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Answering Jurors' Questions: Next Steps in Illinois (2010) (symposium)

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INTRODUCTION

Sometimes jurors have questions that they would like to ask a witness after the witness has testified but before the witness has stepped down from the witness stand. In some states,¹ jurors who have a question can write it down and submit it unsigned to the bailiff. The bailiff gives the jurors' questions to the judge, and the judge, after hearing whether the lawyers have any objections, decides whether the questions can be asked of the witness. If the questions can be asked, then the judge asks them; if the questions cannot be asked, then the judge explains to the jury that they cannot be asked. However, the practice of permitting jurors to ask questions is not universal. In some states, such as Illinois, the jurors do not, for the most part,² have this opportunity.

Jurors benefit from the opportunity to ask questions, and lawyers and judges who actually have experience with juror questions usually support the practice. The challenge, then, is how to convince judges and lawyers who do not have experience with this practice to overcome their initial resistance and to agree to permit juror questions in the courtroom, even if only on a short-term, experimental basis so that they gain experience with the practice.

Judges and lawyers raise a number of concerns about juror questions.

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1. See Eugene A. Lucci, *The Case for Allowing Jurors To Submit Written Questions*, 89 JUDICATURE 16, 16 (2005) ("At least 30 states and the District of Columbia permit jurors to question witnesses. . . . Every federal circuit that has addressed the issue of juror questioning of witnesses agrees that it is a practice that should be left entirely within the court's discretion."); Bruce Pfaff, John L. Stalmack & Nancy S. Marder, *The Right to Submit Questions to Witnesses*, CBA REC., May 2009, at 36, 39 (providing a survey of state court decisions and federal courts of appeals decisions indicating jurisdictions that permit juror questions).

2. Occasionally Illinois judges have allowed jurors to submit written questions for witnesses. See, e.g., Hon. Warren D. Wolfson, *An Experiment in Juror Interrogation of Witnesses*, CBA REC., Feb. 1987, at 12 (describing six cases in which Judge Wolfson allowed juror questions based on the type of case and after having obtained the consent of the lawyers).

For example, judges worry that it will lengthen the trial,³ and lawyers fear that it will lessen their control over the case.⁴ These and other concerns can be addressed, and it is my intention to do so in this Article. However, judges and lawyers need to consider not only how juror questions will affect their own roles in the courtroom, but also how juror questions will affect jurors' roles.

The next step, then, is for judges and lawyers to view the practice from the perspective of the jurors—they need to take a “jury-centric” approach. In doing so, they will see that the practice provides jurors with many benefits, from clearing up juror confusion at the time it arises to helping jurors pay attention and remain engaged in the trial process. Judges and lawyers might still have lingering doubts, but my hope is that they will put them aside when they recognize the benefits to jurors.

Finally, judges and lawyers need to look at the experience of states and circuits that have permitted this practice and to see that it has worked well in these jurisdictions. Many states allow jurors to ask questions of witnesses and have not encountered the problems envisaged by judges and lawyers who resist the practice. Some states that have not yet adopted the practice of juror questions have experimented with pilot programs and these programs have met with success. The Seventh Circuit pilot program is one such example.⁵ If the Illinois judiciary were to conduct a pilot program for Illinois judges it would give them an opportunity to see how juror questions actually work in the courtroom, and it could provide the impetus for a statewide change.

Toward this end, Part I of this Article will describe the ways in which juror questions serve as an aid to juror comprehension and the ways in which the procedures for asking such questions provide appropriate safeguards and constraints. Part II will identify the concerns that judges and lawyers have with respect to juror questions, and will address these concerns. Part III will offer a jury-centric approach to the problem and examine the benefits that will inure to jurors if they can ask their questions. Part IV will describe the experiences of other states that permit juror questions. Finally, Part V will propose next steps in Illinois.

3. See *infra* Part II.A.

4. See *infra* Part II.B.

5. See Am. Jury Project Comm'n, Seventh Circuit Bar Ass'n, Seventh Circuit American Jury Project Final Report 60–62 (Sept. 2008), available at <http://www.7thcircuitbar.org/associations/1507/files/7th%20Circuit%20American%20Jury%20Project%20Final%20Report.pdf>.

I. JUROR QUESTIONS AS AN AID TO JUROR COMPREHENSION

A. *The Problem*

It is important that jurors understand what is going on during the trial. States have recognized the importance of juror comprehension in a number of ways: providing jurors with preliminary instructions,⁶ rewriting jury instructions into plain English,⁷ and allowing jurors to take an individual written copy of the instructions into the jury room to assist them during their deliberations.⁸ Some states, such as Arizona⁹ and New York,¹⁰ have taken a holistic approach to jury reform and have looked at a variety of ways to help jurors perform their role more effectively. Permitting jurors to submit written questions to witnesses is just one tool, albeit an important one, available to courts to ensure that jurors understand what they see and hear during the trial.

Foremost, jurors need to be able to ask questions of witnesses so that they are not confused about witness' testimony. Their confusion can be basic. For example, they might not have heard or understood a key

6. See, e.g., B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 281 (1996) (describing some of Arizona's reforms to its jury system, including giving jurors preliminary jury instructions).

7. See, e.g., James D. Ward, *Jury Practice: The New Civil Jury Instructions*, CAL. LAW., Feb. 2004, at 38, 38 (describing the rewriting of California's jury instructions into plain language as "the most comprehensive revision of jury instructions in California history"); Leonard Post, *Spelling It Out in Plain English*, NAT'L L.J., Nov. 8, 2004, at 1, 19 ("California stands alone, at least for now, as the only state to have written new criminal and civil instructions from scratch.").

8. See, e.g., Jacqueline Connor, *Jurors Need To Have Their Own Copies of Instructions*, L.A. DAILY J., Feb. 25, 2004, at 7 (describing the innovation of giving jurors their own individual copy of the written instructions as "wildly successful" and as "an inexpensive, effective way to virtually guarantee juror understanding of the law"). The Illinois Supreme Court Rules Committee recently made a rule change, which became effective as of September 1, 2009, that requires judges to give jurors in civil cases their own individual copy of the written final instructions so that they can read them as the judge presents them aloud and then take their copies with them into the jury room as an aid during their deliberations. See ILL. SUP. CT. R. 239.

9. See, e.g., William H. Carlile, *Arizona Jury Reforms Buck Legal Traditions*, CHRISTIAN SCI. MONITOR, Feb. 22, 1996, at 1 (reporting that Arizona adopted eighteen of the jury reform panel's fifty-five recommendations); The Ariz. Supreme Court Comm. on More Effective Use of Juries, *Jurors: The Power of 12* (1994) (including a list of recommendations and a proposed bill of rights for jurors).

10. Chief Judge Judith Kaye sought and achieved "an overhaul of the jury system" in New York. Richard Pérez-Peña, *Judge Names Panel To Study Life on Juries*, N.Y. TIMES, Sept. 14, 1993, at B2. Many of the reforms focused on improving basic conditions for jurors, such as improving the facilities, see Jan Hoffman, *Favorable Verdict for Jury Changes; Lawyers Are Unhappy*, N.Y. TIMES, Apr. 12, 1995, at B1, and eliminating mandatory sequestration in felony criminal trials. See Somini Sengupta, *New Law Releases Juries in New York from Sequestering*, N.Y. TIMES, May 31, 2001, at A1.

word that a witness used.¹¹ Or, they might not have understood an ordinary word that was used in a legal sense.¹² Their confusion also could be the result of a failure on the part of a witness or lawyer to make a point clearly.¹³ Whatever the cause for their confusion, jurors need to resolve it right away rather than struggle throughout the trial feeling lost because they missed key terms or concepts.

Jurors also might have questions about procedures that were followed, but not explained fully, by expert witnesses. Jurors are, after all, laypersons; they do not necessarily have expertise in law enforcement or medical procedures, for example, and witnesses who testify can forget that they are addressing laypersons and not fellow experts.¹⁴

Furthermore, jurors might have questions about facts that they think are important but that were not raised during the questioning of the witness.¹⁵ Sometimes these factual questions might be irrelevant, but other times they could be key. The judge can act as a gatekeeper, making sure that the jurors' relevant questions are asked. After all, if the jurors have a question about the facts and no opportunity to ask it, that leaves them with no recourse but to speculate as to an answer during their deliberations.

Jurors need to understand the witness' testimony, and one way for courts to assist them in that task is to permit them to ask questions. Currently, judges ask questions of witnesses if they need clarification or follow-up on a point. In a jury trial, the jury is the body that renders a verdict, and thus, it is critical that the jury, no less than the judge, understands the witness' testimony. In some ways, the situation of

11. See, e.g., Lucci, *supra* note 1, at 17–18 (“Juror questioning of witnesses is especially helpful . . . when jurors misunderstand the words used by the attorney or witness, or fail to hear a word . . .”).

12. See, e.g., 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, 1118–19 (2003) (“Another juror questioned the testimony of a witness that included a legal term: ‘What did you mean by ‘he was never served with the decision from Washington, DC?’ And how do you know that?’”).

13. See, e.g., Lucci, *supra* note 1, at 17 (“[M]ost questions seek clarification of testimony regarding topics that have already been touched upon by the witness, including testimony not heard or which was vague or ambiguous.”); Wolfson, *supra* note 2, at 16 (“In just about every instance the juror was right [to ask a question]. The lawyer had not taken the time to make the point clearly.”).

14. See, e.g., Mott, *supra* note 12, at 1115–16 (“The practices of the law enforcement profession were also unknown to many jurors. For example one juror asked: ‘How are the heat sealed bags sealed? Does the officer close the bag immediately after placing items in the bag or does time [e]lapse between the time the bag is filled and when it is sealed?’”).

15. See, e.g., Wolfson, *supra* note 2, at 14–15 (“The [jurors’] questions made sense and should have been covered by the lawyers.”).

jurors in a courtroom resembles that of students in a classroom.¹⁶ The teacher can try to anticipate students' confusion and to explain an issue as clearly and as precisely as possible, but it is only when students are able to ask their questions that the teacher can see how best to clear up their confusion or misunderstanding.

B. The Practice

Unlike students in the classroom, however, jurors in the courtroom should not be able to raise their hand and ask a question whenever they are confused; such a practice would be far too disruptive and potentially prejudicial. In courts that permit juror questions, the procedure that is typically followed has a number of constraints and safeguards in place. Although there are some variations in practices, there are also some common features. For example, at the beginning of the trial, the judge explains to the jurors that they will have the opportunity to submit written questions for a witness but that they need to follow the appropriate procedure. In a typical instruction, the judge explains that if the jurors have a question, they should write it down on a piece of paper, without including their name or juror number, and give it to the bailiff during a recess or when the judge indicates that the witness is ready to step down from the witness stand.¹⁷ One judge had the jury return to the jury room for a few minutes at the close of each witness' testimony, but before the witness stepped down, so that jurors could write down their questions, if they had any, and submit them to the deputy.¹⁸ That same judge also told jurors not to discuss their questions with each other and not to feel that they had to have questions.¹⁹ Another judge even told jurors that they were "not to reveal any unasked question to the other jurors."²⁰ In a typical instruction, the judge also explains to the jurors that their questions might not be

16. A short film, produced by the Institute of the International Association of Defense Counsel (IADC) Foundation, illustrates what would happen if students were asked to learn in the same way that jurors are. *See* Videotape: Order in the Classroom (Institute of the IADC Foundation 1998). In this film, students are told that their course will be conducted according to certain rules, which happen to be the rules of the jury. For example, students are told that they cannot take notes, ask questions, or even know the subject-matter of the course until it is over. Meanwhile, they must reach a group decision and their entire grade will be based on it. Their looks of incredulity and irritation suggest how jurors must feel when told that they must decide a case that will affect the parties' lives and they cannot even ask questions if they have any.

17. *See* JURY TRIAL INNOVATIONS 260 (G. Thomas Munsterman, Paula L. Hannaford & G. Marc Whitehead eds., 1997) (providing a sample instruction entitled "Questions by Jurors").

18. Wolfson, *supra* note 2, at 14 (providing Judge Wolfson's instruction to the jury explaining the procedure in his courtroom for jurors to ask questions of the witness).

19. *Id.*

20. Lucci, *supra* note 1, at 17.

answered for legal reasons and that they should not take it personally.²¹

After the jurors have submitted their questions, the judge acts as a gatekeeper as to which questions will be asked of the witness. One judge recounted that, with the jury still in the jury room, he read the jurors' questions aloud so that the questions became part of the record; he heard the lawyers' objections to the questions; and he ruled on the objections, if there were any. Before the jury was brought back to the courtroom, the judge reminded the witness to answer only the question that was actually asked. The jury then returned to the courtroom. The judge read the question posed by the juror to the witness and allowed the witness to respond and gave the lawyers a chance to ask follow-up questions limited to the new testimony. At the close of the trial, when the judge delivered his final instructions to the jury, he reiterated that certain questions could not be asked and that the jurors should not let that affect their view of the witness or the evidence.

These procedures provide a number of constraints and safeguards so that when jurors ask questions, they do so in a way that does not disrupt the proceedings or lead to prejudice. The jurors raise their questions in writing, which gives the lawyers an opportunity to object and which gives the judge an opportunity to rule on their objections. Jurors, by having to put their questions in writing, have to think carefully whether they should ask their questions. One judge instructs jurors that they should only ask a question if they "believe the answer would be important to you as a juror in this case."²² Another judge explains to jurors that "questions are not encouraged but are to be sparingly used."²³ In addition, the questions are submitted anonymously so that the lawyers do not know which juror asked which question. This way, the lawyers cannot play to any particular juror based on a question the juror asked. In addition, the jurors do not know which juror submitted which question (other than their own questions) so they cannot compete with each other as to whose question was asked and whose was not. Moreover, the record does not reveal which juror asked which question; rather, the record indicates only the question itself. Thus, the individual

21. JURY TRIAL INNOVATIONS, *supra* note 17, at 260 ("Keep in mind, however, that the rules of evidence or other rules of law may prevent some of your questions from being answered. . . . Do not speculate as to why your question was not asked, if it wasn't. The failure to ask a question is not a reflection on the person asking it."); Lucci, *supra* note 1, at 17 ("[Jurors] should also be told that they are not to draw any inference if their question is not asked, because the rules of evidence and rulings by the judge in the case will limit even the parties' questioning . . ."); Wolfson, *supra* note 2, at 14 ("If your question is not asked, do not be offended and do not let that affect your consideration of the evidence or the witness in any way.").

22. Wolfson, *supra* note 2, at 14.

23. Lucci, *supra* note 1, at 17.

juror's question appears simply as a question from the jury, just as a question raised by a deliberating jury would appear when the judge received a note from the jury and read it into the record. By giving jurors particular junctures at which to submit their questions, the questions do not interrupt the flow of the trial. Finally, the judge usually instructs the jurors at the beginning and the end of the trial that not all questions can be answered and that they should not take it personally. According to one judge's post-trial interviews with jurors, the jurors said that they understood the caveat and did not take it personally when their questions were not asked.²⁴

II. RESISTANCE TO CHANGE AND RESPONSES TO IT

A. Judges' Concerns

One of the main concerns that judges have about juror questions is that they will lengthen the trial. In an age of backlogged dockets and overburdened judges, this is an appropriate concern. Judges worry that having to pause after each witness' testimony to see whether there are juror questions, and if there are questions whether they can even be asked, will lead to longer trials and greater backlogs. One judge succinctly expressed this concern: "These reforms are not going to make trials go faster."²⁵

One way to address this concern is to look at the experience of judges who have actually permitted juror questions and to see how many questions jurors asked and how much time it added to the trials. According to one empirical study, which used data from 130 state-level cases, the average number of questions submitted by jurors per case was sixteen, and the median number of questions per case was seven.²⁶ An earlier pilot program in New Jersey, which was undertaken in 2002 and was based on 127 state cases, found that jurors submitted an average of twenty-one questions per case and a median of nine questions per case,

24. See Wolfson, *supra* note 2, at 16.

25. Patrick S. Pemberton, *Out of the Mouths of Jurors. In Los Angeles They're Letting the Jurors Quiz Witnesses*, CAL. LAW., Nov. 2000, at 18 (quoting L.A. Superior Court Judge Aurelio Muñoz).

26. Mott, *supra* note 12, at 1112–13. This study also found that jurors asked almost twice as many questions in criminal cases as in civil cases. One possible explanation is that jurors knew that so much was at stake in a criminal case. Another possible explanation is that jurors were more familiar with criminal cases through television and movies, but discovered that what they knew from these popular sources compared to what they learned from the trial differed considerably and therefore raised questions in their mind. *Id.* at 1113.

with one case that raised fifty questions.²⁷ According to the New Jersey pilot program, the practice of permitting jurors to ask questions added thirty minutes to the trial.²⁸

Anecdotally, judges who have permitted jurors to ask questions of witnesses report that it has added a little more time to the trial, but not a lot. One judge observed: “Obviously, some time is added, but not much.”²⁹ Another judge noted that juror questions should not be viewed as “delaying” the proceedings any more than attorney objections or sidebar discussions are said to “delay” the proceedings.³⁰ Rather, this judge viewed juror questions as “an integral part of the trial process,” just as requiring counsel to lay a foundation for the admission of an exhibit is an integral part of the trial process.³¹ In his view, juror questions are likely to save time through jurors’ better understanding of the case,³² which may result in shorter deliberations.³³ It may even be that juror questions will lead to fewer hung juries, though there have been no empirical studies that have addressed this question.

Judges also might be concerned about adding a procedure that can form the basis for an appeal. The judge could make a mistake in allowing a question that should not have been asked or in prohibiting a question that should have been asked.

Although this practice could add another basis for appeal, there are several responses that should assuage judges’ concerns. First, trials are not perfect. Parties are entitled to fair trials, not perfect trials, and thus, such errors are reviewed under a “harmless error” standard. Second, according to one trial judge, who at the time had conducted twenty civil trials with juror questions, attorneys did not usually raise objections to the questions.³⁴ Thus, the questions did not form a basis for appeal, at least in his experience.

27. Jury Subcomm., N.J. Sup. Ct. Civ. Prac. Comm., Report on Pilot Project Allowing Juror Questions 3, *available at* <http://www.judiciary.state.nj.us/jurypilot/jurypilot.htm> [hereinafter Report on Pilot Project].

28. *Id.*

29. Wolfson, *supra* note 2, at 16; *see also* *Waking Up Jurors, Shaking Up Courts*, TRIAL, July 1997, at 20, 21 [hereinafter *Waking Up Jurors*] (“The process is minimally disruptive, but it does add several minutes to the trial, depending on how many and what kind of questions are asked.” (quoting then Arizona Superior Court Judge B. Michael Dann)).

30. Lucci, *supra* note 1, at 18.

31. *Id.*

32. *See id.*; *Waking Up Jurors*, *supra* note 29, at 21 (“[T]he effort pays dividends in the form of enhanced juror participation and improved juror comprehension.”).

33. Lucci, *supra* note 1, at 18.

34. Memorandum from Chad C. Schmucker, Questions by Jurors Allowed (Feb. 26, 2003), *available at* <http://www.ncsconline.org> (“I have allowed this procedure [of juror questions] in over twenty (20) civil jury trials and there are usually no objections to the questions.”).

Perhaps most important, the trial judge is committed to the search for truth. Juror questions can aid in that search, so even if there is an added issue for appeal, there is also the added possibility that the jury will reach a just verdict. Through the trial process, the lawyers need to develop the facts and present them in a way that is comprehensible to the jurors. If the lawyers fail to do so, the jury might still arrive at a just verdict, but its chance of doing so is merely "serendipitous."³⁵ To the extent that juror questions aid in the search for truth, the trial judge should want to make this practice available to jurors.³⁶

Underlying judges' concerns might be an unstated, but nonetheless powerful, attachment to tradition and to the traditional view of the juror as a passive observer of the trial. Juror questions threaten this model of the juror as a passive observer. Judges' adherence to tradition has much to commend it. After all, if a practice has served the judicial system well, then why change it? However, the tradition of not permitting juror questions is not as longstanding as today's judges might think.³⁷ Moreover, the view of jurors as passive sponges who can simply absorb information throughout the trial and bring it to mind with perfect recollection and comprehension during deliberations is inconsistent with what educators now know about how people actually learn.³⁸

In England and the United States, jurors were once permitted to question witnesses. It was part of the common-law tradition in England since the eighteenth century,³⁹ and in America since the late 1800s;⁴⁰ it has also been part of American federal court practice since 1954.⁴¹ Juror questions were once known as "juror outbursts" because jurors were not constrained as to when and where they asked their questions.⁴²

35. Lucci, *supra* note 1, at 19.

36. Pemberton, *supra* note 25, at 18 ("A trial is not about strategy, [Superior Court] Judge [Jacqueline] Connor argues. It's a pursuit of justice. And giving jurors the opportunity to ask questions can avoid confusion and speculation.").

37. See *infra* notes 39–45 and accompanying text.

38. See *infra* notes 46–48 and accompanying text.

39. See, e.g., 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373 (Univ. of Chi. Press 1979) (1768) ("Besides the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled . . ."); MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 258 (Fred B. Rothman & Co. 1987) (1st ed. 1713) ("That by this Course of personal and open Examination, there is Opportunity for all Persons concern'd, viz. The Judge, or any of the Jury . . . to propound occasional Questions, which beats and bolts out the Truth . . ."); Lucci, *supra* note 1, at 16.

40. See, e.g., A. Barry Cappello & G. James Strenio, *Juror Questioning: The Verdict Is In*, TRIAL, June 2000, at 44; Lucci, *supra* note 1, at 16.

41. Lucci, *supra* note 1, at 16 (citing *United States v. Witt*, 215 F.2d 580 (2d Cir. 1954)).

42. *Id.* at 16–17.

In several cases dating from the late 1800s and early 1900s,⁴³ including two cases from Illinois,⁴⁴ courts held that such questions were permissible. In 1926, one court started developing formal procedures to govern juror questions, and courts continued to do so in the 1950s and 1960s.⁴⁵

Some judges today approach juror questions as a practice that is counter to the American jury tradition, when in fact, if one goes back beyond the past few decades, it becomes clear that juror questions were part of that tradition. How the practice fell out of favor is a story that still needs to be told. For my purposes, however, it is sufficient to point out that the practice was once part of our jury tradition, and thus judges should not reject it now as counter to that tradition.

Over the past few decades, jurors have been passive observers during the trial, even if they did not always play that role, but the passive observer model is inconsistent with how people actually absorb information. The theory behind the passive observer model was that people could retain information simply by sitting and listening—no matter how complicated or extensive the information was—just like a sponge absorbs water. The view was that when jurors needed the information, they would be able to recall it and understand it. There was a similar theory of memory: Eyewitnesses could simply recall everything they had seen and heard and could describe it in vivid detail, as if they were human “tape-recorders.” This theory of memory,

43. *Schaefer v. St. Louis & Suburban Ry. Co.*, 30 S.W. 331, 333 (Mo. 1895) (“Plaintiff’s counsel objects to the court having asked questions of the various witnesses, and, also, to the fact that one or two of the jurymen also asked questions of the witnesses in their endeavor to properly understand the facts in evidence. We do not see how this could have possibly been prejudicial to the plaintiff”); *see also* *Miller v. Commonwealth*, 222 S.W. 96, 99 (Ky. 1920) (“Any member of the jury has the right, during the examination of a witness, to ask any competent, pertinent question”); *State v. Kendall*, 57 S.E. 340, 341 (N.C. 1907) (“This course [of juror questions] has always been followed without objection . . . in the conduct of trials in our Superior Courts, and there is not only nothing improper in it when done in a seemly manner and with the evident purpose of discovering the truth, but a juror may, and often does, ask a very pertinent and helpful question in furtherance of the investigation.”).

44. *Chi. Hansom Cab Co. v. Havelick*, 22 N.E. 797, 797 (Ill. 1889) (“Complaint is made of the conduct of the court in asking certain questions of witnesses for the defendant, and in permitting certain of the jurors to ask various questions of said witnesses. . . . We have examined the matters thus objected to . . . and fail to find anything of which the defendant can have just cause of complaint.”); *Chi., Milwaukee & St. Paul R.R. Co. v. Krueger*, 23 Ill. App. 639, 643 (App. Ct. 1887) (“While the conduct of the juror may have been improper, the defendant can not now, after allowing the trial to proceed without objection after the bias of the jurymen, if any existed, had become manifest, take advantage of such misconduct.”).

45. *See, e.g.,* Sarah E. West, Note, “*The Blindfold on Justice is Not a Gag*”: *The Case for Allowing Controlled Questioning of Witnesses by Jurors*, 38 TULSA L. REV. 529, 534 (2003); Lucci, *supra* note 1, at 17.

however, was discredited over thirty-five years ago.⁴⁶

Educational theory now recognizes that individuals need to be actively engaged in the process of acquiring information. Former Judge Michael Dann was one of the first judges to call for applying theories of education to the jury in order to aid jurors in understanding the information presented at trial.⁴⁷ For jurors, active engagement can take many different forms, from taking notes to asking questions to receiving preliminary jury instructions. The point is that the process of understanding new material is ongoing and involves trying to organize the new material into a coherent whole. Jurors attempt to do this, whether the court encourages the process or not. Researchers recognized this when they observed that jurors tried to fit evidence into a narrative or story that made sense to them.⁴⁸ To the extent that judges give jurors tools that allow them to be actively engaged in understanding the trial, they facilitate the learning process.

B. Lawyers' Concerns

Lawyers have expressed another set of concerns with respect to juror questions. One concern is that if jurors can ask questions of witnesses during the trial then lawyers will not be able to maintain the same level of control over their case that they currently have. In addition, they worry that their carefully-honed trial strategy might be adversely affected by an unanticipated juror question and that if they did not ask the question, there was a reason for the omission. Lawyers want to

46. See, e.g., Robert Buckhout, *Eyewitness Testimony*, SCI. AM., Dec. 1974, at 23, 23 ("Both sides, and usually the witness too, succumb to the fallacy that everything was recorded and can be played back later through questioning. Those of us who have done research in eyewitness identification reject that fallacy.").

47. See B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1241 (1993) ("Relying on the evidence produced by scientific studies and having as their goals better-informed jurors and more accurate verdicts, social scientists, law professors, a few judges, and others . . . all agree on one thing: jurors must be permitted to become more active in the trial."); B. Michael Dann, *From the Bench: Free the Jury*, LITIG., Fall 1996, at 5 ("[T]he traditional passive jury that absorbs evidence and law should be changed to an active jury that participates as a near equal with judge and counsel."); *Waking Up Jurors*, *supra* note 29, at 20 ("The 'passive juror' notion is an antiquated legal model that is neither educational nor democratic. It flies in the face of what we know about human nature to assume that jurors remain mentally passive" (quoting former Arizona Superior Court Judge B. Michael Dann)).

48. See, e.g., Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242, 249, 252-53 (1986) (finding that jurors organize trial evidence into a story framework); Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189, 189 (1992) ("The Story Model is based on the hypothesis that jurors impose a narrative story organization on trial information . . .").

present their case in as scripted a manner as possible and to the extent that juror questions threaten that predictability, lawyers resist the practice of juror questions.

Although juror questions would add another feature to the trial that lawyers cannot control entirely, there are already many aspects of a trial that lawyers cannot control. Admittedly, this would be an additional one, but lawyers' sense of control over the trial process may be more illusory than real.

For example, lawyers question live witnesses, and there is always a chance that witnesses will respond in unanticipated ways. This situation is more likely to arise with hostile witnesses than with one's own witnesses with whom there can be a lot of preparation, but even with one's own witnesses, their word choice or body language on the particular day they testify might differ from what they had rehearsed. The lawyer might or might not be aware of these subtle differences, and even if aware, the lawyer might be unable to correct for them; the problem is that it is a live performance and each performance is unique.⁴⁹

Another practice that undercuts a lawyer's control is a judge's questions to witnesses.⁵⁰ Judges might pose questions to witnesses for many of the same reasons that jurors ask questions. They might have missed a word; they might seek clarification; they might be unfamiliar with an expert's procedures and seek a fuller explanation; or they might ask about a point that they think the lawyer should have brought out in the witness' testimony but failed to do so.⁵¹ Moreover, when judges ask questions, they just interrupt the attorney's examination of the witness. Their timing might well interrupt the flow of the lawyer's questioning, which jurors could not do because they would ask their questions only after the witness has completed his or her testimony. In addition, judges do not give lawyers an opportunity to object to judges' questions before they ask them, as lawyers would be able to do with juror questions. In sum, lawyers are accustomed to a judge's questions, which can interfere with their timing more so than jurors' questions, and over which they exercise even less control than jurors' questions because they are given no opportunity to object before the question is asked.

Another concern that lawyers have expressed is that when jurors ask questions, they might make up their mind about a case too early in the

49. See Lucci, *supra* note 1, at 18 ("[L]ive testimony is inherently unpredictable.").

50. See *id.* ("But the attorneys are not the sole arbiters of the scope and content of testimony. The judge can ask questions.").

51. See *supra* text accompanying notes 11–15 (describing why jurors might have questions).

proceedings. It is unclear why asking a question would lead jurors, any more than judges, to make up their mind too early in the proceedings. According to James F. Holderman, Chief Judge of the U.S. District Court for the Northern District of Illinois, jurors try hard to keep an open mind. From his thirty years as a lawyer and a judge, he has found “that jurors want to be fair and that they will keep an open mind in evaluating the evidence that is presented.”⁵² In addition, there are procedures in place, such as the judge’s instruction to the jurors at the beginning of the proceedings and throughout the trial, to remind jurors to keep an open mind.⁵³ Moreover, it is important that jurors try to understand the information that they hear at trial so that when they go into the jury room they are ready to deliberate and to reach a verdict.⁵⁴

Lawyers are also worried that jurors’ questions will reveal their leanings either intentionally or unintentionally.⁵⁵ Although the language of a juror’s question could be revealing, there are a number of protections built into the procedures. First, the judge can remind jurors that their questions should not be argumentative.⁵⁶ Moreover, were a judge to receive a question that revealed bias or a point of view, the judge could use that as an opportunity to remind jurors of the need to remain impartial.⁵⁷ Second, some judges have modified the language of the question so that it is worded and read by the judge in as neutral a manner as possible.⁵⁸ Third, the questions are submitted anonymously

52. Patricia Manson, *Practice of Allowing Jurors To Ask Questions Is Facing Challenges*, CHI. DAILY L. BULL., Apr. 25, 2009, at 4 (quoting James F. Holderman, Chief Judge of the Northern District of Illinois).

53. For a general caution on the need for jurors to keep an open mind, see ILL. SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN INSTRUCTIONS—CIVIL 8 (2006 ed.) [hereinafter IPI] (“So you are going to have to keep open minds, minds that are objective and free of any misconceptions or bias. You should not make up your minds as to your verdict until you have heard all of the evidence.”).

54. See Lucci, *supra* note 1, at 18.

55. Pemberton, *supra* note 25, at 18 (describing one prosecutor who complained that a question, “as it was phrased, subtly indicated a bias in favor of the defense. . . . And just the knowledge of which direction a juror is leaning can change an attorney’s strategy” (quoting L.A. Deputy District Attorney Craig Hum)).

56. See, e.g., Lucci, *supra* note 1, at 17 (“Questions should not be asked to express views on the case or to argue with a witness.”).

57. See, e.g., Leland Anderson, Practice Tips for Handling Juror Questions 4 (June 2004), available at <http://www.ncsconline.org> (“This is a great opportunity for you to remind the jurors concerning their duties of impartiality.”).

58. Compare *id.* at 2 (“If it’s possible to reformulate questions to make them permissible under the rules of evidence, an effort should be made to do that in the interest of assisting the jurors.”), and A.B.A., PRINCIPLES FOR JURIES & JURY TRIALS 92 (Aug. 2005), available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf (“The court should modify the question to eliminate any objectionable material.”), with Wolfson, *supra* note 2, at 13 (“I ask the question as written by the juror.”).

so lawyers do not know which jurors asked which questions. Finally, while these procedural safeguards should ensure that jurors' questions do not reveal jurors' leanings, jurors' questions do reveal their confusions and misunderstandings, and lawyers should seek to clear these up while there is still time during the trial.

Lawyers have raised other concerns, such as whether jurors whose questions are not answered will feel resentful or whether jurors will use their questions to elevate their status on the jury, but the procedures adopted by most judges address these concerns. As to the first concern, the judge can deflect this potential problem by explaining at the beginning and end of the trial and whenever jurors ask questions that there are legal reasons why some questions cannot be asked and jurors should not take it personally if their questions cannot be asked.⁵⁹ Various studies, including an empirical study,⁶⁰ pilot program,⁶¹ and interviews with jurors after the trial,⁶² suggest that jurors understand this instruction and follow it. In fact when jurors have the opportunity to ask questions, their response is one of gratitude and appreciation.⁶³ As to the second concern, since jurors do not know which of their fellow jurors' questions were asked, they cannot use juror questions as a basis for establishing leadership of the jury.⁶⁴

Perhaps underlying lawyers' concerns is a view, one shared with

59. See *supra* note 21 and accompanying text.

60. See Larry Heurer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256, 259–60 (1996) (finding that in a study of 67 Wisconsin state court trials and in a national study with 71 trials, jurors understood why their questions were not asked and were not angry when this happened).

61. See, e.g., Anderson, *supra* note 57, at 1 (“Jurors do not react negatively when their questions are declined.” (summarizing Colorado Jury Reform Project (Dodge Report))).

62. See, e.g., Wolfson, *supra* note 2, at 16 (“My post-trial conversations with jurors have disclosed no evidence that . . . [a] juror might be angry or offended that his or her question was not asked, thus affecting judgment”); Anderson, *supra* note 57, at 1.

63. See, e.g., Heurer & Penrod, *supra* note 60, at 261 (“First, it is clear that jurors are in favor of the opportunity to ask questions and take notes.”); Lucci, *supra* note 1, at 17 (“[J]urors universally approve of and appreciate the ability to clear up confusion by asking questions”); Wolfson, *supra* note 2, at 17 (“After each of the five cases, I asked jurors what they thought of the question-asking procedure. Each time the verdict was quick and unanimous: they were pleased and appreciative.”); Pemberton, *supra* note 25, at 18 (“[T]he judges who participated in the [L.A.] pilot program were generally pleased with the results. And so were a large majority of the participating jurors, according to a poll that was done.”); Anderson, *supra* note 57, at 1 (“Jurors show more favorable reactions to the trial process when allowed to ask questions.” (summarizing conclusions of Colorado Jury Reform Project (Dodge Report))); Report on Pilot Project, *supra* note 27, at 1 (finding that jurors in the pilot program in New Jersey responded favorably to the practice of asking questions).

64. See Wolfson, *supra* note 2, at 16 (“[That] jurors might compete to see whose questions get asked, . . . [m]y post-trial conversations with jurors have disclosed no evidence that has happened.”).

judges, that jurors should remain neutral and passive observers of the trial.⁶⁵ Although lawyers and judges are correct that jurors should remain neutral,⁶⁶ lawyers, like judges, should recognize that a passive juror is unable to absorb the information presented at trial as well as an actively engaged juror. Admittedly, lawyers worry about jurors who cross the line and become advocates for a particular position, but there is a difference between an actively engaged juror and an advocate. An actively engaged juror is one who is following the trial by taking notes, trying to organize the material, identifying sources of confusion, and trying to resolve any confusions rather than letting them dominate the trial. In contrast, an advocate juror is one who has decided in favor of one side or the other and will advance that position with the other jurors. Juror questions permit jurors to be active learners, but they do not transform jurors into advocates any more than a question from the trial judge transforms a trial judge into an advocate.⁶⁷

III. A JURY-CENTRIC APPROACH

Although judges and lawyers want to ensure that juror questions do not adversely affect the way that judges and lawyers perform their respective roles, they also need to consider whether juror questions would improve the way that jurors perform their role. In other words, judges and lawyers need to put themselves in the position of jurors and view the question from the jurors' perspective.⁶⁸ I refer to this as taking

65. See *supra* notes 46–48 and accompanying text (describing the passive juror model and the ways in which it limits learning).

66. See IPI, *supra* note 53, at 8 (describing an instruction judges can give to remind jurors that they need to remain impartial and neutral).

67. There is a debate about whether panels of appellate judges use their questions during oral argument to signal their positions to fellow judges on the panel. In other words, are some appellate judges using oral argument to advocate for one side or the other? Most appellate judges would disagree with this characterization of how they use their questions at oral argument. For example, one political science study suggested that even though U.S. Supreme Court Justices view oral argument as a valuable source of information, “that does not mean that oral argument regularly, or even infrequently, determines who wins and who loses.” JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 280 (2002). However, a recent political science study, using transcripts of oral arguments from Supreme Court cases from 1979–1995, found that “when Justices pay more attention to one side during oral arguments [in terms of the number of questions asked], that side is much more likely to lose its case.” Timothy R. Johnson et al., *Inquiring Minds Want To Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?*, 29 WASH. U. J.L. & POL’Y 241, 259 (2009). In any event, a trial judge, who presides alone, and jurors, who submit written questions anonymously, do not run into the same potential problem of appellate judges as to whether they are using their questions to signal their position to their peers.

68. Perhaps this would be easier to do if judges and lawyers served more regularly as jurors. See, e.g., Debra Cassens Moss, *Your Honor as Part of Jury? Judges Reflect on Their Call to Duty from New Perspective*, A.B.A. J., Jan. 1, 1988, at 22 (“Sitting in the box, you see the judge

a jury-centric approach. I have used this term before,⁶⁹ though I am not the only person to take this approach.⁷⁰ The jurors' perspective so often gets lost, largely because jurors are not in a position to advocate for themselves.⁷¹ They are usually laypersons who serve for only one trial, and they often do not have any familiarity with the judicial system before they begin their jury service. Therefore, it is up to other participants, such as lawyers and judges, to take the perspective of jurors and to consider how juror questions might aid jurors in the performance of their roles.

A. *Why Juror Questions are Useful to Jurors*

As described in Part I, juror questions help resolve juror confusion or misunderstanding as soon as it arises so that jurors can focus on the rest of the trial without feeling at sea.⁷² Confusion can arise from words that were missed or from ordinary words that were used in a legal sense but without any explanation.⁷³ Sometimes the witness might not have explained the point clearly or completely the first time, or the lawyer might have failed to address the point altogether, not because he or she meant to avoid it, but simply through oversight.⁷⁴ In any event, the question allows jurors to gain an understanding quickly so that they can focus on the rest of the trial.

Juror questions provide other benefits to jurors in addition to aiding juror comprehension. For example, juror questions help jurors to stay focused on the trial. If jurors serve only as passive observers, then it is easy for them to lose focus, particularly in a lengthy or complex trial.

and the lawyers and the witnesses from a different angle in the courtroom. That gives you a different perspective on the entire courtroom scene.” (quoting Wisconsin Supreme Court Justice Shirley Abrahamson, who sat on a jury in a petty theft case in 1984)).

69. See Nancy S. Marder, *Introduction to the Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L. REV. 909, 918 (2003) (“By [a ‘jury-centric’ perspective], I mean a perspective that takes the jury as its starting point and asks: What tools do jurors need in order to perform more effectively the tasks with which they have been charged?”); *id.* at 918–20.

70. See, e.g., Judge B. Michael Dann (Ret.), *Jurors and the Future of “Tort Reform,”* 78 CHI.-KENT L. REV. 1127, 1128 (2003) (“A calculus, or way of analyzing various tort reform ideas with jurors’ legitimate interests in mind, will be suggested for use by policymakers in determining whether and to what extent a given tort reform proposal might benefit juries.”).

71. For another issue in which judges and lawyers need to put themselves in the position of jurors and take a “jury-centric” approach, see Nancy S. Marder, *Bringing Jury Instructions Into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 482 (2006) (recommending that judges and lawyers who draft jury instructions take a “jury-centric” approach and draft instructions that jurors can understand, and suggesting that one way to do this is to involve laypersons at different stages of the drafting process).

72. See *supra* Part I.A.

73. See *supra* notes 11–12 and accompanying text.

74. See *supra* note 13 and accompanying text.

Just as students who take notes and ask questions are more likely to pay attention in class, so too, jurors who take notes⁷⁵ and ask questions⁷⁶ during the trial are more likely to pay attention throughout the trial. Now that many states allow jurors to take notes⁷⁷ because they recognize that note-taking helps jurors to maintain their focus,⁷⁸ states should consider giving jurors the opportunity to ask questions because it is a concomitant aid to maintaining juror focus.

When courts give jurors the opportunity to ask questions, they also teach jurors several important lessons about their roles and responsibilities. One lesson is that jurors will be treated as adults and can seek clarification when they do not understand what a witness or lawyer has said. Another lesson is that jurors need to take responsibility for their learning during the trial because during the deliberations each juror will be expected to contribute his or her insights to the group deliberations. When jurors have the opportunity to ask questions during the trial, then they enter the jury room as equals who are ready to deliberate.⁷⁹ This creates a better dynamic for thorough and fair deliberations and decreases the likelihood that jurors will feel confused and turn to a fellow juror for the answers, whether or not he or she knows them. Rather than everyone looking upon each other as equals, one juror, who professes to know the answers, will be seen as an authority. Instead, jurors should see themselves as peers with no one juror commanding more authority than any other.

75. See, e.g., JURY TRIAL INNOVATIONS 127 (G. Thomas Munsterman, Paula L. Hannaford-Agor & G. Marc Whitehead eds., 2d ed. 2006) ("The process of notetaking keeps jurors alert and interested in the trial, increasing juror satisfaction with jury service.").

76. See, e.g., *id.* at 129 ("Permitting jurors to ask questions helps keep them alert and engaged in the trial proceedings, thus increasing satisfaction with jury service."); Anderson, *supra* note 57, at 1 ("Jurors appear to be more engaged, attentive, and empowered when allowed to ask questions at trial.").

77. See, e.g., Gregory E. Mize & Paula Hannaford-Agor, *Jury Trial Innovations Across America: How We Are Teaching and Learning From Each Other*, 1 J. CT. INNOVATION 189, 211 (2008) ("In more than two-thirds of both state and federal trials[,] courts permitted juror note-taking; and in the vast majority of those trials jurors were provided with writing materials.").

78. Note-taking also helps jurors to organize the information presented during the trial and to recall it later during the deliberations. See, e.g., Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 BROOK. L. REV. 1257, 1276–77 (2001) (summarizing arguments to allow juror note-taking including: "jurors, like students, learn best by taking notes, jurors should be able to take notes for the same reason that judges take notes during a trial, and note-taking is particularly useful as an aid to memory and as an antidote to boredom in a long or complicated trial").

79. This is also one of the reasons for giving each juror his or her own copy of the written instructions to consult during the deliberations. If there is only one copy, then the juror who holds the copy becomes the authority on the instructions. See, e.g., Jerry Crimmins, *New Rule May Make Jurors' Lives Easier*, CHI. DAILY L. BULL., Oct. 30, 2009, at 3.

Finally, when jurors are permitted to ask questions, they appreciate the opportunity.⁸⁰ Even if juror questions had no benefits, the fact that jurors viewed the practice favorably and thought it was an aid should be a reason for permitting the practice. Almost every empirical study found that jurors appreciated the opportunity to ask questions and viewed the practice positively.⁸¹ Judges' post-verdict interviews with jurors elicited the same responses.⁸² For example, Judge Wolfson, who permitted juror questions when the lawyers did not object, received an unsolicited letter from jurors, which read in part:

'Judge Wolfson has instituted the practice of allowing the jurors to submit questions, from which he then selects those that are not in conflict with the legal aspects of the trial, to particular witnesses. This procedure was most helpful to us as jurors in clarifying and elaborating information given [to] us during the trial. We sincerely hope this practice is continued and encourage its expansion to other courtrooms as well.'⁸³

Chief Judge James F. Holderman permitted juror questions in his courtroom as part of his participation in the Seventh Circuit's pilot program, which tested seven initiatives.⁸⁴ The Seventh Circuit's final report recommended adoption of three of the tools, including juror questions, which Chief Judge Holderman continues to use in his courtroom today.⁸⁵ Chief Judge Holderman observed that just giving jurors the opportunity to ask questions, even if they did not ask any questions in the end, helped them to stay focused on the trial.⁸⁶ Thus, when jurors know that they can ask questions, even if they choose not to, they still benefit from knowing that they have the opportunity.

B. Why Juror Questions are Useful to Judges and Lawyers

A jury-centric approach, which focuses on juror questions from the perspective of jurors, also will have benefits for judges and lawyers,

80. See *supra* note 63 and accompanying text (citing jurors' approval of the practice of permitting jurors to ask questions).

81. See *supra* notes 60–61 and accompanying text (providing studies finding that jurors viewed the opportunity to ask questions positively).

82. See *supra* note 62 and accompanying text (describing an individual judge's findings based on his post-verdict interviews with jurors).

83. Wolfson, *supra* note 2, at 17.

84. Rachel M. Zahorsky, *Legal Rebels: Remaking the Profession – James Holderman: Jury Duties*, A.B.A.J., Nov. 9, 2009, http://www.legalrebels.com/profiles/james_holderman_jury_duties.

85. *Id.*

86. *Id.* ("The mere fact that [jurors] have been invited to participate in the proceedings is enough to keep their focus.").

albeit indirectly. According to empirical studies and judges' anecdotal evidence, jurors do not ask many questions,⁸⁷ but the questions they do ask are usually good ones.⁸⁸ This finding is useful for judges who are committed both to moving trials along and to doing justice. If jurors do not ask many questions, then juror questions will not add much to the length of the proceedings, and if jurors ask good questions, then they will further the pursuit of justice.

Good questions by jurors also will benefit lawyers. Lawyers will get useful feedback while the trial is still in progress.⁸⁹ They can make sure that jurors understand the points that the witnesses are supposed to be making. When the witnesses fail to make these points clearly, intelligibly, or fully, juror questions indicate these shortcomings to the lawyers.⁹⁰

If jurors cannot ask questions, they sometimes engage in self-help measures, and these measures are not to the benefit of judges or lawyers. The milder form of self-help is when jurors speculate as to an answer: they do not know the answer, so they make up one.⁹¹ The stronger and even less desirable form of self-help is when jurors try to find the answer on their own and consult outside sources in their searches. Chief Judge Holderman is not surprised by this response because people today are accustomed to going to the Internet whenever they need information.⁹² Thus, their first response is to check their

87. See *supra* notes 26–27 and accompanying text.

88. See, e.g., Anthony J. Ferrara, *Lessons Learned From Jurors' Questions About Evidence During Trial*, 1 J. CT. INNOVATION 329, 341 (2008) (“Overall, my experience has been: Jurors ask focused questions that are relevant and reasonable.”); Mott, *supra* note 12, at 1120 (noting that judges in her earlier study had described juror questions as “very reasonable”); Lucci, *supra* note 1, at 17 (“I am currently in my fifth year of allowing jurors to propose written questions, and have done so in well over 100 trials. Over that period I have made the following observations: (1) the vast majority (over 90 percent) of juror questions are good questions and many are excellent”); Wolfson, *supra* note 2, at 17 (“[T]he great majority of questions were serious, to the point, and relevant. . . .”).

89. See, e.g., Lucci, *supra* note 1, at 17 (“[T]rial counsel often appreciate the opportunity to get mid-stream glimpses of how the jurors are processing the information coming into evidence and being able to shore up a point they thought they were making, and after experiencing jury questioning of witnesses first-hand, most attorneys approve of and embrace the practice”); Wolfson, *supra* note 2, at 16 (“Lawyers learn what is troubling or confusing the jury as the trial unfolds. Omissions can be corrected.”).

90. See, e.g., Anderson, *supra* note 57, at 1 (“Attorneys become more aware of any confusion surrounding the evidence and, in some cases, are alerted to missing information.”).

91. See Zahorsky, *supra* note 84 (“‘And, if [jurors] are not allowed to ask questions, they are going to worry about it and they are going to try to come up with their own solution.’” (quoting Chief Judge James F. Holderman, Northern District of Illinois)).

92. See *id.* (“‘If [jurors] have a question about something, they expect to be able to go to their BlackBerrys or computers and find out that information.’” (quoting Chief Judge James F. Holderman)).

BlackBerry or laptop.

Judges try to address this propensity by instructing jurors that they are not to do any outside research, such as looking for information on the Internet, including Google or social networking sites.⁹³ However, another way to address this tendency is to permit jurors to ask their questions in court. If they ask their questions in court, then they will have less need to seek information from outside sources.⁹⁴ Judges and lawyers benefit if jurors rely only on the evidence presented in court; any time jurors turn to extraneous sources to answer their questions, a mistrial might be the end result.

Judges and lawyers, like jurors, usually have positive responses to juror questions once they have experience with the practice in the courtroom. Even those who were resistant to the practice beforehand find that when they actually try it, they like it. If judges and lawyers approve of the practice once they try it, then they must find that there are benefits to it. The Dodge Report, which documented Colorado's experience with several jury reforms, found that "[a]ctual experience with juror questions at trial increases support from judges and attorneys on the benefits of the procedure."⁹⁵ After the pilot program in New Jersey, judges were so pleased with the practice of juror questions that they wanted to continue it even after the pilot program had ended.⁹⁶ A majority of attorneys in the New Jersey pilot program also viewed the practice with favor; however, some defense attorneys expressed concern about their control over witnesses and trial strategy, though not necessarily in the trials that they had conducted over the course of the pilot program.⁹⁷ The Seventh Circuit pilot program also found that for the most part judges and attorneys approved of the practice of

93. See, e.g., IPI (Supp. 2009), *supra* note 53, at 1.01 ("You should not do any independent investigation or research on any subject relating to this case. . . . This includes any press, radio, or television programs and it also includes any information available on the Internet."); Andrea F. Siegel, *Judges Confounded by Jury's Access to Cyberspace*, BALTIMORE SUN, Dec. 13, 2009, <http://www.baltimoresun.com/news/maryland/anne-arundel/balmd.ar.tmi13dec13,0,2858534.story> ("Concern has grown so much nationwide that legal experts, including in Maryland, are rewriting model jury instructions to specifically tell jurors that online searches, texting and social media – the things they routinely do on laptops, cell phones and BlackBerrys – are out.").

94. See, e.g., Ellen Brickman et al., *How Juror Internet Use Has Changed the American Jury Trial*, 1 J. CT. INNOVATION 287, 298–99 (2008) ("Finally, allowing jurors to submit questions to witnesses can provide another outlet for their curiosity or confusion. This too may help to prevent jurors from conducting Internet research on material they hear in the courtroom.").

95. Anderson, *supra* note 57, at 1.

96. Report on Pilot Project, *supra* note 27, at 2.

97. *Id.*

permitting jurors to submit written questions,⁹⁸ and some judges who participated in the pilot program maintain this practice today even after the pilot program has ended.⁹⁹

IV. OTHER STATES' EXPERIENCES

More than half of the states and all of the federal circuits permit jurors to submit written questions for witnesses but leave it to the discretion of the trial judge to decide whether to permit the practice in any given case.¹⁰⁰ The American Bar Association, in its *Principles for Juries & Jury Trials*, recommends permitting juror questions and suggests that juror questions might be particularly useful in cases that are “complex” or where there is “complicated evidence or unclear testimony.”¹⁰¹ In criminal trials, three states have rules that mandate juror questions, and six states have case law that prohibits juror questions.¹⁰² In civil trials, six states have rules that mandate juror questions, and ten states have case law that seems to prohibit juror questions.¹⁰³ Thus, most states simply permit the practice but give the trial judge discretion in deciding when to use it.

Several states have tried pilot programs so that they could study how juror questions worked in the courtroom. Several of the states that have experimented with such programs and issued reports have indicated that the practice worked well. The New Jersey pilot program found that judges, jurors, and a majority of lawyers had positive experiences with juror questions.¹⁰⁴ The Colorado pilot program concluded that jurors approved of the practice, and that judges and most lawyers had positive

98. See Manson, *supra* note 52, at 4 (“Two of the procedures that got good reviews were allowing jurors to submit questions and having judges instruct jurors on the substantive law before any evidence was presented in a case.”). But see *id.* (“Many other judges, lawyers and litigators concur with Holderman. But the verdict is not unanimous.”).

99. See, e.g., Zahorsky, *supra* note 84 (describing the Seventh Circuit’s final report as recommending “the three tools [Chief Judge] Holderman has already adopted” including juror questions).

100. See Pfaff, Stalmack & Marder, *supra* note 1, at 39–41 (surveying state court and federal courts of appeals decisions on juror questions).

101. A.B.A., *supra* note 58, at 96.

102. See Mize & Hannaford-Agor, *supra* note 77, at 214 (“The practice [of juror questions] is mandated for criminal trials in three states [Arizona, Colorado, and Indiana], prohibited by case law in [six] states [Arkansas, Georgia, Minnesota, Mississippi, Nebraska, and Texas], and left to the sound discretion of the trial court in the rest.”) (footnotes omitted).

103. See *id.* (“In civil trials, juror questions are mandated in six states [Arizona, Colorado, Florida, Indiana, Washington, and Wyoming], prohibited in ten states [Minnesota, Nebraska, Texas, and possibly Georgia, Louisiana, Maine, Michigan, North Carolina, Oklahoma, and South Carolina], and left to the discretion of the trial judge in the rest.”) (footnotes omitted).

104. Report on Pilot Project, *supra* note 27, at 2.

responses.¹⁰⁵ In fact, the report noted that allowing jurors to ask questions had “positive effects” and “few detrimental results,” with the exception of one unusual case.¹⁰⁶ Colorado has since approved rules explicitly authorizing jurors to ask questions in civil and criminal cases, though the trial court judge still has discretion to decide that juror questions should not be permitted in a particular case if there are particular reasons.¹⁰⁷

Individual judges who have permitted juror questions in their courtrooms and who have written about their experiences with juror questions have been quite positive in their accounts.¹⁰⁸ They praise the practice and encourage other judges to try it. To help other judges, they usually include a description of the procedures they follow and the instructions they give to jurors about asking questions.¹⁰⁹ Some of the judges provide a sample of the kinds of cases in which they have permitted juror questions and the kinds of questions that jurors have raised.¹¹⁰ They try to address the concerns that fellow judges are likely to have as well and to provide templates for how to proceed should fellow judges choose to adopt this practice in their own courtrooms.

Those who have experience with permitting jurors to submit written questions find that lawyers’ and judges’ worst fears are not realized. Instead, when they have actual experience with the practice, they like it. Jurors always like it. Empirical studies, pilot programs, and individual interviews with jurors all point to the same conclusion—jurors appreciate the opportunity to ask questions of witnesses.¹¹¹ Jurors believe that the opportunity to ask questions improves their

105. See Anderson, *supra* note 57, at 1.

106. *Id.*

107. See COLO. R. CIV. P. 47(u); COLO. R. CRIM. P. 24(g).

108. See, e.g., Ferrara, *supra* note 88, at 341 (“In sum, we should pay special attention to what jurors say and respond to their concerns. What better way is there than allowing them to ask questions?”); Lucci, *supra* note 1, at 17 (“I am currently in my fifth year of allowing jurors to propose written questions, and have done so in well over 100 trials.”); *Waking Up Jurors*, *supra* note 29, at 21 (“[T]he effort [to allow juror questions] pays dividends in the form of enhanced juror participation and improved juror comprehension.” (quoting then Arizona Superior Court Judge B. Michael Dann)); Wolfson, *supra* note 2, at 17 (“[T]he advantages of this procedure, used carefully in the proper case, substantially outweigh the disadvantages.”).

109. See Ferrara, *supra* note 88, at 331, 342–43 (providing Judge Stanley Sklar’s instruction on juror questions); Lucci, *supra* note 1, at 17 (recommending “procedural safeguards” for judges to control jury questions); *Waking Up Jurors*, *supra* note 29, at 22 (providing an example of an instruction to jurors on questioning witnesses); Wolfson, *supra* note 2, at 14 (providing the judge’s procedure for allowing juror questions).

110. See Ferrara, *supra* note 88, at 331–41 (examining juror questions in three cases); Wolfson, *supra* note 2, at 13–16 (examining use of juror questions in six cases).

111. See *supra* note 63.

comprehension, keeps them focused on the trial, and contributes to them having positive experiences as jurors. In light of this overwhelming support by jurors, judges, and lawyers who have actual experience with the practice, what steps are needed to introduce juror questions into Illinois courtrooms?

V. NEXT STEPS IN ILLINOIS

Some Illinois judges believe that they can permit juror questions under the “inherent power” of the court. Judge Wolfson subscribed to this view.¹¹² There is no rule that explicitly prohibits Illinois judges from permitting jurors to ask questions, but there is also no rule that explicitly authorizes it. Most Illinois judges are reluctant to permit the practice on their own.¹¹³ They are unwilling to be maverick judges. They are also unwilling to follow Judge Wolfson’s lead from over twenty years ago.

Some Illinois judges believe that they are prohibited from allowing juror questions. At least, this is the response they gave to the National Center for State Courts (NCSC) when it conducted its *State-of-the-States Survey of Jury Improvement Efforts* between 2004 and 2006.¹¹⁴ They were neither able to identify which rule prohibited the practice in Illinois, nor could NCSC researchers uncover any such rule, yet respondents to the survey believed that such a prohibition exists in Illinois.¹¹⁵

Many Illinois trial judges are unwilling to permit juror questions in their courtrooms until there is a rule that explicitly authorizes the practice in Illinois. As a first step toward establishing such a rule, the Illinois judiciary should conduct a pilot program, just like the Seventh Circuit did for federal district court judges. The pilot program could include those Illinois trial court judges who are willing to participate. Admittedly, such a pilot program would be based on self-selection rather than random assignment, but it would at least provide a starting point. If the judges who are willing to try the practice of permitting

112. Wolfson, *supra* note 2, at 13 (“I have not allowed jury questioning unless all lawyers agree in advance. I believe I have the inherent power to do it anyway, but I have not imposed the procedure on anyone.”) (citation omitted).

113. This was the sense of the Illinois judges who attended the 2006 Allerton Conference on Jury Reform in Illinois. They were enthusiastic about permitting juror questions, but they believed that they needed a rule to authorize the practice. *See* Ill. State Bar Ass’n, Allerton Conference on Jury Reform in Ill., Starved Rock, Ill. (Apr. 6–7, 2006) (notes on file with author).

114. Mize & Hannaford-Agor, *supra* note 77, at 214 n.39.

115. *Id.* (“Survey respondents for Illinois . . . reported that juror questions were prohibited but did not report the legal authority for this prohibition. NCSC staff was unable to locate the source of prohibition in the relevant state statutes, court rules, and case law.”).

juror questions are allowed to do so under the auspices of a pilot program, then if they have good experiences with the practice, their experiences are likely to encourage other judges to try it.

If the pilot program leads lawyers and judges in Illinois to become comfortable with the practice and to see that it works well, the next step would be a rule change by the Illinois Supreme Court Rules Committee. If the Rules Committee wants a template from another state, it could look to Colorado's rules, which authorize juror questions in civil¹¹⁶ and criminal trials,¹¹⁷ but provide that judges retain the discretion not to permit questions in a particular case if there is good cause. Colorado's rules that provide for juror questions use the language "shall," thus indicating that judges are required to allow juror questions;¹¹⁸ however, both rules also give judges the discretion not to permit or to limit juror questions in a particular case. In a civil case, the judge would have to have "good cause" to decide against permitting juror questions,¹¹⁹ and in a criminal case the judge would have to have "reasons related to the severity of the charges, the presence of significant suppressed evidence or for other good cause."¹²⁰

Once there is a rule that authorizes the practice, then the Illinois Supreme Court Committee on Jury Instructions in Civil Cases and the Illinois Supreme Court Committee on Jury Instructions in Criminal Cases can draft instructions so that judges can instruct jurors on how to proceed. There are many instructions that could serve as templates.¹²¹ The instruction should tell jurors at the beginning of the trial that they

116. The Colorado rule for civil cases provides:

Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for good cause.

COLO. R. CIV. P. 47(u).

117. The Colorado rule for criminal cases provides:

Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for reasons related to the severity of the charges, the presence of significant suppressed evidence or for other good cause.

COLO. R. CRIM. P. 24(g).

118. See *supra* notes 116–117 (quoting Colorado's rules).

119. See *supra* note 116 (quoting Colorado's rule for civil cases).

120. See *supra* note 117 (quoting Colorado's rule for criminal cases).

121. See, e.g., JURY TRIAL INNOVATIONS, *supra* note 17, at 260; *Waking Up Jurors*, *supra* note 29, at 22; Am. Jury Project Comm'n, Seventh Circuit Bar Ass'n, American Jury Project Manual V-5, V-6, V-7 (Oct. 2005–Mar. 2006) (unpublished copy on file with author); Anderson, *supra* note 57, at 3.

can ask questions; it should describe the procedures they are to follow; and it should remind jurors that sometimes their questions cannot be answered, and they should not take it personally. Jurors have many difficulties understanding jury instructions,¹²² but these instructions do not fall into that category. The experience of other states suggests that jurors understand these instructions and follow them.¹²³

CONCLUSION

Being a juror is not easy. Illinois jurors, like jurors in other states, need tools that will help them to perform their job effectively. Juror questions help jurors to comprehend what is taking place during the trial and to stay focused on the proceedings. Jurors who are able to ask questions appreciate the opportunity to do so; they want to understand what they are seeing and hearing during the trial. Lawyers and judges who have experience with juror questions, even if they had reservations about the practice initially, usually form a positive view based on that experience. In fact, some judges who have permitted juror questions as part of a pilot program have continued the practice even after the pilot program has ended because they found that it worked so well.

The challenge is in convincing judges and lawyers to overcome their initial resistance so that they will try the practice and see what they think. The Illinois Supreme Court should implement a pilot program so that lawyers and judges in the state can gain experience with juror questions in the courtroom. It is unlikely to happen unless Illinois judges take a jury-centric approach and see that the practice is important for jurors, and that it has benefits for judges and lawyers as well. Without the leadership of the judiciary, and the support of attorneys, jurors are unlikely to have access to this tool.

Other states' experiences have been positive. Illinois would hardly be the first state to allow juror questions, but unless the judiciary takes the initiative, it is likely to be among the last to give its jurors this tool. Illinois trial judges are, for the most part, unwilling to act on their own. If Illinois jurors are to have essential tools, such as asking questions, to help them perform their jobs effectively, then the judiciary needs to take action. A first step would be a pilot program; a next step would be a rule change. After that, jurors in Illinois will have more reason than they do now to feel satisfied with their jury service and to think highly

122. See, e.g., Marder, *supra* note 71, at 454–58 (describing empirical studies showing the problems jurors have in understanding jury instructions).

123. See, e.g., Anderson, *supra* note 57, at 1 (reporting that in Colorado “[j]urors do not react negatively when their questions are declined”).

of the judiciary, and maybe the next time they receive a jury summons, they will greet it with alacrity rather than with dread.