

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*

## EDUARD GANS AND THE HEGELIAN PHILOSOPHY OF LAW

MICHAEL H. HOFFHEIMER

EDUARD GANS AND THE HEGELIAN PHILOSOPHY OF LAW

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## PREFACE

Gans ranks at the head of that important group of Hegelian thinkers that bridged the generations of Hegel and Marx.<sup>1</sup> 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,<sup>2</sup> Gans remains almost completely unknown to English-language scholars, and almost none of his work has been previously translated.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> On the other hand, his polemical tracts were embarrassingly superficial, repetitious, and vindictive.<sup>6</sup>

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,<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

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