THE OPEN AND OBVIOUS DOCTRINE: TORT LAW AS THE NEW FRONTIER FOR REVITALIZING THE JURY

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INTRODUCTION

The United States is experiencing a breakdown in democracy. Donald Trump, the Republican Presidential Candidate, has been convicted of and is still facing an onslaught of criminal charges.[1] Although Presidential candidate Kamala Harris has invigorated many progressive voters, the uncommitted movement has criticized Harris's position on a ceasefire[2] and for an incident involving a Palestinian speaker at the Democratic National Convention.[3] College campuses have also been the center of discord. Police have arrested over 2,400 students engaged in protests on more than 50 college campuses across the country.[4] Meanwhile, public faith in the government is low.[5] According to a recent Pew poll, only "22% of Americans say they trust the government in Washington to do what is right 'just about always' (2%) or 'most of the time' (21%)."[6] Additionally, only about 47% of Americans have a positive view of the current Supreme Court, which is close to a

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[1] *See Tracking the Trump Criminal Cases*, POLITICO (Aug. 2, 2024, 4:00 AM), https://www.politico.com/interactives/2023/trump-criminal-investigations-cases-tracker-list. *See also* Eric Tucker & Alanna D. Richer, *Feds File New Indictment in Trump Jan. 6 Case, Keeping Charges Intact but Narrowing Allegations*, AP NEWS (Aug. 27, 2024, 8:42 PM), https://apnews.com/article/trump-jack-smith-jan-6-186c874404912578e44d5781c8267e2d (noting a new indictment that narrowed certain allegations against Trump for the January 6 riots in light of the Supreme Court decision on presidential immunity).

[2] *See* Hala Alyan, *This is Who Kamala Harris Fails*, N.Y. TIMES (Aug. 28, 2024), https://www.nytimes.com/2024/08/28/opinion/kamala-harris-gaza-israel-war.html.

[3] *See* Aymann Ismael, *This Isn't Going Away for Kamala Harris*, SLATE (Aug. 29, 2024, 4:05 PM), https://slate.com/news-and-politics/2024/08/kamala-harris-dnc-speech-israel-gaza-trump.html.

[4] Janie Boschma & Lou Robinson, *How Pro-Palestinian Protest Arrests Have Unfolded Across College Campuses*, CNN (May 8, 2024), https://www.cnn.com/2024/05/08/us/pro-palestinian-protests-arrests-colleges-dg/index.html.

[5] *See Public Trust in Government: 1958-2024*, PEW RSCH. CTR., (June 24, 2024) https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024/.

[6] *Id.*

"historic low" in approval ratings.[7] Our civil jury system has also been in sharp decline. Prior to the pandemic, only 0.5% of civil cases proceeded to trial in federal court and less than 1% went to trial in state courts.[8] This stands in stark contrast to the 5.5% standard in the mid-1900s.[9] Thanks to a combination of settlement and pretrial procedures, our legal system has incentivized parties to avoid trial.[10] Although less trials make for a more efficient legal system, it also means that the public plays little to no role in case outcomes.

In this note, I will focus on the decline of our civil jury system as a critical issue. Fewer trials inevitably take away the role of people in shaping the law. And this may produce laws that are less democratic or detached from specific community interests. Ultimately, I will explore how our breakdown in democracy can be traced to the decline of our civil jury system. On the other end, I will examine how our country can revitalize the jury as a democratic institution. I will look to various sources—tort law, sociology, and political philosophy—to reimagine a legal system that can better center community and people.

In the first section of this note, I will examine the origins and development of the jury system. I will trace its development through key historical periods and assess how our legal system and prominent leaders failed to establish the jury as a robust institution. Moving on, I will turn to Hannah Arendt's theory on revolutions to shed light on the essential principles that comprise robust democratic institutions. Through her theory on the successes and failures of

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[7] Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR., (Aug. 8, 2024) https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low/.

[8] John Quinn, *The Decline of the Civil Jury Trial: Implications for Trial Practice*, NEWSWEEK (May 18, 2022, 10:34 AM), https://www.newsweek.com/decline-civil-jury-trial-implications-trial-practice-1707481.

[9] *Id.*

[10] *See id.*

revolutions, I hope to use this as a theoretical starting point for how legal our system can reconfigure our conception of the jury. Then, this note will shift to tort law. I will examine how tort law is much more than just personal injury law—but an area of law that is grounded in sociology and community values. By tracing the evolution of the Restatements, I will note how community has become the focal point of tort law. Diving deeper into tort law, I will examine the open and obvious doctrine. Under this doctrine, property owners are not liable for any harm caused by a dangerous condition on their property if that harm was open and obvious to a reasonable person.[11] It operates as a no duty rule, in that it allows judges to dismiss plaintiff's negligence claims if they find that the plaintiff encountered an open and obvious danger.[12] The open and obvious doctrine is relevant for two reasons. First, it allows judges to dismiss cases without jury involvement and therefore stands in contrast to tort law's overall shift to community values.[13] Second, this doctrine is an interesting example of how our legal system diminishes the role of the jury. In particular, I will focus on New York's varying approach to the doctrine and examine how New York can change its approach to be more community minded. Finally, I will turn to sociological theories to conceptualize how tort law could be an ideal starting point to re-imagine and re-establish our juries as democratic institutions. By re-interpreting traditional doctrines, like the open and obvious doctrine, and re-imagining a new role for the jury, we can begin to re-build our democracy.

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[11] *See* RESTATEMENT (SECOND) OF TORTS § 343 cmt. a (A.L.I. 1965).
[12] *See id.*
[13] *See* RESTATEMENT (FIRST) OF TORTS § 347(A.L.I. 1934) (landowners are not liable for open and obvious dangers); Michalski v. Home Depot, Inc., 225 F.3d 113, 118 (2d Cir. 2000) (noting the no-duty rule and the shift in Restatements to a foreseeability standard).

I. THE CIVIL JURY SYSTEM

Civil juries have preceded the founding of our nation. Leading up to the revolution, colonists relied on the jury to guard against the Crown's tyranny.[14] An early example of this is John Peter Zenger's trial.[15] In this case, Zenger faced libel and corruption charges for publishing articles that criticized British rule.[16] During the trial, Alexander Hamilton represented Zenger and argued that the jury should assess matters of law and fact in this case.[17] Notably, the jury acquitted Zenger despite the judge threatening perjury for failure to issue a guilty verdict.[18] At the time, colonists celebrated the Zenger trial as a symbol of resistance against the Crown.[19]Blackstone also praised the jury for this very reason.[20] In his scholarship, he described juries as the "principal bulwark of [every Englishman's] liberties" and a "strong and two-fold barrier . . . between the liberties of the people[] and the prerogative of the crown."[21] Thus, leading up to the American Revolution, juries were celebrated for their resistance to British occupation.

Much has changed since the American Revolution, however. Although colonists viewed the jury as a guard against British power, current scholars have highlighted other aspects of the civil jury. Charlotte Tilley takes a sociological view and characterizes the jury as a source of community values.[22] Juries are composed of community members and reinforce or

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[14] Richard L. Jolly et al., *Democratic Renewal and the Civil Jury*, 57 GA. L. REV. 79, 93 (2022).
[15] *Id.*
[16] *Id. See also* Jon P. McClanahan*, The 'True' Right to Trial by Jury: The Founders' Formulation and its Demise*, 111 W. VA. L. REV. 791, 792-93 (2009).
[17] Jolly, *supra* note 14, at 93.
[18] *Id.* at 94.
[19] *Id.*
[20] *Id.* at 93.
[21] *Id.*
[22] *See* Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320 (2017).

create new social norms in issuing a verdict.[23] Like communities, juries discuss and evaluate the boundaries of social norms.[24] Thus, juries are much more than just factfinders—they infuse the legal system with insight on shifting social norms and articulate how the law should operate in communities.[25] Others have praised juries as an essential component of democracy.[26] Juries help uphold our system of checks and balances and ensure that citizens can check government power.[27] Juries also serve as a powerful form of political participation.[28] They empower people to take an active role in our legal system and in turn, reinforce public trust in government.[29] While the jury system is not free of fault, it inspires citizens to serve the public, expands their understanding of the legal system, and reaffirms confidence in the legal system.[30]

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[23] *Id.* at 1353-54.

[24] *See id.* at 1354 (noting that jurors are "drawn from the community…to either approve or disapprove of the defendant's behavior.").

[25] *See id.* at 1353 ("Tort law replicates the processes that sociological communities use to cultivate, reshape, and signal social norms in areas where the political community at large has expressed no specific outcome preference.").

[26] *See* Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241 (2014).

[27] *See id.* at 1271 ("The civil jury further distributes the divided authority of the state and vests citizens with direct and substantial authority with respect to one of the state's functions: adjudicating disputes both among citizens and between citizens and government officials."); Jolly, *supra* note 14, at 84 (noting that juries serve as a "bulwark against powerful social and economic actors" and ensure that government cannot impact "core private rights…without passing through a body of laypeople.").

[28] *See* Jolly, *supra* note 14, at 85.

[29] *See id.* at 85 (noting that juries foster a "commitment to democratic governance").

[30] *See* Judge Pierre H. Bergeron, *The Promise of State Constitutions in Restoring Jury Trials*, STATE CT. REP. (Apr. 19, 2023), https://statecourtreport.org/our-work/analysis-opinion/promise-state-constitutions-restoring-jury-trials. This is not to say that juries are free of fault. First, juries can substantially increase the costs of cases. For instance, an article noted that jury trials increased the average cost of torts cases from "$1,740 to $15,028." Another concern is that jury trials incentivize

Recently however, jury trials have become a rare occurrence. The Brennan Center noted that only one percent of cases make it to a jury trial.[31] This percentage is similar for general jurisdiction courts in New York State, wherein only 1.15% of civil cases were tried by a jury.[32] There are various hypotheses for this decline. The COVID-19 pandemic created unprecedented challenges for our legal system.[33] The pandemic forced courts to temporarily halt trials and other legal proceedings.[34] For instance, In 2020, the Court Statistics Project noted that "juries disposed of a median of only 0.06% of filed civil disputes—with Alaska reporting zero civil jury trials for the second year in a row."[35] Bench trials also declined.[36] While in 1962, 6% of cases were resolved by bench trials, this percentage fell to 0.21% in 2021.[37] Even once pandemic conditions improved, courts had to reckon with a

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attorneys to prioritize style over substance. Critics argue that this could embolden trial lawyers to be "overly flamboyant" to persuade juries to find for a party. This in turn creates the need for more evidence rules to protect juries from "manipulative lawyering." Finally, critics argue that juries are not competent to analyze complicated legal issues. This stems from jury member's lack of technical knowledge on certain legal matters, susceptibility to lawyer's "theatrics", and pro-plaintiff bias. Proponents of the jury system could argue that juries' truth-seeking and democratic function justify increased costs to the legal system. *See* Case Comment, *Developments in the Law: The Civil Jury*, 7 HARV. L. REV. 1408, 1424-26, 1429-30, 1433, 1437 (1997).

[31] *See* Bergeron, *supra* note 30.

[32] Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 27, 32 (2017) (citing data from 2012, "the most recent year for which comprehensive civil case statistics are available").

[33] *See* Janna Adelstein, *Courts Continue to Adapt to Covid-19*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), https://www.brennancenter.org/our-work/analysis-opinion/courts-continue-adapt-covid-19.

[34] *See id.*

[35] Jolly, *supra* note 14, at 114.

[36] *Id.*

[37] *Id.*

backlog of cases and how to effectively implement remote proceedings.[38]

Some have argued that the Federal Rules of Civil Procedure marked the decline in jury power. As a law journal article noted: "[t]he original drafters of the rules were radically anti-jury" and "[v]irtually everyone connected with urging uniform procedural rules denigrated juries."[39] In line with this idea, the drafters created jury waiver default rules that required a litigant to affirmatively request a jury trial.[40] Failure to do this would result in a bench trial.[41] John Langbein contends that the development of pre-trial procedure has made it unnecessary for parties to proceed to trial.[42] For instance, the development of discovery and settlement procedures has incentivized parties to avoid the cost of trial.[43] For parties like corporations, discovery involves documentary evidence that is efficient and reliable.[44] Instead of relying on witnesses who may not be able to recall information, documentary evidence "speaks for itself" and is a better alternative to trial.[45] Summary judgment and motion to dismiss standards are also responsible.[46] Thus, the development of pre-trial procedures may explain the decrease in jury trials.

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[38] *See* Adelstein, *supra* note 33; Lyle Moran, *Court Backlogs Have Increased by an Average of One-Third During the Pandemic, New Report Finds*, ABA JOURNAL (Aug. 31, 2021, 12:57 PM CDT), https://www.abajournal.com/news/article/many-state-and-local-courts-have-seen-case-backlogs-rise-during-the-pandemic-new-report-finds.

[39] Jolly, *supra* note 14, at 116-17.

[40] *Id.* at 117.

[41] *Id.*

[42] *See* Jonathan Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 542 (2012).

[43] *See id.* at 548 (noting that discovery facilitates settlement and "serves to displace rather than to prepare for trial").

[44] *Id.* at 548-49.

[45] *Id.*

[46] *Id.* at 526, 543 (noting that pleadings such as 12(b) motions to dismiss provide an "early-stage opportunity" for defendants to dismiss a case and that summary judgment and pre-trial procedures cause many cases to be resolved at the pre-trial level).

Public confidence in courts has also dropped. A recent article noted that "US Supreme Court's fall in public confidence was most precipitous, declining from 63% approval to 53% from last year's standing" and that this was "20 points lower than the public's confidence in the Supreme Court a decade ago."[47] Similarly, public confidence in the government has reached a low with only 22% of Americans saying that they trust the government "to do what is right."[48] And the decline in jury trials may exacerbate this problem. First, the decline in trials will result in less case law, which could create "greater uncertainty about trial outcomes and substantive law."[49] Additionally, less trials could lead to less equitable outcomes.[50] One concern is that disproportionate reliance on pre-trial procedures can lead to decisions that are devoid of the "full factual content that has in the past given our law life and the capacity to grow."[51] Ultimately, juries bring transparency to the judicial process.[52] They allow citizens to weigh facts and provide new perspectives on how the law should be applied.[53] And without this equalizing force, our democracy could be in danger.

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[47] Valerie Hans, Richard Jolly & Robert Peck, *Fixing the Public's Confidence in the Courts Starts with Juries*, BLOOMBERG L. (Dec. 21, 2022), https://news.bloomberglaw.com/us-law-week/fixing-the-publics-confidence-in-the-courts-starts-with-juries?context=search&index=9.
[48] Pew Rsch. Ctr., *supra* note 5.
[49] Smith & MacQueen, *supra* note 32, at 35.
[50] Robert P. Burns, *What Will We Lose if the Trial Vanishes*, 37 OHIO N.U. L. REV. 575, 576 (2011) (noting that the loss of jury trials would "wound our legal order" and democracy).
[51] *See id.*
[52] *See* Bergeron, *supra* note 30 (noting how juries uphold both justice and transparency in the legal system).
[53] Jolly, *supra* note 14, at 86-87 (noting how jurors bring "diverse viewpoints" to factfinding and incorporate community norms into their decision-making).

II. TRACING THE JURY THROUGH KEY HISTORICAL PERIODS

Although scholars have conceptualized the jury as a symbol of democracy, the modern-day jury has yet to match up to that ideal. To understand why the jury has failed to meet its lofty goals, I will examine how individual and institutional actors in the Founding Era and Reconstruction period failed to properly imbue the jury with certain ideals. The Founding Era marked the beginning of America's democracy.[54] Similarly, the Reconstruction was a watershed moment in which the United States grappled with how to establish a legal system, uphold democracy, and civil rights.[55] Even with this potential, both historical periods quickly lost steam and failed to properly situate the jury as a key to democracy.[56] In these next two sections, I will explore why these two periods failed to establish the jury as a key component of our legal system.

A. The Founding Era

The Founding Era was a pivotal moment for the beginning of our nation. In the wake of the American Revolution, the Founders envisioned a political system free of tyranny and authoritarianism.[57] The jury was one such

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[54] *See* Yaniv Roznai, *Revolutionary Lawyering? On Lawyers' Social Responsibilities and Roles During a Democratic Revolution*, 22 S. CAL. INTERDIS. L.J. 353, 358 (2013); Jack P. Greene, *The American Revolution*, 105 AM. HIST. REV. 93, 93 (2000) (noting that the American Revolution was the first stage in "dismantling imperial structures").

[55] *See* Eric Foner, *The Civil War, Reconstruction and the Origins of Birthright Citizenship*, MARQ. LAW. MAG. 34, 34 (noting how "Reconstruction was a unique moment" in history for "political democracy" and African American rights).

[56] *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States.*, 61 U. CHI. L. REV. 867, 894-95 (1994) (noting the continuing racial disparities in jury service after Reconstruction). *See generally* Renée Lettow Lerner, *The Surprising Views of Montesquieu and Tocqueville About Juries: Juries Empower Judges*, 81 LA. L. REV. 1 (2020) (noting Tocqueville and Montesquieu's top-down view of juries).

[57] *See* Jolly, *supra* note 14, at 92.

safeguard.[58] In *Democracy in America*, Alexis de Tocqueville characterized the jury as a political institution.[59] He likened jury service to universal suffrage and described it as putting the "real direction of society in the hands of the governed."[60] Tocqueville also emphasized the importance of a civil jury.[61] He described how the civil jury "vests each citizen" with a public duty and involves the practice of equitable principles. .[62] Finally, one of Tocqueville's pivotal points was that the jury is a "public school" that helps people learn about their rights, the legal system, and exchange information.[63]

Even with this lofty language about the jury, scholars have begun to rethink Tocqueville's characterization of the jury. One such scholar, Renee Lettow Lerner, has characterized Tocqueville and Montesquieu in a drastically different light.[64] In her article, she described how Tocqueville praised juries because of their ability to hide judicial power.[65] While Tocqueville sought to prevent government tyranny, he also believed that too much popular control could lead to chaos.[66] To Tocqueville, the judge was the safeguard of democracy, not the jury.[67] Tocqueville's paternalistic views can be gleaned from *Democracy in America*. For instance, Tocqueville was explicitly elitist in his characterization of the jury as a school: he described how jury service exposes people to "enlightened members of the upper class" and thus expands their

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[58] *See id.*
[59] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, at 442 (James T. Schleifer ed. & trans., Liberty Fund 2012) (1835) (ebook).
[60] *Id.* at 445.
[61] *Id.* at 447-48.
[62] *Id.* at 448.
[63] *Id.* at 448 ("I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation: and I look upon it as one of the most efficacious means for the education of the people, which society can employ.").
[64] *See generally* Lerner, *supra* note 56.
[65] *Id.* at 2, 6.
[66] *See id.* at 6.
[67] *See id.*

knowledge.[68] Instead of characterizing jurors as possessing crucial knowledge, he saw jury service as increasing the "natural intelligence of a people."[69] Tocqueville also placed considerable importance in the judge. To Tocqueville, the judge possessed the most knowledge about the law, guided the jury, and "put the question of law into their [juror's] mouths."[70] In fact, his view of the jury can be summed up in this sentence: "the jury sanctions the decision of the judge."[71] Thus, contrary to what people may think, Tocqueville viewed the jury as subordinate to the judge and in many ways, his characterization of the jury was antidemocratic.

Montesquieu also shared similar views about the jury. Montesquieu described how juries helped "deflect[s] attention from judges."[72] To Montesquieu, jurors engaged in the "dirty work" of factfinding and assumed the blame for bad decisions.[73] He was also concerned about the jury's ability to understand legal issues and bias.[74] For the first concern, he believed that jurors should only decide questions of fact.[75] He also advocated simplifying cases so that jurors could accurately issue verdicts.[76] In terms of juror bias, Montesquieu believed that new trials and taking away certain criminal cases from the jury could help reduce bias.[77] Thus, thinkers like Montesquieu and Tocqueville characterized the jury as a minor aspect of the legal system.

This elitist and paternalistic characterization of the jury prevented it from becoming a true function of democracy. And though Tocqueville and Montesquieu were not the only scholars, they represented prominent political leaders'

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[68] *See* TOCQUEVILLE, *supra* note 59, at 266, 422.
[69] *Id.*
[70] *Id.* at 267.
[71] *Id.*
[72] Lerner, *supra* note 56, at 16.
[73] *Id.*
[74] *Id.* at 17.
[75] *Id.* at 13.
[76] *Id.*
[77] *Id.*

attitudes about juries.[78] Because the conception of juries was so limited, the Founders were unable to institutionalize the jury as valuable thinkers and embodiment of community values.[79] And by characterizing jurors as mere agents of judges, the Founders missed the mark in establishing a robust democratic system.

B. Reconstruction

Reconstruction was another pivotal period in which the jury could have emerged as a major institution. In the wake of the civil war, the United States abolished slavery and reckoned with how to re-imagine American citizenship.[80] Reconstruction was a period in which the United States could have enacted significant civil rights change.[81] However, President Lincoln's death and President Johnson's assumption of the presidency led to the opposite result.[82] President Johnson was "deeply racist" and sought to scale back the abolition of slavery through the Black Codes.[83] Through the Black Codes, many Southern states passed laws that required Black men to sign labor contracts and work for white employers.[84] Failure to do so would result in an arrest, fine, and indentured servitude.[85] In response, Congress enacted the Civil Rights Act of 1866 and later enshrined crucial civil rights

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[78] Lerner, *supra* note 56, at 2-3 (noting that Tocqueville and Montesquieu were "influential thinkers" and developed foundational scholarship on topics such as the separation of powers doctrine).
[79] *See id.* at 52-53 (noting that Tocqueville and Montesquieu's notion of the jury as a "mask" for judicial power may have "backfired" and masks judicial incompetence or corruption).
[80] Foner, *supra* note 55, at 34, 37.
[81] *See id.* at 34 (noting that Reconstruction was a "unique moment" for "political democracy" and African American rights).
[82] *See id.* at 39-40.
[83] *Id.* at 39.
[84] *Id.*
[85] *Id.*

in the Fourteenth and Fifteenth Amendments.[86] Even with this, however, Reconstruction proved to be a failure for progress in civil rights and racial justice.[87]

Louisiana is a key example of the failure of the civil rights enforcement. In the wake of the Civil War, Louisiana appeared to be a potential incubator for civil rights progress.[88] Louisiana was home to a significant proportion of Black people, Black political leaders, and was host to a major city.[89] However, growing Black political power soon led to a backlash of White Supremacist violence.[90] Ranging from murders to voter intimidation, Louisiana soon faced a crisis that only the Supreme Court could resolve.[91] However, through a series of decisions, the Supreme Court repeatedly refused to intervene and uphold Black people's civil rights.[92]

United States v. Cruikshank is a prime example. In, *Cruikshank*, the Court refused to apply the Fourteenth or Fifteenth Amendment to the states.[93] *Cruikshank* arose out of the brutal Colfax massacre, when a mob of white men murdered around 105 Black men in Louisiana.[94] Although the State prosecuted 97 men in connection with the massacre, a jury only convicted three of conspiracy.[95] Ultimately, the Supreme Court upheld the dismissal of charges against the defendants and held that neither the Fourteenth nor the Fifteenth Amendment allowed the federal government to

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[86] *See* Foner, *supra* note 55, at 39-41.
[87] *Id.* at 42 (noting the failure of the Reconstruction and the rise of patriotism and xenophobia).
[88] Donna A. Barnes & Catherine Connolly, *Repression, the Judicial System, and Political Opportunities for CR Advocacy during Reconstruction*, SOCIO. Q., Spring 1999, at 327, 329.
[89] *Id.* at 329-30.
[90] *Id.* at 331.
[91] *Id.* at 333.
[92] *Id.* at 335 (noting how the Supreme Court refused to enforce the Fourteenth Amendment to states and ultimately hampered civil rights progress).
[93] *See* United States v. Cruikshank, 92 U.S. 542 (1875).
[94] Barnes & Connolly, *supra* note 88, at 332.
[95] *Id.* at 335.

exercise jurisdiction over state civil rights cases.[96] In one fell swoop, the Supreme Court indicated that the federal government would not intervene in egregious racial violence.[97] Furthermore, the Court's decision meant that states had ultimate control over civil rights violations.[98] For states like Louisiana, this meant that the South would have free rein in dismantling any civil rights progress.

The *Civil Rights Cases* of 1883 are also notable. In these five consolidated cases, the Court invalidated portions of the Civil Rights Act of 1875 and held again that the Fourteenth and Fifteenth Amendments did not grant federal jurisdiction over the states.[99] As a result, federal courts could not intervene and stop egregious racial violence at the state level.[100] The Supreme Court's jurisprudence reflected the Court's broader concern about the centralization of power and the Court's belief that it needed to prevent the federal government from encroaching on individual rights.[101] However, this reasoning also created a "structural context" that ultimately doomed the civil rights movement in the Reconstruction period.[102]

The Reconstruction Era's setback in civil rights also limited the jury's development. Initially, Reconstruction brought momentum in dismantling racial barriers to jury service and conceptualizing the jury as an essential right.[103] For instance, the Civil Rights Act of 1875 prohibited jury discrimination.[104] Moreover, the Civil Rights Act built on language from the Fifteenth Amendment which prohibited the federal or state government from denying rights to citizens

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[96] *Id.* at 336.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] Barnes & Connolly, *supra* note 88, at 338-39.
[101] *Id.* at 340.
[102] *Id.*
[103] *See* Andrew G. Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1124 (2014) (noting that during the Virginia Constitutional Convention of 1868, Charles Porter introduced a resolution that framed jury service as a right available to people of all races).
[104] AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 273 (2000).

based on race.[105] The Supreme Court also appeared to affirm this idea. In *Strauder v. West Virginia*, the Supreme Court held that The Supreme Court of West Virginia violated the Fourteenth Amendment in preventing black people from serving on a jury in a criminal case.[106] Finally, the Fifteenth Amendment recognized African American's rights to not only serve on the jury, but to vote and hold office.[107] However, this progress was short-lived. Though the federal government and the Supreme Court prohibited racial barriers to jury service, many Southern states did not enforce this right.[108] Ultimately, like the Founding Era, the government and the Supreme Court in the Reconstruction period fell short in establishing the jury as a democratic institution.

1. Hannah Arendt's Theory and the Jury System

The Founding Era and Reconstruction period are critical in showing how our jury system has failed to reach its true potential. To examine how we can reimagine the jury as a democratic institution, I will turn to Hannah Arendt's theories on revolutions and political institutions.

In *On Revolution*, Hannah Arendt theorized about the success of specific revolutions and the key to creating robust political institutions. In her book, she praised the American Revolution for its focus on freedom.[109] Arendt conceptualized freedom as a positive right.[110] Unlike liberation which meant freedom from government intrusion, freedom required the

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[105] *Id.*
[106] *Id.*; Strauder v. West Virginia, 100 U.S. 303, 304 (1879).
[107] AMAR, *supra* note 104, at 273.
[108] *See* Alschuler & Deiss, *supra* note 56, at 894-95 (noting that "the right remained unenforced for most of the century" and that in 1910, "African Americans rarely served on juries in Florida, Louisiana, Mississippi, Missouri, South Carolina, and Virginia").
[109] HANNAH ARENDT, ON REVOLUTION 62-63 (1963).
[110] *See id.* at 25 (characterizing liberation as a negative right "to be free from oppression" and freedom as the "formation of something new").

creation of something completely new.[111] To Arendt, this distinction was important. Revolutions based on liberation only allowed people to choose who could *not* rule, rather than who *could* rule.[112] Thus, revolutions based on liberation resulted in monarchies, whereas freedom resulted in a completely new system.[113] In more concrete terms, freedom meant political participation and "admission to the public realm."[114] Thus, Arendt concluded that the American Revolution's focus on freedom as a positive and collective right led to its success.

In addition, Arendt attributed the downfall of the French Revolution to its focus on necessity and social inequality.[115] Arendt noted how irresistibility and violence were at the heart of the French Revolution.[116] Rather than creating robust political institutions, the French revolutionaries saw their purpose as "historical necessity" which meant that "instead of freedom, necessity became the chief category of political and revolutionary thought."[117] To Arendt, this was the French Revolution's fatal flaw. Without a clear vision for creating a new government, no one could control the course of the revolution and it devolved into the Reign of Terror.[118] Arendt also criticized the French Revolution's focus on social inequality.[119] This overreliance on social inequality prevented the French Revolution from creating a robust government.[120] Although this point is certainly controversial, theorists have argued that Arendt was not opposed to eradicating social inequality, but believed that revolutions must first focus on

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[111] *Id.*
[112] *Id.*
[113] *See id.*
[114] *Id.*
[115] ARENDT, *supra* note 109, at 54-55.
[116] *See id.* at 40-42 (defining irresistibility and noting that it "echoe[d] from beginning to end through the pages of the French Revolution").
[117] *Id.* at 46.
[118] *Id.* at 44, 92, 94-95.
[119] *See id.* at 54-55.
[120] *See id.* (noting that the revolution's focus on necessity and poverty prevented the French from establishing freedom).

creating democratic institutions.[121] Put another way, Arendt believed that successful revolutions must be both "radical and conservative."[122] Revolutions must be radical in destroying old institutions and must also "moderate change" in order to create "free and durable institutions."[123] Although the validity of Arendt's theories about social issues is beyond the scope of this note, her emphasis on creating robust political institutions is worth noting.

Central to Arendt's analysis of freedom was the importance of collective action. For instance, Arendt criticized Rousseau for his emphasis on the individual.[124] Rousseau theorized that citizens would not communicate or exchange ideas in an "ideal republic" and that promoting individuality would help avoid political factions.[125] In contrast, Arendt argued that individual identity could only be formed collectively.[126] She believed in a "collective effort" to create a government based on "shared public principles."[127] By exchanging information and establishing principles, people would make promises to each other, which would in turn create a strong foundation for freedom.[128] And to Arendt, juries and town halls captured this idea of collective action.[129] Arendt praised town-hall meetings and juries because of their ability

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[121] *See* Daniel Gordon, *"The Perplexities of Beginning": Hannah Arendt's Theory of Revolution*, *in* THE ANTHEM COMPANION TO HANNAH ARENDT 116-18 (Peter Baehr & Philip Walsh eds., 2017); Herbert A. Deane, *On Revolution. by Hannah Arendt*, 78 POL. SCI. Q. 620, 620-21 (1963) (reviewing Hannah Arendt, On Revolution (1963)) (arguing that Arendt's scholarship was "insensitive to the problem of poverty" and characterized her as a conservative).

[122] Gordon, *supra* note 121, at 117.

[123] *Id.*

[124] *See* James Miller, *The Pathos of Novelty: Hannah Arendt's Image of Freedom in the Modern World*, *in* HANNAH ARENDT: THE RECOVERY OF THE PUBLIC WORLD 177, 187 (Melvyn Hill ed. 1979).

[125] *Id.*

[126] *See id.* at 191.

[127] *Id.*

[128] *Id.*

[129] *See* Hannah Arendt, *On Hannah Arendt in* RECOVERY OF THE PUBLIC WORLD 317 (Melvyn A. Hill ed., 1979).

to debate issues of "common public interest" and engage in "active citizen participation."[130] Thus, collective action was a key aspect of Arendt's concept of freedom and democracy.

Arendt's theory offers an interesting perspective on re-conceptualizing the jury. On the one hand, she emphasized the importance of creating robust political institutions and basing government in collective action.[131] At the same time, however, she believed that political institutions should be distinct from entities that promulgate social policy.[132] Although this garnered criticism, Arendt made an important point in examining the building blocks of dynamic political institutions. In a later section, I will further explore how Arendt's thinking and sociological theory can help reformulate our idea of the jury.

III. TORT LAW

Tort law also offers unique insight into reconceptualizing our civil jury system. Negligence, in particular, grapples with how communities should deal with harm. Consider the following example. A child wanders onto a construction site. No workers are present at the time. As the child wanders around the site, he accidentally falls into a manhole and sustains severe injuries. If this was public property, is the government liable for the child's injury? Or does the child assume risk by wandering onto the site? Put another way, how should the law rectify this harm? In this section, I will focus on how the open and obvious doctrine grapples with these very

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[130] However, Arendt also limited collective action to political issues. Thus, juries and town halls could decide political issues, but not social issues. This point has garnered significant controversy in the academic community. Although Arendt's distinction between the social and political spheres is beyond the scope of this note, it is important to capture the nuances of Arendt's definition of collective action. *See id.* at 315-317.

[131] *See* Miller, *supra* note 124, at 191.

[132] *See* ARENDT, *supra* note 109, at 315-16 (noting that the French and Russian Revolutions failed due to its focus on social issues whereas the American Revolution succeeded due to its focus on creating political institutions).

questions. First, I will turn to sociology as a helpful starting point for understanding tort law. Then, I will analyze the Restatement's shifting approach to the open and obvious doctrine and the emergence of the reasonable person standard. Finally, I will examine New York's divided approach to the open and obvious doctrine.

A. The Sociological Underpinnings of Tort Law

Sociology is a helpful theoretical framework for tort law. In *Tort Law Inside and Out*, Christina Tilley theorized that tort law is a "vehicle" for communities to continuously examine and change values.[133] First, Tilley examined differing interpretations of community.[134] For instance, Locke defined community as individuals agreeing to give up certain rights to allow the state to properly enforce public welfare.[135] Thus, Locke viewed the State as the ultimate source of community values.[136] Conversely, sociologists conceptualize community as existing outside the State.[137] Tilley hypothesized that communities form "because the state is incapable of 'meet[ing] the psychic demand of individuals'" due to massive bureaucracy, complicated organization, and disconnect from individual concerns.[138] Thus, individuals step in to fill this gap and create community values through discussion of ideas about adequate social rules.[139]

Tilley also examined how solidarity and significance are essential to communities. Solidarity is akin to "social unity" and significance means that a person feels empowered to "fulfill in the reciprocal exchanges of the social scene."[140] Through both

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[133] Tilley, *supra* note 22, at 1320.
[134] *See id.* at 1346-48.
[135] *See id.* at 1348.
[136] *See id.*
[137] *See id.* at 1349.
[138] *Id.*
[139] Tilley, *supra* note 22, at 1351.
[140] *Id.* (quoting R.M. MACIVER & C.H. PAGE, SOCIETY 293 (1961)).

solidarity and significance, individuals create community norms.[141] And if a member disobeys a norm, this in turn motivates communities to evaluate the boundaries of these social norms.[142] Tilley argued that tort law operates in the same way as communities do.[143] The jury is a key actor. Throughout a tort case, a jury will assess whether a defendant is liable for harm.[144] In reaching this decision, jurors will contemplate whether a defendant's behavior violated a community norm.[145] And just like an individual's violation of a norm can motivate a community to reconsider that norm, a defendant's behavior can prompt juries to reexamine current liability rules.[146] Finally, both solidarity and significance are critical to juries. Jurors must feel empowered to construct norms and be able to work collectively to reach a verdict.[147] As I will explore in a later section, Tilley's concept of community is critical to rethinking the open and obvious doctrine and the jury as an institution.

Tilley also traced the evolution of theories regarding tort law. Tort law has been defined by two competing theories: corrective justice and economic theory.[148] Initially, tort theorists conceptualized tort law as furthering corrective justice by penalizing wrongdoers for harming victims.[149] As legal realism emerged, scholars opted for a new approach that focused on fairly allocating costs "without discouraging socially useful activities."[150] Oliver Wendell Holmes advocated for the view that "injurers should *not* be held liable in tort on the theory that any infliction of harm was immoral, but instead

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[141] *Id.* at 1352.
[142] *Id.* at 1352-53.
[143] *Id.* at 1353.
[144] Tilley, *supra* note 22, at 1354.
[145] *Id.* at 1354-55.
[146] *Id.* at 1355.
[147] *See id.* at 1352 (noting that just as solidarity and significance enable community members to create norms, this will enable juries to construct cogent norms).
[148] *Id.* at 1326-27.
[149] Tilley, *supra* note 22, at 1326.
[150] *Id.* at 1327.

that liability should attach only if the injurer's actions were [unreasonable]. . .."[151] This reasonable person standard would become the foundation of tort law.

In the 1970s, judges and theorists continued to expand this economic theory. Some theorists reasoned that tort law should base liability on the party who could have incurred the least cost in avoiding the accident.[152] Posner added to that idea by postulating that tort law should be based in efficient allocation of resources.[153] Nevertheless, Tilly hypothesized that the economic theory did not completely eliminate the corrective justice view of tort law.[154] Rather, these competing theories draws on a broader theme: the importance of community values.[155]

A. Restatements of the Law and the Open and Obvious Doctrine

Restatements of the law play a critical role in tort law. The American Law Institute publishes the Restatement of the Law to guide courts about key principles in a certain area of law.[156] Through existing case law, statutes, and normative principles, the Restatement assists courts in applying the law.[157] However, unlike statutes or precedent, Restatements only serve as persuasive authority.[158] The American Law Institute has promulgated three restatements regarding tort law—all of which have changed dramatically regarding the open and obvious doctrine. For instance, while the Restatement First did not hold landowners liable for individuals harmed by

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[151] *Id.*
[152] *Id.* at 1329.
[153] *Id.*
[154] *Id.*
[155] Tilley, *supra* note 22, at 1342.
[156] *Restatement of the Law*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/restatement_of_the_law (last visited Oct. 22, 2024).
[157] *See id.*
[158] *Id.*

an open and obvious danger, the Restatement Second shifted away from this strict rule and noted that a landowner could be liable for harm if that harm was foreseeable.[159] As I will discuss below, this shift in the Restatements is crucial—by discarding traditional rules, the Restatement imposed a duty of reasonable care on landowners and involved the jury as a key actor in the process.[160]

B. Restatement First

The American Law Institute promulgated the Restatement First of Torts in 1934.[161] The First Restatement merely summarized common law and did not propose any normative approaches to tort law.[162] This approach affected the Restatement's interpretation of the open and obvious doctrine. Specifically, §340 stated: "A possessor of land is not subject to liability to his licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein."[163] Thus, the open and obvious doctrine operates as a no-duty rule under the Restatement First.[164] If a licensee knew

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[159] *Compare* RESTATEMENT (FIRST) OF TORTS § 347(A.L.I. 1934) (absolving landowners of liability for open and obvious dangers), *with* RESTATEMENT (SECOND) OF TORTS § 343(A) (A.L.I. 1965) (shifting to a foreseeability standard and noting that landowners could be liable in certain situations).
[160] *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 51 (A.L.I. 2012).
[161] RESTATEMENT (FIRST) OF TORTS (A.L.I. 1934).
[162] *See* Richard L. Revesz, *The Debate Over the Role of the Restatements*, A.L.I. (Aug. 8, 2019), https://www.ali.org/news/articles/debate-over-role-restatements/ (quoting Herbert Goodrich) (noting that the First Restatement sought to "state the law as it was, not as some of us would like it to be.").
[163] RESTATEMENT (FIRST) OF TORTS § 347(A.L.I. 1934). The Restatement also applied the open and obvious doctrine to public utilities and stated that a public utility would not be liable for an open and obvious condition unless a person had no choice but to encounter the danger to use the utility. *See id.* §347.
[164] *See* Michalski v. Home Depot, Inc., 225 F.3d 113, 118 (2d Cir. 2000).

of and appreciated the risk of the open and obvious danger, the landowner did not owe any duty of reasonable care to that person.[165] Applying this to the courts, this no duty rule allowed judges to dismiss plaintiff's negligence claims if the judge found that the plaintiff encountered an open and obvious danger.[166] Ultimately, the traditional interpretation of the open and obvious doctrine shielded landowners from liability and centralized power in judges, rather than juries.

The Restatement First also created strict classifications for land entrants. For instance, an invitee is a business visitor who is invited or permitted to be on the land for a direct or indirect business purpose.[167] On the other hand, a licensee is a person who the landowner permitted or invited to be on his or her land.[168] Finally, a trespasser is a person who intentionally entered a landowner's land without his or her consent (or an existing privilege).[169] By creating these classifications, the Restatement (and common law) sought to protect landowners from liability against certain entrants.[170] For instance, a landowner owes a duty of reasonable care to an invitee, but only a duty to refrain from wanton or willful injury to a trespasser or licensee.[171] These classifications also had feudal origins and reflected a time when our "culture [was] deeply rooted to the land" and placed a high value on land

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[165] *See id.* ("Traditionally, a landowner was not subject to liability to business visitors for dangerous conditions on the premises if the visitor knew of the condition and recognized the risk.").
[166] *See* Sandler v. Patel, 733 N.Y.S.2d 131 (App. Div. 2001) (dismissing a plaintiff's negligence claim because it was open and obvious and noting that liability "will not attach when the dangerous condition complained of was open and obvious") (quoting Panetta v. Paramount Communications, 681 N.Y.S.2d 85 (App. Div. 1998)).
[167] RESTATEMENT (FIRST) OF TORTS § 332 (A.L.I. 1934).
[168] *Id.* § 330.
[169] *Id.* § 158.
[170] *See* Rowland v. Christian, 443 P.2d 561, 565 (Cal. 1968) (noting that the justification for limiting a landowner's liability for licensees was that "a guest should not expect special precautions to be made on his account").
[171] *Id.*

ownership.[172] However, the Restatement Second changed the application of this rule.

C. Restatement Second

The Restatement Second changed the strict interpretation and based the doctrine off foreseeability.[173] The context of the Restatement's drafting is also important. At the time, many viewed the First Restatement and other authoritative sources as "ponderous" and "inaccessible."[174] The First Restatement provided information about black letter law and hypotheticals and was too abstract for both practitioners and law students to understand.[175] However, Prosser soon changed this. In the Second Restatement, Prosser condensed complicated legal precedent into clear and understandable principles.[176] Prosser's work was also unique in that it centered the community (and policy) as a function of tort law.[177] A survey found that the Restatement Second alluded to community forty-seven times.[178] This survey also found that these references appeared in every section of the Restatement (including negligence).[179] Thus, although not explicit, the Second Restatement certainly appeared to center community as a key consideration of tort law.[180]

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[172] Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959). *See also Rowland*, 443 P.2d at 565 (noting that strict classifications stemmed from the high value of land ownership in Anglo-American society and landowner power).
[173] *See* Michalski v. Home Depot, Inc., 225 F.3d 113, 119 (2d Cir. 2000).
[174] Kenneth S. Abraham & G. Edward White, *Prosser and His Influence*, 6 J. TORT L. 27, 42 (2013).
[175] *See id.* at 41-42.
[176] *Id.* at 45.
[177] *See* Stephen D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV. 1163, 1164 (1992) (noting that Prosser was interested in policy and the "social functions of tort law"); Tilley, *supra* note 22, at 1342.
[178] Tilley, *supra* note 22, at 1342.
[179] *Id.*
[180] *Id.*

The Restatement's treatment of the open and obvious doctrine also reflected this broader normative change. Contrary to the Restatement First, the Restatement Second stated that a landowner could be liable for open and obvious dangers in certain situations.[181] For instance, if a landowner could anticipate that an open and obvious danger would harm an invitee, then the landowner could be liable for harm.[182] Additionally, the Restatement noted that if a landowner had reason to expect that "invitee's attention may be distracted, so that he will not discover what is obvious….or fail to protect himself against it," then the open and obvious doctrine will not apply, and the landowner will owe a duty of reasonable care to the invitee.[183] By doing this, the Restatement Second moved away from strict no duty rules and signaled that landowners owe a duty of reasonable care to land entrants in specific situations.

D. Restatement Third

The Restatement Third went even further than the Second Restatement. It stated that an open and obvious danger does not relieve a landowner of liability and applies to all entrants (except for flagrant trespassers).[184] The drafters reasoned that even if an entrant could discover an open and obvious danger, landowners are still responsible for "residual risks."[185] Therefore, the jury should assess open and obvious dangers at the comparative fault stage.[186] The Restatement

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[181] *See* RESTATEMENT (SECOND) OF TORTS § 343(A) (A.L.I. 1965).
[182] *Id.* ("A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.").
[183] *See id.*
[184] RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 51 (A.L.I. 2012).
[185] *See id.*
[186] *See id.* (noting the comparative fault scheme and the old rule that landowners owed no duty of reasonable care regarding open and obvious dangers).

detailed that "[w]hen land is held open to the public and a high volume of entrants can be anticipated, a reasonable possessor should anticipate greater risk, requiring greater precaution than if the land is private or few entrants are likely."[187] In assessing reasonable care, "the fact-finder must also take into account the surrounding circumstances, such as whether nearby displays were distracting and whether the landowner had reason to suspect that the entrant would proceed despite a known or obvious danger."[188].

The Restatement Third is notable not only for its radical treatment of the open and obvious doctrine, but its reconceptualization of tort law. In *The Reasonable Person*, Miller and Perry noted that the Restatement Third proposed a "normative commitment" that was atypical of tort law or the American Law Institute.[189] Specifically, the authors found that past restatements were "predominantly positive and only incrementally normative."[190] Other scholars have criticized this change and argued that it undoes the stare decisis doctrine.[191] Some believe that the Restatements should merely "restate the law" in a "non-prejudicial manner so as not to unleash normative forces" that the courts have not legitimized through stare decisis.[192] In short, some theorists believe that the courts, not restatements, should dictate the normative

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[187] *Id.*
[188] Kelli Michelle Devaney, *Summary of Foster v. Costco Wholesale Corp., 128 Nev. Adv. Op. 71*, 129 *NEV. L. J. SUP. CT. SUMMARIES* (Jan. 1, 2013).
[189] Allen D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 334 (2012). *See also* Tilley, *supra* note 22, at n.102 (noting that although the Restatement Third didn't center community as much as the Second Restatement, it still placed community on the same level as efficiency and theoretical justifications).
[190] Miller & Perry, *supra* note 186, at 333 (quoting Stephen Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 814 (2001)).
[191] *See* Steven Hetcher, *Symposium: Non-Utilitarian Negligence Norms and the Reasonable Person Standard*, 54 VAND. L. REV. 863, 866 (2001).
[192] *Id.*

direction of tort law.[193] Regardless of the debate, however, the Restatement Third was a unique effort to instruct the legal system on how tort law should operate.

A few other things are worth nothing. The Restatement Third was unique in that it was completed in "discrete projects" rather than a comprehensive work with one author.[194] Unlike William Prosser, who drafted the Second Restatement, multiple actors drafted the Third Restatement and published sections at different times.[195] Additionally, the Third Restatement was drafted at time when tort law had become a lot more politicized and policy-oriented.[196] Whereas tort law was mainly associated with automobile accidents in personal injury law in the 1960s, it has now become associated with medical malpractice, environmental issues, and much more.[197] Since then, a diverse range of actors have emerged with distinct interests in shaping the direction of tort law.[198] Thus, the Restatement Third included both a radical shift in tort law regarding duty and the open and obvious doctrine and more contention in other areas, such as products liability.[199]

IV. TORT LAW'S SHIFT TO REASONABLE CARE

Modern courts have mirrored the Restatement's shift to the reasonable care standard. Notably, the Supreme Court has stated, "[t]he distinctions which the common law draws

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[193] *See id.* (implicitly noting that restatements should be written in an objective way so as not to affect legitimate processes like stare decisis).
[194] Michael D. Green, *Symposium, Flying Trampolines and Falling Bookcases: Understanding the Third Restatement of Torts (Spring 2010)*, 37 WM. MITCHELL L. REV. 1011, 1012 (2011).
[195] *Id.*
[196] *See* Sugarman, *supra* note 177, at 1164; Tilley, *supra* note 22, at 1338-39 (noting that the Restatement Third of Products Liability was drafted by various "interest group appeals" and that the group's reporters were "brokers of ideas advanced by contending political forces.").
[197] Sugarman, *supra* note 177, at 1164.
[198] *See id.*
[199] *See id.*; Miller & Perry, *supra* note 189 (noting the Restatement Third marked a dramatic shift in drawing normative conclusions about the law).

between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism."[200] The Supreme Court went on to note that due to industrialization and urbanization, modern courts have applied more nuanced rules.[201] Other courts have followed this reasoning. In *Rowland v. Christian*, the California Supreme Court noted, "[w]hatever may have been the historical justifications for the common law distinctions, it is clear that those distinctions are not justified in the light of our modern society and that the complexity and confusion which has arisen is not due to difficulty in applying the original common law rules."[202] In one fell swoop, the Court rejected categorical classifications (such as invitee or trespasser) and held that property owners owe a duty of reasonable care to everyone.[203]

New York has also shifted to the reasonable care standard. *Basso v. Miller* is a helpful example of how New York courts abandoned strict entrant classifications in favor of the reasonable care standard.[204] In *Basso*, the Court of Appeals noted the historical roots of these classifications.[205] Licensee and trespasser classifications arose out of the feudalism era, when the economy was mostly agrarian, and landowners depended on land for subsistence.[206] As the concurrence elaborated, it was "socially desirable policy" for a "landowner to use and exploit his land as he saw fit" without having to worry about liability.[207] As a result, the common law created strict classifications, such as trespasser and invitee, to "immuniz[e]" the landowner from liability.[208] However, with industrialization, there was no longer a need for such strict

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[200] Kermarec v. Compagnie, 358 U.S. 625, 630 (1959).
[201] *See id.*
[202] Rowland v. Christian, 443 P.2d 561, 567 (Cal. 1968).
[203] *See id.* at 568.
[204] *See* Basso v. Miller, 352 N.E.2d 868, 872 (N.Y. 1976).
[205] *See id.* at 871-72.
[206] *See id.* at 871-72, 875 (Breitel, C.J., concurring).
[207] *Id.* at 875 (Breitel, C.J., concurring).
[208] *Id.* (Breitel, C.J.., concurring).

classifications.[209] As a result, modern courts attempted to be more flexible and create further sub-classifications, but this only created further confusion.[210] Finally, the majority noted various sister courts that abandoned these classifications and adopted the duty of reasonable care.[211] Thus, the Court of Appeals adopted the reasonable care standard and held that a landowner should maintain his property in a "reasonably safe condition" and factor in the likelihood of injury to other people and the "burden of avoiding the risk."[212]

Rowland v. Christian is also helpful in illustrating a broader shift in tort law. In *Rowland*, the plaintiff sued Ms. Christian in response to injuring his hand while using her bathroom faucet.[213] The plaintiff argued that Ms. Christian knew that the faucet was broken, and was therefore negligent in failing to fix the open and obvious danger.[214] In response, Ms. Christian filed a motion for summary judgment and argued that the plaintiff was contributorily negligent and assumed the risk of harm.[215] The Court found for the plaintiff and reasoned that the evidence did not show the faucet was obviously cracked to a third party.[216] Rather, the Court found it likely that Miss Christian knew of the danger, could have expected that the plaintiff would not discover the danger, and that she failed to exercise a duty of reasonable care to either fix the danger or warn the plaintiff.[217]

In reaching this conclusion, the Court articulated a radical shift in assessing landowner liability. Rather than following the traditional classifications (such as invitee or trespasser), the court noted that society now exercised "an increasing regard for human safety" that justified abandoning these strict

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[209] *See id.* (Breitel, C.J., concurring).
[210] *See Basso*, 352 N.E.2d at 872.
[211] *See id.* (citing Rowland v. Christian, 443 P.2d 561 (Cal. 1968)).
[212] *Id.* (quoting Smith v. Arbaugh's Rest., Inc., 469 F.2d 97, 100 (D.C. Cir. 1972)).
[213] 443 P.2d. at 562.
[214] *See id.*
[215] *Id.* at 562-63.
[216] *Id.* at 563.
[217] *Id*.

rules.[218] The Court also cited precedent that reflected this shift in viewing harm. For instance, in *Hansen v. Richey*, the court found that the defendant's liability for a wrongful death action regarding a youth who drowned in a pool should be based on the landowner's knowledge of the dangerousness of the pool.[219] In *Howard v. Howard*, the Court held that the defendant was liable for plaintiff's injury from a slip and fall because he instructed the plaintiff to walk through an area that he knew was dangerous and failed to warn the plaintiff of this condition.[220]

In sum, modern courts are trending towards more nuanced and holistic understandings of examining harm. Central to this shift is the overall improvement in societal conditions.[221] As the court noted in *Basso*, the shift from feudalism to a more egalitarian society has prompted courts to re-examine liability.[222] Additionally, the shift in societal norms have made courts more attuned to personal safety.[223] In the next section, I will examine how New York's trend towards the reasonableness standard does not comport with its interpretation of the open and obvious doctrine.

V. New York's Application of the Open and Obvious Doctrine

Although New York Courts have shifted to a reasonable care standard, the courts are unclear regarding the open and obvious doctrine. Generally, New York Courts have held that the open and obvious doctrine does not negate a landowner's

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[218] *Id.* at 565.
[219] *Rowland*, 443 P.2d at 565 (citing *Hansen*, 46 Cal. Rptr. 909, 913 (Cal. Ct. App. 1968).
[220] *Rowland*, 443 P.2d at 565 (citing *Howard v. Howard*, 9 Cal.Rptr. 311, 312-13 (Dist. Ct. App. 1960)).
[221] *See* Basso v. Miller, 352 N.E.2d 868, 872 (N.Y. 1976) (noting that industrialization diminished the need for strict entrant classifications).
[222] *See id.*
[223] *See Rowland*, 443 P.2d. at 565 (noting that society now places a higher value on human safety).

duty of reasonable care.[224] The courts have held that while the open and obvious doctrine can negate a duty to warn, it does not affect the duty of reasonable care.[225] However, New York courts do not apply this in a uniform manner. For instance, courts still apply the open and obvious doctrine as a no duty rule to "natural geographic phenomena."[226] In *Melendez v. City of New York*, the First Department held that the open and obvious doctrine negated the City's liability for a plaintiff's injuries from slipping off a waterfall ledge.[227] The Court reasoned that since the waterfall and the slippery ledge were open and obvious, the plaintiff should have reasonably anticipated the danger.[228] The Court also tried to reconcile its holding with New York's shift to the reasonable care standard.[229] Although open and obvious dangers do not negate a duty of reasonable care, it can negate a duty regarding "natural geographic phenomena."[230] Finally, the Court noted precedent supporting this exception.[231]

Other cases have invoked this natural geographic exception. In *Cohen v. State of N.Y.*, four young men drowned

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[224] *See Basso*, 352 N.E.2d at 872 (holding that landowners owe a duty of reasonable care and rejecting traditional entrant classifications); *Cupo v. Karfunkel,* 767 N.Y.S.2d 40, 42-43 (App. Div. 2003) (noting that a landowner must maintain property in a reasonably safe condition).

[225] *See Cupo,* 767 N.Y.S.2d at 42-43 (noting that a landowner owes a duty of reasonable care but does not have a duty to warn of open and obvious dangers).

[226] Cohen v. State of N.Y., 854 N.Y.S.2d 253, 255 (App. Div. 2008); Melendez v. City of N.Y., 906 N.Y.S.2d 263, 264 (App. Div. 2010).

[227] *Melendez*, 906 N.Y.S.2d at 264.

[228] *Id.*

[229] *See id.* (noting various Departments' rejection of the open and obvious doctrine).

[230] *Id.*

[231] *See Cohen*, 854 N.Y.S.2d at 255 (noting that the duty of reasonable care does not extend to natural geographic phenomena which "can readily be observed by those employing the reasonable use of their senses") (quoting Tarricone v. State, 571 N.Y.S.2d 845, 847 (App. Div. 1991)); Cramer v. Cty. of Erie, 804 N.Y.S.2d 201, 201-02 (App. Div. 2005) (noting that the defendant county had no duty to warn or protect a plaintiff from a ravine because it was a "natural geographic phenomenon").

after entering a swimming hole in the Adirondack State Park.[232] The Third Department noted that although a landowner has a duty "to take reasonable precautions", this did not apply to natural geographic fixtures that a reasonable person could easily observe on their own.[233] Unfortunately, the court did not expand beyond that brief explanation. At first glance, this interpretation comports with the Restatement Second on open and obvious dangers.[234] Comment b states: "the possessor is under no duty to protect the licensee against dangers of which the licensee knows or has reason to know."[235] However, the Restatement Second also notes that § 343A requires the landowner to protect an invitee against known dangers, if the landowner can anticipate potential harm "notwithstanding such knowledge."[236] *Cohen*'s reasoning also appears to violate the Restatement Third. Comment f noted that a landowner owes a duty of reasonable care regarding risks associated with natural conditions, including bodies of water, plants, and much more.[237] Although comment f does not speak to the open and obvious doctrine, it details how the reasonable care standard applies to natural conditions.[238] Finally, comment k notes that a landowner should anticipate a greater risk of harm for public land with a high volume of entrants.[239] Thus, New York courts' application of this exception appears to go against the shift in Restatements towards a reasonable care standard.

Applying the Restatement Second's logic, the court in *Cohen* could have reached an entirely different outcome. The court could have found that the county owed a duty of reasonable care because it was public land and people often visited the swimming hole. The county could have also easily posted signs

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[232] *Cohen*, 854 N.Y.S.2d at 255.
[233] *Id.*
[234] *See* RESTATEMENT (SECOND) OF TORTS § 343(A) (A.L.I. 1965).
[235] *Id.* at § 343 (A) cmt. b.
[236] *Id.*
[237] *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 51 cmt. f (A.L.I. 2012).
[238] *See id.*
[239] *Id.* at § 51 cmt. k.

informing the public of specific dangers, such as risks associated with high rainfall or turbulent water. Moreover, the county could have easily employed lifeguards to watch the pool if someone drowned. Thus, New York's natural geographic exception contradicts the reasonable care standard and ignores how the law can hold actors liable for harm, without imposing a high cost.

New York Courts are also unclear regarding the duty to warn. Although all four departments hold that an open and obvious danger precludes a duty to warn, the Third Department has carved out exceptions. For instance, in *Comeau v. Wray*, the Third Department found that a landowner has a duty to warn when he or she has "reason to expect that persons will find it necessary to encounter the obvious danger" and cited the Restatement Second.[240] The Restatement Second elaborates on the duty to warn. In § 343(A), comment f notes that a landowner's duty of reasonable care can include a duty to warn.[241] If a landowner can anticipate that an open and obvious danger could harm invitees, then he or she may have a duty to warn or take other reasonable steps to protect the entrant.[242] Comment f elaborated on this further:

> There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him,

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[240] Comeau v. Wray, 659 N.Y.S.2d 347, 349 (App. Div. 1997).
[241] RESTATEMENT (SECOND) OF TORTS § 343(A) (A.L.I. 1965).
[242] *See id.*

> against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm. Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it.[243]

In contrast, the Second Department hasn't articulated an exception for the duty to warn or incorporated the Second Restatement. For instance, in *Cupo v. Karfunkel*, the court held that a landowner does not have a duty to warn of an open and obvious danger.[244] The court reasoned that the existence of an open and obvious danger notifies an entrant of potential risks, and therefore negates the need for a warning.[245] The court did not articulate any exceptions to this duty to warn.[246] The Court of Appeals echoed this standard. In *Tagle v. Jakobs*, the court held that a landlord did not have a duty to warn a tenant of electrical wires running through a tree.[247] The court reasoned that a reasonable person could have observed the wires and appreciated the risks associated with climbing that tree with wires.[248] Although not explicit, the court appeared to assume that the tenant assumed all risks associated with the wire,

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[243] *Id.*
[244] Cupo v. Karfunkel, 767 N.Y.S.2d 40, 42 (App. Div. 2003).
[245] *Id.* at 42-43.
[246] *See id.*
[247] 97 N.Y.2d 165, 170 (2001).
[248] *Id.* at 334.

since it was open and obvious.[249] Overall, New York courts fail to fully incorporate the Restatement Second's approach to a landowner's duty to warn.

Although New York has moved towards a reasonable care standard, the courts still fail to fully apply the modern approach to the open and obvious doctrine. For instance, the court's natural geographic exception relieves landowners of any duty of reasonable care regarding natural open and obvious dangers.[250] Similarly, the court's inconsistent application of the duty to warn also fails to recognize the Restatement Second's approach to recognizing a duty to warn in specific situations.[251] Ultimately, if New York seeks to fully apply the spirit of the Restatements, the courts should discard the natural geographic exception and formulate a duty to warn rule that comports with the Second and Third Restatement.

A. Rethinking the Open and Obvious Doctrine and the Jury

How can tort law serve as the starting point for revitalizing juries? In *Tort Law Inside and Out*, Christina Tilley argues that sociology can help re-conceptualize torts as a vehicle for community values.[252] Additionally, Hannah Arendt has penned important discourse in examining the formation of robust political institutions.[253] In this section, I will build on Tilley and Hannah Arendt's theory to re-conceptualize the jury as both a sociological and political institution. I will argue that Tilley's sociological theories should encourage New York Courts to dispense with the open and obvious doctrine and center

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[249] *See id.* (noting that a person would have reasonably seen the wires in the tree and understand the associated risks).
[250] *See* Cohen v. State of N.Y., 854 N.Y.S.2d 253 (App. Div. 2008); Cramer v. Cty. of Erie, 84 N.Y.S.2d 201 (App. Div. 2010).
[251] *See* Comeau v. Wray, 659 N.Y.S.2d 347, 347 (App. Div. 1997); Cupo v. Karfunkel, 767 N.Y.S.2d 40, 40 (App. Div. 2003).
[252] *See* Tilley, *supra* note 22, at 1324-26.
[253] *See* ARENDT, *supra* note 109 at 72.

community values in tort cases.[254] I will also reflect on how conceptualizing juries as incubators for community norms can finally achieve the "freedom" that Hannah Arendt envisioned for political institutions.[255] Finally, I will use legal empowerment theory to frame jury service as civic duty that can promote important change in our legal system.

In *Tort Law Inside and Out*, Christina Tilley examined community values in tort law. To Tilley, "torts operate as a vehicle" in which "communities perpetually reexamine and communicate their values."[256] And juries play a critical role in establishing community norms.[257] To illustrate this point, Tilley examined how juries could create community norms in the negligence context.[258] For instance, in 2015, a California law required parents to immunize their children prior to school enrollment but excepted parents who personally objected to vaccinations.[259] At this time, California also experienced a measles outbreak.[260] Tilley theorized that a parent whose child had gotten measles from an unvaccinated student could sue for negligence.[261] However, the reasonableness of this action would depend on the specific community norms: while one community in California may value vaccinations, another may

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[254] *See* Tilley, *supra* note 22, at 1354 (noting how jurors often contemplate community norms).
[255] *See* ARENDT, *supra* note 109, at 62-63.
[256] Tilley, *supra* note 22, at 1320.
[257] *See id.* at 1354 (noting that jurors "are drawn from the community" and decide whether a defendant's behavior deviates from or complies with norms); Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 436 n.128 (1999) (quoting Leon Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 483 (1956) ("It offers an assurance of judgment by neighbors who understand the community climate of values, a bulwark against the petty tyrannies of headstrong judges, and a means of softening the cold letter of the law in cases of hardship.")).
[258] *See* Tilley, *supra* note 22, at 1389-90 (noting the 2015 measles outbreak as an example).
[259] *Id.*
[260] *Id.*
[261] *Id.*

not see it as a necessary public health requirement.[262] Thus, the jury could help impose the relevant community standard regarding vaccinations.

Tilley's theories about community values are especially salient for New York's approach to the open and obvious doctrine. To fully establish the jury as a hub for community values, New York courts should discard the natural geographic exception and follow the Restatement Third in assessing open and obvious dangers. Consider the following case. In *Cohen v. State of N.Y.*, four young men drowned after entering a swimming hole in the Adirondack Park.[263] The Third Department found that the county defendant did not owe a duty of reasonable care, because the swimming hole was a natural geographic fixture that a reasonable person could have easily observed on his or her own.[264] However, if a jury had considered this case, the outcome may have been drastically different. A jury composed of parents or younger people may have viewed this incident as egregious and found that the defendant should have taken greater precautions to warn the public of drowning risks. A more landowner-based jury may have taken the opposite interpretation and reasoned that the young men should have been more vigilant. Either way, sending this case to the jury would have allowed the community to articulate a cognizable norm regarding landowner's liability for natural dangers.[265] Thus, by shifting the open and obvious danger analysis to the jury, New York Courts can restore the jury as a creator of community norms.

Empowering juries to consider community values also has other benefits. In *Living As One: Tort Law and a Duty to Imagine*, Tilley noted that jury verdicts on personal injury

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[262] *Id.* at 1390.
[263] 854 N.Y.S.2d at 255 (App. Div. 2008).
[264] *Id.* at 255-56.
[265] *See* Tilley, *supra* note 22, at 1390-91 (describing how the reasonableness of vaccination in the measles case would depend on the specific community norms in which the legal dispute arose from).

claims can facilitate social cohesion.[266] Juries are a unique place where "where citizens are expected to listen to the personal narratives" of people with varied racial and economic backgrounds.[267] Through this process, juries engage in an imaginative process where they may reckon with marginalized groups' experiences and issue a verdict that seeks to redress structural inequalities.[268] As Tilley noted, although this assumes that jurors are free of biases, jurors are generally "more willing to identify with plaintiffs who lack social capital than their judicial counterparts."[269] Finally, the collaborative nature of juries encourages people to meaningfully engage with each other and consider different perspectives—all of which can foster "organic social cohesion."[270] Ultimately, situating juries as meaningful actors in the judicial system can encourage juries to address social inequity, lead to more democratic outcomes, and create a sense of unity amongst jurors.

However, to fully establish the jury as a community institution, New York courts will need to engage in broader change. For instance, courts could craft jury instructions that encourage juries to consider community values in their decision.[271] On the other end, lawyers could choose to incorporate community norms in briefs and legal memoranda regarding open and obvious dangers. And finally, juries can assess how to establish norms regarding open and obvious dangers. Should landowners be held liable for all harm that has occurred on their property? Or should liability be limited to egregious instances involving children or death? Put another way, all actors in the legal system should make a concerted

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[266] Cristina Tilley & Rebecca Ferguson, *Living as One: Tort Law and a Duty to Imagine*, CTLA FORUM, Fall 2023, at 1, 11.
[267] *Id.*
[268] *See id.* at 11-12.
[269] *Id.* at 11.
[270] *Id.*
[271] *See* Tilley, *supra* note 22, at 1390-91 (noting that juries would need to be "explicitly instructed" that community is relevant to specific tort claims).

effort to incorporate this idea of community into the analysis of open and obvious dangers.

Arendt's theories about freedom are also applicable to the jury. In an earlier section, I examined how Arendt focused on the successes and failures of different revolutions. To Arendt, the success of the American Revolution lied in its commitment to safeguarding freedom.[272] Arendt conceptualized freedom in a few ways. First, it requires the creation of something that was completely new.[273] It involves eradicating an obsolete institution and creating a new, robust political institution.[274] Arendt also saw political participation and collective action as a foundation for freedom.[275] Through collective action, people would make "promises" to each other which would form the basis for how our government interacts with people.[276] In short, freedom is only formed through collective action, mutual promises, and a radically new yet stable institution.

By encouraging juries to promulgate community norms, jurors engage in the very exercise that Arendt described. In crafting a cogent norm, jurors must make promises to each other (and maybe even compromise).[277] And in making these promises, jurors build trust with each other, feel empowered as decisionmakers, and ideally promulgate verdicts that reflect a community norm. Thus, this collaborative process results in the creation of shared principles that could not only reinspire public faith in the legal system, but also encourage the government to better address community concerns.[278] For instance, jury verdicts can inform the public and legislators about a salient public policy issue.[279] It may prompt legislators

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[272] ARENDT, *supra* note 109, at 62-63.
[273] *Id.* at 34.
[274] *See* Gordon, *supra* note 121, at 117.
[275] *See* Miller, *supra* note 124, at 191.
[276] *See id.*
[277] *See id.* (describing how collective action requires making mutual promises).
[278] *See id.* (describing how mutual promises form the basis of government); see Miller, *supra* note 124 at 187.
[279] *See* Tilley, *supra* note 22, at 1392.

to draft legislation to address a broader public safety issue raised by a tort claim.[280] Conversely, problematic jury verdicts can prompt legislators to promulgate legislation that combats this.[281] Thus, reconceptualizing the jury in this manner can facilitate legislators, organizers, and other actors to better solve pressing social issues.

Further still, critical legal empowerment theory can provide a way forward for our civil legal system. Critical legal empowerment theory focuses on redistributing legal power and placing it in the hands of marginalized communities.[282] Instead of viewing "impacted people as 'recipients of services provided by lawyers'", it conceptualizes them as "'change agents who force greater transparency, accountability, and fairness' from legal systems."[283] This is directly applicable to our jury system. Jurors are critical legal actors with the potential to push the law in an equitable direction. Jurors can help imbue the law with a unique perspective and ensure that the law properly supports marginalized communities.

To properly actualize legal empowerment theory, our legal system will need to dramatically change the way it distributes power. During a jury trial, judges can make a concerted effort to ensure that jurors understand a case's posture and encourage jurors to consider community norms in issuing a verdict. Lawyers can also invest in legal empowerment by treating jurors as dynamic legal actors. For instance, instead of relying on theatrics or emotional appeals to unfairly sway juries, lawyers can incorporate relevant policy and community norm-based arguments during trial. By doing this, lawyers can re-conceptualize jurors as significant decisionmakers, rather than a disinterested group of people with limited legal knowledge.

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[280] *See id.*
[281] *See id.*
[282] *See* Sukti Dhital et al., *Foreword: Critical Legal Empowerment*, 97 N.Y.U. L. Rev. 1547, 1551 (2022) (noting that critical legal empowerment theory "embraces community-based efforts to redistribute legal power").
[283] *Id.*

Finally, jurors can reimagine their role as a civic duty. Rather than view jury service as a burden, people can see it as akin to voting or participating in a town hall meeting.[284] Similarly, instead of perceiving jury service as something that is exclusively legal, people can view it as a way to enact necessary community and policy-based change. And finally, community organizers, activists, and non-profit organizations can do their part to frame jury service as a civic duty. Ultimately, reconceptualizing the jury will require investment from all legal actors– judges, attorneys, jurors, and activists.

CONCLUSION

Revitalizing the civil jury will not be an easy task. However, tort law and community norms could be the perfect way to start this process. In this note, I traced the development of juries throughout American history and how our government, prominent leaders, and the legal system failed to properly situate the jury as a dynamic institution. I then turned to tort law and the open and obvious doctrine as a mechanism to understand the jury as an institution. Both the Restatements and case law illuminated how community norms have become a prevalent consideration of tort law. Moreover, New York's conflicting approach to the open and obvious doctrine further emphasizes how incorporation of community norms and a shift to the Third Restatement approach could better serve community interests.

Finally, I examined various theories to reimagine what a dynamic jury could look like and how New York courts could properly implement this. If we can properly reimagine the jury as a community centric and political institution, we can begin to re-build the civil jury into a dynamic and vibrant institution. And tort law is at the core of this solution. Tort law—and more specifically, community norms—can help refashion the jury into an institution that both considers and crafts community

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[284] *See* ARENDT, *supra* note 129, at 317 (praising town halls for resolving open questions).

norms when issuing verdicts. However, this process will require investment from diverse actors ranging from judges to attorneys to community organizers. Only if we invest in this new vision of the jury, can we create legitimacy to the legal system and in turn, rebuild our democracy.