MUSIC THEORY AS A MODE OF LAW: 
THE CASE OF HEINRICH SCHENKER, ESQ.

Wayne Alpern*

Law alone can give us freedom.
Goethe

I. THEORIST QUA JURIST

A. Schenker's Legal Education

Heinrich Schenker (1868-1935) is the most important music theorist of the twentieth century. Rivaled only by Jean-Philippe Rameau (1683-1764) during the Enlightenment and Gioseffo Zarlino (1517-1590) in the Renaissance, he is one of the greatest of all time, revolutionizing the study of music in a manner comparable to Freud in psychology and Einstein in physics. Ironically, though, Schenker did not have a music degree—he had a law degree. The leading music theorist of our time, perhaps of all time, was a lawyer.

Schenker studied law at the University of Vienna from 1884 to 1888, from ages 16 to 20. His law school transcript (Meldungsbuch) reproduced below confirms that he successfully completed a comprehensive curriculum of three to five courses for eight semesters and received his Doctor of Jurisprudence degree on February 1, 1890. Unlike other famous musicians who pursued law unenthusiastically or against their will, however, he devoted a substantial amount of time and energy to legal study. Although he initially enrolled at his father’s insistence and apparently never intended to actually practice law, Schenker placed great value upon the breadth of his education outside of music.2

* © 1999 Wayne Alpern. The Author is a graduate of Yale Law School and practiced law in New York City for several years before receiving a Ph.D. in music theory and composition at the City University of New York.


2 See Hellmut Federhofer, Heinrich Schenker: Nach Tagebüchen und Briefen, in 3 Der Oswald Jonas Memorial Collection 345 (1985). Schenker’s intellectual interest in jurisprudence and conviction that it was not extraneous to musical theory is evident not only from his own rigorous training and writing, but from the fact that his principal
HEINRICH SCHENKER’S MELDUNGSBUCH³
UNIVERSITY OF VIENNA, 1884-1888

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³ The Oster Collection: Papers of Heinrich Schenker (N.Y. Public Library, Music Div., Item 435, Reel 32, File B ). Otto Gugler of the University of Vienna furnished supplemental records.
Although Schenker is the most prominent music theorist to have studied law, he is not alone. Legal study in European universities was a common approach to liberal education, rather than a vocational training as it customarily is today. Nonetheless, the roster of notable theorists, musicologists, and composers who have studied law is impressive.4

The substance of Schenker’s legal education is documented by his transcript and the extant writings of his professors. Although most of his law teachers have since faded into history, one towers above the rest. Georg Jellinek (1851-1911) was the most renowned legal scholar Schenker came into contact with during this formative period, and his most significant jurisprudential influence.5  Jellinek also received his legal training at the University of Vienna, joining its faculty in 1879, but was never appointed a full professor because, like Schenker, he was Jewish.6  From an intell-

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4 In addition to Schenker, the list of law-trained theorists and musicologists includes Oswald Jonas (1897-1978), Gustave Reese (1899-1977), Emanuel Winternitz (1898-1983), Jaap Kunst (1891-1960), Cecil Sharp (1859-1924), Guido Adler (1855-1941), Hugo Riemann (1849-1919), Eduard Hanslick (1825-1904), August Ambros (1816-1876), Edmond Coussemaker (1805-1876), Ludwig Köchel (1800-1877), Siegfried Dehn (1799-1858), Gottfried Weber (1799-1839), Adolph Bernhard Marx (1795-1866), Francois Castil-Blaze (1784-1857), Johann Forkel (1749-1818), Abbé Vogler (1749-1814), Johann Agricola (1720-1774), John Hawkins (1719-1789), Leopold Mozart (1719-1877), Christian Krause (1719-1770), Jean D’Alembert (1717-1783), C.P.E. Bach (1714-1788), Johann Scheibe (1708-1776), Johann Walther (1684-1748), Johann Heinichen (1683-1729), Johann Mattheson (1681-1764), Johann Treiber (1675-1727), Friedrich Niedt (1674-1708), Johann Kuhnau (1660-1722), Georg Müffat (1653-1704), Roger North (1651-1734), Francis North (1637-1685), Christoph Bernhard (1628-1692), Joachim Burmeister (1564-1629), Nicolaus Burtius (1445-1518), and Johannes Tinctoris (1435-1511). Many of these theorists were also composers, but are better known for their theoretical work. Law-trained composers include Luigi Nono (1924-1990), Igor Stravinsky (1882-1971), Jean Sibelius (1865-1957), Ernest Chausson (1855-1899), Emmanuel Chabrier (1841-1894), Piotr Tchaikovsky (1840-1893), Robert Schumann (1819-1856), Christoph Friedrich Bach (1732-1795), Wilhelm Friedemann Bach (1710-1784), George Frideric Handel (1685-1739), Georg Philipp Telemann (1681-1767), Heinrich Schütz (1585-1672), and Guillaume Dufay (1400-1474). See THE CONCISE EDITION OF BAKER’S BIOGRAPHICAL DICTIONARY OF MUSICIANS (Nicholas Slonimsky ed., 8th rev. ed. 1994); DAVID DAMSCHRODER & DAVID RUSSELL WILLIAMS, MUSIC THEORY FROM ZARLINO TO SCHENKER: A BIBLIOGRAPHY AND GUIDE (1990); THE HARVARD BIOGRAPHICAL DICTIONARY OF MUSIC (Don Michael Randel ed., 1996); THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS (Stanley Sadie ed., 1980) [hereinafter NEW GROVE DICTIONARY]. Among the poets, Ovid, Virgil, Petrarch, Donne, Goethe, Heine, MacLeish, Edgar Lee Masters, and Wallace Stevens studied law. Painters include Henri Matisse and Wassily Kandinsky, and authors include George Fenimore Cooper and Washington Irving. For a psychological study of the artist-lawyer phenomenon in all fields, see Daniel J. Kornstein, The Double Life of Wallace Stevens: Is Law Ever the “Necessary Angel” of Creative Art?, 41 N.Y.L. SCH. L. REV. 1187 (1997).

5 J. Michael Reisman of Yale Law School directed me to the work of Georg Jellinek.

6 In 1889, the year following the completion of Schenker’s law studies, Jellinek moved
lectual perspective, Schenker’s most significant studies were in Legal Philosophy (Rechtsphilosophie) with Jellinek in his fourth semester of law school.\textsuperscript{7} Jellinek’s lectures during the spring of 1886 exposed the young musician to the jurisprudential thinking of one of the preeminent legal scholars of his day. What impact, if any, did Schenker’s law training, particularly his studies with Jellinek, have upon his musical development?

B. The Laws of Music

Schenker explicitly couched his musical ideas in legal terms. In his own epitaph as an addendum to his will he wrote, “Here rests one who, like no other before him, understood the soul of music and proclaimed its laws in the sense of the great ones.”\textsuperscript{8} Schenker perceived himself as a musical Moses chosen to deliver the “monotheistic doctrine of art from a Mount Sinai”\textsuperscript{9} by revealing its eternal commandments. “Truth” in music, he proclaimed, resides “in the unconditional . . . fulfillment of the laws by which it governed, [and] these laws [are] immutable.”\textsuperscript{10} Each issue of Der Tonwille, Schenker’s early periodical, is heralded as a “testimony to the immutable laws of music,”\textsuperscript{11} whose comprehension in Schenker’s view required the same technical mastery as a lawyer’s command of the law itself. “To become fully versed in these laws,” he wrote, “involves educating the spirit and the ear.”\textsuperscript{12} “If an artist tried to state his opinion on matters of . . . jurisprudence to [a] . . . lawyer,” claimed Schenker,

he would soon be told that he simply lacked all qualifications to hold such opinions, and that more was required than just dilettantish impressions. On the other hand, the ‘dilettante’ in the field of art . . . ventures to criticize Bach and Brahms for having composed works with which his primitive ability to enjoy cannot cope.\textsuperscript{13}

Schenker’s work is laced with legal metaphors; hardly a page

\textsuperscript{7} Schenker later studied international law (Völkerrecht) with Jellinek in the fall of 1887.
\textsuperscript{8} Federhofer, supra note 2, at 37 n.56.
\textsuperscript{9} SNARRENBERG, supra note 8, at 154. Schenker’s “Mosaic aspirations” are explored in Robert Snarrenberg, Schenker’s Senses of Concealment, 6 THEORIA 97 (1992).
\textsuperscript{10} 3 HEINRICH SCHENKER, THE MASTERWORK IN MUSIC 70 (William Drabkin ed. & Ian Bent et al. trans., 1994) [hereinafter SCHENKER, MASTERWORK].
\textsuperscript{11} 3 id. at 70.
\textsuperscript{12} 1 id. at 96.
\textsuperscript{13} 2 HEINRICH SCHENKER, KONTRAPUNKT [COUNTERPOINT] xx (John Rothgeb ed. & John Rothgeb & Jürgen Thym trans., 1987) [hereinafter SCHENKER, COUNTERPOINT].
goes by without some reference to law. He portrays music as a complex body of acoustical legislation, replete with statutes, regulations, and ordinances governing different hierarchical levels of jurisdiction. "It is a peculiarity of the musical art," observes Schenker, "that it gives effect to several laws simultaneously and that, while one law may be stronger than the others and impose itself more powerfully on our consciousness, such a law does not silence the other laws, which govern the smaller and more restricted units of tones."14 Schenker’s code of musical statutes includes such enactments as the “law of the triad,”15 “law of the passing note,”16 “law of obligatory register,”17 “law of variety,”18 “law of progression,”19 “laws of tonal life,”20 “laws of counterpoint,”21 “laws of voice leading,”22 “laws of diminution,”23 “laws of suspensions,”24 “laws of polyphonic passing events,”25 “laws of composition,”26 and even “the law of all life”27 itself.

Schenker’s notion of musical law reflects a sophisticated jurisprudential conception of a deep, compulsory obligation possessing bona fide authority that contrasts sharply with the superficial “textbook rules” espoused by other pedagogues of his era. His equation of tonal order with the binding and mandatory nature of law is revealed by his occasional replacement of Zusammenhang, the customary word for musical cohesion, with Bindung or “bindingness.” According to Schenker, Anton Bruckner would glibly confide to his students, “Look, gentlemen, this is the rule. Of course, I don’t compose that way.”28 Schenker sneered at this

14 HEINRICH SCHENKER, HARMONY 82 (Oswald Jonas ed. & Elizabeth Mann Borgese trans., 1954).
15 3 SCHENKER, MASTERWORK, supra note 10, at 2.
16 Id. at 3.
17 2 id. at 50.
19 1 SCHENKER, COUNTERPOINT, supra note 13, at 112.
20 Id. at 10.
21 See 2 id. at xviii.
22 Id. at 1; SCHENKER, BEETHOVEN’S NINTH SYMPHONY, supra note 18, at 96.
23 1 SCHENKER, MASTERWORK, supra note 10, at 3.
24 2 SCHENKER, COUNTERPOINT, supra note 13, at 216.
25 2 id. at 176.
26 SCHENKER, BEETHOVEN’S NINTH SYMPHONY, supra note 18, at 74.
27 1 SCHENKER, MASTERWORK, supra note 10, at 3.
28 SCHENKER, HARMONY, supra note 14, at 177-78 n.2. During his last year in law school, Schenker simultaneously studied music under Bruckner at the Vienna Conservatory. Carl Flesch (1873-1944), the noted violinist and music pedagogue, recalled a young university student at that time “who seemed half-starved, and who towered far above the rest of us. . . . It was Heinrich Schenker.” LARRY LASKOWSKI, HEINRICH SCHENKER:
hollow conception of a musical rule:

What marvelous snarls of contradictions! One believes in rules which should be laughed at; one pokes fun at them rather than ridicule one's own belief in them! And if there are rules which lack any reasonable sense [then] they ought to be considered nonexistent. . . . [H]ow odd it is to behold this or that individual assuming the pose of a hero who allegedly transgresses the rule!  

Even the music of a self-proclaimed iconoclast like Bruckner, who fancied himself as breaking “rules” in a superficial sense, was nonetheless in Schenker’s view “deeply rooted in rules and norms, albeit quite different ones” than the composer imagined. “The commonplace man always hankers after rules and schemas,” he explained, but “if one shows him how the genuine rules only behind the surface particulars, then he rejects such a rule because he does not have the intellectual eyes with which to perceive it. He wants rules that stare him right in the face, rules that stick in the foreground.”

Schenker’s literary style also has a lawyerly flair, bristling with the tenor of musical advocacy. He mercilessly cross-examines his adversaries like hostile witnesses on the stand, demolishing their testimony one by one. Schenker routinely employs the Socratic method in fashioning his case, by posing leading questions which he then proceeds to answer himself. His personal identification with Socrates as an advocate of truth is evidenced by his quote of the Greek philosopher: “But you who would follow me: worry little about Socrates, but far more about the truth.”

Summoning the analytic precision of his legal training, Schenker dissects each compositional argument like a barrister, parsing the rhetorical surplusage of the musical surface, and extracting its gravamen like the essential elements of a prima facie case. He instructs his jury of listeners not to trust the erroneous “impressions of ear-witnesses” in the case of Beethoven’s Ninth, and marshals his facts in the matter of Mozart’s G minor symphony to “bear witness” that its com-

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30. Id. at 107 n.5; 3 id. at 8 n.28.
poser “will live on forever.” Schenker’s analyses are intended not merely to enlighten, but persuade, indeed to prove beyond a reasonable doubt. These are tenders of proof in support of allegations in a musical trial, proffered by an advocate arguing his case before the court of the Muse.

C. The Legal Nexus

The ubiquity of legal references in Schenker’s work suggests that they are more than colorful rhetorical devices. They imply that his extensive legal training had a lasting impact on his intellectual development. Despite the burgeoning literature on Schenker, there has been no significant study of this nexus, although some music scholars have loosely hinted at their interaction. The recent emergence of the law and literature movement in recent years and its prodigy in the fledgling arena of law and music afford an interdisciplinary opportunity to consider this novel issue.

Schenker developed his musical ideas gradually in series of books and monographs over a period of several decades following his legal training. This chronology suggests that it may be specu-

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32 SCHENKER, BEETHOVEN’S NINTH SYMPHONY, supra note 18, at 15; 2 SCHENKER, MASTERWORK, supra note 10, at 61.

33 For a discussion of the relationship between law and music, see Symposium, The Modes of Law: Music and Legal Theory—An Interdisciplinary Workshop, 20 CARDOZO L. REV. 1325 (1999). The Symposium, held on April 26-27, 1998, was jointly sponsored by the Benjamin N. Cardozo School of Law and the Mannes College of Music in New York City. A shorter version of this Article was presented and featured in The New York Times article by Bernard Holland which stated:

Truly compelling to this new little world of law and music is the case of Heinrich Schenker, one of the profound musical theorists of the 20th century and a Viennese lawyer. As Wayne Alpern’s paper before this conference, “Schenkerian Jurisprudence,”... suggest[s], Schenker’s legal training colored his musical thinking in explicit ways.... Indeed, his law professor Georg Jellinek might lay some claim to Schenkerian analysis, a process famous for reducing musical compositions to basic elements.


34 See Heinrich Schenker, A Contribution to the Study of Ornamentation, in 4 MUSIC F. 1 (Hedi Siegel trans., 1976) [hereinafter Schenker, Ornamentation]; SCHENKER, BEETHOVEN’S NINTH SYMPHONY, supra note 18; DER TONWILLE (1921-1924); SCHENKER, MASTERWORK, supra note 10 (1925-1930); HEINRICH SCHENKER, NEW MUSICAL THEORIES AND FANTASIES (consisting of HARMONY (1906), COUNTERPOINT (two volumes, 1910 and 1922), and the culmination of Schenker’s theory in FREE COMPOSITION (1935)). The citations for Schenker’s works appear in footnotes to textual references. In addition to sources cited elsewhere herein, the extensive secondary Schenkerian literature includes EDWARD ALDWell & CARL SCHACHTER, HARMONY AND VOICE-LEADING (2d ed. 1989); ASPECTS OF SCHENKERIAN THEORY (David Beach ed., 1983); 1-4 THE MUSIC F. (1967-1987); READINGS IN SCHENKER ANALYSIS AND OTHER APPROACHES (Maury Yeston ed., 1977); FELIX SALZER & CARL SCHACHTER,
relative to attribute any aspect of his musical thinking, much of which is intrinsic to the notion of music itself, to extraneous jurisprudential ideas he might have encountered years before in law school. Some scholars in fact contend that Schenker’s social and political views bear no “substantive relation to the musical concepts that he developed during his lifetime” and can therefore be disregarded, even though they are nonetheless “part of the man and his work.”

Others more receptive to contextual influences, however, link Schenker’s musical ideas to various cultural, philosophical, and political sources. One study, for example, alleges that Schenker’s “narrative of musical structure represents a political agenda” that is “well suited to his ideological motivations.” This includes above all “a re-ordering of society along the lines of a well-regulated community of tones” that “responded to the serious political and economic instability in post-World War I Germany and Austria with nostalgia turned to bitterness.”

Perhaps stereotypically, another music scholar blames Schenker’s legal training for engendering an overly rigid conception of music as manifesting immutable, precedential rules of law, rather than...
flexible, interpretative principles that are “culturally relative and alterable.” This study claims that “Schenker was unwilling to assent to the contingency of musical laws,” and attributes his formalism and empirical disdain for hermeneutics to a legal frame of mind. “Schenker’s insistence on establishment of the purely factual (das rein Sachliche) as the basis for adjudicating [musical] interpretation,” he concludes “is likely due, in part, to his training in civil law.” Unfortunately, most music scholars untrained in the law have tended to exaggerate its rigidity and thus failed to accurately assess the influence of Schenker’s legal education upon his musical development.

Although these and other similar studies aid in elucidating the historical and ideological context of Schenkerian thought, many of them offer little factual evidence supporting the actual intersection of purported sources of influence with Schenker’s own biographical history as compared to his documented legal studies with Jellinek. Given their precedents, however, it is fruitful to examine correlations between Schenker’s musical thinking and specific legal theories he likely encountered in law school. The value of any intellectual congruence, in this regard, is not dependent upon any precise mapping or demonstrable causal connection; Schenker’s legal education, like other early training, may have had a subtle if not direct influence upon his subsequent mode of thought.

From this methodological stance, audible echoes of Schenker’s law experience can be heard not only in his pervasive legal language, but more profoundly in the substance of his musical theory itself. In particular, the specific jurisprudential ideas of Georg Jellinek, his most prominent law professor, resonate within Schenkerian musical thought. Jellinek’s chief concern was the polarity between social order and individual freedom, and the role of law in mediating its reconciliation. This same tension and synthesis, translated into musical terms, is the cornerstone of Schenker’s theory. He not only framed this musical dichotomy in legal terms, but ultimately resolved it in a way remarkably similar to his law professor. There is, in short, an ideational nexus between Schenker’s legal education and his musical thought. His

39 SNARRENBERG, supra note 8, at 155.
40 Id. at 156.
41 Id. at 5. The conceptual power of Schenker’s legal perspective is apparent from its contagiousness. This non-lawyer music theorist refers to “the adjudication of dissonant configurations” and the role of the harmonic idea (Stufe) in “adjudicating effects of consonance and dissonance” (emphasis added).
42 See Littlefield & Neumeyer, supra note 36, at 48.
revolutionary ideas about tonality sit perched atop a substratum of legal themes comprising a Schenkerian jurisprudence of music. Exploration of this remote intersection between law and music elaborates the intellectual foundation of the most important musical theory of our time.

II. JELLINEK’S JURISPRUDENCE

A. Historical Jurisprudence

Georg Jellinek was a leading proponent of the prevailing school of nineteenth-century German historical jurisprudence founded by Frederick Karl von Savigny (1779-1861) and subsequently developed by Rudolf von Jhering (1818-1892), its most influential proponent. The movement was adumbrated in the writings of Gustav Hugo (1764-1844), but unequivocally launched with the publication of Savigny’s famous essay, The Law of Possession in 1803. Savigny was a professor of Roman law at the University of Berlin, where von Jhering began but later moved to the University of Göttingen, where Hugo taught. Savigny regarded a society’s political destiny and legal development as a predetermined manifestation of its unique national spirit (Volksgeist) buried deep within its mythic group consciousness. Each nation’s jurisprudence, like its language, reflected the peculiar faculties and tendencies of its race, fixed in character during its ancient history. This idea was prevalent throughout the nineteenth century with eighteenth-century precedents in Giambattista Vico (1668-1744) and Johann Gottfried Herder (1744-1803).

Legal scholars during the Enlightenment had conceived of law as a series of logically derived, a priori propositions deduced from universal dictates of morality and reason. Savigny and his followers rejected these dry abstractions of legal rationalism and focused instead on the historical and empirical origins of law. They approached jurisprudence neither as a logical system of abstract propositions nor an instrument of social change, but rather as an epiphenomenon or secondary cultural symptom of deeper and often hidden sociological forces.

The practitioners of historical jurisprudence employed a reductive methodology called the “science of law,” seeking to pierce the legal crust and expose its deeper structural tectonics by “trac[ing] every established system to its root, and thus dis-
cover[ing] an organic principle." From their perspective, law could never be created by the fiat of mere legislation, but only discovered through scientific analysis of its historical evolution. Savigny and his colleagues thus opposed statutory codification of German law, since any effort to make law as opposed to finding it was artificial, arbitrary, and doomed to failure. The ascendency of historical jurisprudence was in part a reaction to the radical disruption of the French Revolution culminating in the excesses of the Reign of Terror and the Napoleonic dictatorship. These alarming developments were viewed by more conservative German and Austrian law faculties as incited by historical and fanciful abstractions of legal rationalism.

Savigny’s rejection of rapid and deliberate legal transformation in favor of gradual evolution grounded in empirical legal history represented a distinct break from the a priori deductions of the preceding century. His theory had a revolutionary impact, generating an immediate following of disciples. Savigny’s renowned successor, von Jhering, the most eminent legal scholar during Jellinek’s career, cultivated a more dynamic approach in his notorious essay, The Struggle for Law. Often called the “father of sociological jurisprudence,” von Jhering portrayed law as a living force struggling to be realized through the clash of competing interests. Law’s essence lay neither in the abstract moral propositions of the Enlightenment nor in Savigny’s monolithic historical forces, but rather in the concrete concerns of real people in conflict. The purpose of law was to secure social order through the reconciliation of these opposing claims in the context of historically derived legal institutions and principles of jurisprudence.

**B. Jellinek’s Jurisprudential Framework**

Jellinek embraced Savigny’s quest for the historical origins of law in national character and von Jhering’s conception of conflict-
ing human interests. His affiliation with historical jurisprudence is evidenced by his conviction that the true principles of law were “taught not by jurisprudence but by history,” and required “careful historical analysis, which will show different results for different epochs.”

Jellinek rejected the abstract doctrines of “legal dialectics” divorced from historical reality as “impossible dreaming,” since they “can easily deduce the given condition with equally logical acuteness from principles directly opposed to one another.” No theory, he concluded, “no matter how abstract it may seem, which wins influence upon its time can do so entirely outside of the field of historical reality.” Unlike his colleagues pursuing this reductive “science of law,” however, Jellinek focused primarily upon the tension between social order and individual freedom evolving throughout the history of law. “To recognize the true boundaries between the individual and the community,” he wrote, “is the highest problem that thoughtful consideration of human society has to solve.”

Jellinek’s jurisprudence—and through inference his legal instruction to Schenker—can be discerned from two of his books, The Declaration of the Rights of Man and of Citizens and The Rights of Minorities. The central theme of both essays is the “struggle between Authority and Liberty.”

Jellinek’s goal of achieving “the harmonious coexistence of the individual with the whole” reflects a broader Germanic reaction to the radical individualism of writers like Jeremy Bentham (1748-1832) and John Stuart Mill (1806-1873), whose influential essay On Liberty (1859) heralded “The Limits to the Authority of Society over the Individ-

47 Id.
48 Id. at 95.
49 Id. at 97 n.6.
50 Id. at 95.
51 Id. at 98.
52 See JELLINEK, RIGHTS OF MAN, supra note 46.
53 GEORG JELLINEK, THE RIGHTS OF MINORITIES (A.M. Baty trans., 1912) (1898) [hereinafter JELLINEK, MINORITIES]. Although the publication of Rights of Man post-dates Schenker’s studies with Jellinek by nine years, it can be extrapolated to contain ideas previously transmitted to Schenker on the basis of Jellinek’s prefatory remark that “the Rights of Man originated in connection with a larger work upon which I have been engaged for some time.” Rights of Minorities, published only three years later, is a continuation of this earlier ongoing work extending its principles from individual to minority rights. See ROSCOE POUND, LAW AND MORALS 110-11 (1969) (tracing Jellinek’s jurisprudential thought back to 1878).
54 JELLINEK, MINORITIES, supra note 53, at 34.
German jurisprudents rejected what they perceived as excessive personal autonomy under English utilitarianism in favor of greater integration between individual and collective ends. Jellinek’s reconciliation of these opposing values represents an important precedent for the social policy approaches to law predicated upon their synthesis in the twentieth century.

Rights of Man is a comprehensive analysis of the historical evolution of individual rights, addressing the “legal position of the individual in the state” and “the position which this state assures to the individual.” The notion of individual rights, argues Jellinek, cannot be comprehended solely through “the development of the conceptions of right, but above all through that history of the institutions themselves.” This historical analysis ultimately reveals that “the legal nature of liberty is entirely different in the ancient state and in the modern.” Jellinek specifically isolates three different legal systems as historical paradigms mediating this fundamental dialectic between social order and individual freedom, shown in the diagram below. The first two systems, Roman law and Democratic law, represent the polar extremes of excessive authoritarianism and excessive libertarianism—both of which undermined their desired synthesis. Only Jellinek’s third paradigm, which he found in the law of the medieval Teutonic state, achieved equilibrium between order and freedom.

55 JOHN STUART MILL, ON LIBERTY (Stefan Collinia ed., Cambridge Univ. Press 1985) (1859). Jellinek quotes Mill’s exaggerated comparison of “the modern regime of public opinion” to the communal authoritarianism of the Chinese political system, and the Englishman’s warning that “unless individuality shall be able successfully to assert itself against this yoke, Europe, notwithstanding its noble antecedents and professed, Christianity will tend to become another China.” In a more moderate tone, Jellinek responds: “I am, of course, not so pessimistic as that famous spokesman of Liberalism who feared . . . Chinese torpidity. . . . But the danger for the free development of individuals and of minorities, which [are] closely connected, is yet sufficiently great.” JELLINEK, MINORITIES, supra note 53, at 33, 39-40 n. 54.

56 See DAVID M. WALKER, THE OXFORD COMPANION TO LAW 1269 (1980).
57 JELLINEK, RIGHTS OF MAN, supra note 46, at 6.
58 Georg Jellinek, Preface to RIGHTS OF MAN, supra note 46 (emphasis added).
59 JELLINEK, RIGHTS OF MAN, supra note 46, at 97.
Fig. 1: Jellinek’s Jurisprudential Dialectic

Jellinek’s first jurisprudential model, Roman law, constituted the epitome of systematic social coherence at the expense of individual freedom. The imperial Roman state was an omnipotent, monistic entity exercising absolute control, representing an undivided community in which the communal will was determinative and the private citizen had no autonomy. Individual rights did not exist apart from the collective, and any personal privileges were only derivatively conferred by state concession without independent foundation. The Roman system of law eventually collapsed, concludes Jellinek, because its excessive authoritarianism and exaltation of social order suffocated individual liberty, thereby disrupting the essential equilibrium between order and freedom.

Jellinek located the antithesis of Roman legal centricity in the excessive libertarianism of modern Democratic law, his second jurisprudential model. Each citizen in a democracy is deemed to possess natural, inalienable, and autonomous rights existing prior to and independent from the state. A distinct boundary exists between the central authority and the individual, who establishes by social contract the conditions under which he enters the community and asserts unilateral claims against it which do not spring from the state itself. But democracy’s exaltation of individual rights placed the state and its citizens in irreconcilable opposition. This conflict, for Jellinek, opened the floodgate to social disorder by elevating the subjective will of the private individual over the objective will of the state.

Roman law thus erred on the side of repressiveness, while democracy erred on the side of permissiveness. Jellinek located their optimal synthesis in his third jurisprudential system, the ma-
The medieval Teutonic state. He claimed to have discovered the historical origin of the abstract notion of individual rights by empirically retracing its evolution back through the French Revolution, Rousseau’s Social Contract, the American Bill of Rights, the English Magna Carta—and ultimately to the Germanic society of the Middle Ages. Unlike the ancient Roman sovereign, the medieval Teutonic state rose from weak beginnings, never to become a dominant centralized authority. Although individual citizens were restricted by family, clan, and decentralized associations, they were not so obliged to a single omnipotent state. The state only existed in a rudimentary form with narrowly defined power. Whereas the monistic will of imperial Rome was identical to the will of its subjects, there was no such integral unity between the Teutonic state and its people, who confronted each other as equals in a reciprocal relationship of mutual autonomy and respect. Individual freedom was conceived neither as “the product of state concession” as in Roman law, nor as an independent “right” higher than and opposed to the state as it was under democracy. It was rather a natural preexisting “condition of liberty” prior to the state’s formation that “was not created but recognized . . . in the self-limitation of the state.” The central authority acquired a duty of lawful obedience from its citizens in exchange for its own adherence to limitations preserving their antecedent freedom.

The increasing concentration of power in absolute state monarchies at the beginning of the modern era coincided with the infiltration of Roman law and its model of systematic central authority into Europe, particularly Germany. Lacking all references to individual rights, the 1871 Constitution of the German Republic reflected this powerful Roman influence. But, the ancient Teutonic concept of individual freedom and the state’s restricted control never died out completely. The Teutonic roots of individualism were especially strong in England—and subsequently in America—which unlike Germany better withstood the impact of Roman law. Its teutonic foundation therefore remained more intact. When the emerging European monarchies finally recognized the private interests of their individual citizens, the Enlightenment doctrine of abstract individual “natural rights,” according to Jellinek, merely attached itself to the dormant historic roots of medieval Teutonic law.

Legal rationalism’s undue exaggeration of individual freedom,
however, ultimately disrupted the ancient Teutonic equilibrium by
tilting the historical pendulum too far in the opposite direction. Overreacting to the excesses of Roman order, democracy elevated
the natural condition of freedom in Teutonic society into a fixed, autonomous “right” possessing a higher rank in opposition to the state. This jeopardized rational social control, argued Jellinek, and unleashed anarchistic tendencies by making the individual more important than the collective, as evidenced by the tyranny of the French Revolution and its Reign of Terror. “The great error in the theory of a natural right lay in conceiving of the actual condition of liberty as a right and ascribing to this right a higher power which creates and restricts the state,” 62 Jellinek concluded. “For years I have used my nose to smell with,” 63 he mused by analogy. “Have I then really a provable right to it?” 64

Jellinek’s model of Teutonic law thus represented “a correct legal comprehension of the relation of the state and the individual” 65 by establishing an ideal balance between the dialectical extremes of excessive social order under Roman law and excessive individual freedom under democratic law. Guided by this historic revelation, “the task of the science of law” in Jellinek’s classroom, where Schenker sat during the spring of 1886, was to restore their delicate equilibrium. 66

C. Intervening Spaces

Jellinek’s Teutonic synthesis was accomplished on an operational level through his pivotal notion of “intervening spaces” (Zwischenräume) between laws. 67 The Teutonic state was neither omnipotent like the older Roman one nor ineffectual like the modern democratic one. Instead of either demanding absolute control or relinquishing it altogether, Teutonic laws functioned as discrete, “self-limited” pillars of social organization that guided rather than dictated individual conduct. Accordingly to Jellinek, there were “intervening spaces which must necessarily remain between those rules with which the state surrounds the individual.” 68 These intervening spaces or pounding gaps in the law delineated an appropriate region of personal liberty or “free sphere” (gesell-

62 Id. at 97-98 (emphasis added).
63 Id. at 96 n.5.
64 Id.
65 Id. at 95.
66 See id. at 98.
67 See id. at 97.
68 Id. at 96-97 (emphasis added).
schaftsfreien Sphäre) in which the natural antecedent condition of individual freedom was preserved. Freedom was therefore negatively defined by the absence of laws imposed by the state, rather than by affirmative countervailing rights against the state. The private citizen could act freely in those spaces between the laws where he was not obligated to behave otherwise.

Teutonic law thus adhered to a principle of “autolimitation” or “self-limitation” by which its authority was deliberately confined to the enforcement of “minimum ethics” or minimum rules that preserved a free sphere of individual autonomy within their intervening spaces. There were “boundaries between the individual and the community” and a “social-psychological guarantee” safeguarding personal liberty within the broader constraints of legal order. By circumscribing freedom within the Zwischenräume between laws, order and freedom were no longer irreconcilably opposed, but rather synthesized in the very fabric of the law itself. “Collectivism and Individualism,” concluded Jellinek, “form no exclusive antithesis if one has learned to recognize that the establishment of collectivism by absolute forcible subjection of the individual to the whole is always limited.”

D. Selective Valuation

Although Jellinek asserted that the twin evils of repressive control and excessive freedom were equally destructive of the equilibrium embodied in Teutonic law, he particularly denounced the democratic principle of majority rule. “Every democratic state has a tendency to exalt the bare majority as the sole decisive factor,” he warned, but “pure majority rule portends nothing but oppression and tyranny.” While democracy outwardly proclaimed the rights of individuals and minorities, majoritarianism in fact “ruthlessly trampled upon the minorities opposing it.” The fatal defect of democratic equality, Jellinek asserted, was its faulty assumption of social homogeneity, which he regarded as empirically

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69 See JELLINEK, MINORITIES, supra note 53, at 34 (emphasis added).
70 JELLINEK, RIGHTS OF MAN, supra note 46, at 97; see also Benjamin Nathan Cardozo, Paradoxes of Legal Science, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE 277 (Margaret E. Hall ed., 1947); POUND, LAW AND MORALS supra note 53, at 110-11.
71 JELLINEK, RIGHTS OF MAN, supra note 46, at 98.
73 JELLINEK, MINORITIES, supra note 53, at 34.
74 Id. at 20.
75 Id. at 16-17. The Roman idea of state omnipotence did not reflect the tyranny of a majority for Jellinek, but tyranny by a minority of one.
false. The Austro-Hungarian Empire, in particular, was far from homogeneous. It not only united a larger number of different nationalities than any other state, but also presented a stark conflict between a sophisticated German minority and an unsophisticated Slavic majority.

Treating all citizens as equals by superficially tallying up their votes on the basis of mere numbers alone not only disregarded their innate differences, but abrogated each person’s unique individuality.76 “The rights of the minority are coextensive with the rights of the individual,” Jellinek observed, and “the will of the majority meets an insurmountable barrier in the existence of the acknowledged rights of individuals.”77 Democratic egalitarianism reflected a process of “universal levelling” that suppressed individual differences and achievement. “All progress in history has been [the] work of minorities,” he affirmed. “[T]he further the democratization of society strides, the further stretches out the power of the Majority principle. [This] reveals a tremendous danger, which threatens all Civilization. . . . What geologists affirm of the hills, that in the course of time they will crumble and sink their summits to the ground, is also true of society.”78

Medieval Teutonic law, in contrast, was a hierarchical meritocracy based on the selective principle that “votes should be weighed, not counted.”79 The idea that “two people are worth more than one,” Jellinek asserted, “ran counter to the strong feeling of individuality in the Germanic nations.”80 Since numerical frequency alone did not bestow value, social adjudication under Teutonic law were resolved on the basis of individual weight or merit. Jellinek referred to this selective principle of valuation by relative weight as “minority-consciousness” (Minoritätsgefühl), an essential procedural corollary he elevated to the status of a “fundamental law” (Grundgesetz), to “keep [society] from the desolate intellectual and moral flats and bogs.”81 Borrowing Thomas Hobbes’s definition in the Leviathan,82 Jellinek regarded this rule as one operational “invested with special sanctity, [with] greater value than all the rest, not capable of unilateral alteration, [and whose] abrogation would disorganize the body politic and evoke a

76 See id. at 6.
77 Id. at 21.
78 Id. at 32-33.
79 Id. at 6 (emphasis added).
80 Id. at 5.
81 Id. at 33-34.
82 THOMAS HOBBES, LEVIATHAN (J.M. Dent & Sons 1914) (1651).
III. JURISPRUDENTIAL CROSS-CURRENTS

A. Kant and Hegel

Jellinek’s lectures at the University of Vienna undoubtedly exposed Schenker not only to his own jurisprudential theories, as well as those of Savigny and von Jhering, but to the influential nineteenth-century legal philosophies of Immanuel Kant and Georg Wilhelm Friedrich Hegel as well. Indeed, from a broader perspective, Jellinek’s thinking reflects a jurisprudential reconciliation between Kant’s idealization of the individual and Hegel’s competing idealization of the state by empirically locating their historical synthesis in medieval Teutonic law.

Kant articulated his mature legal theory in his *Metaphysics of Morals*, claiming that the function of law was to maximize individual freedom such that “the choice of one can be united with the choice of another in accordance with a universal law of freedom.” Legal proscriptions were therefore justified only insofar as they promoted individual liberty. The inherent tension between personal freedom and social obligation in Kant’s legal philosophy is clearly embodied in his jurisprudential notion of “wide” or “indeterminate duties.” Unlike a “narrow duty,” a “wide duty” only prescribes a general principle or “maxim for action” rather than a specific action itself. It provides a “compass,” he says, that points in the right direction without dictating how to act precisely, akin to the laws of Jellinek’s Teutonic state. Kant’s “wide duties” accordingly leave what he calls “playroom” or “latitude” preserving free choice in the specific manner of their fulfillment, again analogous to Jellinek’s “intervening spaces” and “free sphere” under Teutonic law. The Kantian dialectic between abstract communal standards of law on one hand, and the freedom of individual compliance on the other, synthesizes the same tension between order and freedom in Jellinek’s jurisprudence.

As the nineteenth century unfolded, the emphasis upon indi-

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83 JELLINEK, MINORITIES, supra note 53, at 9-10.
85 Id. at 24.
86 See id. at 153-57.
87 See id. at 153.
88 The epistemological relationship outside of law between Kant and Schenker is explored in Korsyn, supra note 36.
individual autonomy manifested in Kant’s philosophy shifted toward priority upon social interdependence, as reflected in Hegel’s thinking. *Philosophy of Right*,89 Hegel’s last major work, elaborated the jurisprudential ramifications of his broader philosophical framework established in his seminal *Lectures on the Philosophy of History*.90 Like Jellinek, Hegel discerned three broad realms in the evolution of the legal relationship between the individual and society. However, unlike Jellinek who sought their reconciliation, Hegel regarded the state as the supreme moral end representing a universal “World Spirit” beyond the subjective individual, who was little more than an agent or means for its historic realization. Furthermore, Hegel also opposed Jellinek’s empirical scientific methodology adapted from Savigny, Hegel’s bitter foe, conceiving legal history instead in terms of a transcendental, almost mystical process of thesis, antithesis, and synthesis.

In Hegel’s Oriental Realm, a unified theocracy constituting his historical thesis, there was no individual personhood apart from the collective unity of the World Spirit itself. After an idyllic but temporary Greek phase in which emerging individual identity balanced serenely with a recollection of collective consciousness, the antithesis of accelerating individual and national differentiation during the Roman Realm culminated in the collapse of the Empire. This polarization between thetic unity and antithetic freedom finally reached an historic “turning point” in the modern Germanic Realm, when the World Spirit in “infinite pain . . . is pressed back upon itself”91 and realizes its own perfection through a synthesis of unity with diversity. Instead of Hegel’s exotic Oriental Realm, Jellinek considered imperial Rome as the model of legal centrism, shifting it from antithesis to thesis as it were. Roman law did not recognize independent individual rights apart from the state and historically exerted a powerful centripetal force in European jurisprudence.92 Jellinek’s “antithesis” appears in the individualism of modern democracy instead of Hegel’s collapse of Rome. Finally, Jellinek’s synthesis of order and freedom in the medieval Teutonic state was a retrospective one discovered

80 G.W.F. Hegel, LECTURES IN THE PHILOSOPHY OF HISTORY (J. Sibree trans., 1956). “It is highly likely . . . that Schenker would have encountered Hegel’s legal treatise at some point during his four years of studying law.” SNARRENBERG, supra note 8, at 65 n.15.
91 KANT, supra note 84, at 379.
92 See HANS JULIUS WOLFF, ROMAN LAW: AN HISTORICAL INTRODUCTION (1982).
through empirical analysis of legal history, rather than a Hegelian inevitability immanent on the German horizon.\(^{93}\)

**B. Classical Political Theory**

Jellinek’s Teutonic synthesis between order and freedom, like many jurisprudential ideas, has roots in the classical political theories of antiquity. Plato’s notion of “mixed government” in his *Laws*\(^{94}\) embodies the same ideal “mixture” or “proper balance”\(^{95}\) between these two polarities. Persia and Athens were “the most autocratic of communities and the freest,”\(^{96}\) thus exemplifying the two “strands” from which all other legal systems were woven. “[W]hen things were pushed to an extreme in either case,” warned Plato, “the consequences were unsatisfactory in both societies alike.”\(^{97}\) His optimal regime, like Jellinek’s Teutonic state, accordingly steered a middle course to “strike a mean between monarchy and democracy”\(^{98}\) and achieve “a maximum of well-being.”\(^{99}\) “[I]t is indispensably necessary,” the philosopher advised, “that there should be both ingredients, [for] no community which has not these characters can be rightly administered.”\(^{100}\)

Plato also adumbrated Jellinek’s image of a self-limited legal structure with intervening spaces of freedom. Law “cannot prescribe with accuracy what is best and just,” he recognized, since the “differences of human personality, the variety of men’s activities, and the restless inconstancy of all human affairs make it impossible for any art whatsoever to issue unqualified rules.”\(^{101}\) Paralleling his famous metaphor of the cave, Plato portrays society as a building or “edifice” held together by laws as the “rivets of society,” binding its “substructure” like a “builder’s supports.”\(^{102}\) Plato’s self-limited “rivets” are likewise separated by “mortises” or gaps analogous to Jellinek’s intervening spaces between Teutonic

\(^{93}\) Snarrenberg explores the parallels between Schenkerian theory and “the dialectical model of rational history developed by Hegel.” SNARRENBERG, supra note 8, at 64-70. Jellinek’s jurisprudence may have mediated this relationship.


\(^{95}\) Id. 693e, at 1288.

\(^{96}\) Id. 701e, at 1295.

\(^{97}\) Id.

\(^{98}\) Id. 756e, at 1336.

\(^{99}\) Id. 701e, at 1295.

\(^{100}\) Id. 693d-e, at 1288; see also Leo Strauss, Plato, in HISTORY OF POLITICAL PHILOSOPHY 84-85 (Leo Strauss & Joseph Cropsey eds., 3rd ed. 1987).

\(^{101}\) See PLATO, STATESMAN 294 (Martin Ostwold ed. & J.B. Skemp trans., 1957).

\(^{102}\) Id.
laws, forming comparable “connecting links” as a “sure shield for all the statutes” to prevent them from any “swerve from the right bounds.”\footnote{103} Aristotle also sought a similar equilibrium between social organization and individual freedom. He condemned the “false notion of unity” that suppressed personal liberty, arguing “[u]nity there should be, . . . but in some respects only.”\footnote{104} “[T]he nature of a statute is to be a plurality . . . [so] we ought not to attain this greatest unity even if we could, for it would be the destruction of the state.”\footnote{105} Aristotle’s optimal legal system adopted a middle road between democratic Athens and authoritarian Sparta, tending to be “neither democracy nor oligarchy, but something in a mean between them.”\footnote{106} He sought a “fusion of oligarchy and democracy,”\footnote{107} that would constitute an “admixture of the two elements”\footnote{108} in a “mixed regime”\footnote{109} or “well attempered polity.”\footnote{110} Aristotle even anticipated Schenker’s transference of this legal dialectic to music, claiming “there is a point at which a state may attain such a degree of unity as to be no longer a state, or . . . an inferior state, like harmony passing into unison, or rhythm which has been reduced to a single foot.”\footnote{111}

Cicero too embraced this same political ideal in Rome, advocating a “fair balance of rights, duties, and functions” where “the magistrates having adequate power, the aristocratic council adequate influence, and the people adequate freedom.”\footnote{112} Polybius’s history of Rome traces its rapid and unprecedented rise to the reconciliation between social order and individual freedom, creating a mixture of checks and balances so effective “that it was impossible to pronounce with certainty whether the whole system was aristocratic, democratic, or monarchical.”\footnote{113} Cicero later attributed Rome’s eventual decline to the destabilization of that equilibrium
through the tyranny of Caesar’s dictatorship, costing Cicero his head, and undermining the delicate synthesis which Marcus Brutus—“the noblest Roman of them all,”[114] as Shakespeare later dramatized—sought desperately in vain to preserve.

C. Jellinek’s Legacy

Georg Jellinek was the most significant legal scholar Schenker encountered during law school. His reductive methodology reflected the prevailing “science of law” of nineteenth-century German historical jurisprudence by seeking to strip away legal rationalizations and expose immutable historical forces in the background dictating legal manifestations on the social surface. Jellinek focused upon the competing dictates of social order versus individual freedom, a polarity represented by the excessive authoritarianism of Roman law and the exaggerated individualism of democratic law. He claimed to have discovered their historical synthesis in the law of the medieval Teutonic state, where intervening spaces of freedom were circumscribed between structural pillars of law. Decisions were made on the basis of a selective principle of relative weight. Parallels to Jellinek’s idea exist in legal philosophies of Kant and Hegel, with precedents in the classical political thought of Plato, Aristotle, and Cicero. What does this have to do with Schenker—or music?

IV. SCHENKER’S MUSICAL JURISPRUDENCE

A. Music Theory as a Mode of Law

Jellinek’s jurisprudence has audible overtones in Schenker’s theory of music. Schenker’s thinking is laden with the same sense of historicism and hidden structural forces. Music for him, like law for Jellinek, is a foreground manifestation of deeper organic processes beneath the surface. The purpose of musical analysis for Schenker, like his professor’s science of law, is to strip away these musical epiphenomena and expose the foundation of their generation. As the proponents of historical jurisprudence believed of the laws of society, the laws of music for Schenker likewise evolved slowly and naturally from fundamental precepts rooted deep in its past and inherent in the structure of music itself. Abstract attempts to codify new musical legislation such as Arnold Schoenberg’s arbitrary twelve-tone system ignored the historical embedd-

ness of authentic musical laws, which could only be discovered, not created. Schenker’s affinity with Jellinek’s search for the organic origins of law is evident from his remark:

   Let mankind observe in art the continuous natural growth of phenomena from the basis of a few principal laws, and learn to trust the power of growing outward from within more than the whims of that low plateau of humanity which believes it possible (or even necessary) to create new laws with each new motion of hand or mouth.\textsuperscript{115}

Jellinek’s paradigmatic “struggle between Authority and Liberty” also strikes a deep chord within Schenker’s musical thought. Schenker’s approach to music parallels his professor’s approach to law, by attempting to resolve this same tension in his own domain. The “antinomy of freedom and coherence,” as Adorno put it, exists in both realms.\textsuperscript{116} Schenkerian theory is a mode of law applied to music, seeking their reconciliation through sound instead of society. Music and society model one another, and both are ruled by law. Broadly allying his task with his teacher as “bringing the general in harmony with the particular,”\textsuperscript{117} Schenker translates Jellinek’s legal dynamic between the state and the individual citizen into the musical dynamic between tonality and the individual tone. His famous motto, “\textit{semper idem sed non eodem modo}—always the same but not in the same way,”\textsuperscript{118} embodies the Teutonic synthesis between unity and diversity in Jellinek’s jurisprudence. Above all, the operational mechanism for his law professor’s reconciliation of this essential dichotomy through the notion of intervening spaces of freedom between self-limiting laws based on a selective principle of structural weight drives Schenker’s own synthesis of ordered freedom in music as well.

C. \textit{The Will of the Tones}

   Tonal relationships in Schenkerian theory are an acoustical analog of relationships between people in a legal system. Schenker explicitly equated the individual tone with the individual being. Notes are “biological creatures” with independent “lives of their own,”\textsuperscript{119} he says animistically. “We should get accustomed to seeing tones as creatures” and “assume in them biological urges as

\begin{itemize}
\item \textsuperscript{115} \textsuperscript{2} \textit{SCHENKER, COUNTERPOINT}, supra note 13, at xvii.
\item \textsuperscript{116} \textit{See THEODOR W. ADORNO, QUASI UNA FANTASIA: ESSAYS ON MODERN MUSIC 290 (Rodney Livingstone trans., 1992)}.
\item \textsuperscript{117} \textit{2 SCHENKER, MASTERWORK, supra note 10, at 23}.
\item \textsuperscript{118} \textit{SCHENKER, FREE COMPOSITION, supra note 35, at title page}.
\item \textsuperscript{119} \textit{SCHENKER, HARMONY, supra note 14, at xxv, 86}.
\end{itemize}
they characterize living beings.”

Der Tonwille, the title of Schenker’s periodical, “expresses a similar thought: the tones have a ‘will’ of their own, to which even the composer must submit.”

Every note “is possessed of the same inherent urge to procreate . . . [that is] in no way inferior to the procreative urge of a living being.” Musical tones accordingly live out their anthropomorphic “destiny [and] real personal fate,” instructs Schenker, “just as human beings are represented in a drama.”

D. Tonal Law

The natural state of individual tones in Schenker’s world is an anarchical struggle for survival. Their “vitality and egotism,” he explains, “expresses itself in the desire to dominate . . . [their] fellow-tones rather than be dominated by them.” The “attempt to live fully in as many relationships as the struggle for life will permit . . . [and] gain the upper hand in each one of these relationships.”

“the urge . . . [to] conquer for itself such wealth, such fullness of life,” and to “seek a life as full and rich as possible.”

This “individuality of the tone” and its “egotistic drive” toward domination from “a biological point of view” manifest themselves in a natural and untempered impulse to self-expression in several ways: by procreating subordinate overtones of a third and a fifth with each tone as the root of a triad, by establishing itself as the tonic dominating other roots in the key and surrounding itself with a “stately retinue” of subordinate tones, by defeating challenges by other vying tones seeking domination through modulation, and by reinstating itself as tonic if temporarily deposed.

Needless to say, this anarchical life among competing tones in their uncivilized state, like that of savage men, is not truly free. The music of primitive societies, claims Schenker, is merely “a chaos of indeterminate tones . . . [without] even as much as a trace of an order.”

True musical freedom for Schenker, like true human freedom for Jellinek, arises only where there is sufficient col-

\[\text{\footnotesize \textsuperscript{120}}\] Id. at 6.
\[\text{\footnotesize \textsuperscript{121}}\] SCHENKER, FREE COMPOSITION, supra note 35, at 35 n.3.
\[\text{\footnotesize \textsuperscript{122}}\] SCHENKER, HARMONY, supra note 14, at 28-29.
\[\text{\footnotesize \textsuperscript{123}}\] Id. at 12.
\[\text{\footnotesize \textsuperscript{124}}\] Id. at 84.
\[\text{\footnotesize \textsuperscript{125}}\] Id.
\[\text{\footnotesize \textsuperscript{126}}\] Id.
\[\text{\footnotesize \textsuperscript{127}}\] Id. at 85.
\[\text{\footnotesize \textsuperscript{128}}\] Id. at 86.
\[\text{\footnotesize \textsuperscript{129}}\] See id. at 40, 252, 256-57.
\[\text{\footnotesize \textsuperscript{130}}\] Id. at 53.
lective order to safeguard it. The “immensely difficult task” of the theorist, therefore, like that of the jurist, is “the taming of the contradictions” between the struggling notes to “reconcile in one system all those urges inherent in the individual tones . . . as well as their mutual relationships.”

“On the one hand, he . . . [is] faced with the egotism of the tones, each of which, as a root tone, insist[s] on . . . [its] right to procreate. . . . On the other hand, the common interest of the community . . . demand[s] sacrifices.”

Musical pitches accordingly enter into legal relationships with one another for their common benefit by forming a stable “system” and orderly “community of tones.”

“They are as living beings with their own social laws,” says Schenker, and “[t]he relationships of the tone are established in its systems.” Each note, like each individual, contracts with the others to relinquish a degree of its personal autonomy to a centralized authority for the mutual sake of collective order, in exchange for an assurance of its own retained freedom. Just as social laws mediate and restrain the pursuit of personal self-interest, tonal laws mediate and restrain the communal lives of tones in their pursuit of self-expression, thus “maintaining amicably neighborly relations.”

Notes become socialized and transformed into naturalized citizens of a bona fide musical state, acquiring privileges and duties defining their social conduct by the operation of law. The tone in Schenkerian society is “an individual with rights and obligations, governed by law, moved by freedom, motivated to act, acting both rationally and rightly.”

Schenker describes this tonal organization in explicit legal terms “as a sort of higher collective order, similar to a state based on its own social contracts by which the individual tones are bound to abide . . . [that] resembles in anthropomorphic terms, a constitution, regulation, [or] statute.”

Like a legal bureaucracy, tonality acts as an administrative framework imposing reciprocal obligations upon the egoistic lives of its individual tonal citizens to regulate musical coherence. It brings “a purposeful organization into

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131 Id. at 30.
132 Id.
133 Id. at 40, 256-57.
134 1 SCHENKER, COUNTERPOINT, supra note 13, at 16.
135 SCHENKER, HARMONY, supra note 14, at 84-85.
136 2 SCHENKER, MASTERWORK, supra note 10, at 114.
137 SNARRENBERG, supra note 8, at 69.
138 SCHENKER, HARMONY, supra note 14, at 84 (emphasis added).
the world of chords”\textsuperscript{139} whose “guidance and direction . . . im-
parts . . . discipline, custom, and order.”\textsuperscript{140} Thus musical constitu-
tion “defin[es] quite precisely the sacrifices which each tone . . .
[has] to make if a community of tones . . . [is] to be established use-
fully and continued stably.”\textsuperscript{141} At the same time, under the terms
of its social contract with the tonal authority, each pitch “lives a
more abundant life, it satisfies its vital urges more fully, . . . [and]
can express its self-enjoyment . . . with the greatest possible inte-

E. Tonal Spaces

Schenker’s society of tonal citizens is a musical microcosm of
Jellinek’s Teutonic state. Equating tonality with the centralizing
force of law in a political state, he achieves the equivalent recon-
ciliation between the order of a musical Rome and the freedom of
a musical democracy. Following Schopenhauer, Schenker charac-
terized law as an impure substance possessing a “small admixture
of arbitrariness and force,”\textsuperscript{143} which then analogized this charac-
terization of law to music.\textsuperscript{144} The technical means by which
Schenker achieved this musical admixture of freedom and restraint
bears striking affinity with Jellinek’s model of law.

Music in Schenkerian theory is conceived as a multi-
dimensional structure defined by different hierarchical levels
(Schichten) comparable to the jurisdictional strata of a legal sys-
tem. The central authority operates on the deepest background
level in the form of a “fundamental structure” (Ursatz) analogous
to a musical constitution to assure tonal order at the highest level.
The norms emanating from this constitution are then hierarchi-
cally projected to lower levels of the musical edifice. This distinc-
tion between a normative jural paradigm in the background and its
manifestation in the legal foreground parallels the relationship be-
tween \textit{ius} and \textit{lex} in jurisprudence. The first represents law in its
broad and undifferentiated sense as that which provides social or-
der, and the second its instantiation in particular legal statutes and
enactments. \textit{ius} in Schenkerian jurisprudence signifies musical law
at the deepest and most abstract level of structure; while \textit{lex} re-

\textsuperscript{139} JONAS, supra note 2, at 136 (quoting \textit{Der Tonwille}).
\textsuperscript{140} \textit{Id}. at 131 (quoting \textit{Der Tonwille}).
\textsuperscript{141} SCHENKER, HARMONY, supra note 14, at 39-40.
\textsuperscript{142} \textit{Id}. at 85.
\textsuperscript{143} 2 SCHENKER, COUNTERPOINT, supra note 13, at xvii (emphasis added).
\textsuperscript{144} See \textit{2 Id}. at xvii.
fects its differentiated realizations in actual compositions.

Jellinek’s pivotal concept of “intervening spaces” of freedom between Teutonic laws has a direct corollary in Schenker’s notion of “tonal spaces” (Toneräume) between pillars of the music structure.\(^\text{145}\) The regulatory framework at each hierarchical level of music, according to Schenker, consists of “harmonic nodal points . . . which provide orientation” by directing the musical flow from one structural juncture to the next.\(^\text{146}\) Like Jellinek’s Teutonic laws, these discrete structural nodes have spaces between them allowing for a relative degree of freedom. The central legal authority thus “assures the coherence of the work,”\(^\text{147}\) while simultaneously “measur[ing] out the tonal spaces”\(^\text{148}\) as intervallic “tension-spans” (Spannung) between its organizational pillars, guiding the music like a template or “compositional matrix” without precisely dictating their connecting “pathways” in between.\(^\text{149}\) As in Jellinek’s Teutonic state, the liberty in the free sphere of these tonal spaces represents an antecedent condition that precedes the fundamental structure. The tone-space is “anterior to form” in Schenker’s words and “provides a fountainhead for all form.”\(^\text{150}\)

Schenker’s fundamental structure (Ursatz) consists of two interdependent components, a “fundamental line” (Urlinie) in the upper melodic voice and a “bass arpeggiation” (Bassbrechung) in the lower harmonic voice. The tonal spaces in the melodic line are created through horizontal arpeggiation or the “unfurling” of notes of the tonic triad, the “sonority of nature,” whose notes become the consonant pillars or stable melodic points of the music.\(^\text{151}\) The tones of the arpeggiated or temporalized triad are separated asymmetrically by intervals of different sizes, which together delineate and differentiate the unformed “space of the horizontal fulfillment of the fundamental line.”\(^\text{152}\) The sequence of arpeggiated notes unfolds gravitationally from the top down to the triadic root. This primordial “Ur-line” is a linear, stepwise descent filling in the intervening Toneräume between triadic pillars by adding a new dissonant note that passes “as a path, or a bridge from the one

\(^{145}\) See SCHENKER, FREE COMPOSITION, supra note 35, at 14.
\(^{146}\) SCHENKER, COUNTERPOINT, supra note 13, at 21.
\(^{147}\) SCHENKER, FREE COMPOSITION, supra note 35, at 111.
\(^{148}\) Id. 
\(^{149}\) SCHENKER, MASTERWORK, supra note 10, at 118.
\(^{150}\) Id.; see ALLEN FORTE, THE COMPOSITIONAL MATRIX (1961).
\(^{151}\) SCHENKER, FREE COMPOSITION, supra note 35, at 16.
\(^{152}\) See SCHENKER, MASTERWORK, supra note 10, at 104, 112.
consonance to the other." It thus constitutes not only “the first passing-note progression,” but actually “the first melody.”

A similar arpeggiation of the root-fifth-root of the tonic triad in the bass establishes a complementary set of nodes, which become the stabilized tonic-dominant-tonic harmonic pillars supporting the fundamental line in the background. The bass arpeggiation transforms the lowest dissonant melodic passing tone of the melodic line approaching the root into a consonance by providing its own harmonic support. It also creates a larger tone-space of a fifth between its own structural nodes that is filled in by adding intermediate “harmonic scale steps” (Stufen) between them, serving as “guideposts to the fundamental line.” Together, this combination of the fundamental melodic line and bass arpeggiation supports the tonal scaffold and “bear[s] the burden of dissonances” across their intervening spans like the “soaring vaults” of a gothic cathedral. Their gapped structures provide orientation while still preserving freedom as to their “possible space-fillings.”

This organizational backbone is then transferred or “propagated” like an archetype from its background to more localized levels of jurisdiction in the “middleground” and “foreground,” operating as a general schematic pattern that shapes both large and small spans of music. The “offshoots” of the structure branch out hierarchically like a tree or bureaucracy. On each subordinate tier of tonal government, the replicated norm performs the same regulatory function: points of consonant order circumscribe and support spaces of dissonant freedom. This freedom is exercised by “filling out” these free “harmonic spaces” with an endless variety of dissonant linear “connective links” (recalling Plato’s term) or “diminutions” (i.e., consisting of smaller notes), in a manner analogous to the original generation of the fundamental line from the initial triadic arpeggiation, but in different musical contexts with progressively greater latitude. These “linear progressions” in turn serve to embellish or sustain their adjoining structural pillars by “prolonging” them from one juncture to the next across their intervening “prolongational spans.” Passage across these unstruc-

153 1 SCHENKER, COUNTERPOINT, supra note 13, at 183.
154 1 SCHENKER, MASTERWORK, supra note 10, at 112; see also RUDOLF ARNHEIM, VISUAL THINKING 218 (1969).
155 2 SCHENKER, MASTERWORK, supra note 10, at 8.
156 1 SCHENKER, COUNTERPOINT, supra note 13, at 112; 1 SCHENKER, MASTERWORK, supra note 10, at 117.
157 SCHENKER, FREE COMPOSITION, supra note 35, at 29.
158 See id. at 87.
tured gaps or “melodic bridges” creates a dynamic tension in the music that only resolves when the next node of stability is finally reached. 159

Since the entire network is hierarchically recursive, the intervening notes on a higher level in turn become secondary structural notes delineating the contours of freedom for subsidiary prolongations across their own intervening synapses on the next level below. The relationship among levels is thus one of mutual “rapport.” An intermediate dissonant progression between two consonant notes on a deeper level independently “lives its own existence in the passing tones,” 160 yet is dependent upon the notes that it prolongs for its meaning. It can, but need not, be incorporated as an integral part of the normative order on a subordinate level by becoming “consonated” and projecting its own consonant harmonic support, just like the transformation of the first dissonant note to a consonance through the harmonic support in the fundamental structure. In this event, the hierarchical structure is further extended through the generation of new spaces for more dissonant freedom within its own intervening spaces on a still lower level of the music. It even may become sufficiently stabilized to create a divergent albeit temporary tonicization of an opposing key area within the tonic’s overall tonal hegemony.

The resulting “contrapuntal complex” of consonant pillars with dissonant fillers at multiple levels of structure synthesizes harmonic order with melodic freedom. There is a dialectical equilibrium between structure and space, consonance and dissonance, and order and freedom. Musical freedom in Schenkerian society is like a freely drawn line connecting two points separated in time and space, a melodic motion traversing the interval between pillars of legal structure, “unit[ing] melodic fluency with the linear expression of harmony.” 161 Since the regulatory framework at each level does not consist of every sonority, but rather only its supportive nodes—alogous to the laws of Jellinek’s Teutonic state—tones “have functional obligations they fulfill, [but] are confronted with alternative possibilities.” 162 The intervening gaps can be filled in a variety of creative ways with progressively greater freedom approaching the musical surface. At the same time, however, this

159 See 2 SCHENKER, MASTERWORK, supra note 10, at 9, 118.
160 SCHENKER, FREE COMPOSITION, supra note 35, at 44.
162 Bent, supra note 36, at 13-14.
intermittent liberty in the free spheres, warns Schenker, is not lawless anarchy: “[L]ines that are not balanced in their melodic discourse and thus do not express a unified goal . . . will be noticed by the ear as poor. In other words, even in free composition, an excessive freedom in handling tones cannot, to say the least, always be justified.”¹⁶³

F. Ordered Freedom

Schenker’s free spaces within the tonal structure are equivalent to Jellinek’s free spaces within the legal structure. Both negotiate a compromise between order and freedom by avoiding the excesses of either extreme. Schenker’s answer to his own question, “If all fundamental lines are similar, what accounts for the dissimilarity of form in the foreground?” elucidates his musical synthesis of ordered freedom:

A particular form of the fundamental structure by no means requires particular prolongations. If it did, all forms of the fundamental structure would have to lead to the same prolongational forms. Indeed, the choice of prolongations remains essentially free, provided that the indivisibility and connection of all relationships are assured. . . . The content of the second and the subsequent levels is determined by the content of the first level, but at the same time is influenced by the goals in the foreground, mysteriously sensed and pursued. The second level, even more clearly sensed than the first, reveals how a work branches out into its own special characteristics.¹⁶⁴

Since the nodal network merely “guides the composer,”¹⁶⁵ musical compositions are individuated through a free choice of infinite options in their intervening tonal spaces. “[T]he musician’s only task is to fill these spaces”¹⁶⁶ as freely and creatively as he can, precisely because overall coherence and direction are assured on a larger level by the surrounding structural frame. Prolongation thus “represents something constantly new,” says Schenker, “an organic propagation of the riches of voice-leading through a tonal spirit dedicated to growth.”¹⁶⁷ The structural grid permits “ever new layers of diminution” within its interstices, so that “every breath of diminution attests to an original, new personal spirit [that] reveal[s] the eternal in constantly renewing transforma-

¹⁶³ 2 SCHENKER, COUNTERPOINT, supra note 13, at 96 (emphasis added).
¹⁶⁴ SCHENKER, FREE COMPOSITION, supra note 35, §§ 25, 47, 182.
¹⁶⁵ See id. at 26.
¹⁶⁶ 2 SCHENKER, MASTERWORK, supra note 10, at 8.
¹⁶⁷ Id. at 96.
“To compose creatively from this background,” therefore, “is to open up to oneself an unlimited world of foreground and melody ready to be articulated.”

“The spaces of tonal movement [are] finite and small,” Schenker explains, “but the possibilities for filling them are infinite.” For the performer as for the composer, the *Urlinie* [fundamental line] is above all a means of orientation, much the same as a trail-map to a mountain climber; no more than the trail-map spares the climber the necessity of negotiating every path, stone and morass does the *Urlinie* excuse the performer from traversing every diminution of the foreground. It is therefore not permissible in performance to follow the *Urlinie* slavishly and pluck it out of the diminution, just to communicate it to the listener.

The astonishing array of music which nonetheless conforms to the same normative laws is ample testimony to their freedom. Although the structural hierarchy is always dominated by the tonic as the central legal authority in the background, the individual tones become progressively detached from its hegemony and freer to assert their own rights as local tonal centers on subordinate levels of jurisdiction with their own prolongations in the middleground. Moving further toward the foreground breeds greater differentiation as the intervening spaces between large-scale structural nodes becomes wider. Ultimately, “the intermediate goals of . . . a prolongational span can introduce chromatic elements quite distant from the tonic key itself.” Approaching maximum individualization at the musical surface, the teeming lives of the tones are free to play out their personal destinies through a myriad of distinctive motives and gestures. Using words that could be his teacher’s, Schenker summarized this musical synthesis of ordered freedom in a passage entitled *Urlinie and Freedom*, where he queries socratically, “Does the *Urlinie* signify freedom or constraint?”

[T]he *Urlinie* signifies freedom in that . . . it brings with it just as much constraint as man needs to escape a savage freedom he can by no means master. . . . Creating under the irresistible constraint of the *Urlinie*, the great masters nevertheless felt completely free. [But to] those who have only to take cognizance of the *Urlinie*, it signifies constraint alone. . . . [M]an to-

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168 Id. at 89.
169 Id. at 119.
170 Id. at 8.
171 Id. at 109 (emphasis added).
172 CADWALLADER & GAGNE, supra note 125, at 387.
day—having fallen victim to a falsely understood freedom . . . perceives even the most beneficial necessity as superfluous con-
straint. [Yet because] the *Urlinie* signifies freedom, it . . . brings the artist a tranquility unknown to those who are not free.\(^{173}\)

For Schenker, as for Jellinek, order and freedom depend upon one another. Without order, freedom devolves into chaos; without freedom, order ossifies into oppression. In this sense, they represent two sides of the same coin. Paradoxically, “[t]he aesthetic ef-
fect of . . . unity will be the more complete the more richly the in-
dependence of the individual voices is constructed.”\(^{174}\) Diminution helps both “the part as well as the whole, [simultaneously] unifying and keeping asunder.”\(^{175}\) “The ‘chaos’ of the foreground belongs with the universal order of the background,” says Schenker, “it is one with it.”\(^{176}\)

G. *Composing Out in Free Composition*

Schenker calls the dynamic process of melodic diversification of the intervening spaces between structural pillars “composing out” (*Auskomponierung*). Composing out is the paradigmatic act of synthesis (*Synthese*) between order and freedom in music. It subsumes all of the connective devices such as arpeggiation, passing tone progressions, neighbor note motions, voice exchanges, motions to and from and inner voice, superposition, register transfer, and octave coupling—all of which “bind together” (*Ver-
binding*) the intervening tension spans between the periodic points of organizational stability just like the “composing out” of the triad into the fundamental line. The objective of composing out is to arbitrate a compositional compromise between unbridled artistic freedom and the constraints of musical structure, both of which are essential. Conversely, the goal of Schenkerian analysis is to reverse the synthetic process of composing out and “retrace the path from the foreground to the background,” through pro-
gressive redaction of the intervening diminutions, not in order to realize the “ultimate, immutable kernel” of the fundamental struc-
ture *per se*, but rather in order to expose the creative manner in which this musical synthesis was accomplished.\(^ {177}\)

Composing out is the cardinal feature of “free composition”

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\(^{173}\) 1 Schenker, *Masterwork*, supra note 10, at 110 (emphasis added).

\(^{174}\) 1 Schenker, *Counterpoint*, supra note 13, at 184.

\(^{175}\) 1 Schenker, *Masterwork*, supra note 10, at 76, n.4 (citing Der *Tonwille*).

\(^{176}\) Schenker, *Free Composition*, supra note 35, at 161.

\(^{177}\) See 1 Schenker, *Masterwork*, supra note 10, at 105, 109.
(der freie Satz), Schenker’s musical realization of the Jelinekian reconciliation between order and freedom. The free play of melodic and contrapuntal dissonance in the foreground of “free” as opposed to “strict composition” (der strenge Satz) is enhanced because of the “mental retention” of the prolonged consonant harmony in the background, which “remains in effect without being literally represented at every moment.” Free composition, says Schenker, “prolongs with greatest freedom the law of retention of the primary tone.” By submitting to the laws of tonality, composers acquired greater freedom to exercise their own subjective “improvisatory impulse” in the intervening dissonant tension spans and cast off the rigid dictates of strict counterpoint.

In free composition, the melodic freedom or right of a dissonant tone to deviate from the consonant norm through a dissonant relationship is safeguarded by the organizational laws of tonality. Consonance for Schenker represents musical order and “the commitment to unity” by providing harmonic governance and stability, while dissonance has “the mark of an independence” preserving melodic liberty and autonomy. The consonant pillars of harmonic stability anchor the multiple strands of dissonant contrapuntal freedom connecting them. Under the laws of strict intervallic or “nonharmonic” counterpoint, the only source of musical coherence is a melodic or linear one. A dissonant melodic tone can only be introduced as “a polyphonic passing event” (Durchgang) encapsulated in the narrow tonal space “enclosed” between two surrounding consonant notes. The “free” dissonant passing tone “remains bound” to the adjacent consonant context and entirely dependent upon the immediate succession of notes on the musical surface for its meaning. It must pass by stepwise resolution to the closest consonant neighbor under the contrapuntal “law of the passing tone” or “postulate of the second.”

Free composition integrates this unidimensional, linear, note-to-note flow into a broader harmonic context with greater “spatial depth.” The encompassing organizational framework projects a series of overarching consonant sonorities or harmonic scale-steps (Stufe) articulated by non-adjacent structural tones in the back-

178 See SCHENKER, FREE COMPOSITION, supra note 35, at 73.
179 ALLEN FORTE & STEVEN GILBERT, Introduction to SCHENKERIAN ANALYSIS 142 (1982).
180 Id.
181 See 2 SCHENKER, MASTERWORK, supra note 10, at 10, 24-25.
182 2 SCHENKER, COUNTERPOINT, supra note 13, at 183.
ground. The “continuing presence”\textsuperscript{183} of this harmonic umbrella “sustaining . . . the harmony”\textsuperscript{184} in the vertical dimension permits several dissonant melodic passing tones to occur successively or simultaneously on the surface in the horizontal dimension with reduced structural import and obligation of their own. They are collectively apprehended under the principle of the “primary tone” as a free, dissonant, melodic prolongation, or linear expansion of the underlying harmony on a deeper level, since “the mental retention of the primary tone achieves coherence.”\textsuperscript{185} A single prevailing consonant note or chord can therefore subsume and liberate a larger number of other dissonant notes and even other chords passing contrapuntally under its control.

Rather than restraining musical freedom, the harmonic context of free composition actually “emancipates the dissonance” from the stringent constraints of strict linear or melodic counterpoint so it can expand with greater freedom through wider intervallic spaces between fulfillment of consonant harmonic obligations.\textsuperscript{186} Thus, “where in strict composition we have a dissonant passing tone,” writes Schenker, “we have in free composition free voice-leading, a series of intermediate chords unfolding in free motion.”\textsuperscript{187} As a result of “the force of the scale-steps,” the individualized “motion of voice-leading is liberated.”\textsuperscript{188} Musicologist Carl Dahlhaus explains this dialectical relationship between dissonant melodic freedom and consonant harmonic order at the core of Schenker’s notion of free composition:

The fact that chord progressions constitute musical continuity and comprehensibility frees the part-writing from the necessity to take account of aspects that would be indispensable in composition consisting of interval sequences. Thus the harmonic and tonal basis of free style is not technically an impediment to linearity but a prerequisite for the unrestricted deployment of the melodic in music.\textsuperscript{189}

H. Zwischenraum

Schenker specifically employs Jellinek’s word for “intervening

\textsuperscript{183} See SCHENKER, FREE COMPOSITION, supra note 35, at 42.
\textsuperscript{184} 1 SCHENKER, MASTERWORK, supra note 10, at 9.
\textsuperscript{185} SCHENKER, FREE COMPOSITION, supra note 35, at 73.
\textsuperscript{186} See 1 SCHENKER, COUNTERPOINT, supra note 13, at 179-83.
\textsuperscript{187} SCHENKER, HARMONY, supra note 14, at 159.
\textsuperscript{188} Id.
\textsuperscript{189} Carl Dahlhaus, Counterpoint, in 4 NEW GROVE DICTIONARY, supra note 4, at 844 (emphasis added).
space,” Zwischenraum, in a way that reinforces its legal connotations. Schenker uses it to designate a brief gap between the end of a trill and the following note, whose function is to clarify the “original meaning of the unadorned tones.” \(^{190}\) In order to carve out this space, each of the two tones surrounding the trill “must give up a little of its original value [and] relinquish an amount approximately equal” to the other. \(^{191}\) By breaking off the trill shortly before the next note, the structural relationship between the two principal tones or pillars is elucidated, while the trill itself is set in relief as a freer, melodic, ornamental filler connecting them. Schenker conspicuously described this Zwischenraum in legalistic language, as representing “the solution of a conflict” and “the happiest compromise” between the competing demands for structural clarity and order on one hand, and for musical continuity and freedom of expression on the other. \(^{192}\) “The Zwischenraum,” he exclaims, is “the small space that makes the difference!” \(^{193}\) In a similar vein, Schenker described Beethoven’s introduction of a brief violin figure in the Ninth Symphony as the Solomonic act of a judge, like von Jhering, achieving “equilibrium between competing interests in the most ingenious way.” \(^{194}\)

I. Artist-as-Individual

The special composer capable of achieving this Jellinekian equilibrium between order and freedom through the synthetic act of composing out of free composition attains authentic individuality and becomes an “artist-as-individual.” He is also able to help his listeners realize their own authenticity, since “whenever the appreciating mind is directly engaged with the creating mind of the artist-as-individual, it does so as an individual itself.” \(^{195}\) He rises to the stature of a “musical genius” not because of mere musical talent, but because he understands the interactive symbiosis between law and liberty, order and freedom, structure and space, background and foreground, consonance and dissonance, harmony and counterpoint, and nature and art.

The musical genius is at once the most law abiding yet freest citizen in the Schenkerian state. He is “imbued with a sense of to-

\(^{190}\) Schenker, Ornamentation, supra note 34, at 78.
\(^{191}\) Id. at 78.
\(^{192}\) See id.
\(^{193}\) Id. at 111.
\(^{194}\) SCHENKER, BEETHOVEN’S NINTH SYMPHONY, supra note 18, at 60.
\(^{195}\) 3 SCHENKER, MASTERWORK, supra note 10, at 72.
nal space,” “needs freedom,” and can “express all that is individual,” yet at the same time, he knows that “truth resides in art in the unconditional (albeit personal) fulfillment of the laws by which it is governed.” His binding commitment (Bindung) to musical law “above all is the sign of the genius.” He “can span a unified contrapuntal line over harmonies,” “harnesses the freedom in the successive events at the foreground to the compulsion of the progressions in the background,” and “fill in the spaces in the arpeggiation . . . of the fundamental structure with passing tones in a manner which . . . does justice to both nature and art.” “All art is extension (Spannung) over long spans,” writes Schenker, “and accordingly calls for a long-spanned extension of the spirit . . . [and] at the same time a bodily extension and exertion; it attains its highest degree in the spirit of the genius, within whose works the spans are the widest of all.”

The music of great composers is “unconfined, and is but lightly chained to the eternal laws of nature. They may be unaware of these laws, yet no living being can escape them.” Bach’s innate understanding of musical law, for example, is like “the knowledge of a person who has the knack for doing the right thing in every situation without . . . even wondering if the statutes of the penal code might apply.” A musical genius like Mozart or Beethoven instinctively recognizes that his creativity is safeguarded rather than confined by law. Thus, he is “grateful for this boundary, for it offers a necessary protection and control of freedom.” He ultimately “brings the morality of lawfulness to fulfillment” by realizing Jellinek’s Teutonic paradox: freedom needs structure and structure needs freedom. The “achievement of such freedom” within the constraints of law is his “greatest, unsurpassable triumph.”

The musical non-genius, on the other hand, fails to achieve authentic individuality not for lack of talent, but because he is unable to comprehend this creative reciprocity between order and

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196 1 id. at 113.  
197 Id. at 117; 2 id. at 119.  
198 3 id. at 69-70.  
199 2 id. at 119; 1 SCHENKER, COUNTERPOINT, supra note 13, at 97; SCHENKER, FREE COMPOSITION, supra note 35, at 11 (emphasis added).  
200 1 SCHENKER, MASTERWORK, supra note 10, at 116-17.  
201 Id.  
202 2 id. at 52.  
203 Id. at 119.  
204 See 3 id. at 70.  
205 Schenker, Ornamentation, supra note 34, at 34.
freedom. “Deficiency in music,” says Schenker, “is deficiency in that sense of tonal space within the individual.”\textsuperscript{206} The deficient artist cannot maintain an equilibrium of order with freedom across large spans of tension. He either escapes from freedom by taking shelter in the excessive law, order, and systematization of a musical Rome, or he abdicates order in the irresponsible caprice of his private musical democracy, wallowing in the anarchy of his own intuition. He has no “power to make remote connections” across musical spaces, “composes entirely in terms of the succession of surface events,” and is forever “consigned to chaos.”\textsuperscript{207}

Thus we can see that musicians divide into those who create from the background, hence from the tonal space and the Ur-\textit{linie}—the geniuses; and those who operate only in the foreground—the non-geniuses, who must therefore compose entirely in terms of the succession of surface events, just as they hear and read in terms of successive events. Between the two groups lies an unbridgeable chasm.\textsuperscript{208}

\textbf{J. Structural Weight}

Jellinek’s procedural rule of “minority consciousness,” dictating that votes should be selectively “weighed” rather than uniformly counted, is a central tenet of Schenker’s analytic practice. Notes in his musical state, like votes, are weighed rather than counted in assessing their structural value. Like Jellinek, Schenker rejects a “democracy of tones” in favor of a musical meritocracy. Members of the tonal community are not equal, but possess unique roles and individuality that may not be abrogated. Their structural rights and obligations are not a function of their frequency, prominence, or duration, but rather their intrinsic contribution to the musical organization. “[W]hat makes out the aristocratic nature of art is that it is totally impervious to the principle of the electoral majority, the be-all and end-all of the democratic way of life,” explained Schenker.\textsuperscript{209} “[I]t is a contradiction to maintain . . . that all scale tones . . . have real independence, or to use a current but certainly musically unsuitable expression, “equal rights.”\textsuperscript{210}

The relatively small minority of structural tones is heavily

\textsuperscript{206} 2 \textsc{Schenker}, \textit{Masterwork}, \textit{supra} note 10, at 119.
\textsuperscript{207} 3 id. at 5; 2 id. at 119-20.
\textsuperscript{208} 2 id. at 119.
\textsuperscript{209} Schenker, \textit{Free Composition}, \textit{supra} note 35, at 13 n.3.
\textsuperscript{210} Id.
outnumbered by the larger majority of non-structural tones of lesser weight. Nonetheless, they exercise disproportionate influence because of their superior value. The notes of the structural minority “may be richly elaborated, others may be less richly, still others not at all. Yet each is an essential element in the structure.”211 A single, soft, fleeting tone may weigh far more than several more prominent around it. Jellinek’s “tyranny of the majority” represents a tyranny of the musical foreground where all notes, consonant and dissonant alike, are treated superficially as though they were equal, thus leveling the stratification of the musical hierarchy.

“Regardless of all the freedom of free composition,” wrote Schenker, “how utopian it is to believe that [one] could ever grant the dissonance an equal birthright alongside consonance! [They] cannot have the same role; that is assured by the basic law of nature.”212 “[D]issonance . . . absolutely presupposes consonance,”213 and “a passing tone is dependent upon the consonant tones which surround it.”214

For Schenker, democratic egalitarianism and majoritarianism were as wrongheaded in music as they were in law. Like Jellinek, he believed that a society where people were “weighed” according to personal merit, rather than counted on the basis of sheer numbers, was the only way to foster the emergence of the true individual. “We know the lie of democratic ‘equality,’ which in the end plays itself out in the act of repression,”215 complained Schenker. “Social parity and equality of opportunity reduce our very civilization to chaos . . . . Even cultural suns set in the West.”216 “The mad democrat’s mind”217 stubbornly resists recognizing its own misconceptions and lies, its violations of nature and culture.218 “Culture is a unity that works by the interplay of opposing forces. It flourishes only where an aristocratic presence still provides a counterforce.”219 In a democracy, “the mass of mankind is consigned to a flat surface that stretches to infinity in all directions,

212 1 SChenker, Counterpoint, supra note 13, at 112.
213 Id. at 184.
214 Id. at 112, 184.
215 2 id. at xiii.
216 2 SCHENKER, MASTERWORK, supra note 10, at 121.
217 2 SCHENKER, Counterpoint, supra note 13, at xv.
218 2 id. at xiv.
219 2 SCHENKER, MASTERWORK, supra note 10, at 121.
“The United States has 110 million inhabitants and not one Mozart or Beethoven or Wagner in all the number,” Schenker sneered, “but then, Germany or Austria never had a John D. Rockefeller.”

A majority of votes is something calculable. . . . What is there is the arts that is calculable in this way? Suppose that a majority . . . agreed upon a particular artistic meaning—what would that signify, for or against it? . . . [A] mindless transferring of the democratic political principle to art . . . would degrade the artist to the level of the businessman and politician.

Schenker’s condemnation of democratic equality was rivaled on the other hand by his disdain for Roman conformity. Like Jellinek, he too was wary of the leveling effect of oversystematization, uniformity, and rigid legalism symbolized by Rome, for it likewise negated the antinomy between social order and individual freedom in the opposite direction. “Through gross pillage and wantonness,” charged Schenker prosecutorially, “the Romans had reached a state of totally depraved gluttony.”

The Roman nation has done more of harm to world culture through its insatiable appetite for lands and peoples than of service.

Rejecting the equivalent of Roman hegemony, the great masses of individual tones in the Schenkerian state retain a degree of freedom within the tonal hierarchy. Schenker equated “the social and political ideology that understands unity only as uniformity [and] excessive control” with a:

huge phrasing slur in contradiction [to] individuality and [a] higher unity growing organically from contrasts. . . . Everywhere, in social and political life as in art, one thus finds [the] same fanatic compulsion to achieve unity along the path of uniformity, simply to avoid one’s duty to the particular. . . . Uniformity has become the catchword.

This “political and social phrasing-slur uniformity” thus deceives mankind from accepting “individual characteristics as the only true source of unity.” As in Jellinek’s ancient Teutonic society, it was only by reconciling the polarities of Roman order and democratic freedom that music could flourish under Schenkerian jurispru-
V. CORRELATIONS AND CONTRASTS

A. Positive Conceptions of Law

Schenker is not the only music theorist to think in terms of an opposition between order and freedom, any more than Jellinek is in law. Others have not only employed this dichotomy, but couched its musical expression in legal imagery as well. What is unprecedented in Schenker’s case, however, is the abundant degree to which law is invoked as a metaphor for this fundamental dialectic and, more importantly, its affirmative role beyond mere rhetoric as a functional element in the actual structure and operation of his approach to music.

The elemental conflict summarized in Schenker’s motto, “always the same, but not in the same way,” underlies the basic principle of musical variation, or “unity with variety,” which has preoccupied music theorists since Zarlino articulated the aesthetics of polyphonic composition in Le istitutioni harmoniche. According to one treatise, the entire “history of musical style can be regarded from one point of view as a continual contest between the contrapuntal and harmonic principles, that is, between independence of melodic lines on one hand and unity of harmonic effect on the other.”

Harmony universalizes, while melody individualizes; to affirm the supremacy of melody mean[s] to affirm that of the subject, of individual emotions, of what is particular. . . . Universality is that which is always the same, that never changes: it is harmony. Melody, however, is what gives every music its specific, peculiar, and distinguishing character. . . . It represents nature as subjectivity, as an outburst of individual expression, of life in its variegated mobility, at the pole opposite to harmony’s empty and abstract universality.

Other music theorists who studied law, like Schenker, have tended to advocate an affirmative conception of law and its positive role in mediating a synthesis between order and freedom in music. Johann Mattheson (1681-1764), for instance, was a leading

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228 DONALD JAY GROUT, A HISTORY OF WESTERN MUSIC 157 (2d ed. 1973) (emphasis added in part).
229 ENRICO FUBINI, MUSIC AND CULTURE IN EIGHTEENTH-CENTURY EUROPE 13 (Bonnie J. Blackburn ed. & trans., 1994).
baroque music theorist who had legal schooling in his youth and later undertook an intensive study of English law. Following a tradition that includes Joachim Burmeister (1564-1629), Christoph Bernhard (1628-1692), Johann Heinichen (1683-1729), Johann Walther (1684-1748), Johann Scheibe (1708-1776), and Johann Forkel (1749-1818)—all of whom studied law—Mattheson interpreted music as a form of oral advocacy governed by the rules of rhetoric, the cornerstone of legal study since the days of Quintilian and Cicero. In his compendious *The Complete Music Director*, Mattheson laid out a logical plan for musical argumentation in three stages: (1) disposition (*dispositio*), (2) elaboration (*elaboratio*), and (3) ornamentation (*decoratio*). He specifically distills the essence of elaboration or development of the musical idea in teleological terms as a Schenkerian dialectic between order and freedom that is “[t]ruly free, yet in constant obligation: Circumscribed; but not servile.”

Adolf Bernhard Marx (1795-1866), another law-trained theorist in the nineteenth century, likewise advocated this same equilibrium in his theory of musical form. The study of form has invariably centered on the interaction between unity and contrast, with conventional musical designs such as the sonata allegro, rondo, and theme with variations representing different resolutions of this basic dichotomy. Marx studied law at the University of Halle and eventually gave up a legal career to pursue music. True creativity, he argued, required a proper understanding of the “rational spirit” of musical form, which involved a musical compromise between structure and freedom. It was artistic folly “either to resist form and struggle free from it[,] or to subjugate oneself slavishly to some external precept . . . losing the freedom of one’s own spirit.” One who composes “mechanically, in accordance with received rules [thus] remains forever without freedom,” but at the same time one who “shakes off that burden in order to bustle about as he pleases . . . only exchanges the tyranny of tradition for the much worse despotism of caprice.” The secret of musical form for Marx lay neither in the “external compul-

230 Johann Mattheson, *Der vollkommene Capellmeister [The Complete Music Director]* 479 (Ernest C. Harriss ed. & trans., 1981) (1739).
231 *Id.*
234 *Id.* at 63.
sion” of mechanical rules nor in the “arbitrary caprice” of unbridled freedom, but rather in a Schenkerian synthesis of “reasoned freedom.”

Hugo Riemann (1849-1919) is yet another law-trained theorist who understood music in terms of an affirmative opposition between order and freedom. Riemann studied law at the University of Berlin from 1868 to 1870 and became one of the most important music theorists at the turn of the century. He located order and unity in “the consonant chord, in the definition of a key, the retention of a beat or rhythm, in the recurrence of rhythmic-melodic motifs, [and] the formation and recurrence of pregnant themes.” Freedom and diversity on the other hand were embodied in “changes of harmony, dissonance, modulation, alteration of rhythm and motifs, [and] the juxtaposition of themes of opposing character.”

The most famous composer of our own time, Igor Stravinsky, also studied law and articulated in legal terms the same musical compromise between order and freedom. Stravinsky was a student of jurisprudence at the University of St. Petersburg from 1901-1906 from the ages nineteen to twenty-four. Like Schenker, he pursued law at his parents’ insistence, since they regarded his youthful musical interest as “mere amateurism.” Unlike Schenker, however, Stravinsky professed to have cared little about law. These years were “by no means attractive from my point of view,” he later confessed, “because my interests all lay elsewhere.” Nor was he particularly diligent in his legal studies, with one biographer venturing that “it is unlikely that he attended more than fifty lectures during the whole of the four years he was there.” It is striking nonetheless that Stravinsky, the most notable composer of the twentieth century, and Schenker, its most no-

\[\text{id. at 62.}\]
\[\text{id. at 122.}\]
\[\text{id. at 709 (quoting Hugo Riemann).}\]
\[\text{id. at 13.}\]
\[\text{IDOR STRAVINSKY, AN AUTOBIOGRAPHY 13 (1936).} \text{Stravinsky’s State Examination certificate and other documents pertaining to his legal studies are preserved in the archives of the Paul Sacher Stiftung in Basel, Switzerland.}\]
table theorist, both studied law. More striking is that each describes the same dialectic between order and freedom in similar legal imagery. In his Poetics of Music, Stravinsky quotes G.K. Chesterton’s juristic remark, “rigidity that slightly yields, like Justice swayed by Pity, is all the beauty of earth.”

243 The notion that musical freedom and constraint temper one another is central to Stravinsky’s neoclassical aesthetic. “It is a fact of experience, and one that is only seemingly paradoxical,” he stated, “that we find freedom in a strict submission.”

244 Doesn’t the fugue imply the composer’s submission to the rules? And is it not within those strictures that he finds the full flowering of his freedom as a creator? Strength, says Leonardo da Vinci, is born of constraint and dies in freedom. Insubordination boasts of just the opposite and does away with constraint in the ever-disappointed hope of finding in freedom the principle of strength. Instead, it finds in freedom only the arbitrariness of whim and the disorders of fancy. Thus, it loses every vestige of control. . . . What is important for the lucid ordering of the work—for its crystallization—is that all the Dionysian elements . . . must be subjugated before they intoxicate us, and must finally be made to submit to the law: Apollo demands it.

B. Negative Conceptions of Law

Marx, Riemann, and Stravinsky, each of whom studied law like Schenker, all expressed a positive view of its role in music. In their view, music benefited when freedom was guided and flexibly constrained by law in the manner of Goethe’s poem Nature and Art: “He who would achieve greatness must exercise restraint. It is only within restrictions that the master proves his mastery. And law alone can give us freedom.”

245 Goethe himself studied law at the University of Leipzig for three years from 1765 to 1768.

The affirmative nature of this legal attitude, reflecting Jellinek’s notion of positive symbiosis between law and freedom, contrasts sharply with the opposing sentiments of Arnold Schoenberg, who did not study law. Although he occasionally referred to a few
general aesthetic principles as laws, such as “the laws comprehensibility”\(^\text{248}\) (Gesetze des Fasslichkeitkeit) and even “the first commandment of coherence”\(^\text{249}\) (erste Gebot des Zusammenhanges), Schoenberg generally characterized law in negative terms during his atonal period as an unnecessary impediment to artistic freedom. The composer’s task according to Schoenberg was not “to flirt with freedom while retaining one’s bonds,” as Schenker and these other law-trained theorists counseled, but rather boldly to break the law and cast off its shackles in order to be completely free.\(^\text{250}\) Citing Goethe’s sonnet in disapproval, Schoenberg charged that the poet himself “was much too great for the narrowness of this unfortunate saying,”\(^\text{251}\) which “can only be the wish of one who would prove himself a master within a restricted sphere because what he can do is too meager for him to attain mastery of freedom.”\(^\text{252}\) In words echoing Rousseau’s celebrated call to arms, “Man is born free; and everywhere he is in chains,” Schoenberg charged:

> the narrowness of our powers of imagination and conceptualization would impose restrictions upon our true spiritual and instinctual nature; given these restrictions, the master proves his mastery by breaking through the barriers and becoming free—even where he thought he was not free because external pressures made him want restrictions to keep him artificially balanced.\(^\text{253}\)

Schoenberg had disdain for the law-invoking theorist who “speaks of the principle of tonality, as of a law—‘Thou shalt . . .’—adherence to which shall be indispensable. Dare to feel otherwise, young artist, and you have them all against you . . . To hell with all these theories,”\(^\text{254}\) he barked incitefully.

I do not, as apparently all theorists before me have done, con-

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\(^{248}\) \textit{Arnold Schoenberg, The Musical Idea and the Logic, Technique, and Art of Its Presentation} 139 (Patricia Carpenter & Severine Neff eds. & trans., 1995).

\(^{249}\) \textit{Id.} at 153.

\(^{250}\) \textit{Arnold Schoenberg, Theory of Harmony} 394 (Roy E. Carter trans., 1978).

\(^{251}\) \textit{Id.} at 396.

\(^{252}\) \textit{Id.} at 395 (emphasis added). The translation of Goethe’s poem in this text is Carter’s.

\(^{253}\) \textit{Id.} at 396 (emphasis added). Jean Jacques Rousseau’s famous epigram comes from his \textit{Social Contract} (1762) and has been a rallying cry for revolutionaries and reformers every since. Ironically, in the \textit{Social Contract} Rousseau upholds a view similar to Schenker that “a society without laws is not a true community; law in society can be deemed legitimate because the laws have been decided by the general will, the constant will of all the members of the State, by virtue of which they are citizens and free. The general will is not the sum of the wills of the individuals composing the community.” \textit{Walker, supra} note 56, at 1089.

\(^{254}\) \textit{Schoenberg, supra} note 250, at 9.
sider tonality an eternal law, a natural law of music. . . . As for laws established by custom, however—they will eventually be disestablished. . . . Let the pupil learn the laws and effects of tonality just as if they still prevailed, but let him know of the tendencies that are leading toward their annulment. 255

Furthermore, if a composer sought to write traditionally, then the dictates of tonality itself did not allow any “intervening spaces” for moderation either:

[T]he bonds of the key are supposed to be loosened, its affirmative elements suppressed, those that destroy it supported; and yet, in spite of all, it is supposed to turn up suddenly at the end . . . and make everyone believe it is the sovereign over all that occurred! . . . No, I believe this kind of thing really cannot succeed. If tonality is to be attained, then one must work toward it with all suitable means. . . . Elements that will not be bound . . . must be omitted, and only such as willingly fit in may be used. 256

Unlike Schenker, Goethe, and these other law-trained theorists and composers, Schoenberg, who never studied law, viewed law not only as a straightjacket for creativity, but stereotypically in black and white terms that precluded any reconciliation between order and freedom.

C. Contemporaneous Legal Theory

Schenker’s musical thinking shows a remarkable affinity not only with the jurisprudence of the most eminent professor he encountered in law school, but also with the influential thinking of the most famous Viennese legal scholar during his maturity, Hans Kelsen (1881-1973). Kelsen was prominent in Viennese society as a renowned professor of law at the University of Vienna, the author of the 1920 Austrian Constitution, and judge of the Supreme Constitutional Court of Austria from 1920-1930. He is among the most significant jurists of the twentieth century, whose stature in law parallels that of Schenker’s in music. Kelsen developed a hierarchical theory of law mirroring Schenker’s hierarchical theory of music in the same city over the same period of time. Initially formulated in 1911, five years after Schenker’s Harmony appeared in 1906, Kelsen’s work culminated in one of the most famous law books ever written, his well-publicized Pure

255 Id. at 27-29.
256 Id. at 394.
Theory of Law published in 1934, one year before the posthumous 1935 publication of Schenker’s Free Composition. Although Kelsen studied law at the University of Berlin and apparently never worked formally with Jellinek himself, he undoubtedly was familiar with his jurisprudential ideas as a common intellectual influence.

Kelsen postulated a recursive edifice of legal norms operating on multiple levels of structure akin to Schenker’s theory. Each layer successively generated the next, and all emanated from a single primordial governing norm (Grundnorm) at the highest level of authority. In an illuminating passage reminiscent of Schenker’s thinking describing law as “a hierarchy of different levels of norms,” Kelsen explains:

The peculiarity of the law [is] that is regulates its own creation. . . . The legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms. Its unity is brought about by the connection that results from the fact that the validity of a norm, created according to another norm, rests on that other norm, whose creation in turn, is determined by a third one. This basic norm (Grundnorm), therefore, is the highest reason for the validity of the norms, one created in conformity with another, thus forming a legal order in its hierarchical structure.

Kelsen viewed legal theory in Schenkerian terms as “an exact structural analysis of positive law.” He considered his approach a “pure theory of law” because it established an organic structural paradigm for all legal systems “purified” of any content of positive or “posited” law. Like Schenker’s normative musical structure, it provided a neutral scaffold for legal relationships whose substance could be formulated freely in a multitude of ways. Just as Schenker, Kelsen synthesizes order and liberty through a self-limited legal framework with intervening “gaps” filled with discretionary freedom:

The higher norm cannot bind in every direction the act by which it is applied. There must always be more or less room for discretion, so that the higher norm in relation to the lower one can only have the character of a frame to be filled by this act. Even the most detailed command must leave to the individual executing the command some discretion. . . . Hence, every law-

257 HANS KELSEN, PURE THEORY OF LAW (Max Knight trans., 1970).
258 Id. at 221-22.
259 Id. at 192.
260 Id. at 198.
applying act is only partly determined by law and partly undetermined. . . . [T]he law to be applied constitutes only a frame within which several applications are possible, whereby every act is legal that stays within the frame. . . . [I]t does not mean that it is the individual norm, but only that it is one of those individual norms which may be created within the frame of the general norm.261

There is no evidence that Schenker had any personal contact with Kelsen, as he did with Jellinek. Given Schenker’s abiding interest in law and politics, however, it is not unlikely that he was acquainted with the highly publicized theories of the leading Viennese legal figure of his day bearing striking resemblance to his own.

VI. Music’s Fate

A. Teutonic Music

The Zeitgeist of Austro-German chauvinism embodied in Jellinek’s historical idealization of Teutonic law resounds throughout Schenker’s historical idealization of Teutonic music. Just as Jellinek believed that German law had an innate sense of the dialectic between order and freedom in society, Schenker believed that German music of the past had an innate intuition of the same dialectic in music. As the Teutonic state steered a middle course, maximizing the spans of social freedom within the bounds of social order, so did the great Teutonic composers, Bach, Haydn, Mozart, and Beethoven, maximize the spans of musical freedom within the constraints of tonal order. German music had achieved Jellinek’s Teutonic equilibrium because “its synthesis [was] compelled yet at the same time free. German melody, the true melody of music,” wrote Schenker, “holds the monopoly of the melody of synthesis.”262 It “commands the broadest spans of tension [and] the most unrestrained processes of dissemination and unfolding [which] it exploits in a compulsive quest for unity, as the articulation of a tonal space.”263

“The music of the Japanese, Arabs, Chinese, and Jews,” on the other hand, suffers from “irrationality” and, as a result, “is still in a state of chaos.”264 “Today’s Westerner,” affirmed Schenker, “has an advantage over today’s Oriental” because of the “estab-

261 Id. at 349-51.
262 2 SCHENKER, MASTERWORK, supra note 10, at 119.
263 Id.
264 1 id. at 21.
lishment of orderly relationships,” since a deficiency in the sense of tonal space “can apply to the totality of society through the sum of its individuals.”

“Whenever and wherever such heroes are lacking, the masses can never become a true nation. It is only through individuals . . . that the masses can be forged into a nation.” Yet, unlike the “incompetent West,” Germany alone was “the last stronghold of aristocracy” where Schenker shared his teacher’s dream that social order and individual freedom might be reconciled yet again, reviving the ancient Teutonic synthesis of the past.

B. Musical Democracy

The evolution of music for Schenker tracked the evolution of society. Modern music was plagued by a condition of unfettered freedom and anarchy comparable to Jellinek’s jurisprudential model of democracy. He analogized the demise of tonality to the aggrandizement of individual rights and the leveling of the social hierarchy. The result in both instances was stultifying uniformity, mediocrity, fragmentation, and the loss of personality. Rameau’s revolutionary theory of harmonic inversion in his infamous Traité de l’Harmonie (1722), proclaiming in Schenker’s words that “lower shall become upper, and upper lower!, “ was for Schenker the musical equivalent of the social inversion and cultural upheaval of the French Revolution, catapulting the masses up over the aristocracy. It disrupted the essential stratification of musical society through misguided notions of equality, fracturing the integral relationship between harmony and counterpoint as the Cartesian axes of musical organization. By elevating each chord to an equal, autonomous, vertical entity severed from its contrapuntal connections, Rameau became a musical Robespierre whose harmonic guillotine threatened the tonal order.

Does not Rameau’s idea of inversion, which is surely the main prop of his theory, repeat itself by analogy, for example, in the “enlightenment” of the so-called Great Revolution? Lower shall become upper, and upper lower! shrieked France’s lower classes, fancying that human rights had first been discovered in France, and rejoicing that they were now the upper classes,

265 2 id. at 119.

266 SCHENKER, FREE COMPOSITION, supra note 35, at 159-60.

267 See 2 SCHENKER, COUNTERPOINT, supra note 13, at xiii. Germany, though Occidental, was not a “western democracy.” 3 SCHENKER, MASTERWORK, supra note 10, at 72 n.16.

268 3 SCHENKER, MASTERWORK, supra note 10, at 4.
without more ado. Just think how the lower classes, together with those shallow-minded dispensers of enlightenment the Encyclopedistes, imagined the course of human affairs. . . . As if any guillotine could ever behead the spirit, especially the spirit of a genius! Whatever is born upper-class remains upper-class, conversely the lower classes remain forever in their place; and no matter how much murder and robbery man may commit against man in the attempt to overthrow this Nature-ordained hierarchy, it is all in vain!  

C. Anarchy and Totalitarianism

In Schenker’s eyes, the flames of musical democracy kindled by Rameau in the eighteenth century spread rapidly during the nineteenth century, eventually culminating in the atonal apocalypse torched by Arnold Schoenberg in the dawn of the twentieth century. Rameau liberated and equalized each chord, then Schoenberg each note. Schoenberg’s infamous proclamation “emancipating the dissonance” to form “vagrant harmonies” of “twelve equal tones related only to each other” ruptured any remaining traces of Schenker’s tonal hierarchy. The life of the tones was no longer “anchored in an Ursatz,” but left mercilessly to the capricious “whim of an imagination.” Dissonance, previously a vehicle of controlled freedom within the intervening spaces of the tonal structure, was cast loose from its moorings, free to roam the musical surface. Instead of allowing Plato’s musical edifice to sway gently in the wind, the free sphere overran its mortises, tore its rivets asunder, and caused “a general collapse of one part upon another, substructure and all that [had] been so admirably built upon it.”

Prior to the collapse of the Austro-Hungarian Empire in the First World War Schenker clung tenaciously to the hope that this inexorable tide might still be turned and its socio-musical erosion thwarted. He warned that its “perpetrators overlook that genius, unlike emperor or prince, cannot be deposed by the caprice of the masses, that in the eternally aristocratic realm of genius the methods of political revolution are without value.” “You may expel Nature with a pitchfork,” he vowed, “but she always returns.” After the unprecedented devastation of the Great War, however,

269 Id.
270 Id. at 35.
272 J. SCHENKER, MASTERWORK, supra note 10, at 2.
273 Id. at 2 n.1.
Schenker pessimistically concluded that the delicate equilibrium between order and freedom that had generated the great musical masterpieces in a stable society of the past was irrevocably destroyed. As the social fabric disintegrated, so did the musical one, leaving a desolate musical wasteland in its wake.

Schenker’s hierarchical aristocracy of structural weight and diatonic differentiation toppled in the chaos of chromaticism. All tones were equal, yet none had individuality. Schoenberg’s credo became “one note, one vote.”\(^{274}\) Atonality was the curse of Rameau’s egalitarianism, the triumph of “the average and the inferior . . . [with] their lie of ‘liberty.’”\(^{275}\) Harmonies were reduced to mere transient auditory effects skimming the musical surface, stripped of their structural authority as pillars of a prolongational framework. Melodies were aimless meanderings, and no longer directed connective links binding tension spans between structural nodes of stability and order. This was music without peaks or valleys, foundering on the shoals of the foreground. “Democracy, democracy,” lamented Schenker, “it has gone too far in music.”\(^{276}\)

Like most rebellions, Schoenberg’s revolution did not herald the dawn of a new freedom, but merely created a vacuum to be filled by an autocratic regime. The collapse of tonal order unleashed uncontrollable forces of chaos paving the way for totalitarian reaction. In the end, it was Schoenberg himself who spearheaded the flight from freedom into chains. Unable or unwilling to tolerate, let alone appreciate, the tension between order and freedom, it was this zealous breaker of laws, the emancipator of dissonance, who lunged compulsively from the anarchy of atonality into the shackles of serialism and dictatorship of the row. Jellinek’s pendulum swung back across the golden mean from democracy to Rome once again, violently inverting its trajectory of centuries past. Each reified a dialectical extreme—one through excessive freedom, the other through excessive control; both ruptured the fragile equilibrium of Schenker’s Teutonic musical state.\(^{277}\)

\(^{274}\) See Private Conversation with William Rothstein, Professor of Music Theory, City Univ. of N.Y. (Sept. 13, 1998).

\(^{275}\) 2 SCHENKER, COUNTERPOINT, supra note 13, at xiii.

\(^{276}\) 3 SCHENKER, MASTERWORK, supra note 10, at 78.

\(^{277}\) The notion of serialism as a compulsive escape from the freedom of atonality is developed in Adorno, supra note 94, at 292. See generally ERICH FROMM, ESCAPE FROM FREEDOM (1969).
VII. THE IMAGE OF MUSIC

The musical thinking of the most influential theorist of modern times, Heinrich Schenker, embodies a jurisprudence of music reflecting the legal ideas of his most prominent law professor, Georg Jellinek. Schenker not only employed legal metaphors, but conceived of music as a microcosm of jural relationships. His theory is a musical replica of Jellinek’s Teutonic state. The function of law for both Jellinek and Schenker was to regulate the dialectical tension between collective order and individual freedom—one in a society of men, the other in a society of tones. Both sought to steer a middle course between the Scylla of exaggerated legalism represented by Rome and the Charybdis of exaggerated freedom represented by democracy. Both singled out the same extremes as disrupting their ideal equilibrium, one through repression, the other through anarchy. Both achieved this reconciliation by differentiating the socio-musical structure into discrete regulatory nodes providing order and guidance, yet separated by intervening spaces where individual freedom was preserved. Both advocated a hierarchical criterion of valuation and adjudication on the basis of structural weight.

In view of Schenker’s relative disinterest in medieval music, it is provocative that after completing two semesters of legal study with Jellinek, he chose to take an elective course in the history of the Middle Ages. Years later, he referred to some mysterious “state-synthesis of the past” as the model for a lost musical art. Unlike the “falsified state-monstrosities of today,” it was truly “just and perfect” because it had “learned to tame [chaos] through selection and synthesis.” Might Schenker have had Jellinek’s medieval Teutonic state in mind?

In words reminiscent of his influential professor, the theorist concluded that “[t]he sum total of my works present[s] an image of art . . . despite all infinitude of appearance, as setting its own limits through selection and synthesis.” It was this paradox of infinitude within limits—of freedom within order—that Jellinek conveyed to his young law student. And this is the same paradox Schenker discovered at the heart of all great music, the “secrets of tones” he revealed on tablets from Sinai with the Mosaic faith that they could transform those who might listen. For, indeed, “the dialectics of freedom and constraint, universal law and human

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278 See 2 SCHENKER, COUNTERPOINT, supra note 13, at xvii.
279 2 id., at xx (emphasis added).
280 See 1 id. at 15.
creativity have been basic to Jewish thought at least since the revelation at Sinai—some might say since Adam and Eve.”

“Art may be recommended to mankind as the only help in time of need, the only means of reconstruction!” Schenker proclaimed from the mountain top with a profound sense of musical activism betraying his love of law. “Let mankind learn to tame through art the chaos that lurks in any matter—to tame it through selection and synthesis.” Perhaps in homage to his legal mentor, or maybe even to Law itself—not for its pillars of order alone, but its arches of freedom as well—this great musical lawgiver went on to pray:

It is my fervent wish that mankind may ultimately be permitted to be guided through the euphony of art to the noble spirit of selection and synthesis, and to shape all institutions of his earthly existence, such as [the] state [itself], . . . into true works of art according to the laws of artistic synthesis!282

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282 2 Schenker, Counterpoint, supra note 13, at xx (emphasis added).