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Enacting citizenship for the healthy politeia

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ABSTRACT

In the wake of ‘end of ideology’ predictions of the late twentieth century, nationalist ideologies and discourses have proven strikingly resilient, as have authoritarian regimes relying on nationalism for their legitimacy and power. Meanwhile, so-called liberal political philosophers and theorists who claim commitments to rights and justice make arguments that invigorate nationalist subjectivities at the expense of the rule of law. This essay explains how even those who are critical of nationalist, authoritarian regimes nonetheless use a vocabulary that reinvigorates Jacques Derrida’s ‘sovereign beast’. Insights from Miguel de Cervantes and Franz Kafka are used to amplify Engin Isin’s timely if not urgent arguments on behalf of theorizing citizenship as enactments that are *creative, innovative, and autonomous*, and not as a status derived from membership. Plato’s views on justice and the ‘healthy politeia’, as well as examples of creativity within existing governments are elucidated to further emphasize the benefits of theorizing new scripts for citizens over proposing new theories for governments.

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[W]e have a chance to rescue the political subject from the claws and pangs of the sovereign beast by naming it as a ‘citizen without frontiers’; but just at that moment of possible rescue, we are delivering to the beast the soul of the political subject. Engin Isin, *Citizens Without Frontiers* (2012 46).

Some commentators on the invasion of Ukraine assert Vladimir Putin is mad (Troianovski 2022) and explain away substantial Russian support for the war as a consequence of state propaganda (Sonne and Ilyushina 2022). And yet Putin is no madder than President Andrew Jackson, who in the 1830s expanded the U.S. frontier by the violent ‘subjugation of the American Indian’ (Rogin 1975), or President James Polk, who in 1845 invaded Mexico, extorting the government to sign over to the United States territory one-third of its contiguous territory (Graebner 1980), much less the unprovoked invasions and occupations of Vietnam and Iraq.

The Russian public, like citizens of other nation-states, grow up expecting stories that include such conflicts. Russians do not support Putin because they are being duped by propaganda specific to the war. As one commentator put it, ‘If everybody lies, they think, then we should support “our son of a bitch”’, (Dmitry Kartsev, quoted in Troianovski 2022). Russians who support the war do so because the lies align with a far greater fiction

that has been propagated through sovereign governments for centuries, the fiction of the nation through which the public knows which one is ‘our son of a bitch’ and have faith in the nation’s existential necessity to human life.

The ‘sovereign beast’ Engin Isin invokes for his critiques of nativist, status-based understandings of citizenship often is associated with images of White nationalists such as Marine Le Pen and her father Jean-Claude, Viktor Orban, Vladimir Putin, or Donald Trump (Isin 2012, citing Derrida 2009). But they are not alone, nor are racist, conservative philosophers such as G.W.F. Hegel ([1821] 1967) or Carl Schmitt ([1932] 2007) their only intellectual allies. This essay notes that liberal philosophers as well as post-sovereign critics of settler colonialism produce axioms of belonging in a political community that encourage liberals and self-described radicals alike to feed the sovereign beast. Isin’s approach, explored in this essay, depends on a Nietzschean and deconstructive understanding of politics at odds with those who theorize citizenship or other political problems by relying on intuitions, axioms, and philosophies of so-called moral questions about justice rooted in ontology or deontology. Isin’s approach also rejects the aspirations of oppressed minority nations, including proponents of a resurgent, Indigenous nation.

The purpose of this essay is to use insights from Isin to suggest how citizens today can script writ large a world in which the rule of law allows for creative enactments of policy and its interpretations, as well as critiques and dissent by, through, as, and even against ‘we, the people’ through the pursuit of justice through a prioritization of what is ‘healthy’ and ‘just’.

The overarching objective is to elaborate and concretize the meanings of ‘enacting citizenship’ (Isin 2012), including refinements that shift the mobilizing objective away from a discourse of rights and justice, and toward aspirations for public health. The proposal developed here is that claims grounded in ‘health’ and not rights allow the production of scripts tied to concrete, mutually recognizable, and universal imperatives necessary for the citizens without frontiers Isin so eloquently represents and theorizes.

The essay first notes the hurdles to understanding citizenship as enactments posed by vast portions of influential moral philosophy as well as more recent scholarship on indigeneity sympathetic to insuring *intergenerational forms of being*, meaning ‘the self-consciousness of an age, a political society, or an individual’ expressed through nationality, ethnicity, race, and family role (Stevens 1999, xiii, 238). The purpose is to show how the scholarly interventions of contemporary political theorists do not just get history and politics wrong, but feed the sovereign beast they claim to be attacking even when they have very different methods and political objectives. Third, I turn to the views of enacted sovereignties in *Don Quixote* (Cervantes [1606/1615] 2015) and *The Trial* (Kafka [1925] 1998) to underscore the utility of Isin’s approach to representing politics as struggles over scripts and not debates about abstract theories. These two world historical novels are not just works of fiction, but thematize the form of citizenship as enactments Isin brings to our attention. Revealing how our politics are enacted through exegeses of Cervantes’ and Kafka’s theatricalization of political and legal struggles highlights the dramas over which we struggle today, in particular through our stories of the nation and the law.

I conclude by expanding on Isin’s work to suggest theories and acts of citizenship that might stage within institutions of governance the sorts of novel and creative resistances his work locates among those operating outside the law. The final sections reflect on how

contemporary institutions of governance can and are being occupied by those wishing to enact citizenship in ways that are *creative*, *innovative*, and *autonomous*, the criteria Engin Isin introduces for explaining the advantages of scripts for ‘enacting citizenship’. Instead of searching for new and better forms of government, the argument here is that many countries have institutions that can be used to bend the arc of history toward outcomes that are more healthy if not more just.

I. The axiomatic nation

From John Rawls (1971) to Glen Coulthard (2014), scholars with very different views on sovereignty ontologize intergenerational groups, especially ‘nations’, thus disregarding insights from Hegel ([1821] 1967) and anthropologists on how political societies create kinship rules to produce members, including citizens, through legal families (Stevens 1999). Contemporary intuitions that nations reflect pre-political groups echo those of Hannah Arendt, who abhorred nationalism and criticized the nation-state (Arendt [1944] 1978, 367; [1951] 1968, 230, [1963] 2018, 256), but attacked the post-World War Two cosmopolitan worldview for ‘break[in] all national traditions and bur[ying] the authentic origins of all human existence’ (Arendt 1957, 543–44). In the same essay, continuing her critique of work by her mentor Karl Jaspers, she writes:

... [J]ust as man and woman can be the same, namely human, only by being absolutely different from each other, so the national of every country can enter this world history of humanity only by remaining and clinging stubbornly to what he is. A world citizen, living under the tyranny of a world empire, and speaking and thinking in a kind of glorified Esperanto, would be no less a monster than a hermaphrodite. (Arendt 1957, 546)

Note how the language on sex resonates as an ugly anachronism, while the phenomenology of national or racial authenticity continues to have broad acceptance (Aizura 2006; Tuvel 2017), despite its imbrication in a politics of patriarchy, nationalism, and racism (Hegel [1821] 1967), and the evidence of harms nations cause, internally and on the world stage, including nations that were at one point oppressed minorities (Stevens 2006).

II. Acts of sovereignty and the rule of law as poorly inscribed

Instead of intellectual histories of principles, reasons, or discourses, Isin suggests we can best discern citizenship’s meanings through scripts and acts (2008, 2012). To address the stickiness of ‘the nation’ and other failures of the rule of law that result in systemic violence and oppression, this section responds to Isin’s invitation to understand citizenship as enacted. The centrality to state violence of narrative fiction, not bad ideas, is exquisitely captured by Miguel de Cervantes. Cervantes worked as a tax collector of the Spanish monarchy and had sought, unsuccessfully, an appointment as governor for Peru (McCrory 2006). His novel within a novel, which contains plays as well, makes fun of the conquistadors. Like many others, Cervantes recognized that the tales they sent home from the Mediterranean and America tracked stories of creatures and places published in widely read fictions, especially the five-volume work by García Rodríguez de Montalvo about the exploits of Amadis de Gaul and his

son Esplandian ([1599] 1992). Perhaps the most obvious example is ‘California’, a toponym derived from a fictional island populated by Amazons in the fifth volume of the knight chivalry romance (Rodríguez de Montalvo and Thomas Little 1992, 456–457; Goodman 1998, 151–52). Were Elon Musk to tweet about his crew encountering ‘Klingons’ from the ‘United Federation of Planets’ it would have elicited the same response as the narratives from the expedition of Hernan de Cortez about their discovery of Amazons in California.

El ingenioso hidalgo [gentleman] don Quixote de la Mancha. The ingenious gentleman don Quixote of la Mancha [1605/1615]

Like the conquistadors, Don Quixote inhabits a world enchanted by figures and stories experienced by the protagonists in the works of fiction Quixote says inspired him (Cervantes [1605/1615] 2015, 1). However, rather than contrast the factualized realities of New Spain with accounts tracking narratives by Rodríguez and others, Cervantes reveals a world of inevitably enacted and materialized narratives. It’s dramas within dramas all the way down. And, Cervantes shows, we’re all in on it. Far from being fooled, we the audience really do know better and, like Sancho, more and less cheerfully play along, an insight that helps explain the obliviousness to evidence and the ‘better argument’ on the part of populations captured by the narratives and the theorists or story-tellers who are debating these experiences. Instead of focusing on phenomenologically non-fictional texts produced by scholars, the imperative for enacting new and better scripts than those expected by narratives of the nation may be more clearly dramatized by understanding these discourses as themselves bad scripts, an intervention facilitated by readings of well-known fiction writers themselves focused on the deadly violence we inflict and endure as actors and audiences in bad fictions.

Cervantes states the conceit quite directly. After Sancho expresses relief that he did not accept as rewards for a fake fight the cheap imitations of a crown and sceptre used by the actors, Cervantes writes:

“That is true,” replied Don Quixote, “because it would not be proper if the finery in plays were really valuable instead of merely illusory and apparent, as the plays themselves are; I want you, Sancho, to think well and to have a good opinion of plays, and to be equally well-disposed toward those who perform them and those who write them, because they are all the instruments whereby a great service is performed for the republic [*republic*], holding up a mirror to every step we take and allowing us to see a vivid image of the actions of human life; there is no comparison that indicates what we are and what we should be more clearly than plays and players. If you do not agree, then tell me: have you ever seen a play that presents kings, emperors, and pontiffs, knights, ladies, and many other characters? One plays the scoundrel, another the liar, this one the merchant, that one the soldier, another the wise fool, yet another the foolish lover, but when the play is over and they have taken off their costumes, all the actors are equal.” “Yes, I have seen that,” responded Sancho. “Well, the same thing happens in the drama and business of this world, where some play emperors, others pontiffs, in short, all the figures that can be presented in a play, but at the end, which is when life is over, death removes all the clothing that differentiated them, and all are equal in the grave.”

“That’s a fine comparison,” said Sancho, “though not so new that I haven’t heard it many times before, like the one about chess: as long as the game lasts, each piece has its particular rank and position, but when the game’s over they’re mixed and jumbled and thrown together in a bag, just the way life is tossed into the grave.”

“Every day, Sancho,” said Don Quixote, “you are becoming less simple and more intelligent.” (Cervantes tr. Grossman, 637-48)

The import of our fictions is hard to overstate. The expedition of Hernán Cortés crossed the gulf between the West Coast of Mexico and what we now call Baja California but not sailed sufficiently north to realize California was accessible by land (Goodman 1998). However, as late as 1710, long after explorers were familiar with the topography, geographers deferred to published narratives and represented California as an island (Homann [1710] n.d.).

The trial [1915]

Franz Kafka has an aphorism in which he suggests Cervantes’ hero is Sancho’s ‘demon, whom he later called Don Quixote, that this demon thereupon set out, uninhibited, on the maddest exploits’ (Kafka 1971), thus following Cervantes in suggesting we are being led by daemonic masters of our imaginations. Kafka was writing at the dawn of the modern state. He wrote *The Trial* (*Der Prozess*) in 1915 and it was published in 1925 to great acclaim, including that of Walter Benjamin (Samuelson 1998, viii). Instead of narratives of knight errantry vying for the attention of an imperial court, subjects of early twentieth century Prussia would distinguish themselves in the court of law. As the painter, with insider access and knowledge, explains to K., ‘Everything belongs to the court’ (Kafka [1925] 1998, 150).

Although ‘Kafkaesque’ nowadays evokes an inescapable maze of bureaucratic dead-ends imposed on desperate subjects by a heartless officialdom, the actual narrative of *The Trial* reveals sovereign power as halls of mirrors whose pathways are established and controlled by ourselves garbed as guards, officials, attorneys and so forth who inflict senseless punishments on each other (e.g. 41, 55, 74, 82), as they pursue romantic conquests, also of their own invention. They/we too are demons in the narratives about the law we tell each other, one that keeps us from an exterior or an exit. Of special note is Kafka’s frequent reference to the theatrical character of our self-subordinations. Don Quixote’s dramas occur under the influence of narratives about courts of kings; Josef K. is under the spell of stories about courts of law.

Like Don Quixote, K. attempts to master an inane, harmful, and paradoxical narrative that has led him into battle. Reflecting on an altercation with the student to whom the court employees were deferential, Kafka writes, ‘[K.] realized that this was the first clear defeat he had suffered at the hands of these people. Of course there was no reason to let that worry him, he had suffered defeat only because he had sought to do battle’ (64). Through conquering his unknown adversaries in court, K. imagines he can emerge a hero, whereby our besotted protagonist will impress and thus win the affection of a lady neighbor who has no interest in reciprocating his lust for her, or even knowledge of the role she plays in his narcissistic imagination about a romance.

Kafka shows K. waiting up so he can regale his fellow boarding house lodger Fraulein Bruestner about how he was accosted earlier by guards who occupied her room. She is tired and wants him to leave, but as he begins to explain the legal muddle in which he finds himself she says, ‘... I’m fascinated with court matters. The court has a strange attraction’ (29) and she allows him to stay, and even to move the nightstand ‘for your performance’ (30). As the novel concludes and K. sees his executioners, Kafka writes, “They’ve sent old supporting actors for me ... [K.] turned to them abruptly and asked: “Which theatre are you playing at?”” (226). Just as Don Quixote on his death bed fantasizes his exploits are being followed by his beloved, Dulcinea, K., in the custody of men he imagines might be ‘tenors’ (226), notes the appearance of Frauelein Buerstner, or someone with a ‘strong resemblance’ to her (227), the suggestion being that K. is fantasizing this unlikely event and realizing its futility as well, insofar as he is about to die, a description that has resonances of Don Quixote’s death that ‘proceeded from the regret of his defeat, and his being disappointed of Dulcinea’s disenchantment’ (763). Cervantes and Kafka both reveal how we cling to these state-centric narratives down to our dying breaths.

III. Enacting citizenship

Isin suggests an ameliorative alternative to the bad scripts of Don Quixote and Josef K: new scripts that exclude these outcomes.¹ Isin’s theorization of acts of citizenship and its scripts (2008, 2012) takes us far beyond the provincial, romantic views of national attachments dramatized by Cervantes. Grounded in contemporary examples – *Citizens Without Frontiers* has over 20 illustrative vignettes set off in one to two-page narratives – Isin also critiques political theories of citizenship grounded in principles of sovereignty, order, and the nation. Instead, Isin shows how citizenship could be construed as enacted through scripts that: (1) mobilize ‘claimants not subjects’ as ‘citizens with a right to claim rights’ (Isin 2012, 7), including ‘rights they may not have’ (111) as well as rights that traverse and may even be opposed to the claims on behalf of groups to which they have the status of belonging (156); (2) are ‘creative, inventive and autonomous’ (87); and (3) create ruptures with the present order (158).

Embracing already existing practices, albeit practiced on the margins or outside the law, Isin’s immanent intervention shares and advocates for current scripts of those enacting citizenship today, and not a utopian request for a different future: ‘[N]o matter what political and social theorists may say about citizenship, people have proved themselves as flexible, intelligent, if not ingenious practitioners of the art of performing or enacting their rights and the rights of others’ (2012, 150). Although Isin does not romanticize citizenship as heroism, the acts he documents are those that warrant recognition and will remain with us, including Chelsea Manning’s release of classified information documenting United States soldiers shooting at people in Iraq, killing Reuters journalists (15), Rachel Corrie’s death on behalf of Palestinians (18), and Sezai Ozan Zeybek’s resistance to conscription, not on his own behalf but because compulsory military service is universally unjust (20–2). Tying these acts of citizens together is their contribution to ‘nourishing a spirit of dissent against unjust government’ (179), as Isin characterizes the importance of the Occupy movement, despite the apparent failure of Occupy and other movements to immediately accomplish their concrete objectives.

In short, Isin's theory of acts of citizenship shifts governance away from political theory's conventional focus on sovereign institutions and to citizens without frontiers, that is, people who empower themselves to make claims on rights in order to pursue justice, un beholden to past norms or practices and without the permission of a sovereign. In addition to offering new narratives of enacting citizenship as an alternative to abstract philosophizing, Isin also questions enacting citizenship based on a status as belonging to a 'nation' (2012, 29) including those who experience exclusions or other discrimination for those interpellated as members of such a people along the lines described by Coulthard. For instance, arguing against the Roma's claim for recognition as a nation without a territory, Isin observes the 'Roma is as invented, or made up, as any people' (2012, 161) and notes 'each nation has been invented and founded on violence' (2012, 162). Isin concretizes how citizens can and are acting politically by prioritizing their own scripts and disregarding sovereign threats and related discourses, including those reacting against settler colonialism but reinvigorating sovereign beasts that are weaker than their adversaries but sovereign beasts nonetheless.

While Isin's project of enacting citizenship holds tremendous promise, I find his echo of Foucault's invocation of 'right', and also 'justice' somewhat discomfiting, and perhaps symptoms of the search for a new vocabulary (2012, 184). On the one hand, Isin is sensitive to Foucault's rejection of absolute truths or values, and distinguishes discourses from scripts, the latter of which provide 'contested and contestable programmes of action' (2012, 169 note 6). On the other hand, Isin makes use of ideas from a short speech in which Foucault uses the discourse of human rights, a decision that seems at odds with a methodology that rejects abstract concepts outside of power/knowledge. Isin quotes with approval Foucault describing how witnessing the suffering of others 'grounds an absolute right to stand up and speak to those hold power' (2012, 7, quoting Foucault 2006) and also references the 'right to have rights' Arendt identifies (Arendt [1951]). The avowal of rights and justice are inconsistent with Foucault's critique of Noam Chomsky in 1971, when Foucault says, 'the idea of justice in itself is an idea which in effect has been invented and put to work in different types of societies as an instrument of a certain political and economic power or as a weapon against that power' (Chomsky, Foucault, and Rajchman 2006, 54). The 1984 speech occurs quite late in Foucault's career, after his embrace of Ayatollah Khomeini and the backlash against this (Afary, Anderson, and Foucault 2005).

Unlike Arendt, a modernist with certain residual sentimental beliefs in traditional scripts of nations and sex roles, as well as rights (Benhabib 2003), Foucault and Isin both recognize that the invocation of rights does not characterize anything of ontological substance but reflects and reiterates a discourse of old-fashioned tautologies seemingly inconsistent with the call for creative, inventive, and autonomous interventions Isin has in mind. There are probably good reasons for this. Those writing in the tradition of Nietzsche realize we cannot simply create a new vocabulary for engaging oppression (e.g. Nietzsche 2011). That said, the reliance on the discourse of rights deserves further consideration. Foucault and Isin both realize that the vocabulary of rights has many well-documented problems, including its origins in the natural rights discourse originally specific to Christianity (Asad 1997, 234, citing Friedrich 1964), the implicit interpellation of a sovereign for their recognition if not enforcement, and of course the sheer vagueness

of the concept. Isin's example of the Minutemen on the Texas border – whose murderous attacks were in the name of 'we, the people' – illustrates the quandary that typically results in the sorts of criteria from abstract treatises discussed above (Isin 2012, 47).

In addition to reinvigorating 'rights', Isin, in keeping with Derrida ([1989] 1992), also relies on the pursuit of 'justice'. Derrida, Foucault, Isin, and many others rejecting discourses of the status quo seem unable to characterize the common goals for acts of citizenship absent this vocabulary, even though 'justice' poses for this project problems similar to the discourse of 'rights'. When St. Augustine wrote, 'Without justice, what are kingdoms but great robberies?' he made an eloquent statement questioning the legitimacy of sovereignty, even as he was arguing for the prerogative of Christians to assault pagans or other Christians to coerce changes in their religious beliefs (Augustine [426], 1984; Brown 1964). To respond to this concern perhaps requires a more substantive statement about the sorts of scripts and habitus for enacting citizenship. Where is the script that allows us to enact citizenship and also avoid abstract debates about principled criteria for rights and justice tied to sovereignty?

IV. The healthy *politeia*

This final section revisits Socrates' script on harm and justice in Books I and II of *The Republic* to expand on 'health' as an alternative to 'justice' and to reconsider whether 'ruptures' must be created to enact new scripts. I turn here to passages from *The Republic* because the work remains influential on contemporary intuitions and debates about justice among contemporary scholars and many others, and because its form – relying heavily on parody – remains relevant for today's ongoing difficulties of shifting intuitions of the demos. Although much relevant to concerns of citizenship could be explored from *The Republic* – including Plato's ridicule of nationalism, Homeric stories glorifying war, and a democracy predicated on a self-defeating ethos of materialism – for the purposes of this essay three key points warrant highlighting. First, Socrates in Book I rejects definitions of justice associated alliances to groups or causes other than 'the good' (Plato [375 B.C.] 1996, lines 332d-e, 335a). Second, Socrates rejects definitions of justice as inflicting harm (335e). And third, Socrates' first model city for envisioning justice is a *politeia* where people are satisfied with a comfortable lifestyle and are not driven by greed or what today we might call conspicuous consumption or atomized individualism. They drink wine, sing hymns, and wear garlands, but 'will take care that their families do not exceed their means; having an eye to poverty or war' (372a-c). This is how Socrates replies to Adeimantus (Plato's brother). Glaucon then intervenes and calls this a 'city of pigs' (372d), a statement that is hard to credit on its face and that might best be read as a note of irony on the part of Plato, especially when Socrates replies that Glaucon is calling for a 'fevered state' (372e) and cautions that the 'true state I believe to be the one we have described – the healthy state, as it were' (372e), an observation that contradicts Glaucon's premise that the first state was a city of pigs.

In transitioning to the *politeia* most readers see as synecdochical with justice, Socrates asks, "shall we not have to enlarge our city again? For that healthy state is no longer sufficient, but we must proceed to swell out its bulk and fill it up with a multitude of things that exceed the requirements of necessity in states . . . (373b). The features of the 'fevered state' Socrates adds are those desired by Glaucon, and the result is guardians and

war. A focus on health, along the lines suggested by Plato's Socrates, provides no magic solutions to difficulties of meeting the needs of a *politeia*, either absolute or relative. Like 'justice', 'health' too is subject to disputes and also appropriations reflecting discourses of power/knowledge Foucault identified (e.g. Foucault 1990). But the language of health, unlike justice, inherently prioritizes life and rejects the violence 'justice' may allow or even obligate. Indeed, a healthy public discourse can and has been used to reframe episodic as well as state violence, and to connect disparate policies that directly benefit large majorities, including those of health care, public transportation, and responses to climate change.

The language of health is especially useful for advancing substantive goals of protecting communal land autonomous of incursions coerced by wealthy elites pulling levers of sovereign governments. Seen through this lens, efforts to create private, titled land parcels and refuse recognition of subsistence farmers and fish harvesters throughout the Americas should be rejected because they are demonstrably unhealthy and thus unjust, not because they threaten the perpetuation of a specific intergenerational group's narrative of authentic origins and differences.

Isin's 'Theorizing Acts of Citizenship' distinguishes the acts of a citizen as those instantiating 'creative breaks' with the law, e.g. through protests or civil disobedience (Isin 2008, 18), and not advancing causes within existing institutions. The view of the law drawing Isin's critique is not only oppressive, but also predictable and overall somewhat boring (2008, 36). The upshot is that Isin emphasizes 'ruptures' from acting outside law and also without clear justifications for one's actions (Isin 2008, 36, 38–9). Thinking-outside-the-box, so to speak, may make it difficult to articulate one's new ideas, and Isin rightly affirms a need for openness to massive changes to the political and legal status quo. That said, it is important to recognize opportunities for enacting radical political changes from within existing legal institutions when opportunities present themselves and not to normalize the rule of law as authoritarian, nationalist, and oppressive. 'Ruptures' in this context could include written laws, legal briefs and orders that break with present conventions, in keeping with written texts in general, along lines indicated by Derrida ([1972] 1988, 9), but for the purpose of outcomes that are healthy and therefore just. Here I want to suggest we enact citizenship as Isin imagines, but perhaps as more privileged or entitled citizens, whose claims should be presumed to occasion respect, recognition, and responsiveness from other citizens. In some contexts, creative acts of citizenship can occur only outside of formal institutions of governance. But in many others, the impediment to radically novel, healthy, and just acts are constraints of imagination and not sovereign force.²

Kafka's narratives suggest modern institutions of governance will be unfriendly to anything but delusions, frustrations, and, especially, death. Yet Kafka's tale is not the final word. Unlike the harms we see from adhering to scripts that glorify the nation, the laws and rules operationalizing courts in the United States have an affinity with epistemologies of deconstruction many critics may find surprising. The rationale for turning to certain types of government institutions is not that they automatically eliminate systemic oppression, or even provide an even playing field. However, they do provide meaningful forums for confronting and thwarting harms. Citizens can and do pass laws and use courts – domestic, regional, and international – to prevent, discourage, and remediate harms inflicted based on exclusions premised on land deeds derived ultimately from the

authority of the sovereign government, including to thwart mercenary violence brought in by mining firms trying to displace communal farmers (e.g. New Yorker 2022, Valencia 2021; InterReligious Task Force on Central America 2022).

Insofar as there are important differences between both left Schmittian (e.g. Holmes 2010) and Kafka's understanding of the law, on the one hand, and, on the other hand, laws and practices in some countries, including the United States, citizens may find it possible to enact new scripts through using venues of some legal systems in novel ways. First, for those who are accused, there is not just one door for those on defense. Habeas proceedings, appeals within agencies and to higher courts, and, more rarely, pardons and clemency are available and made use of by advocacy groups and legal clinics.

Second, those harmed, especially those who are targeted without legal justification, may use courts to go on offense against those who have more power and even the government officials in their private capacities. The U.S. Supreme Court in 1971 responded to a lawsuit brought by a man who was arrested after federal agents entered his home without a warrant. The Court held that a violation of a constitutional right implied a remedy and authorized *pro se* Wilson Bivens to sue the agents in their private capacities, so that the damages would be paid by them and not the government (*Bivens v. Six Unnamed Federal Agents*, 403 U.S. 388 [1971]). Since then, plaintiffs represented by attorneys have prevailed in about one-third of complaints properly alleging a constitutional violation (Reinert 2009). Further, an 8–0 decision authored by Clarence Thomas in 2020 held that if Muslims can prove they were on a 'no fly' list solely because of their religion, they may sue for damages individual officers, pursuant to the Religious Freedom Restoration Act (42 U.S.C. §2000b(b-b4), 1993). Two additional federal laws removing sovereign immunities are the Federal Tort Claims Act (28 U.S.C. §§ 2671–2680 [1946]) and Civil Action for Deprivation of Rights (42 U.S.C. §1983 [1979]).

Third, the U.S. government empowers citizens to put government officials and their acts under surveillance and to report on them. The Freedom of Information Act obligates agencies to turn over records on agency actions, as well as contracts, e-mail, text messages, and many other sources (5 U.S.C. 552a). States have similar laws. Records obtained under these laws have been used by journalists in exposes and attorneys use them to sue the government and corporations, as was done in the litigation against the private prisons using the labor of those detained under immigration laws for one dollar/day, in violation of labor laws (Stevens 2021) – as well as updating laws. Citizens also may publish state secrets alleged to threaten national security without threat of criminal prosecution (*New York Times v. United States* 403 U.S. 713 [1971]).

Fourth, the currently favored approach to statutory interpretation tethers law enforcement to the plain text of statutes, thus allowing citizens as litigants to craft new interpretations that exceed the intentions of enacting legislators. In 2020, the Supreme Court interpreted a 1964 law prohibiting employers from discriminating based on sex to prohibit discrimination based on sexual orientation, inferring that taxonomies of sex difference created identities of 'sexual orientation' (*Bostock v. Clayton County* 590 U.S. ___ [2020]), even though the enacting legislature did not intend this. And in a separate case, Justice Neil Gorsuch, a Trump appointee, wrote for the majority that a treaty signed by the U.S. government precluded the state of Oklahoma from jurisdiction over crimes alleged to have been committed by

Creek Indians, a position at odds with past Court interpretations (*McGirt v. Oklahoma* 591 U.S. ___ [2020]). Responding to concerns about unsettling current practices, Gorsuch writes, ‘Unlawful acts, performed long enough, are never enough to amend the law’ (42). Justices in this case changed outcomes decided by previous courts, not because a new law was written but because previous courts had substituted what they took to be popular preferences for what the laws and treaties stated.

Fifth, the adversarial rules of court procedure in the United States are deeply Socratic, insofar as they provide equal opportunities to both sides to present and respond to arguments and evidence (Federal Rules of Civil Procedure 2020). Contemporary trials in the United States have little resemblance to that which convicted Socrates: a person cannot be charged under criminal law by a private individual; has the opportunity to interview and then prevent jurors being seated for bias or other causes; and may exclude from evidence information obtained in violation of Constitutional prohibitions on government powers, to name just a few of numerous prerogatives citizens today hold as a result of struggles against the unhealthy outcomes of the past. The system now in place still favors those who dedicate themselves to the pursuit of wealth and power over the majority of citizens. But it is by no means clear that this is inherent to the legal system as such and not an outcome of a citizenry that suffers from legal illiteracy and a related pessimism. It is important to distinguish between governments that routinely respond to protests with mass arrests or even deadly assaults and torture from those that allow and even sustain protests from within, especially with outcomes reversing seemingly intractable political and legal outcomes.³

The past record of *de jure* violence and oppression within the United States and other constitutional democracies should not distract us from real improvements in our legal systems. Perhaps it is time for citizens to strategize on making use of what others have won for us, not to be complacent but to be creative and even ingenious in how we enact new scripts (e.g. Kolbert 2022), including expanding jurisdictional boundaries to anyone who seeks protection or community within them. ‘We the People’ do not have constitutional limits on our composition or location.

Notes

1. For analyses responsive to concerns that such scripts are ‘unnatural’ or otherwise inconsistent with human predilections for violence, see Stevens (2009).
2. For a project envisioning creative citizenship within and outside existing sovereign institutions see ‘Declaration of Citizenship,’ <https://declarationofcitizenship.org>.
3. For the 2020 election, Stacy Abrams, a Black candidate for governor in 2018, mobilized voters in Georgia to vote for Joe Biden and two Democrats as Senators, a reversal of a decades-long Republican track record (New York Times 2021). Also in Georgia the mother of Ahmad Arbury after encountering officials refusing to prosecute for murder the three men who killed her son, first used the rules of the system to have the reluctant prosecutor removed, and, after securing guilty verdicts from a White jury, prevailed on a federal judge to reject a plea deal for hate crime charges; the second trial resulted in a second conviction by a separate jury (New York Times 2022).

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