

JUROR QUESTIONING OF WITNESSES IN CRIMINAL TRIALS: THE “JURY’S STILL OUT” IN ILLINOIS

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Over the last couple of centuries, the American jury has devolved from an active interrogator to a passive observer. Various reform movements have attempted to restore the jury’s active role. Most recently, Illinois passed Illinois Supreme Court Rule 243. This rule allows members of the jury to ask witnesses questions. The hope is that by allowing jurors to ask questions, they will become more engaged and more deeply comprehend what is occurring in the trial. Additionally, it will make for a more informed jury, raising the chances that a fair verdict is returned.

Rule 243, however, only applies in civil trials. Jurors cannot ask questions of witnesses in criminal trials. This Note argues that Rule 243 should expand to allow jurors to ask witnesses questions in criminal trials. In criminal trials, the most basic American interests of freedom and justice are at stake. Allowing jurors to ask questions of witnesses is paramount to preserving these interests.

This Note begins by looking at the history of juror questioning in America, as well as in Illinois, specifically the events leading up to the passage of Rule 243. Additionally, it presents the approaches of other jurisdictions to juror questioning. There are three types of approaches: (1) express prohibition of jury questions; (2) no express prohibition but lack of implementation of the practice; (3) allowance of jury questions within specific guidelines.

While there are noted benefits and drawbacks to allowing jurors to ask questions of witnesses, this Note argues that the interests of justice are best served by allowing these questions in both civil and criminal trials. It concludes by proposing a rule similarly worded to Rule 243 but including guidelines particular to criminal trials.

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I. INTRODUCTION

It was primetime, Sunday evening, and viewers across the country were glued to their television sets watching the newest episode of television's hit legal drama, *The Good Wife*, set in Cook County, Chicago, Illinois. Suddenly, they heard fictional star Will Gardner say, "I'm sure the jury will have questions about that."¹ Of course, this statement may not seem all that unusual; naturally, members of a jury always have questions. Yet, as the television audience soon saw, the writers of *The Good Wife* were capitalizing on the potential drama created by an innovative legal concept that has recently affected Illinois courts: the passage of a new law by the Illinois Supreme Court that allows jurors to conduct their own questioning of civil trial witnesses. This particular *Good Wife* episode, entitled "And the Law Won," portrayed at first what seemed to be a typical courtroom trial.² During the trial, however, the presiding judge was suddenly handed a note: a question from a juror, that when read, changed the course of the entire judicial proceeding. Likewise, many of

1. *The Good Wife: And the Law Won* (CBS television broadcast Oct. 7, 2012).

2. *Id.*

the other jurors began offering their own clever questions.³ As the scene unfolded, and juror after juror posed individual queries, the episode craftily highlighted the progressive impact of the new Illinois rule.

The legal effects of Illinois's new courtroom rule, which is known among the Illinois legal world as Supreme Court Rule 243 ("Rule 243"), clearly made for great "TV drama." What many television viewers that night probably did not realize, though, is that Illinois state courts only recently began implementing this groundbreaking rule in *civil* trials. Juror questioning of witnesses in *criminal* trials, however, is still not explicitly allowed in Illinois. This Note will argue that it should be.

Moreover, many of the episode's viewers that night most certainly did not realize that *The Good Wife's* portrayal of the rule's function was a large-scale dramatization of a concept that plays out much differently in real courtrooms. This episode of *The Good Wife* drew attention to the innovative practice of juror questioning, but at the same time it also managed to significantly misconstrue the concept. Interestingly, the episode's portrayal of the new rule sheds light on the general confusion and misunderstanding that people have concerning courtroom rules that allow juror questions. For instance, the method the juror members used to submit questions in this episode is not the way in which such questions are actually submitted. Unfortunately, the thematic Hollywood interpretation of the Illinois juror questioning rule made the practice seem so radical that many viewers likely were unable to grasp the true value that juror questioning of witnesses can add to trials in general, let alone to criminal trials specifically.

So, "to ask or not to ask?"⁴ And if "to ask," *how* to ask?—those are the questions this Note presents. As stated, the Illinois Supreme Court answered the question of whether jurors should be allowed to ask questions of witnesses during *some* trials with an emphatic "yes" when it passed Rule 243 in July 2012.⁵ Yet, the caveat in passing this potentially controversial rule was that juror questioning of witnesses in Illinois is admissible only in civil trials—and at that, only subject to the trial judge's discretion.⁶ Thus, whether "to ask" remains the question for the myriad of courtroom situations involving criminal cases that occur within the State of Illinois.

Admittedly, the practice of allowing jurors to question witnesses has sparked lengthy controversy and lively debate for quite some time, especially on a national level. The topic is an important issue for the public, which is most certainly why even Hollywood is taking notice of juror questioning and capitalizing on its relevance in trial procedures. While some states have embraced the practice, others have gone so far as actu-

3. *Id.*

4. 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 (2003).

5. Howard Zimmerle, *New Illinois Rule 24—Jurors Can Ask Questions!*, QUAD CITIES INJ. LAWS. (Apr. 3, 2012, 12:50 PM), <http://qcinjurylawyers.wordpress.com/2012/04/03/468/>.

6. ILL. SUP. CT. R. 243.

ally outlawing juror questioning entirely.⁷ Illinois has remained open to juror questioning of witnesses and the belief that it might provide significant value in determining the outcomes of trials. Until the recent adoption of Rule 243, Illinois had neither explicitly prohibited nor approved of the practice; its usage in state trials was, in reality, quite rare.⁸ With the passage of Rule 243, Illinois has now taken steps to embrace the practice. Because Rule 243 only allows the jury to ask witnesses questions during *civil* trials, however, there remains much uncertainty and inconsistency in the Rule's implementation. Moreover, although the main purpose of allowing jurors to question witnesses is to strengthen the trier of fact's ability to accurately determine the truth,⁹ by limiting Rule 243's usage to civil trials only, the language of the new statute fails to apply to the very situations which are arguably most in need of truth-finding: criminal trials. Indeed, in criminal trials the most basic American interests of freedom and justice for all are at stake.

Section II of this Note provides a background of juror questioning and discusses the current rule in Illinois. Next, Section II examines current approaches to juror questioning in other jurisdictions. Section III analyzes the advantages and disadvantages of allowing juror questions in criminal trials and discusses the opinions of current legal experts in Illinois on the issue of juror questioning. Finally, Section IV argues that the Illinois Supreme Court should either create a separate juror questioning rule for criminal trials or amend Rule 243 by extending the statute to allow jurors to ask questions of witnesses not only in civil trials, but in criminal trials as well. Furthermore, Section IV recommends that courts implement greater procedural safeguards to avoid confusion and to ensure the protection of defendants' Sixth Amendment rights.

II. BACKGROUND

A. *History of Juror Questioning*

Although the push for allowing jurors to question trial witnesses seems to be a recent trend in some jurisdictions, juror questioning of wit-

7. See *Jurisdiction-by-Jurisdiction Rules for Juror Questions to Witnesses*, AM. JUDICATURE SOC'Y (2012), <https://www.ajs.org/judicial-administration/jury-center/jury-system-overview/jury-improvement-efforts/improving-trials/juror-questions-witnesses/juror-questions-statutes/> (last visited Aug. 31, 2013) [hereinafter *Jurisdiction-by-Jurisdiction Rules*].

8. Chris Dettro, *Proposal Would Allow Jurors to Ask Questions in Some Trials*, ST. J. REG. 1 (May 8, 2011, 11:00 PM), <http://www.sj-r.com/top-stories/x173162607/Proposal-would-allow-urors-to-ask-questions-in-some-trials> (last updated May 9, 2011, 6:13 AM).

9. See Michael A. Wolff, *Juror Questions a Survey of Theory and Use*, 55 MO. L. REV. 817, 821 (1990) ("Those in favor of juror interrogation focus on the jury's role as the finder of fact and discerners of truth; these advocates view juror questions as a means of improving the jury's information and understanding of the issues it must decide. The benefit of juror interrogation can be summarized in the words of one advocate: 'the better informed the jury, the more likely it is to render a just verdict.' For juror question advocates, the pragmatic benefits of better-informed juries, and thus of better-considered verdicts, exceed the theoretical risks of altering a settled and static system of trial procedure.").

nesses is actually not a modern-day concept.¹⁰ In fact, the practice can be traced to eighteenth-century England, when “open, *viva voce* examination by the litigants (as well as the judge and jury) was said to be the best way to ‘sift out the truth.’”¹¹ Not only was the practice in existence during this time, but more than that, the adjudicatory proceedings in those days were specifically arranged so that jurors genuinely believed it was their *duty* to investigate any and all questions of fact to be tried.¹² Moreover, instances of jurors asking witnesses questions were even seen in criminal trials in the English courts as far back as the 1560s, where “the witnesses and defendant were subject to disputatious questioning by the judge, jury, and each other.”¹³

Given that the United States modeled its judicial process after the English court system,¹⁴ it is no surprise that juror questioning also existed in the early history of U.S. courts. The United States first saw the appearance of juror questioning in 1825,¹⁵ and the practice continued into the 1900s.¹⁶ By 1895, juror questioning had become an approved practice, and by 1926, at least one court had established formal procedures for juror questioning.¹⁷ In federal courts, the questioning of witnesses by jurors dates back to at least 1954.¹⁸ Notably, in its history, the U.S. Supreme Court consistently has denied *certiorari* to cases involving questions on the constitutionality and procedural implementation of juror questioning of witnesses.¹⁹

Unlike today, individuals accused of criminal activity at common law were only afforded counsel if there existed some point of law that

10. Eugene A. Lucci, *The Case for Allowing Jurors to Submit Written Questions*, 89 JUDICATURE 16, 16 (2005), available at http://www.lakecountyohio.gov/Portals/18/Judge%20Lucci/Selected%20Articles/Judicature%2016-19_Lucci_891.pdf.

11. Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 591 (1990) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765–1769, at 373 (Univ. of Chi. Press 1979)).

12. Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, in 44 HASTINGS L.J. 579, 585 (1992), available at http://cyber.law.harvard.edu/~nesson/American_Jury.rtf.

13. Landsman, *The Rise of the Contentious Spirit*, *supra* note 11, at 505.

14. See Early History of the U.S. Court System – Part 1, TIJERNIA LEGAL FIRM P.C. (Sept. 10, 2012), <http://www.tlegalfirm.com/2012/09/early-history-of-the-u-s-court-system-%E2%80%93-part-1/> (“Because the original Thirteen Colonies had followed English legal precedent, they already had their own comprehensive court system in place.”).

15. Lucci, *supra* note 10, at 16.

16. See *State v. Kendall*, 57 S.E. 340, 341 (N.C. 1907) (“It is objected to the validity of the trial that one of the jurors was permitted to ask a question of a witness who was then upon the stand giving his testimony. There is no reason that occurs to us why this should not be allowed in the sound legal discretion of the court, and where the question asked is not in violation of the general rules established for eliciting testimony in such cases. This course has always been followed without objection so far as the writer has observed, 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. Authority is also in favor of the court’s action in permitting the question.”).

17. Lucci, *supra* note 10, at 16–17.

18. *Id.* at 16.

19. Wolff, *supra* note 9, at 820.

required debating.²⁰ Otherwise, defendants were subject to the control of the judge and the jury without representation to guide them throughout the legal process. Very few procedural rules existed, and both the judge and the jury were able to ask questions to witnesses.²¹ Although today most courts allowing the practice agree that juror questions must adhere to strict requirements and procedural safeguards, such was not the case in earlier times. The earliest type of juror questioning took the form of a “juror outburst.”²² A “juror outburst” consisted of a member of the jury posing an unsolicited question to a witness during the testimonial examination of that witness at trial.²³ Understandably, such a scenario could produce fear and resistance among present-day attorneys and judges who strive to maintain control over a lawsuit and its procedural aspects.

Eventually, 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.²⁴ As the adversarial nature of the court system evolved, defendants started using defense attorneys who began taking more control over the trial and the process of presenting evidence.²⁵ Over time, as the lawyers representing each side gained more control of the proceedings, jurors became more and more silent until finally the jury transformed from its original role as active interrogator into passive observer.²⁶

Yet, as time went on, some members of the American public became frustrated and disillusioned with the passive jury system.²⁷ In fact, in some states, citizens were so disenchanted with the jury system that they refused to perform their civic responsibilities when called for jury duty.²⁸ As a result, various reform movements began in an attempt to improve the American jury system and restore its value.²⁹ One of these

20. Robert Augustus Harper & Michael Robert Ufferman, *Jury Questions in Criminal Cases: Neutral Arbiters or Active Interrogators?*, FLA. B. J., Feb. 2004, at 8, 8.

21. *Id.*

22. Wolff, *supra* note 9, at 817–18.

23. *Id.*

24. See Lucci, *supra* note 10, at 16 (“As the English court system evolved, more emphasis was placed on fair procedure. Defense counsel played an increasing role, while the role of jurors as active participants diminished.”).

25. Harper & Ufferman, *supra* note 20, at 8.

26. *Id.*

27. See Laura Mansnerus, *Under Fire, Jury System Faces Overhaul*, N.Y. TIMES (Nov. 4, 1995), <http://www.nytimes.com/1995/11/04/us/under-fire-jury-system-faces-overhaul.html?pagewanted=all&src=pm>.

28. See Kirsten DeBarba, Note, *Maintaining the Adversarial System: The Practice of Allowing Jurors to Question Witnesses During Trial*, 55 VAND. L. REV. 1521, 1531 (2002) (“In fact, some members of the American public have become so disillusioned with the current jury system that they refuse to participate in the process. In California, the Blue Ribbon Commission on Jury System Improvement announced that the state jury system was ‘in crisis’ and ‘on the brink of collapse.’ The commission found that the public expressed their dissatisfaction with the current jury system by refusing to appear for jury duty when called for service.”) (citations omitted).

29. See Mansnerus, *supra* note 27 (“Responding to a growing public disenchantment with juries after a raft of unpopular verdicts, state legislatures and court systems across the nation are starting to rewrite the rules of the jury system. Some states have already changed the way juries operate. Starting next month, Arizona will permit jurors to take notes, question witnesses through the judge and, in some cases, discuss evidence while a trial is in progress. Delaware is considering a similar list of proposals.”).

reforms still present today includes the reintroduction of juror questioning into trials³⁰ in hopes that the practice will lead to deeper comprehension by jurors and that it will cause jurors to be more engaged during trial.³¹ In turn, the role of the jury ideally will be strengthened as an integral part of trial.³²

B. Juror Questioning in Illinois and Supreme Court Rule 243

Slowly, more and more jurisdictions have started to reimplement juror questioning of witnesses into their adversarial process.³³ In July 2012, Illinois became one of the newest additions to the group of states that explicitly allow the practice of juror questioning in some form. On April 3, 2012, the Illinois Supreme Court officially adopted Rule 243.³⁴ Shortly thereafter, on July 1, 2012, Rule 243 became effective, placing within the discretion of Illinois trial courts the ability to allow jurors in civil trials to submit written questions to trial witnesses.³⁵

Before July 2012, most Illinois courts had left the topic of juror questioning largely untouched. While allowing the jury to ask questions to witnesses was not explicitly prohibited, the practice was rarely exercised.³⁶ The approach started to gain more popularity in recent years,

30. See DeBarba, *supra* note 28, at 1531 (“The debate over the role of the jury has led many courts, commentators, and legislatures to propose and implement practices to improve the efficient functioning of the jury. One proposal would permit jurors to question witnesses during trial.”).

31. See Lucci, *supra* note 10, at 19 (“Questioning facilitates juror understanding, attentiveness, and overall satisfaction, improves communications, and corrects erroneous juror beliefs.”).

32. See DeBarba, *supra* note 28, at 1531 (noting that legislatures have begun proposing and implementing innovative practices such as juror questioning in order “to improve the efficient functioning of the jury . . . during trial”).

33. See *infra* Parts II.C.2–3.

34. Williams Venker & Sanders, *Illinois Supreme Court Rule 243 – Written Juror Questions Directed to Witnesses*, JDSUPRA LAW NEWS (July 7, 2012), <http://www.jdsupra.com/legalnews/illinois-supreme-court-rule-243-writte-78478/>.

35. *Id.* The content of Rule 243 reads as follows: “(a) Questions Permitted. The court may permit jurors in civil cases to submit to the court written questions directed to witnesses. (b) Procedure. Following the conclusion of questioning by counsel, the court shall determine whether the jury will be afforded the opportunity to question the witness. Regarding each witness for whom the court determines questions by jurors are appropriate, the jury shall be asked to submit any question they have for the witness in writing. No discussion regarding the questions shall be allowed between jurors at this time; neither shall jurors be limited to posing a single question nor shall jurors be required to submit questions. The bailiff will then collect any questions and present the questions to the judge. Questions will be marked as exhibits and made a part of the record. (c) Objections. Out of the presence of the jury, the judge will read the question to all counsel, allow counsel to see the written question, and give counsel an opportunity to object to the question. If any objections are made, the court will rule upon them at that time and the question will be either admitted, modified, or excluded accordingly. (d) Questioning of the Witness. The court shall instruct the witness to answer only the question presented, and not exceed the scope of the question. The court will ask each question; the court will then provide all counsel with an opportunity to ask follow-up questions limited to the scope of the new testimony. (e) Admonishment to Jurors. At times before or during the trial that it deems appropriate, the court shall advise the jurors that they shall not concern themselves with the reason for the exclusion or modification of any question submitted and that such measures are taken by the court in accordance with the rules of evidence that govern the case.” ILL. SUP. CT. R. 243.

36. See Ted A. Donner, *New Rule 243 Allows Jurors to Ask Questions of Witnesses in Civil Cases*, 24 DUPAGE COUNTY B. ASS'N BRIEF 18, 18 (2012), available at <http://www.dcbabrief.org/vol240612art1.html> (“Prior to the enactment of new Illinois Supreme Court Rule 243, the practice . . . had been used in a number of state court proceedings in Illinois (usually in cases in which the

however, after certain legal leaders within Illinois undertook the initiative to implement juror questioning into various trials. Specifically, in 1986, the Honorable Warren D. Wolfson, a Cook County trial judge at the time, introduced the practice of juror questioning into several of his trials. The following year, he published an article in the *Chicago Bar Association Record* detailing his experiences.³⁷ His forward-thinking article revealed both benefits and drawbacks that can result from allowing jurors to ask their own questions to witnesses.³⁸ Ultimately, Judge Wolfson concluded that allowing jurors to question witnesses “fundamentally improve[s] the trial process.”³⁹

Shortly afterwards, in 1990, Judge Wolfson presided over a Cook County trial where he once again asked both parties whether they would be interested in allowing jurors to ask questions.⁴⁰ A Springfield lawyer named Stephen Kaufmann was one of the attorneys in the case who represented the party, Central Illinois Public Service Co.⁴¹ Although Kaufmann would later prove to be extremely influential in the Illinois movement towards allowing juror questioning, this particular trial in 1990 was Kaufmann’s first real experience observing juror questioning in practice.⁴² Kaufmann said he was “intrigued by the process.”⁴³

Despite the pioneering efforts of Judge Wolfson that began over twenty years ago to introduce juror questioning in Illinois, many judges remained reluctant to follow his lead.⁴⁴ In fact, 2004 and 2006 studies by the National Center for State Courts (NCSC) revealed that many judges in Illinois actually mistakenly believed that they were expressly prohibited from allowing jurors to ask questions, although they could not identify which rule they thought prohibited the practice.⁴⁵

That perception began to change in August 2010, when Kaufmann, who is currently a partner in the Springfield office of HeplerBroom, LLC, proposed a juror-questioning rule to the Rules Committee for the Illinois Supreme Court.⁴⁶ His proposed rule specifically allowed jurors to ask questions of witnesses in civil trials.⁴⁷ During that same time, Kaufmann also published an article on juror questioning with Springfield at-

parties agreed to its use). The new rule, though, both provides for specific practices to be followed in such cases and, as a practical matter, brings a unique innovation to the fore which, previously, did not warrant a great deal of attention in Illinois.”)

37. Stephen R. Kaufmann & Michael P. Murphy, *Juror Questions During Trial: An Idea Whose Time Has Come Again*, 99 ILL. B.J. 294 (2011), available at <http://www.isba.org/ibj/2011/06/jurorquestionsduringtrialanideawhos>.

38. For a discussion of the potential advantages and disadvantages of juror questioning, including those identified in Judge Wolfson’s article, see *infra* Part III.A.

39. Kaufmann & Murphy, *supra* note 37.

40. Dettro, *supra* note 8, at 1.

41. *Id.*

42. *See id.* at 1–2.

43. *Id.*

44. Nancy S. Marder, *Answering Jurors’ Questions: Next Steps in Illinois*, 41 LOY. U. CHI. L.J. 727, 749 (2010).

45. *Id.* at 749.

46. Dettro, *supra* note 8, at 1.

47. *Id.*

torney Michael P. Murphy in the *Illinois Bar Journal* to further advocate for the addition of such a rule.⁴⁸ Then, on May 20, 2011, the 18-member Supreme Court Rules Committee held a public hearing in Chicago, where Kaufmann testified in favor of juror questioning.⁴⁹ Ultimately, Kaufmann's proposal would become Rule 243.

Even with the passage of Rule 243, it is likely that many Illinois judges will refrain from experimenting with the practice. As explained in the Committee Comments to Rule 243,⁵⁰ juror questioning is only permissible *at the discretion of the judge*, which means that despite the desires of the parties, jurors only will be allowed to ask questions when the judge ultimately decides they should be able to in a given case.⁵¹ Moreover, many Illinois judges and attorneys remain hesitant to implement what they perceive to be such a radical change in the course of normal trial procedure, due in large part to the fact that there simply have not yet been many trials in which courts have used juror questioning.⁵²

C. Overview of Modern Jurisdictional Approaches to Juror Questioning

Importantly, Illinois is not the only state currently addressing juror questioning. During the past quarter century, a national debate has developed among American courts, commentators, and legal scholars concerning whether they should once again allow jurors to ask questions of witnesses during trials.⁵³ Although the enactment of Illinois's juror questioning rule occurred only very recently, other states have been passing these types of courtroom rules for a while.⁵⁴ Most state courts have actually already discussed the issue of juror questioning in some manner.⁵⁵ In fact, as progressive as Rule 243 might initially seem, "[o]ver half of all states and all federal circuits [already] have such a rule allowing jurors to submit written questions for witnesses."⁵⁶

48. Kaufmann & Murphy, *supra* note 37; *see also* Dettro, *supra* note 37, at 1.

49. Dettro, *supra* note 5, at 1.

50. Specifically, the Committee Comments for Rule 243 consist of the following remarks: "This rule gives the trial judge discretion in civil cases to permit jurors to submit written questions to be directed to witnesses—a procedure which has been used in other jurisdictions to improve juror comprehension, attention to the proceedings, and satisfaction with jury service. The trial judge may discuss with the parties' attorneys whether the procedure will be helpful in the case, but the decision whether to use the procedure rests entirely with the trial judge. The rule specifies some of the procedures the trial judge must follow, but it leaves other details to the trial judge's discretion." ILL. SUP. CT. R. 243.

51. *Id.*

52. Telephone Interview with Stephen Kaufmann, Partner, HeplerBroom LLC (Mar. 4, 2013).

53. Harper & Ufferman, *supra* note 20, at 8.

54. *See* Laurie Forbes Neff, *The Propriety of Jury Questioning: A Remedy for Perceived Harmless Error*, 28 PEPP. L. REV. 437, 453 (2001).

55. *Id.*

56. Corey Raines, *A New Role for Jurors in Civil Trials*, WEXLER WALLACE BLOG (June 4, 2012), <http://blog.wexlerwallace.com/?p=1373>.

For the most part, state courts tend to be more accepting of juror questioning than federal courts,⁵⁷ although it is crucial to recognize that *all* federal courts permit the practice.⁵⁸ Generally, the varying jurisdictional approaches to juror questioning can be categorized into three different groups: (1) jurisdictions “that expressly prohibit questions,” (2) jurisdictions “that do not prohibit questions but where trial judges [might] not typically employ the practice,” and (3) jurisdictions “that allow questions in some form and within specified guidelines.”⁵⁹ The following is a representative overview of these jurisdictions and a discussion of their differing perspectives on jury questioning.

1. *Jurisdictions That Expressly Prohibit Questions*

In reality, only a very small number of states *expressly* forbid the practice of allowing jurors to question witnesses. Nevertheless, the rules and case law from these states are important in understanding the various arguments that critics advance against juror questioning. In terms of outlawing juror questioning, only two states have disallowed the practice entirely in trial settings.⁶⁰ Indeed, the courts of these two states, Nebraska and Mississippi, have held that juror questioning of witnesses is not permissible in criminal trials or in civil trials.⁶¹

In fact, over two decades ago the Supreme Court of Nebraska first issued its state ban on juror questions.⁶² In *Nebraska v. Zima*, the Nebraskan Supreme Court prohibited juror questioning of witnesses throughout all trial courts in that state.⁶³ Reasoning that “due process requires a fair trial before a fair and impartial jury,” the court stated that the judicial process is most effectively served when counsel elicits evidence that “is heard, evaluated, and acted upon by jurors who have no investment in obtaining answers to the questions they have posed.”⁶⁴ The court emphasized its fear that the practice of juror questioning might

57. Peter F. Vaira, *Questions from Jurors a Practice Slowly Gaining Acceptance*, VAIRA & RILEY, P.C., <http://www.vairariley.com/CM/Custom/Questions-from-Jurors.html> (last visited Aug. 31, 2013).

58. Alayna Jehle & Monica K. Miller, *Controversy in the Courtroom: Implications of Allowing Jurors to Question Witnesses*, 32 WM. MITCHELL L. REV. 27, 53–54 (2005).

59. Mott, *supra* note 4, at 1100. Note that Mott’s article uses these three categorical labels only to describe *state* approaches. I find, however, that these labels, however, are fitting for federal approaches as well and have thus expanded Mott’s classifications to include federal jurisdictions in addition to state jurisdictions. *See also* State v. Zima, 468 N.W.2d 377, 379 (Neb. 1991) (outlining similar jurisdictional categories and providing a detailed overview of the case law supporting them: “Although the issue of juror questioning of witnesses is one of first impression in Nebraska, it is not without precedent. One group of jurisdictions, although it may discourage juror questioning of witnesses, holds that allowing the practice is within the discretion of the trial court”) (citations omitted).

60. *Jurisdiction-by-Jurisdiction Rules*, *supra* note 7 (noting that Mississippi and Nebraska prohibit jurors from questioning witnesses in both criminal and civil cases).

61. *Id.*

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

63. *Id.* (“We therefore rule that in the trial courts of this state, juror questioning of witnesses is prohibited.”).

64. *Id.* at 379–80 (citations omitted).

transform jurors from unprejudiced individuals into “advocates and possible antagonists of the witnesses.”⁶⁵

Influenced by this apprehension, the court expressed its concern that juror questioning might not actually lend itself to a “fairer or more reliable truth-seeking procedure.”⁶⁶ Interestingly, however, in his concurring opinion, Judge Shanahan considered the Nebraska Evidence Rules as well as the rules of other jurisdictions and, as a result, specifically objected to any rule that would “flatly prohibit[] jurors from ever asking questions”⁶⁷ In doing so, he remarked that “an absolutely prohibitive rule against all questions from jurors is as incomprehensible as it is imprudent.”⁶⁸

In 1998, just seven years after *Nebraska v. Zima*, Mississippi first announced its broad prohibition on juror questioning in the case of *Wharton v. State*.⁶⁹ Stating that “[t]he most obvious problem with allowing jurors to question witnesses is the unfamiliarity of the jurors with the rules of evidence,” the Mississippi Supreme Court ruled that “juror interrogation [was] no longer to be left to the discretion of the trial court, but rather is a practice that is condemned and outright forbidden”⁷⁰ Nevertheless, while the Mississippi Court’s fear concerning jurors’ unfamiliarity with the law is a valid concern, studies have found that even though most jurors have no knowledge of the rules of evidence, “they still [do] not ask inappropriate [or frivolous] questions.”⁷¹

While Mississippi and Nebraska are the only two states forbidding juror questioning entirely, only four states explicitly prohibit the practice of jury questions in all criminal contexts.⁷² These four states include Minnesota and Texas, in addition to Nebraska and Mississippi.⁷³ The state of Georgia, however, has banned the practice of allowing jurors to ask oral questions *directly* to witnesses in criminal trials, although the act of submitting written questions to the court is nevertheless allowable in various circumstances.⁷⁴

These states that ban juror questions in criminal cases have expressed the typical apprehensions associated with juror questioning. For example, in the 2002 case of *State v. Costello*, the Supreme Court of Minnesota outlawed the practice of juror questioning in criminal cases for fear that it would adversely affect juror impartiality and would relieve the prosecution of its burden of proof.⁷⁵ In holding that jurors should not

65. *Id.* at 380.

66. *Id.*

67. Neff, *supra* note 54, at 461.

68. *Zima*, 468 N.W.2d at 380 (Shanahan, J., concurring).

69. 734 So.2d 985, 990 (Miss. 1998).

70. *Id.*

71. See Jehle & Miller, *supra* note 58, at 48–49.

72. *Jurisdiction-by-Jurisdiction Rules*, *supra* note 7.

73. *Id.*

74. *Id.*; see also A. Barry Capello & G. James Strenio, *Juror Questioning: The Verdict Is in After Years of Debate, Courts Are Increasingly Allowing Jurors to Question Witnesses, Following Procedural Safeguards*, 36 TRIAL 44, 46 (2000).

75. 646 N.W.2d 204, 213 (Minn. 2002).

be afforded the opportunity to question trial witnesses during a criminal trial,⁷⁶ the Minnesota Court expressed its concern that the practice might lead to juror impartiality and that it might also impact the burden of proof and production that is possessed by the State during criminal prosecutions.⁷⁷

While the fears expressed by the Minnesota Supreme Court might be representative of the concerns generally held by those opposed to juror questioning, it remains nevertheless noteworthy that Minnesota exists among a small minority in terms of banning the practice entirely.⁷⁸ The vast majority of jurisdictions, however, still have not found opponents' apprehensions grave enough to warrant the complete prohibition of juror questions.⁷⁹ Rather, many jurisdictions instead find the advantages of juror questions to outweigh any potential drawbacks.⁸⁰

2. *Jurisdictions That Do Not Expressly Prohibit Questions but Where Trial Judges Might Not Typically Employ the Practice*

As previously stated, not a single federal circuit prohibits the practice of juror questioning.⁸¹ Rather, every federal circuit that has evaluated juror questioning has found it to be an acceptable practice entirely within the discretion of the trial court.⁸² In *United States v. Callahan*, the Fifth Circuit expressly acknowledged the beneficial impact that juror questions can offer:

There is nothing improper about the practice of allowing occasional questions from jurors to be asked of witnesses. If a juror seems unclear as to a point in the proof, it makes good common sense to allow a question to be asked about it. If nothing else, the question should alert trial counsel that a particular factual issue may need more extensive development.⁸³

In this same opinion, the Fifth Circuit further approved juror questioning by explaining that it leads to a more comprehensive development of the issues and facts within a case, and that “[t]rials exist to develop the truth.”⁸⁴ Likewise, the Eighth Circuit has extensively examined the practice, ultimately holding that juror questions are permissible within “enu-

76. *Id.* at 214.

77. *Id.* at 213 (“In sum, our concern about allowing jurors to question witnesses is two-fold. First, the opportunity to pose questions may prevent jurors from keeping an open mind until all the evidence has been presented. Second, the opportunity to pose questions may upset the burden of production and persuasion in a criminal trial. We believe the passive-juror system minimizes these problems because jurors are (1) not enticed to form hypotheses or judgments about missing testimony; and are (2) prevented from affecting the production of evidence.”).

78. See *supra* notes 60–61, 72–73 and accompanying text.

79. See *infra* Parts II.C.2–3.

80. See *infra* Part II.C.3.

81. Jehle & Miller, *supra* note 58, at 53–54.

82. Emma Cano, *Speaking Out: Is Texas Inhibiting the Search for Truth by Prohibiting Juror Questioning of Witnesses in Criminal Cases?*, 32 TEX. TECH L. REV. 1013, 1018 (2001).

83. *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir. 1979).

84. *Id.*

merated procedures.”⁸⁵ The Fourth Circuit has also commented on the admissibility of juror questioning, preferring written questions as opposed to oral questions.⁸⁶ The First Circuit, too, has addressed juror questioning, specifically within a criminal context, and has advised that courts adhere to procedural safeguards when utilizing the practice.⁸⁷ Analogous to both the Fourth and First Circuits, the Seventh Circuit also recommends that district courts permitting juror questions should adopt preventive measures and require questions to be in writing.⁸⁸ Moreover, and perhaps most relevant for the purposes of this Note, several Seventh Circuit district court judges from Illinois have in recent years rigorously advocated for the implementation of juror questioning.⁸⁹ Both former Chief Justice James F. Holderman of the Northern District of Illinois and Chief Justice David R. Herndon of the Southern District of Illinois are among the staunchest of advocates,⁹⁰ with former Chief Judge Holderman having employed juror questioning in every single trial he has had since 2005,⁹¹ and with Chief Judge Herndon having actually been “begged” by parties to allow the practice.⁹²

Apart from federal jurisdictions allowing questions to witnesses, most military hearings permit members of court-martial panels to ask questions of witnesses as well.⁹³ The majority of states also already allow for some form of juror questioning in certain circumstances.⁹⁴ Typically, these states allow the practice subject to the trial judge’s broad discretion.⁹⁵ Although the practice might technically be allowed in most jurisdictions, it is infrequently employed or actively encouraged, which might explain why the public knows little about the practice. (It might also explain why Hollywood storytellers like the creators of *The Good Wife* would find the topic innovative and interesting enough to use as the basis for a plot twist.)⁹⁶ Notably, prior to the enactment of Rule 243, Illinois took this stance. To be certain, many of the states that expressly allow juror questioning in at least some form have only addressed the matter in either a criminal trial or a civil trial, but not necessarily both.⁹⁷ Thus, emerging from trial courts across the country, comes a history of case law

85. Cano, *supra* note 82, at 1017.

86. *United States v. Polowichak*, 783 F.2d 410, 413 (4th Cir. 1986); Cano, *supra* note 82, at 1019.

87. *United States v. Sutton*, 970 F.2d 1001, 1005 (1st Cir. 1992) (stating that “a judge who decides to utilize it should take pains to lessen its inherent dangers by implementing a series of prophylactic measures”).

88. Cano, *supra* note 82, at 1024–25.

89. *See Kaufmann & Murphy, supra* note 37.

90. *See id.*

91. Telephone Interview with the Honorable James F. Holderman, former Chief Justice, U.S. Dist. Court for the N. Dist. of Ill. (Mar. 8, 2013).

92. Telephone Interview with the Honorable David R. Herndon, Chief Justice, U.S. Dist. Court for the S. Dist. of Ill. (Mar. 4, 2013).

93. Lucci, *supra* note 10, at 16.

94. *See Marder, supra* note 44, at 747 (“[M]ost states simply permit the practice but give the trial judge discretion in deciding when to use it.”).

95. *See id.*

96. *See supra* Part I.

97. *See Jurisdiction-by-Jurisdiction Rules, supra* note 7.

that explores the constitutional boundaries of juror questioning and overwhelmingly legitimizes the practice as a lawful procedure for use in accordance with a trial judge's discretion. Significantly, the majority of judicial precedent analyzing juror questioning has occurred against the backdrop of a criminal trial.⁹⁸ In fact, the states of Alaska, Arkansas, Massachusetts, Michigan, Nevada, New Mexico, New York, North Carolina, Ohio, Vermont, Virginia, and the District of Columbia have all examined juror questioning of witnesses in criminal cases and have concluded that the practice is admissible.⁹⁹ Furthermore, there has been no indication that these states would rule any differently if evaluating the legality of juror questioning in civil cases.¹⁰⁰ Similarly, Connecticut, Iowa, and Pennsylvania each have established case law holding that juror questioning is an admissible procedure with the court's discretion for civil matters, and no reason exists to believe any of these three states would hold otherwise for a criminal trial.¹⁰¹ Judicial rulings in Georgia have also upheld juror questioning of witnesses as long as jurors offer the questions in writing and not through direct oral interrogation.¹⁰²

Nevertheless, while to date only four states expressly prohibit jury questions in criminal trials,¹⁰³ a handful of other states have admittedly discouraged the practice.¹⁰⁴ California, Kansas, and Montana, for instance, all have produced criminal case law in which their respective state courts declared juror questioning constitutional but simultaneously discouraged the practice and highlighted its potential dangers.¹⁰⁵ Likewise, South Carolina civil precedent has discouraged juror questioning despite recognizing its admissibility subject to the trial court's discretion.¹⁰⁶ Despite Illinois's recent approval of juror questioning in *civil* matters, commentators have occasionally included Illinois among the minority of states that discourage juror questioning in *criminal* trials.¹⁰⁷

98. *See id.*

99. *See id.*

100. *See id.*

101. *See id.*

102. *Id.*

103. That is, four states (Minnesota, Mississippi, Nebraska, and Texas) prohibit *all* juror questions in criminal trials. Some scholars, however, also include Georgia as one of these states because it prohibits the practice of asking *oral* questions *directly* to witnesses in criminal trials. *See id.* For an example of an article that categorizes Georgia as a state which prohibits juror questioning, see W. Gardner Shelby, *Efrain De La Fuente Says Jurors in Most States, But Not Texas, Can Ask Questions of Witnesses in Trials*, POLITIFACT (Nov. 29, 2011), <http://www.politifact.com/texas/statements/2012/jan/22/efrain-de-la-fuente/efrain-de-la-fuente-says-jurors-most-states-not-te/>.

104. *See* Shelby, *supra* note 103.

105. *See Jurisdiction-by-Jurisdiction Rules*, *supra* note 7.

106. *See id.*

107. *See* Shelby, *supra* note 103.

3. *Jurisdictions that Allow Questions in Some Form and Within Specified Guidelines*

A number of state jurisdictions have already explicitly codified procedural rules regarding juror questioning of trial witnesses.¹⁰⁸ Many of these states even allow the practice in *all* jury trials, meaning courts in these states permit juror questioning in *both* civil and criminal contexts. Arizona, Colorado, Hawaii, Idaho, Tennessee, and Utah, for example, each have designated two separate, albeit similar, rules: one for juror questioning during civil trials and one for juror questioning during criminal trials.¹⁰⁹ Similarly, New Hampshire has adopted a juror questioning rule that encompasses both civil cases and “any criminal case in which all parties consent.”¹¹⁰ Likewise, Indiana, Kentucky, Missouri, and Oregon have all codified a general procedural rule for juror questioning of witnesses in any trial.¹¹¹ A typical juror-questioning rule adapted for both a civil trial and a criminal trial might look similar to the following rule language, which Idaho has adopted for both of its civil and criminal rules on juror questioning:

In the discretion of the court, jurors may be instructed that they are individually permitted to submit to the court a written question directed to any witness. If questions are submitted, the parties or counsel shall be given the opportunity to object to such questions outside the presence of the jury. If the questions are not objectionable, the court shall read the question to the witness. The parties or counsel may then be given the opportunity to ask follow-up questions as necessary.¹¹²

In addition, a considerable number of other states have enacted a juror-questioning rule that applies only to civil trials. This group of states includes Florida,¹¹³ New Jersey,¹¹⁴ North Dakota,¹¹⁵ Washington,¹¹⁶ Wyoming,¹¹⁷ and as of July 2012, Illinois.¹¹⁸ Interestingly, some of these state juror questioning rules surfaced as a result of various pilot projects and reports that endorsed juror questioning.¹¹⁹

Emerging as a leader of the juror questioning movement has most certainly been Arizona. Whereas most states allow juror questions only subject to the trial court’s discretion,¹²⁰ Arizona is one of three states

108. *See Jurisdiction-by-Jurisdiction Rules*, *supra* note 7.

109. *See id.*

110. *Id.*

111. *See id.*

112. *Id.*

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.*

118. ILL. SUP. CT. R. 243.

119. Jehle & Miller, *supra* note 58, at 53.

120. Brian Skoloff, *Arizona Murder Defendant Jodi Arias Faces More Jury Questions, Under Fire, Jury System Faces Overhaul*, SAN JOSE MERCURY NEWS (Mar. 7, 2013), http://www.mercurynews.com/nation-world/ci_22738865/arizona-murder-defendant-jodi-arias-faces-more-jury (“Arizona

(with the other two being Colorado and Indiana) in which jurors actually have a mandated right to question witnesses in all trials.¹²¹ Arizona not only mandates juror questioning in both civil and criminal trials,¹²² but most recently the state has garnered monumental media attention for using the innovative practice in a highly publicized criminal case: the Jodi Arias murder trial.¹²³ On March 6 and 7, 2013, the ex-lover-turned-accused-murderer, Jodi Arias, confronted more than 220 juror questions read aloud to her by the judge.¹²⁴ Tellingly, the American public responded favorably to the jurors' questions; in an online poll by *Head-LineNews*, seventy-nine percent of voters rated the jurors' questions as being within the A+, A, or A- range on an A through F grading scale.¹²⁵

III. ANALYSIS

A. *Benefits of Juror Questioning*

1. *In General*

“The purpose of trial is to find the truth and exact justice through the transmission of information to the jury.”¹²⁶ It is this vision that lies at the heart of the juror questioning debate. Proponents argue that juror questioning represents and facilitates the most essential goal of jury trials: to present evidence in such a way that the jury can accurately determine the underlying truth and, accordingly, fashion an appropriate verdict. Indeed, the goal of Illinois Supreme Court Rule 243 is that juries will develop a greater understanding of witness testimony, thus “allowing for [juror] verdicts that are based on a correct understanding of the facts and testimony.”¹²⁷ Enabling the search for truth, then, seems to be at the forefront of the argument in favor of allowing jurors to question witnesses.

Proponents list numerous other benefits from juror questioning as well. One of the most commonly recognized advantages is that juror questioning tends to result in having jurors who are more engaged and

is one of just a few states where jurors in every trial can ask questions of witnesses. In many other states, it's up to individual judges to decide whether it's permissible.”).

121. David Lohr, *Jodi Arias Trial: “Why Should We Believe You Now?”*, HUFFINGTON POST (Mar. 7, 2013), http://www.huffingtonpost.com/2013/03/07/jodi-arias-why-should-we-believe-you_n_2833118.html (“Arizona is one of three states that allow jurors to pose questions to witnesses after prosecution and defense lawyers have finished.”); Kaufmann & Murphy, *supra* note 37, at 296.

122. See *Jurisdiction-by-Jurisdiction Rules*, *supra* note 7.

123. See, e.g., Lohr, *supra* note 121; Skoloff, *supra* note 120.

124. Skoloff, *supra* note 120.

125. *Arias Trial: Grade the Jury*, HLN VOTE (Mar. 7, 2013, 10:52 PM), <http://www.hlnv.com/poll/2013/03/07/arias-trial-grade-jury/results>.

126. Cappello & Strenio, *supra* note 74, at 48.

127. Katherine O'Malley, *Illinois Adopts Rule Allowing Jurors to Question Witnesses*, SUBROGATION & RECOVERY L. BLOG (June 26, 2012), <http://www.subrogationrecoverylawblog.com/2012/06/articles/subro-roundup/illinois-adopts-rule-allowing-jurors-to-question-witnesses/>.

more attentive during trial.¹²⁸ Jurors who are allowed to ask questions to witnesses might actually find the trials more interesting.¹²⁹ In particular, the more active a role that the jurors play, the more understanding they will possess regarding the significance of their responsibility.¹³⁰ Furthermore, empirical research has shown that jurors who are permitted to ask questions to witnesses are ultimately “more satisfied with their service and more confident with their verdicts.”¹³¹ Not only can juror questioning aid the jury in becoming “more active, focused, and involved,” but other perceived benefits include that juror questions “help[] jurors resolve questions they may have regarding the facts or the law[,] increas[e] the public’s perception of the credibility of the jury[,] and serv[e] as a check on the power of judges and attorneys.”¹³²

Significantly, “questions may provide counsel an opportunity to better comprehend jurors’ thought processes and their perceptions of case weaknesses.”¹³³ Such insight can provide both sides with a greater understanding of how to communicate with the jury. Otherwise, “without feedback from jurors, the attorneys presenting a case may not realize that vital information is [inadvertently] being omitted.”¹³⁴ Hearing jurors’ questions also alerts both the court and counsel to the aspects of the case that the jury finds most troubling.¹³⁵ In turn, such awareness of the jury’s thoughts can allow party attorneys to better structure their cases and witness examinations in a manner that more effectively addresses and resolves issues in the eyes of the jurors.¹³⁶

Another advantage of permitting juror questioning is that jurors finally have an outlet by which to seek answers to questions they possess but that no one else has thought to ask. Otherwise, if jurors are not allowed to ask their questions, the likelihood is that they will engage in “self-help measures,” which in the long run “are not to the benefit of judges or lawyers.”¹³⁷ While “the milder form of self-help is when jurors speculate to an answer” and simply “make up one” whenever they do not know, the “stronger and even less desirable form” is when jurors resort to finding their own answers with the help of outside sources, such as conducting quick searches on their iPhones or laptops.¹³⁸ In today’s tech-

128. See Marder, *supra* note 44, at 728 (“[T]he 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.”).

129. See Lisa M. Harms, Comment, *The Questioning of Witnesses by Jurors*, 27 AM. U. L. REV. 127, 133 (1977) (“In addition, allowing questions could improve jury duty from a juror’s point of view. Greater participation could make serving as a juror more interesting.”).

130. ELLEN CHILTON & PATRICIA HENLEY, PUB. LAW RESEARCH. INST., IMPROVING THE JURY SYSTEM: HELPING JURORS UNDERSTAND THE EVIDENCE AND THE LAW 4 (2004), available at <http://gov.uchastings.edu/public-law/docs/plri/juryinst.pdf>.

131. Harper & Ufferman, *supra* note 20, at 8.

132. DeBarba, *supra* note 28, at 1532.

133. Harper & Ufferman, *supra* note 20, at 8.

134. Harms, *supra* note 129, at 131.

135. See DeBarba, *supra* note 28, at 1532.

136. *Id.*

137. Marder, *supra* note 44, at 745.

138. See *id.*

nology-fueled world of the Internet and social media, information is literally just a quick keyword search and mouse-click away. Society has grown accustomed to endless possibilities for immediate communication and the ability to satiate human curiosity with instantaneous results. Indeed, the modern public is comprised of individuals who have been taught and encouraged to be self-sufficient thinkers and to take advantage of today's advanced technological tools. The danger in forcing members of a modern jury to sit passively and quietly throughout a trial, which often spans over a period of days or even weeks, is that it goes against the very nature of a public which has been raised to "just Google it" and receive thousands of results in a matter of seconds.¹³⁹ Even though a judge might warn the jury not to consult any outside information throughout the duration of the case, common sense points to the reality that each time the jurors leave the courtroom only to return the next day, the issues of the case will likely still be present in their minds.

As a result, many jurors might succumb to the temptation to address their questions by impermissibly seeking answers on their own time in order to feel better prepared and knowledgeable the next time they enter the jury box. Indeed, "[t]here are instances in which jurors have, on their own, made site visits or consulted reference books, the Internet, and lawyers who are not involved in the case."¹⁴⁰ Because the court has no control over the content of this outside information, it could easily be inaccurate or biased and thereby negatively influence the jurors' viewpoints of the case. Critics argue that allowing juror questioning could lead to juror impartiality, but the reality remains that barring jurors from expressing their concerns and questions during trial (at a time when counsel has the opportunity to adapt the presentation of their evidence so as to clear up any confusion) is just as likely to lead to juror impartiality and premature deliberation.¹⁴¹ Additionally, another undesirable outcome might be that jurors instead rely on turning to one another before, or during, deliberation to understand what occurred during trial; the danger, however, is that "fellow jurors may or may not know the answer."¹⁴² Alternatively, simply allowing jurors to make their inquiries and uncertainties known in a timely fashion to the court through written questions can help reduce the need for jurors to resort to undesirable and prohibited self-help measures.

139. See *id.* at 745–46.

140. NANCY S. MARDER, *THE JURY PROCESS* 113 (2005) (citation omitted).

141. See Lucci, *supra* note 10, at 18 ("If the jury is confused about the evidence, then jurors should be allowed to ask questions designed to alleviate the confusion The idea that justice is somehow served by a confused jury that is not allowed to express its confusion and seek clarity of understanding is flat wrong. If the failure to persuade results from curable juror confusion, then the party with the burden of proof is not the only one who suffers. The entire community suffers because a miscarriage of justice has occurred. . . . To say that the party with the burden of proof must make its points clear or suffer the loss at trial ignores the fact that a jury may just as easily rule in favor of the opposing party (the one without the burden) if the jurors are confused about the evidence.").

142. MARDER, *supra* note 140, at 112.

2. *Specifically in Criminal Trials*

To understand the specific benefits to criminal trials that the practice of juror questioning provides, one must consider what is at stake in a civil trial versus what is at stake in a criminal trial. In civil trials, the alleged wrongdoing can be thought of as harm to a private group or individual.¹⁴³ Criminal trials, however, are a different story. In a criminal lawsuit, the alleged wrongdoing is not simply an injury to a private party, but rather a transgression against the whole of society.¹⁴⁴ It follows, then, that the purpose of a civil trial differs quite significantly from the purpose of a criminal trial.¹⁴⁵ Whereas the primary goal of a civil trial is to provide compensation and restore the injured party to its whole condition, the principal aim of a criminal trial is to protect members of the public and to restore justice through retribution and punishment.¹⁴⁶ Indeed, in the world of civil litigation, the remedy for wrongdoing is typically monetary damages or some type of injunction.¹⁴⁷ In the realm of criminal litigation, however, the remedy is commonly imprisonment.¹⁴⁸ As a result, the consequences of a civil trial are quite disparate from those of a criminal trial. While a defendant's money and reputation might be at stake in the former, the defendant in the latter has the grave potential of completely losing his or her constitutional right to individual freedom.

Keeping in mind this reality of the stark contrast in what is at stake in a civil trial versus a criminal trial, logic would dictate that the need for meticulous truth-finding might arguably be much greater in a criminal trial than in a civil trial. Furthermore, it would seem unreasonable and unfair that if society is willing to allow juror questioning in the first place, that it would not first try to implement the practice in a criminal context where the impact of questioning the witness would arguably best serve the societal interests of promoting justice and protecting human liberty.

B. *Concerns Associated with Juror Questioning*

1. *In General*

As with every good thing, alongside the advantages associated with juror questioning exist many concerns regarding the constitutionality and overall impact of the practice. At the forefront of these concerns is the fear that allowing jurors to question witnesses might prevent parties from

143. *Differences Between Civil and Criminal Trials*, UNIV. OF TEX., <http://www.laits.utexas.edu/gov310/JU/civcrim/index.html> (last visited Aug. 31, 2013).

144. *Id.*

145. *See id.*

146. *See id.*

147. *Differences Between Criminal and Civil Litigation Cases*, LAW FIRMS.COM, <http://www.lawfirms.com/resources/lawsuits-and-disputes/litigation/differences-between-criminal-and-civil-litigation.htm> (last visited Aug. 31, 2013).

148. *Differences Between Civil and Criminal Trials*, *supra* note 143.

receiving their constitutional guarantee to an impartial jury.¹⁴⁹ Critics contend that juror questioning negatively affects trials by transforming what should be a passive, impartial jury into an active, partial jury.¹⁵⁰

The concern about maintaining impartiality is perhaps the most troubling apprehension for people who are not in favor of juror questioning. For instance, one fear is that jurors might pose their questions in such a way that the questions cease to be inquisitorial and instead exist more as commentary.¹⁵¹ In addition, skeptics contend that one risk in allowing jurors to submit even written questions is that it could potentially lead to bias if a particular juror's question is not ultimately asked.¹⁵² The worry is that the process of posing questions only to have them remain unanswered might greatly frustrate jurors. On the other hand, if the court *does* decide to ask a juror's question, there is also the potential that that juror might assign too much weight to the answer to that particular question solely because he or she thought to ask it. Stated differently, the answer of that particular question might significantly distract the juror who asked it and might cause him or her to inadvertently overlook other testimonial evidence.¹⁵³

In particular, those opposed to juror questioning fear "premature deliberation."¹⁵⁴ Premature deliberation occurs when a juror begins to deliberate and determine what the outcome of the trial should be prior to having heard and seen all of the evidence.¹⁵⁵ According to the argument, the act of formulating witness questions actually *encourages* jurors to begin the deliberation process before all the evidence has been submitted and before the jurors have retired to the jury room to decide the verdict as a group.¹⁵⁶ Advocates who have used juror questioning in practice, however, have responded to the fears of impartiality and premature deliberation by pointing out that they have actually not found such risks to come to fruition after allowing juror questions.¹⁵⁷

149. See Jehle & Miller, *supra* note 58, at 40 ("The main concerns stem from the potential threat to the adversarial system, in which jurors' roles may be transformed from neutral fact-finders to biased advocates.").

150. Capello & Strenio, *supra* note 74, at 45–46 ("But critics . . . warn of disadvantages. They contend that juror questioning transforms jurors from neutral and passive arbiters into partial and active adversaries or advocates . . .").

151. Harper & Ufferman, *supra* note 20, at 12.

152. CHILTON & HENLEY, *supra* note 130, at 3–4 (noting the following as a few "potential negative consequences" of juror questioning: (1) "Juror questioning may create a bias among jurors that would interfere with the constitutional requirements of due process and a fair trial"; (2) "Juror questioning may cause jurors to become overly involved and lose their objectivity and impartiality"; (3) "Jurors might place too much emphasis on the answers to their own questions"; and (4) "An individual juror's question and the answer elicited may take on a stronger significance to the jury than those questions and answers presented and received in the normal adversarial manner").

153. See *id.*

154. See Lucci, *supra* note 10, at 18 ("[F]ormulating questions invites a juror to begin deliberating before all the evidence has been submitted.").

155. *Id.*

156. *Id.* ("In fact, group deliberations cannot take place effectively unless individual jurors have begun to formulate questions in their minds about the evidence.").

157. Telephone Interview with the Honorable David R. Herndon, Chief Justice, U.S. Dist. Court for the S. Dist. of Ill. (Mar. 4, 2013).

On the contrary, supporters note that jurors appear only to better understand the facts of the case and do not even appear negatively affected when a judge chooses not to allow a particular question due to admissibility.¹⁵⁸ In fact, several judges interviewed for this Note specifically remarked that jurors react positively even when the judge excludes a question, because at least then the judge has had the opportunity of explaining to the jurors why that particular question is not relevant or admissible for the issue at hand in the case.¹⁵⁹ In turn, the judge's ruling and subsequent explanation relieves the jurors from being burdened by distracting thoughts and uncertainties that they should not be focusing on for purposes of rendering a verdict.

Furthermore, skeptics fear that allowing juror questions will inevitably lead to the disclosure of inadmissible evidence.¹⁶⁰ Indeed, some lawyers are opposed to juror questioning because they believe it will disrupt their well-thought-out plans for the representation of their cases, including both the construction of their side of the story as well as their execution in proving its truth.¹⁶¹ Yet, it is important to remember that opposing counsel are not "the sole arbiters of the scope and content of testimony";¹⁶² and although they can spend large quantities of time preparing their witnesses as to how and what to testify, the attorneys representing each party ultimately have no control in choosing what the witnesses will or will not say when giving live testimony.¹⁶³

Another argument against allowing juror questioning is that the process might cause delay and result in an increase in the average time length of trials.¹⁶⁴ Opponents of juror questioning contend that the practice causes inefficiency, as well as unwarranted interruptions during trial.¹⁶⁵ In response, supporters say that although it may take longer to try a case by allowing juror questions, "the trade-off of having a more informed jury is worth the delay."¹⁶⁶

2. *Specifically in Criminal Trials*

As former Supreme Court Justice Black once noted, "[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

158. Telephone Interview with the Honorable James F. Holderman, former Chief Justice, U.S. Dist. Court for the N. Dist. of Ill. (Mar. 8, 2013).

159. *Id.*

160. Chilton & Henley, *supra* note 130.

161. *Id.*

162. *Id.*

163. *Id.* (noting that "live testimony is inherently unpredictable" and that "[i]f testimony in court were so predictable, then trial counsel would have no need for carefully-indexed and cross-referenced depositions, and all witnesses would testify via pre-recorded video").

164. *Id.* (noting that "[s]ome advocates have argued that allowing jurors to submit written questions is inefficient and will result in needless interruption and delay").

165. *Id.*

166. Judge John R. Stegner, *Why I Let Jurors Ask Questions in Criminal Trials*, 40 IDAHO L. REV. 541, 552 (2004).

State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty.¹⁶⁷ Indeed, as a society, Americans subscribe to the notion that it is preferable to let a guilty man walk free than to deprive an innocent man of his freedom.¹⁶⁸ The need to protect a defendant's Sixth Amendment's rights from juror bias is thus one of the most popular arguments used by opponents of juror questioning.

Furthermore, the concern regarding premature deliberation is particularly acute in criminal trials, because in criminal trials, the State presents its evidence first.¹⁶⁹ Defense attorneys therefore worry that if jurors are deliberating prematurely, they will not wait for the defense to provide any of its exculpatory evidence and will instead make up their minds before ever even hearing the defendant's side of the story.¹⁷⁰ The danger is that such a situation would cause a prejudice against the defendant so as to make him or her guilty in the eyes of the jury before even given a chance to prove his or her innocence, instead of adhering to the basic American notion that everyone is "innocent until proven guilty." Alternatively, though, the danger of not allowing questions is that the jurors might not have the same chances of dissecting the truth; without the jurors having the best possible chance at discovering the truth of the case, it is only logical that their verdicts might inadvertently be condemning innocent people as though they were guilty and absolving guilty people as they were though innocent.

Additionally, many opponents of juror questioning of witnesses in criminal cases argue that such questioning effectively relieves the prosecution of establishing its burden of proof.¹⁷¹ In criminal cases, the prosecution is responsible for proving beyond a reasonable doubt that every element of the crime alleged actually exists.¹⁷² Thus, when it comes to juror questioning, many people fear that allowing the jury to question witnesses alleviates the prosecution's burden.¹⁷³ In a trial *without* juror questions, the State is forced to develop a thorough prosecutorial plan and to ask relevant questions that elicit important and revealing testimony. In a trial *with* juror questions, people worry that prosecutors might not take their jobs as seriously and will instead rely on the jury to do the work for them.¹⁷⁴ In other words, "[i]f jury questions are permitted in criminal cases, . . . the prosecutor could forget or simply fail to develop an aspect of its case, and the jury, in effect acting on the part of the prosecutor, could ask questions of witnesses that ultimately fill the holes in the pros-

167. *Williams v. Florida*, 399 U.S. 78, 113 (1970) (Black, J., concurring in part and dissenting in part).

168. Thomas Regnier, *Restoring the Founders' Ideal of the Independent Jury in Criminal Cases*, 51 SANTA CLARA L. REV. 775, 837 (2011).

169. Harper & Ufferman, *supra* note 20, at 10 (citing *State v. Costello*, 646 N.W.2d 204, 210 (Minn. 2002)).

170. *See id.*

171. *Id.* (citing *Costello*, 646 N.W.2d at 211).

172. *Id.*

173. *Id.* (citing *Costello*, 646 N.W.2d at 211-12).

174. *See id.*

ecution's case."¹⁷⁵ In fact, the Minnesota Supreme Court has explicitly acknowledged this potential drawback to juror questioning in criminal cases:

The assistance provided to the prosecution by juror questioning may be direct or indirect. "Juror questioning can directly assist the prosecution when . . . evidence could be revealed by a juror question. Juror questioning can indirectly assist the prosecution when it simply illuminates a facet of the case that interests the jurors Because the practice of juror questioning can actively assist the State in meeting its burden of proof, the jurors' role may be compromised."¹⁷⁶

The response to this argument is that when it comes to ensuring justice, it should not matter who thought of the question—the prosecution, the judge, or the jury—so long as when the question is asked, it appropriately elicits admissible testimony and helps solve the underlying truth of the matter.¹⁷⁷ Moreover, if the correct procedural safeguards are followed by the court, then no juror's question will be asked without first having been subject to objection by counsel on each side and ultimately having been approved by the presiding judge.¹⁷⁸ Therefore, "[t]he fact that the question originated with a juror is less important than the fact that the judge deems the question worthy of being asked."¹⁷⁹

C. *The Powers of Judges Versus the Powers of Juries*

Interestingly, those opposed to juror questioning seem not to have considered the fact that their expectations for a "trier of fact" are not uniform across trials. During a bench trial, for example, the judge is the trier of fact and completely within his or her right to question witnesses for clarification.¹⁸⁰ Yet, for whatever reason, many people appear to believe that the American court system should not afford the same rights to jurors, who are the triers of fact during a jury trial.¹⁸¹ In fact, even though jurors probably need more clarification because they are typically much less informed in the law than is the average judge,¹⁸² jurors cannot ask questions like a judge can. Thus, jurors are entitled to fewer means by which to determine the truth and make an informed decision. Furthermore, even though jurors have just as much power over the outcome of a jury trial as the judge does over the outcome of a bench trial, jurors are

175. *Id.*

176. *Id.* (quoting *Costello*, 646 N.W.2d at 211–12).

177. *See, e.g.*, Lucci, *supra* note 10, at 19.

178. For a discussion on the procedural safeguards associated with juror questioning of witnesses, *see infra* Part III.D.

179. Lucci, *supra* note 10, at 19.

180. *See Harms*, *supra* note 129, at 140 ("A judge has a right to question and even to call witnesses on his own motion to elicit truth and clarify facts for the jury."):

181. *See id.* at 139.

182. *See id.* at 141 (noting that "an experienced judge, familiar with various types of trials, could overlook simple or common matters that perplex novice jurors" and that "more technical or complex aspects of a trial might be easily understood by a judge but incomprehensible to jurors").

essentially discouraged from seeking better understanding simply because they do not have the same authoritative status that society gives to the black-robed, gavel-wielding individual.

Despite the number of questions a judge presiding over a bench trial may have posed to witnesses during a trial, society has faith that the judge will remain impartial until the end of the trial. In a natural course of events, one would think that the same outlook would apply to jury trials, where not *one* person, but *twelve* people are combining their intelligence and common sense in order to determine the correct outcome. Moreover, in responding to fears such as juror impartiality and premature deliberation, advocates of juror questioning have been quick to point out that “[j]uror questioning of witnesses is no more indicative of a prematurely made-up mind of a juror than a judge’s questioning of witnesses in a bench trial is of the judge’s premature decision.”¹⁸³ As expressed by the Honorable John R. Stegner, a judge in Idaho who utilizes juror questioning in criminal trials, if it is essential that trial judges be permitted to pose questions “for clarification and for gathering information . . . [when] they act as fact-finders,” it follows that “jurors should likewise be afforded a similar opportunity.”¹⁸⁴

The argument against allowing juror questions is also somewhat perplexing since often it is the judge who ends up asking the witnesses the jurors’ questions anyway.¹⁸⁵ As such, the structure of the trial does not drastically change at all by implementing the use of juror questioning. Although many may argue that counsel should possess the sole authority to present evidence, the legal system has never actually entrusted party attorneys with a complete and exclusive power to do so.¹⁸⁶ In fact, the judge has always retained the capacity to intercede and interrupt partisan presentation whenever the interests of justice render it necessary for the furtherance of the truth.¹⁸⁷ By its very nature, the adversarial system encompasses an inherent limitation to its truth-searching objectives: at the outset of any case, two quarreling parties are set in opposition against one another with the sole aim of winning.¹⁸⁸ This end goal translates into the reality that parties will occasionally sacrifice verity in exchange for a favorable verdict.¹⁸⁹ As judges themselves have previously remarked,

The supreme concern of the parties on trial, and therefore of counsel, is to win. Of course, the battle should be fought by the rules,

183. Lucci, *supra* note 10, at 18.

184. Stegner, *supra* note 166, at 547 (quoting *Wolfe v. State*, 791 P.2d 26, 29-30 (Idaho Ct. App. 1990)).

185. See generally *Jurisdiction-by-Jurisdiction Rules*, *supra* note 7 (listing state juror-questioning rules, in which most of the rules assert that the court should ask the juror questions to the witnesses).

186. Harms, *supra* note 129, at 146.

187. *Id.*

188. *Id.* at 147.

189. *Id.* (“This goal of victory may be inconsistent with a search for truth since ‘frequently the partisanship of the lawyers blocks the uncovering of vital testimony in a way that distorts it.’”) (citation omitted).

but the goal is victory—not the triumph of ‘justice’ viewed in detachment, but triumph. The high objective of the defense lawyer on trial is acquittal—not an acquittal because the client is innocent, just an acquittal.¹⁹⁰

In short, the judge of any trial is accountable for ensuring that the adversarial system upholds fairness and encourages the quest for truth. Naturally, in a jury trial, the judge must work in conjunction with the jurors to administer such justice. Surely, in a system in which the presiding judge already possesses the capacity to intervene and ask his or her own clarifying questions during trial, allowing the presiding jury the same right for clarification would not greatly disrupt the system.

D. Procedural Safeguards

In recognizing the potential of certain disadvantages associated with juror questioning, jurisdictions that employ the practice have developed a series of procedural safeguards.¹⁹¹ Yet, the question of *which* procedural safeguards should be implemented has led to almost as much examination as has the topic of whether juror questioning should even be allowed.

Unsurprisingly, one of the principal concerns is exactly *how* the jurors’ questions will be asked. Indeed, in implementing juror questioning, courts must consider numerous procedural questions:¹⁹² How will the jurors make their questions known? Who will ask the jurors’ questions to the witnesses? During what part of trial will the jurors’ questions be asked? Will the attorneys have an opportunity to hear—and perhaps object—before these questions will be asked? What happens when a juror asks a question the answer of which would require the disclosure of inadmissible evidence? What will be the standard of review regarding these questions? The list goes on and on.

In those jurisdictions that do favor juror questioning, the general opinion seems to be that one of the most imperative procedural safeguards is the requirement that jurors submit their questions in *written* form.¹⁹³ Importantly, “[b]y having the question submitted in writing, the judge and lawyers control when jurors ask their questions [and] have time for well-considered answers.”¹⁹⁴ In Illinois, for instance, Rule 243 requires jurors to submit any questions in writing.¹⁹⁵ The idea of Rule 243 is that jurors will be able to listen to a witness’s testimony, and at the

190. Marvin E. Frankel, *The Adversary Judge*, 54 TEX. L. REV. 465, 470 (1976).

191. Capello & Strenio, *supra* note 74, at 48.

192. *Id.*

193. The alternative to requiring jurors to submit written questions would be to allow jurors to ask their questions orally, and thus directly, to the witnesses. Due to the many potential dangers that can arise from jurors speaking directly to witnesses, however, oral questioning is a method that most courts do not allow. See *Jurisdiction-by-Jurisdiction Rules*, *supra* note 7 (listing state juror-questioning rules, in which most of the rules assert that the jurors’ questions should be in writing).

194. MARDER, *supra* note 140, at 111.

195. ILL. SUP. CT. R. 243(a).

conclusion of questioning by counsel, the judge will determine whether jurors should be allowed to ask follow-up, written questions.¹⁹⁶ Furthermore, although one option could be to have the parties ask the juror questions to the witnesses,¹⁹⁷ the most common practice appears to bestow the question-asking responsibility upon the court.¹⁹⁸

For any witness that the court deems appropriate for juror questioning, many courts have implemented an opportunity for the attorneys from each opposing side to raise objections to questions they feel would provide bias towards their client or that might elicit inadmissible evidence.¹⁹⁹ In response to the genuine concern that juror questioning might lengthen the duration of a trial exists the apt suggestion that counsel should make objections to juror questions during sidebars.²⁰⁰ The other alternative would be to require the jury to first physically leave the courtroom before the attorneys make their arguments on the admissibility of the questions.²⁰¹ Either way, it would appear most sound to preserve the anonymity of the juror posing each question, so that the jurors feel complete freedom to make their concerns known without simultaneously drawing attention to their individual skepticisms and uncertainties.

Another safeguard is that judges should provide comprehensive direction to jurors whenever the court decides to utilize the practice of juror questioning for a particular trial. At the commencement of the trial, the court should instruct the jury regarding their ability to submit questions to witnesses by briefly detailing how the process will work.²⁰² The judge's admonishment should consist of the judge either explaining to the jury the reasoning behind modifying or excluding questions, or if nothing else at least advising the jurors that any modification or exclusion has been made in accordance with the rules of evidence and that the jurors should therefore not become distracted with the details about why the question as originally written was inadmissible.²⁰³ In other words, "[i]f the question is one that is inappropriate . . . to address, the judge [should] simply explain this to the jury."²⁰⁴

196. ILL. SUP. CT. R. 243(b).

197. See AM. BAR ASS'N AM., BAR. ASS'N PRINCIPLES FOR JURIES AND JURY TRIALS 18, 92 (2005) ("[T]he court may pose the question to the witness, or permit a party to do so . . .") [hereinafter PRINCIPLES FOR JURIES & JURY TRIALS].

198. See *Jurisdiction-by-Jurisdiction Rules*, *supra* note 7 (listing state juror-questioning rules, in which most of the rules assert that the court should ask the juror questions to the witnesses).

199. See *id.* (listing state juror-questioning rules, in which most of the rules assert that counsel should have an opportunity to make objections to juror questions).

200. See *id.* (listing Ohio's juror-questioning rule, which specifically suggests the use of sidebar discussions for making objections to juror questions).

201. See *id.* (listing state juror-questioning rules, in which most of the rules assert that objections shall be made outside of the presence of the jury).

202. PRINCIPLES FOR JURIES AND JURY TRIALS, *supra* note 197, at 24.

203. Telephone Interview with the Honorable James F. Holderman, former Chief Justice, U.S. Dist. Court for the N. Dist. of Ill. (Mar. 8, 2013).

204. MARDER, *supra* note 140, at 111.

E. Opinions of Illinois's Current Legal Leaders and Community

While legal leaders in Illinois have clearly taken the stance that juror questioning can be useful in certain trials, there remain differing opinions about exactly which types of trials should permit such questions. Whereas some attorneys and judges in Illinois think that jurors should only be able to ask questions in civil trials,²⁰⁵ other lawyers and judges in the state believe that juror questioning should be considered for criminal trials as well, especially “since the whole purpose is to search for truth.”²⁰⁶ A full examination on the topic of juror questioning in Illinois criminal trials warrants a discussion of opinions by some of Illinois's most notable legal experts.

Importantly, although state courts recognizably do not have to adopt the procedures of federal courts regarding juror questioning, it bears noting that numerous prominent judges of the federal district courts within Illinois strongly advocate for the practice and have found its exercise to be an invaluable technique during trial.²⁰⁷ In these courts, several judges have made it their practice to utilize juror questioning extensively.²⁰⁸ In doing so, certain of these federal judges became influential in helping the Illinois Supreme Court determine whether or not to adopt Rule 243.²⁰⁹ Former Chief Justice James F. Holderman of the United States District Court for the Northern District of Illinois, for instance, testified in support of juror questioning for the Illinois Supreme Court hearing in which the court ultimately decided to enact Rule 243.²¹⁰ As Judge Holderman noted in an interview in connection with this Note, he has used juror questioning “extensively and exclusively” in every trial he has presided over since 2005 and “will never go back” to not using the practice.²¹¹ He believes being able to submit written questions “allows jurors to dispel any concerns they have from the evidence that is presented.”²¹² Judge Holderman acknowledged that, as of yet, he has only had the opportunity to use juror questioning in civil trials, but that he expects to preside over criminal trials in the near future and definitely plans to allow juror questions in the criminal context.²¹³ He also noted that he be-

205. Telephone Interview with the Honorable Warren D. Wolfson, former Judge, Circuit Court of Cook Cnty. & Ill. First Dist. Appellate Court, 1st Div. (Mar. 5, 2013).

206. Dettro, *supra* note 8, at 2. For instance, a Springfield, Illinois attorney named Jon Gray Noll, of Noll Law Office, LLC, who is familiar with the practice of juror questioning, believes that juror questioning should be looked at in criminal cases as well as civil cases, because “[t]he whole purpose is to search for the truth, and the rules of evidence hinder that at times.” *Id.*

207. See Kaufmann & Murphy, *supra* note 37.

208. Telephone Interview with the Honorable David R. Herndon, Chief Justice, U.S. Dist. Court for the S. Dist. of Ill. (Mar. 4, 2013); Telephone Interview with the Honorable James F. Holderman, former Chief Justice, U.S. Dist. Court for the N. Dist. of Ill. (Mar. 8, 2013).

209. See Kaufmann & Murphy, *supra* note 37.

210. Telephone Interview with the Honorable James F. Holderman, former Chief Justice, U.S. Dist. Court for the N. Dist. of Ill. (Mar. 8, 2013).

211. Telephone Interview with the Honorable James F. Holderman, former Chief Justice, U.S. Dist. Court for the N. Dist. of Ill. (Mar. 8, 2013).

212. *Id.*

213. *Id.*

lieves the practice of juror questioning “would work the very same in criminal trials and that it would work very well.”²¹⁴ “If a juror were to ask a question that would be eliciting inadmissible evidence, the judge could explain it like they do in civil cases,” by simply telling the jurors that the answer their question seeks “is not part of the evidence nor should it be . . . and go[ing] on to explain why.”²¹⁵ Furthermore, Judge Holderman, who said he tries to explain to jurors the reasoning why a particular question is inadmissible, stated that he “can see in the jurors’ eyes that they understand [when and why a question is inadmissible], because the judge has just explained the law to them and they like that.”²¹⁶

As another experienced expert in the field of juror questioning, Chief Justice David R. Herndon of the United States District Court for the Southern District of Illinois emphasized in an interview for this Note that juror questioning is effective because “juries are non-lawyers [and] they miss things [and] ask questions that lawyers don’t think [to ask].”²¹⁷ More than that, Chief Judge Herndon also said that in his experience, the “jury likes [juror questioning] and feels far more invested in the trial” when the court allows the practice.²¹⁸ He also stated that he thinks juror questioning makes people “feel better about serving on the jury” and in general allows them to “pay better attention.”²¹⁹ Additionally, Chief Judge Herndon, who uses juror questioning in both criminal and civil trials, remarked that he is “not sure why people are afraid” of juror questioning in criminal trials.²²⁰ In his own experience, he has actually had parties “beg” him to allow the practice, and he said he “has never had a defense counselor or defendant object to the practice” and “has yet to receive a question from any juror that a defense lawyer has suggested would encroach upon a constitutional right.”²²¹ If he ever did receive such a question, though, he stated he “just wouldn’t ask it.”²²² As Chief Justice Herndon further emphasized, the practice of juror questioning “allows the defense to talk to the defendant” regarding all juror questions, and “all objections are heard and dealt with.”²²³ Overall, Chief Justice Herndon “fails to see the distinction” between allowing juror questioning in civil trials versus allowing the practice in criminal trials.²²⁴

Perhaps most noteworthy is that the strongest advocates of allowing jurors to submit questions to witnesses are frequently those practitioners and trial judges who have actually experienced juror questioning in prac-

214. *Id.*

215. *Id.*

216. *Id.*

217. Telephone Interview with the Honorable David R. Herndon, Chief Justice, U.S. Dist. Court for the S. Dist. of Ill. (Mar. 4, 2013).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

tice.²²⁵ The same reality was true concerning the jury innovation of allowing jurors to take notes during trial, which in recent years has become a more common practice nationwide; those who “actually had experience with it in the courtroom” became advocates of its beneficial impact.²²⁶

Still, it remains important to acknowledge that change seldom occurs without at least some resistance. Indeed, even since the Illinois Supreme Court enacted Rule 243 in July 2012, many attorneys have remained hesitant to utilize the Rule and allow juror questioning to occur during trial.²²⁷ In an interview for this Note, Partner Stephen Kaufmann of HeplerBroom LLC, identified earlier as the attorney who initiated the Rule 243 proposal before the Illinois Supreme Court, affirmed that he believes that such hesitancy unfortunately exists among many Illinois courts and practitioners.²²⁸ Since Rule 243 came into effect, Kaufmann himself “has not [yet] had a trial in an Illinois state court where the [juror-questioning] Rule was utilized,” although at a trial in Decatur, Illinois last September, he “came close.”²²⁹ To Kaufmann’s admitted surprise, when he brought up Rule 243 in the final pretrial conference for that case, “the circuit judge indicated he had not yet utilized the Rule.”²³⁰ The other attorneys also “indicated resistance to using the Rule,” although “they could not really say why,” instead merely expressing that they felt uneasy towards the Rule because they were not familiar with it.²³¹ Kaufmann suspected that the reluctance to utilizing Rule 243 is “because [the Rule] is new and unfamiliar.”²³² Kaufmann further stated that he suspects the hesitancy might be due in part to “more-experienced attorneys being resistant to change.”²³³

Further, even certain advocates of the practice in civil trials are unwilling to allow juror questioning of witnesses in criminal trials. The Honorable Warren Wolfson, for example, a huge proponent of using juror questions for civil matters, commented for purposes of this Note that he “would be reluctant” to allow juror questioning in criminal trials.²³⁴ His fear is that “it [might] shift the burden of proof.”²³⁵ In explaining his thoughts further, however, Judge Wolfson noted he actually has “never done [juror questioning] in a criminal trial” before, and his reluctance

225. MARDER, *supra* note 140, at 114 (“Interestingly, the practice of allowing jurors to ask questions, like the practice of permitting jurors to take notes, gained support from judges and lawyers alike when they actually had experience with it in the courtroom.”).

226. *Id.*

227. Telephone Interview with Stephen Kaufmann, Partner, HeplerBroom LLC (Mar. 4, 2013).

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. Telephone Interview with the Honorable Warren D. Wolfson, former Judge, Circuit Court of Cook Cnty. & Ill. 1st Dist. Appellate Court, 1st Div. (Mar. 5, 2013).

235. *Id.*

comes not so much from scientific reasoning but rather is “just a feeling [he has]”²³⁶ after so many years on the bench.

The Honorable Ronald Spears of the Fourth Circuit in Christian County, Illinois, reiterated the reality that many judges, himself included, have a degree of hesitation toward juror questioning simply because they do not want to cause any “constitutional implications” and “[do not] want to do anything to impose a burden of proof on the defendant.”²³⁷ In recognizing that a “fear of the unknown” exists in regards to juror questioning, Judge Spears emphasized in an interview for this Note that one of his main concerns in allowing juror questions would be maintaining control.²³⁸ If control and constitutional implications were not issues, however, Judge Spears “would be very receptive [and] willing to implement” juror questioning because he is “positive toward all developments that improve the jury system.”²³⁹ Specifically, Judge Spears noted that juror questioning seems to be an “evolutionary” and “logical next step.”²⁴⁰ Furthermore, as Judge Spears recognized when interviewed for this Note, because defendants are capable of waiving their rights in other circumstances, it might be interesting to consider how a court should respond if a criminal defendant actually requested juror questioning and thereby waived any privilege he or she possessed against using it, such as protection from self-incrimination.²⁴¹ As Judge Spears said, at the point at which the accused desires that the jurors have permission to ask questions, then “the prosecution and judge might have to answer [those] questions.”²⁴² Judge Spears also acknowledged that there would likely be less apprehension in a case in which both parties agreed to the jurors asking questions.²⁴³

While not all federal judges in Illinois have had as much experience with juror questioning as former Chief Justice Holderman and Chief Justice Herndon have, there seems to exist a general consensus that if it helps elicit the truth, then juror questioning could be a very effective method—if only the parties would be open to trying it. In an initial interview in connection with this Note, the Honorable Sue E. Myerscough of the United States District Court for the Central District of Illinois²⁴⁴ indicated that she “ha[d] offered [juror questioning] in every jury trial [she has had since becoming a federal judge], but [that] both sides ha[d]

236. *Id.*

237. Telephone Interview with the Honorable Ronald D. Spears, Judge, Ill. 4th Judicial Circuit Court (Mar. 4, 2013).

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. Judge Myerscough also previously served as the Chief Judge of the Illinois Seventh Judicial Circuit and Presiding Judge of Sangamon County before being elected to the Fourth District Appellate Court.

rejected it.”²⁴⁵ Yet, as Judge Myerscough emphasized, she is a *judge*, and so for her, “the truth’s the truth.”²⁴⁶ Accordingly, to the extent that juror questioning of witnesses helps jurors determine the truth, Judge Myerscough stated that she was “not opposed” to allowing the practice in her courtroom;²⁴⁷ at that time, she, like many others, simply “just [hadn’t] had much experience with it.”²⁴⁸ A few months following that initial interview, however, Judge Myerscough did encounter several opportunities to allow juror questioning.²⁴⁹ In her words, allowing the practice in those cases led to “amazing results.”²⁵⁰ Quite possibly, Judge Myerscough’s experiences with juror questioning within the past few months may be indicative of a larger movement in which juror questioning is slowly gaining acceptance in courts in Illinois—and at both state and federal levels.

Perhaps any present reticence toward juror questioning among Illinois judges and attorneys can be attributed to a typical “fear of the unknown.” For judges who espouse traditional notions of the jury’s role as passive, the general sentiment is “that not allowing jurors to ask questions has worked well in the past, so why . . . experiment with this new practice now?”²⁵¹ Yet, even though many Illinois prosecutors and defense attorneys may be unfamiliar and inexperienced with juror questioning, that does not mean that they are all automatically against trying to implement the practice in criminal cases. For instance, criminal defense lawyer Thomas Bruno of Champaign County, IL, who has over twenty-five years of experience practicing law and has served as former President of the Champaign County Bar Association and adjunct professor at the University Illinois College of Law, stated for purposes of this Note that he “would like to see the practice implemented because [he is] confident that in the long run we can evolve and adapt and come up with rules and practices which would result in juror questioning being a net improvement for criminal trials in Illinois.”²⁵² Like many current practitioners in Illinois, Bruno has “tried many criminal jury trials . . . but has not had any direct experience with juror questioning of witnesses” and is “filled with questions.”²⁵³ He did admit that he is “tempted to think of negative aspects of the process.”²⁵⁴ Nevertheless, Bruno also emphasized his belief that “[o]ne of the major failings of our legal system is its inabil-

245. Telephone Interview with the Honorable Sue E. Myerscough, Fed. Judge, U.S. Dist. Court for the Cent. Dist. of Ill. (Mar. 6, 2013).

246. *Id.*

247. *Id.*

248. *Id.*

249. E-mail from the Honorable Sue E. Myerscough, Fed. Judge, U.S. Dist. Court for the Cent. Dist. Of Ill. to author (Aug 15, 2013, 09:32 AM CST) (on file with author).

250. *Id.*

251. MARDER, *supra* note 140, at 112.

252. E-mail from Thomas A. Bruno, Attorney, Bruno Law Offices to author (Mar. 7, 2013, 06:09 PM CST) (on file with author).

253. *Id.*

254. *Id.*

ity to be nimble and adapt to changing times.”²⁵⁵ As Bruno stated, he “would hate to fall into that category of lawyers who simply dismisses a new idea because that’s not the way we have always done it.”²⁵⁶

Furthermore, other attorneys throughout the State share Bruno’s eager and forward-thinking attitude. In an interview for this Note, attorney Jon Gray Noll of Springfield, Illinois declared juror questioning of witnesses “a good tool for everyone.”²⁵⁷ Previously, Noll served as an officer in the Judge Advocate General’s Corps, where he used juror questioning while defending people in criminal trials.²⁵⁸ When asked his opinion on whether Illinois should consider expanding Rule 243 to incorporate criminal trials, Noll stated that there exists “no reason not to” and that he “would be for it.”²⁵⁹

Perhaps, as the discussion regarding juror questioning grows throughout Illinois’s legal community, more attorneys and judges will ask each other at the outset of trial whether juror questioning should be included. Many prominent legal leaders in Illinois apparently hope that will be the case.

IV. RECOMMENDATION

In determining the answer to the juror questioning debate, perhaps the first question to ask is why the public even has trials in the first place. Is not the purpose of trial to determine the truth of alleged facts so as to ultimately promote justice?²⁶⁰ It would be difficult to argue otherwise. Therefore, “[t]o the extent that jurors’ questions assist in the search for truth, those questions should be asked.”²⁶¹ As a state, Illinois clearly subscribed to this viewpoint when it passed Rule 243. With this perspective as Illinois’s basis for Rule 243, it follows that the search for truth should be the most important consideration in determining when to permit juror questioning. While the passage of Rule 243 has certainly been an encouraging sign that Illinois is working toward improving the jury system, the Rule nevertheless falls short of achieving its full potential. By restricting Rule 243’s applications to civil trials only, the Illinois Supreme Court has limited jurors from freely exercising one of their key methods for establishing truth during all trials. Importantly, one must remember that in criminal trials, jurors are not simply rendering verdicts concerning monetary compensation, but instead are asked to determine someone’s guilt or innocence and ultimately choose that person’s fate and affect his or her freedoms.

255. *Id.*

256. *Id.*

257. Telephone Interview with Jon Gray Noll, Attorney, Springfield, Ill. (Mar. 4, 2013).

258. *Id.*

259. *Id.*

260. Lucci, *supra* note 10, at 19 (explaining that “[t]he search for truth is central to the legitimacy of a trial’s function,” and thus, “[i]f the trial does not effectively develop the facts and comprehensibly present them to the factfinder, justice is serendipitous”).

261. *Id.* at 16.

One must also keep in mind that “a jury is expected to be the conscience of the community and a safeguard against government oppression.”²⁶² Thus, as the public’s outward conscience, the jury is entrusted with the great responsibility of actually determining the fair and proper fate of society’s accused individuals. In hopes of facilitating this process, many academics have pushed for jury independence.²⁶³ Weighing the importance of juror rights and the overall power vested in the jury, the idea of allowing jurors to ask their own questions of witnesses in order to clarify understanding suddenly does not seem like such a radical concept. Specifically, the idea that jurors should be permitted to ask questions in *criminal* trials becomes even more commonsensical when one considers what is in jeopardy in a criminal trial versus what is in jeopardy in a civil trial: namely, personal freedom, societal justice, and protection of the public versus awards such as monetary damages, injunctions, court orders to fulfill duties, and compensation for harm done.

In response to prevalent worries about potential juror partiality resulting from juror questioning, juror questioning can actually *reduce* juror bias because it will encourage jurors to seek understanding *inside* of the courtroom, as opposed to having to turn to sources *outside* the courtroom.²⁶⁴ Indeed, “[g]etting questions answered in court may prevent jurors from turning to outside sources—if jurors can get answers to the questions they have during trial they may be less likely to use outside sources, [like] the Internet, newspapers, dictionaries, etc., to get answers to questions they think are important.”²⁶⁵ Additionally, unsubstantiated fears of the unfamiliar should not prevent any judge, attorney, or juror from endeavoring to use every tool possible to uncover the truth.

To combat the current “fear of the unknown” sentiment associated with juror questioning, advocates throughout the state should begin holding more and more continuing legal education (“CLE”) programs on Rule 243 as it presently exists, as well as on the general topic of juror questioning and common jurisdictional approaches. These CLE programs should be offered to both judges and attorneys alike so as to increase awareness not merely at the bench, but at all levels of the court system and within all those involved. With greater awareness will come greater familiarity amongst the legal world, and, perhaps, a greater willingness to at least afford the practice of juror questioning a *chance*.

As many forward-thinking practitioners in Illinois recognize, “[o]nce the jurors are given the case to decide, the lawyers lose all control over it anyway, so why not make the trial process more interactive

262. Regnier, *supra* note 168, at 829.

263. *Id.* at 852.

264. Andrea Krebel, *Juror Questions: Why Attorneys Should Embrace Allowing Jurors to Ask Questions of Witnesses*, THE JURY EXPERT (May 29, 2012), <http://www.thejuryexpert.com/2012/05/juror-questions-why-attorneys-should-embrace-allowing-jurors-to-ask-questions-of-witnesses>.

265. *Id.*

and satisfying for the jurors?”²⁶⁶ Given this reality, and the fact that so much is at stake for a defendant in a criminal trial, there really seems to be no valid point in keeping juror questioning away from *any* trial, be it civil or criminal. Illinois should therefore either extend Rule 243 to encompass criminal trials, or it should create a new rule that is tailored specifically to allowing juror questions in criminal contexts.

In broadening Rule 243, or in creating a new rule entirely, simply maintaining current procedural standards while also implementing additional safeguards can alleviate many of the fears that people have regarding juror questioning. Illinois lawmakers could incorporate such safeguards in a manner that allows juror questioning and thus ensures that jurors have an outlet by which to clarify their understanding, but that does not compromise any of the defendants’ Sixth Amendment rights. As one of the most obviously necessary safeguards for a juror-questioning rule pertaining to criminal cases, it would be advisable for Illinois courts not to allow jurors to directly question witnesses, as in the days of the “juror outbursts” discussed above.²⁶⁷ Rather, the system of submitting *written* questions put in place by Rule 243 for civil trials should be the mandated standard for criminal trials as well, since it allows for both the judge and the party attorneys to carefully examine each question for bias and inadmissibility. In addition, courts should certainly continue to read juror questions to counsel outside of the presence of the jury, either during jury recesses or, if time is a factor, during sidebars.

Because trepidation admittedly exists among a number of state courts in implementing juror questioning, another precaution to consider is only allowing juror questions in a criminal trial after the court has evaluated the complexity of a particular witness’s testimony and deemed that such questions would be appropriate. For instance, in *Principles for Juries & Jury Trials*, the American Bar Association recommends permitting juror questions and acknowledges that they might be especially beneficial for cases with complex evidence or ambiguous testimony.²⁶⁸ Furthermore, for evidence that is inherently more confusing and difficult to comprehend, perhaps Illinois judges could allow jurors to retreat to the jury room directly after testimony and take one of their routine recesses, thereby affording the jurors a few short minutes to collect their thoughts and write down any questions they might have. The jurors could then hand their written questions to the bailiff, who could in turn immediately transport the questions to the judge’s bench. At that point, the judge could read the questions aloud to partisan counsel and any necessary objections could be made. Similar to the juror-questioning process for Illinois civil trials, any juror question that the court deems admissible should continue to be asked of the witness by the judge, as opposed to having

266. Kaufmann & Murphy, *supra* note 37 (quoting practitioner Bruce Praff, who co-authored an article on juror questioning entitled “The Right to Submit Questions to Witnesses” with John L. Stalmack and Nancy S. Marder in May of 2009).

267. See Lucci, *supra* note 10, at 16.

268. Marder, *supra* note 44, at 747.

the prosecutor or defense lawyer ask the question. Placing this responsibility upon the judge, who acts as a neutral arbitrator, will help ensure fairness and reduce prejudice. It would also protect the lawyers from having to reveal to the jury their individual reactions, including those of potential annoyance or frustration, to any of the questions.

Equally, the rule should also attempt to protect jurors from having to reveal their individual thoughts and uncertainties to the entire court, including counsel and potentially angry defendants, witnesses, and members of the gallery. Thus, an important addition for a criminal juror-questioning rule, and one that Rule 243 currently lacks, is a provision mandating the anonymity of any juror who submits a question.

Given that people tend to associate greater worries about juror questioning with criminal trials than they do with civil trials because of the many reasons discussed earlier in this Note, perhaps Illinois courts might consider employing a safeguard for criminal trials in which at the outset of the trial, the judge weighs the gravity of the crime alleged and the dangerousness of the accused individual. Operating under this balancing test, courts could thus begin requiring juror questioning in those cases where the consequences for not discovering the truth are most severe. For instance, to appeal to those practitioners who are understandably concerned about the potential disadvantages of juror questions in criminal trials, one alternative could be for Illinois to first try applying juror questioning only to those trials concerning allegations of felony misconduct, as opposed to merely misdemeanor behavior. As a result, in situations involving felonies such as alleged murder, terrorism, treason, child pornography and molestation, sexual assault, and rape—all of which are arguably some of the most heinous crimes against society—jurors would be able to ask any questions needed for clarification as they ascertain the truth. Such a situation would not only allow for greater comprehension and improved determination of the facts, but it would also afford to jurors the maximum capability of exercising their right to ensure justice and public safety because they would be doing so under the gravest of circumstances. Even if the new rule did not mandate a balancing test concerning the magnitude of the crime, the Advisory Committee could at least consider recommending this option in a comment to the rule.

Finally, as part of these newly proposed guidelines, perhaps Illinois could at least allow for juror questioning of witnesses in criminal trials when both parties have consented. Stated differently, the State could consider allowing juror questioning in criminal trials only when both the prosecution and defense have explicitly agreed to its usage. Alternatively, the rule could highly encourage judges to especially consider allowing the practice at the request of both parties. Further, the judge could also be directed to give special consideration to allowing juror questioning when the defendant is the one specifically asking for its usage, since protecting a defendant's Sixth Amendment rights is what most critics ex-

press as being their main concern with juror questions. In a scenario in which the defendant specifically requests that the judge allow juror questions, the defendant willingly would be choosing not to worry about constitutional dangers like risks of self incrimination, burden shifting, or juror bias. Effectively, the defendant would be choosing to waive any privilege he or she might otherwise have against juror questioning due to these potential risks. In the end, it should ultimately be the defendant's prerogative to present his or her version of the facts in whichever manner he or she deems most effective. If, in order to prove the truth, and with proper representation by counsel and oversight by an impartial judge, the defendant is willing to answer the jury's questions, then the court should not arbitrarily refuse to use juror questions. Such questions are truth-eliciting, fact-finding tools that jurors use at trial to determine guilt or innocence.

As mentioned, if Illinois were to explicitly allow juror questioning in criminal trials, the Supreme Court could either extend Rule 243 currently in place for civil trials, or the court could create a new rule entirely that pertains solely to the use of juror questions in criminal trials. Lawmakers could most easily amend Rule 243 by simply changing the words "in civil cases" located in the first line of the rule to instead read "in all cases"²⁶⁹ or to read "in civil cases, and in any criminal case in which all parties consent."²⁷⁰ Alternatively, a separate rule to allow juror questions in criminal trials could be modeled after Rule 243, as well as after certain rules from other jurisdictions across the nation.²⁷¹ Such a rule should be detailed and encompass a number of safeguards²⁷² to appropriately respond to any concerns over control or impartiality.

269. See ILL. SUP. CT. R. 243 ("(a) Questions Permitted. The court may permit jurors in civil cases to submit to the court written questions directed to witnesses. (b) Procedure. Following the conclusion of questioning by counsel, the court shall determine whether the jury will be afforded the opportunity to question the witness. Regarding each witness for whom the court determines questions by jurors are appropriate, the jury shall be asked to submit any question they have for the witness in writing. No discussion regarding the questions shall be allowed between jurors at this time; neither shall jurors be limited to posing a single question nor shall jurors be required to submit questions. The bailiff will then collect any questions and present the questions to the judge. Questions will be marked as exhibits and made a part of the record. (c) Objections. Out of the presence of the jury, the judge will read the question to all counsel, allow counsel to see the written question, and give counsel an opportunity to object to the question. If any objections are made, the court will rule upon them at that time and the question will be either admitted, modified, or excluded accordingly. (d) Questioning of the Witness. The court shall instruct the witness to answer only the question presented, and not exceed the scope of the question. The court will ask each question; the court will then provide all counsel with an opportunity to ask follow-up questions limited to the scope of the new testimony. (e) Admonishment to Jurors. At times before or during the trial that it deems appropriate, the court shall advise the jurors that they shall not concern themselves with the reason for the exclusion or modification of any question submitted and that such measures are taken by the court in accordance with the rules of evidence that govern the case.").

270. See *Jurisdiction-by-Jurisdiction Rules*, *supra* note 7 (listing a rule from the New Hampshire Supreme Court that contains the language "in any civil case, and in any criminal case in which all parties consent").

271. For further examples of rules on juror questioning in other states, see *id.*

272. See *supra* Part III.D.

Below is an example of how Illinois lawmakers could write a separate rule to allow juror questioning specifically in criminal trials. This proposed rule contains language almost identical to the current language of Rule 243²⁷³ but with added guidelines and provisions incorporated:

Written Juror Questions Directed to Witnesses.

- (a) Questions Permitted. The court may permit jurors in criminal cases to submit to the court written questions directed to witnesses. Questions shall be submitted anonymously, so that the juror's name is not included in the question.²⁷⁴ In any case in which all parties consent or in which the defendant specifically requests that the court allow juror questions, the court shall give special consideration to permitting jurors to question witnesses.
- (b) Procedure. The court shall explain the procedures to the parties and jurors at the commencement of the trial. Following the conclusion of questioning by counsel, the court shall determine whether the jury will be afforded the opportunity to question the witness. Regarding each witness for whom the court determines questions by jurors are appropriate, the jury shall be asked to submit any question they have for the witness in writing. Following any testimony the court finds unusually lengthy or complex, jurors shall be given an opportunity to take a recess directly afterwards to formulate potential questions they have, if any. No discussion regarding the questions shall be allowed between jurors at any time; neither shall jurors be limited to posing a single question nor shall jurors be required to submit questions. The bailiff will then collect any questions and present the questions to the judge. Questions will be marked as exhibits and made a part of the record.
- (c) Objections. Out of the presence of the jury, the judge will read the question to all counsel, allow counsel to see the written question, and give counsel an opportunity to object to the question. If any objections are made, the court will rule upon them at that time and the question will be admitted, modified, or excluded accordingly.
- (d) Questioning of the Witness. The court shall instruct the witness to answer only the question presented and not exceed the scope of the question. The court will ask each question; the court will then provide all counsel with an opportunity to ask follow-up questions limited to the scope of the new testimony.
- (e) Admonishment to Jurors. When possible and appropriate, the court is highly encouraged to briefly explain to the jurors the reasoning behind the modification or exclusion of any question and

273. See *supra* note 236.

274. Part of the language for this added safeguard of anonymity is modeled after the civil and criminal juror questioning rules in Tennessee. See *Jurisdiction-by-Jurisdiction Rules*, *supra* note 7.

why the question as originally written is inadmissible. Otherwise, at times before or during the trial that it deems appropriate, the court shall advise the jurors that they shall not concern themselves with the reason for the exclusion or modification of any question submitted and that such measures are taken by the court in accordance with the rules of evidence that govern the case.

V. CONCLUSION

“Evidence is rarely unflawed and unambiguous.”²⁷⁵ Allowing the practice of juror questioning both acknowledges and ameliorates this reality by helping jurors to better comprehend the trials in which they participate. Illinois recently made great strides towards improving the jury system when the Supreme Court adopted Rule 243. Yet, as innovative and groundbreaking as Rule 243 might seem, it fails to live up to its full potential. As the Rule exists currently, juror questioning simply remains a practice that a judge can allow during trials involving civil disputes; trials involving criminal misconduct remain outside of Rule 243’s reach.

As this Note explains, the benefits of allowing the practice of juror questioning of witnesses in criminal trials significantly outweigh the concerns of not allowing it. This assertion rings especially true when considering the impact of civil versus criminal verdicts on the lives of not only the plaintiff and defendant, but also on the whole of society at large. Perhaps most telling about the juror questioning debate is that most attorneys and judges who actually experience its effects are the ones who end up advocating for courts to utilize the practice.²⁷⁶ Indeed, as the Chief Justice Thomas L. Kilbride of the Illinois Supreme Court stated in regards to enacting Rule 243, “[b]ased on the comments of those who have used or seen the procedure at trials, such a rule enhances juror engagement, juror comprehension and attention to the proceeding and gives jurors a better appreciation for our system of justice.”²⁷⁷ Stated differently, the concept of allowing jurors to question witnesses is not simply an idealistic or impractical string of legal theory. Instead, juror questioning is an exercise that numerous judges and practitioners, both around the country and within the state of Illinois, have already found to be extremely useful in enhancing the legal system and its application of standards of fairness. Even more specifically, as examined previously in this Note, countless courts throughout the nation have already determined that juror questioning of witnesses in criminal trials is not only

275. H. Richard Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, in *LAWYERS' ETHICS: CONTEMPORARY DILEMMAS* 139 (Allan Gerson ed., 1980).

276. MARDER, *supra* note 140, at 114 (“Interestingly, the practice of allowing jurors to ask questions, like the practice of permitting jurors to take notes, gained support from judges and lawyers alike when they actually had experience with it in the courtroom.”).

277. See Donner, *supra* note 36, at 19.

constitutional but also even desirable.²⁷⁸ In fact, the Jodi Arias trial in Arizona, discussed above,²⁷⁹ has not been the only criminal trial to make current news headlines for advancing juror questioning; on Thursday, March 14, 2013, Michigan jury members posited four questions to a grandmother named Sandra Layne who allegedly killed her grandson in an act of self-defense.²⁸⁰ In commenting on the trial, journalists have remarked that these “members of the jury may have asked the biggest questions of all.”²⁸¹

The argument for extending Illinois Supreme Court Rule 243 to include juror questioning of witnesses in criminal trials can be summarized in one simple statement: “the better informed the jury, the more likely it is to render a just verdict.”²⁸² Logically furthering that idea, the more just the verdict, the more fairly the criminal legal system will have treated both the accused and the accuser, and as is often the case, the perpetrator and the victim. In short, Illinois lawmakers should expand the language of Illinois Supreme Court Rule 243 to include not only civil trials but criminal trials, as well. Another alternative, however, could be to make an entirely separate, but yet still similar rule for criminal trials, as several other states around the country have already done.²⁸³ Either way, it would be most advisable for the new rule to also have new procedural safeguards and guidelines to follow.

Finally, perhaps the judge presiding over the trial in *The Good Wife* episode mentioned earlier best stated the reasoning for juror questioning: “You can never have too many knights in the quest for justice.”²⁸⁴ As argued throughout this Note, never is the quest for justice more important than when used to determine the fate of an accused person’s life and liberty. For this reason, Illinois should follow the wise example of states such as Arizona, Colorado, Hawaii, Idaho, New Hampshire, Tennessee, Utah, and Washington (to name a few),²⁸⁵ as well as the expert advice of federal judges and attorneys in Illinois,²⁸⁶ and earnestly consider how a juror-questioning rule for criminal cases will positively impact the pursuit of justice in criminal trials.

278. See *supra* Part II.C.3.

279. See *supra* notes 117–19 and accompanying text.

280. L.L. Brasier, *Sandra Layne Says She Shot Her 17-Year-Old Grandson Repeatedly After He Kicked Her and Demanded Cash*, DETROIT FREE PRESS (Mar. 14, 2013), <http://www.usatoday.com/story/news/nation/2013/03/14/grandmother-accused-of-killing-grandson/1988489/>.

281. Dave Phillips, *Jurors Question Sandra Layne in Murder Trial*, THE OAKLAND PRESS, Mar. 15, 2013, http://www.theoaklandpress.com/articles/2013/03/15/news/cops_and_courts/doc514221449c67e569420249.txt.

282. Wolff, *supra* note 9, at 821 (citing Interview with Hon. Scott O. Wright, United States Dist. Court, Western Dist. of Missouri, in Kansas City, Missouri (May 2, 1989)).

283. See *supra* Part II.C.3.

284. *The Good Wife: And the Law Won* (CBS television broadcast Oct. 7, 2012).

285. See *Jurisdiction-by-Jurisdiction Rules*, *supra* note 7.

286. See *supra* Part III.E.

