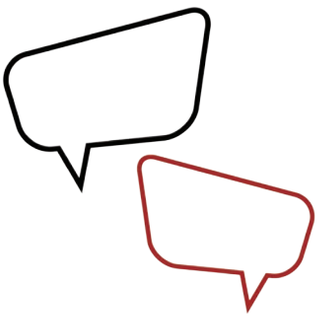

Jurors asking questions

In some courtrooms, the practice of allowing jurors to pose questions to witnesses is gaining traction. Questioning witnesses allows jurors to clarify information and better understand the evidence and arguments presented, proponents say. But others worry it plants seeds of bias among jurors and compromises the ideal of a fair trial by an impartial jury. Here, JUDGE DAVID R. HERNDON of the U.S. District Court for the Southern District of Illinois, and JUDGE N. RANDY SMITH of the U.S. Court of Appeals for the Ninth Circuit discuss what might be gained, and what might be irrevocably lost, when jurors are allowed to participate in the examination of witnesses.

OPPONENTS RAISE CONCERNS THAT ALLOWING JURORS TO ASK WITNESSES QUESTIONS DURING TRIAL TURNS THE JURORS INTO ADVOCATES AND SACRIFICES THEIR NEUTRALITY. IS THIS A REAL CONCERN?

HERNDON: There is no concern, in my mind, that jurors asking questions will lose their neutrality since, in my experience, they only ask questions about matters of evidentiary substance that require clarification. My experience has been that, equal to a juror's effort at deliberating in a serious fashion, so is the juror's effort to function as a fact-gathering entity. So while the questions that I have observed are probing and to the point, they do not suggest a bias.

Moreover, jurors do not ask questions frivolously and always have a good-faith basis for their effort. I have never experienced a juror question that in any way suggested a premature decision about the outcome of a case or even so much as an inclination to favor one party or another. While it may be true, though not necessarily, that the lawyers may make efforts to perceive the mindset of the interrogator (if they can even discern which juror forwarded the question), that effort is rank

speculation at best and far from guiding the inquisitive juror to a preconceived notion of how to determine the final outcome of the case.

Furthermore, I have never observed a juror nor perceived a question from a juror which was meant to try to persuade other jurors to one viewpoint or another. Even though some questions have been rejected as seeking irrelevant evidence or an answer that was previously elicited, no question was asked in a trial I presided over that was argumentative or was a leading question in the sense that it reflected a bias on the part of the interrogating juror.

SMITH: Absolutely. The Sixth Amendment "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."[1] To implement such protection in jury trials, we begin with the voir dire process.[2] Next, judges give jury instructions. Generally, trial judges in both civil and criminal actions admonish jurors to keep an open mind throughout the trial and to not jump to any conclusions before deliberations.[3] If allowed to ask questions of witnesses, jurors likely will not remain neutral.[4] By empowering jurors to ask questions, the court transforms the jurors into advocates, giving them the ability to pursue their own theories of the case, rather than impartially deciding the case on the evidence presented to them.[5] Jurors may give more weight to answers that were solicited by their questions than to evidence brought to light by the attorneys.[6] Alternatively, jurors may overanalyze a judge's refusal to ask a juror's question. Although these potential problems may not have played out in any conspicuous manner in studies conducted on the effect of allowing jurors to ask questions,[7] they remain real concerns that are not easily detectible.[8] Because juror questioning threatens jury neutrality, courts should conclude it is "ill-advised."[9]

PROPONENTS BELIEVE THAT PERMITTING JURORS TO QUESTION WITNESSES DURING TRIAL INCREASES THEIR LEVEL OF ATTENTION AND INTEREST IN THE PROCEEDINGS, RESULTING IN BETTER DECISION-MAKING. WHAT IS YOUR VIEW?

"...[W]hen doing exit interviews and asking how the jury felt about the ability to forward questions to the court for witnesses, jurors have confirmed that they felt more vested in the proceedings and that it made the trial even more interesting for them."

"Jurors may give more weight to answers that were solicited by their questions than to evidence brought to light by the attorneys. Alternatively, jurors may overanalyze a judge's refusal to ask a juror's question."

HERNDON: I have never perceived a difference in the demeanor of a jury that has been given the opportunity to ask questions and one that has not. However, when doing exit interviews and asking how the jury felt about the ability to forward questions to the court for witnesses, jurors have confirmed that they felt more vested in the proceedings and that it made the trial even more interesting for them because they knew that if a witness was not asked something they had at least a chance to ask that witness a question. One might surmise from those kinds of responses, though not "scientific" in any way, that a jury that is aware of the possibility of vicarious interrogation may well be more alert than one that is being spoonfed every question and answer.

My informal perception is that juries that are allowed to ask questions have more notetakers than those who are not. Consequently, it is my personal belief that a jury that is allowed to ask questions does have an increased level of attention compared with a jury that is not so allowed.

SMITH: It seems reasonable to argue that allowing jurors to ask questions will encourage jurors to be more attentive and interested in the proceedings. However, there are other methods — methods far less prejudicial — that can help jurors stay attentive and interested in proceedings without a need for juror questions. When I was a state district court judge, I employed several of these methods. First, I gave jurors the same (substantive) jury instructions before trial as those I gave at the end of trial, so the jurors would know what they were being asked to decide in advance of hearing the evidence. This allowed the jurors to ask me questions about the instructions before trial began and gave them context for the evidence they were about to hear. Second, I allowed jurors to take notes during trial.[10] Third, I emphasized to the jurors their importance to the judicial process and reemphasized this point daily throughout the trial. I accommodated the jurors by providing breaks when needed, along with snacks and beverages. I always tried to make them feel needed and appreciated. These practices ensured that the jurors remained involved and attentive throughout the proceedings. Even so, being more attentive may not equal being a better decision-maker,[11] and any benefit gained by having a more atten-

tive jury must be trumped by our interest in individual rights.[12]

ALLOWING JURORS TO ASK WITNESSES QUESTIONS WILL INCREASE THE TIME SPENT IN TRIAL. HOW MUCH DELAY IS TYPICALLY EXPERIENCED USING THIS PROCEDURE?

HERNDON: There is very little delay caused by juror questions. Any delay occasioned by this process is clearly outweighed by its advantages. The first delay to consider is the three to five minutes it takes to explain the procedure to the jury. I have never experienced a trial where the jury asked every witness questions. In fact, even though they were instructed on the procedure, I have had many juries simply not ask a single question.

Even for the juries that are fairly active interrogators, it is usually one or two jurors who take the lead in forwarding questions.

The procedure I employ, which seems to be common, is quite seamless. For each witness, at the completion of all attorney questioning, I turn to the jury to ask if there are any questions. Often by that time or immediately upon my inquiry, the jurors pass their written questions to the designated end of the jury box where either my law clerk or clerk gathers the notes. Upon handing the notes to me, I meet counsel at the sidebar whereupon a brief discussion occurs, on the record, to determine if the questions are proper or whether counsel or I have objections that need to be ruled upon. Alternatively, the questions may be reformed in some manner, without changing their essential meaning, to place them in proper form. If the questions are to be asked, I ask the witness the questions. Counsel are allowed to ask follow-up questions strictly within the scope of the juror questions.

Keeping in mind that jurors are typically reserved in asking questions, I have never had a trial that was delayed in any appreciable amount by juror questions.

SMITH: As an appellate court judge, I can only speculate as to how much time juror questions add to trials.[13] However, reports show that the amount of time added to trial by juror questions can be significant and depends on the complexity of the subject matter and the number of witnesses at the trial.[14] From my experience, increasing the time any juror needs to spend away from his daily life is a far bigger burden to the average juror than not allowing the juror to ask questions.[15] Extended trials can also mean needlessly excessive costs for the court and the parties.[16]

"By allowing jurors to question witnesses, the burden of proof is shifted away from the otherwise burdened party in violation of the defendant's due process rights."

"The greatest advantage in allowing juror questions is that if a juror is truly confused about some bit of testimony, they have the opportunity to clarify the evidence in his or her own mind while that witness is still on the stand."

SHOULD THE OPPORTUNITY TO QUESTION WITNESSES BE EXTENDED TO JURORS IN EVERY CIVIL CASE OR DOES THE PROCEDURE MAKE MORE SENSE FOR SPECIFIC TYPES OF CASES?

HERNDON: When I first started the practice of juror questions, upon my arrival on the federal bench in 1998, I restricted the practice to those civil cases which anyone would recognize as the more complex and difficult cases. The theory being that the complexity of the case provided incentive to the court and counsel to ensure that the jury had a complete understanding of the evidence in the case.

As time progressed and the procedure worked well and was so well received by counsel, I expanded its use to all civil cases. My experience with the procedure has been uniform regardless of whether the case is simple or complex. The number of questions and demeanor of the jury relative to the procedure are the same. Circuit acceptance of the procedure varies around the nation, but the focus is largely on the procedure followed by the court in taking and processing the questions from the jury. It is unlikely that any circuit or judge would permit a juror to simply stand up and interrogate a witness unfettered. I follow the procedure in both civil cases and criminal cases of discussing the availability of juror questions and the procedure to be followed pretrial and allowing each side to make objections to either. Parties simply do not object and most simply offer their preference for the availability of the opportunity for the jurors to participate. No lawyer has objected to the procedure outlined above or suggested an alternative procedure.

SMITH: Parties have enough issues about which to litigate without splitting hairs between types of civil cases in which courts should allow juror questioning. Some may argue that allowing jurors to ask questions helps the jurors clarify evidence in complex civil litigation. However, I respond by again noting that, although jurors report being more comfortable with the facts and issues after asking questions,[17] they do not necessarily understand the facts and issues better.[18]

IS THERE ANY REASON TO LIMIT THE OPPORTUNITY TO QUESTION WITNESSES IN CIVIL CASES ONLY AND NOT PERMIT JUROR QUESTIONING IN CRIMINAL CASES?

HERNDON: I evolved to a position of not limiting the opportunity for jurors to ask questions in only civil questions and use of the procedure in criminal cases as well. I always ask if there are any objections to the procedure and have not once had anyone verbalize an objection to the procedure in a criminal case.

Once as a visiting judge in another district, both counsel advised that they understood I employed the procedure in criminal cases and were looking forward to it since no judge in that district utilized it. When I expressed concern about the logistics of doing so given the physical dimensions of the courtroom, each counsel began suggesting alternatives until we all agreed upon one that we believed would accommodate the process.

I do employ an extra step in the procedure for criminal cases, which is to have defense counsel take all juror questions to the client so counsel can state on the record (at the sidebar out of the hearing of the jury) whether he objects to the question(s) following his conference with his client and whether he cares to include his client's position or not. A criminal defendant certainly does not have that luxury with every question in open court during regular interrogation, but it is an added protection out of an abundance of caution for this particular procedure.

In all my experience in allowing jurors to ask questions in criminal cases, I have never experienced a juror asking a question that in any way suggested that the juror challenged the defendant's right to a trial and in doing so was sacrificing his or her Fifth Amendment rights or any other constitutional right for that matter. Most judges who express hesitation about the practice, as a reflexive reaction it seems to me, cite concerns about the defendant's Fifth Amendment rights in rejecting the possibility. Following the procedures outlined herein, I submit, fully protects the defendant's constitutional rights.

SMITH: This question confirms the risk of this practice. I agree that criminal defendants risk the greatest prejudice because criminal trials generally involve higher burdens of proof and higher stakes. However, "[e]ncouraging jury questions . . . simply leads to being innovative solely for the sake of innovation."[19] Civil parties, some of whom have as much at stake in trial as a criminal defendant, should not be guinea pigs for a practice we don't trust in the criminal field.

WHAT IS THE GREATEST ADVANTAGE AND WHAT IS THE WORST DISADVANTAGE WITH ALLOWING JUROR QUESTIONING OF WITNESSES DURING TRIAL?

HERNDON: The greatest advantage in allowing juror questions is that if a juror is truly confused about some bit of testimony, they have the opportunity to clarify the evidence in his or her own mind while that witness is still on the stand. In this way, we reduce the chance of one or more than one juror discussing the case with some lack of clarity. Perhaps one could argue that the time spent at the sidebar discussing juror's questions is simply too much or that there is risk in the jury asking about matters that are not in evidence for a very good reason whether that is legal or strategic.

SMITH: Only one person benefits from juror questions: the attorney with the burden of proof. This individual is able to listen to juror questions, understand the jurors' thoughts and concerns, and modify his or her strategy accordingly.[20]

The greatest disadvantage in allowing juror questioning is the potential for diminishing the burden of proof in both criminal and civil cases. Who bears the burden of proof in an action is not a mere formality. "The allocation of the burden of proof reflects a societal judgment about how the risk of error should be distributed between litigants."[21] By allowing jurors to question witnesses, the burden of proof is shifted away from the otherwise burdened party in violation of the defendant's due process rights.[22]

CONCLUDING REMARKS

HERNDON: In conclusion, I am quite sold on the procedure. With overwhelmingly positive feedback from practitioners and jurors alike, together with the lack of a truly valid argument that the process constitutes a waste of time, one seems hard put to make a strong argument against the procedure. Even assuming that not every jury will adopt the procedure enthusiastically, there is no reason to refrain from offering it.

SMITH: The foundation of American adjudication is its adversarial nature. We embrace this system as the best means of arriving at the truth,[23] while still protecting a party's rights.[24] Prior to trial, each party reviews the evidence, chooses its arguments, and then presents its best case to the jury. We adopted this system in lieu of the more antiquated inquisitorial system to protect individual rights and promote impartial juries.[25] The mere fact that we are now asking whether juries should be allowed to abandon their impartial roles as fact-finders and revert to their inquisitorial ancestors illustrates a dangerous disregard for the fundamental principles of American jurisprudence.

Today, seven states require courts to allow jurors to ask questions in civil cases, three require courts to allow the practice in criminal cases, and numerous states permit the practice in both civil and criminal cases.[26] However, five states prohibit juror questions in both civil and criminal trials[27] and an additional four states prohibit the practice in criminal trials only.[28] Although some may argue that juror questioning results in better and more just verdicts, that position ignores the adversary legal system in this country. Justice Black puts this framework in mind:

> The Framers were well aware of the awesome investigative and prosecutorial powers of government and it was in order to limit those powers that they spelled out in detail in the Constitution the procedure to be followed in criminal trials. A defendant, they said, is entitled to notice of the charges against him, trial by jury, the right to counsel for

his defense, the right to confront and cross-examine witnesses, the right to call witnesses in his own behalf, and the right not to be a witness against himself. All of these rights are designed to shield the defendant against state power. None are designed to make convictions easier and taken together they clearly indicate that in our system the *entire burden of proving criminal activity rests on the State.* The defendant, under our Constitution, . . . has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury though its own resources. Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: "Prove it!" . . .

A criminal trial is in part a search for truth. But it is also a system designed to protect "freedom" by insuring that no one is criminally punished unless *the State* has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty. That task is made more difficult by the Bill of Rights, and the Fifth Amendment may be one of the most difficult of the barriers to surmount. The Framers decided that the benefits to be derived from the kind of trial required by the Bill of Rights were well worth any loss in "efficiency" that resulted.[29]

The framework upon which America's judicial system was formed is destroyed when jurors can step into the role of prosecutor. This practice is not supported by the Constitution. Nor is the practice less unsavory in civil cases where the parties' risks and considerations in pursuing a jury trial may be altered by the jury itself.

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[1] *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

[2] *See id*. at 724–28.

[3] In Idaho, both our criminal and civil jury instructions contain such admonitions. *See* Idaho Crim. Jury Instr. 108, 204; Idaho Civ. Jury Instr. 1.03, 103.1, 1.13, 1.13.1.

[4] Unlike judges, jurors are not trained to remain neutral in their questioning. *See DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 516 (4th Cir. 1985) ("One simply cannot compare the questioning by the trial judge — who is trained in the law and instructed to 'see that justice is done' — with the questioning by members of the jury — who are untutored in the law, and instructed to sit as a neutral fact-finding body. . . . [T]he practice of juror questioning is fraught with dangers which can undermine the orderly progress of the trial to verdict. . . . Since jurors generally are not trained in the law, the potential risk that a juror question will be improper or prejudicial is simply greater than a trial court should take . . . .").

[5] *See* Alayna Jehle & Monica K. Miller, *Controversy in the Courtroom: Implications of Allowing Jurors to Question Witnesses*, 32 Wm. Mitchell L. Rev. 27, 47–48 (2005); *Morrison v. State*, 845 S.W.2d 882, 885–87 (Tex. Crim. App. 1993) ("To allow active juror participation in the presentation of evidence encourages jurors to depart from their role as passive listeners and assume an active adversarial or inquisitorial stance. Such participation inevitably leads the inquirer to draw conclusions or settle on a given legal theory before the parties have completed their presentations, and before the court has instructed the jury on the law of the case."); *United States v. Johnson*, 892 F.2d 707, 713 (8th Cir. 1989) ("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 factfinder in the adversary process."). *Cf.* Fed. R. Evid. 614(b) advisory committee's note to 1972 amendment ("The authority is, of course, abused when the judge abandons his proper role and assumes that of advocate . . . .").

[6] *See* Shari Seidman Diamond, Mary R. Rose, Beth Murphy & Sven Smith, *Juror Questions During Trial: A Window into Juror Thinking*, 59 Vand. L. Rev. 1927, 1943 (2006) (noting that in a study of 50 jury deliberations, "the jurors explicitly referred to 11% of the questions they submitted.").

[7] *See* Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 L. & Hum. Behav. 121, 146–47 (1994) (concluding that jurors who are allowed to ask questions "do not become advocates rather than neutrals," "[do] not draw inappropriate inferences from unanswered questions," and "do not over emphasize their own questions and answers at the expense of other evidence presented during the trial.").

[8] Studies showing that jurors are not prejudiced by asking questions, such as that reported in *supra* note 7, require jurors to self-report. Self-reported data "must be interpreted cautiously" as it is inherently biased. *See* Heuer & Penrod, *supra* note 7, at 149.

[9] *United States v. Rawlings*, 522 F.3d 304, 409–10 (D.C. Cir. 2008) (citing cases).

[10] When done properly, permitting jurors to take notes can help jurors refresh their memories, focus their concentration on the proceedings, and "prevent their attention from wandering." *United States v. Maclean*, 578 F.2d 64, 66 (3d Cir. 1978).

[11] *See* Heuer & Penrod, *supra* note 7, at 143 (explaining that, based on a study of 71 trials in which juror questions were permitted, "[j]uror questions [did] not clearly help get to the truth."); *Morrison*, 845 S.W.2d 882 (rejecting the argument that juror questions improve jurors' ability to seek out the truth).

[12] *See Morrison*, 845 S.W.2d at 884 ("Due process and those individual rights that are fundamental to our quality of life coexist with, and at times override, the truth-finding function.").

[13] Although I have also served as a state district court judge, I never permitted juror questions in my trials. Therefore, I have no experience from which to draw my answer.

[14] Some reports show that juror questions typically add only 30 minutes in trial time. *See* Ryan J. Winter, *Does the Jury Have Questions for the Witness?*, 45 Monitor on Psychology 22, 22 (2014). However, in high-profile criminal cases, such as that of James Holmes (theater shooter in Colorado), the time added is far more significant. *See* Sadie Gurman, *Jurors' Questions Aim at Heart of Theater Shooting Trial*, Associated Press (May 12, 2015, 2:30 PM), http://www.salon.com/2015/05/12/jurors_questions_aim_at_heart_of_theater_shooting_trial/ (jurors asked more than 100 questions of witnesses during the first two weeks of trial). In the trial for Jodi Arias (woman who brutally murdered her boyfriend in Arizona), jurors asked Arias more than 150 questions, adding three days to her trial. See Warren Moise, *The Arizona Jury Reform Project Meets Pretty Miss Jodi Arias*, 25 S.C. Law. 12, 13 (2013) (Arias testified for 18 days); Crimesider Staff, *Jodi Arias Trial Update: Woman Charged in Ex-Boyfriend's Murder Hit with 150 Questions from Jury*, CBS News (Mar. 7, 2013, 12:58 PM), http://www.cbsnews.com/news/jodi-arias-trial-update-woman-charged-in-ex-boyfriends-murder-hit-with-150-questions-from-jury/ (juror questioning began after Arias's 15th day on the stand).

[15] As a state district court judge, the primary complaint I received from jurors was the amount of time they had to take away from their lives. Most jurors want the trial to end as quickly as justice allows. Why annoy those jurors to accommodate the few who are plagued with questions?

[16] *Expert Witness Fee Study*, SEAK, http://www.seak.com/expert- witness-fee-study/ (last visited Dec. 11, 2015) (noting a high of $7,500/hour for in-court expert testimony with an average fee for non-medical experts at $248/hr and for medical experts at $555/hr); *see also* Ariz. Rev. Stat. § 21-222 (Arizona's lengthy trial fund allows employed jurors, who serve more than five days, to receive $40 to $300 per day).

[17] Heuer & Penrod, *supra* note 7, at 142.

[18] *Id.* at 143; *see also* Mari Fagel, *Jury Questions to Jodi Arias Illustrate Their Frustration with Her Story,* Huff Post: Crime Blog (May 8, 2013, 5:12 AM), http://www.huffingtonpost.com/mari-fagel/jodi- arias-jury-questions_b_2825167.html (noting that after more than 150 questions "Arias' answers to the jurors' did little to clear up her story.").

[19] Robert Augustus Harper & Michael Robert Ufferman, *Jury Questions in Criminal Cases: Neutral Arbiters or Active Interrogators?*, 78 Fla. B. J. 8, 13 (2004).

[20] *State v. Costello*, 646 N.W.2d 204, 212 (Minn. 2002) (describing the prosecutor's satisfaction with the juror questioning, because it permitted him to understand what the jury was "seriously considering" and change the dynamic of the trial accordingly).

[21] *Medina v. California*, 505 U.S. 437, 466 (1992) (Blackmun, J., dissenting).

[22] *Costello*, 646 N.W.2d at 211 ("Due process requires that the state prove beyond a reasonable doubt the existence of every element of the crime charged. A defendant's due process rights are violated if the burden to disprove the existence of any element of the crime charged is shifted to the defendant. Allowing jurors to pose questions could, in some cases, elicit testimony from a witness that sufficiently proves an element of a crime, therefore relieving the state of its burden." (citations and footnote omitted)).

[23] *See* Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 Ind. L. J. 301, 316 (1989).

[24] Kristen L. Sweat, *Juror Questioning of Witnesses in Criminal Trials: The "Jury's Still Out" in Illinois*, 2014 U. Ill. L. Rev. 271, 276 (2014) (noting that as the judicial system evolved in the United States "both society and the legal system began to place more emphasis on defendants' rights, and particularly on a defendant's right to a fair trial.")

[25] *See* B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 Ind. L. J. 1229, 1231–36 (1993); N. Randy Smith, *Why I Do Not Let Jurors Ask Questions in Trials*, 40 Idaho L. Rev. 553, 556 (2004); *McNeil v. Wisconsin*, 501 U.S. 171, 188–89 (1991) (Stevens, J., dissenting).

[26] *See* Mitchell J. Frank, *The Jury Wants to Take the Podium — But Even with the Authority to Do So, Can It? An Interdisciplinary Examination of Jurors' Questioning of Witnesses at Trial*, 38 Am. J. Trial Advoc. 1, 51–60 (2014) (Mandatory for civil cases: Arizona, Colorado, Florida, Nevada, Texas, Washington, and Wyoming; Mandatory for criminal cases: Nevada, Colorado, and Arizona; Discretionary for civil cases: 38 states; Discretionary for criminal cases: 37 states.).

[27] *Id.* (Not allowed in civil or criminal cases: Delaware, Louisiana, Maine, Mississippi, and Nebraska.).

[28] *Id.* (Not allowed in criminal cases only: Arkansas, Minnesota, New Jersey, Texas.).

[29] *Williams v. Florida*, 399 U.S. 78, 111–14 (1970) (Black, J., concurring) (emphasis added).