginning with the third question: Did the practice clear up any confusion or misunderstandings? Every juror agreed that allowing them to ask questions during the trial helped clear up confusion or misunderstandings, with eighty-three percent expressing strong agreement with this proposition. The second category reflecting the highest overall consensus came from the first question: Did the practice enhance understanding of the issues and the evidence presented? Every juror agreed that the practice enhanced their ability to understand the issues and the evidence. These results seem consistent with the lack of questions posed by the jurors during deliberations and with the efficiency of the deliberative process given the length and complexity of the trial. Plain and simple, allowing the practice appears to have helped jurors better understand the evidence which, in turn, helped them avoid confusion or misunderstandings of the evidence.

Last, but not least in terms of importance, the second question—did the practice encourage jurors to remain more alert and focused throughout the trial?—resulted in ninety-two percent of jurors agreeing with this proposition, with seventy-five percent strongly agreeing. The benefits of an alert, attentive, and focused jury should speak for themselves. The goal of allowing the practice is not to provide one side with an advantage over the other or to try to direct a particular outcome in the trial. Yet, even the most zealous advocates in the hardest fought trials would agree that a focused attentive jury is better than a sleepy, inattentive one. Two charts summarizing the survey findings are displayed below.

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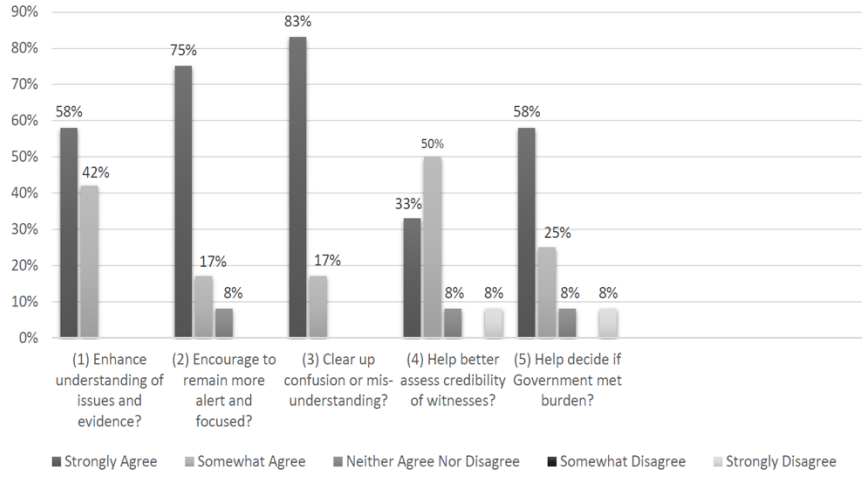
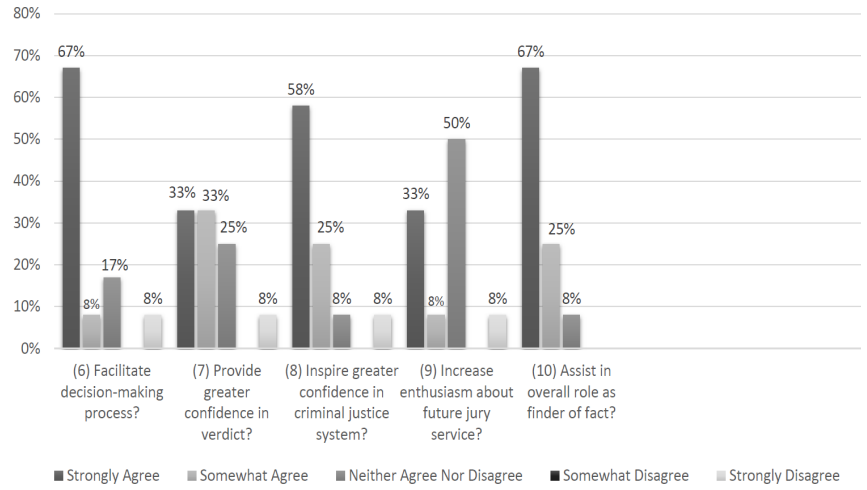
[119] As the judges of the facts in this case, did the ability to ask clarifying questions of testifying witnesses: (1) Enhance your understanding of the issues and evidence presented?; (2) Encourage you to remain more alert and focused throughout the trial?; (3) Clear up any confusion or any misunderstanding?; (4) Help you better assess the credibility of witnesses?; (5) Help you decide if the Government met its Burden of Proof Beyond a Reasonable Doubt?; (6) Facilitate the decision-making process by lessening the number of questions asked during deliberations?; (7) Provide greater confidence in verdict reached?; (8) Inspire greater confidence in the criminal justice system?; (9) Increase your enthusiasm about future jury service?; and (10) Assist you in your overall role as finder of fact?

[120] Once again, I am mindful that the previously mentioned empirical studies involved hundreds of trials and participants, and that my descriptive account is merely an additional glimpse of the practice in practice. It nonetheless confirms the positive benefits experienced by others who have dared to allow jurors the opportunity to directly participate in the trial process by asking clarifying questions.





B. *Interviews*

In addition to completing the immediate post-verdict polls, the jurors also agreed to participate in interviews which took place several months after the conclusion of the trial.[121] The sole purpose of the interviews was

121 Interviews took place in Laredo, Texas and were conducted either in-person or by telephone. A transcript of each interview is on file with the Author.

to ascertain whether the jurors' initial post-verdict views had changed in any way; jurors confirmed they had not. During the interviews, the jurors highlighted the overall and individual benefits of the practice, reiterating great appreciation for the opportunity to ask clarifying questions given the length and complexity of the trial[122]: "We felt like we were part of the trial." We had an "incentive to be more alert and attentive" throughout the proceedings. Other reported benefits to the practice included the "clarification of the attorney's vocabulary" and greater understanding of the evidence. As one juror, who opted not to ask a single question, pointed out: "Knowing I could ask questions resulted in my note-taking being more thorough and I also felt more engaged."

Those who refrained from asking questions did so because there was nothing they felt needed additional clarification. They expressed satisfaction with the way the parties presented and challenged the evidence. The jurors further reiterated their understanding that they should not ask for additional evidence or submit a question that could be viewed as either argumentative or expressing a personal opinion. Jurors also expressed a clear understanding of the Court's instructions as to the appropriate parameters and the Government's role in proving the case beyond a reasonable doubt: "We knew we had to pay close attention to the presentation of the evidence and not take over the lawyers' roles." Another juror pointed out that having the ability to ask questions "helped us stay awake and be on top of everything. It helped us stay focused in order to figure out what, if anything, needed to be asked after the lawyers had asked their questions."

Jurors also confirmed their understanding of the importance of the task placed upon them and the potential impact on six people's lives being "ultimately in their hands." In this regard, one juror noted the ability to ask clarifying questions helped "calm nerves, manage the anxiety that comes with deciding a person's fate." Some of the jurors expressed their belief that the practice helped them make the right decision given their increased understanding of the evidence which was described as overwhelming. Ultimately, although the task at hand was not an easy one, jurors felt more confident they had understood the evidence and made the right decision.

[122] One juror expressed, "if I wasn't allowed to ask questions on such a big case, I would have been lost." This same juror stated that being lost was not the same thing as having a reasonable doubt. Jurors expressed belief that the evidence was overwhelming. Allowing them to ask questions helped them understand the evidence better.

As to the effect of the practice on deliberations, jurors noted it greatly facilitated deliberations amongst themselves because there was "no need to debate factual misunderstandings. Those had been resolved during the trial." Jurors also reported greater confidence they had performed their role as jurors as ably as possible. This was especially important to them given their lack of formal legal training.

VI. Importance of Judicial Protocols To Address Perceived Impediments

Trials, by their nature, are dynamic, given the many moving parts and potentially dangerous pitfalls. This is true whether or not the practice is allowed. Something as customary and routine as the vetting of legal objections can take on a life of its own if allowed to proceed in front of a jury.[123] Thus, *any* trial procedure, to include the practice, must be properly managed by the Court in order to alleviate the primary concern—potential prejudice to any of the parties. This requires advance planning, proper implementation, and active judicial involvement and oversight.

Although I had previously considered allowing the practice early on in my judicial career, it was not until years later that I actually implemented it, and even then I was, admittedly, off to a rocky start given the lack of carefully crafted procedures and protocols. While the parties in the first two trials were given advance notice and acquiesced to the practice given their own level of intrigue, the lack of clear instructions and guidance to the jury meant that these implementations of the practice arguably lived up to the concerns expressed by the critics—namely, jurors commenting on the quality of the evidence, the posing of irrelevant, argumentative questions, and improper burden shifting by requesting additional evidence.[124] Still, the jury is not to blame for these initial shortcomings, which were directly attributable to my failure to instruct them

[123] By way of example, "speaking objections" by counsel—commonly defined as unnecessary and otherwise extensive, prolonged arguments by the parties in the presence of the jury—can influence and prejudice a jury if allowed by the Court. The purpose of raising legal objections is for the Court to rule on the legal admissibility of evidence. However, if counsel are allowed to reference and argue about the validity—or lack thereof—of a particular piece of evidence in front of the jury, it becomes impossible to later "un-ring the proverbial bell" even if jurors are otherwise instructed to disregard the evidence and the statements of counsel. In other words, the very evidence that one side is trying to keep out is already in front of the jury when presented in this fashion.

[124] The juror questions posed in the first two trials are part of the record in their respective cases, and the juror questions posed in the second trial are under seal.

properly. In the end though, even the shortcomings described above were cured through active judicial involvement.[125]

It is worth noting that the average layperson juror does not own the copyright on asking improper questions. Even seasoned lawyers ask improper, argumentative, and at times irrelevant questions. And when this occurs, judges do what we do best—we intervene by sustaining opposing counsel's objections and instruct the jury to disregard the question and not speculate as to the answer.

By way of important comparison, the third trial (described above) provided a marked contrast to the first two trials, proving once again that jurors can and do carefully heed the Court's instructions. The difference in the quality and tenor of the questions was astonishing with jurors asking mostly relevant, clarifying questions in the case where they had been properly instructed by the Court not only at the beginning, but throughout the entire trial.[126] Thus, if implemented correctly, the practice will live up to the manifold praise of its supporters. The inverse also appears to be true.

Notwithstanding the primary objections to the practice, judges have discretion and legal authority to allow it. Whether or not a particular judge chooses to do so seems to be based more on the prevailing community culture than on formal legal authority or lack thereof, given the results of studies showing judges' propensity to take cues from their peers as to best trial practices.[127]

Nonetheless, there appear to be several pragmatic impediments to its expansion. First, although there is no doubt there is a proper legal foundation giving judges discretion to employ the practice, much of the existing scholarship and conversation centers around judges not committing

125 Even without exhaustive instructions as to scope and parameter, many of the questions posed by the juries were relevant, proper, and asked without objection from the parties. To the extent that an irrelevant or argumentative question was posed, the Court did not ask it. In the second trial and after asking for a brief recess to confer with his counsel, the defendant decided to enter a plea of guilty following a flurry of questions posed by the jury after his testimony. He ultimately received a better plea offer than the Government originally extended given the Government's own concern about the tenor of some of the jury's questions. Even though the practice presented more speed bumps than necessary in the first two trials, both sides reported satisfaction with the process given the insight it gave them into the jurors' thought process and the manner in which it was handled.

126 The juror questions in the third trial are also part of the record and are under seal.

127 Paula L. Hannaford-Agor, *Judicial Nullification? Judicial Compliance and Non-Compliance with Jury Improvement Efforts*, 28 N. ILL. U. L. REV. 407, 417–18 (2008) ("[T]he stud[ies] found that local community practice has the single biggest impact on actual trial practices for both criminal and civil trials. Trial judges, it seems, take their cues about how best to exercise their discretion primarily from their peers, rather than from more formal legal authority." (footnote omitted)).

plain error when doing so.[128] Given the inherent pressures that come with busy schedules and docket management, a plain error dialogue—in any context—is a red flag cautioning judges to steer clear and leave innovation efforts to braver souls. Second, before now there was no comprehensive, user-friendly procedural roadmap to assist with implementing the practice, which effectively meant that judges contemplating implementation had to reinvent the wheel to educate lawyers as to the practice of juror-posed questions. These judges had to draft preliminary, cautionary, and final jury instructions and procedural protocol.[129] Third, even the most ardent proponents seem to favor the use of the practice in civil trials over criminal trials without any empirical justification for the distinction.[130] Perhaps allowing the practice in civil trials represents a baby-steps approach to implementation in the hopes of winning the critics over by demonstrating that the most commonly held fears and concerns appear to be unfounded. After my exhausting review of existing scholarship, discussion with colleagues who have allowed the practice, and my own experience, I see no substantive distinctions that cannot be cured with proper judicial protocols and oversight.

To that end, I suggest a roadmap for judges who wish to implement the practice. The proper procedural steps, accompanied by suggested language, are included in the Appendix.

Conclusion

"Justice is the by-product of hard work done by the lawyers, the judge, and a jury. Not allowing jurors to ask questions of a witness diminishes us and the justice system."[131]

History has demonstrated that democracy cannot rest, and that complacency is in fact the enemy of justice. As judges, we have taken an oath to administer justice and to perform faithfully and impartially all duties under the Constitution and laws of the United States. In order to do this and to do it well, we must constantly ask ourselves how we can do our jobs

128 *See, e.g.*, Waterman et al., *supra* note 44, at 490 ("[T]he Eighth Circuit had to decide whether permitting juror question[ing of witnesses] constituted 'plain error' when no objections were made about the procedure at trial.").

129 Ideally, judges would give the lawyers notice of the intended practice and begin the dialogue with the prospective jurors during voir dire to expose any potential bias.

130 *See* AM. JURY PROJECT, ABA, PRINCIPLES FOR JURIES AND JURY TRIALS 18 (2005), https://perma.cc/4L9B-M3SW (Principle 13-C).

131 Pfaff et al., *supra* note 12, at 37.

better.[132] It is too easy to become comfortable with procedural practices best left in the past. As autonomous judges, we have the power to implement processes, procedures, and innovations that not only enhance individual experiences, but keep up with the times in order to ensure we our fulfilling our oath to uphold the Constitution.

More than three decades of studies now confirm the practice of allowing jurors to ask clarifying questions is efficient, effective, and highly favored by those familiar with it, including the final decision makers—the jurors who report greater job satisfaction and overall confidence in verdicts rendered.[133] These facts alone should nudge a slow-moving judiciary, mostly content with the status quo and inherited practices, in the direction of introspection and change.[134] Call it reciprocal professional courtesy[135] or just plain common sense; the fact is that people's lives are hanging in the balance, and it is time to reevaluate the benefits of allowing the practice not only in civil trials, but in criminal trials as well. As Judge Eugene A. Lucci states: "The idea that justice is somehow served by a confused jury that is not allowed to express its confusion and seek clarity of understanding is flat wrong."[136] It undermines confidence in our system of justice, results in a "miscarriage of justice," and promotes cynicism.[137]

Research confirms that experience with the practice results in greater enthusiasm by all who use it and confidence in our system of justice:

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132 *See* Bennett, *supra* note 8, at 487 (recalling that, when prompted by a juror asking why everyone had water except them, his "lifelong motto . . . flashed before [him]: 'There is a better way to do everything—go find it"). Judge Bennett's goal was to "nudge a slow-moving judiciary towards change remembering, as Martin Luther King, Jr., proclaimed: 'The arc of the moral universe is long but bends towards justice.'" *Id.* at 524. Judge Bennett noted, however, "it does not bend on its own" and reasoned that "[a]dopting and implementing this Juror Bill of Rights for jurors helps bend the arc towards justice." *Id.*

133 Pfaff et al., *supra* note 12, at 37 ("[The practice] helps jurors reach a just result. It also increases juror satisfaction with the justice system, which is not an insignificant benefit." (citing Hon. Warren D. Wolfson, *An Experiment in Juror Interrogation of Witnesses*, CBA REC. (Feb. 1987), at 12)).

134 In his article, Judge Bennett, quoting an article that "had a huge impact on [his] judging . . . [and] may have the answer, at least for judges," stated:

> The final obstacle to sensible practices to improve the conduct of jury trials is the inherent conservatism of the bench. Judges "have seldom been accused of being progressive." They, as members of a tradition-driven institution, embrace what has been done before and are sometimes skeptical of new approaches.

Bennett, *supra* note 8, at 488 (quoting Susman & Melsheimer, *supra* note 38, at 439).

135 *See* Pfaff et al., *supra* note 12, at 37 ("Judges ask questions to clarify the facts or to bring an issue into sharper focus so they can make a just ruling. Who would argue in favor of eliminating question from the bench? Should we treat jurors differently from judges in this way?").

136 Lucci, *supra* note 3, at 18.

137 *Id.*

"There can be little doubt at this time, with all three trial participant groups having spoken, repeatedly, that juror questioning is an innovation whose time has fully arrived."[138]

138 Frank, *supra* note 81, at 26.

Appendix

A. *Notice to the Parties*

ADVISORY

"Trials exist to develop truth." *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir. 1979). To that end, the Court is empowered to exercise reasonable control over the mode and order of examining witnesses and presenting evidence. *See* FED. R. EVID. 611(a). Thus, where the positive value of allowing jurors to ask clarifying questions is sufficiently high and procedural safeguards are in place to guard against possible abuses of the practice, it is within the discretion of the trial judge to permit jurors to write down clarifying questions that the Court may pose to witnesses on the stand.[139]

The Court anticipates that the issues presented by this case will be sufficiently complex that the search for truth and justice will be promoted by allowing jurors to ask clarifying questions at the conclusion of each witness's testimony. To safeguard against potential abuse, the Court will issue preliminary cautionary instructions[140] regarding the procedure and proper ends of juror questioning; it will reiterate those instructions on question sheets that will be provided to the jurors.[141] The Court will also remind jurors of the acceptable parameters of questioning prior to the first witness taking the stand. Any questions submitted will be reviewed at the bench and subject to evidentiary objections by the Parties. If the Court determines that a question is appropriate, it will issue the question to the witness once both sides have had an opportunity to conclude their own questioning.

With these procedures in place, the Court is confident that the jurors in this case will be empowered to more effectively fulfill their vital role as judges of the facts.

SIGNED _____.

139 *See supra* note 2.

140 The language of these instructions is attached at Appendix B.

141 A copy of these instructions and question sheets is attached at Appendix C.

B. *Preliminary Instructions*

Preliminary Instructions on Juror Questions

You will be allowed to pose written questions to witnesses but are not required to do so. When a witness has been examined and cross-examined by counsel, and after I ask any clarifying questions of the witness, I will ask whether any juror has any further clarifying question for the witness. You may propose questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you propose any questions, remember that your role is that of a neutral fact finder, not an advocate. It is of paramount importance for you to always remember that in criminal cases Defendants are presumed innocent; the burden of proof is on the Government from beginning to end.

If you have a question, write it on the sheet of paper provided and hand it to my staff. Do not identify yourself on any of the question sheets or discuss your question with any other juror. I will review your question with counsel at the bench and determine whether the question is appropriate under the Federal Rules of Evidence. If so, I will ask your question, though I might put it in my own words. If the question is not permitted by the Rules of Evidence, or if it is expected to be answered later in the case, it will not be asked, and you should not draw any conclusions or speculate about the fact that your question was not asked. If the Court determines that your question will not be asked, do not hold that decision against the Parties.

If I do ask your question, you should not give the answer to it any greater weight than you would give to any other testimony. Remember to keep an open mind until you have heard all the evidence, the closing arguments, and my final instructions on the law.

C. *Cautionary Instructions*

JURY INSTRUCTIONS

Caution: Always keep an open mind until all of the evidence is presented, remembering the Burden of Proof, Presumption of Innocence, and the Right to Remain Silent.

Burden of Proof: It is the Government who must convince you of a Defendant's guilt beyond a reasonable doubt.

Presumption of Innocence: Defendant is presumed by law to be innocent and is not required to produce any witnesses or present any evidence.

Right to Remain Silent: Defendant has the right to remain silent, and you may not use his silence against him.

Warnings: You are not investigators and must not conduct any outside research or investigation.

You are not an advocate and must not try to be the Prosecutor or Defense Attorney in this case.

I am the judge of the law and will determine which evidence you may lawfully consider.

You will be allowed to pose questions to witnesses, but are not required to do so.

All questions will be screened by the Court for admissibility pursuant to the Federal Rules of Evidence.

If a question is not asked, it may have nothing to do with the quality of the question. Do not speculate as to reasons why it wasn't allowed or what the answer may have been had the witness been allowed to answer. Do not hold the failure to ask a question against the lawyers or the Defendant.

Procedure for Questions: If you choose to ask questions, keep the following in mind:

1. Don't get so focused on potential questions that you fail to listen to the questions posed by the lawyers or by the Court.
2. Avoid asking a question that you know has already been asked.
3. Ask only clarifying questions. Questions that would clear up a particular factual issue. For example: (1) What color was the car? or (2) What was the weather that day?
4. In your questions, do not express an opinion or comment on the believability of a particular witness's testimony.
5. Do not ask questions that impermissibly require the Defendant to prove his innocence. For example: (1) Did the Defendant provide documents? or (2) Did the Defendant give an alibi?
6. Do not ask questions that impermissibly comment on a Defendant's right to silence. For example: Did the Defendant say anything in this case?
7. Do not discuss or comment on the questions posed by you or other jurors with each other until the end of the trial when you are actively involved in your deliberations.
8. Do not make up your mind on any point until after you have heard all the evidence in the case and my instructions to you on the law.

D. *Sample Blank Note*

(Insert Style of Case)

Witness #_____

Question:

E. *Final Instructions*

Modify preliminary instructions.