TOWARDS DEFENSIBLE JUDGE-MADE DEMOCRATIC PROCESS

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What is the function of judicial review? By the stated lights of Article III ("cases" and "controversies"),[1] to individual judges resolving cases, and to litigants asserting they have suffered an injustice, courts must fairly resolve particular disputes. Yet thanks to the wide-ranging consequences of common law decision-making and the hunger of ambitious law professors to advance novel and transformative scholarly claims, doctrine tends to be evaluated by its purported systemic effects. In election law—which explicitly bears on terms of collective participation—this contrast is especially sharp. Yet contemporary election law scholarship so thoroughly emphasizes systemic accounts that it neglects the foundation of legitimate collective self-governance: the participation and consent of individuals in politics.

The Law of Freedom aspires to return attention to this foundation. Professor Yunsieg Kim's wonderfully insightful review draws out this point while clearing the path for the challenging but urgent analysis that future jurisprudence and scholarship must undertake. Reconciling judge-made law and constituent autonomy is an endeavor of intimidating analytic and normative complexity. An "operationally useful framework"[2] will require courts to engage with how personal autonomy is translated into valid collective action through representation, all while diligently respecting the norms of rule of law that ameliorate the counterpopular dilemma.

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1. U.S. CONST. art. III, § 2.
2. Yunsieg P. Kim, *Liberty Before Party: The Courts as Transpartisan Defenders of Freedom*, 98 S. CAL. L. REV. POSTSCRIPT 74, 92 (2025).

I. RIGHTS, STRUCTURES, AND COLLECTIVE SELF-GOVERNANCE

The narrative of modern American election law runs something like this: when courts perform "strong judicial review,"[3] their characteristic act is to constrain governmental action that illegitimately intrudes upon personal liberty or interests. While sometimes this is realized through structural principles such as federalism or separation of powers,[4] the most familiar means is rights enforcement. The result is that courts are guardians of rights as "political trumps held by individuals."[5] This conventional understanding of constitutional review gives judges a unique role in the liberal democratic order. While the political branches are motivated by the preferences of majorities, interest groups, and the representatives and officials empowered by them, judges serve rule of law neutrality. Through this role, judges protect unpopular but morally urgent liberties and interests against the risk of majoritarian tyranny and protect some aspects of liberal constitutionalism against fleeting but potentially corrosive popular inclinations. Indeed, on its face the predominant story of election law is of courts protecting rights against governmental intrusion: limiting campaign finance regulation to protect speech rights (*Buckley v. Valeo*; *Citizens United v. Federal Election Commission*);[6] prohibiting the dilution of personal voting power effected by malapportionment (*Baker v. Carr*)[7] or racial gerrymanders (*Gomillion v. Lightfoot*; *Cooper v. Harris*);[8] and protecting parties and party participation where they are mediums of private political expression and organization (*Kusper v. Pontikes*; *Tashjian v. Republican Party*).[9] The challenge for courts is defining the rights and weighing them against countervailing governmental interests (*Burdick v. Takushi*).[10] While the *substance* of such analysis may be more intricate than in some other contexts, it is the same type of rights analysis that courts undertake in any context.

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3. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1354 (2006).

4. *Id.* at 1357. The similarity of the ultimate interest in federalism or separation of powers to individual rights is apparent in the way that judges invoking these structural grounds likewise turn to "first principles . . . [of] reduc[ing] the risk of tyranny and abuse [of power]." United States v. Lopez, 514 U.S. 549, 552 (1995) (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)) (citation modified). The ultimate values of autonomy that vindicate rights tend to be the foundational resort of structural interests as well.

5. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at xi (1978).

6. Buckley v. Valeo, 424 U.S. 1, 14 (1976); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 319 (2010).

7. Baker v. Carr, 369 U.S. 186, 187–88 (1962).

8. Gomillion v. Lightfoot, 364 U.S. 339, 339 (1960); Cooper v. Harris, 581 U.S. 285, 291 (2017).

9. Kusper v. Pontikes, 414 U.S. 51, 56–57 (1973); Tashjian v. Republican Party, 479 U.S. 208, 214 (1986).

10. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992).

A great underappreciated story of contemporary legal academia is the rejection of the rights-based understanding of election law.[11] Starting in the 1990s, leading scholars explicitly rejected rights frameworks[12] in favor of instrumentalist-structuralist accounts.[13] Scholars have denied that rights-based analysis explains the real character of malapportionment and of racialized districting;[14] of campaign finance regulation;[15] of laws that govern parties in politics;[16] or of the wider theoretical import of election law.[17] There has been debate over what alternative analytic framework is best,[18] but scholars are united in preferring consequentialist, often metrically informed approaches. As I state in *The Law of Freedom*, contemporary election law scholarship has thereby turned the field into "a policymaking problem. The prevalent question is always which legal interventions would yield a good electoral design."[19]

Yet this switch to treating election law as a domain of technical policymaking comes at a profound normative cost. If *The Law of Freedom* were to be boiled down to its most essential observations, the first would be this: treating election law as an arena of instrumental reasoning and technical innovation elides the real stakes—the challenge of synthesizing individual moral autonomy (the root of liberalism) into a collective system. This omission becomes directly problematic when authority over that collective control is given to non-accountable actors like courts. As do the finest

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11. The story is *underappreciated*, however, rather than unrecognized. *See, e.g.*, Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 139 (2005) ("The prevailing trend among legal commentators is therefore away from traditional rights-based approaches and toward a 'pragmatic, functional approach' to legal regulation.").

12. It is worth noting in passing that John Hart Ely's foundational work on process theory also shifted away from a rights framework, though he (unsuccessfully, by the light of his critics) tried to retain the veneer of constitutionalism. *See* JACOB EISLER, THE LAW OF FREEDOM: THE SUPREME COURT AND DEMOCRACY 73–77 (2023).

13. In *The Law of Freedom*, I call this "instrumentalist institutionalism." *See id.* at 77–82.

14. Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CALIF. L. REV. 1201, 1201–02 (1996); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1667–68 (2001).

15. Samuel Issacharoff & Pamela S. Karlan, *Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1705–06 (1999); Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1429–33 (2015).

16. Kang, *supra* note 11.

17. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644–46 (1998); NICHOLAS O. STEPHANOPOULOS, ALIGNING ELECTION LAW 1–25 (2024).

18. *Compare* Issacharoff & Pildes, *supra* note 17 (arguing for competition as the sine qua non of valid electoral procedures) *with* Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 288 (2014) (preferring a concept of preference alignment) *and* Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 738 (2008) (arguing for "deliberative competition among political leaders" that yields rank-and-file discourse).

19. EISLER, *supra* note 12, at 41.

readers, Kim states this observation more cogently than I do: "[A]ny institution exogenous to popular accountability is incongruous with the normative basis of a democracy [determination of governance *by the constituent members of the policy themselves*] whether that institution is a politically insulated judiciary or an anointed monarch."[20]

As Kim incisively notes, if advocates for structuralist-instrumentalist approaches respond by arguing that their approaches, regardless of their origin, are "correct," this is as unsatisfying as a "deus ex machina" in a plot to resolve an otherwise unsolvable situation.[21] This point is a fulcrum of *The Law of Freedom*.

If a "right" configuration of democratic rules can be legitimately, externally determined and imposed on a polity, thus negating the need for the polity to have the authority to set its own terms of self-rule, one of two conditions must apply. The first is that democratic rules do not need to conform to requirements of constituent self-determination and democratic justice. But if this is the case, and if electoral rules do not need to conform to the demands of justice, then presumably they do not have any normative weight and are morally and politically insignificant. The second condition is that electoral rules *are* significant, but that the right answer can be reached through technocratic moral philosophy rather than constituent self-determination. And yet, if this is the case, the basic premise of democracy—constituent self-rule—does not apply.[22]

The Law of Freedom frames this purely as a matter of the morality of freedom, but Kim helpfully elaborates the *social* and *political* consequences of a judiciary that dictates terms of democratic process. "Judicial review still requires a democratic normative justification because, without it, the people may reject the courts' wisdom."[23] Kim elegantly observes how this risk has manifested in recent, highly contentious Supreme Court decisions; in one sense this is a very classical point, traceable to Alexander Bickel's underlying worry about the countermajoritarian difficulty. Other branches ultimately reflect the consent of the people, reaffirmed by regular elections.[24] Courts, conversely, do not so directly manifest popular consent and are not

20. Kim, *supra* note 2, at 82. It is worth noting, and deserves far more careful parsing as part of the project described below, that structuralist scholars differ on if courts are *uniquely* positioned to improve election law (a position taken by, for example, Issacharoff & Pildes, *supra* note 17) or if they are just one institution among many that can advance the "correct" technocratic values (a position elaborated by STEPHANOPOULOS, *supra* note 17, at 25, 319–360).

21. Kim, *supra* note 2, at 77.

22. EISLER, *supra* note 12, at 99.

23. Kim, *supra* note 2, at 84.

24. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 17 (1962).

regularly subject to accountable oversight. If judicial authority is to be maintained, it must be through a sort of diffuse and ongoing cultural approval—and this is an existential necessity for courts. If a given legislature loses popular support, the constituency will simply throw the bums out; but if an unaccountable court loses respect, it has no recourse and risks broader delegitimation.[25]

The answer of structuralist-instrumentalists appears to be that courts can render these concerns moot by imposing wise rules. Winning (here, good electoral design) is the only thing.[26] But as Kim notes in a second elaboration upon the counterpopular dilemma, while current scholarship is prevalently focused on achieving this through compelling-looking "objective" tests and metrics, this approach does not address the core concern with judicial imposition of democratic principle. The essence of democratic design is *normative*. There is thus no way through technical analysis informed by an "instrumentalist perspective"[27] to find a given judicially adopted metric to be "the best decision in an objectively discernible way."[28] Any such judicial action must be justified through adverting to the underlying moral principle of democracy—and, as *The Law of Freedom* argues, this must inevitably involve justification by adverting to constituent self-determination alone.[29] The scholarship's neglect of this foundational morality shows the more ominous possibility of what could happen if courts become excessively enamored of technical sophistication.[30] Such a fixation with metricality could both override and conceal the questions of constituent liberty and popular self-determination in the name of technical sophistication.

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25. Some argue that courts are more accountable than is generally acknowledged; but these arguments simply seek to plaster over the counterpopular dilemma by subtly eroding rule of law. *See* EISLER, *supra* note 12, at 10 n.19 (discussing the "accountable" court theories of Christopher L. Eisgruber and Christine Lafont).

26. This is an adaptation of a quote attributed to influential college football coach Red Sanders. *See Winning Isn't Everything; It's the Only Thing*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Winning_isn%27t_everything;_it%27s_the_only_thing [https://perma.cc/2BZ3-LSFY].

27. Kim, *supra* note 2, at 90.

28. *Id.* at 85.

29. EISLER, *supra* note 12, at 98.

30. Both Kim and I have written on this point specifically. Yunsieg P. Kim & Jowei Chen, *Gerrymandered by Definition: The Distortion of "Traditional" Districting Criteria and a Proposal for Their Empirical Redefinition*, 2021 WIS. L. REV. 101, 151 (2021); Jacob Eisler, *Partisan Gerrymandering and the Constitutionalization of Statistics*, 68 EMORY L.J. 979, 1014 (2019).

II. RE-BALANCING THE NARRATIVE: CONSTITUENT SELF-RULE AND THE JUDICIAL INTERVENTION

This does not mean election law scholarship must scurry back to doctrinaire, unreflective rights enforcement. Rather the answer is greater rigor in considering how to inform democratic process. Structuralism-instrumentalism overlooks that courts have legitimacy in liberal constitutional democracies not because courts are the most competent policymakers, but because courts advance some distinct values. Courts might express such values through constitutional interpretation and rights enforcement, but these are only the intermediary mechanisms for realizing these values.

Taking a cue from leading scholars of liberal constitutional democracy, the seminal value of judging is rule of law neutrality: courts should decide disputes with a disinterest and universality distinct from preference-informed, power-driven accountable politics.[31] Such disinterest simpliciter may be a sufficient normative touchstone when a court resolves disputes emerging from relationships individual in scope; when a court resolves, say, a tort dispute, if it selects and applies plausible legal rules blind to the interests and identities of the parties, the most basic requirement of judicial legitimacy has been satisfied. Yet, as has been the starting point of election law scholarship, elections are different. Development of the one person, one vote rule for determining how to justly manage racially polarized voting requires more than mere procedural disinterest; it demands a theory of democracy. To justly intervene in such democracy, courts must be a "facilitator, not inhibitor, of freedom"[32]—a particularly challenging proposition given their lack of standard consent-based accountability.

The second central claim of *The Law of Freedom* is that the existing Supreme Court doctrine *can* be redeemed as seeking to pursue freedom—albeit a pursuit marked and ultimately redeemed by contestation over rather than resolution of democratic norms. This takes the form of a debate between the core preconditions of democracy—liberty and equality—focused not on satisfying some technocratic criterion or achieving some outcome but rather satisfying some requirement of constituent autonomy. The traditional components of judicial reasoning—constitutional interpretation, rights protection, and rule of law—are intermediaries in this normative debate.

Yet *The Law of Freedom* is ultimately retrospective: it explains how the doctrine reconciles judicial independence (and non-accountability) with the

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31. TOM GINSBERG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 12–13, 210 (2018).

32. Kim, *supra* note 2, at 87.

need to forge democratic self-rule in constituent autonomy. It shows that the doctrine can be organized as a debate over the *moral* requirements of democratic freedom. The closest analogue in the general jurisprudence is Ronald Dworkin's account of law as a "chain novel" of precedent informed by a community's moral norms.[33] In the context of election law, the moral norms at issue are those of legitimate constituent self-rule. As *The Law of Freedom* demonstrates, the election law "chain novel" is a struggle over whether constituent self-rule should prioritize liberty over governmental oversight or governmental protection of citizen equality.

Yet by its retrospective nature, *The Law of Freedom* does not say what the Supreme Court *should* aspire to do in its reshaping of democracy but makes sense of what it *has done*. This retrospective synthesis shows that the most compelling accounts of what election law has *actually* done looks to its foundation in the moral centrality of constituent autonomy. This in turn counterbalances the technocratic and instrumentalist impulses of prevalent scholarly trends.

This backwards-looking quality comes at a cost that Kim recognizes: the framework of *The Law of Freedom* does not indicate when the Court has made the "right" decisions, nor what future analysis will lead to the "right" decisions. Kim elegantly elaborates by observing that while *The Law of Freedom* characterizes the one person, one vote principle as a minimum condition of democracy, it is unclear why this could not be equally used to mandate other specific conditions as minimums for valid democracy.[34] However, the description of the one person, one vote rule as protecting the "minimum of equal constituent power" necessary for "constituent self-rule in a liberal democracy" is a description of how the judicial *consensus* about the rule in *American* democracy can be understood internally,[35] not an unconditional statement of how democracy must operate. Other democracy systems and theories—from the European Union's overlapping cosmopolitan distribution of power[36] to John Stuart Mill's theory of plural voting[37]—deviate from this value, yet can be plausibly defended as legitimately democratic, albeit with different starting postulations.

Kim suggests that a future-looking project will need to develop

33. RONALD DWORKIN, LAW'S EMPIRE 228 (1986).

34. Kim, *supra* note 2, at 94–95.

35. EISLER, *supra* note 12, at 103.

36. *Democratic deficit*, EUR-LEX (June 17, 2022), https://eur-lex.europa.eu/EN/legal-content/glossary/democratic-deficit.html [https://perma.cc/LHZ2-9UFK].

37. J. Joseph Miller, *J.S. Mill on Plural Voting, Competence, and Participation*, 24 HIST. OF POL. THOUGHT 647, 648 (2003).

"objectively discernible parameters."[38] Such parameters may be the holy grail of electoral design—and they may, like a rainbow, eternally retreat as scholars and judges aim to authoritatively define them. However, there is no alternative to this aspirational quest. It would return to the technocratic shortcutting of existing scholarship to seek to authoritatively fix such parameters. Rather, this project must begin with the observation that democracies are legitimated by the freely-willed consent and participation of their individual members—the normative core of democracy as a basis for political authority. The development of such parameters will need to remain founded in this normative system. Only through such a continuous focus on the norms that legitimate democratic self-rule can the judiciary's own peculiar relationship to democratic political authority be vindicated.

III. TOWARDS A JURISPRUDENCE OF COLLECTIVIZED SELF-GOVERNANCE: REPRESENTATION, AUTHORIZATION, AND AUTHORITY

Previous efforts to construct such parameters have problematically shortcut between the norm of constituent autonomy and the high-level terms of democratic process. The inclination has been to identify some high-level descriptive feature of democratic process (competition, alignment, deliberation, and so forth) and then explain ex post how it satisfies democratic legitimacy. The preferable alternative is to start with the requirements and constraints imposed by such norms and build out parameters (or conditions for parameters) that can satisfy the normative requirements. Such an approach will yield analytic incrementalism rather than lead with sweeping claims regarding desirable systems (again, as tends to be favored by current legal scholarship). Any claim regarding a valid quantified precondition for democratic process would need to be rigorously grounded in democratic norms, such as tracing it back to the priority of constituent autonomy and showing how it satisfies that value's demands. For validating judicial authority, this project would involve showing how the unique contributions of judicial review—such as rule of law—have origins in constituent autonomy.

Others have undertaken projects of a similar type in general constitutional law, but they have not engaged with sufficient depth and precision regarding the conditions that legitimate democratic rule and the intricate architecture connecting those conditions to rule of law. By far the most prominent instance is originalism. Originalism seeks to link popular autonomy to judicial authority by asserting that "constituents have freely

38. Kim, *supra* note 2, at 92.

contracted into a set of overriding commitments whose meaning can be definitely settled by the terms of the initial commitment."[39] On its face, this answers the problem of constitutional authority over electoral process—it is a higher-order commitment that binds the polity. Yet the most foundational critiques of originalism's basic authority—the dead hand problem;[40] that the moment of originalist formation itself lacked democratic legitimacy[41]—argue, in effect, that this linkage between the will of the constituency and the meaning of the constitution is not so foolproof. These problems exemplify the need to legitimate democratic constitutionalism by reference to constituent autonomy. Without an incontrovertible causal chain between constitutional authority and popular autonomy, originalism cannot bear its own normative weight; these seminal critiques of originalism are precisely attacks on the validity of this causal chain. Furthermore, leading attempts to adapt originalism or its virtues to address these flaws—Akhil Amar's proposal for renewing constitutional authority via implied consent;[42] Jack Balkin's theory of citizen interpretation as touchstone of constitutional interpretation[43]—try to repair this causal chain through alternate starting postulations. But like originalism itself, they may operate at too ambitious a level of generality: the precise link between autonomy of the constituency as freely-willing citizens and the constitution as a basis for dictating terms of democracy remains underspecified.

The solution is an incremental conceptualization—and debate—over the individual steps that link individual autonomy and political consent to the authority of judicial constitutionalism. This project may be somewhat frustrating to many legal academics, who prefer to offer whole cloth theories that often compact the complexity of this relationship.[44] Yet what is

39. EISLER, *supra* note 12, at 53. *See also* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120–21 (1978) ("The fundamental theory of political legitimacy in the United States is contractarian . . . .").

40. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 494 (1997).

41. Louis Henkin, *The United States Constitution as Social Compact*, 131 PROC. OF THE AM. PHIL. SOC'Y 261, 263 (1987).

42. Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1074 (1988). For how this links to contractarian theory, *see* RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY 280 (2016).

43. JACK M. BALKIN, LIVING ORIGINALISM 17 (2011).

44. The treatment in scholarship of one of the central intermediary ideas in explaining collective authority—representation—offers a case in point. Whether arguing for a particular electoral value as necessary for valid representation, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 615 (2002); arguing for more equitable representation of the socially powerless, Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 571 (2021); or challenging a mode of interpretation as fundamentally undemocratic, William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1734,

necessary is a *building up* from the deontological roots of individual democratic consent up to the principle of legitimate constitutionalism. While some scholars have made sympathetic calls for "a theory of representation, an idea about how a healthy democracy is supposed to function,"[45] realistically this project will be far more onerous and involve far more discrete points of contention than a single radical intervention which offers a "deus ex machina" that can be encapsulated in a single law review article.[46]

The granularity of this project also informs Kim's assertion of the need for parameterization by indicating the thresholds, normative and quantitative, that legitimate parameterization must fulfill. Any democratic system in a diverse, large-scale polity will inevitably displease many of its members, both in its practical policy outcomes and its voting rules. A critical question is when, despite this discontent, the totality of the system remains valid. Ironically, John Hart Ely's own watershed attempt to make sense of constitutionalism in *Democracy and Distrust* was just such an effort to describe when judicial constitutionalism might be so valid despite being countermajoritarian, but faltered when it sought to declare itself an expression of the general procedural commitments of the Constitution.[47] A more granular approach to linking personal liberty to constitutional authority will yield a more precise set of indicia regarding when democratic process remains *universally* valid despite the fact that it may displease some who are governed by it. It would do so by showing how the indicators of valid democratic process derive from the foundational wellspring of constituent autonomy.

The Law of Freedom did not seek to complete this ambitious project. Rather, it merely sought—given the direction of contemporary election law scholarship—to redirect attention back to the most morally essential grounds of election law and show how these themes are of immediate relevance to understanding the doctrine. By noting the limits of the account of *The Law of Freedom*, Kim suggests the vast but exciting scholarly projects that are necessary to generate a just law of elections.

1750 (2021), scholars tend to deploy representation as a self-contained placeholder, even if they concede it is "complicated," Andrias & Sachs at 571. A more fruitful approach may be offered by Ashraf Ahmed, *The Two Faces of Representation* (July 9, 2025), which begins the critical project of making sense of the Court's struggle over competing understandings of political representation.

45. Heather Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 508 (2004).

46. Kim, *supra* note 2, at 77.

47. EISLER, *supra* note 12, at 75–76.