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Maintaining the Adversarial System: The Practice of Allowing Jurors to Question Witnesses During Trial

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NOTES

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I. INTRODUCTION

A defendant sits in the witness stand undergoing examination by his attorney. He is accused of armed robbery, among other criminal

acts. During the course of the defendant's testimony, a juror blurts out that he has a question. The judge tells the juror to write his question down and advises the juror that he will be able to ask his question upon completion of the attorneys' examinations. When the juror's question is finally asked, the judge indicates to the defendant's attorney that the attorney should address the matter raised by the juror on reexamination. During the reexamination, the attorney turns to the jury box and directly addresses the individual juror, inquiring whether the juror's question had been sufficiently answered. At this point, several other jurors, feeling released from their silence, also begin questioning the witness. The judge or attorneys occasionally rephrase the questions, but often the witness answers the jurors directly. Neither party objects to the jurors' questions at the time of trial.

The members of the jury in the trial discussed above appear to have acted as inquisitors. Instead of listening passively to the presentation of evidence from the opposing parties, they pose their own questions to the defendant. In an inquisitorial system of justice, used in many civil law countries, judges or juries have the primary responsibility for gathering and evaluating evidence.[1] These fact finders actively seek evidence, such that the parties become mere objects of inquiry rather than the directors of the trial.[2] In contrast to the inquisitorial system, the United States' adversarial system assigns the primary responsibility for the development and presentation of evidence to the parties themselves.[3] In the adversarial system, an impartial fact finder decides a case based on the conflicting evidence presented by opposing parties.[4] The depiction above, however, describes not a trial governed by the inquisitorial system of justice, but rather a recent trial in the Eastern District of New York.[5]

Commentators and courts are currently questioning the efficacy of our jury system.[6] Some view the system as too rigid and

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1. Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 74 (1998).

2. Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 18 (1995).

3. Freedman, *supra* note 1, at 57.

4. *Id.*

5. United States v. Bush, 47 F.3d 511, 512-14 (2d Cir. 1995) (reviewing the record of the district court). After the defendant was convicted, he brought an appeal claiming that allowing jurors to question witnesses, including defendants, during a criminal trial was reversible error. *Id.* at 512.

6. *E.g.*, Steven D. Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 PSYCHOL. PUB. POL'Y & L. 259, 260 (1997) (stating that there is a "high intensity and frequency of recent jury criticism"); Eugene R. Sullivan & Akhil R. Amar, *Jury Reform in America—A Return to the Old Country*, 33 AM. CRIM. L. REV. 1141, 1141 (1996) ("The present [jury] system is being judged inadequate by the bench, the bar, the press, and the

unreliable a truth-finding body.[7] These critics suggest altering aspects of the jury system, and most recommend alterations that encourage a more active and involved jury.[8] One such proposed alteration[9] would permit the jury to pose questions to witnesses during trial.[10] Many jurisdictions are either considering or are currently experimenting with the use of juror questioning.[11]

Presently, the propriety of juror questioning is a widely contested matter.[12] The debate also focuses on the necessary safeguards that should be required if the practice is ultimately deemed proper.[13] There are few guidelines available to assist trial courts in implementing the practice.[14] Because the factors leading courts to find prejudice in a case are not clearly defined, trial courts are often left to their own discretion.[15]

To understand the issue of juror questioning, it is best to begin with a historical overview of the jury system and the adversarial process. The consequences of giving the jury a more active role can only be analyzed effectively with this history in mind. Part II of this Note will discuss the history of the jury system and provide an overview of the merits of the current adversarial system. Part III will examine the practice of juror questioning and its impact on the adversarial system. Part III also examines the history of jury questioning and analyzes the advantages and disadvantages of the practice. It looks at the practice's current status in jurisdictions across

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public."). The recent criticisms of juries led the Judicial Council of California to create a special commission to evaluate the jury system and recommend changes. J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1436 (1996).

7. *See e.g.*, Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 443-45 (1997).

8. Penrod & Heuer, *supra* note 6, at 260. Proposed alterations include allowing jurors to take notes during trial and deliberations and allowing jurors to question witnesses. *Id.* at 261.

9. The term "alteration" indicates that this issue has only recently become a topic of widespread discussion. The actual practice of juror questioning has been used infrequently throughout the history of United States jurisprudence.

10. *E.g.*, Peter B. Krupp, *When Jurors Speak: A Practical Guide to Jurors Questioning Witnesses in Massachusetts*, BOSTON B.J., Sept./Oct. 2001, at 12.

11. *See, e.g.*, R.N. Singh et al., *Reforming the Jury System: What do the Judges Think?*, 63 TEX. B.J. 948, 950-51 (2000) (noting that the Texas Supreme Court appointed a Jury Task Force to research and evaluate possible jury reforms, including allowing jurors to question witnesses).

12. Janessa E. Shtabsky, Comment, *A More Active Jury: Has Arizona Set the Standard for Reform with its New Jury Rules?*, 28 ARIZ. ST. L.J. 1009, 1011 (1996).

13. Mark C. Roberts, II, Comment, *Evidence – Witnesses – Jurors May Not Pose Written Questions to Witnesses in Criminal Cases*, 24 ST. MARY'S L.J. 1421, 1423-25 (1993) (stating that courts and commentators are debating both the merits of juror questioning and the procedures to be utilized if the practice is allowed).

14. Penrod, *supra* note 6, at 262.

15. Kara Lundy, Note, *Juror Questioning of Witnesses: Questioning the United States Criminal Justice System*, 85 MINN. L. REV. 2007, 2007 (2001).

the country and sets forth current views about the appropriateness of the practice in general. Part IV suggests procedural safeguards designed both to eliminate or reduce potential problems with juror questioning and to preserve the virtues of the adversarial system.

II. THE ADVERSARIAL SYSTEM OF JUSTICE

The American criminal justice system strives to balance the government's dual interests in enforcing its laws and protecting its citizens' rights to receive fair trials.[16] The Constitution and the American adversarial system provide a criminal defendant the right to a trial before an impartial jury.[17]

A. Development of the Adversarial System

Dispute resolution procedures have evolved over time.[18] The adversarial system currently employed in the United States is a product of the evolution of both English and American jurisprudence.[19] Precursors to the current adversarial system of justice include the medieval period's trials by battle, wager of law, and ordeal.[20] Each of these methods was premised upon divine intervention—a belief that God would intervene and demonstrate the correct judgment.[21] Trial by battle involved disputants, or sometimes their representatives, engaging in "physical combat until one side yielded . . . , was decisively defeated, or, in certain serious criminal matters, was slain."[22] In the Middle Ages, people believed that the results of the battle were the judgments of God.[23] The often unfavorable and drastic results of trial by battle rendered this form of dispute resolution unpopular and eventually obsolete.[24]

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16. Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 303 (1999).

17. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."); Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 713 (1983).

18. *Id.* at 717.

19. *Id.*

20. *Id.* at 717-19.

21. *Id.* at 719.

22. *Id.* at 717.

23. W.J.V. WINDEYER, LECTURES ON LEGAL HISTORY 44 (2d ed. 1957) ("Men who honored warlike gods were ready enough to settle their disputes by personal combat, on the assumption that the gods would give to the combatant, whose quarrel was just, strength to vanquish the wrongdoer.").

24. Landsman, *supra* note 17, at 718. The decisions often favored the rich, who either had fighting skills or could hire those who did to stand in for them as their "champions." *Id.*; *see also*

Trial by wager of law produced equally biased results but was more popular because it used less drastic means.[25] In a trial by wager of law, one of the litigants was required to make an oath that he was speaking the truth.[26] This litigant won his case if he had enough advocates, or compurgators, taking an oath in his support.[27] The compurgators were not required to have any firsthand knowledge of the case. The litigant with the most compurgators to support his claims would prevail in the trial.[28] Hence, the wager of law has been described as a "character test."[29] Its bias stemmed from the fact that those who were popular in a given community would have more supporters and would therefore prevail.[30]

In a trial by ordeal, the litigant would agree to undergo some physical test. Tests used included carrying a red-hot iron bar, placing an arm in boiling water, or being bound and lowered into water.[31] Medieval Europeans believed that if the litigant were telling the truth, God would intervene and show a sign by protecting the person from harm in the course of the ordeal.[32]

By the middle of the thirteenth century, these three medieval methods were either banned or seriously criticized.[33] Although these medieval methods may seem arcane, they contributed to the evolution of the adversarial process.[34] As Stephan Landsman, a prominent legal historian, notes, "[The medieval methods] helped to establish the principle that the parties to a dispute should play the preeminent part in the procedure leading to its resolution."[35] The outcome of a dispute "depended entirely upon the physical strength, stamina, intelligence, or self-control of the party."[36]

FRANKLIN STRIER, RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM 12 (1994) ("[T]rial by battle never became popular in England, partly because it was hard to see God's hand in it, and partly because it was foisted on the populace by the hated Normans.").

25. Landsman, *supra* note 17, at 718.

26. *Id.*

27. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 5 (3d ed. 1990). The bias stems from the fact that those who were popular in a given community would have more supporters and would therefore prevail.

28. *Id.*

29. *Id.*

30. Landsman, *supra* note 17, at 718.

31. WINDEYER, *supra* note 23, at 14.

32. *Id.* Such signs included the lack of festering burns after carrying a hot iron rod or putting an arm in boiling water or the ability to float when bound and placed in cold water. *Id.*

33. Landsman, *supra* note 17, at 720 (noting that these methods of dispute resolution did not often use legitimate evidence or fact-finding and were not "even remotely adversarial").

34. *Id.*

35. *Id.*

36. Sward, *supra* note 16, at 321.

As the medieval methods of dispute resolution declined in popularity in Europe, trial by jury gained prominence.[37] By the thirteenth century, trial by jury was the predominant judicial procedure.[38] While not proven, it is commonly believed that the jury derived from the "inquisition" introduced to England by William the Conqueror.[39] Skeptics of the prior medieval methods preferred the "so-called rational mode of trial . . . [whereby] litigants looked to *peers* for redress, rather than divine retribution or reward."[40]

The presentment jury, or grand jury, was the first type of jury to appear in the criminal justice system.[41] These juries issued reports of the criminal acts committed by local citizens and prepared indictments for their prosecution.[42] A second jury was used to decide the guilt or innocence of the indicted party.[43] In the early history of the jury, several of the same individuals who served on the initial grand juries would be on the second jury.[44] The early juries "were not the neutral and passive fact finders that they eventually became when incorporated within the adversary framework."[45] Often, no evidence was heard, and the juries relied on divine guidance to reach a resolution.[46] Furthermore, the juries were composed of persons with knowledge of the dispute in question, and members were allowed to conduct an investigation in the community before trial began.[47] Thus, the early juries "were more like witnesses than passive fact finders."[48] In this sense, these juries were more inquisitorial than adversarial.[49] Juries retained their inquisitional nature for many years in both

37. *Id.* The jury system was incorporated into the English judicial process by the end of the twelfth century. Landsman, *supra* note 16, at 720.

38. Sward, *supra* note 16, at 322.

39. Jeffrey Reynolds Sylvester, Comment, *Your Honor, May I Ask a Question? The Inherent Dangers of Allowing Jurors to Question Witnesses*, 7 COOLEY L. REV. 213, 214 (1990).

40. STRIER, *supra* note 24, at 12.

41. Landsman, *supra* note 17, at 720, 724 (providing a history of the civil jury system and the role of the church in dispute resolution).

42. *Id.* at 720.

43. *Id.* at 721.

44. *Id.* Thus, persons who reported and indicted other citizens were also those who decided their guilt or innocence. *Id.* at 720-21.

45. *Id.* at 721.

46. *Id.* at 721-22. *But see* Sylvester, *supra* note 39, at 214-15 (noting that there was some control over these early juries). It was possible for a second jury to convict the first jury of perjury and impose significant penalties on those individuals, including imprisonment or the destruction of their homes. *Id.*

47. Landsman, *supra* note 17, at 722.

48. Sward, *supra* note 16, at 322.

49. Landsman, *supra* note 17, at 722. The juries were an "active and inquiring body searching for material truth." *Id.*

England and the United States.[50] Even now, the "grand jury functions as an inquisitorial body seeking evidence upon which to premise criminal indictments."[51]

Slowly, however, the jury system evolved into an increasingly adversarial process.[52] By the fourteenth century, prospective jurors could be removed from the jury panel for potential bias, and contact between jurors and litigants was curtailed.[53] From at least the "fifteenth century onward[,] jurors began to rely upon what was presented in court as the basis for their decision."[54] After lawyers gained prominence, formal witness testimony became the accepted form of evidence, and formal rules of evidence subsequently were developed.[55] By the end of the eighteenth century, the adversarial system had become "firmly established not only in England but also in America."[56]

B. The Modern Adversarial System

The United States has utilized an adversarial system of justice since the time of the American Revolution.[57] It was incorporated into the Constitution by the Framers and has been elaborated upon by the Supreme Court.[58] Landsman asserts that the

> central precept of [the] adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information from which a neutral and passive decision maker can resolve a litigated dispute in a manner that is acceptable both to the parties and to society.[59]

Therefore, the adversarial system requires a neutral and passive fact-finder—either judge or jury.[60]

In the adversarial system, lawyers on opposing sides argue their cases before this neutral and passive trier of fact.[61] Opposing

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50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 723; STRIER, *supra* note 24, at 13 ("[I]t was not until the fifteenth century that the jury had transformed from a body of witnesses to a body which *hears* witnesses.").

55. *Id.* at 725-27.

56. *Id.* at 730.

57. *Id.* at 713.

58. Freedman, *supra* note 1, at 52; *see also* Berger v. United States, 295 U.S. 78, 88 (1935).

59. Landsman, *supra* note 17, at 714.

60. *Id.* at 713.

61. Nancy Amoury Combs, Comment, *Understanding Kaye Scholer: The Autonomous Citizen, the Managed Subject and the Role of the Lawyer*, 82 CAL. L. REV. 663, 683 (1994).

attorneys "control the presentation of evidence and argument"[62] and attempt "to persuade the fact finder, whether judge or jury, that its presentation of the facts is more convincing than that of the opposing side."[63] The system therefore encourages the opposing sides to find and present their most persuasive evidence.[64] However, evidentiary, procedural, and ethical rules prevent a "win-at-any-cost" attitude on the part of the opposing attorneys.[65] The fact finder is prohibited from making any judgments before the conclusion of the evidence and from becoming actively involved in gathering evidence.[66]

Despite its long-established tradition, recent reforms in the jury system may move the United States away from the adversarial system of justice.[67]

C. Merits of the Adversarial System

The conceptual underpinnings of the adversarial system should be preserved. Professor Wayne R. LaFave notes that the system's superiority in producing accurate verdicts rests on two premises: (1) "that adversaries will uncover more facts and transmit more useful information to the decision maker" and (2) that the adversarial system avoids "decisionmaker bias," a prosecutorial slant that results from decisionmakers also acting as fact finders.[68] The parties' self-interest ensures the production of relevant evidence and the expression of the strengths and weaknesses of the opposing side's case.[69] For example, because a defendant in a criminal case has a powerful incentive to stay out of jail, he or she will accordingly research and present all of the favorable evidence and legal defenses. Alternately, the State has an interest in protecting its citizens and will present all potential evidence of guilt to obtain a conviction. The system also rejects a

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62. *Id.*

63. Hyongsoon Kim, Note, *Adversarialism Defended: Daubert and the Judge's Role in Evaluating Expert Evidence*, 34 COLUM. J.L. & SOC. PROBS. 223, 226 (2001).

64. Landsman, *supra* note 17, at 715.

65. *Id.* at 716.

66. *Id.* at 715 ("[I]f the decision maker strays from the passive role he risks prematurely committing himself to one version of the facts and failing to appreciate the value of all the evidence... [N]eutrality and passivity are essential not only to ensure an evenhanded consideration of each case, but also to convince society that the judicial system is trustworthy; when a decision maker becomes an active questioner ... society is likely to perceive him as partisan rather than neutral.").

67. *See id.* at 738, n.179.

68. 1 WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 1.4(c) (2d ed. 1999).

69. *Id.*

hierarchical model of seeking justice in favor of a "coordinate model."[70] The coordinate model used by the adversarial system divides authority for developing and presenting evidence, determining legal issues, and deciding a verdict.[71] The result of this division of authority is a system of checks on the power of the decisionmakers.[72]

Douglas G. Smith suggests other merits of the adversarial system—specifically the merits of the traditional role of the jury—in *Structural and Functional Aspects of the Jury*.[73] These merits include manifesting the "sovereignty of the people," barring governmental abuse, and preventing abuse by lawyers.[74] He quote Alexis de Tocqueville's observation that the American jury functions as "a political institution . . . one of the forms of sovereignty of the people."[75] Smith notes that the jury imports community values, and hence a democratic quality, to the process of adjudication because, conceptually, a defendant is being judged by his peers.[76] A group of twelve citizens may better represent the "average" member of society than a single judge.[77] In addition, Smith states that the "jury [especially the criminal jury] may counteract both judicial bias as well as corruption."[78] Smith notes that juries provide "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[79] A final merit of the traditional jury is the addition of legitimacy to the adjudicatory process.[80] A single judge may be less able than a group of twelve citizens to represent the "average" member of society.[81] The jury is less likely than a single individual to be perceived as biased, and jury decisions based upon community values are therefore more likely to be considered legitimate.[82]

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70. *Id.*; Smith, *supra* note 7, at 472. ("[T]he jury was thought to hold the 'class instincts of the judge in check,' being composed of members of the community as opposed to being drawn from an elite class within society.").

71. This model contrasts with the inquisitorial system, which places nearly all authority in the fact finders rather than in the parties. *Id.*

72. *Id.*

73. *Id.*

74. Smith, *supra* note 7, at 469-89.

75. *Id.* at 470-71 citing 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 291 (Henry Reeve trans., Knoph 1945).

76. *Id.* at 473.

77. *Id.* at 484.

78. *Id.* at 475.

79. *Id.* at 477 (citing Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

80. *Id.* at 482.

81. *Id.* at 484.

82. *Id.* at 482.

The adversarial system has many merits that are worth preserving. Any reforms to the jury, a central aspect of this system, should be examined closely to ensure that these merits are protected.

III. JUROR QUESTIONING

A. History of Juror Questioning

1. Criticisms of the Traditional Passive Jury

Juries have increasingly become a focus of discussion as a result of media influence.[83] For example, in 1891 Mark Twain observed, "[t]he jury system puts a ban on intelligence and honesty, and a premium upon ignorance, stupidity and perjury. It's a shame that we must continue to use a worthless system because it *was* good a thousand years ago."[84] More recently, an editorial comment on the public response to jury verdicts following several highly publicized cases stated:

> The Rodney King verdict sparked riots in Los Angeles and demands for mixed juries in all cases. The hung jury in the Menendez brothers' first murder trial led to calls for less than unanimous verdicts. And the "not guilty" verdict in the O.J. Simpson case has led some critics to call for scrapping the jury system altogether.[85]

Similarly, some commentators have argued that the truly passive jury is an unattainable goal.[86] They assert that the rules of evidence "developed in large measure to control the jury and to channel its decision making."[87] Empirical research on juries indicates that jurors "bring expectations and preconceptions with them to the jury box, actively searching for causal explanations to make sense of the events described, and consciously or unconsciously process information . . . in ways that may strongly influence their decisions."[88] The traditional passive jury may appear inconsistent with the reality of jurors as "active information-processors." Several commentators

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83. Penrod & Heuer, *supra* note 6, at 259 (stating that it is "clear that the jury is currently a highly visible feature of the American justice system" and noting that one possible reason for the increased focus on juries is the advent and prevalence of modern media).

84. *Id.*

85. *Id.* at 260 (quoting *Judging Juries*, USA TODAY, June 16, 1997, at 18A).

86. *Id.*

87. Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1857 (2001).

88. *Id.* at 1859-60.

assert that the jury system should be adapted to fit this more active model.[89]

Such criticisms have influenced public attitudes regarding the jury system.[90] In fact, some members of the American public have become so disillusioned with the current jury system that they refuse to participate in the process. In California, the Blue Ribbon Commission on Jury System Improvement announced that the state jury system was "in crisis" and "on the brink of collapse."[91] The commission found that the public expressed their dissatisfaction with the current jury system by refusing to appear for jury duty when called for service.[92]

The debate over the role of the jury has led many courts, commentators, and legislatures to propose and implement practices to improve the efficient functioning of the jury.[93] One proposal would permit jurors to question witnesses during trial.[94]

2. Implementation of the Practice

Juror questioning is not a recent development in the United States.[95] In 1895, a state appellate court addressed the issue for the first time and explicitly approved of the practice.[96] In 1907, North Carolina became one of the first states to formally permit jurors to question witnesses, with certain limitations on the types of questions that could be asked. [97] The first federal appellate court to address the

89. *Id.* at 1860.

90. *Id.* (quoting MARK TWAIN, ROUGHING IT 343 (Hartford, CT, Am. Publ'g Co. 1891)).

91. Kelso, *supra* note 6, at 1445.

92. *Id.* The Commission noted that, because of an inability to provide a sufficient number of jurors, this refusal occasionally resulted in delayed trials. *Id.*

93. *See, e.g.*, ARIZ. R. CIV. P. 39(b)(10) (allowing jurors to take notes during trial and to submit written questions to the judge); *see also* Kelso, *supra* note 6, at 1508 (stating that the California Commission investigating juror improvements recommended giving trial courts discretion to permit jurors to question witnesses). In fact, the Commission found that "the benefits of juror questioning" outweigh the "largely speculative concerns that have been raised about the practice." *Id.* at 1507-08.

94. Kelso, *supra* note 6, at 1507-08.

95. Laurie Forbes Neff, Comment, *The Propriety of Jury Questioning: A Remedy for Perceived Harmless Error*, 28 PEPP. L. REV. 437, 437 (2001).

96. Schaefer v. St. Louis & Suburban Ry. Co., 30 S.W. 331, 333 (Mo. 1895) (holding that it was not prejudicial to allow jurors to question witnesses). The court stated, "We do not see why it was not a commendable thing in both the court and the jury endeavoring to ascertain just exactly the situation at the time [of the facts in question], so that they could properly determine the case before them." *Id.*

97. Neff, *supra* note 95, at 437. The court limited the allowable questions to those whose purpose was to elicit the truth. *Id.*

issue of juror questioning deemed its utilization to be within the discretion of the trial court.[98]

Despite the early recognition of juror questioning, the Federal Rules of Evidence remain silent on the issue. Ellyn C. Acker states that the Rules "neither permit nor prohibit juror questioning of witnesses during trial."[99] The issue is currently being debated in many jurisdictions across the United States. Despite the possible constitutional implications of such an interference with the right to a fair trial and due process, the Supreme Court has yet to address the issue of juror questioning.

B. The Effectiveness of Juror Questioning

1. Advantages of Juror Questioning

Courts and commentators have recognized advantages and disadvantages to allowing jurors to question witnesses in open court. The perceived advantages of juror questioning include the following: having a more active, focused, and involved jury that perceives a greater sense of responsibility and participation in the pursuit of justice; helping jurors resolve questions they may have regarding the facts or the law;[100] increasing the public's perception of the credibility of the jury;[101] serving as a check on the power of judges and attorneys;[102] and helping attorneys structure their cases to address and resolve issues troubling the jury.[103]

Social science research supports the proposition that jurors learn more by engagement "rather than passively trying to absorb

98. *Id.* (stating that *United States v. Witt*, 215 F.2d 580, 584 (2d Cir. 1954), was the first federal appellate case to address the issue).

99. Ellyn C. Acker, *Standardized Procedures for Juror Interrogation of Witnesses*, 1990 U. CHI. LEGAL F. 557, 557 (1990). *But see* Sylvester, *supra* note 39, at 216 (noting that while the issue of juror questioning is not explicitly mentioned in the Federal Rules of Evidence, the Rules "provide that the court may interrogate witnesses and control the mode of questioning to most effectively ascertain the truth").

100. Krupp, *supra* note 10, at 12 ("There can be little dispute that a juror, who does not understand certain terms used in a line of questions or who cannot picture the scene, will not follow or recall the line of questioning as well as a juror who does. Thus, advocates of juror questions have pointed to the salutary benefits of jurors being able to seek clarification by questioning the witness before the witness is off the stand.").

101. Kelso, *supra* note 6, at 1506.

102. *Id.*

103. Shtabsky, *supra* note 12, at 1020-21.

information."[104] Proponents of juror questioning note that allowing jurors to question witnesses engages them more in the process, making them more satisfied with their service.[105] Also, allowing jurors to communicate their perceptions of the trial to the attorneys provides the attorneys with valuable insights about the fact finders which may alter their advocacy strategies.[106]

Furthermore, proponents of juror questioning point out that this practice is part of the normal procedure in England.[107] In England, the jurors' questions are submitted in writing to the judge.[108] After conferring with the attorneys, the judge has discretion to ask the questions for the jurors.[109] Since no major problems have resulted from this practice in England, proponents suggest that the practice would also work well if adopted in the United States.[110]

2. Disadvantages of Juror Questioning

In contrast, several courts and commentators have noted the disadvantages associated with juror questioning. Perhaps the practice's greatest potential drawback is the danger of jurors losing their neutrality by becoming advocates for a specific party through their questioning.[111] This loss of neutrality would impair the proper function of the adversarial system of justice. As one commentator noted, "[T]he line between impartial fact finder and partisan interrogator or advocate may be a difficult one to define."[112] A juror's question may unintentionally be prejudicial to a party, affecting the adversarial process.[113] The resulting bias created in the other jurors could "interfere with the constitutional requirements of due process and a fair trial."[114]

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104. Krupp, *supra* note 10, at 12 (discussing the more active role jurors are allowed to play in the Massachusetts courts and noting that juror questioning is "perhaps the most controversial" aspect of that more active role).

105. *Id.*

106. Acker, *supra* note 99, at 561.

107. Sullivan & Amar, *supra* note 6, at 1142.

108. *Id.* at 1143.

109. *Id.*

110. *Id.*

111. United States v. Bush, 47 F.3d 511, 515 (2d Cir. 1995) (stating that the "most troubling concern is that the practice risks turning jurors into advocates, compromising their neutrality"). The court further noted, "It is difficult for jurors to be both active participants in the adversarial process, embroiled in the questioning of witnesses, and detached observers, passing on the credibility of the witnesses and the plausibility of the facts presented." *Id.*

112. Krupp, *supra* note 10, at 12.

113. *See id.*

114. Kelso, *supra* note 6, at 1506.

There are other risks inherent in the practice. There is the risk that giving jurors the opportunity to form and ask questions may lead them to engage in premature deliberation.[115] Jurors also might weigh the answers to questions asked by themselves or by fellow jurors more heavily than evidence presented through the attorneys' examinations.[116] Other potential drawbacks include longer trials, the possibility that jurors will not focus on the evidence presented because they are preoccupied with forming their own questions,[117] and the "nuisance to the judge and courtroom staff."[118] Since jurors are often untrained in the law and unfamiliar with the rules of evidence, there is a grave risk that their questions may be irrelevant, improper, or confusing.[119] Additionally, an attorney's litigation strategy may be undermined by a particular question or series of questions.[120]

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115. *Bush*, 47 F.3d at 515 (warning that "[a]t the very least, jury questioning is a subliminal invitation to launch prematurely into evaluating the evidence"); United States v. Brockman, 183 F.3d 891, 898 (8th Cir. 1999) (noting that "the process of formulating questions may precipitate prematurely the deliberation phase of [the] trial") (quoting United States v. Groene, 998 F.2d 604, 606 (8th Cir. 1993)); DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 515-17 (4th Cir. 1985) (stating that the practice of allowing jurors to question witnesses may lead them to begin the reasoning process prematurely). One commentator, however, suggests that this concern may not be a sufficient objection to the practice because, by empirical proof, jurors commonly reach predeliberation judgments regardless of whether they are permitted to pose questions to witnesses. B. Michael Dann, *From the Bench: Free the Jury*, 1 LITIG., Fall 1996, at 5-6.

116. *Brockman*, 183 F.3d at 899 (citing *Groene*, 998 F.2d at 606); *see also DeBenedetto*, 754 F.2d at 516-17 (finding that the "possibility that the jury will attach more significance to the answers to [other jurors'] questions is great"). The *DeBenedetto* court recognized that "every trial judge has noted the development in most lengthy trials of a cohesiveness in the jury as the trial goes on, coming eventually almost to a spirit of camaraderie, in which the actions and reactions of any individual juror are perceived by the jurors as those of the whole jury." *Id.* at 517.

117. *Brockman*, 183 F.3d at 899 (listing increased duration of a trial and lack of attention as potential disadvantages of allowing jurors to question witnesses). Also, the possibility that a juror, untrained in the law, may want to be "Perry Mason" is disquieting. This person may take advantage of the ability to ask questions to pose many questions and thus try to steer the focus of the trial. As the *DeBenedetto* court noted, human nature lends itself to the possibility that one or two jurors may dominate the jury inquries. *DeBenedetto*, 754 F.2d at 516; *see also, Springfield v. Thompson Sales Co.*, No. 23595, 2001 Mo. App. LEXIS 1285, at *13-14 (Mo. Ct. App. July 24, 2001)(recognizing that jurors may become distracted while forming questions). Juror distraction and preoccupation may be increased in trials that attract media attention, because jurors may seek individual attention by frequently interrupting the trial to ask questions or even inject information about the case obtained from an extraneous source. Krupp, *supra* note 10, at 32.

118. Kelso, *supra* note 6, at 1507.

119. *E.g.*, *DeBenedetto*, 754 F.2d at 516 (raising the possibility that "under the worst case, a juror question may emerge which is so prejudicial as to leave only a declaration of mistrial as an appropriate remedial step, with all the waste that flows from a mistrial"). While holding that the juror's questioning was permissible, the court advised that the risk of a improper or prejudicial question is usually "greater than a trial court should take" absent compelling circumstances. *Id.*

120. *Thompson Sales Co.*, 2001 Mo. App. LEXIS 1285, at *13.

A final drawback to juror questioning is the challenge that lawyers would face in deciding how to manage an improper question. By objecting to a juror's question, a lawyer risks alienating that juror.[121] By deciding not to object, however, a lawyer may waive the ability to raise the issue on appeal.[122] Remedial measures to overcome an improper question, such as a judge's instruction to disregard the question, may not be sufficient, because jurors may already have taken the question into account.[123]

Several commentators argue that these possible drawbacks outweigh the potential advantages of juror questioning and that the practice should therefore be prohibited.[124] Advocates of juror questioning, however, argue that the potential disadvantages can be countered by implementing certain safeguards, such as requiring jurors to submit their questions to the judge in writing.[125]

C. Current Status of Juror Questioning

1. The Propriety of the Practice

Almost every jurisdiction that has addressed the issue of juror questioning has determined that the practice is not prejudicial per se.[126] New Jersey, however, has declined to allow juror questioning until the New Jersey Supreme Court addresses the issue.[127] Only Mississippi[128] and Nebraska[129] prohibit the practice.[130] This Note will

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121. United States v. Bush, 47 F.3d 511, 515 (2d Cir. 1995).

122. *Id.*

123. Remedial measures undertaken by a court after an objection may leave a juror feeling embarrassed or angry. Furthermore, even with remedial measures, "the poison introduced by an improper inquiry from a fellow juror has already been absorbed by the entire jury." *Id.* at 515-16. A similar notion is found in the *DeBenedetto* court's analysis. The court noted that "it is questionable how effective remedial steps are after the jury has heard the question." *DeBenedetto*, 754 F.2d at 516. These remedial measures may lead the juror to feel uncomfortable, and the other jurors may "retain whatever mindset [was] created by the question." *Id.*

124. Shtabsky, *supra* note 12, at 1011 (noting the "resistance to reforming the current jury system").

125. *E.g.*, Dann, *supra* note 115, at 5, 64-66.

126. *E.g.*, United States v. Richardson, 233 F.3d 1285, 1288 (11th Cir. 2000) ("[W]e reject outright [appellant's] argument that permitting juror questioning of witnesses is per se error. Indeed, every circuit to consider the practice has permitted it, holding that the decision to allow juror questioning rests within the discretion of the trial judge."). The legislatures of Arizona and Florida have also enacted statutes specifically mandating the practice. ARIZ. R. CIV. P. 39(b)(10); FLA. STAT. ANN. § 40.50(3) (West Supp. 2002).

127. *Richardson*, 233 F.3d at 1288 (discussing State v. Jumpp, 619 A.2d 602, 609-13 (N.J. Super Ct. App. Div. 1993)).

128. Wharton v. State, 734 So. 2d 985, 990 (Miss. 1998).

129. State v. Zima, 468 N.W.2d 377, 380 (Neb. 1991).

130. Krupp, *supra* note 10, at 13.

next detail the current practices that have been adopted by various jurisdictions.

a. Advocates of Limiting or Prohibiting Juror Questioning

In *Wharton v. Mississippi*, the Supreme Court of Mississippi held that "juror interrogation is no longer to be left to the discretion of the trial court, but rather is a practice that is condemned and outright forbidden by this Court."[131] This decision overruled two prior cases, which had granted trial courts discretion to permit juror questions.[132] The prior cases cautioned against the potential dangers of the practice, but in *Wharton* the court noted that these warnings had not been heeded in several subsequent decisions.[133] The court stated that the "most obvious problem" with the practice was "the unfamiliarity of the jurors with the rules of evidence" and noted that "[o]ur system is an adversary one which depends upon counsel to put before lay fact finders that which should be admitted in accordance with the rules of evidence."[134] The dissenting judge in *Wharton* disagreed and maintained that the dangers inherent in juror questioning could be avoided, for the most part, by granting trial judges discretion and providing them with procedural guidance.[135]

Nebraska also prohibits juror questioning. *Nebraska v. Zima* was the first case in that state to address the issue of juror questioning.[136] The court examined other jurisdictions and noted that there appear to be two groups: One group discourages juror questioning but leaves the issue to the discretion of the trial court; the other group outlines procedures for implementing the practice.[137] Although the procedural guidelines outlined by the second group resolved some of the dangers associated with the practice, the court

131. 734 So. 2d at 990. Although the court concluded that the practice was reversihle error, the court deemed the juror questioning in this case to he harmless. *Id.* The court held, however, that juror questions could only be allowed in the limited situations of clarifying issues presented by the attorneys. *Id.* at 988.

132. *Id.* at 990.

133. *Id.*

134. *Id.* (quoting State v. Hays, 883 P.2d 1093, 1099-1100 (Kan. 1994)). The court noted other dangers inherent in the practice, including the risk of offending a juror by objecting to a question, the loss of juror impartiality, the potential for premature deliberations, and the disruption of courtroom decorum. *Id.* (citing *Hays*, 883 P.2d at 1099).

135. *Id.* at 993 (Mills, J., dissenting) (concluding that allowing juror questioning is useful to clarify issues for the jury).

136. State v. Zima, 468 N.W.2d 377, 379 (Neb. 1991).

137. *Id.*

concluded that at least one fundamental problem remains.[138] The court found that impartiality was threatened by permitting jurors to pose questions and that this problem could not be resolved by implementing the procedures utilized in other jurisdictions.[139] Furthermore, the court noted, "Since due process requires a fair trial before a fair and impartial jury, the judicial process is better served by the time-honored practice of counsel eliciting evidence which is heard, evaluated, and acted upon by jurors who have no investment in obtaining answers to questions they have posed."[140] The court also warned that changing the adversary system would not create a "fairer or more reliable truth-seeking procedure."[141] Therefore, the court prohibited juror questioning of witnesses in Nebraska trial courts.[142]

In Texas, the practice is barred in criminal cases.[143] The Texas Court of Criminal Appeals has ruled that the use of juror questioning is reversible error.[144] In *Morrison v. Texas*, the court noted that the Texas Rules of Evidence do not explicitly mention the practice of juror questioning.[145] The court then looked to Criminal Rule 610(a), which gives trial courts discretion to control the order of interrogation of witnesses and presentation of evidence.[146] However, the Criminal Rules do not provide explicit guidance as to whether jurors are allowed to question witnesses.[147] Thus, a divided court held that the "adversary theory as it has prevailed for the past [two hundred] years maintains that the devotion of the participants, judge, juror and advocate, each to a single function, leads to the fairest and most efficient resolution of the dispute."[148] The court concluded that allowing jurors to deviate from their traditional role as passive fact-

138. *Id.* ("Although the techniques employed by the second group of jurisdictions (1) minimize the likelihood of debacles such as that in this case, (2) may obviate the concern which would otherwise face counsel who fear that raising an objection would alienate the questioning juror, and, (3) to a lesser extent, address as well the question of juror qualification to examine witnesses, they do not deal with the more fundamental question" concerning the effect of juror questioning on juror impartiality.).

139. *Id.*

140. *Id.* at 379-80 (citations omitted).

141. *Id.* at 380. The court stated that the practice may cause jurors to "become advocates and possible antagonists of the witnesses." *Id.*

142. *Id.*

143. Texas rejects juror questioning only in criminal cases; the issue is still open with regard to civil cases. STEVEN GOODE ET AL., TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE CIVIL AND CRIMINAL § 611.1 (2d ed. 1993)

144. Morrison v. State, 845 S.W.2d 882, 883, 889 (Tex. Crim. App. 1992).

145. *Id.* at 885.

146. TEX. CRIM. R. EVID. 610(a).

147. *See id.*

148. *Morrison*, 845 S.W.2d at 885.

finders could undermine this essential aspect of the adversary system.[149] The court also cautioned that active participation could result in jurors assuming an active adversarial, or even inquisitorial, stance.[150] The court felt that this problem would arise even if procedural safeguards were applied.[151] Furthermore, the court noted that the practice may result in other disadvantages, such as encouraging the jury to deliberate before the parties have concluded their cases and before the court has instructed them on the proper application of the law.[152] Because of this potential threat to the adversarial system, the court held that criminal trial courts could not experiment with this practice of juror questioning without legislative authority.[153]

Three years after the *Morrison* decision, the Texas Supreme Court appointed a one-hundred-member task force to study and recommend changes to the Texas jury system.[154] The task force examined the issue of juror questioning and recommended that the practice be prohibited in all cases.[155] The task force later surveyed judges on issues involving the jury.[156] The survey data revealed that a slight majority of judges disagreed with the task force's conclusion and indicated that they would prefer to have discretion to permit jurors to question witnesses.[157] Not all of the judges agreed, however. One judge contended that "[t]he fact is that the rules have been developed over literally thousands of years and are, for the most part, what they are for a reason."[158]

The majority of courts technically allow the practice of juror questioning but discourage its use in practice. In Massachusetts, for example, the "Supreme Judicial Court has cautiously endorsed the practice, explicitly recognizing the perils of permitting jurors to pose questions of their own."[159] In *Commonwealth v. Urena*, the Supreme

149. *Id.* at 885-87.

150. *Id.* at 887.

151. Potential procedural safeguards are discussed in detail *infra*, Part IV.

152. *Morrison*, 845 S.W.2d at 888.

153. *Id.*

154. Singh, *supra* note 11, at 950.

155. *Id.* at 951.

156. *Id.* The task force mailed questionnaires to 202 Texas district judges, and 115 responses were received and studied. *Id.* at 952. It is important to note that the judges surveyed were civil court district judges.

157. *Id.* The results showed that fifty-nine judges wanted discretion while fifty-six either did not or were undecided on the issue. *Id.* at 951.

158. *Id.* at 952. Another judge held the opposite view, stating that "jurors are becoming increasingly disenchanted with the jury process" and that changes therefore might be necessary. *Id.* at 952-53.

159. Krupp, *supra* note 10, at 12.

Judicial Court of Massachusetts stated that "the practice of allowing jurors to question witnesses has the potential for introducing prejudice, delay, and error into the trial, and should be utilized infrequently and with great caution."[160] The Supreme Judicial Court of Massachusetts granted trial courts discretion over whether to employ the practice in any given case, but this discretion is limited.[161] The court outlined detailed procedures that trial courts must follow if they decide to permit juror questioning.[162]

b. Advocates of Juror Questioning

While the majority of courts discourage juror questioning because of its potentially harmful consequences,[163] some courts view the practice favorably.[164] For example, the Supreme Court of Kentucky has indicated its approval in several cases. In *Slaughter v. Kentucky*, the court stated that juror questioning is "proper" as long as the questions are both pertinent and competent.[165] In *Louisville Bridge & Terminal Co. v. Brown*, the Supreme Court of Kentucky further stated that jurors may be aided in discovering and understanding the facts and evidence presented in trials if they are permitted to ask questions of witnesses.[166] Most significantly, the court stated in *Stamp v. Commonwealth* that the practice should be encouraged in the interest of justice and fair play, because, as the court found, it is often necessary for the jury to ask questions to obtain a fair understanding of the issues.[167]

Some commentators have also advocated juror questioning. As one commentator notes, "[The] practice [of juror questioning] seems to

160. 632 N.E.2d 1200, 1206 (Mass. 1994).

161. Krupp, *supra* note 10, at 30.

162. *Id.*

163. *E.g.*, United States v. Bush, 47 F.3d 511 (2d Cir. 1995).

164. *E.g.*, Slaughter v. Kentucky, 744 S.W.2d 407, 413 (Ky. 1987). The courts in several earlier cases also viewed the practice approvingly. *See, e.g.*, Louisville Bridge & Terminal Co. v. Brown, 277 S.W. 320, 322 (Ky. 1925); Stamp v. Commonwealth, 253 S.W. 242, 246 (Ky. 1923). While this Note focuses on the practice of juror questioning in criminal cases, it may be useful to note that at least one court of appeals for civil cases in Texas has approved of the practice. United States v. Callahan, 588 F.2d 1078, 1085 (5th Cir. 1979) ("If a juror is unclear as to a point in the proof, it makes good common sense to allow a question to be asked about it."); *Morrison*, 845 S.W.2d at 888.

165. *Slaughter*, 744 S.W.2d at 413.

166. *Louisville Bridge & Terminal Co.*, 277 S.W. at 320 (explaining that the practice of jurors asking questions of witnesses will likely aid them in discovering and understanding the actual facts and evidence).

167. *Stamp*, 253 S.W. at 242 (finding that the practice should be encouraged in the interest of justice and fair play, because it is often necessary for the jury to ask questions to gain a fair understanding of the issues).

be an eminently salutary one that, if judiciously used, would enable jurors to clear up the trivial confusions that sometimes impede the search for truth."[168] One justification for the practice is that it enhances the jurors' understanding of the facts and issues in a case.[169] B. Michael Dann, Chair of the Arizona Supreme Court Committee on More Effective Use of Juries, believes that "the traditional passive jury that absorbs evidence and law should be changed to an active jury that participates as a near equal with the judge and counsel."[170] He advocates allowing the jury to ask questions because he believes that letting jurors voice their confusion will help to ensure a fair verdict.[171] For Dann, the image of the "ideal juror" as a passive recipient of information is based on "assumptions or wishful thinking about human behavior and our adversarial system, not on empirical validation."[172] In fact, he suggests that empirical studies disprove this supposedly ideal model.[173] Dann asserts that a more active jury is less likely to encounter confusion and that feedback from jurors will assist the judge and attorneys in identifying difficult areas during the course of the trial.[174] He does, however, advocate the adoption of appropriate safeguards.[175]

District Court Judge Scott O. Wright advocates juror questioning and provides anecdotal evidence of an incident that occurred in his courtroom to support his position.[176] Judge Wright permitted the jury to pose questions to witnesses and the court during prosecution for a narcotics offense.[177] The defendant was accused of selling narcotics to a third party.[178] The defendant's pants and a videotape of the crime were both included as evidence.[179] During the trial, a juror asked to review the videotape for a second time.[180]

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168. GOODE, supra note 148, § 611.1 n.28 (noting that an ABA–Brookings Institution report recommends the use of juror questioning).

169. *See Slaughter*, 744 S.W.2d at 413.

170. Dann, *supra* note 115, at 5.

171. *Id.*

172. *Id.* at 5-6.

173. *Id.* at 6. He suggests that the studies indicate that passive juries result in "juror confusion, impairment of opportunities for learning, distraction, and boredom." *Id.*

174. *Id.* He also states that a more active jury will be more satisfied with their service than a passive jury. *Id.*

175. *Id.* at 64. The safeguards he mentions include insisting upon written questions presented to the judge and allowing attorneys the opportunity to object to the questions outside the presence of the jury. *Id.*

176. Penrod & Heuer, *supra* note 6, at 260-61.

177. *Id.* at 260.

178. *Id.*

179. *Id.*

180. *Id.*

During deliberations, the jury asked to review the tape a third time.[181] The judge stated that one of the jurors "had noticed a tear in the dealer's pants in the videotape and discovered a matching tear in the defendant's pants. Within minutes the jury returned a verdict of guilty."[182] The jury had noticed something that the attorneys, police, and FBI agents had missed.[183] They had discovered this crucial piece of evidence by playing an active role in the trial process.[184] Judge Wright's anecdote supports the view that jurors should play a more active role in the judicial process. As one scholar notes, however, such anecdotal examples have been "more the exception than the rule. In the majority of trials, juror questions do not alter the outcome so dramatically."[185]

Whether they view the practice favorably or unfavorably, most courts generally hold that the decision of whether to allow juror questioning is best left to the discretion of the trial judge. Many courts believe that the trial judge is in the best position to balance the dangers of juror questioning against its benefits in specific cases.[186]

2. Questioning Procedures and Their Impact on a Finding of Prejudice

There are not yet any uniformly agreed-upon guidelines for implementing the practice of juror questioning. Arizona and Florida are the only states that have enacted formal rules concerning the practice. In 1995, the Arizona legislature adopted an amendment to the state's trial court procedure statute authorizing the practice of juror questioning and providing guidelines for its implementation.[187] The statute provides as follows:

> Jurors shall be permitted to submit to the court written questions directed to witnesses or to the court. Opportunity shall be given to counsel to object to such questions out of the presence of the jury. Notwithstanding the foregoing, for good cause the court may prohibit or limit the submission of questions to witnesses.[188]

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181. *Id.* at 260-61.

182. *Id.* at 261.

183. *Id.*

184. *Id.*

185. Acker, *supra* note 99, at 561.

186. *E.g., United States v. Thomas*, No. 99-3430, 2000 U.S. App. LEXIS 29372, at *10 (6th Cir. Nov. 9, 2000), *cert. denied*, 532 U.S. 935 (2001) (stating that "the practice of allowing questions by jurors should be discouraged, but nevertheless is permissible and best left to the discretion of the trial judge, who should balance the dangers against the benefits in any given case").

187. ARIZ. R. CIV. P. 39(b)(10).

188. *Id.*

A comment to the amendment notes that jurors should be instructed as to the procedures for submitting questions[189] and should be given instructions regarding unasked questions.[190] The comment further provides that if a question is ruled admissible, the trial court has discretion as to whether the court or counsel will pose the questions to the witness.[191]

Florida's statute has similar procedural features.[192] Like the Arizona statute, it provides that jurors must submit written questions to the court. The court and attorneys then must review the questions outside of the presence of the jury. The court may specify the means to answer the jurors' questions.[193] The jury must be informed that they "should not attach any significance to the failure of having their question asked," because trial rules often prohibit certain types of questions.[194] Unlike Arizona's statute, the Florida statute grants the trial court the option of limiting the submission of questions.[195]

While still allowing the trial court significant discretion, the Arizona and Florida statutes are more structured and comprehensive than the limited guidance provided by many federal appellate courts. The Eighth Circuit in *United States v. George*, while not explicitly providing guidelines for use in future cases, upheld the juror-questioning procedures used by the trial court.[196] The procedures employed by the lower court were very similar to those prescribed by the Arizona statute.[197] In the trial court, juror questions were submitted in writing and were discussed by the attorneys outside of the presence of the jury.[198] The judge then ruled upon each question, rejecting "any question found by the court to be objectionable under

189. ARIZ. R. CIV. P. 39(b)(10) cmt. (1995) (directing witnesses to submit their questions, written and unsigned, to the bailiff during recess or, if the witness is about to leave the witness stand, to signal to the bailiff and then submit the question).

190. The comment provides that if a juror's question is rejected because it calls for inadmissible evidence, the court should instruct the jury that "trial rules do not permit some questions to be asked and that the jurors should not attach any significance to the failure of having their question asked." *Id.* It is unclear whether this instruction is to be given after every rejected question or only once, before any questions are asked.

191. The trial court also would prescribe the means of answering the individual questions. The means include, but are not limited to, stipulation or additional testimony. *Id.*

192. FLA. STAT. ANN. § 40.50(3)-(4) (West Supp. 2002).

193. *Id.*

194. § 40.50(4).

195. § 40.50(3) ("The court may, as appropriate, limit the submission of questions to witnesses.")

196. 986 F.2d 1176, 1179 (8th Cir. 1993) (stating that "prejudice must be determined according to the facts of each case").

197. *See* ARIZ. R. CIV. P. 39(b)(10) cmt.

198. *George*, 986 F.2d at 1178.

the rules of evidence."[199] The jury had previously been instructed about the questioning procedure and was told that it should not "draw any factual conclusions from what it observed because it was the judge's job to determine which questions were proper."[200]

In contrast to the Eighth Circuit, in *DeBenedetto v. Goodyear Tire & Rubber Co.*, the Fourth Circuit determined that both the propriety of the practice and the procedures used should be left to the discretion of the trial judge.[201] The trial judge determined that there should be no limit to the number of questions the jury could ask.[202] The judge also allowed the jurors to direct their questions orally to the bench upon completion of both attorneys' examinations, and "if the trial judge deemed the question proper, he instructed the witness to answer it."[203] After the question was asked and answered, the attorneys were given the opportunity to reexamine the witness.[204] The court noted that the only formal guidance for the practice was found in Rule 611(a) of the Federal Rules of Evidence, which instructs courts to "exercise reasonable control over the mode and order of interrogating witnesses."[205]

In *City of Springfield v. Thompson Sales Co.*, a division of the Missouri Court of Appeals held that juror-questioning procedures must remain uniform throughout the trial.[206] While recognizing that the Missouri Supreme Court Rules established that the practice is not prejudicial per se, the court found that the particular procedures employed by the trial court that case were prejudicial.[207] The court specifically held that it was an abuse of discretion for the trial court to invite, receive, and allow a large number of questions.[208] The trial

199. *Id.*

200. *Id.*

201. Like the *George* court, the Fourth Circuit did not prescribe a "bright-line rule" for trial courts to follow. *See* DeBenedetto v. Goodyear Tire & Ruhber Co., 754 F.2d 512, 516, 518 (4th Cir. 1985).

202. The jury asked a total of ninety-five questions over the course of the three-week trial; the foreman asked over half of the questions. *See id.* at 517.

203. *Id.* at 515 n.1.

204. *Id.*

205. *Id.* at 515 (quoting FED. R. EVID. 611(a)).

206. No. 23595, 2001 Mo. App. LEXIS 1285, at *21 (Mo. Ct. App. July 24, 2001) (holding that the "absence of a clear, well-defined jury questioning procedure and the failure to include the lawyers in the development of that process was an abuse of trial court discretion").

207. *Id.* at *16.

208. The trial judge told the jury that he would allow them to question witnesses and explained that he was a "fan of juror questioning." *Id.* at *2. The Missouri Court of Appeals found that this "actively and affirmatively" encouraged juror questions, although dicta in previous cases had warned against the practice. Although the trial judge emphasized that the jury was not "encouraged to ask large numbers of questions because that is the primary responsibility of counsel," the jury was permitted to ask the witnesses a total of 127 questions

judge had allowed the jurors to submit written questions to the bailiff, which the judge and attorneys then reviewed to determine their admissibility.[209] As a remedial measure, the court instructed the jury that no adverse inference should be drawn if a question was not asked or if the question was asked by the attorney, rather than the judge or jury[210] The main reason the reviewing court found prejudice, however, was that a uniform procedure was not employed throughout the trial.[211] Not all of the witnesses were available for jury questioning because their testimony was provided via videotape.[212] Another problem was that the attorneys received no guidance as to the manner in which the questioning should take place.[213] The procedure therefore "evolved and changed by 'trial and error.' "[214] Over the course of the trial, the attorneys progressed from repeating the juror's question verbatim to rephrasing and adding follow-up questions.[215] Both attorneys in this case entered multiple objections to the use of juror questioning; all of their objections were overruled.[216]

Perhaps the most detailed procedures outlined by an appellate court come from the Supreme Judicial Court of Massachusetts.[217] The court, in *Commonwealth v. Britto*, encouraged trial judges to consult with counsel concerning whether to allow juror questioning.[218] The

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(excluding those questions found inadmissible pursuant to the rules of evidence). *Id.* at *5-6. One juror asked thirty-two questions of a single witness. *Id.* at *5-7.

209. The conferences to determine admissibility of the questions were held outside the presence of the jury. *Id.* at *5-6.

210. *Id* at *5.

211. *Id.* at *6-7.

212. *Id.* at *3. This "disparate treatment of witnesses" resulted in potential prejudice. because at least one of the witnesses was "shielded from such interrogation." *Id.* at *23.

213. *See id.* at *16 (stating that "[a]dequate warning and inclusion of the lawyers in developing a jury questioning procedure would have promoted a more consistent juror questioning process and an opportunity for equal understanding of it by all litigants").

214. *Id.*

215. *Id.* at *16-18.

216. *See id.* at *2-4.

217. *See* Commonwealth v. Urena, 632 N.E.2d 1200, 1206 (Mass. 1994); Commonwealth v. Britto, 744 N.E.2d 1089, 1105-06 (Mass. 2001). The guidelines offered by the court apply to both criminal and civil cases in Massachusetts. Krupp, *supra* note 10, at 30.

218. Krupp, *supra* note 10, at 31. The court gave the following guidance to trial courts:

> 1. Although a trial judge may permit juror questioning over objections of the parties, the Court "continue[s] . . . to encourage judges" to consult with counsel about whether to permit jurors to pose questions.
>
> 2. The judge should instruct the jurors that tbey will be allowed to pose questions, but that they must remain neutral, should not direct their questions to belp or respond to any party, and must not assume the role of investigator or advocate. . . .
>
> 3. [T]he jurors' questions need not be limited to "important matters," but may also "seek clarification of a witness's testimony."

Supreme Judicial Court also provided that upon a trial judge's determination that juror questioning will be allowed, the judge should instruct that they may submit, in writing, neutral questions to the judge to be asked of witnesses, but the court cautioned that jurors are not to assume the role of advocate or investigator.[219] Additionally, the judge should inform the jury that questions submitted may not be posed to witnesses or may be altered in order to abide by the rules of evidence.[220] The court dictated that the trial judge consult with counsel regarding possible objections outside of the presence of the jury after a juror submits a question.[221] Finally, the court recommended that counsel be allowed a limited opportunity to cross-examine witnesses after a juror asks a question.[222] Despite the fact that these instructions were given in definite terms, the court indicated that a failure to follow any of the recommended procedures would not result in reversal absent a showing of prejudice.[223]

There are also conflicting views on the necessity and timing of attorney objections to juror questioning. Courts are generally in agreement "that an objection directed to the mere occurrence of juror questioning must be raised at the time of trial in order to be asserted on appeal."[224] However, courts are divided as to whether objections are required to particular questions in order to preserve the issue for

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4. The judge should instruct the jurors that, although they are not expected to know the rules of evidence, their questions will have to comply with those rules and therefore the judge may have to alter or refuse particular questions.

5. The judge should instruct the jurors that, if the judge alters or does not pose a particular question, the jurors should not be offended or hold that against either party.

6. The judge should instruct the jury that they should not give the answers to their own questions a disproportionate weight, and that they should not discuss the questions among themselves.

7. The judge should repeat these instructions during the final charge.

8. All questions should be submitted in writing to the judge, with the juror's identification number on each question.

9. After questions are submitted, counsel should have an opportunity, out of the hearing of the jury, to examine and object to the questions, and for the judge to rule on those objections . . . .

10. After the juror questions are posed, counsel should be given the opportunity to reexamine the witness, usually limited to the subject matter raised by the juror questions and the witness's answers.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Britto*, 744 N.E.2d at 1106.

224. Jonathan M. Purver, Annotation, *Propriety of Jurors Asking Questions in Open Court During Course of Trial*, 31 A.L.R.3d 872 (1970).

appeal.[225] From the examples discussed above, it is clear that trial courts are left with a great deal of discretion to determine both when juror questioning will be allowed and what procedures to follow if it is allowed. This discretion leads to inconsistency, both among courts in different jurisdictions and, in some cases, among courts within the same jurisdiction.

IV. SUGGESTED GUIDELINES TO MINIMIZE THE NEGATIVE EFFECTS OF JUROR QUESTIONING ON THE ADVERSARIAL SYSTEM

Guidelines for juror questioning should be established in order to minimize the disadvantages inherent in the practice. These guidelines can be developed either legislatively or judicially. As discussed previously, any reforms to the traditional jury system should be considered in light of preserving the virtues of the adversarial process. These virtues include the increased legitimacy of decisions, the prevention of abuse or attorney misconduct, the encouragement of superior investigation and evidence presentation, and the expression of popular sovereignty and democracy. Providing protective guidelines for juror questioning helps preserve these goals.[226]

In contrast, some critics conclude that this practice violates the constitutional right to a fair trial and due process.[227] They argue that the adversarial system is premised upon a fair and impartial jury.[228] Allowing jurors to ask questions and possibly advocate for a particular party would directly violate this premise. Juror questioning should therefore either be prohibited entirely or permitted only with procedural guidelines constructed to minimize the impact of the practice on the jury. These guidelines could be imposed by legislatures or by the judiciary.

For example, allowing clarifying questions does not conflict with the ideals of the adversarial system. Questions indicating that jurors did not hear a statement or could not understand its meaning seem necessary to the successful operation of the adversarial process. While a passive jury is desirable, the adversarial system assumes that

225. *Id.*

226. *See supra* Part II.C.

227. State v. Zima, 468 N.W.2d 377, 379-80 (Neb. 1991) (stating that allowing jurors to actively participate in trials by questioning witnesses may upset "[d]ue process [which] requires a fair trial before a fair and impartial jury").

228. Sylvester, *supra* note 39, at 213 (stating that neutrality is required for the adversarial system).

jurors will base their decisions on the evidence presented.[229] A juror who does not hear or understand certain aspects of the evidence presented by the parties will not be able to properly fulfill his or her obligation.[230] Therefore, limited clarifying questions should be allowed and encouraged.

Moreover, jurors should be able to request clarifications during the course of the testimony.[231] While immediate questioning may interrupt the pace of the party's evidence presentation and cause slight delays, witnesses and attorneys would more easily be able to address problems as they present themselves. If this process were not permitted, not only would jurors be required to remember their questions, but witnesses and attorneys would also be required to recollect the context of the questioned statement.[232] Allowing jurors to ask questions during the course of testimony would facilitate the ability of the court reporter to locate and read back portions of statements that were not heard by a juror. Permitting immediate questioning would also enable the jury to hear the evidence in the order desired and presented by the parties.

More stringent safeguards should be required for juror questions that go beyond a mere request for clarification. Substantive questions could lead to biased juries or waste of time.[233] Guidelines should therefore be developed to assist courts in implementing this practice. Moreover, jurors should be instructed on proper procedures.[234] These instructions should include a statement that the jurors should not give any additional weight to questions asked and should not draw an adverse conclusion if a question is not asked.[235] The jury should also be informed that questions are often not asked because evidentiary rules preclude them.[236]

Additionally, jurors should be required to submit any questions in writing to the judge.[237] The judge should then allow the attorneys to

229. *See* Acker, *supra* note 99, at 560 ("[W]e try cases on the assumption that intelligent jurors know what is happening[,] . . . [and] [s]ilent jurors remain confused about case issues.") (quoting Chief Judge John F. Grady of the U.S. District Court for the Northern District of Illinois)).

230. *See id.*

231. Krupp, *supra* note 10, at 12 ("[A]dvocates of juror questions have pointed to the salutary benefits of jurors being able to seek clarification by questioning the witness before the witness is off the stand.").

232. *See id.*

233. Sylvester, *supra* note 39, at 217-21.

234. *See* ARIZ. R. CIV. P. 39(b)(10) cmt. (1995).

235. *Id.*

236. *Id.*

237. ARIZ. R. CIV. P. 39(b)(10).

make objections out of the presence of the jury.[238] This method would help alleviate the problem of attorneys alienating the jury by raising objections to their questions.[239] It would also allow the court or attorneys to alter any questions to abide by the rules of evidence and prevent jurors from hearing inadmissible questions.[240]

The guidelines should indicate which party will pose the jurors' questions to the witnesses. The most neutral source would be the judge. The judge should ask the question verbatim whenever possible, rephrasing only when necessary to satisfy the rules of evidence. Allowing attorneys to ask the questions could potentially indicate to the jury that the question benefits a particular party. As several courts currently allow, after the question has been asked and answered, both parties should be allowed to reexamine the witness on any issue implicated by the jurors' questions.[241]

V. CONCLUSION

The propriety of allowing jurors to question witnesses during trial is a salient issue in many jurisdictions. Our adversarial system of justice is premised on a passive and impartial trier of fact making decisions based on evidence presented by opposing parties. Juror questioning may have negative implications for the adversarial system and result in deprivation of the constitutional right to a fair trial before an impartial jury. Due to this potential ramification, some critics argue that the practice should be prohibited. However, problems can be limited or avoided entirely by implementing proper procedural safeguards. Regardless of these safeguards, courts should always use caution in deciding whether to allow the practice in a given case and in establishing the specific procedures to be followed.

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238. *See* United States v. Bush, 47 F.3d 511, 515 (2d Cir. 1995); *see also supra* notes 100-03 and accompanying text.

239. *Id.*

240. *See id.*; DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 516 (4th Cir. 1985).

241. *E.g.*, United States v. Richardson, 233 F.3d 1285, 1288 (11th Cir. 2000).

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