

## CONTROVERSY IN THE COURTROOM: IMPLICATIONS OF ALLOWING JURORS TO QUESTION WITNESSES

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## I. INTRODUCTION

Many people find themselves following a strict daily routine that can be severely disrupted if they miss something as minor as their morning coffee. For such people, jury duty presents a major challenge. The court system disrupts many Americans' routines across the nation on a daily basis, forcing them to miss work, find alternate daycare, and make alternate plans to transport children to after-school activities. The trial itself presents unusual tasks that few people undertake on a daily basis, such as remembering large amounts of testimony from experts in an unfamiliar field. To illustrate, consider the case of Linda Johnson. After dropping off her children at school, Linda would normally head straight to the office for an eight-hour day of work, but instead she must go to the courthouse because she has been summoned for jury duty. After the voir dire process, she is selected to sit on the jury, and she happily complies to fulfill her civic duty. She listens carefully to the opening statements and the witnesses' testimonies, but she begins to feel uncomfortable as the expert witness discusses an unfamiliar topic. Linda becomes stressed as the witness is being cross-examined because she is having trouble understanding what the expert is saying. A simple definition is all she needs, but she has no opportunity to ask. Linda's experience is an example of stress that jurors can feel because they are not allowed to ask questions during trial. This article discusses the controversy surrounding the practice of allowing jurors to ask such questions.

Jury duty is an experience that a majority of Americans face at least once in their lifetime.<sup>1</sup> Most do not find jury service to be a burden,<sup>2</sup> despite the popular notion of "getting out of jury duty." In fact, eighty-four percent of adults polled believe jury service is a civic duty to be fulfilled despite its possible inconvenience.<sup>3</sup> Furthermore, adults called for jury duty have a more positive attitude towards the experience than those who have never been called.<sup>4</sup> Despite these positive statistics, jurors often experience a variety of stressful events as a result of jury duty.<sup>5</sup>

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1. AM. BAR ASS'N, JURY SERVICE: IS FULFILLING YOUR CIVIC DUTY A TRIAL? 6 (2004), <http://www.abanews.org/releases/juryreport.pdf>.

2. *Id.* at 5.

3. *Id.*

4. *Id.* at 6.

5. For a review, see Stanley M. Kaplan & Carolyn Winget, *The Occupational Hazards of Jury Duty*, 20 BULL. AM. ACAD. PSYCHIATRY & L. 325, 327-28 (1992).

In order to encourage jurors to fulfill the constitutional role set out by the Sixth Amendment, courts should provide the jurors with the best experience possible, including finding ways to limit juror stress.<sup>6</sup> Thirty states<sup>7</sup> have begun testing and implementing jury innovations to improve the jurors' experiences and aid them in being better fact-finders.<sup>8</sup> This article will focus on the controversial<sup>9</sup> jury innovation of allowing jurors to ask questions to witnesses during trial. Such a practice could have many benefits, including aiding in jurors' comprehension of evidence and promoting overall satisfaction with the process.<sup>10</sup> On the other hand, the practice could negatively impact the adversarial process in a variety of ways.<sup>11</sup>

In Part II, this paper will discuss the psychological "Story Model" of juror decision-making. This model theorizes that jurors actively participate in trial by constructing stories that help them understand complex evidence.<sup>12</sup> This psychological research supports the need for jury innovations, especially the practice of allowing jurors to ask questions of witnesses. Next, Part III will provide an overview of juror questioning and examine various reasons why judges hesitate to allow this innovation. Then, Part IV will examine the benefits and criticisms that have been supported through empirical studies. Part V follows with a discussion of apparent misconceptions among the supporters and critics, and Part VI will present court decisions that support and discourage the practice. Part VII provides the recommendation that courts should uniformly adopt the practice of allowing jurors to ask questions. This article concludes that, because there are few adverse effects in

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(discussing the disconcerting physical and physiological symptoms experienced by jurors); Monica K. Miller & Brian H. Bornstein, *Juror Stress: Causes and Interventions*, 30 T. MARSHALL L. REV. 237 (2004) (outlining various sources of juror stress).

6. See generally Miller & Bornstein, *supra* note 5.

7. Gregory E. Mize & Christopher J. Connelly, *Jury Trial Innovations: Charting a Rising Tide*, 41 CT. REV. 4, 5 (2004).

8. *Id.*

9. B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1253 (1993) (listing ten techniques and procedures to enhance juror participation and comprehension); B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, 41 CT. REV. 12 (2004); Valerie P. Hans, *U.S. Jury Reform: The Active Jury and the Adversarial Ideal*, 21 ST. LOUIS U. PUB. L. REV. 85, 90 (2002) (noting increasing support for a participatory approach to decision-making).

10. See *infra* Part IV.A.

11. See *infra* Part IV.B.

12. See *infra* note 18 and accompanying text.

allowing juror questioning, the practice should be implemented. This practice will increase jurors' satisfaction with the jury experience and help jurors become better decision-makers.

## II. THE ACTIVE JURY CREATES A STORY

In its idealistic form, the adversarial system requires the decision-maker to remain passive and neutral by waiting until after the closing arguments to make any decisions.<sup>13</sup> This system differs from the inquisitorial system that is used in many European countries.<sup>14</sup> The inquisitorial system is an alternative to the adversarial system that allows the decision-maker to play an active role in uncovering evidence, including the questioning of witnesses.<sup>15</sup>

While jurors in the adversarial system cannot actively participate, legal rulings have concluded that judges are allowed to play an active role and question witnesses, both when the judge is the decision-maker and when a jury is the decision-maker.<sup>16</sup> This apparent inequity poses the question: If the judge is allowed to play an active role and ask questions of witnesses, then should jurors be allowed to do the same when they are the decision-makers in the case? The answer to this question differs depending on who is being asked, and has created quite a controversy.<sup>17</sup>

For the purpose of this section, the issue will be viewed from a psychological standpoint. A well-known psychological theory of decision-making, called the "Story Model," explains that jurors rarely wait until the end of the trial to come to conclusions.<sup>18</sup> Instead, they are cognitively active throughout the trial. Such research suggests that jurors should be allowed to ask questions in order to facilitate their natural decision-making tendencies.

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13. Hans, *supra* note 9, at 87.

14. *Id.*

15. *Id.*

16. *Id.* at 88.

17. See Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Jurors' Unanswered Questions*, 41 CT. REV. 20 (2004).

18. See generally Nancy Pennington & Reid Hastie, *Juror Decision Making Models: The Generalization Gap*, 89 PSYCHOL. BULL. 246 (1981) [hereinafter Pennington & Hastie, *Juror Decision Making Models*] (reviewing decision-making models that have been applied to jurors); Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242 (1986) [hereinafter Pennington & Hastie, *Evidence Evaluation*] (discussing the role of representation of evidence in juror's decision-making).

Psychologists Nancy Pennington and Reid Hastie propose that jurors organize trial evidence into a narrative story based on intentions and causation of events.<sup>19</sup> The Story Model suggests that jurors construct mental accounts of the trial to comprehend evidence. This story allows the juror to better understand the evidence and reach a verdict decision.<sup>20</sup> Through empirical studies, the authors discovered support for their model<sup>21</sup> and its three components: construction of a story, establishing verdict categories, and classifying the story into the best fit verdict category.<sup>22</sup>

In one study, participants were randomly selected from a Massachusetts jury pool to view a videotaped trial, and each was instructed to reach a decision as a juror.<sup>23</sup> Participants were then interviewed to discuss their decision-making processes and their recall of verdict definitions.<sup>24</sup> Interviews uncovered that participants did not organize evidence as a list, but instead organized evidence by arranging events into causes and effects, which facilitated the creation of a sensible story that best explains the evidence presented. Jurors also surmised missing pieces, while disregarding information that did not fit their stories.<sup>25</sup> Next, after hearing all of the evidence, participants constructed stories about the relevant verdict categories (e.g., first-degree murder, manslaughter).<sup>26</sup> Simply put, jurors create a mental image of what each verdict category means to them. Finally, jurors decide which verdict category is most suitable for the story they have created. This finding implies that jurors create and shape stories as a means to answer the legal questions bestowed upon them.

Pennington and Hastie performed another series of experiments that further supported the Story Model.<sup>27</sup> In these experiments, participants read shortened trial transcripts and were asked the direction and probability of their judgment about the

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19. Pennington & Hastie, *Juror Decision Making Models*, *supra* note 18, at 252-53; Pennington & Hastie, *Evidence Evaluation*, *supra* note 18, at 243.

20. Pennington & Hastie, *Evidence Evaluation*, *supra* note 18, at 243.

21. *Id.* at 242-43; Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189 (1992) [hereinafter Pennington & Hastie, *Explaining the Evidence*].

22. Pennington & Hastie, *Evidence Evaluation*, *supra* note 18, at 242.

23. *Id.* at 246.

24. *Id.*

25. *Id.* at 252.

26. *Id.* at 252-53.

27. Pennington & Hastie, *Explaining the Evidence*, *supra* note 21, at 189.

case.<sup>28</sup> Different versions of case facts were manipulated<sup>29</sup> that would affect the ease of constructing a story.<sup>30</sup> The research found that participants' evaluations of evidence strength, witness credibility, and confidence judgments are all affected by the ease in which they can construct stories.<sup>31</sup> This means that jurors make stronger,<sup>32</sup> more confident decisions when the evidence is presented in the order of a story as opposed to the order that evidence is presented at trial.<sup>33</sup> The authors conclude that a "narrative *story sequence* is the most effective 'order of proof' at trial."<sup>34</sup> While trial judges instruct jurors to refrain from making a judgment until all evidence has been presented, these studies suggest that jurors' natural decision-making processes do not allow them to do so.<sup>35</sup> This line of research also suggests that jurors often have "holes" in their stories, which could be filled by asking questions of witnesses. Answers could help jurors create more accurate stories, leading to better judgments.

In sum, the Story Model provides theoretical explanations of how jurors actively process information throughout trial.<sup>36</sup> The Honorable B. Michael Dann, the judge responsible for the leading jury innovations in Arizona, acknowledges that jurors actively process information based on a similar Behavioral-Educational Model,<sup>37</sup> even though they are instructed to make decisions in

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28. *Id.* at 193-94 (Experiment 1), 197-98 (Experiment 2), 201 (Experiment 3).

29. Ratings for the likelihood of the defendant's guilt varied based on the various experimental conditions.

30. Pennington & Hastie, *Explaining the Evidence*, *supra* note 21, at 193-94 (Experiment 1 manipulated order of presenting evidence and credibility of a witness), 197-98 (Experiment 2 manipulated the completeness of the story to infer either guilt or innocence and the aggregation level for making judgments, in which participants were to assess evidence strength by making either a single "global" judgment after reading all the evidence, "item-by-item" judgments after each piece of evidence was presented on all the evidence given to that point, or "local" judgments on blocks of evidence considered separately), 201 (Experiment 3 manipulated aggregation level on a new case, using only "global" and "item-by-item" judgments).

31. *Id.* at 194-96, 202.

32. The jurors' decisions are stronger in the preponderance of the evidence direction. *Id.* at 202.

33. *Id.* at 194-95.

34. *Id.* at 203.

35. *Id.*

36. See generally Pennington & Hastie, *Juror Decision Making Models*, *supra* note 18; Pennington & Hastie, *Evidence Evaluation*, *supra* note 18; Pennington & Hastie, *Explaining the Evidence*, *supra* note 21, at 189.

37. The Behavioral-Educational Model is based on systematic research

accordance with the adversarial Legal Model.<sup>38</sup> Judge Dann advocates the use of educational techniques<sup>39</sup> to assist jurors in making fair and accurate decisions.<sup>40</sup> Allowing jurors to ask questions of witnesses is just one of the many jury innovations that Judge Dann recommends and has implemented in his Arizona courtroom.<sup>41</sup>

Other states are recognizing that jurors are actively participating, and that allowing them to ask questions is important.<sup>42</sup> Some court decisions<sup>43</sup> and jury innovation committees<sup>44</sup> are recommending the practice due to the realized benefits. Thus, this line of psychological research has found its way into courtrooms across the country.

### III. JUROR QUESTIONING: WHY ALL THE CONTROVERSY?

The surge of jury innovation research has convinced many federal and state courts,<sup>45</sup> as well as the American Bar Association (ABA), to allow jurors to ask questions of witnesses.<sup>46</sup> The ABA has developed standards for juror questioning which include cautionary instructions and procedures<sup>47</sup> and added commentary

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findings, including the "Story Model," as well as other psychological and educational studies. For an overview of the research contributing to this model, see Dann, *supra* note 9, at 1241-46.

38. The Legal Model is the longstanding model used by the courts, which is based on the ideal expectations of the adversarial system and assumes that jurors are passive. For a description of the Legal Model, see *id.* at 1239-40. For a comparative summary of the Legal Model and the Behavioral-Educational Model, see *id.* at 1246.

39. The main technique is interaction (to "evoke questions, focus attention, motivate students, assist recall, and allow students to benefit from the exposure to others' views"), specifically student-initiated interaction (to provide and elicit information, as well as provide teachers with direction). *Id.* at 1245. The other technique used by educators is the "democratic classroom," which balances control and students' "speaking rights." *Id.* at 1245-46. For a deeper look into these educational techniques, see *id.* at 1244-46.

40. *Id.* at 1230, 1246.

41. *Id.* at 1253-55.

42. See *infra* Part VI.A.

43. See *infra* notes 227-32.

44. See *infra* notes 241-43.

45. See *infra* Part VI.A. For a list of states' rules on juror questioning, see AMERICAN JUDICATURE SOCIETY, JURISDICTION-BY-JURISDICTION RULES FOR JUROR QUESTIONS TO WITNESSES (2004), [http://www.ajs.org/jc/juries/jc\\_improvements\\_questions\\_laws.asp](http://www.ajs.org/jc/juries/jc_improvements_questions_laws.asp).

46. AM. BAR ASS'N, CIVIL TRIAL PRACTICE STANDARD PART ONE: THE JURY, STANDARD 4 at 6, 8 (1998).

47. *Id.* at 6-7.

about the practice.<sup>48</sup> The ABA Standards indicate that juror questioning may be neither necessary nor appropriate in many cases, but the opportunity should be available if the need does arise.<sup>49</sup> Although the role of questioning of witnesses is reserved for the attorneys, juror questioning may provide clarification of complicated or unclear testimony during the juror's quest for truth.<sup>50</sup>

If juror questioning is going to be permitted, the trial judge reads the instructions to the jury regarding the practice. The ABA Standards indicate that the purpose of questioning is only to clarify testimony, thus jurors cannot express opinions through the questions or argue with witnesses. Additionally, jurors are reminded that their role is one of a neutral fact finder, not an advocate for either party to the case.<sup>51</sup> Jurors are also instructed that their own questions are not to be given more weight than other evidence in the case.<sup>52</sup> Furthermore, the judge informs the jury that some questions may not be answered due to legal reasons, such as the rules of evidence, or because the question will probably be answered later in the case.<sup>53</sup> The judge instructs the jury that no inference is to be drawn if a question is not asked, and that it is not a reflection on the juror or the question.<sup>54</sup>

#### A. *Positive Opinions of Juror Questioning*

Many judges<sup>55</sup> and attorneys<sup>56</sup> favor the practice of allowing jurors to ask questions of witnesses. The Committee on Juries of the Judicial Council of the Second Circuit looked at twenty-six

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48. *Id.* at 8-10.

49. *Id.* at 8.

50. *Id.*

51. *Id.* at 6.

52. *Id.* at 7.

53. *Id.* at 6-7.

54. *Id.* at 7.

55. Leonard B. Sand & Steven A. Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 446 (1985). See generally Colin F. Campbell & Bob James, *Innovations in Jury Management from a Trial Court's Perspective*, 43 NO. 4 JUDGE'S J. 22, 26 (2004); John R. Stegner, *Why I Let Jurors Ask Questions in Criminal Trials*, 40 IDAHO L. REV. 541 (2004); John P. Wesley, *Jury Trial Innovations: Daring to Improve What We Are Sworn to Reserve*, 30 VT. BAR J. & L. DIG. 17 (2004).

56. J. Donald Cowan, Jr., Thomas M. Crisham, Michael B. Keating, Gael Mahony, Debra E. Pole, Michael A. Pope, William W. Schwarzer & John R. Wester, *What Attorneys Think of Jury Trial Innovations*, 86 JUDICATURE 192, 194 (2003).

trials, involving New York and Vermont federal district courts.<sup>57</sup> Four of the six judges who participated found the procedure to be beneficial, particularly in keeping the jury focused on important issues and helping the jury stay alert by allowing them to feel more involved in the proceedings.<sup>58</sup> Another study of judges' attitudes toward jury innovations also found general support for juror questioning.<sup>59</sup> Sixty percent of the Washington judges surveyed believed that permitting jurors to ask questions would improve the jury system.<sup>60</sup>

Additionally, Judge John R. Stegner argues that finding the truth is the main purpose of the trial<sup>61</sup> and that this goal is weakened when attorneys hold back and twist evidence.<sup>62</sup> Therefore, jurors should be allowed to ask questions to sort out or clarify complex and ambiguous evidence.<sup>63</sup> Since judges are given this opportunity, jurors should also have the same privilege.<sup>64</sup>

Speaking anecdotally from his experiences, Judge Stegner has never seen an instance where a juror's question sought to investigate a new aspect of the crime that was not already established by the attorneys.<sup>65</sup> He also reports that juror questioning alerts attorneys to issues that must be developed further.<sup>66</sup> In addition, jurors are appreciative of being allowed to ask questions.<sup>67</sup> Judge Stegner also acknowledges that juror questioning extends the trial length,<sup>68</sup> which is a major concern of the critics.<sup>69</sup> Nevertheless, he still allows the practice and goes so far as to reject objections on the grounds of "needless consumption of time."<sup>70</sup> When a juror asks a question that has already been addressed or that extends past the range of the earlier questioning, the attorneys have a legitimate objection based on time

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57. Sand & Reiss, *supra* note 55, at 443.

58. *Id.* at 446.

59. David C. Brody & John Neiswender, *Judicial Attitudes towards Jury Reform*, 83 JUDICATURE 298, 299 (2000).

60. *Id.* at 301.

61. Stegner, *supra* note 55, at 545-46.

62. *Id.* at 546.

63. *Id.* at 546-47.

64. *Id.* at 547.

65. *Id.* at 545.

66. *Id.* at 549.

67. *Id.*

68. *Id.* at 550.

69. See N. Randy Smith, *Why I Do Not Let Jurors Ask Questions in Trials*, 40 IDAHO L. REV. 553, 568 (2004).

70. Stegner, *supra* note 55, at 550.

consumption.<sup>71</sup> However, Judge Stegner does not view answering the question again as an unnecessary waste of time because he finds it more important to be sure that the juror hears and understands the evidence.<sup>72</sup> He believes that more questions result in a better outcome because jurors have more information and can analyze it more thoroughly.<sup>73</sup>

A poll conducted by the American College of Trial Lawyers found a general support for juror questioning among attorneys as well.<sup>74</sup> Seventy-nine percent of the attorneys polled believe that allowing jurors to ask questions improves juror comprehension of the evidence.<sup>75</sup> Additionally, ninety-three percent of the attorneys believe that the practice increases juror satisfaction with the trial.<sup>76</sup> About one-half of respondents also view the practice as enhancing the quality of justice.<sup>77</sup>

#### *B. Negative Opinions of Juror Questioning*

Although there has been much approval for allowing jurors to ask questions, not all attorneys<sup>78</sup> and judges<sup>79</sup> support the practice. One of the primary reasons appears to be the possible threat to the principles underlying the adversary system.<sup>80</sup> The adversary system calls for a neutral jury that remains an unbiased and objective fact-finder.<sup>81</sup> By allowing jurors to perform a role not intended for them under the adversary system, critics believe that the juror's role becomes radically different.<sup>82</sup> This leaves open the question of what the juror's role currently is and what it should be.

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71. *Id.* at 550-51.

72. *Id.* at 551.

73. *Id.*

74. Cowan et al., *supra* note 56, at 194.

75. *Id.*

76. *Id.*

77. *Id.*

78. *See id.*

79. *See generally* Smith, *supra* note 69.

80. *See* Robert Augustus Harper & Michael Robert Ufferman, *Jury Questions in Criminal Cases: Neutral Arbiters or Active Interrogators?*, 78 FLA. B.J. 8, 13 (2004); 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, 1099 (2003); Smith, *supra* note 69, at 563-64.

81. Smith, *supra* note 69, at 562; Harper & Ufferman, *supra* note 80, at 13.

82. *See* Smith, *supra* note 69, at 563-64.

### 1. *Judges' Concerns*

Judge Dann believes that there are many reasons for the controversy over juror questioning.<sup>83</sup> One major concern is that allowing jurors to question witnesses significantly alters the roles of attorneys and the judge.<sup>84</sup> In particular, allowing juries to participate in the trial threatens the advocates' control of their case and the judge's control of the trial.<sup>85</sup>

Another primary criticism is that jurors' questions will help prosecutors and plaintiffs meet their required burden of proof by bringing out evidence that will strengthen one party's arguments.<sup>86</sup> For example, jurors may ask questions that indicate that there are holes in the prosecutor's story, giving the prosecutor a second chance to prove the case. This could be seen as an unfair advantage for the prosecutor. If this happens, it compromises the legal system's premise that if a party cannot meet the burden of proof, then that party should not win the case.<sup>87</sup> In such an instance, the prosecutor is given an unfair advantage. Because the goal of finding the truth must not trump the defendant's constitutional right of a fair trial by jury,<sup>88</sup> some critics suggest that jury questioning is too risky.

Additionally, despite the Second Circuit's generally positive findings for juror questioning,<sup>89</sup> two judges in the study said they did not intend to permit the practice in the future.<sup>90</sup> One of these two judges found the questioning to be disruptive and believed that counsel should be the only ones allowed to question witnesses.<sup>91</sup> This judge said that if jurors need crucial information, then they will ask the court for it, without needing special procedures to ask questions.<sup>92</sup> The other judge expressed his belief that if jurors ask questions, then they probably have preconceptions that are not likely to be changed.<sup>93</sup> While voir dire is intended to act as a safeguard to prevent jurors with such inflexible preconceptions

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83. Dann, *supra* note 9, at 1253.

84. *Id.*

85. *Id.*

86. See Smith, *supra* note 69, at 567.

87. *Id.* at 560.

88. *Id.* at 567; see also Harper & Ufferman, *supra* note 80, at 13.

89. See *supra* notes 57-58 and accompanying text.

90. Sand & Reiss, *supra* note 55, at 444.

91. *Id.* at 445.

92. *Id.*

93. *Id.* at 444.

from sitting on the jury, typical voir dire is seldom effective in detecting this bias.<sup>94</sup> Thus, biased jurors do manage to find their way on the jury. These jurors could, as the judge notes, use questioning as a technique to further his or her own agenda.<sup>95</sup> However, this judge's concerns are not supported by research, which has revealed that questions asked by the jurors appear to focus more on clarifying evidence rather than choosing a side and interrogating witnesses.<sup>96</sup>

G. Thomas Munsterman, a leading researcher in jury innovations, suggests an alternative explanation for the debate over juror questioning.<sup>97</sup> He argues that judges are more hesitant to allow this jury innovation as compared to most other innovations because of the continued vigilance of the judge that is required over this ongoing process.<sup>98</sup> Unlike other jury innovations, juror questioning is one of the few that requires attention throughout the entire practice.<sup>99</sup> For example, jury note-taking only requires one decision: whether or not to allow the practice.<sup>100</sup> However, juror questioning involves numerous procedures and the judge needs to make many more decisions in addition to the initial decision to allow the practice.<sup>101</sup> Therefore, the practice lengthens the trial,<sup>102</sup> which some argue is "a needless consumption of time."<sup>103</sup> Another potential concern may be that making numerous decisions about the practice allows for many more chances for appeals because every one of these decisions is under scrutiny.

Munsterman proposes that many judges feel uncomfortable making decisions about whether to allow a question.<sup>104</sup> The judges face a greater complexity with this innovation as compared to

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94. Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT. L. REV. 1179, 1182 (2003).

95. Sand & Reiss, *supra* note 55, at 444.

96. Mott, *supra* note 80, at 1119.

97. Interview with G. Thomas Munsterman, Dir. of the Ctr. for Jury Studies, Nat'l Ctr. for State Courts (Dec. 7, 2004).

98. *Id.*

99. *Id.*

100. AM. BAR ASS'N, *supra* note 46, at 5.

101. *Id.* at 6-7.

102. Stegner, *supra* note 55, at 551.

103. Smith, *supra* note 69, at 568. This comment is based on Rule 611(a) of the Idaho Rules of Evidence, which states that courts must "avoid needless consumption of time." IDAHO R. EVID. 611(a).

104. Interview with G. Thomas Munsterman, Dir. of the Ctr. for Jury Studies, Nat'l Ctr. for State Courts (Dec. 7, 2004).

others because of the potential ramifications (e.g., jurors drawing inferences from unasked questions).<sup>105</sup> Different judges have varying thresholds for admittance standards, in which some follow the most lenient standard possible, while others employ a stricter standard.<sup>106</sup> Judges who use the lenient standard simply ask the attorneys if they accept the question, and if neither attorney objects, then the judge will ask the question.<sup>107</sup> Juror questioning gives the judge a greater challenge than any other innovation, but the solution to the challenge may come with more training, particularly over the threshold for admitting questions.<sup>108</sup> In addition, after a determination is made that a question can be asked, a new decision must be made of whether an attorney or the judge asks the question.<sup>109</sup> With a lack of training on how to handle juror questioning, it is no surprise that many judges are skeptical of allowing the practice.

## 2. Attorneys' Concerns

While the American College of Trial Lawyers poll uncovered that attorneys generally support juror questioning,<sup>110</sup> many attorneys are still skeptical of the practice.<sup>111</sup> Some attorneys fear jurors will abuse the opportunity by becoming competitive against attorneys or other jurors, or that jurors may ask questions simply because they can.<sup>112</sup> In addition, one-third of the attorneys feel that the practice diminishes the quality of justice.<sup>113</sup>

Another criticism of juror questioning is that it gives the prosecutor a "second chance to make his case" to the jurors.<sup>114</sup> If jurors see a gap in the prosecution's theory, they may ask for further clarification, and then the prosecutor can fill in the gap.<sup>115</sup> Therefore, attorneys<sup>116</sup> have the same fear as judges<sup>117</sup> about jurors

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105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*; see also AM. BAR ASS'N, *supra* note 46, at 7.

110. Cowan et al., *supra* note 56, at 194.

111. *Id.*

112. *Id.*

113. *Id.*

114. Richard Willing, *Courts Try to Make Jury Duty Less of a Chore*, USA TODAY, Mar. 17, 2005, at 17A.

115. *Id.*

116. Harper & Ufferman, *supra* note 80, at 13.

117. Smith, *supra* note 69, at 567; see also text accompanying notes 86-88.

helping meet the burden of proof. Additionally, critics believe that defense attorneys would need to abandon their role of fervently representing the defendant by asking jurors' questions that may be unfavorable to their side.<sup>118</sup>

In sum, some judges and attorneys fear the consequences of allowing jurors to question witnesses. The main concerns stem from the potential threat to the adversarial system, in which jurors' roles may be transformed from neutral fact-finders to biased advocates. Furthermore, the defendant's constitutional rights may be infringed upon if the prosecution is given another chance to meet the burden of proof. Also, judges and attorneys may feel that they lose control over the case. Other concerns include the additional trial time necessary in implementing the practice and the lack of knowledge on the part of judges in making decisions about the admissibility of certain questions.

#### IV. THE VERDICT IS IN: BENEFITS AND CRITICISMS THAT HOLD UP IN EMPIRICAL COURT

##### A. *The Benefits*

Psychological research has demonstrated many benefits of allowing jurors to ask questions to witnesses, such as assisting with comprehension of evidence and reducing stress of trial.<sup>119</sup> For instance, Larry Heuer and Steven Penrod conducted two studies on trial complexity and how jury reforms would help jurors better comprehend the evidence and the law.<sup>120</sup> Their national study

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118. Harper & Ufferman, *supra* note 80, at 12.

119. See Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29 (1994) [hereinafter Heuer & Penrod, *Trial Complexity*]; Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256 (1996) [hereinafter Heuer & Penrod, *Increasing Juror Participation*]; Larry Heuer & Steven Penrod, *Jury Decision-Making in Complex Trials*, HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS (D. Carson & R. Bull eds., 1995) [hereinafter Heuer & Penrod, *Complex Trials*]; Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 LAW & HUM. BEHAV. 231 (1988) [hereinafter Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*]; Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 LAW & HUM. BEHAV. 121 (1994) [hereinafter Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*].

120. See Heuer & Penrod, *Trial Complexity*, *supra* note 119; Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119; Heuer & Penrod, *Complex Trials*, *supra* note 119; Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra*

consisted of 160 state and federal trials in thirty-three states,<sup>121</sup> seventy-five of which were civil cases and eighty-five were criminal cases.<sup>122</sup> Their other study consisted of sixty-seven Wisconsin state trials, thirty-four of which were civil cases and thirty-three were criminal cases.<sup>123</sup> The authors drew many conclusions that respond to advocates' claims of advantages and critics' claims of disadvantages.<sup>124</sup>

The authors conclude that juror questioning is beneficial in that it advances juror understanding of the case issues and facts.<sup>125</sup> In addition, the process reduces juror doubts about evidence presented at trial.<sup>126</sup> The jurors allowed to ask questions in the Wisconsin study were more satisfied with the questioning of the witness, and more often said there was sufficient information to reach a reliable verdict.<sup>127</sup> In the national study, juror questions were the most helpful when evidence and legal information were most complex.<sup>128</sup> As evidence became more complex, jurors in the non-questioning condition were less confident that they reached the right verdict, as compared to those in the question-asking condition.<sup>129</sup> The authors determined that jurors asked questions primarily to help clarify complicated testimony or legal issues.<sup>130</sup>

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note 119; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119.

121. Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 122; Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 256-57.

122. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 258; Heuer & Penrod, *Trial complexity*, *supra* note 119, at 29; Heuer & Penrod, *Complex Trials*, *supra* note 119, at 534.

123. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 258; Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119, at 231.

124. See Heuer & Penrod, *Trial Complexity*, *supra* note 119; Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119; Heuer & Penrod, *Complex Trials*, *supra* note 119; Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119.

125. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 142; Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119, at 252.

126. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260.

127. *Id.*; Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119, at 252.

128. Heuer & Penrod, *Complex Trials*, *supra* note 119, at 537.

129. *Id.*

130. *Id.*

Allowing jurors to question witnesses also reduced the harms (e.g., weaker verdict confidence, and finding the defense attorney less helpful)<sup>131</sup> that often result when attorneys present complex information.<sup>132</sup>

Judge Dann and psychologist Valerie P. Hans conducted an experiment using a mock jury to study questions jurors would ask to a DNA expert witness testifying on technical data.<sup>133</sup> Their research uncovered extremely high support (97%) for juror questioning in the conditions that allowed the practice.<sup>134</sup> In addition, 75% of mock jurors in the question-asking conditions said that the practice aided them in better comprehending the evidence.<sup>135</sup> However, testing of comprehension levels found no statistical differences,<sup>136</sup> indicating that the practice increased subjective perceptions of understanding but did not increase actual understanding of the evidence.

Furthermore, jurors often expressed their desire to ask questions when they were unable to do so at trial.<sup>137</sup> A Philadelphia study showed that 80% of jurors wanted to question witnesses, and 49.5% said that at the end of the case, they still had questions that they wanted answered.<sup>138</sup> Another study involving post-trial interviews revealed that jurors remained confused as they entered the jury box, and one juror wondered why she was not allowed to ask questions.<sup>139</sup> “[Y]ou mean we just have to decide and can’t ask any more questions? . . . [W]hy do you leave us floundering here, why don’t you let us ask some questions and give us some answers?”<sup>140</sup>

Research by Monica K. Miller and Brian H. Bornstein provides support for the use of jury questioning during trials as a means of reducing juror stress.<sup>141</sup> When asked to identify stressors involved

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131. *Id.* at 536.

132. *Id.* at 537.

133. Dann & Hans, *supra* note 9, at 15.

134. *Id.*

135. *Id.*

136. *Id.*

137. Nicole L. Mott, Valerie P. Hans & Lindsay Simpson, *What’s Half a Lung Worth? Civil Jurors’ Accounts of Their Award Decision Making*, 24 LAW & HUM. BEHAV. 401, 417 (2000); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 556 (1997).

138. Smith, *supra* note 137, at 556.

139. Mott et al., *supra* note 137, at 417.

140. *Id.*

141. See generally Miller & Bornstein, *supra* note 5 (summarizing research on

in jury service, 21% of respondents reported at least a moderate stress level (i.e., a 3 or higher on a scale of 1-5) produced by the prohibition of asking questions and taking notes.<sup>142</sup> This study also revealed that 40% of jurors experienced at least a moderate level of stress due to “having limited input during trial; not being allowed to ask questions.”<sup>143</sup> While only 6% of jurors in the study were permitted to ask questions, 70% said the practice helped them at least moderately in performing their duties.<sup>144</sup> On the other hand, 65% of jurors who were not permitted to ask questions said the practice would have at least moderately helped them.<sup>145</sup>

The National Center for State Courts has suggested that jurors experience stress when they are unable to actively participate in the trial.<sup>146</sup> If jurors are allowed to ask questions at trial, then they will feel more control over the proceedings,<sup>147</sup> which will increase concentration and make information processing easier.<sup>148</sup> Furthermore, a bailiff expressed his empathy for jurors not being allowed to ask questions.<sup>149</sup> “I tell new bailiffs to think how it would feel if you had to sit there and couldn’t ask questions. You have to just sit there listening to other people talk.”<sup>150</sup>

Finally, a Colorado pilot program for testing juror questioning in the courts found evidence strongly in favor of allowing the innovation.<sup>151</sup> Specifically, surveys of jurors found that 93% believe the practice should be permitted.<sup>152</sup> Furthermore, jurors show more positive attitudes towards the trial proceedings when they are allowed to utilize the practice.<sup>153</sup> Jurors felt they gained more information and clarification, as well as appearing more attentive

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juror stress and the measures available to help alleviate it).

142. *Id.*; see also NAT’L CTR. FOR STATE COURTS, THROUGH THE EYES OF THE JUROR: A MANUAL FOR ADDRESSING JUROR STRESS 29 (1998), [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_JurorStressPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_JurorStressPub.pdf).

143. Miller & Bornstein, *supra* note 5.

144. *Id.*

145. *Id.*

146. NAT’L CTR. FOR STATE COURTS, *supra* note 142, at 29.

147. *Id.* at 3.

148. *Id.* at 29.

149. *Id.*

150. *Id.*

151. See MARY DODGE, SHOULD JURORS ASK QUESTIONS IN CRIMINAL CASES? A REPORT SUBMITTED TO THE COLORADO SUPREME COURT’S JURY SYSTEM COMMITTEE (2002), <http://www.courts.state.co.us/supct/committees/juryreformdocs/dodgereport.pdf>.

152. *Id.* at 47.

153. *Id.* at 57.

and engaged in the trial.<sup>154</sup> In addition, judges and attorneys who experienced the innovation became increasingly supportive of the procedure.<sup>155</sup>

*B. The Criticisms*

Research has revealed very little data to support the criticisms of allowing jurors to ask questions. Shari Seidman Diamond, Mary R. Rose, and Beth Murphy were given the unique opportunity to perform a detailed content analysis on jurors' discussions both during deliberations and any conversations that occurred in the jury room.<sup>156</sup> These interactions were videotaped as part of the Arizona Filming Project,<sup>157</sup> in which fifty civil trials were sampled in the experiment.<sup>158</sup> Jurors asked 820 questions throughout these trials, and over three-quarters (76%) of the questions were allowed by the judges.<sup>159</sup> Overall, the findings of this study support the practice of jurors questioning witnesses,<sup>160</sup> particularly because most of the questions refused by the judge resulted in no reaction from the jurors.<sup>161</sup> However, some questions did cause some conversations that critics would deem harmful.<sup>162</sup> Seven questions (4%) ignited some mild complaints over the judge's refusal to ask the question, such as expressing shock or arguing that the question was relevant.<sup>163</sup> In addition, there were thirty-one questions (16%) that the jurors tried to answer themselves after the judge refused to ask the question, implying that the question was inappropriate or irrelevant and should not be used in evaluating the case.<sup>164</sup> The jurors drew inferences from direct testimony when attempting to answer twelve of those questions.<sup>165</sup> The other questions were answered using the jurors' own experiences, beliefs, and expertise.<sup>166</sup> However, these questions were discussed as jurors

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154. *Id.*

155. *Id.*

156. Diamond, Rose & Murphy, *supra* note 17, at 21-22.

157. *Id.* at 21.

158. *Id.* at 22.

159. *Id.*

160. *Id.* at 27.

161. *Id.* at 25.

162. *Id.* at 26.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

would normally talk about the issues if a question was not posed on the topic.<sup>167</sup>

This study also found only one instance where a juror drew conclusions from the sole fact that the judge refused to answer the question.<sup>168</sup> In this instance, the juror was interested in knowing if the plaintiff's car had a specific design feature, and inferred from the judge's failure to answer the question, "I got no answer, so evidently it's not [part of the design]."<sup>169</sup> However, a brief explanation as to why the question will not be asked serves as a simple safeguard that can be implemented to actually prevent such assumptions.<sup>170</sup> The study found that no such inferences were drawn in any case when the judge gave even a small acknowledgment as to why the question was not asked.<sup>171</sup> If the judge in this case would have mentioned that the question could not be answered simply because it is not relevant in making a decision, then the juror may not have drawn the conclusion that he did. Therefore, only one question out of 820 caused a major problem, which probably would not have resulted if the proper safeguards were in place.<sup>172</sup>

In sum, empirical research has supported many benefits and few criticisms of allowing jurors to ask questions. First, jurors were more satisfied with the questioning of witnesses when they had the ability to ask questions. Second, jurors were more confident in their understanding of the evidence and felt the evidence was clarified and sufficient for reaching a reliable verdict. Next, jurors wanted to ask questions and they became more attentive and engaged in the trial when they were given the opportunity. Furthermore, the practice reduced juror stress caused by the jury experience.

Conversely, empirical studies also uncovered criticisms for allowing jurors to ask questions. For instance, jurors sometimes mildly complained when their questions were not answered and occasionally attempted to answer the questions themselves. Although very rare, jurors also drew conclusions from an unanswered question.

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167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 28.

171. *See id.* at 27.

172. *Id.* at 26, 28 n.48.

V. COMMON MISCONCEPTIONS: BENEFITS AND CRITICISMS THAT  
REMAIN UNSUPPORTED

A. *Not-So-Beneficial Benefits*

While some benefits are explained above as being supported empirically, there are other benefits listed by supporters that were not confirmed by psychological research.

Advocates for juror questioning claim that one benefit of the practice is that it would help jurors get to the truth.<sup>173</sup> However, the research discussed earlier by Heuer and Penrod demonstrated that this benefit does not actually occur, just as judges and lawyers in both studies had expected.<sup>174</sup>

Another suggested benefit of juror questions is that they alert attorneys to specific issues that need to be developed further.<sup>175</sup> In both studies conducted by Heuer and Penrod, the judges and lawyers expected juror questions to be helpful in pinpointing juror confusion about the law or evidence,<sup>176</sup> but they agreed after the trial that that benefit was not realized.<sup>177</sup>

Juror questioning also did not increase juror, attorney, and judge satisfaction over the verdict.<sup>178</sup> Jurors appeared to be satisfied with the trial procedure, no matter which condition they were in during the trial, and their opinions did not differ much between

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173. Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119, at 237; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 125.

174. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119, at 252-53; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 143.

175. Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119, at 237; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 125.

176. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119, at 254.

177. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119, at 254; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 143.

178. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119, at 253; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 144.

their verdicts<sup>179</sup> or their attitudes toward jury service.<sup>180</sup> Both judges and lawyers were also reasonably satisfied, judges somewhat more than lawyers, finding little difference between the conditions.<sup>181</sup>

*B. Criticizing the Criticisms*

While some criticisms of juror questioning were uncovered through psychological studies, there were also many criticisms rejected by empirical research. One of the main criticisms of juror questioning is its posed threat to the adversary system;<sup>182</sup> however, this criticism did not stand up to empirical testing.<sup>183</sup> Nicole Mott performed a content analysis on 2271 questions asked by jurors in real trials.<sup>184</sup> She found that jurors' questions pose no real threat to the adversary system, and instead the questions are used to advance their role as neutral decision-makers.<sup>185</sup> Jurors' questions were used to clarify testimony and they did not attempt to uncover new evidence or cross-examine witnesses.<sup>186</sup> Mott concludes that if jurors are supposed to seek truth in the facts, they need to comprehend the facts so as to not make uninformed decisions or possibly hang the jury.<sup>187</sup>

The Heuer and Penrod studies found similar results by examining whether jurors can remain neutral (i.e., not become advocates) when they are allowed to ask questions.<sup>188</sup> This concern is indirectly addressed by the pattern of jury decisions, which indicated that the verdicts were not significantly affected by whether or not the juries were allowed to ask questions.<sup>189</sup> The

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179. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119, at 253; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 144.

180. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260.

181. *Id.*

182. Mott, *supra* note 80, at 1099.

183. *Id.* at 1119.

184. *Id.* at 1111.

185. *Id.* at 1119. Some examples of questions given are: "Please clarify who is allowed to contact who[m] during the order of protection."; "Did you see blood anywhere else other than the knife?"; "What type of door locks were on the entry door? And how old is the door and lock?" *Id.* at 1117.

186. *Id.* at 1119.

187. *Id.*

188. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 146.

189. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 261;

practice did not affect judge-jury agreement rates<sup>190</sup> and did not give the jury a less favorable impression of either attorney, which would be assumed if they lost sight of neutrality.<sup>191</sup> Instead, both attorneys were viewed somewhat more favorably when jurors were allowed to ask questions.<sup>192</sup>

Additionally, attorneys in the Heuer and Penrod national study did not expect questions to cause prejudice to their clients or to undermine the adversarial process goals.<sup>193</sup> After the trial, the lawyers and judges were confident that those problems did not arise.<sup>194</sup> This evidence suggests that critics' concerns about the negative outcomes of allowing jurors to ask questions could be unfounded.

Another concern with juror questioning is that jurors will attempt to uncover information intentionally left out by the attorney.<sup>195</sup> In Heuer and Penrod's Wisconsin study, lawyers were asked if the jurors raised information that they had deliberately left out, but the attorneys said that was not a problem.<sup>196</sup> Therefore, juror questioning did not appear to interrupt the attorneys' trial strategies.<sup>197</sup>

Even though jurors do not know the rules of evidence, they still did not ask inappropriate questions.<sup>198</sup> In the Wisconsin study,

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Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 146.

190. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 261; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 146.

191. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 261.

192. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 261; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 146-47.

193. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 148.

194. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 148.

195. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 261; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 145; Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119, at 255.

196. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260.

197. Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119, at 255.

198. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 144-45.

judges and lawyers did not expect their questions to be inappropriate and they did not believe they were.<sup>199</sup> The same responses occurred for the judges in the national study.<sup>200</sup> Lawyers in the national study were originally more skeptical of the questions, but in the end they did not find the questions asked to be harmful or irrelevant.<sup>201</sup> Furthermore, the Diamond et al. study found absolutely no instances within the 820 questions of jurors asking frivolous questions.<sup>202</sup>

In addition, jurors do not give more weight to their own questions over the other evidence presented at trial.<sup>203</sup> Jurors in the questioning condition were quite modest when evaluating the helpfulness of the answers to their questions.<sup>204</sup> In addition, discussing answers to jurors' questions was only 10% of deliberation time, an average of fifteen minutes.<sup>205</sup>

Despite the critics' beliefs, attorneys will object to inappropriate juror questions without reluctance, as shown in both Heuer and Penrod studies.<sup>206</sup> In the national study, 20% of questions were objected to,<sup>207</sup> and 17% were in the Wisconsin study.<sup>208</sup> Lawyers in the national study objected to at least one

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199. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260.

200. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 145.

201. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 145.

202. Diamond, Rose & Murphy, *supra* note 17, at 27.

203. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 261; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 147.

204. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 261; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 147.

205. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 261; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 147-48.

206. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 145; Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119, at 255-56.

207. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 145.

208. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119, at 255-56.

question in 40% of the trials in which at least one question was asked.<sup>209</sup> Jurors in both studies responded that they understood the basis for the objection and were not embarrassed or angry.<sup>210</sup> Similarly, Diamond et al. found that a majority (62%) of the 197 questions disallowed by the judge resulted in no reaction from the jurors.<sup>211</sup>

Furthermore, attorneys were concerned that juror questioning would unnecessarily slow down the trial, but lawyers in the question-asking trials responded that this was not a problem.<sup>212</sup> Judges did not believe that the practice would waste too much time, and judges in the question-asking trials did not find time to be an issue.<sup>213</sup> Juror questioning also did not seem to affect courtroom decorum.<sup>214</sup>

Heuer and Penrod concluded from their studies that there is not a prejudicial effect in allowing juror questioning.<sup>215</sup> The judge-jury agreement rate for the verdicts and the fact that the jurors had more favorable views of both attorneys when the practice was allowed show that the questions did not cause prejudice.<sup>216</sup> Lawyers and judges did not see these biasing effects, even though lawyers had expected to see them.<sup>217</sup> The judges and attorneys in the Wisconsin study did not seriously object to juror questioning, viewing it more favorably after participating in a trial with the procedure.<sup>218</sup> Lawyers did not expect any major benefits and did not find any, but they also did not see any detriment.<sup>219</sup> In the

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209. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 145.

210. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 260; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 145-46; Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119, at 256.

211. See Diamond, Rose & Murphy, *supra* note 17, at 25.

212. Heuer & Penrod, *Increasing Jurors' Participation: A Field Experiment*, *supra* note 119, at 254-55.

213. *Id.* at 255.

214. *Id.* at 254-55.

215. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 261; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 148.

216. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 261; Heuer & Penrod, *Juror Notetaking and Question Asking During Trials*, *supra* note 119, at 148.

217. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 119, at 261.

218. *Id.*

219. *Id.*

national study, judges and attorneys were asked to rate how much they agree with the statement, "I am in favor of allowing jurors to ask questions of witnesses during the trial."<sup>220</sup> Judges and lawyers in the juror-questioning condition were more enthusiastic with the practice.<sup>221</sup> Judges in this condition were essentially undecided beforehand,<sup>222</sup> and then moderately endorsed the procedure after exposure to it.<sup>223</sup> Lawyers were modestly against the procedure<sup>224</sup> and then became more neutral afterwards.<sup>225</sup>

In sum, some suggested benefits and criticisms of juror questioning are not supported by empirical research. The practice does not aid jurors in finding the truth or help attorneys pinpoint areas that need further development. Juror questioning did not threaten the adversary system, and instead jurors only asked questions to clarify testimony that would improve their neutral fact-finding role. The practice did not disturb attorney's strategies or courtroom decorum. Furthermore, jurors did not ask inappropriate or frivolous questions, nor did they give more weight to their questions than other evidence. Attorneys were not reluctant to object to questions, and unanswered questions generally did not elicit any response. Finally, juror questioning did not unnecessarily lengthen the trial process.

#### VI. THE CURRENT STATUS OF ALLOWING JURORS TO QUESTION WITNESSES

The State of Arizona has been the leader of the reform effort,<sup>226</sup> becoming the first to allow jurors to ask questions,<sup>227</sup> and some states are now beginning to follow suit.<sup>228</sup> Meanwhile, a few states have ruled the practice unconstitutional and forbid its use.<sup>229</sup>

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220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. See generally Mize & Connelly, *supra* note 7, at 4-5; 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 (1996).

227. Mize & Connelly, *supra* note 7, at 5.

228. *Id.* For information on the first national meeting on jury reforms, see Robert Boatwright & Elissa Krauss, *Jury Summit 2001: A Report on the First National Meeting of the Ever-Growing Community Concerned with Improving the Jury System*, 86 JUDICATURE 145 (2002).

229. These states are Minnesota, *State v. Costello*, 646 N.W.2d 204 (Minn.

Other states are reluctant to allow the practice but have ruled that it is constitutional.<sup>230</sup> The federal circuits have all ruled that juror questioning is constitutional, but most discourage the practice.<sup>231</sup>

A. *Jurisdictions Allowing the Practice*

Approximately one-third of states have approved the use of juror questioning through either court rulings or state statutes.<sup>232</sup> The New Hampshire Supreme Court ordered that it is at the trial judge's discretion to allow jurors to ask questions by approving Superior Court Rule 64-B.<sup>233</sup> Vermont also ruled that the practice is permissible at the discretion of the trial judge.<sup>234</sup> Although New York Judge Kenneth Lange has allowed juror questioning in his courtroom since 1984,<sup>235</sup> it was not until 1994 that the state court determined that courts should allow juror questioning at the trial court's discretion.<sup>236</sup>

Additionally, the Fifth Circuit acknowledged the benefits of juror questioning in *United States v. Callahan*,<sup>237</sup> stating,

There is nothing improper about the practice of allowing occasional questions from jurors to be asked of witnesses. If a juror seems unclear as to a point in the proof, it makes good common sense to allow a question to be asked about it. If nothing else, the question should alert trial counsel that a particular factual issue may need more extensive development.<sup>238</sup>

The Tenth Circuit also ruled that the practice is permissible,

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2002); Mississippi, *Wharton v. State*, 734 So. 2d 985 (Miss. 1998); Nebraska, *State v. Zima*, 468 N.W.2d 377 (Neb. 1991); and Texas, *Morrison v. State*, 845 S.W.2d 882 (Tex. Crim. App. 1992).

230. See, e.g., *Landt v. State*, 87 P.3d 73 (Alaska Ct. App. 2004).

231. See *infra* notes 249-66 and accompanying text.

232. AM. JUDICATURE SOC'Y, JURY IMPROVEMENTS: JUROR QUESTIONS TO WITNESSES (2004), [http://www.ajs.org/jc/juries/jc\\_improvements\\_juror\\_questions.asp](http://www.ajs.org/jc/juries/jc_improvements_juror_questions.asp). For a list of states' rules on juror questioning, see AM. JUDICATURE SOC'Y, JURISDICTION-BY-JURISDICTION RULES FOR JUROR QUESTIONS TO WITNESSES (2004), [http://www.ajs.org/jc/juries/jc\\_improvements\\_questions\\_laws.asp#n](http://www.ajs.org/jc/juries/jc_improvements_questions_laws.asp#n).

233. Supreme Court of New Hampshire, Order 1130 (Nov. 30, 2000), available at <http://www.courts.state.nh.us/supreme/orders/ordr1130.htm>.

234. *State v. Doleszny*, 844 A.2d 773 (Vt. 2004).

235. Jonathan Bandler, *Practice Becoming More Popular in Courtrooms*, THE JOURNAL NEWS (Westchester County, N.Y.), Feb. 3, 2002, at 1B.

236. *People v. Bacic*, 608 N.Y.S.2d 452, 452 (App. Div. 1994).

237. 588 F.2d 1078 (5th Cir. 1979).

238. *Id.* at 1086.

following precedent that no federal court has prohibited its use.<sup>239</sup>

In addition, some states implemented pilot projects and produced reports recommending juror questioning.<sup>240</sup> The results of the reports influenced Hawaii,<sup>241</sup> New Jersey,<sup>242</sup> Colorado,<sup>243</sup> Washington,<sup>244</sup> and Tennessee<sup>245</sup> to implement procedural rules for allowing the jury innovation. In addition, the Massachusetts<sup>246</sup> and Ohio<sup>247</sup> courts have ruled in favor of the practice after their states' pilot projects, although they used precedent for their reasoning<sup>248</sup> and do not mention the projects in their decisions.

### B. *Jurisdictions Allowing the Practice, but Cautious of It*

A majority of the federal circuit courts have voiced their reservations about juror questioning, although they all permit the

239. *Willner v. Soares*, No. 02-1352, 2003 WL 254327, at \*2 (10th Cir. Feb. 5, 2003).

240. *Mize & Connelly*, *supra* note 7, at 5-7.

241. *See* HAW. R. PENAL P. 26; HAW. R. CIV. P. 47. For more information on the project and its recommendations, see HAW. COMM. ON JURY INNOVATIONS FOR THE 21ST CENTURY, HAW. STATE JUDICIARY, FINAL REPORT OF THE HAWAII COMMITTEE ON JURY INNOVATIONS FOR THE 21ST CENTURY (1999); HAW. COMM. ON JURY INNOVATIONS FOR THE 21ST CENTURY, HAW. STATE JUDICIARY, SUPPLEMENTAL REPORT OF THE HAWAII COMMITTEE ON JURY INNOVATIONS FOR THE 21ST CENTURY (1999).

242. *See* N.J. CT. R. 1:8-8. For information on the project and report, see JURY PILOT SUBCOMM., N.J. JUDICIARY, REPORT ON PILOT PROJECT ALLOWING JUROR QUESTIONS (2001), <http://www.judiciary.state.nj.us/jurypilot/jurypilot.htm>.

243. *See* COLO. R. CTY. CT. CIV. P. 347(u); COLO. R. CRIM. P. 24(g). For the complete report and recommendations on jury reform in Colorado, see COLO. JURY REFORM IMPLEMENTATION COMM., COLO. JUDICIAL BRANCH, IMPLEMENTATION PLAN: JURY REFORM IN COLORADO (1998), [http://www.courts.state.co.us/supct/committees/juryreformdocs/98\\_jury\\_imp.pdf](http://www.courts.state.co.us/supct/committees/juryreformdocs/98_jury_imp.pdf). For information on the project and report see, DODGE, *supra* note 151; Leland P. Anderson & Melinda Taylor, *Jury Reform in the State Court System*, 33 COLO. LAW. 39 (2004).

244. *See* WASH. SUP. CT. CIV. R. 43(k); WASH. CIV. R. CT. LIMITED JURIS. 43(k). For information on the project and report, see Jeffrey C. Grant, *Recent Changes to Washington's Jury Trials: A Great System Made Even Better*, 26 SEATTLE U. L. REV. 431 (2003).

245. *See* TENN. R. CIV. P. 43A.03; TENN. R. CRIM. P. 24.1(c). For information on the pilot project, see Neil P. Cohen, *Better, Happier Juries: Tennessee Jury Reform Respects Jurors' Time and Provides Them More Resources to Do the Job*, 39 TENN. B.J. 16, 17-18, 22 (2003).

246. *Commonwealth v. Britto*, 744 N.E.2d 1089, 1103-06 (Mass. 2001) (upholding the ruling allowing the practice and the procedures for its implementation); *Commonwealth v. Urena*, 632 N.E.2d 1200 (Mass. 1994). For information on the project and report, see PAULA HANNAFORD & G. THOMAS MUNSTERMAN, MASSACHUSETTS PROJECT ON INNOVATIVE JURY TRIAL PRACTICES: FINAL REPORT (2002).

247. *See generally* *State v. Fisher*, 789 N.E.2d 222 (Ohio 2003).

248. *Id.* at 226-30; *Britto*, 744 N.E.2d at 1103-06.

practice. In voicing their disapproval, the First Circuit said in *United States v. Sutton*, “juror participation . . . should be the long-odds exception, not the rule.”<sup>249</sup> In *United States v. Ajmal*<sup>250</sup> and *United States v. Bush*,<sup>251</sup> the Second Circuit ruled that the practice is at the discretion of the trial judge, but they “strongly discourage its use.” Additionally, the Sixth Circuit,<sup>252</sup> Seventh Circuit,<sup>253</sup> and Eighth Circuit<sup>254</sup> also discourage juror questioning. Furthermore, the Third Circuit allows the practice after judicial screening of the questions, but stated, “the dangers of allowing jurors to ask questions orally far outweighs any perceived benefit of allowing juror questioning of witnesses.”<sup>255</sup> The Fourth Circuit also permits juror questioning, but said the practice is “fraught with dangers which can undermine the orderly progress of the trial to verdict.”<sup>256</sup>

The Ninth Circuit allows the procedure, but warns that juror questions “should not be encouraged or solicited.”<sup>257</sup> This circuit ruled that the trial court has discretion in implementing the practice<sup>258</sup> and that the trial judge makes no error in permitting the procedure.<sup>259</sup> Since 1994, Ninth Circuit<sup>260</sup> Judge Robert Jones has allowed jurors to interrupt witnesses on the stand and ask questions in civil trials.<sup>261</sup> The lawyers have a switch under their desks that they can flip when they want to object to a question.<sup>262</sup> A button then lights up under Jones’s bench and he can dismiss the question.<sup>263</sup>

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249. *United States v. Sutton*, 970 F.2d 1001, 1005 (1st Cir. 1992).

250. 67 F.3d 12, 14 (2d Cir. 1995).

251. 47 F.3d 511, 515 (2d Cir. 1995).

252. *United States v. Collins*, 226 F.3d 457, 461 (6th Cir. 2000).

253. *United States v. Feinberg*, 89 F.3d 333, 336 (7th Cir. 1996).

254. *United States v. Lewin*, 900 F.2d 145, 147 (8th Cir. 1990).

255. *United States v. Hernandez*, 176 F.3d 719, 726 (3d Cir. 1999).

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

257. JURY INSTRUCTIONS COMM. OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES 65 (2004), available at [http://www.ce9.uscourts.gov/Web/SDocuments.nsf/a67a78661317c5a58825673200662c8c/\\$FILE/2004%20manual.pdf](http://www.ce9.uscourts.gov/Web/SDocuments.nsf/a67a78661317c5a58825673200662c8c/$FILE/2004%20manual.pdf).

258. *United States v. Huebner*, 48 F.3d 376, 382 (9th Cir. 1994).

259. *United States v. Gonzales*, 424 F.2d 1055, 1056 (9th Cir. 1970).

260. In the Portland, Oregon court.

261. Associated Press, *Jurors Can Interrupt, Ask Questions*, SEATTLE TIMES, Jan. 2, 1999, at A7. This article is summarized and monitored by Roger Knights for the Global Ideas Bank, available at <http://www.globalideasbank.org/site/bank/idea.php?ideaId=420>.

262. *Id.*

263. *Id.*

The Eleventh Circuit used precedent in ruling that juror questioning is permissible,<sup>264</sup> but the court acknowledged the potential dangers discussed in past cases.<sup>265</sup> Therefore, the court concluded that the practice is to be considered on a case-by-case basis.<sup>266</sup>

In addition to federal courts, the Alaska Court of Appeals has ruled in *Landt v. State*<sup>267</sup> that allowing jurors to ask questions at trial is not an abuse of judicial discretion.<sup>268</sup> Alaska will review the permissibility on a case-by-case basis to determine if the procedure prejudices the defendant in the particular case.<sup>269</sup>

### C. Jurisdictions Forbidding the Practice

While the federal courts have all permitted juror questioning (even though most caution its use), four states have ruled to completely forbid the practice. Despite the Fifth Circuit's opinion actually approving juror questioning, the Texas Court of Criminal Appeals<sup>270</sup> ruled against the practice in *Morrison v. State*, stating,

To allow our adversary system to travel, without prior authorization, unregulated by statute or rule, in the direction encouraged by the trial court's practice is inconsistent with the principles underlying the system. Further, the dangers inherent in such a practice cannot be adequately circumvented by the imposition of procedural safeguards.<sup>271</sup>

Along with Texas, the only other states that specifically prohibit jurors from asking questions to witnesses are Mississippi,<sup>272</sup> Nebraska,<sup>273</sup> and Minnesota.<sup>274</sup> The Mississippi Supreme Court

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264. *United States v. Richardson*, 233 F.3d 1285, 1289 (11th Cir. 2000).

265. *Id.* at 1290.

266. *Id.* at 1291.

267. 87 P.3d 73 (Alaska Ct. App. 2004).

268. *Id.* at 74.

269. *Id.* at 80.

270. Texas is within the Fifth Circuit's federal jurisdiction.

271. *Morrison v. Texas*, 845 S.W.2d 882, 884 (Tex. Crim. App. 1992). However, Texas does permit the practice in civil cases if the proper procedural safeguards are in place. *Hudson v. Markum*, 948 S.W.2d 1 (Tex. Ct. App. 1997).

272. *Wharton v. State*, 734 So. 2d 985, 988-90 (Miss. 1998) (prohibiting the practice in both criminal and civil cases).

273. *State v. Zima*, 468 N.W.2d 377, 380 (Neb. 1991) (prohibiting the practice in both criminal and civil cases).

274. *State v. Costello*, 646 N.W.2d 204 (Minn. 2002) prohibits the practice in criminal cases. There is currently no state case law about the permissibility of the practice in civil cases.

opined that a major problem with the practice is that jurors are unfamiliar with the rules of evidence.<sup>275</sup> The Nebraska Supreme Court ruled that juror questioning is prohibited because jurors become advocates and may possibly antagonize witnesses.<sup>276</sup> Similarly, the Minnesota Supreme Court ruled that allowing jurors to ask questions threatens the jurors' role in the adversary system.<sup>277</sup>

In sum, many states acknowledge the benefits of allowing jurors to ask questions and permit the practice at the discretion of the trial judge. There are some states that are more cautious in allowing the procedure and the appellate courts will review the prejudicial effects of the practice on a case-by-case basis. There are four states that prohibit juror questioning in criminal cases, and two that specifically disallow the practice in civil cases as well. Additionally, there are no federal circuit courts that forbid the practice, but a majority of them discourage its use.

#### VII. RECOMMENDATIONS AND CONCLUSIONS

Based on the psychological and other empirical evidence supporting jurors asking questions to witnesses, the authors conclude that this practice should be allowed during trial.

The Story Model of juror decision-making indicates that jurors are cognitively active decision-makers.<sup>278</sup> Legal experts such as Judge Dann have agreed that jurors are not passive decision-makers and have implemented juror innovations—such as allowing jurors to ask questions—that help jurors in their tasks. Allowing jurors to ask questions provides answers that help jurors build accurate stories and come to better verdicts.

Empirical psychological studies further support the idea that juror questioning can be beneficial<sup>279</sup> and that the feared consequences do not seem to occur frequently.<sup>280</sup> Jurors experience stress due to not being allowed to ask questions and feel they could have performed their jobs better if they were allowed to ask questions. This is especially true when the legal issues or evidence is complex. When allowed to ask, jurors appreciate the opportunity to ask questions and feel it helps them in their fact-

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275. *Wharton*, 734 So. 2d at 990.

276. *Zima*, 468 N.W.2d at 380.

277. *Costello*, 646 N.W.2d at 213.

278. *See supra* Part II.

279. *See supra* Part IV.A.

280. *See supra* Part V.B.

finder tasks. Jurors are more confident in their verdicts and more satisfied with their jury experience when allowed to ask questions. In addition, court actors get a more favorable view of the procedure after experiencing it. Other research has indicated that most jurors do not ask frivolous questions or make improper inferences when judges refuse to ask the question.

On the other hand, some evidence indicates that actual comprehension is not enhanced, suggesting that the benefits of jury questioning are largely subjective. Even if this is the case, it is still important that allowing jurors to ask questions improves jurors' experiences in the court system. Jury duty is an essential part of the justice system. In order to encourage juror participation, courts should take measures to ensure participation and limit juror no-shows. This includes adopting procedures, such as juror questioning, which enhance the subjective experience of jury duty. Making jury duty a better experience encourages participation and preserves the integrity of the legal system.

Because the wealth of psychological research reveals many benefits and few ills resulting from allowing jurors to ask questions, this article recommends that courts uniformly adopt the practice. It is recommended that jurisdictions follow the standards set forth by the ABA. Courts should also develop training and education programs to inform judges about appropriate ways to conduct jury questioning.

Finally, it is recommended that researchers continue to investigate the effects of questioning. Many states have started their own task forces for implementing jury innovations, which is a step in the right direction. Allowing jurors to ask questions benefits both the defendant and the jurors. The practice helps jurors perform their role as fact-finders and allows them to make better judgments.

While some states and judges have recognized the benefits and implemented juror questioning, many courts discourage or forbid the practice. However, despite this division, there has become an emerging trend towards allowing questioning, as well as many other trial innovations. Only four states refuse to permit juror questioning and no federal circuit court has prohibited the practice, thus it is possible that an increasing number of judges will realize the benefits and allow the reform in their courts. With Arizona serving as an example, juror questioning may be a jury reform that blossoms even further in the near future.