

Special Contribution

A Six-Member Civil Jury In Georgia? The Trial Judges Weigh In

by R. Perry Sentell, Jr.*

I. INTRODUCTION

The American civil jury stands in the cross hairs of historic reflection. No institution receives more acclaim, and no institution attracts more controversy. On the one hand, the civil jury glows as the jurisprudential bedrock of our legal system. On the other hand, the civil jury draws first-round fire as the preferred target of system reformists. Historically, the jury “reform” proposals range the gamut: from arguments for abolition to movements of modification. The modification movements prove particularly persistent.

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Among modern proposals for modification, the civil jury's size has emerged as an aspect of peculiar vulnerability. The reformists are highly critical of the traditional twelve-person panel, and they advocate a drastic decrease in membership. Their substitute, more or less arbitrarily, proposes a civil jury of six members. That proposal has drawn both national and state attention, and it currently confronts the citizens of Georgia. Their ultimate disposition of the issue holds crucial significance. Obviously, it will impact upon each citizen's service as a potential juror. Far more fundamentally, however, it will directly determine the system, which, in turn, determines each citizen's civil rights and responsibilities. Few subjects loom larger for a society.

Intelligent appraisal of the six-juror proposal deserves assistance from all informed sources. No source is more informed than the judges of the superior courts throughout the state. These are Georgia's trial court judges who daily serve with juries to capture that illusive but precious quality of civil justice. This Article seeks to tap that source.¹

II. NATIONAL PERSPECTIVE

The jury size-reduction proposal has drawn national attention in two primary contexts. First, the United States Supreme Court has touched upon the issue's constitutionality.² Second, the Federal Judicial Conference has treated the matter by changing its Federal Rules of Civil Procedure for the guidance of the United States district courts.³ Manifesting the explosive controversy enveloping the subject, the actions of both forums drew sharp responses. Only the briefest description of each context will suffice as appropriate background to Georgia's present debate.⁴

1. For previous empirical efforts to profile the Georgia civil jury, see R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85 (1991); R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the (Federal) Bench*, 27 GA. L. REV. 59 (1992); R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Trenches*, 28 GA. L. REV. 1 (1993). These studies are reprinted in R. PERRY SENTELL, JR., *THE GEORGIA NEGLIGENCE JURY* 1, 95, 157 (1995).

2. See *infra* Part II.A.

3. See *infra* Part II.B.

4. These descriptions are largely drawn from R. Perry Sentell, Jr., *The Six-Member Civil Jury: In Georgia?*, 4 GA. B.J., Oct. 1998, at 16.

A. *Developments in the United States Supreme Court*

1. The Supreme Court's Decisions. In its 1898 decision of *Thompson v. Utah*,⁵ the United States Supreme Court confirmed popular predilections by affirming that a constitutionally guaranteed jury "is a jury constituted, as it was at common law, of twelve persons, neither more nor less."⁶ That position appeared to hold firm in the Court until 1970. Then, in its famous decision of *Williams v. Florida*,⁷ the Court sustained the validity of a state statute allowing six-member juries in noncapital criminal cases.⁸ The common law jury of twelve "appears to have been a historical accident,"⁹ the Court asserted, and "is not a necessary ingredient of 'trial by jury.'"¹⁰

Three years later the Court took its next step. In *Colgrove v. Battin*,¹¹ the Court denigrated earlier "dicta"¹² and permitted the use of six-member juries in federal civil trials.¹³ The Court in *Colgrove* dismissed reservations about smaller juries and concluded that "a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases."¹⁴ Indeed, the Court elaborated, "[F]our very recent studies have provided convincing empirical evidence . . . that 'there is no discernible difference between the results reached by the two different-sized juries.'"¹⁵

5. 170 U.S. 343 (1898).

6. *Id.* at 349.

7. 399 U.S. 78 (1970).

8. *Id.* at 103.

9. *Id.* at 89.

10. *Id.* at 86. The Court held there was no constitutional requirement of twelve-member criminal juries at either the state or federal level. *Id.*

11. 413 U.S. 149 (1973).

12. "It is true, of course, that several earlier decisions of this Court have made the statement that 'trial by jury' means 'a trial by a jury of twelve' But in each case, the reference to 'a jury of twelve' was clearly dictum" *Id.* at 157 (citations omitted).

13. *Id.* at 160.

14. *Id.* The Seventh Amendment provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

15. *Colgrove*, 413 U.S. at 159 n.15 (quoting *Williams v. Florida*, 399 U.S. at 101, and citing Lawrence Mills, Note, *Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results*, 6 U. MICH. J.L. REFORM 671 (1973); INSTITUTE OF JUDICIAL ADMINISTRATION, A COMPARISON OF SIX- AND TWELVE-MEMBER CIVIL JURIES IN NEW JERSEY SUPERIOR AND COUNTY COURTS (1972); Joan Kessler, Note, *An Empirical Study of Six- and Twelve-*

In 1978, in *Ballew v. Georgia*,¹⁶ the Court indicated possible second thoughts.¹⁷ There, as it invalidated a county criminal court's five-member jury, the Court noted the existence of more recent scholarship.¹⁸ Those studies indicated smaller juries to be deficient in representing all community views, in fostering group deliberation, and in withstanding biases.¹⁹ Although reaffirming *Williams*, the Court in *Ballew* professed "significant doubts about the consistency and reliability of the decisions of smaller juries."²⁰

2. The Response. The Supreme Court's cavalier characterization of the twelve-member jury as "a historical accident" provoked sharp and sustained rebuttal.²¹ "[T]welve was the common number throughout Europe, particularly Scandinavia, and . . . it made its way with the Danes into England."²² Moreover, the Middle Ages' "presentment jury" of the English Hundred consisted of twelve; "any variation in number ended during the reign of Edward IV (1461-1483) when the unanimous verdict of twelve unquestionably and invariably became the law of England, absent consent of the parties."²³ A different theater yielded the same conclusion: "If the twelve apostles on their twelve thrones must try us in our eternal state, good reason hath the law to appoint the number of twelve to try our temporal. The tribes of Israel were twelve, the patriarchs were twelve, and Solomon's officers were twelve."²⁴ Finally, "[i]f the number twelve . . . was used without interruption until

Member Jury Decision-Making Processes, 6 U. MICH. J.L. REFORM 712 (1973); Gordon Bermant & Rob Coppock, *Outcomes of Six- and Twelve-Member Jury Trials: An Analysis of 128 Civil Cases in the State of Washington*, 48 WASH. L. REV. 593 (1973).

16. 435 U.S. 223 (1978).

17. *Id.* at 239.

18. *Id.* at 231.

19. *Id.* at 231-39.

20. *Id.* at 235. "[T]hese studies, most of which have been made since *Williams* was decided in 1970, lead us to conclude that the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members." *Id.* at 239.

21. See, e.g., Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971).

22. Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 11 (1993).

23. *Id.* at 8.

24. *Id.* at 11 (quoting JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 90 (Augustus M. Kelley 1969) (1898)).

twenty years ago, it carries with it a certain presumption of regularity, a certain entitlement to respect”²⁵

In substantial sum, the scholars insisted, “History . . . might have embodied more wisdom than the Court would allow. It might be more than an accident that after centuries of trial and error the size of the jury at common law came to be fixed at twelve.”²⁶ There seems little historical accident in the conclusion that “the Founders believed a ‘jury’ to be twelve when they drafted the Seventh Amendment.”²⁷

The Supreme Court’s “no discernible difference” conclusion, asserted in both *Williams* and *Colgrove*, likewise drew withering scholastic fire. The attacks focused primarily upon the Court’s “empirical” support in both cases. The six studies cited in *Williams*²⁸ suffered devastating refutation as glaringly unsubstantiated.²⁹ As for the four additional studies enlisted in *Colgrove*,³⁰ “significant flaws in the design of each study preclude any cautious observer from basing conclusions about differences between six- and twelve-member juries on the reported results.”³¹

25. *Id.* at 12.

26. Zeisel, *supra* note 21, at 712.

27. Arnold, *supra* note 22, at 12. Also: “[T]he universal understanding was that the Seventh Amendment preserved jury trial as it was known at common law.” 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2491, at 134 (2d ed. 1994).

28. The studies were: Philip M. Cronin, *Six-Member Juries in District Courts*, 2 BOSTON B.J. 27 (1958); Richard H. Phillips, *A Jury of Six in All Cases*, 30 CONN. B.J. 354 (1956); Edward A. Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L.J. 120 (1962); Lloyd L. Wiehl, *The Six Man Jury*, 4 GONZ. L. REV. 35 (1968); *New Jersey Experiments with Six-Man Jury*, BULL. OF THE SEC. OF JUD. ADMIN. (ABA, Chicago, IL), May 1966, at 6; *Six-Member Juries Tried in Massachusetts District Court*, J. AM. JUDICATURE SOC’Y, Dec. 1958, at 136.

29. As summarized, the first study relied upon an unsubstantiated assertion; the second, third, and fourth studies reported casual observations by courtroom officials; the fifth study noted the fact of a county court’s experimentation; and the sixth study predicted economic benefits from permitting litigants to opt for six-member juries. These summary refutations appear in Arnold, *supra* note 22, at 29.

30. The studies were: INSTITUTE OF JUDICIAL ADMINISTRATION, A COMPARISON OF SIX- AND TWELVE-MEMBER CIVIL JURIES IN NEW JERSEY SUPERIOR AND COUNTY COURTS (1972); Bermant & Coppock, *supra* note 13, at 593; Note, *An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes*, 6 U. MICH. J.L. REF. 671 (1973); Note, *Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results*, 6 U. MICH. J.L. REF. 712 (1973).

31. The refutations are summarized in Richard O. Lempert, *Uncovering “Nondiscernible” Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643, 646 (1975).

B. Developments in the Federal District Courts

1. The Judicial Conference's Rule Change. Until 1991 the Federal Rules of Civil Procedure assumed a civil jury of twelve members.³² At that time, the Federal Judicial Conference amended Rule 48 as follows: "The court shall seat a jury of not fewer than six and not more than twelve members"³³ This change "removed the presumption that the jury always must be composed of twelve members absent party stipulation and formally recognized the validity of local rules that make the standard jury size a number that is fewer than twelve."³⁴

2. The Response. The Judicial Conference's 1991 rule change for the federal district courts prompted the Conference's own Standing Committee on Rules and Procedure to undertake further study of the issue. Evidence before the Committee reportedly indicated that smaller juries increase pressure on minority-viewpoint jurors, yield to aggressive jurors, conduct poorer deliberations, and reach less desirable outcomes.³⁵ As a result, the Committee "apparently decided that the efficiency achieved by using smaller juries was not worth a deterioration in the quality of the deliberative process."³⁶ Accordingly, the Committee recommended that the Judicial Conference reinstate the twelve-member jury requirement for all federal civil trials.³⁷ In 1996, however, the Conference rejected that recommendation.³⁸

The controversy surrounding the rule change refuses to subside. In 2001, the American College of Trial Lawyers issued a "Report on the Importance of the Twelve-Member Civil Jury in the Federal Courts."³⁹ The "College," composed of "more than 5,000 Fellows across the United States and Canada," boasts a membership that includes lawyers "who

32. WRIGHT & MILLER, *supra* note 27, § 2491, at 136.

33. FED. R. CIV. P. 48.

34. WRIGHT & MILLER, *supra* note 27, § 2491, at 139.

35. These are collected from journalistic reports by Note, *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1487-88 (1997).

36. *Id.* at 1488.

37. *Id.* at 1487.

38. *Id.* at 1488.

39. AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON THE IMPORTANCE OF THE TWELVE-MEMBER CIVIL JURY IN THE FEDERAL COURTS (2001). The Report was prepared by the College's Committee on Federal Civil Procedure and was approved by the College's Board of Regents in October 2000. *Id.*

represent plaintiffs and those who represent defendants in civil cases.”⁴⁰ It reports that “[o]n the twelve-person jury issue, however, the plaintiff and defense Bars were of one voice.”⁴¹ Following considerable discussion, the College’s Report reasons that “just as ‘two heads are better than one,’ twelve heads are better than six.”⁴² It proceeds to find that “[t]welve-person juries work better than six-person juries, whether as fact-finders, repositories of social norms, voices of the community, integrators of individual viewpoints, or in all roles combined.”⁴³ Finally, it concludes, “the reduction in the size of the jury from twelve members to six impairs the process of rational fact-finding that lies at the heart of civil litigation and diminishes the role of the jury as an effective instrument of democratic government.”⁴⁴ The Report recommends that “the traditional twelve-member civil jury should be reinstated in the federal courts.”⁴⁵

C. A Summary of Positions

A national body of learning, even superficially summarized, reflects a number of positions on jury size-reduction, both in opposition and in favor.

1. Opposition. Much scholarly literature holds remarkable consensus on five features: (1) The six-member jury is deficient in representing a broad cross-section of the community.⁴⁶ (2) The six-

40. Emil Gumpert, *Foreword* to AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 39.

41. AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 39, at 35.

42. *Id.* at 30.

43. *Id.*

44. *Id.* at 4.

45. *Id.*

We believe that with the beginning of the new millennium, it is time to have another look at this most basic of issues in the federal civil justice system. The federal civil trial is the poorer with six-person panels. Simply stated, six-person panels are inferior to twelve-person juries in their ability to find facts objectively, accurately, and independently, and as well, they are less capable of representing the values and interests of the community at large.

Id. at 35.

46. Statistically projected, minorities would be represented on 72% of all twelve-person juries (on the average), but only on 47% of six-member panels. Arnold, *supra* note 22, at 30. A subsequent actual experiment yielded an even more glaring contrast: 82% to 32%. Michael J. Saks, *Ignorance of Science is No Excuse*, TRIAL, Nov./Dec. 1974, at 18, 19. Finally, “however limited a twelve-member jury is in representing the full spectrum of the community, the six-member jury is even more limited, and not by a ‘negligible’ margin.” Zeisel, *supra* note 21, at 716.

member jury decreases participation in deliberations by minority-viewpoint jurors.⁴⁷ (3) The six-member jury's decisions lack predictability and consistency.⁴⁸ (4) The six-member jury is unduly vulnerable to domination by personality characteristics of an aggressive juror.⁴⁹ (5) The six-member jury's deliberations suffer in time and in quality.⁵⁰

2. Reduction Advocates. Advocates of the six-member jury highlight four areas of advantage for the smaller panel.⁵¹ (1) Members of the six-person jury are more likely to be satisfied with their service.⁵² (2) Smaller juries entail fewer mechanical problems of disruption and

47. Jurors who hold a minority view are far more likely to defect to the majority in six-member juries, because those jurors are far less likely to have additional support on the panel. Lucy M. Keele, *An Analysis of Six vs. 12-Person Juries*, TENN. B.J., Jan./Feb. 1991, at 32, 35. Statistically, the expectation of having more than one minority advocate on the twelve-person jury is 34 out of every 100; on the six-member jury, that expectation falls to only 11 out of 100. Zeisel, *supra* note 21, at 720. "An individual in the minority of a 5 to 1 vote is far more likely to defect than is an individual in the minority of a 10 to 2 vote, even though the proportions remain the same." *Developments in the Law: The Civil Jury*, *supra* note 35, at 146 n.165.

48. Six-member juries will show an approximately 41% greater variation in verdicts than will juries consisting of twelve members. Hans Zeisel, *Twelve is Just*, TRIAL, Nov./Dec. 1974, at 13, 15. See also Michael Saks, *If There Be A Crisis, How Shall We Know It?*, 46 MD. L. REV. 63, 76 n.51 (1986). This "means that damages awarded by two different juries to two plaintiffs suffering similar injuries are likely to be closer in amount if the juries each have twelve members than if each have six." Lempert, *supra* note 31, at 681. The smaller panel's lower predictability rate serves to increase the perceived "gamble" taken by litigants in going before a jury; that magnified uncertainty leads in turn to waivers and a decrease in jury trials. Zeisel, *supra* note 21, at 719.

49. "[I]ndividuals on six-person panels are far more likely than those on 12-person panels to be swayed by a single aggressive juror." *Developments in the Law: The Civil Jury*, *supra* note 35, at 1486 n.166. The six-member jury "is more likely to come under the dominance of a single juror." *Id.* (quoting Victor J. Baum, *The Six-Man Jury—The Cross Section Aborted*, JUDGES' J., Jan. 1973, at 12, 13). This increased vulnerability portends jury decisions based on personal idiosyncracies rather than on the evidence in the case. Arnold, *supra* note 22, at 31 (citing Norbert L. Kerr & Juin Yih Haung, *Jury Verdicts: How Much Difference Does One Juror Make?*, 12 PERSONALITY & SOC. PSYCHOL. BULL. 325 (1986)).

50. The larger panel excels in remembering and understanding the facts of the case, a quality crucial to an effective deliberative process. Lempert, *supra* note 31, at 687. Moreover, the larger the size of a randomly selected group, the greater the heterogeneity of its membership. "Research indicates that heterogeneous groups are more likely to arrive at correct solutions to problems than homogeneous groups." *Id.* (citing L. Richard Hoffman, *Homogeneity of Member Personality and Its Effect on Group Problem-Solving*, 58 J. AB. & SOC. PSYCHOL. 27 (1959)). The twelve-member panel's decisions bode less likely to be completely aberrant, because that panel is less likely to be overwhelmingly composed of individuals representing disfavored positions in the community. *Id.*

51. These positions are summarized in Lempert, *supra* note 31, at 691.

52. *Id.*

coordination.⁵³ (3) Smaller juries encourage equality of participation by all members.⁵⁴ (4) Smaller juries are less likely to divide into factions that decrease the quality of their decisions.⁵⁵

III. THE SIX-MEMBER CIVIL JURY DEBATE IN GEORGIA

A. *The Setting*

The Georgia Constitution reflects an illustrious common law heritage: “A trial jury shall consist of 12 persons”⁵⁶ The Georgia Supreme Court explicates that same heritage: “Absent a waiver or a stipulation to the contrary, there is a right to a 12-person jury in cases tried in superior court.”⁵⁷

Recent unrest with those traditional absolutes found manifestation during the 1998 session of the Georgia General Assembly. At that time, two reform resolutions proposed constitutional changes.⁵⁸ One of those offerings would expressly empower the General Assembly “to prescribe a jury of six persons in all courts in all civil cases.”⁵⁹ The other proposal would do the deed directly: “A trial jury in all civil cases shall consist of six persons.”⁶⁰ Either way, these forces of change advocated two foundational jury “reforms” for Georgia: first, a sharp delineation between nonmisdemeanor criminal cases and civil cases and, second, a reduction in the number of civil jurors from twelve to six. Although neither resolution successfully cleared the 1998 legislative session, the

53. *Id.*

54. *Id.* at 693.

55. *Id.* at 697.

56. GA. CONST. art. I, § 1, para. 11. Exceptions are that “the General Assembly may prescribe any number, not less than six, to constitute a trial jury in courts of limited jurisdiction and in superior courts in misdemeanor cases.” *Id.*

57. *Hague v. Pitts*, 262 Ga. 777, 777-78, 425 S.E.2d 636, 637 (1993).

58. Both resolutions were referred to the House Judiciary Committee.

59. H.R. 173, 144th Gen. Assem., Reg. Sess. (Ga. 1998). The resolution proposed to amend Art. I, § 1, para. 11 as follows: “A trial jury shall consist of 12 persons; but the General Assembly may prescribe a jury of six persons in all courts in all civil cases, in courts of limited jurisdiction in any cases, and in superior courts in misdemeanor cases.” *Id.*

60. S. Res. 200, 144th Gen. Assem., Reg. Sess. (Ga. 1998). The resolution proposed to amend Art. I, § 1, para. 11 as follows: “A trial jury in criminal matters shall consist of 12 persons; but the General Assembly may prescribe any number, not less than six, to constitute a trial jury in misdemeanor cases. A trial jury in all civil cases shall consist of six persons.”

passions for modification by no means abated. In one fashion or another, it appeared, the movement would eventually bring to ballot the Georgia citizen's constitutional right to a civil jury of twelve members.

The reform forces did not long lack an outlet for expression. On March 1, 1999, an "Order" of the Georgia Supreme Court created "The Blue Ribbon Commission on the Judiciary."⁶¹ That Order charged the twenty-member Commission to consider the "structure and organization of the courts as they relate to efficiency and effectiveness in the dispensation of justice."⁶² Following a period of slightly more than two years, on June 13, 2001, the Blue Ribbon Commission submitted its final Report to the Georgia Supreme Court.⁶³ That Report traces Commission efforts to "advance the judiciary's ability to serve the public in the administration of justice."⁶⁴ One avenue for such advancement, the Report reasons, consists of "[e]nhancing the [e]ffectiveness and [e]fficiency of [j]uries."⁶⁵ Among a number of suggested jury system improvements, the Blue Ribbon Commission's recommendation is explicit: "Six-[p]erson [j]uries for [a]ll [c]ivil [t]rials."⁶⁶

Elaborating upon its jury size-reduction recommendation, the Commission Report "surmise[s]" that "alternative dispute resolution techniques" make "the public more receptive to changes in the traditional concept of jury trials."⁶⁷ The Report expresses "considerable doubt that community representation is significantly weakened by the use of six-person juries,"⁶⁸ and embraces "several studies" showing "that six-person juries and twelve-person juries reach similar results."⁶⁹

The Commission offers two "chief benefits" in support of its recommendation.⁷⁰ The shift to a smaller jury would entail the following: (1) "a reduction in the time required for jury selection;" and (2) "a reduction in

61. This Order and the Commission's final report appear in the form of an article, Richard W. Creswell, *Georgia Courts in the 21st Century: The Report of the Supreme Court of Georgia Blue Ribbon Commission on the Judiciary*, 53 MERCER L. REV. 1 (2001).

62. *Id.* at 3 (internal quotation marks omitted). The Honorable Hardy Gregory, Jr. served as Chair of the Blue Ribbon Commission.

63. *Id.* at 1.

64. *Id.* at 5.

65. *Id.* at 17.

66. *Id.* at 26.

67. *Id.* at 27.

68. *Id.*

69. *Id.* (citing Adam M. Chud & Michael L. Berman, *Six-Member Juries: Does Size Really Matter?*, 67 TENN. L. REV. 743 (2000); Robert T. Roper, *Jury Size and Verdict Consistency: "A Line Has to Be Drawn Somewhere"?*, 14 LAW & SOC'Y REV. 977 (1980); Bermant & Coppock, *supra* note 15, at 593).

70. *Id.*

the size of jury panels.”⁷¹ With benefits adumbrated, the Report discounts “any potential losses of certainty or community representation in civil trials.”⁷² Those losses, the Commission declares, “are of insufficient weight to justify continuing the present expenditure of judicial resources and juror resources inherent in the twelve-person jury.”⁷³

Once again, therefore, history repeated itself: the advocates for decreasing the size of the civil jury forged solid encampment upon Georgia’s jurisprudential doorstep.⁷⁴

B. A Source of Appraisal

Intelligent appraisal of the six-juror proposal requires assistance from all informed sources. What better benchmark for assessing changes in the jury system than the entity composing the system’s other half? As the jury’s daily working companion, and the one most directly affected by jury changes, the trial judge possesses an unmatched perspective. Operating as the jury’s full partner in resolving civil litigation, the trial judge brings a viewpoint of hands-on experience. If experience is the best teacher, the judge offers an unequalled education on the jury system. Truly, the trial judge is positioned, and uniquely so, to gauge jury reduction impact upon the essential pursuit of civil justice.

Moreover, this appeal to Georgia trial judges for jury information does not write on a clean slate. Roughly a decade ago, a study of Georgia’s negligence system sought judicial response to all manner of inquiries about the jury.⁷⁵ Respond, they did. In sustained and elaborate detail, the trial judges painstakingly profiled the Georgia civil jury.⁷⁶ Their profile overwhelmingly reflected a body of innate ability and ingrained competence. “With virtually a unanimous voice, the judges acclaimed

71. *Id.*

72. *Id.*

73. *Id.* “The six-person jury is currently used in Georgia for the trial of misdemeanors in all courts. Surely the loss of liberty at stake in those cases is of equal seriousness to the monetary stakes in civil litigation, and the certainty with which six-person juries make their decisions should be sufficient to satisfy the requirements of civil justice.” *Id.*

74. For one federal judge’s expressed disagreement with the Blue Ribbon Commission’s six-member jury recommendation, see Duross Fitzpatrick, *A Defense of the 12-Person Jury*, GA. B.J., June 2002, at 4.

75. Sentell, *The Georgia Jury and Negligence: The View From the Bench*, *supra* note 1.

76. That profile also reflected valuable contributions from Georgia’s federal trial judges, and from the Georgia Trial Bar. Those studies too are reprinted in R. PERRY SENTELL, JR., *THE GEORGIA NEGLIGENCE JURY* (1995).

the jury's ability to grasp the facts of negligence cases.⁷⁷ "Similarly, the judges were massively at one in proclaiming the individual juror's freedom from resentment in being called to the task."⁷⁸ Finally, the judges radiated an "enormous amount of good will" for the jury.⁷⁹ Their expressed admiration far transcended "merely settling for a system that is better than any alternative."⁸⁰ Rather, it exemplified an esteem of rare and genuine affection.⁸¹ In a phrase, Georgia trial judges *like* the Georgia civil jury.

A citizen pressed to determine the desirable size of that jury deserves informed assistance from the judges of Georgia's superior courts.

IV. AN APPEAL FOR APPRAISAL: THE TRIAL JUDGES SPEAK

A. Method

A cover letter and a five-page Questionnaire⁸² composed the primary appeal for assistance to Georgia's trial judges. The letter sketched the issue, described the present project, and solicited the judge's assistance.⁸³ It acknowledged the inexactness of the requested reflections and sought only the recipient's "best effort" (even "roughest instincts") on some of the questions.⁸⁴ Finally, it promised the respondent

77. Sentell, *The Georgia Jury and Negligence: The View From the Bench*, *supra* note 1, at 173.

78. *Id.* "They thus shattered the perceived incongruity of obtaining effective collective mediation from individuals officially conscripted from their own daily cares." *Id.* at 173-74.

79. *Id.* at 177.

80. *Id.*

81. *Id.*

The presence of such an esteem, unfailingly registered in survey after survey over the years, is a rare thing. Operating between two institutions working so closely together in such charged and often frustrating conditions, it is all the rarer. Held and expressed by the professional institution for the lay institution, it is rarer still. That quality of esteem, in itself, counts for something.

Id.

82. Questionnaire, Survey of Georgia Superior Court Judges on Reducing the Size of Civil Juries (2002) (on file with Author).

83.

As you know, there is a continuing movement in Georgia to reduce the size of civil trial juries from 12 members to 6 members, a change that would require a constitutional amendment. Georgians will hear much argument on the matter if and when they are required to vote on such an amendment. Aside from the politics of the thing, I would like to know what you, personally and individually, think about the substance of the proposal.

Letter to recipients of Survey of Georgia Superior Court Judges on Reducing the Size of Civil Juries (2002) (on file with Author).

84. *Id.*

anonymity in respect to the information contributed. Subsequently, a follow-up letter completed the solicitation phase of the project.

The Questionnaire initially requested the judge's "Yes" or "No" response to the following statement: "In my opinion, the Georgia civil jury *should* be reduced from 12 members to 6 members."⁸⁵ If the respondent tendered an affirmative response to that statement, the Questionnaire then proposed six additional inquiries. If the respondent's initial answer registered in the negative, the Questionnaire followed up with five additional inquiries. In this fashion, the project sought the trial bench's views upon an issue of crucial significance. That issue threatened to impact, no less, the capacity of Georgia's historic system for dispensing civil justice.

The mailing covered all 257 of Georgia's superior court judges. That total included 68 "Senior Judges" and 189 "Active Judges," but the solicitation made no distinction between the groups. Ultimately, 160 recipients returned completed questionnaires,⁸⁶ thus attaining a highly impressive sixty-two percent rate of return.⁸⁷ Given that benevolent response and the respondents' thoughtful attention to the inquiries, the project stood assured of statistical legitimacy.

B. The Judges Speak: "Yes" or "No"?

Of the total 160 responding trial judges, 103 agreed that "the Georgia civil trial jury should be reduced from 12 members to 6 members." Accordingly, the majority view, and by a considerable margin, was clear: the professional partner in administering Georgia's civil trial system believed that its lay partner should undergo substantial modification. Whatever the national debate, Georgia's trial judges stood unpersuaded of the feared negatives of jury-size reduction. On the contrary, they resoundingly recommended the change. Rejecting a natural conservative hesitation over restructuring a common law fixture, the judges registered a strikingly reformist disposition. They possessed few qualms, their responses reflected, in reducing by one-half the common law's historic mandate of twelve civil trial jurors. They apparently viewed that mandate as yet another shibboleth of ancient order, an anachronism in today's dispensation of civil justice. Their trial experience, the judges manifested, counseled the courage of correction.

On the other hand, the judicial "revolution" was by no means complete. Some 57 of the 160 respondents disapproved jury-size

85. Questionnaire, *supra* note 82 (question 1).

86. Responses, Survey of Georgia Superior Court Judges on Reducing the Size of Civil Juries (2002). [The reader is assured that these responses appear in the Author's files.]

87. Deep appreciation is due the respondents for their kind assistance on the project.

reduction. For more than one-third of the responding judges, therefore, the six-juror effort represented a mistake of unacceptable proportions. Their registered rejection, moreover, evidenced far more than a natural reluctance merely to change a common law icon; although, that sentiment assuredly surfaced. Rather, the dissenting jurists emphasized an ingrained conviction of the modification's potential for positive peril. From a profusion of perspectives, these judges insisted, the proffered reform portended a foundational fracture to the Georgia system. The reduction movement affected far more than trial administration; it reached to the essence of accomplishing civil justice. Their trial experience, the judges manifested, counseled the courage of opposition.

This substantial division between Georgia's trial judges raised a question of perplexing intrigue. How could the judges' daily associations with the trial jury evoke such diametrically opposing convictions over a reform so fundamental to the relationship? Obviously, much remained for revelation by the judges' responses to the accompanying inquires.

Table I. Jury Reduction: Yes or No

	<u>No. Responding</u>	<u>Percentage</u>
Yes	103	64%
No	57	36%
Totals	160	100%

C. The "Yes" Judges Speak

If the trial judge approved the jury-reduction proposal, the Questionnaire presented a series of further inquiries. In the main, those inquiries exposed the judge to the national body of literature opposing the modification. In this fashion, the survey sought to mesh that literature with the Georgia context. Thus, each question yielded a rebuttal, formulated in the judge's own words, to one of scholarship's primary positions against the six-person civil jury. In mass, therefore, those rebuttals constitute Georgia's reformist challenge to a jury-system tradition grounded in the test of time.⁸⁸

88. For discussion purposes, the Author has taken liberties in generally classifying the gist of the judges' responses, and the study proceeds on the basis of those classifications. The effort throughout is to allow the judges to respond in their own words.

1. The Jury's Community Representation. The Questionnaire first sought the reduction-approving judge's opinion on the following objection: "In the literature, there is the objection that the 6-member jury is less successful than the 12-member jury in fulfilling the foundational purpose of representing a broad cross-section of the community."⁸⁹ Of the ninety-five judges responding to this objection, sixteen simply disagreed without further comment.⁹⁰ Of the remaining responses, the largest single group (20) relied upon the six-person jury's acclaimed representative successes elsewhere. For some, however, this was merely an impression of success elsewhere; that is, a deduction that the smaller jury must be sufficiently representative because it is used in state courts, in federal courts, or in other states. (*E.g.*, "Six-person juries have been successful enough in other jurisdictions to contradict this objection."⁹¹ "The federal courts have been successful in using the six person jury for some time."⁹² "While this may be true, it does not appear to have been a problem in either the federal courts or the state court trials of misdemeanors. There is no indication from those bodies that a potential loss of community representation justifies going to 12-member juries.")⁹³ For other respondents of this persuasion, however, the reliance reflected actual hands-on experience. (*E.g.*, "I served ten years as a state court judge, and considered the six person jury to be both fair and effective in representing an increasingly diverse community."⁹⁴ "As a senior judge, I have been trying cases in the state court with six member juries and have found them to be representative of the community and fair."⁹⁵ "Juries are composed of six persons in the U.S. District Court, with no apparent [representation] problems. I served four years as state court judge . . . and six person juries were no problem.")⁹⁶ In any event, this "experience proves otherwise" position constituted the most commonly expressed answer to the inquiry.⁹⁷

89. Questionnaire, *supra* note 82 (question 1(A)).

90. *E.g.*, "I disagree;" "I do not believe it to be true;" "No;" "I do not believe that a six-member jury is less successful in representing a broad cross-section." Responses, *supra* note 86.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Other such responses: "As a judge in the state court . . . for 15 years, I have never observed this to be a problem." "I have used both 6 and 12 member juries and have not seen this as a problem." "That has not been my experience in state court misdemeanor cases." *Id.*

A sizeable number of respondents (16) conceded validity to the “community representation” objection, but held it insufficiently fatal to the smaller jury. (*E.g.*, “Of course you would have a broader cross-section with 12 rather than 6 jurors; however, your cross section with 6 would be broad enough.”⁹⁸ “This is probably true, but not a good reason [to reject the smaller jury]. The issue is what is practicable and reasonable in meeting all the purposes of the jury.”⁹⁹ “The [objection] is probably valid. Nonetheless, six interested and thoughtful jurors will produce a fair and considered verdict.”¹⁰⁰ Some believed this objection to augur more forcefully in criminal cases than civil ones. (“This [objection] is more significant in criminal cases but not as significant in civil cases.”¹⁰¹ “In the civil context, the ‘broad cross section’ argument is not as strong as it is in the criminal context.”)¹⁰² Finally, some respondents held the force of the objection blunted both by today’s diverse society and by an increasingly informed public. (“Our society is so diverse today that . . . there is no reason to believe that a six-person jury would be any more, or less, diverse than a 12-person jury.”¹⁰³ “With a more well-informed population, the historical concerns with a broad cross-section of the community are not as important.”)¹⁰⁴

Another significant contingent of responding judges (16) maintained that the cross-section concerns should be directed to the jury pool, not the particular jury panel. As one response formulated the position, “The entire jury venire is composed to be a representative cross-section of the community, therefore any traverse jury selected from a valid pool should be representative of the community.”¹⁰⁵ (Others: “Since jury pools are drawn entirely at random from jury lists which are certified to represent a cross section of the particular community, . . . 6-member juries are as likely to represent a cross section of the community as 12-member juries.”¹⁰⁶ “Jurors are put in a pool by random selection and therefore, no matter the size of the jury, represent a broad cross-section of the community based in Georgia upon our requirement to have statistically

98. Responses, *supra* note 86.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* Other of the “concession but denial” group maintained as follows: “This is obviously true, [but] the question is whether 6 is adequate representation.” “It [the smaller jury] is necessarily a less broad cross section, but not so much so as to be patently unfair.” “You also have a smaller cross section of the majority population.” *Id.*

105. *Id.*

106. *Id.*

balanced jury boxes.”¹⁰⁷ Accordingly, these respondents emphasized, the “representation” efforts should focus forcefully upon the locality’s attention to its jury pool: “Constant work and monitoring should be exercised to assure that the jury pool is a broad cross-section of the community.”¹⁰⁸ (Again: “As a judge, I am satisfied that the jury commissioners prepare representative lists of trial jurors representing the ‘broad cross-section.’”)¹⁰⁹ Finally, there is the view that (given a correctly constituted pool) the expectations of a representative jury panel are irrelevant. “A litigant isn’t promised a panel to select from that mirrors the cross-section; a litigant is only promised a list from which panel selections are made which does reflect the cross section.”¹¹⁰ (Similarly, “As long as the jury pool accurately reflects the demographics of the county, there is no problem.”)¹¹¹

In the opinion of several respondents (11), the issue of “representation” constitutes something of a red herring in the debate, for it is an issue that can never be accommodated.¹¹² Thus, “a hundred jurors would do that better than 12.”¹¹³ “Would the objectors favor 24, [even] 48 jurors for their ‘cross section’ purposes?”¹¹⁴ “Why not have 100 [jurors] or more?”¹¹⁵ For these judges, therefore, the matter of “representation” is a matter of degree. “Under that theory, you should have a jury which statistically reflects the size of the sample you desire, whatever that number would be—certainly more than 12.”¹¹⁶ At some point, they asserted, practicality must prevail: “[A] 24-person jury would be better, but more expensive and time consuming.”¹¹⁷ “Look at the converse—why not put 100 people on a jury?”¹¹⁸

A number of the judges (11) responded to the “representation” objection by taking refuge in the jury-striking process. Intriguingly,

107. *Id.*

108. *Id.*

109. *Id.* Another: “The cross section is accomplished by jury [pool] revision every two years and by meeting the required standards relating to deviation.” *Id.*

110. *Id.*

111. *Id.* “As long as the traverse jury list is well-drawn (albeit within the limits of the voter registration list), the actual make-up of a jury should not be controlling.” *Id.*

112. “There is some merit to this objection. There is a better chance of a broad cross-section at 12 than at 6. [Twenty-four] would give even more chance.” *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* For some, exasperation was apparent: “Poppycock—what is magical about the number 12? [Eighteen] member juries would or could be more diverse than 12—so what?” *Id.*

however, they enlisted that process to arrive at conflicting conclusions. On the one hand, jury strikes may assist in insuring a representative panel: "The parties may carefully select (strike) responsible juries with broad-section community values, regardless of the precise numbers."¹¹⁹ Similarly, "with strikes and an adversarial process, a broad cross-section should be obtained."¹²⁰ On the other hand, jury strikes will inevitably frustrate whatever representation efforts are made: "Given . . . the number of strikes exercised, any effort to achieve a cross section by controlling the size of the jury seems futile at best."¹²¹ Likewise, "lawyers tend to eliminate the 'broad cross section' with peremptory challenges."¹²² Finally, "the broad cross section would be a valid point if there were fewer peremptory strikes."¹²³

In conclusion, a few judges (5) disputed the objection's "jury representation" premise: "I don't think the foundational purpose in civil jury trials is to represent a broad cross-section of the community."¹²⁴ Rather, "the purpose is to provide a decision making body in a responsible, credible way, with as little inconvenience to citizens as possible."¹²⁵ Similarly, "a diverse jury is hardly a guarantee of the ultimate goal of reaching a good decision."¹²⁶ As one respondent reasoned, "I am not sure the public has this concern."¹²⁷

The Georgia judges who advocate reducing the civil jury to six members thus take strong issue with the objection of insufficient community representation. From a myriad of rationales, the judges coalesce to their conviction that the objection is lacking in determinative significance.

119. *Id.*

120. *Id.* "With . . . the number of jury strikes available to litigants, most six person juries are as equally representative of the population as twelve person juries." *Id.*

121. *Id.*

122. *Id.*

123. *Id.* "[A]fter 24 are subject to 12 partisan strikes, a 'broad cross section' is not likely to emerge." *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* "In the rural area served, there is little to no diversity to be represented in the jury pool." *Id.*

Table II. Six-Person Jury Insufficient to Represent Community

<u>Judges' Responses</u>	<u>No. Responding</u>	<u>Percentage</u>
Not So	16	17%
Experience Contra	20	21%
Valid But Not Fatal	16	17%
It's The Jury Pool	16	17%
Only A Matter of Degree	11	12%
The Jury Strike Factor	11	12%
Erroneous Premise	5	5%
Totals	95	101%

2. The Smaller Jury's Impact Upon Minority Viewpoints. The judges who approved the jury's size reduction next confronted the following objection: "In the literature, there is the objection that the 6-member jury would be less successful in insuring that a minority viewpoint will be heard during panel deliberations."¹²⁸ Unfortunately, the language of that objection misled a majority of the judges into discussing an unintended issue. Of the eighty-two judges responding to this objection, thirty-six understood it to relate to racial or ethnic minorities. Those respondents, and rightly so, viewed that issue to possess little relevance to the Study. As one responder queried: "Does 'minority viewpoint' mean women, blacks, Latinos, Asians?? How do you successfully obtain that on any sized jury?"¹²⁹ Another reasoned that "[m]ost civil cases which we handle do not have a racial/ethnic component."¹³⁰

Actually, the question's intended reference was to substantive viewpoints on the case (*e.g.*, liability or no liability) held by one or two jurors during deliberations, in opposition to the position assumed by most members of the jury. Would the smaller size of the panel operate

128. Questionnaire, *supra* note 82 (question 1(B)).

129. Responses, *supra* note 86.

130. *Id.* Other examples of the misperception: "Juries take an oath to render a verdict according to the law and evidence. Juries should be concerned with their oath and not race, color, creed, etc." "I did not know that there is a minority viewpoint on civil issues." *Id.*

to discourage the minority-view juror(s) from advocating those views and holding to those convictions as jury deliberations continued? This was the national scholarship's expressed concern.

Of the judges who appeared to perceive the inquiry in its intended light, a considerable number (12) simply disagreed with the objection without comment.¹³¹ Of the dissenters who elaborated their grounds, several (6) reasoned that minority viewpoints will surface during deliberations regardless of the jury's size. Thus, the expression of minority viewpoints constituted no basis, they maintained, upon which to object to the smaller jury. (*E.g.*, "In talking with jurors after trial, it seems that various viewpoints were discussed, both with 12[-] and 6-person juries."¹³² "Observation of jurors of late indicates the public is very opinionated and not shy to vocalize those opinions."¹³³ "I don't see that 1 or 2 voices of 6 is any different from 2 or 4 voices of 12.")¹³⁴

Another group of respondents (5) likewise urged that no such distinction turned upon the jury's size, but they rested their position on traits of individual jurors. For instance, "whether or not any jury viewpoint is expressed depends more on the personality of the juror than the [size] of the panel."¹³⁵ Similarly, "depending on the personality of the jurors, the minority opinion will be heard . . . regardless of the number on the panel."¹³⁶ Indeed, "[a] strong personality will push his point and a fragile type will not, regardless of jury size."¹³⁷

Interestingly, a considerable number of judges (15) agreed that jury size did indeed impact minority expression, but argued that impact to operate in precisely the opposite direction. For example, "I believe the opposite—the larger the group the greater the 'control' the majority enjoys. In larger groups, minority viewpoint holders are less likely to speak up, and more easily drowned out and overruled."¹³⁸ "As a matter of fact, two minorities on a 6-person jury would have a louder voice than 2 minorities on a 12-person jury."¹³⁹ Similarly, "one or two

131. *E.g.*, "No." "I disagree." "I don't think it makes any difference. Moreover, I believe the literature is more opinion than fact." *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* "My experience is to the contrary. The smaller group is usually more considerate of the minority view simply because of the numbers." *Id.*

139. *Id.* "A one person minority might very well have more impact on deliberations of a six person jury than a twelve person jury." *Id.*

people can exert more influence over 6 than over 12.”¹⁴⁰ Indeed, some were incredulous that an opposite position existed: “I don’t understand this argument—isn’t one vote out of 6 more powerful than one vote out of 12?”¹⁴¹ Again, “[i]t only makes sense that the fewer in the jury room, the greater the chance of all being heard.”¹⁴²

Finally, a number of respondents (8) appeared to concede the thrust of the objection, but nevertheless stayed the course in supporting the six-person jury. For instance, “this may be the case and perhaps should be safeguarded to insure minority participation.”¹⁴³ More elaborately, it is “[s]ociologically true that the individual has more anonymity in a big crowd than in a small group; inferentially, one who might be intimidated in a small group (closely seated by a dominant personality . . .) might speak up in a larger group.”¹⁴⁴ Similarly, the objection “[m]ay be true in isolated cases, but for the vast majority of cases 6 is as effective as 12.”¹⁴⁵ Finally, “while this objection would appear to be statistically true, it only has validity if one assumes that a jury can reach a good decision only if it has at least one member who holds every arguably relevant viewpoint involved in the case.”¹⁴⁶

It was regrettable that the objection’s phrasing misled the majority of respondents. Those who confronted the intended issue offered a variety of thoughtful responses. For a number of reasons, and from an assortment of positions, they perceived the smaller jury’s size as no obstruction to minority viewpoints. Those viewpoints, the judges insisted, would be held and heard.

140. *Id.*

141. *Id.* “No. Large numbers intimidate most people.” *Id.*

142. *Id.*

143. *Id.*

144. *Id.* Again, “[t]here is some merit to this objection, to this extent. There is more likely to be a minority viewpoint with 12 members than with 6, but there is no reason that 1 juror, for example, would find it easier to have his viewpoint heard in a group of 12 than a group of 6.” *Id.*

145. *Id.* “I don’t know. If a minority viewpoint is less likely to be heard in a group of 6 rather than 12, that would seem to be a matter of group dynamics.” *Id.*

146. *Id.*

Table III. Smaller Jury Squelches Minority Viewpoints

<u>Judges' Responses</u>	<u>No. Responding</u>	<u>Percentage</u>
Misperceived the Issue	36	44%
Not So	12	15%
Makes No Difference	6	7%
Juror Traits Are Determinative	5	6%
Causes Opposite Result	15	18%
True But An Insufficient Objection	8	10%
Totals	82	100%

3. The Verdict's Predictability. The judges who approved reducing the jury's size were next requested to comment on the following objection: "The literature contains the objection that the decisions reached by 6-member juries would be less predictable than decisions of 12-member panels."¹⁴⁷ Of the ninety-five judges responding to the objection, twenty-one disagreed without further comment: they simply deemed the statement "not so."¹⁴⁸ The largest group of respondents (27) offered as its rationale the unpredictability of any jury regardless of its size. "A jury is unpredictable whether it has 12 or 6 members."¹⁴⁹ Similarly, "jury decisions are not really predictable in my opinion—6 or 12 persons."¹⁵⁰ Again, "12-member juries are not predictable either."¹⁵¹ Not only is unpredictability a constant, "it is folly to try to predict what six or twelve person juries are going to decide."¹⁵² Indeed, unpredictability is the result of going to the jury: "[I]f you do not settle the case, you lose control once it is submitted to [the] jury, regardless of the number of panel members."¹⁵³ This for the reason

147. Questionnaire, *supra* note 82 (question 1(C)).

148. Responses, *supra* note 86. *E.g.*, "I don't agree." "I doubt it can be proven." "I simply don't believe that." "I don't know how anyone can reach that conclusion." *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

that “[m]any factors come into play with any particular jury,”¹⁵⁴ and “the number of jurors would not change that phenomenon.”¹⁵⁵ Among those “variables” are “the facts, credibility of witnesses, skill of lawyers, and the make-up of the jury.”¹⁵⁶ Thus, “‘runaway juries’ can consist of 6 or 12.”¹⁵⁷ In sum, “there is always a ‘predictability’ issue with juries,”¹⁵⁸ and “this will probably remain the dominant rule no matter if the jury is composed of six or twelve members.”¹⁵⁹

A substantial number of the judges (16) implied agreement (more or less) with the smaller jury’s increased unpredictability, but strenuously contested the fact’s relevance. Thus, “[t]he decisions to be reached by juries should not necessarily be predictable.”¹⁶⁰ As queried by several respondents, “[w]hy is predictability desirable?”¹⁶¹ Again, “[w]hy should either [six or twelve] be predictable?”¹⁶² Finally, “[w]ho suffers if such decisions are ‘less predictable?’”¹⁶³ Our jury system, these judges emphasized, “strives for fairness, not predictability.”¹⁶⁴ Thus, “I fail to see how the predictability would influence justice.”¹⁶⁵ “Why be concerned with predictability,” one judge wondered, “when the truth is the object.”¹⁶⁶ If predictability of outcome is important, one respondent advised, then “waive jury trial.”¹⁶⁷ Indeed, “[i]f a jury verdict is predictable, one party ought not be in court.”¹⁶⁸

Another sizeable contingent of responding judges (15) disputed the objection’s accuracy by invoking personal experience. “My personal

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* “You have the same averaging out effect of twelve members when you have six members.” “To the extent that juries are not as predictable as they used to be, [this] is most likely caused by the increase in intelligence of the jury pools caused by the General Assembly and the appellate courts.” *Id.*

160. *Id.* Indeed, “only a fool says he/she can predict what a jury will do.” *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* “Why is predictability a goal? Facts and law, right?” “Anyone attempting to predict a verdict by considering any factors other than the evidence and lawyers’ presentation thereof needs a new windmill.” *Id.*

166. *Id.*

167. *Id.*

168. *Id.* “I have never known jury verdicts to be predictable! If they were predictable, then why bother with the jury system at all?” *Id.*

experience in the state court does not support this position.”¹⁶⁹ That experience, the respondents attested, was substantial: “I have had 20 years of court room experience and 25 years as a trial judge;”¹⁷⁰ “In 21 years of judicial service, I haven’t found 6 or 12 person juries to be more or less predictable, based on the number of jurors.”¹⁷¹ Finally, “[w]e now have six person juries for criminal trials in misdemeanor cases and the jury verdict of six members is just as reliable as that with twelve members.”¹⁷²

One group of respondents (12) agreed that jury predictability constitutes a legitimate concern, but argued that the change would favor the six-member panel. These judges, that is, maintained that a shift to the smaller jury would actually improve verdict predictability. Thus, “I believe a 6-member jury would be more predictable than a 12-member panel.”¹⁷³ Some urged the result purely as a factor of the smaller number: “It is easier to predict the response of 6 people than 12 people to a given set of facts.”¹⁷⁴ Similarly, “with only 6 jurors to deal with, the predictability would be better not worse.”¹⁷⁵ Others conjectured that “it would seem a panel of 6 would have less need of compromise than a panel of 12.”¹⁷⁶ Still others of the improvement persuasion emphasized a smaller jury’s decreased chances of including an aggressive juror: “There is more likelihood of getting a ‘loose cannon’ on a jury of 12 than on a jury of 6.”¹⁷⁷ Similarly, “with 12 jurors there is an increased chance that you pick up at least one real oddball who can sway the jury in crazy ways.”¹⁷⁸

Finally, several judges (4) agreed that a six-member jury likely results in less verdict predictability, but nevertheless assessed the change as worth the risk. Accordingly, “[t]hat may be true, . . . but I don’t feel that

169. *Id.* “That has not been my experience.” “I can rely on my experience with six person juries in misdemeanor trials as opposed to twelve person juries in felony trials.” *Id.*

170. *Id.* “This was not my experience while using six member juries in state court.” *Id.*

171. *Id.* “I’ve had some experience with 6-person juries in state court. I don’t think it makes a difference.” *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* One judge took the perspective that a “probable unintended consequence is more settlements after jury selection because of mutual uncertainty heightened relative to a 12-person jury.” *Id.*

177. *Id.* One respondent took it even further: “I would think that six loose cannons would be less predictable than twelve loose cannons.” *Id.*

178. *Id.*

there would be a significant loss of predictability although there is probably a slightly higher risk of a rogue jury.”¹⁷⁹

Table IV. Smaller Jury is Less Predictable

<u>Judges' Responses</u>	<u>No. Responding</u>	<u>Percentage</u>
Not So	21	22%
Equally Unpredictable	27	28%
Predictability Immaterial	16	17%
Experience Contra	15	16%
More Predictable	12	13%
Likely But Not Fatal	4	4%
Totals	95	100%

4. Vulnerability to Aggressive Juror(s). Critics of the jury reduction movement fear that the six-member jury would prove more vulnerable to the domination of a single juror. That fear found expression in the fourth objection presented to the judges who approved reduction: “The literature argues that the 6-member jury would be more likely to fall under the influence of a single juror than would a 12-member jury. What is your opinion about this?”¹⁸⁰ The ninety-three judges who responded to the inquiry divided roughly into four categories. First, as ever, a substantial number of the respondents (22) simply dissented without opinion. Although most basically expressed their disagreement (*e.g.*, “I do not believe this to be the case.”),¹⁸¹ others found the objection offensive to jurors: “Personally, this insults the intelligence of jurors;”¹⁸² “those who hold this opinion have less

179. *Id.* Others: “Maybe.” “Probably true in the abstract and over time.” “If it is true, then the result will be more settlements, which is a good result.” *Id.*

180. Questionnaire, *supra* note 82 (question 1(D)).

181. Responses, *supra* note 86. “I don’t believe anyone can make general predictions because of the unique aspects of each jury.” *Id.*

182. *Id.*

confidence in our citizens who serve as jurors.”¹⁸³ A few even took refuge in perceived modern characteristics (“jurors today are more independent than ever.”).¹⁸⁴

An impressively large number of the remaining respondents (39) expressly indicated their agreement (more or less) with the position posited by the objection. A few even conceded a negative effect: “This is the one concern I have about a six person jury;”¹⁸⁵ “Of all the arguments against 6-member juries, this one has the most merit.”¹⁸⁶ Others found the point insufficiently persuasive to discourage the movement: “This may be true, . . . but is not a good reason [to reject] six-person juries;”¹⁸⁷ “I still believe the advantage far outweighs the disadvantage.”¹⁸⁸ A few judges deemed the problem one for disposition by the attorneys in the case: “Most attorneys are so vigilant in getting rid of possible leaders for the other side that educated, middle class jurors often state that there is a bias against them;”¹⁸⁹ “[T]he attorneys for the respective sides could strike [a person whom] they believe would be a strong leader.”¹⁹⁰

Surprisingly, however, the large majority of judges in this second category professed to deny the undesirability of a “captured” jury. As one respondent expressed it, “The argument is probably good, but in many trials it is best for someone with more knowledge of the issues to explain those issues to the others.”¹⁹¹ After all, “who is to say that a jury should not be influenced by a juror who is intelligent, perceptive, and persuasive?”¹⁹² Time and again, the respondents manifested this view: “As long as all jurors agree, who cares?;”¹⁹³ “Positively true, but what’s wrong with that?;”¹⁹⁴ “[T]he smaller the number of jurors, the

183. *Id.* “That’s saying that the mere numbers control one’s character and will. I don’t agree.” *Id.*

184. *Id.* “I rarely find that one juror can do that in a case of any significance.” *Id.*

185. *Id.*

186. *Id.*

187. *Id.* “This may be a problem in isolated cases but generally it is not any more a problem than with 12-person juries.” *Id.*

188. *Id.* After all, “every jury has its leader and to him belongs the verdict.” Moreover, “how strongly any jury can be influenced by a single juror depends more on the ‘strength’ of the foreperson than on the resistance of other jurors.” *Id.*

189. *Id.*

190. *Id.*

191. *Id.* “On the other hand, the less number of members may lead to better discussion from all the members as to their opinions.” *Id.*

192. *Id.* “This assumes a ‘bad’ result, however, it might be a ‘good’ one.” *Id.*

193. *Id.* “The influence of a single juror generally results in a hung jury and not an unfair verdict.” *Id.*

194. *Id.*

more likely the panel is to fall under the influence of a single juror—is this bad?”¹⁹⁵ On that assuaging note, these judges converted the critics’ detraction into a positive feature for the reduction movement.

A third contingent of the “vulnerability” respondents (23) conceded the hazards of the aggressive juror, but denied those hazards to be greater in six-member juries. Thus, “[a]ll juries, no matter the size, can be influenced by ‘strong’ jurors;”¹⁹⁶ “[I]f this is true for 6 people, it is just as true for 12 people;”¹⁹⁷ “[A] strong and forceful juror could persuade or have much influence on the other members of the panel, whether the number be six, twelve, [or] eighteen.”¹⁹⁸ The phenomenon, the respondents registered, is simply a part of the group-decision process: “[A] strong willed juror will try to dominate any jury;”¹⁹⁹ “[A] jury, whether 6 or 12, that has a strong leader will be influenced by such leader;”²⁰⁰ “[A] strong leader is going to carry a small group, [whether] twelve or six.”²⁰¹ Once again, the sentiment surfaced that this constant may not be all bad: “[A] person who is articulate, personable, and influential may occur in any size panel;”²⁰² “[T]his happens just as frequently in twelve person juries and most often it occurs because that one person is pretty reasonable.”²⁰³

The fourth category of respondents (9) held no brief for jury domination, but believed its potential actually to decrease with the move to six-member juries. This, they perceived simply as a result of the change in numbers: “A 12-member jury would be twice as likely to contain a person of influence;”²⁰⁴ or “as the number of jurors increases, so does the probability that such juror would be present.”²⁰⁵ Additionally, they maintained that “in smaller group settings, those with differing viewpoints tend to speak up more often and more vocally.”²⁰⁶ Likewise, “it may be that some people are willing to express and fight for

195. *Id.*

196. *Id.* “A dominant juror would be in a position to control eleven other jurors as well as five other jurors.” *Id.*

197. *Id.* “I find it hard to believe the likelihood would be any greater for control by one juror with a six-person jury.” *Id.*

198. *Id.* “Could happen in a jury of any size.” *Id.*

199. *Id.* “Actually, one or two members dominate a jury panel regardless of the number of jurors.” *Id.*

200. *Id.* “If a single juror is so powerful, then 6 or 12 wouldn’t matter.” *Id.*

201. *Id.* “I would think that if one juror is particularly dominant, that juror will dominate a 6 as well as a 12-person jury.” *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* “With a 6-person jury, more people would be likely to talk freely.” *Id.*

their views in a small group who are unwilling to speak up in a larger group.”²⁰⁷ Consequently, “each juror would be less intimidated by the numbers and would be more likely to actively participate in the deliberations.”²⁰⁸ Indeed, “it can be argued just as persuasively that with only 6 jurors each individual juror would be less intimidated by the crowd and . . . less likely to be influenced by a dominant single juror.”²⁰⁹

Table V. Smaller Jury More Vulnerable to Domination

<u>Judges' Responses</u>	<u>No. Responding</u>	<u>Percentage</u>
Not So	22	24%
True But Not Fatal	39	42%
Equally Vulnerable	23	25%
Smaller Jury Less Vulnerable	9	9%
Totals	93	100%

5. Length and Quality of Jury Deliberations. The fifth objection submitted to assessment by the judges who favored jury size reduction related to jury deliberations: “There is the argument that the 6-member jury’s deliberations would likely be both shorter and of lower quality than would the deliberations of the 12-member jury.”²¹⁰ Roughly one-third (31) of the 92 responding judges were content with simply (and summarily) rejecting the statement’s accuracy. Those rejections ranged from an abbreviated “don’t agree”²¹¹ to an assortment of succinct dispositions. For some respondents, the “quality” of deliberations is a factor not amenable to substantive measurement (“I don’t think you can measure the quality of argument [among jurors]”).²¹² For others, the number of jurors and the worth of their deliberations defy assimilation

207. *Id.* “Smaller numbers may provide for fuller discussion by all members.” *Id.*

208. *Id.*

209. *Id.* “I believe 6-person juries would be more able to reach a fairer verdict because there would be less bickering and posturing . . . on the jury panel.” *Id.*

210. Questionnaire, *supra* note 82 (question 1(E)).

211. Responses, *supra* note 86.

212. *Id.*

(“The number of jurors does not determine the quality [of their deliberations]”).²¹³ Rather, “[t]he length and quality of deliberations is a function of who is on the jury, not the number of people on it.”²¹⁴ Similarly, “the care and characteristics of each juror is what determines the length and quality of deliberations.”²¹⁵ Additionally, “the amount of complexity of the evidence”²¹⁶ in each case exerts primary influence on the amount of time necessary for jury deliberation.

For a resounding majority of the respondents (51), the objection struck a nerve by connecting the length of a jury’s deliberations with the “quality” of those deliberations. Because advocates of jury reduction rely primarily upon claimed economies in time and money, they can scarcely concede those economies themselves to denigrate value. Thus, these respondents forcefully assaulted the critics’ conclusion that a shorter period of consideration equals a product of lesser worth. Accordingly, the predominating theme of “less equals same” resonated throughout the responses.²¹⁷ The conclusion for many was both brief and emphatic: “Shorter—yes!; lower quality—no!”²¹⁸ Others felt called to elaborate, but with a minimum of explication: “The deliberations would be shorter for sure, but I do not believe of lower quality.”²¹⁹ Again, “it would be shorter because there are less views to present, but the quality would in no way be diminished.”²²⁰ As judge after judge reiterated, “a shorter deliberation is not necessarily one of lower quality. The deliberations of a 6-member jury would be at least as good as those of a 12-member jury.”²²¹ Repeatedly, they could not understand “why shorter would necessarily mean lower quality.”²²² Many of these respondents sought

213. *Id.* One respondent conjectured that “most jurors . . . already have their minds made up without deliberations.” *Id.*

214. *Id.* “The composition of a jury determines quality, not numbers.” *Id.*

215. *Id.*

216. *Id.* “The quality of jury deliberations is determined by the quality of jurors, the court, the lawyers—not by the number of any component.” *Id.*

217. *E.g.*, “Probably shorter, but that does not mean that the quality will be lower;” “Probably shorter—good; but the quality should not suffer;” “There is no harm in shorter deliberations if the same result occurs.” *Id.*

218. *Id.* Others: “Shorter—possibly so; lower quality—probably not;” “Shorter—yes; lower quality—I disagree;” “They may be shorter, but I doubt there would be a reduction of quality.” *Id.*

219. *Id.*

220. *Id.* “Logically, it might seem to be shorter due to less people having to talk, but that does not mean of lower quality.” *Id.*

221. *Id.*

222. *Id.* “I do not see where reducing the number of jurors should have any negative effect on quality;” “I don’t know how you measure quality. A 6-member verdict is just as likely to be ‘right and just’ as a 12-juror verdict.” *Id.*

to deemphasize the element of time by advancing other factors determinative of quality. Thus, "too many outside factors influence the quality of deliberations; *i.e.*, what we actually allow the jury to know."²²³ Other pivotal determinants: "the quality of the jurors;"²²⁴ "an intelligent selection of jurors;"²²⁵ "the quality of the evidence,"²²⁶ "possible juror ignorance or bias,"²²⁷ and "the enthusiasm of the discussions."²²⁸ As one judge summed up the sentiment: "[A] jury that deliberates too long is a jury more likely to deliberate wrong."²²⁹

A final grouping of respondents (10) went the extra mile: they mounted the position that briefer deliberation constitutes deliberation of even higher quality. "I think it may be shorter and of a higher quality than [that of] a 12-person jury."²³⁰ Similarly, "[deliberations] should be enhanced by the lower number."²³¹ Some relied upon a small group's assumed conduciveness to fuller participation: "Small groups frequently work better than large groups—I would expect a 6-member jury to produce higher quality deliberation;"²³² "I think each of the six jurors would have more hands-on input into a decision than each of twelve jurors, and the outcome would likely be better."²³³ Among proffered reasons for the more effective six-juror deliberations, "it is probably easier to review and discuss the evidence with six jurors."²³⁴ In fact, "longer deliberations may do nothing but encourage jurors to change their honest opinions [in order] to go home or back to work."²³⁵ As for the contrasting disadvantages for the jury of twelve: "[T]welve-member panels are more likely to be deadlocked, resulting in more mistrials,"²³⁶ "we get more 'compromise' verdicts from 12-person juries."²³⁷

223. *Id.*

224. *Id.* "The quality of the deliberations in my opinion would depend on the quality of the jury;" "the quality always depends on the quality of each of the jurors and not the arbitrary number of them." *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* "My gut reaction is that with only 6 jurors they will be more attentive and might speak up more. With 12 jurors there may be a tendency to let others pay attention

Table VI. Smaller Jury Has Shorter and Poorer Deliberations

<u>Judges' Responses</u>	<u>No. Responding</u>	<u>Percentage</u>
Not So	31	34%
Shorter But Equal Quality	51	55%
Shorter And Higher Quality	10	11%
Totals	92	100%

6. Additional Reasons for Smaller Jury. As a final inquiry for the judges who approve the move to a six-person civil jury, the Questionnaire solicited "any other reasons you may have for favoring jury size reduction."²³⁸ As might be expected, the seventy-five responding judges highlighted almost exclusively their concerns with efficiency and economy. For purposes of classification, those concerns focus upon money, jurors, and attorneys. Just over one-half of the respondents (39) reasoned that utilization of the smaller jury would directly translate into monetary savings. Their responses ranged from enthusiastic formulations of "cost to counties!"²³⁹ and "taxpayer relief!"²⁴⁰ to straightforward assertions of "savings to county taxpayers"²⁴¹ and "savings to the counties in money."²⁴² Primarily, they were content to leave their declarations simply as statements of fact, but a few responses sought to detail visions of frugality: "fewer summons,"²⁴³ "less postage,"²⁴⁴ "less personnel,"²⁴⁵ "fewer bailiffs,"²⁴⁶ "less cost to sheriff,"²⁴⁷ and

and do the talking and then just go with the flow." *Id.*

238. Questionnaire, *supra* note 82 (question 1(F)).

239. Responses, *supra* note 86.

240. *Id.*

241. *Id.*

242. *Id.* Other examples are numerous and similar: "the county would save considerable money;" "saves money of taxpayers and jurors;" "economy of money and time;" "less cost to county;" "expense to the courts and the public is much reduced;" "much less cost;" "six-person juries would lower the cost of jury trials;" "save time and expense in jury trials;" "a great savings in cost;" "less expense to taxpayers and parties;" "saves a great deal of time and money." *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

"less space needed for holding juries."²⁴⁸ In sum, a savings in the administrative costs to counties loomed as the judges' strongest recorded impetus for the six-person jury.

Almost one-third of the responding judges (23) emphasized as their first "economic" concern an overriding wariness about the treatment of citizens called to jury service. Some simply urged the use of "juror resources more carefully,"²⁴⁹ "less interruption of citizens' lives,"²⁵⁰ and "fewer lives disrupted by jury service."²⁵¹ Some elaborated on the desired results of such treatment: "[J]urors who are [less frequently] selected to serve will be more likely to actively participate and appreciate the importance of their service."²⁵² Additionally, "more citizens could remain on their jobs instead of at the courthouse."²⁵³ Many of these respondents, however, reflected genuine alarm over a perceived juror unrest with current conditions: "We need to utilize jurors more efficiently or they will rebel against being called for jury service."²⁵⁴ Presently, "citizens are routinely summoned to the courthouse to sit and wait to be sent home."²⁵⁵ In a phrase, "we annoy the heck out of the public."²⁵⁶ As a consequence, judges bemoaned, "jurors . . . are getting harder and harder to deal with,"²⁵⁷ "the more capable . . . request to be excused,"²⁵⁸ and "many [citizens] stopped voting to get out of the [jury] box."²⁵⁹ With smaller juries, a respondent concluded, "jurors would not be summoned to serve as often as they are now and might accept jury service better."²⁶⁰

The remaining responses (13) largely stressed the desirability of "economizing" the attorneys' utilization of voir dire. "Voir dire is the most tedious and time consuming aspect of any jury trial," an "expensive, boring, process."²⁶¹ Hopefully, "6-member juries would reduce the

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* Again, "fewer jurors would have their lives disrupted by jury service;" "fewer people would be inconvenienced in the trial of cases." *Id.*

252. *Id.*

253. *Id.* Again, "jurors don't have the extra time to take off from their work or business;" "citizen jurors [must miss] work or taking care of their families." *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* "We need to minimize the inconvenience to . . . jurors," and make jury service "less [of an] imposition on jurors." *Id.*

261. *Id.*

effectiveness of class-warfare voir dire,²⁶² and operate to insure that “the case is not tried during voir dire but at trial.”²⁶³ Almost as one, these judges pleaded for “simplification of jury selection.”²⁶⁴

Table VII. Additional Reasons for Smaller Jury

<u>Judges' Responses</u>	<u>No. Responding</u>	<u>Percentage</u>
Economy: Money	39	52%
Economy: Jurors	23	31%
Economy: Attorneys	13	17%
Totals	75	100%

7. In Summary. By an impressive majority of sixty-four percent, the responding judges of Georgia's superior courts favor the movement to reduce the size of civil juries. A decrease by one-half in the number of jurors, these judges manifest, is a reform whose time has arrived. Although regarding the jury itself as foundational to the cause of civil justice, the judges believe a six-person panel adequate to the task. They thus appear undaunted by a proposed change in the historic fabric of the trial system they daily administer.

Pressed to address a body of scholastically formulated objections, the judges remained steadfast in their support of the reduction effort. As they countenanced specifically alleged defects in the six-member civil jury, their responses coalesced into Georgia's juristic position for reforming a common law trial tradition. As assembled into general subject categories, the judges' responses delineated thread after thread in their analytical brief for the smaller jury. The following table summarizes the specific objections and reflects the judges' most popular response to each.

262. *Id.*

263. *Id.* “With a six-person jury the voir dire time would be considerably less.” “Voir dire and striking the jury come much faster.” *Id.*

264. *Id.* Others: “Jury selection is entirely too time consuming;” “judicial economy in jury selection process;” “the jury [with six persons] could be selected much quicker;” “cuts down the time used in jury selection process.” *Id.*

Table VIII. The “Yes” Judges Speak

<u>Specific Objections to Six-Member Jury</u>	<u>Judges’ Most Popular Response in Approving the Reduction</u>
(1) Insufficient Cross-Section Representation of the Community	Belied by Actual Experience with Smaller Juries (21%)
(2) Squelches Expression of Minority Viewpoints During Deliberations	Reduction Will Actually Work to Enhance Expression of Minority Views (18%)
(3) Smaller Jury Yields Less Predictable Verdict	All Juries Yield Unpredictable Verdicts Regardless of Size (28%)
(4) Smaller Jury More Vulnerable to Aggressive Juror	True, but Captured Juries Are a Positive Not a Negative (42%)
(5) Smaller Jury Experiences Shorter and Poorer Quality Deliberations	Shorter Yes, but Not Lower Quality Deliberations (55%)
(6) Additional Reasons for Approving Jury Size Reduction	Less Costs to Counties in Administering Civil Justice System (52%)

D. *The “No” Judges Speak*

If the trial judge disapproved the jury-reduction proposal, the Questionnaire followed with a series of further inquiries. Largely, those inquiries reflected grounds most commonly, and most forcefully, advanced in support of jury size reduction. In this fashion, therefore, the inquiries sought to structure the trial judiciary’s rationale for opposing “jury reform” in Georgia.

1. The Citizen’s Satisfaction with Jury Service. The Questionnaire first sought the disapproving judges’ reactions to the following argument: “Advocates of the reduction argue that members of the 6-member jury are more likely to be satisfied with their jury service than those of the 12-member jury.”²⁶⁵ This “satisfaction” position, a highly popular reformist contention, drew reactions from fifty-four of the total fifty-seven judges who disapproved of reduction. A substantial number of those reacting judges (18) was satisfied simply to register a basic

265. Questionnaire, *supra* note 82 (question 2(A)).

rejection of the argument. Primarily, those rejections consisted of such responses as “don’t agree,”²⁶⁶ “no logical basis,”²⁶⁷ and “don’t understand the rationale.”²⁶⁸ A few of these judges went slightly further to manifest that “most jurors gauge their service by factors other than the number of jurors.”²⁶⁹ Those “factors” included “having their time wasted,”²⁷⁰ “disrespectful treatment by court personnel,”²⁷¹ and “the judge who administers in the courtroom.”²⁷²

An equally sizeable contingent of respondents (17) fully concurred that a juror on a six-member jury may well experience increased satisfaction with jury service. These respondents, however, took inordinate umbrage at the point’s suggested relevance to the debate. Time and again, they forcefully asserted, “Jury service is a duty; satisfaction is irrelevant.”²⁷³ As several judges indignantly exclaimed, “I am not concerned about juror satisfaction with jury service. It is our civic duty and responsibility to serve as jurors. Jury service is not about fun and satisfaction.”²⁷⁴ Similarly, “satisfied jurors is not the goal of a trial,”²⁷⁵ and “satisfaction seems to be a slender reed” upon which to rest reduction.²⁷⁶ Again, “satisfaction with jury service is not the primary goal; a verdict that reflects the collective wisdom of a fair, impartial, and representative jury is.”²⁷⁷ Along those lines, a veritable chorus of respondents emphasized “we are not conducting jury trials to give jurors a satisfactory experience but to achieve justice for our citizens!”²⁷⁸ Similarly, “justice is still the goal, not satisfaction of jurors who serve on the jury,”²⁷⁹ “the paramount goal of a jury system is not the satisfaction of the jury—it is *justice*.”²⁸⁰ Fundamentally, “if [jurors] have done their

266. Responses, *supra* note 86.

267. *Id.*

268. *Id.* “The size of the jury would not improve or diminish satisfaction with jury service.” *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* “Probably true, but juror satisfaction is not our reason for existence.” *Id.*

274. *Id.* “It may very well be that 6-member jurors are more satisfied with their service than 12-member jurors, but juror satisfaction is not the goal of jury trials.” *Id.*

275. *Id.*

276. *Id.* “It is not the duty of the jurors to determine their satisfaction or dissatisfaction with their jury service, but to listen closely to the evidence and the charge of the court and render a true verdict therefrom.” *Id.*

277. *Id.*

278. *Id.* “To whom do we owe ‘satisfaction’? The jurors or the parties?” *Id.*

279. *Id.* “I would think juror ‘satisfaction’ less important than quality of justice.” *Id.*

280. *Id.*

best to find the truth and render a verdict which reflects that truth, of what relevance is it that they 'feel good' about [the experience]?"²⁸¹

Offering an interesting supplement to the "irrelevance" position, several judges (7) emphasized the juror's likely misplaced basis for "satisfaction" with a smaller jury. Thus, they likewise harbored few doubts as to the juror's satisfaction, but they attributed it to all the wrong reasons. "Of course" the juror on a six-member jury is more satisfied, one judge asserted, he is "proportionately twice as powerful."²⁸² As another respondent elaborated, "'satisfaction' here would more likely mean 'getting one's way' or 'controlling the debate' as opposed to satisfaction with the end result."²⁸³ "That," the judge insisted, "is not the point."²⁸⁴ Similarly, "certain individuals may be more satisfied as they may experience greater 'percentage power' over the process," but "the majority [of jurors] will not have a greater satisfaction."²⁸⁵ In sum, the jurists attested, any satisfaction derived from membership on a small jury likely arose from the juror's aspirations of dominating that jury.²⁸⁶ "One person," they insisted, "can more easily control six people than twelve people."²⁸⁷

As a final dissenting view on the "satisfaction" argument, a significant number of judges (12) deemed their experiences with twelve-person juries a sufficient rebuttal. In a phrase, "I have found that members of 12-person juries are generally pleased with their service."²⁸⁸ Indeed, "in my 25 years as a judge, I have found in most cases [that] jurors are satisfied with their services."²⁸⁹ That satisfaction, the respondents believed, emanated from a number of sources: a feeling of reverence for the historical 12-member jury;²⁹⁰ pleasure from the point "that 11

281. *Id.* "Subjective satisfaction is not the primary goal of jury service. Reaching justice is." *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* "In my experience as a trial attorney, before election to the bench, 6 person juries usually were controlled by one dominant person—with less deliberation, less discussion, and results (verdict) reflecting the desires of that one person." *Id.*

287. *Id.*

288. *Id.* Actually, one judge surmised, jurors tend to be satisfied with the jury upon which they happened to serve. *Id.*

289. *Id.* Another: "In almost 50 years of practice, I have never had a juror express a desire to reduce the number of jurors." *Id.*

290. *Id.* "My experience with 12-member juries has been very different. They know that 12-member juries have come down and survived through the ages, and they feel a real part of history." *Id.*

other jurors agreed with them on the verdict;²⁹¹ a perception of their “role as more important, being a part of a 12-person jury,”²⁹² and the enjoyment of serving as “a better cross section of the community.”²⁹³ Genuine juror satisfaction occurs, a judge reasoned, “when the case is presented to them in an efficient manner that does not waste their time.”²⁹⁴

Table IX. Jurors More Satisfied with Smaller Jury

<u>Judges' Responses</u>	<u>No. Responding</u>	<u>Percentage</u>
Not So	18	33%
Satisfaction Is Irrelevant	17	32%
Satisfied For Wrong Reasons	7	13%
Experience Contra	12	22%
Totals	54	100%

2. Disruptive Mechanical Problems of Coordination. From the intangible of “juror satisfaction,” the Questionnaire turned to the far more concrete concern with administrative convenience. Thus, the next inquiry solicited the disapproving judges’ opinions on the following position: “Advocates of the reduction argue that the 6-member juries cause fewer disruptive mechanical problems of coordination than do 12-member juries.”²⁹⁵ Consequently, the nay-saying judges confronted yet another mainstay of the jury-reduction movement.

Of the total forty-eight responses to the inquiry, a number (8) flatly disputed the argument’s factual accuracy. Although none accompanied those denials with explanatory comments, one respondent did allude to a perceived distinction in dignity: “[S]ix-member juries take less time to render a verdict, but I get the feeling of ‘let’s get it over with and out of here.’ Twelve-member juries impress me with their dignity and conscientious approach.”²⁹⁶

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. Questionnaire, *supra* note 82 (question 2(B)).

296. Responses, *supra* note 86. Another judge reflected that “having also served on the state court bench, I see no difference in time of breaks, lunch, and other such things.” *Id.*

Once again, the single largest group of respondents (13) exuded utmost incredulity over the argument's relevance to the jury-size conundrum. The matter of mechanical coordination, these judges declared, was neither "important"²⁹⁷ nor "particularly problematic."²⁹⁸ Moreover, it was a matter extraordinarily far removed from "the goal of the justice system."²⁹⁹ "Expediency should not divert the goal of reaching a fair result,"³⁰⁰ asserted a respondent, for "speed or quick selection of juries should not be the prime objective."³⁰¹ Seizing upon what they perceived as an extremely vulnerable position, the judges gleefully traversed the most slippery of slopes: "Abolish jury trial altogether and we won't have any mechanical problems!"³⁰² Similarly, "let's eliminate juries altogether and have no 'disruptive problems,'"³⁰³ Perhaps "one-person juries would make it easier" for the reformists,³⁰⁴ and "a bench trial would remove all problems of coordination."³⁰⁵

A third group of respondents (8) emphasized the miniscule nature of any "coordination problems" presented by the twelve-member jury.³⁰⁶ "This is certainly not so overwhelming that I would run the risk of injustice [in taking] 6 people off a jury."³⁰⁷ Similarly, "[t]here are not enough 'coordination' differences between six versus twelve member pools to warrant a change."³⁰⁸ Feared results of such a change included "single-juror domination of the jury,"³⁰⁹ and the loss of "a cross section of the community."³¹⁰ Contrarily, the larger jury "adds great confidence and responsibility"³¹¹ and "resolves the issue better and more accurately."³¹²

297. *Id.* "[C]onvenience of the court system is not the goal of the justice system." *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* "I agree that a one-member jury would also have less such problems that a two-person jury and so on Although the argument is correct, it is not persuasive." *Id.*

305. *Id.* "This is ridiculous! We can raise one child easier than five, but does that make the single child family better?!" *Id.*

306. "It will be easier to deal with six persons as opposed to twelve, but a relatively small amount." *Id.*

307. *Id.* "If true, I believe it is worth the trouble to have twelve." *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

A fourth response to the “disruptive coordination” argument took an interestingly different tack. If such administrative problems actually existed, several of the respondents (7) maintained, those problems should be laid at the appropriate door. That door, they insisted, led to the chambers of the judge.³¹³ “A good judge should be able to handle any mechanical problems”³¹⁴ by making “sure that jury selection runs efficiently, regardless of the number of jurors.”³¹⁵ Because it is their job to “control and move cases efficiently,”³¹⁶ perhaps “trial judges need to work on ‘disruptive problems.’”³¹⁷ In sum, “[d]isruptive problems of coordination should and can be avoided by the presiding judge’s careful management, pre-screening, voir dire, and taking into account the human conditions and life beyond the courtroom.”³¹⁸ Indeed, one of the respondents suggested, “if a court system can’t handle the mechanics of the 12-member jury, then perhaps we need new court system personnel.”³¹⁹

Finally, a substantial number of respondents (12) simply disclaimed the existence of coordination problems in their own experience. “I have encountered few problems of coordination,”³²⁰ “it simply has not been my experience.”³²¹ Reflecting upon dealings with six-member criminal misdemeanor juries, “I have noticed no real difference;”³²² “I have found no difference in the administration and coordination [with the smaller jury].”³²³ As one judge concluded, “Courthouse facilities have been designed to accommodate 12-panel juries, so I have never witnessed any major problems.”³²⁴

313. *Id.* “Says who? This is merely a function of court management practices and sounds more anecdotal than based on fact.” *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* Others: “I don’t suffer coordination problems;” “I seldom (very seldom) have this occur;” “I have experienced no significant problems in 21 years of trial practice and 9 years on the bench;” “The chances of a wayward juror are greater with 12 than 6, but I have not seen much difference.” *Id.*

322. *Id.*

323. *Id.*

324. *Id.* “We are equipped for the mechanics of 12-member juries.” *Id.*

Table X. Fewer Coordination Problems with Smaller Jury

<u>Judges' Responses</u>	<u>No. Responding</u>	<u>Percentage</u>
Not So	8	17%
Irrelevant Concern	13	27%
Not Worth Potential Losses	8	17%
Judge's Responsibility	7	14%
Experience Contra	12	25%
Totals	48	100%

3. Encouraging Participation by All Jurors. The Questionnaire's third inquiry focused the disapproving judges' attention upon individual juror participation in deliberations: "Reduction advocates argue that 6-member juries would be more likely to encourage equality of participation by all members than would 12-member juries. What is your opinion about this?"³²⁵ Typically, eleven of the forty-eight judges who responded to the inquiry did so in a completely unelaborated formulation: "I disagree."³²⁶ The remaining respondents can be grouped, generally, in four categories.

Several of the judges (7) disagreed by assuming the diametrically opposing position. They contended that, for a number of reasons, the twelve-member panel offers "a better dynamic" for the expression of individual opinions.³²⁷ Although the larger jury "may take more time," reasoned one response,³²⁸ it is also likely "to have better understanding" of the case.³²⁹ That increased insight emerges, others added, from the "better representation of the community" provided by the twelve-member jury.³³⁰ "How," queried one judge, is "equality of participation' served by certain members of the community not being present in the jury room?"³³¹ Rather than inflicting individual intimi-

325. Questionnaire, *supra* note 82 (question 2(C)).

326. Responses, *supra* note 86. Examples: "I don't think so;" "I doubt it;" "Pure speculation;" "I simply don't believe this." *Id.*

327. *Id.* "I think minority viewpoints would be more likely to be heard in a 12-person jury." *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

dation,³³² the larger number assists in diluting the potential for single-juror aggressiveness: “[T]he likelihood of multiple leaders would be reduced,”³³³ “a larger group can ‘tone down’ the effect of one strong personality.”³³⁴ “Numbers add to confidence,”³³⁵ urged the respondents, combating the dominating influence of a “strong foreperson.”³³⁶

Almost one-third of the responding judges (14) came down on the issue of relevance. Initially, they centered upon both the nature and importance of “participation.” Thus, “different people ‘participate’ in different ways.”³³⁷ Similarly, “I do not perceive that a juror is non-participating simply because he is only listening.”³³⁸ In any event, “I don’t think equality of participation has any effect on the overall result.”³³⁹ Additionally, there was no legitimate basis, these respondents argued, for connecting a juror’s willingness to speak with the size of the jury: “It seems to me that a vocal/timid juror would be just as vocal/timid,” regardless of the jury’s size.³⁴⁰ Similarly, “there will always be jurors who won’t speak up.”³⁴¹ Vocal participation depends upon both the make-up of each jury³⁴² and the personality of each juror,³⁴³ neither of which is much affected by the size of a particular panel. “Participation depends upon a juror’s personality and desire to be involved in the process, not the number of jurors involved.”³⁴⁴ Moreover, the respondents concluded, jury deliberations are frequently captured by the “more assertive jurors,”³⁴⁵ another factor possessing little relevance to the jury’s size.³⁴⁶

332. *Id.* “If there are 12, you are more likely to find someone ‘like you’ among the group.” *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* “As we have seen, the foreperson of the jury has much influence on the verdict.” *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* “Participation in the jury room is simply a preference by a particular juror. Simply having fewer numbers will not add to or detract from one’s participation.” *Id.*

341. *Id.*

342. *Id.* “It depends on the make up of each jury. All juries are different.” *Id.*

343. *Id.* “Those jurors who desire to participate will do so anyway.” *Id.*

344. *Id.*

345. *Id.* “In my experience, the more assertive jurors take over deliberations regardless of the size of the jury.” *Id.*

346. *Id.* “Regardless of size, I believe juror participation is pretty much controlled by the ability of the foreperson to lead and encourage participation.” *Id.*

A fourth category of respondents (10) also brandished the potential of a captured jury, but from a slightly different perspective. That potential, they feared, constituted the unacceptable trade-off for adopting a six-person jury to obtain better juror participation. "Actually," as one judge cautioned, the smaller jury "increases the likelihood that one person will dominate the jury's proceedings."³⁴⁷ Via an assortment of assertions, that concern surfaced in forceful fashion: "A 6-member jury would be more vulnerable to the influence of a strong personality,"³⁴⁸ "The chance of getting one leader and the rest followers is greater with six as opposed to twelve,"³⁴⁹ "One individual with a strong personality is more likely to dominate a 6-member jury than a 12-member jury,"³⁵⁰ "The smaller group may well be more likely taken over by one forceful personality."³⁵¹ Other trade-off concerns ran to sacrificing the larger jury's better "collective memory"³⁵² and increased number of informing "life experiences."³⁵³

Once again, a number of judges (6) rejected the "participation" position as contrary to their actual experiences with twelve-member juries.³⁵⁴ "It has been my experience that all twelve jurors participate as fully as they desire."³⁵⁵ Similarly, "I have no problem with jurors participating during deliberation on an equal basis."³⁵⁶ Finally, "[f]rom the noise coming from my jury rooms, they all seem to be fully debating."³⁵⁷

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.* Others: "It can also be argued that one or two forceful personalities may intimidate the few in a six-member jury easier than members of a 12-person panel." "In my opinion, there would be a greater likelihood that one strong personality could discourage the participation of five easier than he/she could eleven." "It might be less likely to encourage independence of some jurors from the influences of more dominant jurors." *Id.*

352. *Id.* "The 'collective memory' of the jury is better with twelve." *Id.*

353. *Id.* "The larger jury would encompass those with more life experience and afford a greater probability of participation." *Id.*

354. *Id.* "That has not been my experience." *Id.*

355. *Id.* Then too, "human beings are not hampered when they decide a case because of inequality of participation. This argument is one of theory and not practicability." *Id.*

356. *Id.* "My experience with 12-member juries is that they all participate more readily; they take more time to listen to everybody; more in-put provokes more thought and consideration." *Id.*

357. *Id.* "Twelve-person juries operate as representative democracies with spokespersons for each little group of those who have expressed (privately) accord on an issue or outcome. Hence, inequality of participation does not necessarily lead to inequality of influence." *Id.*

Table XI. Smaller Jury Encourages Equality of Participation

<u>Judges' Responses</u>	<u>No. Responding</u>	<u>Percentage</u>
Not So	11	23%
Opposite Result	7	15%
Size Irrelevant To Participation	14	29%
Insufficient Trade-Off	10	21%
Experience Contra	6	12%
Totals	48	100%

4. Smaller Juries and Factions. The Questionnaire's fourth query of the judges who opposed six-person juries featured the oft-expressed fear of factions: "Reduction advocates argue that 6-member juries would be less likely to divide into factions that decrease the quality of their decisions than would 12-member juries."³⁵⁸ Pressed for comment on this concern, forty-six judges responded with an enlightening profusion of positions. A number of those respondents (10) rejected the argument out of hand, professing factual disbelief, but tendering virtually no elaboration.³⁵⁹

A sizeable contingent of the remaining respondents (12) expressly denied existence of a causal relation between the size of a group and its proclivities of polarization. As one comment formulated the position, "I think there is a distinct possibility of 'factions' any time 3 or more assemble."³⁶⁰ That possibility, the judges declared, is by no means averted by a smaller size jury. "I cannot believe the dynamics of the group would change that much so as to improve the quality of its decisions."³⁶¹ Rather, "[p]ersonalities drive the deliberations, not simple numbers of participants,"³⁶² and dominant personalities will not

358. Questionnaire, *supra* note 82 (question 2(D)).

359. Responses, *supra* note 86. *E.g.*, "I disagree;" "Likely no effect;" "No reason to believe this;" "Each panel is unique." *Id.* One respondent expressed the opinion that "number 12 juror will feel more comfortable in his/her role than number 6 juror." *Id.*

360. *Id.* Others: "A smaller size jury would not eliminate the possibility of factions." "I don't believe it is a big factor for concern." "I think you could still have factions." *Id.*

361. *Id.*

362. *Id.*

disappear from smaller juries.³⁶³ Because “six people can become six ‘factions,’”³⁶⁴ there is no credible reason to believe that downsizing the jury will decrease its tendency to factionalize.³⁶⁵

In what was perhaps the most surprising result of the inquiry, a truly impressive number of responses denied (and fervently so) its basic premise. Thus, in numbers exceeding forty percent, the responding judges disagreed that factionalism decreases the quality of jury decisions.³⁶⁶ On the contrary, “[w]hile some people may call it ‘factions,’ it could also be called a thorough discussion of all points of view which renders a better verdict.”³⁶⁷ Factions, these judges proclaimed as one, “do not decrease the ‘quality’ of [jury] decisions. After all, trial by jury is about the opinion of the evidence as seen by one’s peers, and twelve is better than six.”³⁶⁸ Resoundingly, they asserted that “[d]ivision into factions may foster debate and analysis, [and] you want jurors to consider the views of all in arriving at a consensus.”³⁶⁹ Similarly, “[s]ometimes division into factions produces a better verdict because there is greater participation, deeper thought, and more discussion.”³⁷⁰ More succinctly: “More factions? Also more options, more views, and more debate.”³⁷¹

Factions, these judges maintained, go to the heart of the jury process. “The jury system is a vehicle for the jury to speak as the conscience of the community, including factions not excluding them.”³⁷² “Dividing into factions is a necessary part of jury deliberations. I want the jury to discuss all sides of the issue, not one side.”³⁷³ “Factions, or coalition building, should be a necessary ingredient to reach a decision.”³⁷⁴

363. *Id.* “This dynamic involves personalities and beliefs of the jurors, not numbers.” *Id.*

364. *Id.*

365. *Id.* “I think you could still have factions—perhaps fewer but just as deadly to the decision making process.” *Id.*

366. *E.g.*, “Who is to say that a divided jury is coincident with decreased quality of decisions?” “I’m not sure that division into factions decreases the quality of jury decisions.” *Id.*

367. *Id.* “Why doesn’t more discussion produce a better result?” *Id.*

368. *Id.* “My thoughts are that different views (or factions) result in a fair verdict.” *Id.*

369. *Id.*

370. *Id.*

371. *Id.* “I would believe that 12-person juries will reach better and fairer overall decisions because more points of view may be considered.” *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

Factions reach to “fairness and diversity,”³⁷⁵ “population representation,”³⁷⁶ and the exercise of “a good composite memory.”³⁷⁷

As for the reductionists, “It seems to me that advocates of the 6-member jury are looking for the quickest verdict possible and are not particularly concerned with whether or not the verdict is the right verdict.”³⁷⁸ Those advocates must understand that “unanimity is not always quality,”³⁷⁹ and that “unanimity for its own sake or for the sake of the record” is not the goal.³⁸⁰ If honestly obtained unanimity is impossible, the judges reasoned, then “nothing about a hung jury offends me,”³⁸¹ for “mistrials have a place in the system.”³⁸² It would be difficult to over-emphasize the intensity of conviction with which the responding judges treated the factionalism query.

Finally, several of the judges (5) closed out the responses by attesting to their contrary experiences. That is, these respondents coalesced, their own dealings with twelve-member juries gave them no reason to suspect those panels’ undue susceptibility to paralysis by polarization. In a representative phrase, “That has not been my experience.”³⁸³

375. *Id.*

376. *Id.* “The fact that more people share an opinion when more people are present seems logical. The advantage would be that these opinions will necessarily be given voice. In a 6-person jury, a single person would have less voice and the quality of the decision would be poorer therefor.” *Id.*

377. *Id.* “In my experience any two people hearing the same testimony observe and remember different ‘facts.’ The more eyes and ears, the more likely a good composite memory.” *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.* Others: “I have not had problems with jury factions with 12-person juries.” “I have not found this to be so.” “I don’t think there is any valid evidence to support this based on my experience with 12-person jurors.” *Id.*

Table XII. Smaller Jury Fosters Fewer Factions

<u>Judges' Responses</u>	<u>No. Responding</u>	<u>Percentage</u>
Not So	10	22%
Size Unrelated To Factions	12	26%
Factions Are Good	19	41%
Experience Contra	5	11%
Totals	46	100%

5. Additional Reasons for Opposing Smaller Jury. As the final inquiry, the Questionnaire sought to obtain any reasons thus far unexpressed by the opposing judges for their opposition.³⁸⁴ The thirty-five responses scattered generally across five areas of unrelenting sentiment. As might be expected, a number of those responses (5) manifested an ingrained appreciation of tradition. The twelve-person jury is "historical,"³⁸⁵ it is "traditional,"³⁸⁶ and it constitutes a mainstay of our common law "heritage."³⁸⁷ Its continued utilization assists in "maintaining the integrity of our judicial system,"³⁸⁸ bolstered by the comforting assurance "that most 12-person juries would be more likely to consider all points of view thoroughly before reaching a verdict."³⁸⁹ One response, in particular, appropriately exuded the group's overriding sense of urgency: "[Twelve]-member juries are a part of our heritage. The courts and their functions used to be somewhat sacred and honored. Let's not do anything more to bring disrespect than has been done already."³⁹⁰

The second sub-set of responses (5) similarly reflected an article of faith for those who shared them. A larger jury, they were convinced, produced a better verdict.³⁹¹ Because "jurors usually have no expertise

384. "Please give any additional reasons you may have for opposing jury-size reduction." Questionnaire, *supra* note 82 (question 2(E)).

385. Responses, *supra* note 86.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* Additionally, "with computers available, the drawing of the jury is a very small administrative task." *Id.*

390. *Id.*

391. *Id.* "I respect the expression that 'the smartest person in the world is a 12-person jury.' Put another way, what number of people is smarter than 12?" *Id.*

in the matter being tried,” one judge reasoned, “the quality of the verdict is enhanced by having more jurors.”³⁹² On the human level, “a juror who is seen, heard, watched, and reasoned with (and potentially talked about) by eleven others is likely to be more careful than would be the case with five.”³⁹³ The larger number exerts “a more positive impact on the [parties] and on the community involved,”³⁹⁴ that impact is “overall more healthy for our society.”³⁹⁵ Finally, one respondent could do no better than illustrate (personally) the interests at risk: “The trial of cases is not an exact science, and if my liberty or property is at stake, I want 12 people to make the decision.”³⁹⁶

A third segment of the judges who opposed reduction (8) forcefully denied that advocates had demonstrated a need for the change.³⁹⁷ The twelve-person jury “has worked satisfactorily for several hundred years, so there is no need for change.”³⁹⁸ Again, “the system has worked;”³⁹⁹ it “has served us well for over 500 years;”⁴⁰⁰ and “should not be the subject of any so-called reform.”⁴⁰¹ Similarly, “I am against changing a system without any evidence that the change will be better.”⁴⁰² Not only history, but personal experience as well, augured against the change: “Based on my years on the bench, I am convinced that the 12-person jury is one of the greatest assets of our judicial system.”⁴⁰³

Aside from personal experience, these defenders (9) of the twelve-person jury also brandished the conceptual cause of “broad representation.”⁴⁰⁴ Expressing a dominant sentiment, one respondent affirmed that “a 12-member jury is more likely to reflect the community than a 6-member jury.”⁴⁰⁵ Similarly, “the broad cross section issue is the most compelling reason to stay at 12 members.”⁴⁰⁶ Others elaborated the

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.* “Efficiency and cost considerations do not outweigh the need for fairness.” *Id.*

397. *Id.* “The law is settled and there is no good reason to change.” *Id.*

398. *Id.* “If it is not broken, then do not fix it.” *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.* “My 26 years experience as a trial lawyer and trial judge, both in federal and state courts—I like 12 members over 6 [sic].” *Id.*

404. *Id.* “My personal feeling is that the greater number increases the opportunity for a broader cross-section of the community to be fully represented.” *Id.*

405. *Id.*

406. *Id.*

representation position in terms of “diversity.”⁴⁰⁷ Thus, “a greater number gives more points of view and diversity to the deliberations.”⁴⁰⁸ Specifically, “racial, gender, economic, and ethnic representations are my main concerns.”⁴⁰⁹ Likewise, the respondents feared, less representation promptly yielded to single-juror domination. With greater cross-section representation, there is “less opportunity for a dominant personality to control the jury,”⁴¹⁰ and less likelihood of a “chilling effect’ on juror independence.”⁴¹¹

A final group of respondents (8) focused explicitly upon the reduction movement’s primary proffered justification: the economic advantages of a six-member jury. As one judge expressed the justification, “the only obvious benefit to reducing jury size is economic and logistical.”⁴¹² That benefit, the respondents asserted, is insufficient: “Six-member juries save money, but that is hardly the point. Freedom, liberties, and rights—is there a cost to protect them that is too high?”⁴¹³ Similarly, “it is our job to make our court system better, not just to make it simpler.”⁴¹⁴ Moreover, these judges were not fully convinced that true economy beckoned: “The ‘reduction advocates’ seem to want fast jury action rather than quality verdicts based upon the law and facts of the case. Result: new trials and appeals—more lengthy and costly.”⁴¹⁵

407. *Id.* “A 12-member jury provides a greater diversity of opinion than a 6-person jury.” *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.* As for “economy” in terms of burdens on jurors, the respondents were less than fully sympathetic: “It should be work for a jury to reach a decision. The ramifications of each verdict usually impact more than one person. While jury service should not be a burden on anyone, it requires work and effort [on the part] of a panel to reach a decision.” *Id.*

415. *Id.* Some were not even convinced that “economy” was the goal. “The simple fact that judges who are looking for administrative simplicity, and the plaintiffs’ bar who believe that six-person panels are more susceptible to control, are the strong advocates of this change should suggest that losers will emerge somewhere after the change is instituted. This is not justice!” *Id.* Again: “I am certain that the ease and comfort in decision-making is not the goal [of advocates] of a six-member panel. As I have a doubt as to the efficacy of the proposed change, I would prefer to leave juries at twelve members.” *Id.*

Table XIII. Additional Reasons for Opposing Smaller Jury

<u>Judges' Responses</u>	<u>No. Responding</u>	<u>Percentage</u>
Twelve Is Traditional	5	14%
Twelve Gives Better Verdict	5	14%
Twelve Has Worked Well	8	23%
Representation	9	26%
Justice Trumps Economy	8	23%
Totals	35	100%

6. In Summary. By a sizeable minority of thirty-six percent, the responding judges of Georgia's superior courts oppose the movement to reduce the size of civil juries. Such a reduction, these judges manifest, bodes irretrievable ill for the state's civil justice system and deceptively masquerades under the cover of needed reform. The twelve-member jury represents awesomely more than a common law fixture, these judges believe; it remains a crucially essential component of the trial system which they daily administer. If that system is successfully to serve modern society's daunting demands, the judges caution, then the proposed move to a six-member jury must be rejected. They advance that caution with quantifiable conviction.

Pressed to address the most forceful arguments for jury size reduction, the judges are unwavering in their formulated opposition. Their responses, as grouped into general subject categories, constitute a trial judiciary's position paper against six-member juries in Georgia. The following table summarizes the specific arguments and captures the opposing judges' most popular response to each.

Table XIV. The “No” Judges Speak

<u>Specific Arguments Favoring Six-Member Jury</u>	<u>Judges’ Most Popular Response in Opposing the Reduction</u>
(1) Greater Citizen Satisfaction from Jury Service	Juror Satisfaction Is a Factor Irrelevant to the Debate (32%)
(2) Fewer Disruptive Mechanical Problems of Coordination	Irrelevant to the Cause of Justice (27%)
(3) Encourages Juror Participation in Deliberations	Size of Jury Irrelevant to Juror Participation (29%)
(4) Fewer Factions That Decrease Quality of Verdict	Factions Among Jurors Are Essential to Justice (41%)
(5) Additional Reasons for Opposing Jury Size Reduction	Smaller Juries Effect Less Cross-Section Community Representation (26%)

V. CONCLUSION

The juxtapositions reflect a bit of irony. In 1973 the United States Supreme Court perceived “no discernable difference” between decisions reached by larger and smaller civil juries.⁴¹⁶ Five years later, the Court expressed “significant doubts” about the reliability of decisions by smaller juries.⁴¹⁷ In 1991 the Federal Judicial Conference amended its rules to permit utilization of smaller civil juries in the district courts. Five years later, the Conference’s own rules committee recommended reinstatement of twelve-member juries. In 1998 the Georgia General Assembly failed to adopt proposals reducing, from twelve members to six, the state constitution’s requisite civil jury. Four years later, a “blue ribbon” commission recommended the shift to six members. Obviously, the grass appears greener.

In any event, the six-juror proposal seems destined to arrive again before the General Assembly and, ultimately, to confront Georgia citizens via a state referendum. Upon that occurrence, it is imperative that Georgians fully and seriously comprehend the occasion’s signal significance. They must understand that the electoral context in which

416. *Colgrove v. Battin*, 413 U.S. 149, 159 n.15 (1973) (quoting *Williams v. Florida*, 399 U.S. 78, 101 (1970)).

417. *Balleu v. Georgia*, 435 U.S. 223, 235 (1978).

the issue is presented does not signify merely a “political” choice. They must appreciate, rather, that they are determining one of the most fundamental matters conceivable in a society governed by the rule of law. They are dealing with the essence, no less, of democracy’s “gallant experiment” for fashioning civil responsibility.⁴¹⁸

In rendering a judgment so fraught with potential, citizens require assistance from the most informed source available. This Study identifies that source as the members of the trial bench. It deems those professionals the most knowledgeable extant repository of information on their lay counterparts in the civil justice system. If the likely results of reducing the number of civil jurors can be realistically evaluated, trial judges offer the best hope for the endeavor.

To their considerable credit, Georgia’s superior court judges proved impressively receptive to the request for assistance. In gratifying numbers, they reflected upon the accompanying Questionnaire and tendered thoughtful responses to its inquiries. By a sizeable majority, the judges registered their approval of reducing from twelve to six the number of civil jurors. Exemplifying striking amenability to restructuring a common law icon, the judges expressed two basic beliefs. First, projected economies in time, effort, and money justified a move to the six-member jury. Second, projected fears from the move failed to justify retaining the twelve-member jury.

The judges manifested these beliefs in the course of confronting the objections tendered by the Questionnaire. In general, they denied alleged prospects of diluting the jury’s community representation, as well as the suppression of minority viewpoints. They deemed verdict unpredictability a fixture of the process, regardless of jury size. They applauded an increased likelihood of jury domination by aggressive jurors, and they forcefully disputed the effort to equate shorter deliberations with discussions of lower quality. Based on their experience, therefore, the trial judges found negligible cause for concern in the body of scholarship condemning the six-member jury. In mass, they transmitted (and rather routinely so) an assurance that jury size reduction held no risk to the dispensation of civil justice in Georgia.

A substantial minority of the judges took strong issue with the forces of jury reform. Countering the Questionnaire’s proffered arguments for the six-member panel, these judges radiated a perceptible foreboding, an urgency of striking intensity. In general, their responses coalesced into a massive denial of relevancy. That denial encompassed the arguments of increased juror satisfaction, fewer administrative problems, and better

418. The phrase belongs to Professor Kalven. Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1055 (1964).

juror participation. Not one of those justifications, the minority judges indignantly insisted, possessed even remote relevance to the core purpose of the jury system. That purpose, the most perfect civil justice humanly attainable, soared untouched by the reformers' mundane concerns with "comfort," "convenience," and "sociability." As for the smaller jury's decreased factionalism, the respondents viewed that "asset" as yet another reason for opposition. Factions, they urged, touch the heart of the jury process. Factions insure the presentation of different views and the deliberation of all issues. The more factions, the judges insisted, the more fairness. The fairness facet also drove the judges' strongest "additional reason" for opposing reduction. Thus, they reflected, the smaller jury's necessary decrease in cross-section representation threatened the causes of diversity, ample deliberation, and jury independence. In mass, the minority judges maintained, the reduction proponents had failed, and by a considerable margin, to carry their case.

The Study leaves several overall impressions. First, there is the starkness of the contrast between the two groups of respondents. One group finds virtually no reason to oppose Georgia's move to the six-person civil jury. The other group finds virtually no reason to favor it. Judges appreciating both sides of the issue, or holding no strong views, find themselves in analytical isolation. The observer may ponder the circumstances under which similar judicial experiences have forged such diametrically opposing positions on this fixture of the trial system. Second, there is the responding judges' remarkably uniform effort to focus on the substantive issues of the controversy. Their responses steer impressively clear of the politics that necessarily surround a proposal of such profound public importance. To be sure, there is the implied acknowledgment that the plaintiffs' bar drives the movement and the defense attorneys oppose it, each for mercenary reasons. This unelaborated assumption receives virtually no recognition from the judges, however, who devote admirable and sustained attention to answering the questions presented. Finally, there is the unaccustomed location of the passion inhabiting the debate. Typically, one would expect that passion to reside with the forces of "reform"—those attacking a traditional mainstay of the civil justice system. Regarding the jury-size controversy, however, that is not the case. Rather, those judges favoring the reduction proposal largely exude a mind set calmly convinced of the proposal's desirability and tendering a somewhat subdued analysis of its advantages. It is left to the defenders of the status quo to exhibit the passion of their position. They convey that position with forceful ferocity and a striking intensity of conviction. Their abject alarm over the proposed change receives continuing emphasis throughout their responses and is a palpable condition of their expressed concerns. This

reversal of roles represents but another of the controversy's intriguing dimensions.

Ultimately, the citizens of Georgia will determine the fate of the proposal to reduce the size of the civil jury to six members. The fact that they will make a decision is one thing; the hope that they will make it on the best information available is quite another. That is the hope of this Article.