

**A CRITICAL HISTORY OF  
MODERN ENGLISH  
JURISPRUDENCE: A STUDY IN  
LOGIC, POLITICS, AND  
MORALITY**

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A Critical History of Modern English Jurisprudence: A Study in Logic, Politics, and Morality by  
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*Non a Prætoris edictu, neque a Duodecim Tabulis, sed  
penitus ex intima philosophia haurienda  
juris disciplina.*

BY

GEORGE H. SMITH

AUTHOR OF

"Right and Law," "The Law of Private Right," and Essays in the  
American Law Review on "The Certainty of Law and the  
Uncertainty of Judicial Decisions," "The True Method of  
Legal Education," and other subjects.

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## PREFACE.

A limited edition of this little work has been printed, with a view of submitting it to friends of the author, and others, who, he may have reason to suppose, are interested in political science. But in submitting it even to this limited class of readers, the author is painfully conscious, from experience, that both the subject of the work, and the method in which it is treated stand in need of apology.

In regard to the subject,—which is Jurisprudence,—its study in England and this country, within the last fifty years, has fallen into almost entire neglect; and there is now no subject more generally unpopular. The general reader regards it as belonging peculiarly to the province of the lawyer, and the lawyer, in general, as a study of no practical utility, and, with which, consequently, he has no concern. And the few who are addicted to philosophy, turning to the works of the modern English jurists, find there something which bears no resemblance to real Jurisprudence, but which has usurped its place, and even its name.

This so-called jurisprudence is the theory of Austin, (the principal subject of our review,) which has become so generally received and firmly established in English philosophy as to occupy exclusively the whole field of Jurisprudence. But this theory, as will be shown more fully in the body of the work, asserts, as its fundamental principle, that the law (*Jus*) is merely an expression of the arbitrary will of the government, or state; and, consequently, that rights, and Justice or Right, are the mere creatures of that will. Hence, if the theory be true, it follows that Jurisprudence,—which, as universally conceived by all but the modern English jurists, is

the Science of Justice or Right,—can have no existence. There is nothing, therefore, to surprise us in the fact that the study of the subject has fallen into decay. For true Jurisprudence, so far as opinion can effect such a result, has been abolished in England and English-speaking countries; and the *pseudo* Jurisprudence that has been substituted for it, as may be verified by reference to the current works upon the subject, is, of all others, the dreariest and the most uninviting.

But real Jurisprudence, the science of Rights, or of Right or Justice, is, in fact, the science of the necessary conditions of rational social life, and therefore the fundamental part of Political and Social Philosophy. And, as of all the departments of the Science of Human Nature it is of most transcendent and vital importance, so it excels them all in the scientific rigor of its method,—which approaches nearly to that of Geometry,—and, consequently, in the certainty of its results. Hence, if we leave out of view its fortunes in England during the present century, no other branch of philosophy has had a grander history; nor is there another that excels, or even equals it, either in the genius of those who have devoted themselves to its study, or in the interest and beneficence of the results achieved. For among its *devotés*, (or, as Celsus calls them in the passage cited below, its priests,)

*"Jus est ars boni et aequi, of which some one deservedly calls us the priests; for we conduct the cult or religion of Justice, and profess the knowledge of the Good and the Equal, separating the equitable from the inequitable, and distinguishing the lawful from the unlawful \* \* \* following, if I am not deceived, a true, and not a spurious philosophy."* Pandects II., 1, § 1.

are numbered all the great philosophers of the world, from Socrates, Plato and Aristotle, to Kant and his followers, inclusive; and among its achievements, the development of the Roman Law, the reconstruction of political society in Europe, when emerging from the anarchy of the dark ages, and the institution of International Law or Right. In short, its history is the history of human civilization;

for civilization itself, in the proper sense of the term, is merely the capacity of a people for social life, or, in other words, its capacity for realizing justice; and Jurisprudence may, therefore, without impropriety, be said to be the Science of Civilization.

From this science and its literature, consisting of the best work of the greatest intellects of the race, and to which in the continental countries of Europe fresh additions are being constantly made, English-speaking peoples, since the advent of Bentham and Austin, and by the predominance of their philosophy, have been effectually isolated; and it may, therefore, with confidence be asserted that no task can be nobler, or, to the philosophic mind, more interesting, than the one I have here, however inadequately, attempted; namely, to refute the fantastic and pernicious theory by which the English mind has been so long dominated, and by which, for the time being, it has been reduced, in its capacity to deal with jural and political science, to a state approaching imbecility, and to rehabilitate in our midst true Jurisprudence.

It remains to add a few words in explanation of the method in which the subject of the work is treated; which, with the average reader, it is to be feared, will prove equally unpopular as the subject itself. The modern English theory of Jurisprudence is universally admitted to be the creation of Austin; by whom the loose and popular notions of Bentham were reduced to a rigidly coherent system. But Austin himself, for his fundamental principles, drew largely upon Hobbes, whose philosophy is thus necessarily brought within the scope of our inquiries. The history of modern English Jurisprudence, therefore, consists, almost exclusively, of the works of Hobbes and Austin; and hence our investigations will, in the main, be confined to a review of their reasoning. Now, it happens that the works of Hobbes and Austin present the most striking and instructive examples anywhere presented,—and, in modern times, almost the only



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and especially in geometry, and also in the writings of the classical jurists of the Roman law; and, at least in our *investigations*, it can never be departed from without the risk of error. Of the essential characteristics of this style the writings of Hobbes and Austin are among the best examples; the former, on the whole, superior; but the latter, in their analytical parts, though lacking the graces of rhetoric, excelling all others in a rigid observance of the requirements of logic.

My own style I have sought equally to adapt to the subject, and to the nature of our investigations, and I trust I may say of it, without vanity, with Hobbes, that while "there is nothing I distrust more than my elocution, nevertheless, I am confident, excepting the mischances of the press, it is not obscure."

LOS ANGELES, June 11, 1893.