On Law as Poetry:
Shelley and Tocqueville

ABSTRACT:
Consonant with the ongoing "aesthetic turn" in legal scholarship, this article pursues a new conception of law as poetry. Gestures in this law-as-poetry direction appear in all three main schools in the philosophy of law's history, as follows. First, natural law sees law as divinely-inspired prophetic poetry. Second, positive law sees the law as a creative human positing (from poetry's *poesis*). And third, critical legal theory sees these posited laws as calcified prose prisons, vulnerable to poetic liberation. My first two sections interpret two texts at the intersections among these three theories, namely Percy Bysshe Shelley's "A Defense of Poetry" and Alexis de Tocqueville's *Democracy in America*. Shelley identifies a poetic rebirth in the ruins of natural law, suggesting a philosophy of law as "natural poesis." And Tocqueville names several figurative aristocracies capable of redeploying aristocratic law against democratic despotism, suggesting a philosophy of law as "aristo-poetic counterforce." Finally, I propose a new theory of law as poetry bridging these two theories, "natural aristo-poetic counterforce."

In elaborating on the connections between the law and poetry, the present investigation is consonant with the ongoing "aesthetic turn" in legal philosophy, as outlined in a recent call for papers, which notes that "Law and literature scholarship explores the aesthetic dimension of law, and in doing so, traces its appeal to the imagination, to lived experience, to the senses, to emotions and to our faculties of judgment."[1] Legal scholar Peter Fitzpatrick (a) notes that "Laws in many cultures are put poetically," (b) posits a fictive/mythical foundation for all law, and (c) (in the spirit of the poet-legislators from Plato's *Laws*) dubs the Freud of *Totem and Taboo* "the first epic poet." (286).[2] One important source for Fitzpatrick's conception, and for literary interpretations of law generally, is Jacques Derrida's essay, *Force of Law: The 'Mystical Foundations of Authority*'," which famously asserts that "Deconstruction is justice."[3] And

[1] See, for example, the description of the Law and Literature stream in the Society for Socio-Legal Studies website: https://slsa2019.com/streams-current-topics/law-and-literature/. I am indebted for this reference to an early reviewer of the present article.

[2] See Peter Fitzpatrick (2001a) and (2001b).

[3] See Jacques Derrida (1992), 15.

Derrida, in turn, notes the efforts of critical legal studies, and (ambivalently) of Stanley Fish's positing of an ontological equivalence of literary and legal texts.[4]

In each of the three main schools in the history of the philosophy of law—natural law theory, positive law theory, and critical legal theory—one finds major texts that present law as a form of poetry. First, natural law theory presents the law as metaphysically divine, but as historically dependent for its expression on the work of poets viewed as prophets. Second, the name of natural law's primary competitor, "positive" law theory, already suggest that its approach, which is to "posit" imaginative individual literary creation as the sole fount of human law (given that, for example in Aristotle's writings, the Greek word *poesis* is sometimes translated as "positing").[5] And third, the newer schools of critical legal theory (including critical legal studies, critical race theory, and feminist legal theory) explore the historical calcification of poetic law into a kind of prose prison, vulnerable nevertheless to a new poetic liberation.

The present article will proceed as follows. First, I locate Percy Bysshe Shelley's "A Defense of Poetry" (hereafter "Defense") at the transition between natural law and positive law theory, and posit therein a new legal theory I call "natural poesis" theory. By this I mean a poetic positing that creates-by-identifying beautiful patterns in nature, which poets can help fashion into human laws which they also help sustain. Second, I locate Alexis de Tocqueville's *Democracy in America* (hereafter *Democracy*) at the transition between positive law theory and critical legal theory, and posit therein a new legal theory that I call "aristo-poetic counterforce" theory. By this, I mean that the U.S.' figurative aristocracies can wrest, from its vicious literal aristocracies, the aristocratic poetry of the law, in order to redeploy it against democratic despotism, in pursuit

[4] See Stanley Fish (1989).

[5] For more on this etymological connection, see Hall (2019).

of greater flourishing for the disempowered. In other words, the poetry that was almost omnipresent in the ancient and medieval worlds has become the possession of the privileged few, and can therefore be deployed strategically to check and balance the problematic positing of the sometimes tyrannical majority. Finally, I construct a new theory to bridge these two bridging theories, namely an historically comprehensive philosophy of law as poetry.

I. Shelley's Natural Poesis Theory

In the history of the philosophy of law, Shelley is a contemporary of the utilitarian founders of positive law theory, Jeremy Bentham and John Austin. Champions of a largely successful blitzkrieg against English law, they sought to eliminate everything from the law that is not an avowedly human effort to improve the people's well-being through reason. Though sympathetic to Bentham and Austin's efforts, Shelley is ultimately closer to that most famous utilitarian, John Stuart Mill. Both Shelley and Mill were directly inspired by the early Romantics (especially Wordsworth and Coleridge), and concurred with the Romantics that imagination is no less important than reason for sustaining global human happiness. Thus, from this perspective, poetry is no less important than prose. Shelley differs from Mill, however, in that his "Defense" explicitly affirms the role of poetry and imagination in legal and political philosophy. Not only does Shelley's title carry the legal connotations of a court trial, but it also famously closes with the claim that "poets are the unacknowledged legislators of the world" (Shelley 2002, 535).

The editors of the Norton anthology of Shelley's work note that his "Defense" originated as a response to an essay by the influential literary critic Thomas Love Peacock entitled "The Four Ages of Poetry."[6] Peacock, the editors elaborate, "after failing as a poet had recently begun

[6] See Shelley (2002).

work at the East India Company, urged intelligent men to stop wasting their time writing poetry and apply themselves to the new sciences, including economics and political theory" (Shelley 2002, 509). Peacock's argument here clearly resonates with today's debate between STEM advocates and the defenders of the arts and humanities. In identifying poetry with the law, Shelley offers a powerful counterargument to poetry's alleged irrelevance.

The two most influential studies of the "Defense" both emphasize the concept of metaphor in that essay, as suggested by their titles. John W. Wright's *Shelley's Myth of Metaphor* emphasizes how Shelley's concept of metaphor empowers his blending of British empiricism with German idealism.[7] This anticipates my claim that Shelley blends natural law theory and positive law theory. To wit, Aristotle is father of both empiricism and natural law theory; and positive law theory is indebted to J. S. Mill's idealism-infused revision of Utilitarianism. In other words, Wright's claim that Shelley blends empiricism (which begins in Aristotle) with idealism (which manifests in Mill's utilitarianism) supports my claim that Shelley blends natural law theory (which also begins in Aristotle) and positive law theory (which was created by Mill's fellow utilitarian John Austin). Similarly, Jerrold E. Hogle's "Shelley's Poetics: The Power of Metaphor," through its deconstructive reading of Shelley's metaphors, anticipates my own postmodern reading of Shelley.[8] Both scholars, Wright and Hogle, attribute a processual open-endedness to Shelley.

The centrality of metaphor in Shelley's "Defense" is also the reason why everything there flows from his analysis of reason and imagination, which he defines in four comparative ways. First, reason examines thoughts' interrelationships, while imagination reinterprets thoughts and

[7] See Wright (1970)

[8] See Hogle (1982).

builds new thoughts from those existing thoughts. Second, reason analyzes while imagination synthesizes. Third, reason lists while imagination evaluates. And fourth, reason concerns differences while imagination concerns similarities. In addition to explicitly stating the superiority of the imagination, Shelley also acts on that claim throughout the essay, as indicated in part by his description of its method, namely setting "down these remarks according to the order in which they were suggested to my mind" (Shelley 2002, 534). The implication, consonant with law-as-poetry, is that imagination trumps reason even in the latter's terrain: the prosaic space of an academic essay.

It is through the imagination that Shelley proceeds to pronounce poetry, defined as "the expression of the Imagination," as the highest of human creations (Shelley 2002, 511). As if this praise were insufficient to support his identification of poetry with law, he then adds an historical justification, claiming that poetry is "connate with the origin of man" (511). Thinking these two claims together, there is for Shelley nothing higher or older than the imaginative art of poetry. This buttresses positive law theory's claim that the poetically creative power of human laws cannot be automatically trumped by any preexisting standards, whether religious, natural, or ethical. This is not to say that the latter standards do not exist, but only that they are dependent on poetic practice.

As for these practitioners, Shelley first defines "poets" as those who are excessively sensitive to the pleasure of perceiving the beautiful patterns that nature and society impose on the mind (Shelley 2002, 512). Though admittedly this sounds closer to descriptive law than prescriptive law, the closing line about poets as moral legislators makes the prescriptiveness clear. For Shelley, ordered patterns in both nature and society can be articulated, and all humans perceive and reproduce these patterns for pleasure. What makes poets special, in this context, is

that they perceive and reproduce a larger quantity of these patterns, thus experiencing a larger quantity of pleasure, which they are also able to transmit to others. In other words, via superior receptivity, poets identify and articulate what will become new human laws (which I will term "embryonic laws"). And via superior communicative powers, poets disperse that receptivity in a way that helps sustain the laws that they helped create.

This description also recalls ancient Hebraic and Greek conceptions of poetry. According to these conceptions, poets such as Homer, Virgil, and Isaiah serve as vehicles of divine truth and power. The key, for Shelley, to the power of their sacred poetic texts (and indeed of all poetry to varying degrees) is metaphor. Though every metaphor begins its life as a poetic novelty, all metaphors necessarily decay in historical time into "dead metaphors" (i.e., thoughtless, shorthand phrases, such as "feeling down" or "dead as a doornail"). Tracing this historical death back to the origins of language, Shelley claims that each language at its beginning consists entirely of poetry, insofar as each new word makes a new connection to whatever the word names in the world.

As a given language develops, however, only part of it remains poetry, and the subset of the language's speakers who work with that remaining poetry thereby become the creators of law, society, art, education, and religion. One striking implication of this history of language is that all religion is originally and inherently poetry. Indeed, Shelley adds, the words "legislators or prophets" are merely labels under which poets operated in the ancient world (Shelley 2002, 513). In this way, Shelley infuses the traditional bearers of natural law, the poets-as-prophets, with the powers of positive law theory, while nevertheless retaining their natural law stature. In short, nonreligious poets are secular prophets, promulgators of nondivine human laws.

Having thus undermined the distinction between the religious and the secular, Shelley then attacks the (partially-overlapping) distinction between poetry and philosophy. At first, he simply reverses the labels for famous poets and philosophers. “Plato is essentially a poet,” Shelley writes, while “Shakespeare, Dante, and Milton” are “philosophers of the very loftiest power” (Shelley 2002, 515). He quickly clarifies, however, that he wishes to replace a mutually exclusive conception of these two terms with a conception that one might call a “spectrum theory of poetry,” in which all texts are poetry (including philosophy and prose), but to varying degrees, with prose being merely the least poetic kind of poetry. One way to determine the degree of a text’s poetry, Shelley claims, is to consider its power to cause pleasure, specifically by acting on the reader or listener “beyond and above consciousness” (516). In short, to the degree that something delights us, and delights us specifically beneath our conscious awareness, it is poetry. Examples of the literal law delighting us include the rapturous attachment shown by many U.S. Americans for the *U.S. Constitution*, by Christians for the Ten Commandments, and by people worldwide for the French Revolution’s *Declaration of the Rights of Man.* This potent pleasure, Shelley adds, helps explain the power of poetry as law to compel, for the most part unconsciously, obedience.

It has been objected, based in part on Shelley’s following observation about Plato and Bacon, that he also deploys a narrower conception of poetry at other moments in the “Defense”:

> All the authors of revolutions in opinion are not only necessarily poets as they are inventors, nor even as their words unveil the permanent analogy of things by images which participate in the life of truth; but as their periods are harmonious and rhythmical, and contain in themselves the elements of verse; being the echo of the eternal music (Shelley 2002, 516).

To paraphrase, revolutionary legislators in the court of public opinion are poets (Shelley's example here being the philosopher Lord Bacon), not only because they are creative, or because their words capture objective truth in lively images, but because their writing manifests a poetic musicality. The implication here is that none whose writing is too prosaic can become figurative legislators. This excludes most literal legislators, not because their legislation is not poetry (since for Shelley all writing is to some degree poetry), but because their legislation is not poetic enough. Put differently, the most influential and sustainable laws are those, such as the Ten Commandments and the "Preamble" to the *U.S. Constitution*, whose poetic musicality elevates them above their local political origins, thereby achieving literary immortality. On my reading, Shelley is claiming, not that all literal and figurative legislators are equally poets, but that all are to some degree poets, though most of them are admittedly (like most poets) not very skillful.

More generally, this spectrum theory of poetry facilitates Shelley's blending of natural law theory with positive law theory. That is, it reimagines (a) human laws as mixtures of the natural and the posited, (b) legislators as varyingly poetic, and (c) poets as varyingly legislative. Though I have already attempted to substantiate the links between natural law theory and poetry, it might be helpful to pause here and make a similar effort regarding the links between poetry and positive law theory. The key connections, as I have explored in detail elsewhere, are those that Aristotle and Nietzsche identify among poetry, *poesis* and positing.[9]

Beginning with Aristotle, he deploys a verbal form of *poesis* (the singular verb being *poiein*) to refer to the first principles that are posited by his philosophical competitors (such as water posited by Thales, and fire posited by Heraclitus). In other words, the laws that these philosophers articulate for the cosmos are ones that they have freely posited. Moreover, the fact

[9] See Hall (2019) and (2012).

that Aristotle necessarily views his rivals' posited laws as mistaken reinforces the poetic freedom and license of their positing. Turning to Nietzsche, he claims (arguably drawing on Shelley), that poetry's central power is to posit imaginary entities, and to compel belief in those entities though its poetic musicality. That is, all laws for Nietzsche, literal and figurative, are the result of humans' poetic positing. Thus, both Aristotle and Nietzsche support positive law theory's contention that human laws are free creations of the sovereign human legislator, unbound by the so-called laws of nature.

An additional example of Shelley's blending of natural and positive law theory can be seen in the ways that he connects poetry to ethics. On the one hand, Shelley's use of poetry as a middle term linking the law to ethics resonates with natural law theory (for which the law is a branch of ethics). On the other hand, the specific way that poetry links ethics to law resonates with positive law theory (for which laws have no basis aside from imaginative human creation). I will now consider three examples of this dual blending. First, Shelley asserts that "to be greatly good," one "must imagine intensely and comprehensively" (Shelley 2002, 517). Thus, the same imaginative power that creates and buttresses laws also empowers poets' ethical greatness. Second, Shelley affirms that the "great instrument of moral good is the imagination," which implies that poets are better, not just at exceptional moral virtue, but also at everyday goodness. And third, toward the essay's end, Shelley again closely links poetry's aesthetic power to ethics, in the essay's final definition of poetry, namely "the record of the best and happiest moments of the best and happiest minds" (532). This means that the poet not only describes and inspires goodness, but also overflows their own personal goodness to the reader or listener.

To summarize these three examples, natural law links the law's rationality to goodness understood as an objective, universal property. Positive law denies any essential connection

between law and goodness. And Shelley links the law's imaginativeness to a sliding scale of poetic goodness. In part for this reason, Shelley's goodness is unlike that of the two foundational theorists of natural law. Whereas Aristotle's conception of goodness amounts to conformism, and Aquinas' conception terminates in deference to a transcendent power (namely god), Shelley's goodness is militant and revolutionary. The latter traits are suggested, for example, by his second definition of poetry in the "Defense," namely "a sword of lightning, ever unsheathed, which consumes the scabbard that would contain it" (Shelley 2002, 520). The goodness of Shelley's law is its liberatingly disruptive poetic power, which renders it a weapon that cannot be contained, even by its wielder.

It is due to this tremendous power of poetry that Shelley identifies it at the center of the history of politics and law, going back to the Ancient Romans, who have long been identified in the Western imaginary with the mythic origins of law. Shelley claims that, while Lucretius is in the highest, and Virgil in a very high sense, a creator," nevertheless the "true Poetry of Rome lived in its institutions" (Shelley 2002, 523). Here Shelley not only exalts a poet (Lucretius) who is near-universally judged as inferior to another (Virgil), but also exalts what one might call the calcified poetry of Roman law over Rome's most celebrated literal poet. In both cases, moreover, the poet Shelley affirms philosophy and (apparent) prose over poetry. This is not to ignore the many references to the Greeks in Shelley's text, but merely to observe that he also attends to the Roman civilization that has been more influential for literal legislators than has Greece. (This lesser influence is due in part to Athens having been a direct democracy, and therefore less invested in law per se than the republic and empire of Rome).

Similarly counterintuitive is Shelley's next move, which is to choose a poet for a position that one would expect him to fill with a philosopher. The "poetry of Dante," Shelley claims, is

"the bridge thrown over the stream of time, which unites the modern and the ancient world" (Shelley 2002, 526). Perhaps, pace Dante, Shelley intends this "over" both historically and eternally, with Dante's poetry stretched both parallel to the stream of time and also perpendicularly to that stream (from one eternal riverbank, as it were, to the other). In other words, Dante's poetry articulates allegedly divine laws that claim to transcend time, thus uniting the disjunct worlds of the ancients and the moderns. Insofar as this is correct, then Shelley's Dantean claim is consistent with Shelley's previous point about Roman poets and laws, given the *Comedy*'s influential self-presentation as a divinely-inspired sacred text. In fact, with the latter move, Dante anticipated and facilitated the Protestant Reformation, which in turn meant the dethroning of Aquinas' natural law theory. In sum, the true poetry for Shelley is the laws that Virgil's and Dante's verses articulated.

One concrete example of this poetic legislative power can be found in the real-life arena of gender relations, which both Virgil and Dante impacted by their elevation of human women to the status of timeless feminist heroines, namely Queen Dido of Carthage (for Virgil) and the Florentine citizen Beatrice Portinari (for Dante). In the latter presentation, Beatrice exceeds not merely Dante's own male virtue, but that of almost every human who ever lived.[10] In this spirit, Percy Shelley—husband and son-in-law of the feminist pioneers Mary Shelley and Mary Wollstonecraft, respectively—writes that the "freedom of women produced the poetry of sexual love" (Shelley 2002, 525). Though Dante was one of the founders of this modern genre, Shelley argues that Dante's work is more accurately understood as a revival of Plato. In the *Phaedrus*, Socrates cites the great love poet Sappho. In the *Symposium*, he relates how the woman Diotima

[10] See Hall (2020).

educated him in philosophical *eros.* And in the *Republic*, he argues for an equal education for men and women as co-guardians of the polis.

This type of social justice work, in Dante, Plato and Shelley himself, is perhaps what Shelley intended near his essay's end, writing that "we want the poetry of life" (Shelley 2002, 530). If one considers real-life examples of such life-poetry in practice (including the suffragist and women's liberation movements) then Shelley's final line seems less counterintuitive: "Poets are the unacknowledged legislators of the World" (535). Like Plato in the *Laws*, Shelley here explicitly names the law—not a law, but *the* law—as one of the forms taken by poetry, albeit in a new formulation compatible with the (then) nascent legal philosophy of positive law theory.

This formulation is what I am calling Shelley's new legal philosophy, natural poesis theory. By this phrase, I mean a poetic positing that creates, by identifying, the beautiful patterns in nature which poets can help fashion into human laws. This theory also bridges natural law theory and positive law theory, in three specific ways. From the first island, natural law theory, natural poesis theory's laws are based on orderly patterns that transcend the individual human mind. From the second island, positive law theory, natural poesis theory's laws are simultaneously the product of the creative imagination of individual human minds. And as the bridge between the two islands, natural poesis theory's laws are historically traceable to poets. More precisely, they originate with the poet-prophets of ancient monotheism, celebrated by natural law as divine vehicles, and critiqued by positive law as propagandists of a manipulative priesthood.

To condense these three points, and conclude this first section of my investigation, Shelley's natural poesis theory (1) substitutes imaginative transcendence for natural law's rational transcendence, (2) emphasizes the poetry of positive law's positing, and (3) valorizes the

founding poets and poetry which both traditions marginalize. It is no accident that this natural poesis theory, in Shelley' text, is located at the historical intersection of natural law theory and positive law theory. My hope is that this situatedness will facilitate an openness to natural poesis theory in those who recognize both the strengths and weaknesses of natural law theory and positive law theory, and who prefer to preserve the good in both while overcoming the rest.

II. Tocqueville's Aristo-Poetic Counterforce Theory

This theoretical bridging of Shelley's natural poesis theory, especially by way of its poetry, prefigures Tocqueville's similar bridging of positive law theory and critical legal theory. On the positive law side, Tocqueville is a contemporary and friend of J. S. Mill. On the critical legal theory side, Tocqueville differs from Mill in being less sympathetic to bourgeois political economies, and more sympathetic to archaic feudal aristocratic norms. The former comportment practically defines critical legal theory, and the latter comportment entails allegiance to a disempowered minority rather than to the white majority. Tocqueville's *Democracy* grew from the young prosecutor's official visit on behalf of the French government to the study the U.S. prison system. In his book, Tocqueville affirms that certain holdovers of the feudal era are necessary to restrain what he identifies as modernism's self-destructive tendencies and democracy's form of despotism. In other words, though the law indeed derives from the free poetic positing of the people (specifically through evolving cultural practices), society desperately needs a dialectical and critical counterforce, lest the majority run roughshod over disempowered minorities.

Though the connections and influences from Tocqueville to critical legal theory (and especially critical race theory) might seem less obvious than those between Shelley and natural

and positive law theory, the former are arguably even stronger. It was for this reason that my graduate mentor, an African American critical race theorist, enthusiastically recommended Tocqueville. The clearest link from Tocqueville to critical race theory is *Democracy*'s famous section entitled "Some Considerations on the Present State and the Possible Future of the Three Races that Inhabit the Territory of the United States." That section's retroactively vatic predictions include the genocide of most Native Americans, and a Civil War based on racist oppression. More generally, *Democracy* is one of the two foundational texts of the discipline of American Studies (the critical rejoinder to its other foundational text, *The Federalist Papers*).

A second and third strand of influences from Tocqueville to critical legal theory can be traced through J. S. Mill to a school of philosophy on whom he had a major impact, namely American Pragmatism. The second strand concerns John Dewey especially, whose anti-capitalist political philosophy and founding of the critical thinking method in the U.S. education system both contributed directly to critical legal theory (and especially critical race theory). More precisely, Tocqueville's trenchant critique of normalized materialism in the U.S., and his consistently multifaceted analyses of U.S. culture (including law), prefigure the work of critical legal theorists such as Duncan Kennedy, Kimberlé Crenshaw, and Roberto Unger.[11] And the third strand extends from Pragmatist's founder William James to his close friend Oliver Wendell Holmes, the legendarily progressive U.S. Supreme Court Justice. In brief, Holmes' controversial school of "legal realism" inspired critical legal theory's similarly realistic and pragmatic approach to U.S. law.[12]

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[11] See, for example, David Kennedy (2007), Kimberlé Crenshaw, et al (1996), and Roberto Mangabeira Unger (2015).

[12] For more, see A. Javier Travino (1994).

Of the vast secondary literature on Tocqueville, I am most sympathetic to the work of Cheryl Welch, Sheldon S. Wolin, and Lucien Jaume. With Welch, I hold that Tocqueville's analyses of women, nonwhite people, and other disempowered people are of central importance, and interpret him as anticipating Foucault (who is also popular among critical legal theorists).[13] With Jaume and Wolin, I find aristocracy at the heart of Tocqueville's entire corpus. In Wolin's words, "aristocracy is allowed to live on, not as a social class but as the symbol of a heroic politics of resistance" (Wolin 2001, 159). Jaume, similarly, cites Dino Confranceso's claim that Tocqueville adhered to values "which can be characterized as constituting an 'aristocratic state of mind'," including "the virtue of disinterestedness, participation in jointly exercised power, power of over oneself and one's prejudices, and finally what he calls *autarkeia*, that is, power over one's own domain" (Jaume 2008, 302). The latter virtue (in English, "autarchy") brings one back to Foucault, in whose later work the concept is central (thus supporting Welch's linkage of him to Tocqueville).

Against this scholarly background, I interpret *Democracy* as prefiguring critical legal theory's response to positive law theory, specifically by refusing to accept that the laws of modern (alleged) democracies such as the U.S. are merely poetically created ex nihilo. Instead, they are jointly shaped through the critical poetic counterforce of minority groups including African Americans, Muslim people, and practicing U.S. attorneys. For Tocqueville, the privileged name of this counterforce is "aristocracy," whose "spirit" or "soul" he associates with a counterintuitive group of phenomena including literal poetry, the law, and several overprivileged and disempowered communities. The latter, more specifically, are feudal lords, Native Americans, Southern slaveholders, and women. One implication of this association,

[13] See Cheryl Welch (2001).

resonant with critical legal theory, is that the aristocratic poetry of U.S. law begins in the cultural practices of the democratic majority but is challenged and refined by the figurative aristocracies that Tocqueville identifies in the U.S. Put differently, these figurative aristocracies constitute an aristo-poetic counterforce that can defy democratic despotism in pursuit of social justice for disempowered minorities.

This point warrants further clarification, as the source of law in Tocqueville's philosophy may not be as obvious as the source in Shelley's. There are two critical moments of legal genesis in Tocqueville, namely (1) the democratic improvisation of the figurative laws that are cultural practices, and (2) the aristocratic editing of these figurative laws for translation into literal laws. On my interpretation of Tocqueville, though literal poetry has little power in the democratic improvisational moment (due to the anti-literary hostility of the U.S. materialistic majority), a surprising amount of figurative poetry has great indirect power for the aristocratic moment. The reason for the latter is that the most hierarchical subcommunities in the U.S. channel their literary skills into legal work, which edits the products of democratic practice. In short, poetry flees from the democratic majority's hostility into the arms of the elite, who use it to control the majority's laws. This includes laws that further disempower women, people of color, and the poor, who are also the three demographics championed by critical legal theory.

I begin my reading of *Democracy* with the aristocracy of poetry, to reveal the latter's counterintuitive connection to Tocqueville's figurative U.S. aristocracies. At the beginning of Chapter 17 of Volume 1, "On Some Sources of Poetry in Democratic Nations," Tocqueville defines poetry as "the search for and depiction of the ideal" (Tocqueville 2002, 458). This aspiration to the ideal already suggests poetry's connection to the law, specifically in the law's loftiest aspirations (for example in the *Declaration of the Rights of Man and of the Citizen*). As

for poetry's relationship to democracy, Tocqueville's prognosis is mostly grim, concluding that "the taste for the ideal and the pleasure one takes in seeing it depicted are never as lively and as a widespread in a democratic people as within an aristocracy" (458). In short, poetry is inherently aristocratic, and aristocracies are inherently poetic.

Tocqueville identifies four tendencies in aristocracies' poetic nature, as follows: (1) emphasizing the soul over the body, (2) placing "intermediary powers between God and man" such as angels and demigods, (3) leading "the human mind to a contemplation of the past" filled with epic and dramatic poetic exploits, and (4) being constituted by both (a) "a certain number of privileged individuals whose existence is so to speak outside the human condition" and (b) "ignorant, humble, and subjugated classes" (Tocqueville 2002, 458-459). (The latter, he explains, "lend themselves to poetry by the very excess of their coarseness and misery as do the others by their refinement and greatness"). In short, both aristocracies and poetry are populated with souls, supernatural beings, and legendary/mythical heroes.

Each of these points, moreover, illustrates hidden connections between poetic aristocracy and disempowered groups in the U.S. First, women according to Tocqueville are the privileged bearers of aristocratic religious mores prioritizing soul over body. Second, the aristocratic "persons" constituted by associations (including legal associations fighting for the disempowered) function as political powers intermediary between the individual and the democratic sovereign. (The sovereign in the U.S. being the people, and especially the majority). Third, the past for disempowered minority communities such as African Americans and Native Americans is a repository of memories of injustice. And fourth, the U.S. today is filled with the ongoing, excessive suffering and misery of these and other disempowered communities.

Before turning to my next example of Tocqueville's U.S. aristocracies, it might help to consider *Democracy*'s most famous constructive claim about poetry, as follows:

> Among a democratic people poetry will not be fed with legends or the memorials of old traditions…the destinies of mankind, man himself taken aloof from his country and his age and standing in the presence of Nature and of God, with his passions, his doubts, his rare prosperities and inconceivable wretchednesses, will become the chief if not the sole theme of poetry among these nations (Tocqueville 2002, 463).

By shifting from fantasy to reality, and from the mythic past to the living present and future, democratic poetry thereby also shifts away from poetry's traditional essence, which helps explains Tocqueville's grim conclusion that there is little place for poetry in the U.S. And what little poetry remains, according to his prophecy, will be burdened with a dull homogeneity of theme, and a lowly anonymous protagonist.

This diminished importance of literal poetry in a democracy like the U.S. nevertheless suggests, especially after Shelley, that there must be some other figurative poetry at work elsewhere, likely among the U.S. "revolutionaries of opinion" working in prose. In other words, put on the defensive by the democratic majority's indifference and hostility, the aristocratic spirit of the poets flees for refuge and empowerment to the similarly marginalized aristocratic-spirited enclaves of U.S. society, and especially the legal profession. At a more mundane level, this process can be observed perpetuating itself, each time a junior in college changes their major from English to Pre-Law, in fear of lifelong irrelevance and poverty. Beneath the homogeneous suits, however, lies the heart of the poet; and between the lines of legalese, there is room enough for poetic power.

With this poetic background in place, I now proceed sequentially through *Democracy*'s litany of other literal and figurative aristocracies. Its first literal aristocracy, namely the feudal nobility, appears on the book's second page. Tocqueville claims that democracy's defining feature, "equality of conditions," was ironically "introduced into government by the aristocracy itself" (Tocqueville 2002, 3). That is, the feudal nobility, "in order to struggle against royal authority or to take power from their rivals, gave political power to the people" (4). Tocqueville claims, nostalgically, that this feudal aristocracy, in previous eras, "took the sort of benevolent and tranquil interest in the lot of the people that the shepherd accords to his flock" (8). As a result, one "could see inequality and misery in society at that time, but souls were not degraded" (8). To reverse this soul-degradation in the U.S., but without reintroducing feudal inequality and misery, Tocqueville recommends that "free association of citizens could then replace the individual power of the nobles" (9). This point resonates with critical legal theory's championing of associations of workers, women, and people of color (among others) to challenge the hegemony of white supremacist patriarchal capitalism.

Moving from *Democracy*'s first literal aristocracy to its first figurative aristocracy, the racial identities of the Native American peoples reveal another resonance with critical legal theory, especially critical race theory. Tocqueville introduces the Indigenous Americans with the following startling claim: "The most famous ancient republics [i.e., Greece and Rome] had never admired a firmer courage, prouder souls, a more intractable love of independence than was then hiding in the wild woods of the New World" (Tocqueville 2002, 25). Tocqueville's Greco-Roman analogy extends beyond ethics, moreover, to include all of philosophy and religion. He observes that Native Americans' "adored God," and that their "notions on great intellectual truths were generally simple and philosophical" (26). In a later elaboration of Native American

philosophies, Tocqueville observes that they hold “the same ideas, the same opinions, as the noble of the Middle Ages in his fortified castle” (314). In this way, Tocqueville also connects Native Americans to the literal aristocracy of the feudal nobility (314).

At this point, given my selective quotations concerning Native Americans (in pursuit of my theme of aristocracy), the reader might justifiably worry that Tocqueville succumbs to the opposite but also problematic racist stereotype of Indigenous Americans, namely the “noble savage” (as popularized by Rousseau and the Romantics). On the contrary, Tocqueville describes them as, above all, human beings who are suffering unspeakable injustice. “The Europeans,” he writes, “after having dispersed the Indian tribes far into the wilderness, condemned them to a wandering and vagabond life, full of inexpressible miseries” (Tocqueville 2002, 305). He even goes so far as to write of “the pretended nobility of” the Native American’s “origin” (305). In fact, the closest Tocqueville comes to romanticizing these peoples is his description of the genocide’s impending completion. Just like his medieval nobles, the eighteenth-century Native Americans are, in Tocqueville’s vision, already tragically doomed. “The ruin of these peoples,” he writes, “began on the day when the Europeans landed on their shores; it has continued ever since; in our day it is finishing its work” (27). Also tragically, the fact that this injustice has persisted unabated for almost 200 years makes the historical gap between Tocqueville and the critical legal theorists less significant than one might assume. That is, critical legal theory ends up repeating a surprising number of his critiques.

Zooming back out to this group of Tocqueville’s U.S. aristocracies, what they all resist is the democratic majority’s relentless homogenizing conformism. The latter tendency arises, he claims, from “a depraved taste for equality in the human heart,” which taste “brings the weak to want to draw the strong to their level” and “reduces men to preferring equality in servitude to

inequality in freedom" (52). The political cost of this preference, Tocqueville continues, is that "when citizens are all nearly equal, it becomes difficult for them to defend their independence against the aggressions of power" (52). By resisting this equalization, the U.S. aristocracies that Tocqueville identifies have repeatedly saved it from self-made disaster.

Among these salvific aristocracies, the legal profession is the one that is covered most exhaustively in Volume 1, specifically in Chapter 8, "On What Tempers the Tyranny of the Majority in the United States," and especially the latter's first subsection, "On the Spirit of the Lawyer in the United States and How it Serves as a Counterweight to Democracy." As these titles imply, Tocqueville reaches two fundamental conclusions about this legal aristocracy. First, a balance between democracy and aristocracy is necessary for a free and non-tyrannical U.S. And second, what preserves U.S. freedom is not lawyers as such, but their spirit, which implies that any U.S. groups sharing that lawyerly spirit—including *Democracy*'s other aristocracies—also share its liberty-saving power. Moreover, since the legal profession is today open to anyone (at least in theory), this lawyerly aristocracy also overlaps with *Democracy*'s other aristocracies, including poets, Native Americans, and women. In this way, this lawyerly freedom-preserving power can be synergistically augmented—which is precisely what has occurred with critical legal theory (and especially critical race theory).

Tocqueville begins this section by describing lawyers' participation in U.S. government as "the most powerful barrier today against the lapses of democracy" (Tocqueville 2002, 251). He immediately clarifies, though, that lawyers have not always performed this function in all historical times and places. For three counterexamples, medieval lawyers supported monarchs, English lawyers of Tocqueville's era "have been seen to unite intimately with the aristocracy," and in France the lawyers "have shown themselves to be its [aristocracy's] most dangerous

enemies" (251). There is, however, a common theme, in all three counterexamples and the U.S. example, namely defiance. In the case of the U.S., given its anti-aristocratic norms, this lawyerly defiance manifests as an anti-anti-aristocracy, which (by double-negation) amounts to pro-aristocracy.

Tocqueville traces this oppositional spirit to U.S. lawyers' education and socialization. "Men who have made the law their special study," he observes, "have drawn from their work the habits of order, a certain taste for forms, a sort of instinctive love for the regular sequence of ideas" (Tocqueville 2002, 252). Moreover, this lawyerly education is historically oriented, studying laws inherited from England and Rome. In this way, an aristocratic past invades the democratic present, transfiguring U.S. lawyers into strangers in this strange land, and connecting them to their historical precursors in the feudal nobility and the Native Americans' ancestors. Due to this education, finally, U.S. lawyers "naturally form *a body*" and "a sort of privileged class among [persons of] intelligence," since "communities of study and unities of methods bind their minds to one another" (252). This reference to embodiment recalls Tocqueville's prior point about democratic associations' forming aristocratic bodies. "Hidden at the bottom of the souls of lawyers," Tocqueville concludes, "one therefore finds a part of the tastes and habits of aristocracy" (252).

Like *Democracy*'s other aristocracies, U.S. lawyers also have a more complex relationship with democracy's majority than do conventional aristocrats. Although "lawyers are naturally brought by their tastes toward the aristocracy," Tocqueville explains, lawyers are simultaneously "naturally brought toward the people by their interest" (Tocqueville 2002, 254). Insofar as "the rich man, the noble, and the prince are excluded from government" by democracy, Tocqueville continues, lawyers become "the only enlightened and skilled men whom

the people can choose outside themselves" (254). Put differently, the lawyer "is like a natural liaison between" the people and aristocracy, "like the link that unites them" (254). This linkage is so crucial for Tocqueville that, "without this mixture of the spirit of the lawyer with the democratic spirit," he "doubt[s] that Þmocracy could long govern society" (254).

Put in terms of the history of legal philosophy, Tocqueville distrusts positive law theory's unopposed positing, and instead prefers the aristo-poetic counterforce affirmed by critical legal theory. To take one famous example, critical race theorist Cheryl Harris argues, in her essay "Whiteness as Property," that "The origins of property rights in the United States are rooted in racial domination" (Harris 1996, 277). More precisely, only black people were treated as property, Native Americans were subjected to genocide as the result of the declaration of their lands as white property, and these injustices have been perpetuated and exacerbated by the disproportionately large property inheritances of white Americans down to the present. Thus, like Tocqueville, Harris offers a critical counter-narrative to the U.S.' white-dominated narratives of brave colonists, benevolent enslavers, adventurous pioneers, and an equal opportunity for wealth regardless of race.

Also resonant with critical legal theory, Tocqueville affirms an ethical-religious power in the U.S.'s legal aristocracy which is directly tied to historical memories of injustice. Given the common law's dependence on historical precedent, Tocqueville avers that "the English or American man of law resembles in a way the priests of Egypt," specifically in being "the long interpreter of an occult science" (Tocqueville 2002, 255). By contrast, a French lawyer (like Tocqueville himself) merely reasons in the present, and in a way that is accessible to the layperson (255). This ethical-religious ambience can also be felt in Derrick Bell's classic interpretation of *Brown V. Board of Education* (the Supreme Court decision that technically

ended formal educational segregation). Bell's essay lionizes Herbert Wechsler, a misunderstood civil rights rebel professor and attorney. Though Weschler welcomed the consequences of the ruling, he nevertheless "saw the need for criteria of decision that could be framed and tested as an exercise of reason and not merely adopted as an act of willfulness or will" (20). In Tocqueville's terms, Bell praises Wechsler's distrust of the mere subjective poesis of the democratic majority, since he rightly anticipated that today, sixty-five years later, "most black children attend public schools that are both racially isolated and inferior" (20).

Emboldened by exploring the details of U.S. legal practice, Tocqueville then elevates U.S. lawyers from a merely legal aristocracy to a fully literal one. "The American aristocracy," he writes, "is at the attorneys' bar and on the judges' bench," where "the body of lawyers forms the most powerful and so to speak the lone counterweight to democracy in this country" (Tocqueville 2002, 256). Tocqueville then elaborates, as follows: "The courts are the most visible organs used by the body of lawyers to act on democracy" (256). The individual lawyer's considerable political power, he continues, "serves to place him in a rank apart and to give him the instincts of the privileged class" (257). More specifically, U.S. lawyers are the "sole enlightened class that the people do not distrust," and are therefore "naturally called on to occupy most public offices" (257). This explicit elevation of a lawyerly elite has a parallel in Roberto Unger's distinction between jurists as priests and jurists as prophets (Unger 2015, 12, 75, 100). In brief, Unger calls for the democratizing creation of "political prophets"—both within and without the judicial system—to oppose the legal functionaries, who support the current system regardless of its injustices.

One might object, however, that if most offices are occupied by the members of an aristocracy, then how can we still call the U.S. a democracy? Tocqueville's honest answer,

perhaps, would be that the U.S. has always been an aristocracy in disguise. This would also help explain why he offered the U.S. example to his fellow French citizens, since France was at the time convulsing in its own series of democratic crises (which in Tocqueville's view could have been ameliorated by an infusion of more aristocracy). Support for this interpretation can be found in the following, sinister-sounding coda to this section of *Democracy*:

> Lawyers in the United States form a power which envelops society as a whole, penetrates into each of the classes that composes it, works in secret, acts constantly on it without its knowing, and in the end models it to its desires (Tocqueville 2002, 258).

Put in terms that anticipate my reading of Volume 2 of *Democracy* below, though the U.S. possesses an ostensibly democratic body, it only runs on its aristocratic blue blood.

The most famous example in *Democracy* of this aristocratic infiltration of the U.S. is Tocqueville's valorization of jury duty. "In forcing men to occupy themselves with something other than their own affairs," he writes, jury service "combats individual selfishness, which is like the blight of societies" (Tocqueville 2002, 262). More precisely, jury duty "serves incredibly to form the judgment and to augment the natural enlightenment of the people" (262). In this way, the jury constitutes, according to Tocqueville, "a school, free of charge and always open" (264). Finally, and "above all," it is this jury "school" that "makes what I have called the spirit of the lawyer penetrate down to the lowest ranks of society" (264). In other words, the U.S.'s literal legal aristocracy trains its people in a figurative aristocracy of soul—in Tocqueville's words, "a virile disposition without which there is no political virtue" (262).

Volume 2 of *Democracy*, published five years after Volume 1 (in 1840), adds both a new dimension of U.S. aristocracy, and one last figurative aristocracy. The new dimension is an elaboration of his identification of aristocracy with the soul, and a corresponding identification of

democracy with the body, which entails that his figurative U.S. aristocracies, qua aristocracies "of soul," are therefore "aristocracies of aristocracy," or (by logical substitution), "the soul of soul." In other words, the core of aristocracy for Tocqueville is "soul," which means that figurative aristocracies are more essentially aristocratic, and that these aristocracies are the very core of their societies.

Tocqueville sets the stage for this aristocracy-soul identification by first linking aristocracy to religion, the privileged domain of the soul. Equality, which for him is democracy's central tendency, "opens [peoples'] souls excessively to the love of material enjoyments," whereas the "greatest advantage of religion is to inspire wholly contrary instincts," especially by affirming the soul's immorality (Tocqueville 2002, 419). The latter is so important, in his view, that he openly advises politicians to "act every day as if they themselves believed it" (521). As caretaker of the most powerful counterforce to democracy's equality, religion's soul is thereby linked to aristocracy.

Having thus link aristocracy and soul, via religion, Tocqueville proceeds to link aristocracy to a cognate of soul, via science (more precisely "mind," which derives from the ancient Greek *psyche*, meaning "soul"). "In aristocratic centuries," he writes, "enjoyments of the mind are particularly demanded of the sciences; in democratic those of the body" (Tocqueville 2002, 437). Finally from this three-part argument, Tocqueville then links aristocracy to soul via the arts. Democracies, he observes critically, "often turn [artists] from the depiction of the soul to apply themselves only to the body" (442). Condensing these three points, religion for Tocqueville is aristocratic because its emphasis on soul is shared by the aristocratic phenomena of the arts and sciences. This is important, Tocqueville indicates, because "the soul must remain great and strong, if only to be able from time to time to put its force and its greatness in the

service of the body" (522). In sum, every democratic individual is internally dichotomous, a doublet of aristocratic soul and democratic body. This allows an augmentation, through the soul, of the aristocratic opposition to democracy's despotism.

This internalized dichotomy also obtains, according to Tocqueville, at the level of marriage, which brings me to *Democracy*'s final figurative aristocracy. His analysis of women in the U.S. follows his discussion of literal aristocrats' stoic endurance of material deprivation, and their self-sacrifice in pursuit of higher, soulful ideals. The connection to women here, and the elevation of women to the status of a figurative aristocracy, appears earlier in Tocqueville's claim that religion "reigns as sovereign over the soul of woman, and it is woman who makes mores" (Tocqueville 2002, 279). He then repeats the latter claim verbatim in Chapter 9, "Education of Girls in the United States," which stresses their balance of independence and disciplined restraint. Nowhere more than in the U.S., he asserts, "is the girl left more promptly or completely to herself," yet she still "enjoys all *permitted* pleasures *without abandoning herself to them*, and her reason does not drop the reins although it often seems to let them dangle" (563, 564, emphasis added). This issue of balance reappears in the subsequent chapter. There, regarding U.S. girls' transition to marriage, Tocqueville claims that "it is in the use of independence that she drew the courage to undergo sacrifice without struggle and without murmur when the moment came for it to be imposed on her" (566). In short, he sees U.S. women as freely choosing to give up their freedom.

It is unsurprising, therefore, that "American women," from Tocqueville's perspective, "often display a manly reason and a wholly virile energy," and that they "sometimes show themselves to be men in mind and heart" (Tocqueville 2002, 574). In conclusion, reminiscent of his praise for *Democracy*'s other aristocracies, "if one asked me to what do I think one must

attribute the singular prosperity and growing force of this people, I would answer that it is to the superiority of its women" (576). Put in terms of Tocqueville's previous claim about the internal balance of aristocratic soul and democratic body, every legal "person" constituted by (conventional heterosexual) marriage is similarly internally balanced. In this case, the balance comes from its being constituted by an aristocratic woman and a democratic man.

This point also sheds new light on the following famous quote from *Democracy*, which brings my investigation full circle, back to its first aristocracy of poetry:

> One can conceive of nothing so small, so dull, so filled with miserable interests, in short so antipoetic, as the life of a man in the United States; but among the thoughts that direct it [i.e., the life] one always meets one [thought] that is full of poetry, and that one is like the hidden nerve that gives vigor to all the rest (Tocqueville 2002, 461).

To paraphrase, using a variation on the cliché, behind every antipoetic, democratically bodily man stands a poetic, aristocratically soulful woman.

More specifically, Tocqueville identifies two poetries here. The first, namely the "life of a man in the United States," derives from another of *Democracy*'s figurative aristocracies, the "great English property owners" living "Southwest of the Hudson," who brought to the colonies their aristocratic "principles, and with them English estate laws" (Tocqueville 2002, 46). Tocqueville notes that it was "this class that, in the South, put itself at the head of the insurrection; to it the American Revolution owes its greatest men" (46). Moreover, the "American of the South" in Tocqueville's day, descended from such original Southerners such as Washington and Jefferson, "has the tastes, prejudices, weaknesses, and greatness of all aristocracies" (361). As is also true for Marx, however, for Tocqueville too the energies of class struggle eventually fueled the destruction of the feudal class, in favor of the bourgeoisie.

These class struggle ideas, moreover, are what compose the above block quote's second poetry, namely the "thoughts that direct" the life of the U.S. (As such, these "thoughts" could also be could be understood as the ghosts of that quote's first poetry). This second poetry, in other words, is the return of the repressed, the critical interventions of the poor, women, and various racialized others. From these sources, this second poetry channels the aristocratic power and values of the U.S.'s vicious literal aristocracies (including the founders, slaveholders, and industrialists) to resist and overcome today's legalized dystopia.

In the latter, finally, I identify Tocqueville's new philosophy of law, "aristo-poetic counterforce theory." By this phrase, I mean that the U.S.'s figurative aristocracies channel its literal aristocracies' poetry of law into an aristo-poetic counterforce to democratic despotism, in pursuit of social justice. This counterforce could be an example of what Tocqueville prophesied as democracy's true poetry, which views the entire world as "nothing but a vast democracy," and which "puts the shape of the human race in broad daylight for the first time" (Tocqueville 2002, 461). Guided by critical legal theory's poetic counterforce, democratic "equality does not destroy all the objects of poetry; it makes them less numerous and more vast" (463). In this way, the creative power of positive law theory is harnessed, and its worst abuses checked, by critical legal theory's virtuous figurative aristocracies, in pursuit of social justice for all.

III. Conclusion: Natural Aristo-Poesis Counterforce Theory

It is no accident that these two texts, wherein I posit these two new bridging philosophies of law as poetry, are located at the intersections, historical and conceptual, among natural law theory, positive law theory, and critical legal theory. More precisely, though Volume 1 of *Democracy* was published in 1835, and "Defense" was written in 1821, the latter was published

(posthumously) in 1840, the same year as Volume 2 of *Democracy*. Thus, Shelley's and Tocqueville's texts overlap at the center of the same century that boasts the second of the three central theories in the history of legal philosophy. Despite occupying this same historical juncture, however, Shelley attempt to bridge the past (natural law) and present (positive law), while Tocqueville attempts to bridge the present (positive law) and future (critical legal).

The remaining problem, though, is that these bridges appear insufficient, owing perhaps to the precarious narrowness of their construction, as evidenced by the fact that neither theory is well-known nor utilized in the philosophy of law. To remedy this situation, I have taken advantage of this surprising combination of historical simultaneity and conceptual juxtaposition, attempting to build a stronger, wider bridge to reinforce these two weaker, narrower bridges. More specifically, in the metaphorical ocean of theory, where Shelley constructed a bridge that can support literary critics in crossing between the islands of natural law and positive law, and Tocqueville constructed a bridge that can support historians in crossing between the islands of positive law and critical legal theory, I have attempted to construct a reinforced, two-part bridge that can support even legal philosophers in crossing among all three islands. In effect, I am attempting to broaden the theoretical definition of the law, by uniting three currently isolated and warring settlements into one archipelago city—an aspiring cosmopolitan Venice of legal theory.

To paraphrase my opening remarks in terms of this metaphor, the first island is natural law theory, where law grows wild as divinely inspired prophetic poetry. The second island is positive law theory, where law is cultivated as creative human positing (from poetry's *poesis*). And the third island is critical legal theory, where law has become an imprisoning overgrowth in need of pruning for a renewed poetic liberation. The first arch of my bridge, between the first and second islands, is natural poesis theory, which enables a cross-cultivation whereby the law

becomes beautiful patterns in nature, which poets can help fashion into the human laws they help sustain. The second arch of my bridge, over the second and third islands, is aristo-poetic counterforce theory, which enables a cross-cultivation whereby the law becomes an aristocratic force that is redeployed by virtuous figurative aristocracies against democratic despotism. Uniting all three islands, this two-part bridge constitutes what I am tentatively calling "natural aristo-poetic counterforce" theory.

In the latter conception, through a cross-cultivation of all three islands, the law becomes the poetry of the virtuous, growing on the organic scaffolding of nature, and inherently oppositional (comparable, in both ways, to ivy on an oak). More precisely, law in this conception is opposed to existing laws, some literal poetry, those people who are wrongly portrayed as virtuous, and various aspects of nature that undermine community flourishing. Put differently, the law is something made by the best people in the community, which creatively discovers and tracks the natural scientific laws that necessarily structure human communities, and in so doing resists various destructive forces in the society. The latter forces include older laws that may have crystallized and cemented previous eras' injustices, the oligarchical persons and institutions masquerading as a virtuous aristocracy, and those phenomena in human and nonhuman nature that would otherwise run roughshod over the community (such as selfishness and natural disasters). I will now, by way of conclusion, consider two concrete examples of natural aristo-poetic counterforce theory, one literal and one figurative.

First, the Civil Rights Act of 1964 was the creative act of heroic activists, erected on the natural equality of what were regarded (at the time) as biological racial groups, in order to challenge (a) various laws of the Jim Crow era, (b) poetic cultural artifacts (such as blackface minstrel performances and the film *Birth of a Nation*), (c) the presumed-aristocratic white

supremacist industrial-political oligarchy, and (d) the natural inertia that psychology and sociology (among other scientific disciplines) have identified as entrenching racism in the U.S.

And second, Milton's *Paradise Lost* was the creative act of a heroically-defiant poet, erected on the Enlightenment's scientific conception of human equality (across classes, and to a certain degree genders, but not races), to challenge (a) laws such as those protecting regressive monarchy and marriage, (b) the literal poems of rival poets who defended regressive monarchy and marriage laws, (c) England's vicious literal oligarchies (including the House of Lords), and (d) the natural-scientific forces propping up said regime.[14]

For reasons of space, I cannot further elaborate this new theory of law as poetry here. But I am happy to do so in future research, if this beginning strikes any readers as promising.

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[14] For more on Milton and law, see Hall (2018).

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