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EDUARD GANS AND THE HEGELIAN
PHILOSOPHY OF LAW

by

MICHAEL H. HOFFHEIMER



KLUWER ACADEMIC PUBLISHERS

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To
H.S. Harris
qui facit per alium facit per se

Alles erblickt ich im Glass,
Alte und neue Völkergeschichte,
Türken und Griechen, Hegel und Gans,
Zitronenwälder und Wachtparaden,
Berlin und Schilda und Tunis und Hamburg ...

[I see everything in the glass,
Ancient and modern history,
Turks and Greeks, Hegel and Gans,
Citrus groves and military parades,
Berlin and Schilda and Tunis and Hamburg ...]

Heine, *Die Nordsee II*

PREFACE

Gans ranks at the head of that important group of Hegelian thinkers that bridged the generations of Hegel and Marx.¹ Yet there is a large gap between Gans's historical importance and the scholarship on him. Despite a renewal of interest in Gans's work on the Continent,² Gans remains almost completely unknown to English-language scholars, and almost none of his work has been previously translated.³ His Prefaces to his posthumous editions of Hegel's writings are inaccessible to English speakers, despite the fact that they shed important light on the authenticity of the so-called Additions to those texts. His Preface to Hegel's *Philosophy of Law* has never been translated before, while his Preface to the *Philosophy of History* has been omitted from reprintings for generations.⁴

Moreover, the recent scholarship on the Continent has focused on Gans's political and philosophical rather than his legal writings. There is little discussion in any language of his system of law, which is the focus of the present study.

Some of the reasons for the neglect of Gans are obvious. Gans cannot be a hero for most readers today. He accepted apostasy as a means to professional advancement. And though more liberal than Hegel, Gans nonetheless accommodated himself to the results of the Restoration and evaded political persecution that might have kindled the sympathy of later generations.

By disclaiming originality in his scholarship, Gans also deterred interest in his works by twentieth-century historians of ideas who have prized innovation and originality. The content of his writings further deterred interest: his ambitious original research on the history of the law of succession remained unfinished, and was so detailed, descriptive, and dated that it would appeal only to the legal specialist or dedicated antiquarian. His principal research interests, Roman Law and the law of succession, were topics that remained peripheral to the interests of ensuing generations of legal historians.⁵ On the other hand, his polemical tracts were embarrassingly superficial, repetitious, and vindictive.⁶

For Victor Hugo the idea of translating Gans into French provided the perfect example of tiresome, dispiriting intellectual work. In a scene that may have recorded Hugo's own early efforts to translate Gans,⁷ Hugo recounted how a law student struggles to translate Gans. The student takes a daily walk, hoping the exercise will fortify him for work on his translation.

...the work he had on hand at that time was the translation into French of a celebrated quarrel between two Germans, the controversy between Gans and Savigny; he took Savigny, he took Gans, read four lines, tried to write one of them, could not, saw a star between his paper and his eyes, and rose from his chair, saying: "I will go out. That will put me in trim."

And he would go to the Field of the Lark.

There he saw the star more than ever, and Savigny and Gans less than ever.

He returned, tried to resume his work, and did not succeed; he found no means of tying a single one of the broken threads in his brain; then he would say: "I will not go out tomorrow. It prevents my working." Yet he went out every day.⁸

As early as 1826 Heine had caricatured both Gans's ponderous prose and his esoteric research interests in the nightmarish fantasy of an opera with a libretto by Gans about inheritance law and set to music by the contemporary Italian Spontini.⁹

Gans championed three losing causes and in the end he suffered the fate of losers. First, he championed the cause of codifying German civil law at a time when the codification movement was decisively rebuffed. The codification that eventually occurred a half century after Gans's death owed little to his efforts. Second, he supported liberal political values at the height of the Restoration. Seeking an accommodation of national aspirations and traditional German political institutions with guarded support for liberty and greater participatory democracy, Gans stood isolated from the main political and ideological currents of the day. Third, he subordinated his career to the project of promoting Hegel's system of philosophy, and interest in Gans accordingly waned with the decline of interest in Hegel.

By defining his own scholarship as an application of Hegelian doctrine to legal study, Gans sought to expand the influence of Hegel's philosophy in his university lectures, in time consuming work on behalf of the Hegelian Society for Scientific Criticism, and in preparing posthumous editions of Hegel's own writings. Gans succeeded in a short period in rising to a position of preeminence among Hegel's academic followers. But he rose just at the moment that Hegel's reputation, having peaked, began a bumpy decline.¹⁰ Gans – ever ambivalent and accommodating – championed a sort of liberal, centrist interpretation of Hegel that was to be lost in the dynamic debates among Left

and Right Hegelians that dominated the period after Hegel's death.

* * *

The present study of Gans hopes to establish that his writings on law and legal philosophy merit closer attention than they have received. These writings provide some of the best surviving evidence of the coverage of legal education at the University of Berlin during the important period before 1848. The translation of his *System of Roman Civil Law* included in this study is, as far as I know, the only German law textbook from that period that is available. The features of Gans's work that account for its lack of appeal to scholars nevertheless shed light on characteristics and limitations of German academic law in the early nineteenth century. The abstract, philosophical, and historical focus of German legal education, evident in Gans's work, manifested the chaos and impotence of private law throughout German states. But the gulf between German academic scholarship and contemporaneous legal practice should not obscure the fact that Gans's legal writings expressed a theoretical response to pressing legal and political problems of his day. His passionate interest in specific doctrinal areas, such as the law of possession, likewise expressed his underlying concern with the practical problems resulting from the absence or inefficacy of private law remedies. Quite apart from the ideological debates about romanticism in law, all educators (including Gans) found their work turning to one of two extremes: on the one hand, they turned to historical reconstruction of details of particular legal practices. On the other hand, they engaged in constructing various systems in laconic prose marked by pervasive abstraction and ambiguity.

Gans's work shared the characteristic defects of the German legal scholarship of his age. It not only failed to provide a mechanism for integrating academic law and legal practice; it discredited the very possibility of academic participation in social criticism and political reform. Strategies of abstraction and ambivalence pervaded the scholarship of Gans and his contemporaries and pose the need to reconstruct the context that subtended the discourse and motivated intense legal debate, historical research, and enmity on issues such as the origin and nature of possessory rights in Roman Law. At the same time, the debates over such esoteric issues are of central importance for the intellectual history of pre-Germany precisely because they were the forum in which the critical intellectual debates took place. And the character of intellectuals as a group and their intellectual product were powerfully affected by the nature of the discourse in which they engaged and through which they defined themselves. The very form of intellectual activity in which Gans engaged – the systematic elaboration of Roman Law – provided cohesion and

cultural identity to the German legal profession. His lectures and publications served to create and perpetuate at Berlin a tradition of legal scholarship that was continued by later schools of jurisprudence – among them, *Pandektenwissenschaft* and legal positivism – that were often indifferent or even antagonistic to Gans's Hegelian theory.

Gans's work also merits closer attention than it has received because of its importance for understanding the diffusion of Hegel's views. Gans discloses the power of Hegel's influence and the reach of that influence into disciplines and areas of research in which Hegel himself expressed little real interest (or ability). At the same time, a close reading of Gans's work reveals far more originality among Hegel's proselytes than has been usually recognized. Gans's innovations were not limited to filling gaps, extending, or popularizing Hegel's teaching. On the contrary, Gans redefined the contents of Hegel's philosophy of law; he reshaped the systematic form of Hegel's philosophy; and he altered the treatment of legal and historical components of Hegel's system.

Lastly, Gans's work deserves closer study because it represented a positive and creative product of a northern German culture that is often remembered only for its negative legacy. The intellectual history of Gans cannot pretend to be ignorant of the failure of German intellectuals and legal institutions to prevent the rise of Nazi rule. It is easy in hindsight to find the failings of Gans and German liberal legal theory. It is more difficult today to appreciate the positive contributions of Gans to the history of thought. By his death, Gans was a recognized authority on Roman Law and the history of the law of succession. Hegelian influence no doubt encouraged certain dogmatic views, but it also validated a comprehensive polyglot conception of law which encouraged Gans to acquire a more sophisticated grasp of English and Scots law than any British thinker of the day would acquire of German law. So, too, his history of medieval French law would be translated into French. Gans provided a sounder systematic framework for the Digest than Thibaut, upon whose treatment of Roman Law nineteenth century barristers lavished the most extraordinary praise.¹¹

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Michael H. Hoffheimer
Oxford, Mississippi
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CHAPTER 1

THE PHILOSOPHY OF LAW OF EDUARD GANS

1.1. LIFE AND CAREER

I have laboured carefully, not to mock,
lament, or execrate, but to understand
human actions ...

*Spinoza*¹²

Eduard Gans was born in 1797¹³ into a prosperous Berlin Jewish family. He grew up in years marked by prolonged political and military turmoil, the rise and fall of empires, and the permanent shifting of national state power alignments within the German-speaking world. An infant when the French imperial expansion began, he was a child when the Holy Roman Empire of the German nation collapsed and a teenager when the “War of Liberation” culminated in the French retreat from Eastern Europe and the fall of Napoleon.

Both his personal life and his intellectual development were informed by a sense of his awkward fit into his historical period. As a Jew raised in an alien culture – one that reacted with increasing hostility towards Jews as he grew to manhood – Gans defined his personal and intellectual identity in a way that sought to respond positively to the dominant culture and to redefine that culture so as to encompass heterogeneity. The powerful appeal of Enlightenment ideals and the promise of a liberal state led him eventually to seek full assimilation into German cultural life, including religious conversion. But Gans understood, perhaps better than later generations, that his individual conversion was part of a larger process of Jewish assimilation into north German society. Heine converted the same year as Gans, and Gans no doubt viewed this amalgamation of cultures in which he participated as itself imparting further diversity to the dominant culture.¹⁴

It is tempting to speculate that Gans’s later work exhibited attitudes and defenses that he acquired as a Jew raised in a hostile intellectual environment. Numerous scholars have looked for distinctive Jewish features in works he authored after his conversion. At the time of his death, a Jewish newspaper observed that, though the example of his conversion should not be followed,

Gans nevertheless remained a Jew. "In his particular field Gans also remained – we state this quite openly – a Jew."¹⁵ Gans's later convictions might manifest general patterns of thought that Yirmayahu Yovel identifies as characteristic of Marrano intellectuals: "a this-worldly disposition, a split religious identity, metaphysical skepticism, a quest for alternative ways to salvation that oppose the official doctrine, an opposition between inner belief and the outer world, and a gift for dual language and equivocation."¹⁶ The problem, of course, is that such broadly defined patterns of thought mark modern and post-modern European culture in general. For example, Gans's profound gift for equivocation, manifest so strikingly in his Preface to Hegel's *Philosophy of Law*, was a trait he shared fully with Hegel.

Gans gave voice to his feeling of awkward fit with his age, and in particular his age's resistance to historical progress. He observed in 1828 in a lecture:

This is the history of the modern period in general. All other histories paused at the time of the French Revolution. One could only consider their influences on the other states, and history took its starting point from France. But because of its many outrages and horrors, a hatred set in after the Restoration towards this event, the foundation of our entire history. And I cannot agree with the view, as little as I can with the fear, that the *ancien regime* will return after the Restoration. Never in history does something return in the same condition. One can neither revere nor fear one's age; one must observe it.¹⁷

His final injunction – that one must engage in the passive process of observing or contemplating (*betrachten*) – demanded something more than historical verisimilitude. Observation furnished Gans with a strategy for personal survival; and the role of observer deeply shaped his identity and activity as a scholar and teacher. In the role of detached observer he also wrote actively as a cultural critic, literary essayist, and political journalist.¹⁸

The conclusion in the 1828 lecture – that one "can neither revere nor fear one's age" – comprises a tacit reference to a famous statement by Spinoza¹⁹ and thus further disclosed Gans's sense of detachment from his age at the same time it signified his community with other philosophers (like Spinoza) who had been similarly detached. The reference to Spinoza three years after his formal conversion to Christianity may suggest that Gans continued to see himself as part of a tradition of Jewish intellectual activity. But the image of Spinoza more certainly served as an emblem for radical rationalism and humanism.

Gans belonged to the generation between Hegel and Marx – living in the years between the end of the Enlightenment and the emergence of modernist thought. He attended university in the years immediately after the "War of Liberation" and completed his academic legal education in three years of

study. He attended the University of Berlin for three semesters (summer 1816 to 1817). While a student at Berlin, Gans became active in a circle of Jewish intellectuals who met weekly to discuss a variety of topics. Gans was one of the most active participants in these meetings; participants discussed a host of European cultural topics but concerned themselves especially with Jewish issues.²⁰ His interest in law was reflected in his presentations on “the upcoming lectures on the characteristics of Roman law” and “on the characteristics of public and private legal relationships of Rome.”²¹

After Berlin Gans studied law at the University of Göttingen from October 1817 through the summer of 1818. He left Göttingen in August 1818 to enroll in the law faculty at the University of Heidelberg, where he completed his dissertation on the law of forfeiture in the Roman Law of contracts in 1819.²²

At Berlin and Göttingen Gans was immersed in the legal culture dominated by the so-called Historical School. Public interest in the Historical School was peaking just at the time Gans began his legal studies, and the University of Berlin was home of its most famous and active spokesman, Friedrich Carl von Savigny (1779–1861). Savigny had taught at the University of Berlin since its founding in 1810, and he had been active as a scholar for years. Most recently, only two years before Gans enrolled at Berlin, Savigny had caused a major stir by publishing *The Vocation of our Age for Legislation and Legal Science* (1814), a polemical tract opposing codification of German private law.

The Historical School had an equally powerful presence at Göttingen (where Savigny himself had once studied). At Göttingen the Historical School could trace its intellectual roots to the work of Gustav Hugo. Indeed, the Göttingen Professor Karl Friedrich Eichhorn together with Savigny and J.F.L. Goeschen co-founded the organ of the Historical School in 1815, the *Journal for Historical Legal Science*.²³

Gans’s decision to complete his legal education at Heidelberg was to have an important effect on his career. Like Berlin, Heidelberg was widely respected as a center of legal learning.²⁴ But in contrast to the modern state-created university in Berlin, Heidelberg’s longstanding preeminence went back to the middle ages; and it could proudly point to Pufendorf’s residency at Heidelberg from 1661 to 1668. Despite the reorganization of Heidelberg in the early eighteenth century, its established traditions, and the relative weakness of the local state administration, translated into greater academic autonomy from interference.

While Berlin and Göttingen were associated with the Historical School, the University of Heidelberg was identified with the most important intellectual, political, and personal opponent of Savigny and the Historical School – Anton Friedrich Justus Thibaut (1722–1840). It was Thibaut’s public call

for the codification of German law, *On the Necessity of Universal Civil Law for Germany* (1814), that had provoked Savigny's polemical tract against codification that crystallized the romantic movement among legal academics into the Historical School. In jurisprudence Thibaut insisted on a doctrinal study of law that derived its validity from a system of relations and obligations. His approach was deliberately formal and classical, and he resisted the romanticist trend that the Historical School promoted which sought to trace social practices, including law, to national folk roots.²⁵

Methodological differences in jurisprudence were bound up closely with ongoing political debate. While Thibaut had emerged in 1814 as vocal partisan of the codification of German private law, the Historical School defined itself in opposition to the precipitate codification of German law.²⁶ Gans thus moved to Heidelberg in 1818 at a fateful moment, and his exposure to the jurisprudence of Thibaut was to exercise a decisive effect on his intellectual development. Gans's decision to leave Göttingen for Heidelberg in 1818 was probably a function of his political convictions, personal experiences, and legal interests.²⁷ In 1815 and 1816 the social ferment following the "War of Liberation" generated loosely organized student movements at German universities, spreading from Jena in 1815 to other traditionally protestant universities, including the University of Heidelberg. The student activists, encouraged by some faculty members, combined nationalist aspirations and liberal protests against the suppression of free thought. The movements had almost no following among students at Berlin and Göttingen, who were more conservative,²⁸ and Gans may well have been attracted by Heidelberg's reputation as a center of student activism. While in Göttingen, Gans responded to anti-Semitic attacks on his family. Professor Rühls, a historian at Berlin, had published a criticism of Gans's father, Abraham Gans (who had died in 1813) for supposedly usurious business deals with von Moltke. Gans's first published first work appeared while he was a student at Göttingen, an open letter responding to the posthumous, anti-Semitic attacks.²⁹

It was not unusual for German students to attend various universities, but Gans's decision to leave two institutions closely identified with the Historical School and to complete his study at Heidelberg reflected his reaction against the politics, values, or jurisprudence of the Historical School. The Historical School's embrace of German nationalism and its ardent subservience to reactionary political tendencies in Prussia appealed to anti-Semitic currents in the popular culture. Though many discussions of Savigny politely avoid treating his hostility to Jews, he made no secret of it, and when he assumed positions of political and legal power in the 1820s, he worked to oppose and actually reverse the process of Jewish legal emancipation.³⁰ Anti-Semitic fervor motivated at least some students attracted by the Historical School's

nationalist rhetoric. One student of Savigny and Eichhorn in 1820 defended the "thesis" that it was immoral to grant the doctor of laws degree to Jews.³¹

Jews at Heidelberg, too, suffered legal disabilities, but Jews were treated far better there than at Berlin or Göttingen. By 1818 Thibaut "had gained a national reputation as a defender of Jewish emancipation and as the most eloquent opponent of the narrow nationalism and conservative historicism of the Historical School."³² The students at Heidelberg also exhibited less hostility to Jews and were less receptive to anti-Semitic hate mongering. In 1819 Thibaut led his students in defending Jews in Heidelberg from public attack in 1819.³³

On March 6, 1819, Gans defended his doctoral dissertation with honors. On March 23, 1819, a deranged student with liberal associations attacked and killed a conservative playwright, providing German state authorities with the pretext for a savage crackdown on dissent. The assassination sparked a period of extensive, and remarkably successful, state censorship and thought control. The political repression was formally institutionalized under the Carlsbad Decrees, by agreement among various German states in September, 1819.³⁴

In response to the political reaction and the increased persecution of Jews, Gans and other Jews founded the Union for the Culture and Science of Jews.³⁵ Gans played a leading role in the Union, serving as Secretary (1820) and President (1821), until its dissolution in 1824.³⁶ At first the goals of the organization were politically ambitious, as appears from its original name, the Union for the Improvement of the Condition of Jews in the German Federated States.³⁷ But the persistence of the reaction led to an erosion of optimism, and intellectuals throughout the German states responded to the repressive political atmosphere by turning inward. German Jewish intellectuals, too, redefined their aspirations in more politically ambivalent fashion and in more spiritual terms: the Union sought in the science of Jews "to present the Jewish world to itself," and it defined the culture of Jews as "the inner concept of the collective relations, property, and production of Jews with respect to religion, philosophy, history, law, literature in general, civil life, and all human affairs."³⁸

Gans's presented three Addresses to the Union, and the evolution of his views in the addresses document the impact of Enlightenment ideas on Gans's vision of cosmopolitan Jewish culture. At the same time, the addresses document his growing frustration with and distance from the Jewish intellectual community. His earliest address (1821) already reveals some Hegelian influence,³⁹ but it does not yet identify Gans as a committed Hegelian.⁴⁰ The second address (1822) reveals a liberal Jew coming to embrace Hegel as the spokesman for cosmopolitan German culture that was viewed opti-

mistically as growing increasingly indifferent to the distinction of Jew and Christian.⁴¹ A close reading of the second address further reveals a masterly adoption of equivocating postures towards the issue of Jewish assimilation. Gans recognizes as legitimate the universalizing European demand for Jewish integration into the dominant culture. He calls for the merger of Jewish world into the European but qualifies: "To merge does not mean to perish [*aufgehen ist nicht untergehen*]. Only the obstinate, self-centered independence of the Jews will be destroyed, not that element which becomes a part of the whole. . ."⁴² In a provocative image, Gans likened the assimilation of Jews to a river flowing into the sea: ". . . neither the Jews will perish nor Judaism dissolve; in the larger movement of the whole they will seem to have disappeared, and yet they will live on as the river lives on in the ocean."⁴³ While still active as a leader of the Union, Gans voiced his disdain for "studies of ignorant, prejudiced rabbis, who conceived of Judaism not as a part of the whole, but as exclusive and isolated from other branches of knowledge."⁴⁴

The success of the Restoration's program of enforced ideological conformity was due in large part to its avoidance of outright suppression of intellectual dissent in favor of a combination of censorship (that enforced an interior sense of perpetual state supervision) together with an effective monopoly of academic opportunities that allowed the state to co-opt potential dissidents. Having obtained a law degree at a time when opportunities for Jews in legal practice were extremely limited, Gans's only real opportunity lay in an academic position. Although education at pre-college level was controlled by the Church and thus closed to Jews, the emancipation edict of 1812 had announced that academic positions were open to Jews. But Gans's application in 1822 for the position of professor of law at the University of Berlin provided an opportunity for the King personally to declare that Jews were no longer eligible for academic appointment.⁴⁵ And Gans accepted a travel stipend as compensation.⁴⁶

In early 1822 Gans still expressed interest in the idea of establishing a Jewish colony in America. Heine jokingly named its capital "Ganstown."⁴⁷ But from 1822 to 1824, Gans became further alienated from the political aspirations of those Jewish intellectuals who responded to the political reaction with a separatist or utopian schemes, and who abandoned the cosmopolitan goals of Jewish culture and the political goals of complete legal emancipation. Like other German Jews of his generation, assimilationist social convictions and universalist religious beliefs coincided with personal career aspirations, and Gans formally converted to Christianity in December, 1825.⁴⁸ With this conversion he became eligible for the position of professor in the law faculty at the University of Berlin. He was accordingly appointed extraordinary pro-