

QUESTIONS FROM THE BOX: JURY QUESTIONING AND THE ADVERSARIAL SYSTEM

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For all the power society invests in juries, it is curious that we are generally disinclined to listen to what they actually have to say until they are ready to return a verdict. Although interrogation of jurors can occur during *voir dire*, the practice of allowing jurors to ask questions of witnesses still represents a departure from typical conceptions of the jury's role in the American justice system. However, jury questioning¹ is certainly not a new phenomenon, and the practice has become more widespread in the last twenty-five years. Jury questioning is permitted in most state and federal courts, but its usage varies considerably among different courts in various jurisdictions. The scope of this paper does not explicitly address differences in practice between civil and criminal trials. While I believe that jury questioning is desirable in both, its implementation should differ in response to the greater emphasis on the protection of rights in criminal trials and the greater emphasis on reasonable resolution in civil matters.

This paper will examine jury questioning in four parts. Part I outlines the historical development of jury questioning and compares various implementations, as well as appellate review thereof. Part II focuses on the Eighth Circuit, as the case law regarding jury questioning in this particular jurisdiction illustrates many aspects of the broader debate. In Parts III and IV, I present a series of guidelines for jury questioning, and then argue that despite the challenges it poses to a strict conception of the adver-

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¹ In the interest of brevity, I have used the phrase "jury questioning" to refer to the questioning of witnesses by jurors (as opposed to the questioning of jurors by judges or lawyers during *voir dire*).

serial system, the use of jury questioning suggests a more realistic conception of the jury's capabilities and responsibilities. Allowing questioning is one way of helping jurors make more informed decisions within the restrictions of the legal system. There is also strong polling support among jurors, judges, and lawyers for the practice (Dann 2004: 4). Yet, perhaps more important is the question of whether jury questioning is in the first place compatible with an adversarial system of justice.

Many countries instead choose an inquisitional system where the fact-finder is also the investigator, charged with determining fact through active investigation. However, a central attribute of the U.S. justice system is that it embraces a dialectic model, in order to seek authoritative truth and ensure fairness through competition between advocates. As proponents of this adversarial system suggest, the jury's role is to serve as a neutral fact-determining body. In some sense, allowing jurors to ask questions departs from narrow conceptions of the adversarial system, which consider the juror to be a passive and mechanical decision-maker. Historical experience, academic research, and common sense, however, all offer evidence that that is not how jurors learn, think, or reach decisions (Berkowitz 3). Indeed, that a practice alters the implementation of the adversarial system is no grounds to reject it automatically; after all, the American justice system accepts other customs (e.g. the judge's prerogative to ask questions of witnesses) that depart from the pure adversarial ideal.

This essay is neither a call for the rejection of the adversarial system altogether nor a defense of the inquisitional model. I simply will argue that allowing jurors to ask questions challenges but ultimately improves upon the function of the adversarial model in the United States. Jury questioning will not seriously undermine jurors' role as neutral fact-determiners, nor will it displace the advocates' central role in the adversarial process. My argument is based on the positive effect of jury questioning with respect to three broad goals of the jury system: ensuring procedural fairness together with the protection of each party's rights, the

jury's truth-finding task, and the civic educational aspect of jury service. In each of these three roles the benefits of allowing jurors to question witnesses outweigh the costs, provided that adequate procedural guidelines are in place. This debate need not be an argument over whether the claims of the litigious parties or the broader interests of society are paramount. Instead, I will argue that a well-designed system of jury questioning can actually further the protection of rights in the trial process.

I. BACKGROUND AND CASE LAW

The role of the jury in the American legal system was largely imported from England. However, the earliest uses of the jury in the English legal system were radically different from modern conceptions. Up until the sixteenth century, English jurors were prominent community members summoned by the king to share what they knew about a case and to serve in an investigatory role. Much the opposite of the modern American jury, these inquisitorial jurors thereby served as witnesses, investigators, and legal advisors. The task of decision-making was left to the Court (Berkowitz 3). As the jury developed a more active role over time, professional lawyers took over most of the functions of the earlier inquisitorial jury, while jurors adopted a silent decision-making role "dependent on others for facts" (Dann 1993: 3).

Generally, American juries have been passive fact-determiners rather than active fact-seekers (Dann 1993: 4). Yet, the practice of jury questioning has persisted in the United States' legal system unto this day (Berkowitz 2). The Third Circuit's 1895 decision in *Schaefer v. St. Louis & Suburban Railway Company* established jury questioning as an accepted means of seeking truth. Later state and federal decisions restricted and discouraged the practice, although few proscribed it altogether (Neff 3). Since the early 1980s, jury questioning has been revived and, in 1989, judges in thirty-six states agreed to implement the practice in order to study its effects on civil and criminal trials (Hans 1).

Judicial reviews of jury questioning have generally been tol-

erant of the practice, yet many courts do discourage its use. Generally, the courts have held that permitting jurors to ask questions is justified as an acceptable use of judicial discretion. No law or rule permits jury questioning at the federal level, but many proponents claim that Article 611(a) of the Federal Rules of Evidence establishes a sphere of judicial discretion that justifies a court's decision to permit the practice (Neff 8). Article 611(a) states that "the Court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." However, the judicial notes accompanying the rule make no indication as to whether it can be exactly construed as to permit jury questioning (Federal Rules of Evidence Article 611(a)). All federal circuit courts that have reviewed the practice allow jury questioning, though with restrictions (Neff 8).

Of states whose courts have reviewed jury questioning, only Mississippi and Nebraska prohibit it outright, while others have adopted positions ranging from explicit support to reluctant and qualified tolerance (Neff 8). Arizona has a unique policy based on a jury 'bill of rights' which explicitly "guarantee[s] jurors the opportunity to ask questions" and claims that "if proper safeguards are announced and carefully followed, no substantial risks are incurred" by jury questioning (Neff 4).

II. JUDICIAL REVIEW OF JURY QUESTIONING IN THE EIGHTH CIRCUIT

In order to demonstrate some of the practices and controversies surrounding jury questioning, this section focuses on the use and review of the practice in the Eighth Circuit Federal District Courts and Courts of Appeal. There are several reasons for focusing on the Eighth Circuit in particular. First, between 1989 and 1999, the Circuit decided a significant number of cases concerning jury questioning. The progression of these cases demon-

strates many of the arguments both for and against the practice, even though the Eighth Circuit maintains a relatively consistent position throughout. Secondly, these cases involve several different implementations of jury questioning on the trial court level. Finally, it is appropriate to focus on the Eighth Circuit because its stance on jury questioning—not encouraged, but within the discretion of the trial court—is largely consistent with the policy in most U.S. districts (Neff 4). Thus, in the absence of a clear and unified national procedure on the issue, focusing on a representative circuit is the best approach.

The Court of Appeals for the Eighth Circuit first considered jury questioning in its 1989 review of *United States v. Land*. The trial court had instructed jurors that they would be permitted to ask questions to each witness at the conclusion of the lawyers' examinations. Jurors would pose a question aloud, and the judge would instruct the witness whether or not to answer. The defense (the appellant) made no objection at trial to either the use of jury questioning or to any particular question asked. Therefore, as is standard in appellate practice, the Court held that its review was "limited to deciding whether the procedure involved plain errors or defects affecting substantial rights." This "plain error" limitation set a precedent for the Eighth Circuit's review of jury questioning cases: unless an appellant raised a specific objection at trial, the Court would apply a strict standard, which granted trial courts considerable leeway in allowing juror questioning.² Barring such an objection, the Eighth Circuit had consistently limited its review of jury questioning to the issue of whether the trial court's actions could be considered "plain error." The Court held that the implementation of the practice in *Land* did not constitute "plain error," and therefore declined to reverse the decision (*United States v. Land*).

In *Land* as well as subsequent cases, the Eighth Circuit relied

² Although the Court does not say so in *Land*, other cases suggest that the objection to the practice need not be raised immediately, in the presence of the jury, but can be submitted later in the trial (*DeBenedetto v. Goodyear Tire & Rubber Co.*).

heavily on the Fourth Circuit Court of Appeals' 1985 review of jury questioning in *DeBenedetto v. Goodyear Tire & Rubber Co.* In that case, the Fourth Circuit considered an appellant's argument that "since the Federal Rules of Evidence do not explicitly permit this practice, it is ['plain'] error for a trial court to permit it." The Fourth Circuit rejected this argument, holding that trial courts do have the discretion to allow for jury questioning. However, the Court of Appeals suggested that future jurors be required to submit their questions in writing because of the potential for problems with the practice. The Eighth Circuit notes this recommendation in several cases (*United States v. Land*, *United States v. Welliver* 1992, and *United States v. George* 1993) but consistently declines to explicitly forbid oral questioning.

The Eighth Circuit returned to the issue in *United States v. Johnson* 1989. As in *Land*, the trial court had asked jurors if they wanted to ask any questions after the lawyers' examinations of each witness. Jurors posed their questions verbally. Once again, the defense raised no objection to the practice or to any particular question—although the judge disallowed one question because he thought it outside the scope of the witness's knowledge. Reviewing under the standard of "plain error," the Court of Appeals declined to reverse, again holding that jury questioning was within the trial court's discretion. The majority opinion did caution that the Court "express[ed] no opinion on the appearance and propriety of juror questioning in general." In a strongly worded concurring opinion, however, Chief Judge Donald Lay noted that he was bound to concur by the precedent established in *Land*. However, he did have significant reservations about the process of jury questioning, arguing that:

The practice of juror questioning raises an even more basic problem than matters of procedure: the fundamental problem with juror questions lies in the gross distortion of the adversary system and the misconception of the role of the jury as a neutral fact finder in the adversary process. Those who doubt the value of the adversary system or who question its continuance will not object to distor-

tion of the jury's role. However, as long as we adhere to an adversary system of justice, the neutrality and objectivity of the juror must be sacrosanct (*United States v. Johnson* 1989).

Lay quotes passages from the trial transcript that show a considerable degree of informality in the implementation of jury questioning in *Johnson* 1989. This excerpt raises important questions about the use of jury questioning within the adversarial system, especially since the defendant was testifying. A conversational dynamic between the judge, juror, and witness pervades the questioning. For example, at one point when jurors ask for details about a drug deal, the exchange seems to be more of a casual conversation than an on-the-record interrogation:

JUROR #12: Yes, I didn't understand if Mr. Johnson received any kind of money or drugs in exchange for his setting up these people. Was there any kind of money or drugs that he received for doing that, for setting up Detective Inman with Jerry?

THE COURT: All right. That's a good question.

THE WITNESS: No ma'am. They handed me the money, you know, and I got it for them and gave it to them, just like that. I was more or less, you know, kind of doing them a favor because I knew him and I really didn't want to do it from the beginning but I was more or less trying to do him a favor. I told him that.

JUROR #1: They said the money was marked and the serial numbers were taken and if the money was passed from him to the other guy, was the money ever recovered and if they did, who had it?

THE COURT: Well, this witness wouldn't know that. You don't know that, do you?

THE WITNESS: No, sir.

JUROR #7: I was curious why somebody would get involved in a drug deal like that and supposedly not get any monetary gain out of it, knowing that if they were

apprehended what could happen.

THE COURT: Okay. Can you answer that?

THE WITNESS: Well, the first two times they got something, you know, he brought it over, you know, and like I say, he was a friend but Jerry had said, you know, maybe he would give me something if they got the pound but like I say, they don't always, you know, tell the truth, so I didn't know for sure on that.

THE COURT: Jerry said he would do what?

THE WITNESS: He said maybe he would give me something, you know, if they got the pound, if that went through.

THE COURT: All right.

JUROR #12: When he says "some" does he mean drugs or does he mean money?

THE COURT: Yeah. Do you mean that he would give you some drugs or some money?

THE WITNESS: Money, Your Honor (*United States v. Johnson 1989*).

This implementation of jury questioning is troubling. Clearly, the conversational nature of the interrogation leaves no opportunity for the defense to object to a question without the objection being readily apparent to the jury. Especially since it was the defendant on the witness stand, such an objection might be seen as a way of dodging an incriminating question and trying to hide the truth. Although the decision to object to another lawyer's question is always tempered by the concern that the jury will resent the withholding of information, that risk is undoubtedly amplified when a juror is the one asking the question. Without the chance to object silently, a lawyer must choose between allowing otherwise inadmissible testimony to be introduced (and also losing the right to appeal that decision except under "plain error") on one hand and risking offending a juror by challenging his or her question on the other. However, so long as the parties have an opportunity to object without the jurors knowing (a sidebar

conference seems to be the most expedient option) the judge can ‘take the blame’ for any rejected question, and can offer an explanation as to why it was inadmissible or otherwise unacceptable. Interestingly, the Federal Rules of Evidence require that lawyers be allowed to object to questions asked by the Court at the first available opportunity when the jury is not present; but, the Eighth Circuit does not require a similar opportunity for questions asked by the jury directly, nor does it construe the Rules to require this for questions asked by a judge when acting as a proxy for a juror (Federal Rules of Evidence Article 614(c)). While the above transcript makes clear the need for structural limitations to jury questioning in order to ensure procedural fairness, the Eighth Circuit is unwilling to go far enough in making such a requirement.

The Court took up the issue again in *United States v. Johnson* 1990.³ In this case, however, there were two additional considerations. First, because the defense objected to some of the jurors’ questions, the Court “examined the record to determine if the district court abused its discretion,” a more demanding review than the “plain error” standard. Second, jury questioning was implemented differently at trial. Although the questions were posed verbally to the judge, lawyers were given an opportunity to object at a sidebar conference, out of earshot of the jury.⁴

Throughout these cases, the Court frequently returned to the question of whether jury questioning unduly interfered with the adversarial system. In *United States v. Gray* 1990, the Eighth Circuit considered another appeal of the issue, focusing on questions of judicial discretion and the compatibility of jury questioning with the adversarial system. The Court noted that “some trial judges in this circuit have been permitting jurors to ask questions for many years. Only recently has the practice come under fire to the extent that it has generated appeals to this court” (*United States v. Gray*). The most notable aspect of this decision is the

³ The 1990 *Johnson* case is unrelated to the 1989 *Johnson* case.

⁴ However, the Eighth Circuit again did not require that such an opportunity be provided in future trials.

Court's discussion of the relationship between judicial discretion and the adversarial system. In contrast to Chief Judge Lay's opinion in *United States v. Johnson* 1989, the *United States v. Gray* decision incorporates a conception of the trial more focused on 'truth' than 'conflict':

A trial is a search for truth, subject to the burdens of proof imposed upon the parties and the requirements prescribed by the Constitution and the law. Trial judges must have substantial latitude in overseeing this search and they should be reversed on matters of trial procedure only when prejudice to one party or the other affects the outcome of the litigation (*United States v. Gray*).

The Eighth Circuit is careful to note that while the Court "do[es] not suggest" that jurors be permitted to ask questions—even without the "plain error" limitation—there are still no grounds for interfering with the trial court's discretion. In a similar case, the Court held that "neither the defendant nor his counsel was placed in a direct adversarial role with respect to the jury [because] the procedures of the trial court were more formal than those in *DeBenedetto*, and we believe that they effectively insulated the jury from the parties" (*United States v. George* 1993). Although the opinion correctly recognizes the importance of proper procedural safeguards, it does not outline specific requirements for future cases. The Court addressed the issue again in 1993, 1995, and 1999; in each case it repeated the suggestion that written questions be used so that the content of rejected inquires was not disclosed to other jurors (*United States v. Groene*; *United States v. Bascope-Zurita* 1995; *United States v. Brockman* 1999). Even though the Eighth Circuit noted its concern in each of the eleven cases in which it considered the practice of jury questioning, the justices were never willing to adopt a bright-line rule requiring defined procedural safeguards.

Although I argue that jury questioning is generally advantageous, its unregulated use carries with it many risks—inadmissible questions are particularly worrisome, as they may unduly influence the jury. Yet, strict and clear governance of jury ques-

tioning can go a long way toward reducing the possible impact of these risks. Although a strictly adversarial system is inherently incompatible with jury questioning, the Eighth Circuit was correct in *George* that careful implementation of the practice can minimize the conflict.

III. PROPOSED GUIDELINES FOR JURY QUESTIONING

At this point it is helpful to separate the normative discussion surrounding jury questioning—whether jurors should ever be allowed to question witnesses—from the more pragmatic aspects of the debate—whether a defined set of procedural limitations could ensure that the benefits of jury questioning outweigh its potential risks. To this end, I propose a set of guidelines for jury questioning. These suggestions are based on rules established by the Supreme Court of Arizona, as well as appellate review in the Fourth and Eighth Circuits (Arizona Proposal 4). However, I offer more specific and detailed guidelines than are found in the Arizona proposal: the process I have outlined continues to afford the trial court considerable discretion over the admittance of questions, but it constrains the scope of discretionary authority with respect to how questioning may occur. It is my hope that these limits would reduce appellate issues by making the jury questioning process more concrete while ensuring that the protections for involved parties are both sufficient and non-discretionary.

1. Before opening statements, jurors should be instructed that at the end of each direct or cross examination, they may submit to the Court a written question for the witness if they think it important to do so. At the Court's discretion, jurors may be allowed to ask for clarification of concepts they do not understand at any point during the testimony of expert witnesses in complex or confusing matters.
2. Jurors should be informed that some questions will

not be permissible, and that the judge will not allow such questions to be asked. Jurors should be reminded that such a refusal does not imply that their question was bad or unintelligent, but that it cannot be allowed for technical reasons. They should be advised not to draw any conclusions from the Court's refusal to ask a particular question. They should also not try to guess which party, if any, might have raised an objection.

3. Jurors should be reminded that they must submit their questions to the judge and may not ask them to the witness directly. Questions must be submitted in writing, and must not be shared with other jurors. Upon receipt of a written question, the Court should either reject the question or confer with counsel in a sidebar discussion out of the jury's hearing, and if necessary continue the discussion in chambers. Either side should have the opportunity to object to or suggest modification of the question without the risk of offending a juror by objecting to his or her question. Any objections must be noted on the record, but they must not be made known to the jury. After hearing objections, the Court will either reject the question or pose it to the witness.

4. Both sides must be allowed to reexamine the witness after the jury's question(s) are asked, but this examination should be strictly limited to the scope of the jury's question(s).

IV. JURY QUESTIONING, FAIRNESS, AND THE ADVERSARIAL SYSTEM

As the Eighth Circuit's review suggests, one of the most important objections to jury questioning is that it will pervert the adversarial system by giving jurors an active adversarial role rather than just a passive fact-finding role. This objection is outlined by

the appellant in *United States v. George* 1993: "...the practice of juror questioning distorts the posture of the jury from that of an impartial observer into that of an adversary [...] such a role is in direct conflict with the standard instruction to the jury that it is to form no opinions until all evidence has been presented."

Indeed, allowing the jury a more active role can conflict with the 'fight model' of adversarial justice, in which the involved parties' conflicting arguments are used to divine the truth (Strier 3). Yet, the 'fight model' does, perhaps, oversimplify trial dynamics, thereby precluding any role for jury questioning in the courtroom. Procedural safeguards such as those outlined above can reduce conflict with the adversarial model. Most of all, the reality that jury questioning does challenge the adversarial system should not be grounds to reject it forthright. We must consider the adversarial model as a means and evaluate what effect jury questioning has on the model's ability to achieve its ends. I will focus on three goals in particular: juror education, truth finding, and the protection of procedural fairness and individual rights.

One function of the American jury system is to educate those who serve. Alexis de Tocqueville is perhaps the best known advocate of this position, arguing that jury service is a school for civic education and that those who serve get as much— if not more— out of the experience than do those whom they serve. He suggests that "it would narrow one's thought singularly to limit oneself to viewing the jury as a judicial institution; for, if it exerts a great influence on the fate of cases, it exists a much greater one still on the very destinies of society" (Tocqueville 262-263). Yet, should the defendant in a criminal trial, with money, freedom and perhaps even life at stake, be forced to accept a juridical system primarily designed to teach the citizenry about its civic duties? One would think that courts, judges, and juries should be more concerned with protecting the defendant's rights.

This line of reasoning ignores, however, the significant extent to which these goals can and must coexist. Jurors are certain to learn something about the justice system through their service, and society has an interest in ensuring that the lessons jurors take

away from their court experiences are useful and consistent with the task jurors are meant to perform. Moreover, the interests of society and the involved parties are better served if those who sit in judgment have a better understanding of their task before they must reach a verdict.

Most importantly, jury questioning promotes juror education by increasing jurors' engagement and satisfaction with the trial process (Dann 2004: 4). Jurors who are allowed to ask questions feel more involved as decision makers and more confident in the decisions they make (Berkowitz 9). Moreover, the process of drafting and submitting questions helps jurors gain a better understanding of judicial process and rules of evidence, especially if judges are careful to offer clear explanations of the reasons for their ruling certain questions inadmissible.

If the only advantage of jury questioning were that it increased juror satisfaction, it would be difficult to argue that the benefits of the practice outweigh its risks. However, what we now know about how people learn and process information would indicate that a more pragmatic jury system might also help optimize or improve juries' truth-determining capabilities. Judge Michael Dann, an active proponent of jury questioning, draws a distinction between the traditional legalistic model of juror behavior and a more realistic, modern conception thereof. The traditionalist perspective views the juror as a passive participant, an observer of the process with perfect recall faculties, capable of suspending judgment until all evidence is heard. A modern conception of the jury recognizes that its decision-making process is more complicated and far less structured; jurors are able to learn better when they are actively engaged in courtroom dialogue, and the consequent higher levels of engagement lead to more competent and insightful jury verdicts (Dann 1993: 7).

Increased courtroom dialogue may come at a cost, though. The more involved the jury, the more likely it is that one juror's questions will affect the other jurors' impartiality. Corollary to this line of reasoning is the fear that jury questioning will lead to 'premature deliberations' conducted during the trial (Neff 14).

However, these fears are largely unfounded: it would be unrealistic to assume that traditional juries will not begin to deliberate or even discuss the case amongst themselves until they are given permission to do so. Instead, it is clear that the process of reaching a decision is far less regimented. Second, it is naïve to expect that a group of people will remain in close quarters—without a considerable measure of privacy—for weeks and even months without discussing the task to which they have been assigned, a task which likely forms their only shared experience. As Dann argues, jurors are not ‘blank slates;’ rather they make evaluative determinations during the presentation of evidence. Thus, deliberation occurs throughout the trial (Dann 2004: 2).

It is important that jurors remain receptive to additional information as they digest the testimony of each witness. If a particular juror decides to ‘play lawyer’ by asking questions in an attempt to help one party, receptivity to new information might be challenged. However, even without jury questioning, a juror could well adopt such a role in the context of deliberations. At least by allowing the juror to play his or her ‘game’ aloud, the judge and the parties have an opportunity to identify, document, and address the issue. Moreover, ‘early deliberations’ aid the truth-seeking role of the jury by improving understanding of the evidence and taking advantage of the group knowledge base, as well as by exposing individual assumptions and biases to the group (in the case of early internal deliberation) or the Court (in the case of jury questioning) (Dann 1993: 14).

People learn better from two-way communications than from a one-way flow of information. They convey meaning much more rapidly and accurately when their interactions respond to one another’s verbal and non-verbal signals (Berkowitz 2). Indeed, a major aspect of the thriving trial-consulting industry is the attempt to divine jurors’ responses to testimony and arguments based on non-verbal communications. But this process is indirect and inefficient at best. Jury questioning can serve lawyers’ interests by ensuring that jurors understand the testimony being presented. In some cases jurors are asked to understand and apply re-

markably complicated scientific testimony. Few laypeople could be expected to understand such material if forced to learn it in an environment where they are forbidden from communicating their progress to those conveying the information. The situation is analogous to teaching students in a classroom without allowing questioning. Allowing jurors to ask questions improves the situation both through the direct flow of information (responses to their questions) as well as the content of the questions themselves, which allows witnesses and lawyers to readdress areas of confusion or misunderstanding. Even though 'pure' interactive communication may be impossible within the scope of the American justice system, jury questioning is a way of reaping some of its benefits.

Jury questioning can also serve the interests of procedural fairness for all parties, and can help protect each party's rights. For example, it can help judges to address legal and procedural misunderstandings, which might lead to juror misconduct. Likewise, it can help lawyers identify areas of factual misunderstanding. Judges already try to identify misunderstandings and misconduct, but the information on which they must rely is often second-hand, speculative, or unclear. By allowing jurors to ask questions, judges can recognize which areas of law the jurors do not understand. It may well be that judges and lawyers can learn as much from the questions as the jurors do from the answers.

Another way in which jury questioning can help ensure procedural fairness is by providing an opportunity for judges to explain and justify the omission of information. When a juror asks a question about an inadmissible topic, the judge can use the opportunity to explain why the issue cannot be raised in court and why it is important for jurors to prevent it from influencing their deliberations. On the other hand, if jurors are not allowed to ask questions, a juror who is curious about an inadmissible topic might well allow that concern to affect deliberations, not knowing or understanding why it is inappropriate to do so. One might object that asking a question about an inadmissible topic simply shares the issue with other jurors. However, written questions

can be reviewed without revealing their content to other jurors, and the judge's explanation of the inadmissibility of the question can be phrased in general terms so as not to share the particular contents. Moreover, if a juror is fixated on a single topic, he or she is quite likely to share the concern with other jurors during deliberations anyway.

Acknowledging the questions and concerns of jurors under the jury questioning system is consistent with the goal of making our conception of the jury system more realistic. Instead of depending on the jurors' dubious ability to consider only the evidence, which is introduced in court and simply not think about anything else which might seem relevant, why not take advantage of an opportunity to explain why certain topics must be left out? In a study on the use of jury behavior in several states, Valerie Hans analyzed the issue of insurance coverage in civil trials, information about which is not admitted in most cases in hopes that the jury will not consider the issue of insurance when determining liability. She found that because "jurors, like the rest of us, take an active approach to the decision-making task [...] the traditional blindfolding approach cannot succeed" and instead it is more effective to provide a clear explanation of why the issue of insurance cannot be part of the jury's considerations (Hans 6). Similarly, in a study of how jurors set damages in response to treble damage rules, Shari Diamond and Jonathan D. Casper found that "consistent with a picture of the jury as active rather than passive, jurors are more likely to follow judicial instructions when they are given explanations rather than bald admonitions" (1). Jury questioning is thus useful in providing both an indication of interest in inadmissible material as well as a chance to explain why it is inadmissible. Certainly there is some risk of 'poisoning' other jurors, but it is unreasonable to think that such contamination would not otherwise happen during deliberations. Jury questioning represents an opportunity to confront dangerous issues, rather than letting them simmer in the minds of silent jurors.

Asking judges to explain and justify decisions does entail

certain risks. Some judges already silence themselves to avoid being overturned on appeal, and inevitably some judges who do instruct will make mistakes. However, these problems can be mitigated to a considerable degree by encouraging judges to keep their explanations concise and by providing training for judges on how best to communicate such information. Ultimately, if the system trusts judges to make decisions on difficult issues, it has reason to expect them to be able to give fair explanation of their decisions. Furthermore, this process could also serve to identify judicial errors and misunderstandings.

Society frequently demands that jurors evaluate incredibly complicated issues; if we trust lay-people to reach decisions on these complex matters, why do we not trust them enough to allow them to ask questions during the learning process? As Dann puts it, “jurors are rarely brilliant and rarely stupid, but they are treated as both at once” (1993: 1). Does society think that jurors are so smart so as to have no need to ask questions, or too stupid to ask good questions and process the response in an appropriate way?

Indeed, the justice system asks jurors to do a great deal. Therefore, it must not hamstring them with unrealistic limitations. Rather, it should give jurors the tools they need to make good decisions. Concerns about the influence of jury questioning on the adversarial process are important to consider, but so is the reliance of the modern adversarial process on an effective and engaged jury. Defenders of the adversarial ideal argue that jury questioning endangers the impartiality of the jury by turning its members into active courtroom participants.

However, if the information elicited by jury questioning helps the jury in its capacity as a fact-finder, then it is hard to object to its introduction while still asking jurors to determine these facts later; is it the jury’s job to pursue truth or not? The adversarial process is, after all, a means to determine facts and mete out justice. If jury questioning helps reach these ends, the objection that the practice interferes with the adversarial system takes a ‘means justify the ends’ argument to a bizarre extreme.

A related objection to jury questioning is that it interferes with each party's prerogative to select which information to include in its arguments: jurors' questions might ask about something which moves the presentation in a direction lawyers did not want to go. After all, lawyers may, for strategic reasons, leave certain information out of their case presentations. Is it problematic that jury questioning might force unwanted information disclosure? If the information which is elicited is true, or aids the jury in determining truth, then the benefit to the 'ends' of truth-determination outweighs the harm to the 'means' of a (narrowly-conceived) adversarial process. If the information is untrue, unhelpful, or misleading, both parties surely have ample opportunity to rebut it. Moreover, the involved parties might be left better off by such a situation. The jury's questions offer the litigants a chance to address what would normally be concealed, lingering doubts about their case presentation. This is another situation where a two-way communication process helps not only the jurors but the parties as well.

Ultimately, jury questioning could not gravely damage the adversarial system. The adversarial ideal does not include the right of parties to *exclude* information (other than that which is legally inadmissible) when opponents want to introduce it. Each side can offer information which challenges the other's case, and its opponent can respond with rebuttal evidence. After all, it is through this dialectical model that the adversarial system seeks to determine truth. As long as each party is given a chance to make a counterargument, information introduced by jury questions can hardly be that different. Might jurors grant more credibility to evidence which is introduced as a result of their own inquiries? Possibly, but the alternative is not introducing the evidence at all, and anyone who trusts the jury enough to believe in the adversarial system should be able to take comfort in jurors' abilities to weigh various claims well enough to achieve their task.

CONCLUSIONS

As with any reform, there are risks inherent in jury questioning, some of which cannot be predicted without observing its use in practice. Even so, experimenting with such changes is part of a long tradition in the American justice system. To forbid experimentation is to forgo the advantages of new procedures; as Justice Brandeis wrote, “denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country” (*New State Ice Co. v. Liebmann*).

The debate over jury questioning is part of a larger movement to reform the jury system based on modern research in the social sciences. Similar proposals include allowing jurors to take notes (already allowed in most jurisdictions), allowing jurors to ask the judge to help them resolve deadlocked deliberations, and allowing jurors to discuss the case during breaks in the trial (Dann 1994: 1). Practices designed to help a jury do its difficult job more effectively offer a reply to those like Justice James D. Heiple of the Illinois Supreme Court who complain that “jurors are getting dumber every year” (Dann et al. 5). There is no reason to believe that jurors are getting dumber, but there is every reason to believe that their task is becoming more difficult. It is essential, therefore, that they be given the tools to do their job well. Citizen jurors are not asked to serve as lawyers or machines, but as human beings. Our jury system should thus respect the nature of their task and allow them to function as such.

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