JETHRO BROWN: THE FIRST TEACHER OF LAW AND HISTORY IN THE UNIVERSITY OF TASMANIA

by

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In the radical adjustment of nineteenth-century liberalism to meet newly perceived social needs, Jethro Brown, Alfred Deakin, and F. W. Eggleston were the outstanding Australian theorists. Brown's basic liberalism came from the tradition which reached its peak in John Stuart Mill and which gained confidence from the theories of Charles Darwin. The most important mediators of that tradition for Brown were the 'Oxford Idealists', especially T. H. Green, who in the last decades of the nineteenth century strove to endow liberalism with stronger elements of social sympathy and recognition of human and historical complexity. In refining this position, Brown adopted an evolutionary, or as he often said, a 'progressive' view of man, society, and truth itself. All were in constant process of change, all inter-related, yet infinitely various within themselves. 'Prospicio, non respicio', went Brown's motto, but he saw no certainty that the outcome of this flux must be for good — the disposition was that way, but only determined activity by society's best men could ensure it. Thus Brown was an elitist. Most, perhaps ultimately all, political theories are elitist; Mill's liberalism was, and Green's too. Brown's elitism and activism went beyond theirs, to have affinities with the style developed in the English speaking world around 1900 by the Fabians in Britain and the Progressives in the United States. Yet it stopped short of the proto-Fascism which the more extreme members of these schools were expounding well before the rise of Mussolini. Likewise, Brown's recognition of social and human flux, of the relativity and complexity of truth, accorded with ideas espoused by Henri Bergson (whose key concept of creative evolution will find echoes through this paper), by William James (of whose pragmatism the same is true), and by many neo-Romantics, yet he rarely drifted into the mysticism and extravagance espoused by some of these thinkers as they broke the shackles of nineteenth century creeds.[1]

1868-1900: FORMATION

Brown was born at Mintaro, South Australia, 29 March 1868. His

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1 The outstanding account of this process is H. S. Hughes, *Consciousness and Society* (1958).

father, James Brown, was a son of Devon who migrated to South Australia in 1847 and remained there ever after, save for a spell on the Victorian gold fields. He became a model of the self-made colonial man, working hard as a farmer and acquiring much property. His wife, Sophia Jane, was of similar background and style; her primitive methodism set the religious tone of the large, close-governed family. At her death in 1917 her son honoured 'a life sanctified by myriad acts of self-denial, long service, and heroic struggle'.[2]

The young Brown himself had no easy path. From boyhood he did his share of heavy farm work. His secondary education came from an able man, but was brief. Early in 1882 Brown spent months as a cabin boy, from Adelaide to London and back. Then he passed nearly four years at the Moonta Mines school, qualifying as a teacher. To have maintained his academic interests in so remote and demanding a task is impressive evidence of his tenacity and spirit. Probably this determined his father to agree that the youth should receive, as an advance patrimony, education in the Old World.

Brown spent a year at Oxford as a non-collegiate student, polishing his classics, and then in October 1887 entered St John's College, Cambridge. There he studied law with great ability, achieving first class honours in both his second and third years. He won the friendship and patronage of F. W. Maitland, paramount among English legal historians. That Brown became President of the Debating Society at St John's, one of the biggest and proudest Colleges, spoke for his aplomb and probably for his ambition. He always remained very conscious of the niceties of public address.

The appeal of Europe was strong. Brown remained at Cambridge after taking his degrees in Arts and Law. He taught some students there while completing his qualifications as a barrister. His travels ranged to Italy, France, North America. But even Brown's record failed to win an attractive post in Britain. Early in 1892 he was back in Australia.

Here the task of finding an academic post was easier, although not simple. Brown first tried for the Chair of Law at the University of Melbourne, but just missed out to W. Harrison Moore. Then offered the Tasmanian post, as Dean of Law and lecturer in modern history. The competition was stiff enough, but Brown triumphed. In January 1893 he arrived in Hobart and began discussions with the University Council and his academic fellows: W. H. Williams in charge of the Faculty of Letters (Arts), and Alexander McAulay, Science. All were graduates of Cambridge; all had the title, lecturer, and a salary of £500; Brown was the youngest, and the only native Australian. They began teaching with six pupils amongst them in mid-March.

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2 *In Memoriam Sophia Jane Brown* (1917) at p. 4.

Numbers stayed minuscule throughout the decade, but Brown's prescriptions suggest his aims.[3] The Law degree as he developed it required examination at three stages. At the first stage students took property and 'wrongs' (close to latter-day 'torts'); at second stage, further property, contracts, and constitutional law; at third stage, equity, comparative law (including jurisprudence), principles of legislation, Roman law. In addition students had to pass a specified Arts subject. An honours degree required further study in conflict of laws, political science, constitutional and legal history. Local practitioners taught most of the professional subjects. The breadth of the course with its recognition of comparative, historical and philosophic elements is notable. It appears that Brown personally would have liked the degree to be tougher, extending over four years; he failed too to carry a proposal that compulsory essays help determine students' results. Brown sought and received advice from Maitland and another English luminary, Frederick Pollock, in shaping the syllabus.

Brown taught in the Faculty of Letters too, this being made possible by adapting his law subjects and by the paucity of students, which meant that considerably more courses appeared in the *Calendar* than in the classroom. His nominal offerings were:

First Stage:	History of the British Empire
Second Stage:	Constitutional history of England Political science
Third Stage:	European history, with a special study on the Stuarts. General theory of law and government, with a special study on Federal Government political economy
Honours:	General European history Political philosophy The constitutional law of a Federal State

Perhaps the most striking feature is 'political science', a subject actually taken in the University's first teaching year. 'Political economy' further bespoke Brown's readiness to venture towards applied and sociological learning. The call for academic teaching of such subjects was to become quite loud in Australia in the early twentieth century, part of the pragmatic thrust for relevance and social awareness in education. Economics, psychology, political science, sociology have grown under the aegis. The most important forum for the upholders of these new disciplines were the relevant sections of the Australasian Association for the Advancement of Science. Brown contributed to the Association's 'economics' sub-section in 1895, 1898, and 1900, being chairman in 1900. His economics there, as in the *University Calendar*, were socio-political, rather than modern-mathematical, but that is how the subject evolved.

3 The *University of Tasmania Calendar* for the 1890s documents this story, together with the records of the Faculty of Law and the University Council.

By contract, our pioneer pedagogues had to engage in 'extension' work. This had a double prong. If northern students enrolled, their teachers were obliged to visit Launceston every three weeks or so. Beyond that, the University arranged public lectures, often repeated in Launceston. Brown's first substantial contribution (1894) was a series of six lectures on 'the age of the Stuarts'. He presented the conflicting ideas of that century with learning and sympathy, stressing the secularization of political thought and the development of pre-democratic ideas. The lectures were beautifully prepared, each accompanied by a comprehensive synopsis, linotyped on high-quality paper.

Brown appears to have added the more elusive qualities of the good teacher to his care in preparation and delivery. His features suggest an alert, intense mind, eager to commune with others; his youth no doubt eased contact with students. He served as treasurer of the University Union, and on his leaving Hobart one student asked for a photograph as a memento of so fine a teacher.

The writer was W. M. Hodgman, which hints that although only a dozen men graduated in law by 1900, some interesting names were among them. The first batch, 1896, included future chief justice, Herbert Nicholls; future chancellor of the University, W. J. T. Stops; and future Deakinite federal minister, J. H. Keating. Brown's sole Honours man was H. E. Solomon, first (and, so far, second last) graduate of the University to become Premier of Tasmania.

Brown pleased the big-wigs too. Henry Dobson, perhaps the most able member of that family which dominated Tasmanian public life of the day, averred that the opening lecture of the Stuart series had persuaded him that the University was worth maintaining, despite its cost and Tasmania's ever-straitened resources.[4] Dobson notwithstanding, the politicians gave serious thought in 1895 to cutting the University grant virtually to nothing. In self-defence, Brown gathered testimonials from Sir Lambert Dobson, Bishop H. H. Montgomery, Neil Elliott Lewis, and others, applauding his enthusiasm, competence, and popularity. The crisis passed. Later that year the University Council rescinded its original ban on Brown practising at the bar, heeding his statement that he had the offer to become acting professor at Adelaide, with possible permanency. Perhaps this letter also moved Council to decide that their three academics should have the title 'professor' from 1 January 1896. (The salary did not rise, indeed the original £500 temporarily fell to £450). Brown still applied, but vainly, for the Adelaide Chair; he did not join the Tasmanian bar. In 1898 Council allowed him leave (without pay) to go first to Sydney as acting professor for two terms, and then to Europe.

All the while, Brown pushed on with his own thinking and writing. In the early Tasmanian years his chief interest was to complete a thesis

4 Memo in note-book holding lecture synopses, Brown papers.

for a Cambridge doctorate, so to fulfil the honour of having been elected by St John's to the McMahon Law Studentship (worth £150 for each of four years), soon after his arrival in Tasmania. Brown's subject was that contest of political ideas in seventeenth-century Britain about which he lectured to the Tasmanian public in 1894. Central to the work was the ideology of the divine right of kings, but Brown also attended to the counter-theories evoked thereby, culminating with Locke.[5]

The thesis did not win acceptance, probably because of the rather thin and mechanical way in which Brown dealt with his vast subject matter. The judgment still seems harsh: Brown had read a great deal, in French and English, and presented his argument clearly and logically. The chief interest of his study is its readiness to eschew the great Whig historians' contemptuous dismissal of divine right, and instead to seek out its meaning and function for its original upholders. Through this historical understanding, Brown was able to see the theory as having an intrinsic role in the evolution of politics, contributing to further developments in that process.

Brown's clearest statement to this effect was in a review of a book, prepared simultaneously with his own thesis by another Cambridge graduate, J. N. Figgis, *The Divine Right of Kings* (1896). The approach of the two was extraordinarily similar. Brown applauded Figgis's 'triumph of the historical method', and his demonstration that divine right was 'in its essential meaning... a doctrine of liberty, since it was the means by which political societies asserted their freedom from an ecclesiastical organisation'.[6] That is to say, kings thereby asserted that their office and tasks were justified by God, needing no sanction by pope or priests; in denying such ecclesiastical supremacy, they opened the way for more radical theorists to deny all theological supremacy and so for the secularizing of politics. At the same time, Brown claimed, the theory had confirmed in most Britons 'a deep sense of the majesty of the law, and an abiding conviction of the duty of civic obedience' — and his praise of that legacy revealed the conservative element always present in his own thought.

Figgis's book foreclosed Brown developing his seventeenth century studies, and he turned to more immediate issues. While rooted in historical and academic expertise, his thought increasingly considered present political realities and sought to mould their future. In another extension series, of 1896, Brown argued that man's best political hopes lay in the development of 'federal democracy'.[7] Justifying his historical approach he affirmed that 'we might almost speak of the Nineteenth Century as the Age of the Historical Method'; for modern man understanding could only come by scrutinizing the context, in time and society,

5 There are parts of the manuscript in Brown papers.

6 'The Theory of the Divine Right of Kings', (1897) 147 *Westminster Review*, 211.

7 Manuscript, Brown papers.

of the phenomenon under study. That was true, say, of a literary work. It was true of biology: 'the doctrine of Evolution is an application of the historical method in the sphere of natural science'. It was true of political systems, as Brown's lectures now aspired to reveal.

The first stage of political development had been 'the rule of the priest', common to all primitive peoples and culminating in Europe with papal hegemony in the middle ages. Notwithstanding its rigidity, despotism and sacerdotal bias, such government bequeathed much. It anticipated federalism by posing a dual allegiance, to State and to Church. More important still:

> There is a world of meaning in the Theological character of the ancient theory of political duty. Philosophers may contend that our notions on the basis of civil authority have gone through later stages and become metaphysical or scientific; but historians, speaking for the race, will aver the contrary. The spell which the primitive Priest threw around the notion of Political Duty has never wholly left us. Men still require some basis for political duty other than utility as commonly understood. We can no more build the modern than the ancient state upon the calculus of profit and loss. The contrary belief, though apparently sanctioned by pre-evolutionary utilitarianism, is wholly repugnant to the established conclusions of historical science.

In these words, more clearly than any others, Brown showed himself akin to the romanticism of his day, hostile, to cold, classical utilitarianism.

After the rule of the priest came the rule of the Caesar. His function was to achieve political union on a grand scale, 'the great state' as Brown termed it. Brown cited Rome as the exemplar of how classical republicanism failed to manage the problems of governing an immense area; the Empire necessarily evolved, and for centuries did manage this mighty task.

In the contemporary world the notion of 'the great state' was again ascendant; Brown saw the forces making to this end as near irresistible, and overall he approved. Such polities were best suited for securing the welfare and good government of men. In making this point Brown endorsed the virtue of positive government. He cited the United States:

> Think, of the Agricultural Department of that great country which alone employs 10,000 persons engaged at home and in foreign countries, in the compilation of statistics respecting the area and conditions of crops, the costs of transit, the condition of labour! Think of this department as but one of several, all directed to securing a greater economic efficiency by saving the nation from the evils of misdirected effort.

Here indeed was the political economist speaking; speaking, moreover, in strikingly up-to-date terms, for this faith in the glory of efficiency, to be won by an expert, fact-gathering bureaucracy, was at the core of that Progressive-Fabian thought to which I referred earlier, and the hey-day of which did not come until the century's turn.

Brown could wax still more eloquent over 'the great state'. 'From a commercial point of view, the State is but a vast syndicate', he declared, in terms anticipatory of twentieth-century corporative theory. The bigger it was, the more effectively could economic forces rationalize and combine. Economic competition between such states would force each of them to concentrate these resources in production, and so to reduce their military costs and ambitions. Further, the consolidation of the world into a relatively few powers would ease international tensions and probably assist arbitration of those remaining. In expressing this optimism, Brown drew on the American theorist of social evolution, John Fiske.

While 'the great state' held out much promise, its fulfilment posed certain problems. In the past its achievement had depended on the assertion of a Caesar; but the whole trend of modern history was towards democracy, which, conversely, had earlier worked well only in small polities. Just as Brown approved 'the great state' so too he was a democrat. Thus he sympathized with each of two movements which seemed contradictory, even mutually destructive. What was to solve this dilemma? Essentially this is the key question of modern politics — how to maintain popular government without denying freedom. Brown answered: *federal* democracy, whereby the principle of dual loyalty would preserve the virtues both of small-polity democracy and great-state efficiency. It was a cheering thought.

Federalism was no abstract issue for an Australian of the 1890s, especially one committed as was Brown to applying principles to the real world. Accordingly he spoke to the 1898 Advancement of Science meeting on the subject, 'Why Federate', adopting his eulogy of federalism to the current Australian debate and afterwards publishing his speech in pamphlet form.[8] The result was one of the more impressive items of that debate, putting Brown in the company of Deakin, Edmund Barton, Bernard Wise, Robert Garran — Australians of wide learning and liberal sympathy who saw Australian federation as a noble ideal. In Tasmania the federation movement owed much to Brown's students, Nicholls and Keating.

Why Federate? first argued for the affinity of federation and peace. The tie of such brotherhood, said Brown, must minimize danger of war between the federated units. This seems tautological, while in developing his claim that federal nations were likely to be peaceful *vis-à-vis* the world, Brown reversed his argument of 1896 that big states tended to reduce their military costs. One vital means to peace, he now stressed, was the building of armed strength. Brown called on a federal Australia to develop its forces, even to seeking independence from British naval

8 *Why Federate* was published as a monograph (1898). It was republished in Brown's *The New Democracy* (1899) and I have worked from that version; following quotations from pp. 168 and 173-4.

power. Like Deakin and Wise, he saw no conflict between this sort of attitude and belief in imperial federation.

A federal Australia could hope for prosperity as well as peace. Developing this point, Brown repeated the type of argument with which he had favoured 'the great state'. Australians should seek self-sufficiency in economics as well as military matters. 'They must adapt their organisation to meet the new necessities which the progress of the world imposes': in other words, they must evolve creatively.

Finally, federation would exalt Australian honour. Recognition of unity would give the people 'an inspiring faith in the splendour of the future which must lie before them'. Such national ideals were necessary to the full development of citizenship and statehood, and Australians had suffered from their lack. Australians were too practical, and few felt moved by the glories of empire. 'I believe that nothing but a political Union can give them the ideals which they so greatly need to broaden their sympathies and to refine and elevate the whole tone of their political life'.

In this eulogy Brown presented federalism as not merely reconciling democracy with 'the great state', but as purging the potential ills of democracy. He was always conscious of those dangers: mediocrity, inefficiency, over-riding of minorities, materialism, and so on. The task of the good citizen and the political thinker as he saw it was to recognise and destroy these traits. Federalism promised to serve this purpose; was there any other means to the same end ?

Yes, and Tasmania had applied it: proportional representation. Brown praised this plan for assisting the representation of minorities, the increased commitment of electors, and the defeat of corruption (relatively easy in a small electorate). All these influences helped to secure better politicians, men of wide appeal, able and willing to find their strength in the community at large rather than through the patronage of a few factional leaders and local pressure groups. But greater even than this was the virtue of proportional representation in creating 'organic' constituencies. Voters gathered behind a particular candidate by virtue of what he stood for and accordingly felt a vibrant tie with him and each other. Thus politics were redeemed from that mechanical utilitarianism which the neo-Romantics abhorred.

Just as Brown entered the public arena in his support of federation, so he did in this matter. The first of his many articles to appear in top-ranking international journals explained how the Hare-Clark system had worked in its first Tasmanian application in 1897, giving a highly detailed account of the polling in Hobart.[9] In 1899 the government introduced a Bill to extend the systems so that it would apply generally, not just to Hobart and Launceston. Brown prepared a statement in favour

9 'The Hare System in Tasmania', (1899) 15 *L.Q.R.* 51.

and it was published as a parliamentary paper.[10] Not until 1906, however, did the change go through.

As a complement to his support of proportional representation, Brown opposed the idea (then favoured by many reformers) of referenda becoming the mode of initiating and ratifying legislation.[11]

> For the successful working of democracy under existing conditions we need great men to lead it, skilled men to carry out its decisions, and, finally, effective means for securing that its deliberate judgments shall be the standard of legislation. To each of these three requisites, the principle of the referendum is directly and manifestly opposed. By attributing ultimate authority to the fluctuating majority, it must tend to drive strong and independent men from politics, to lower the standard of legislation, and to increase the sense of popular despotism.

The passage showed the elitist element in Brown's thought. Government should be benevolent, and have the sanction of a concerned and involved citizenry, but its leaders should be superior men.

Brown believed the best means to wider acceptance of this credo was the study of history.[12]

> Intellectually, it contributes a knowledge of social laws and a mental discipline of particular value to the political student; morally, it will go far to lessen the indifference which stands aloof from politics, to modify the dogmatism which results from a deficient sympathy, and to check the irreverence which, like an attendant spectre, accompanies the national pursuit of equality.

So elitism sounded again, and Brown underpinned it with 'hard' rather than 'creative' Darwinism. 'History illustrates the application of natural selection to the life of society', teaching that 'the qualified and controlled leadership of the few' was necessary for any group's survival. Men *were* unequal. But Brown softened this asperity by arguing for widening opportunities for every man and he was emphatic that history taught the primacy and potency of right, justice, and good, as traditionally defined.

Brown considered how to build books out of his political papers of the late 1890s. He wrote to Deakin and Barton suggesting that they and others contribute to a volume of essays in favour of Federation, his own piece to be included. That plan misfired, and Brown had to pursue others. The upshot was *The New Democracy*, a book published by MacMillan, London, at the very end of 1899, the first to emerge from the University of Tasmania. It presented Brown's arguments on problems of democracy, proportional representation, the referendum, the study of history, federalism, and the Australian Constitution. While sometimes woolly and wordy, and disparaged by Brown himself in later years, it remains quite impressive. It was early among studies which

10 Number 26 of 1899.
11 *New Democracy*, at p. 99.
12 *New Democracy*, chapter 5; following quotations from pp. 129 and 131.

presented Australasia to the world as a testing-ground for new social and political forms (in this case, proportional representation and federation); the best such book is that by the New Zealander, W. P. Reeves, *State Experiments in Australia & New Zealand* (1902), and Reeves ranks with Deakin as the outstanding Australasian in the Progressive-Fabian mode. Still, Brown came earlier, and in some ways had a broader vision.

The previous paragraphs have hinted at Brown's ultimate beliefs about man and faith. While accepting a naturalist explanation of the universe, he felt the need for reverence and emotion. The last sentence of *A New Democracy* invoked God, with a capital G. Perhaps that a little exaggerated Brown's commitment. Addressing a student group in Tasmania,[13] he recognized the psychological and moral value of belief, but urged that his auditors be ready to question old ideas. 'The historic sense, which scruples not to regard the Bible as a phase of progressive revelation, will surely recognize the need for revision of the creed'. Brown distinguished between the absolute truth held by all ages and the relative truth applying to a man's particular time, place, and station. He quoted Mazzini, but William James was a more immediate influence:

> whatever may be the defects of Pragmatism, I believe that the earnest seeker after truth will find a useful, if only approximate and provisional, touchstone of reality in the effect of creed upon conduct. Not everything that works is true; yet everything that is true works. It seems to me to be only an application of this that enlightenment may come to the individual in the life of active service. Light may come in the silence and seclusion of the cloister. Or it may come in strange sub-conscious ways, in doing the duty that lies at hand.

Those few sentences express the kernel of James's thought, especially in opening the way for the so-called Social Gospel, the distinctive application of early twentieth century thought to theology.

Small though Hobart was, it offered some congenial spirits for Brown. Notwithstanding his theology, he and Bishop Montgomery were sympathetic. His papers include a letter from the Bishop as to the emotional oddities of women, meaning Mrs Montgomery, which deserves the attention of those now engaged in sorting out the psyche of their famous son, Bernard. But Brown's spiritual mentor in Hobart inevitably was Andrew Inglis Clark — liberal, lawyer, Unitarian, creative modifier of proportional representation. To Brown as much as anyone, Clark's soubriquet, 'padre', must have had real meaning. At a dinner for Brown in May 1900, 'padre' sat at the head of the table, the guest of honour at his right hand, R. M. Johnston (at least equal in intellect with Clark, and only a shade less charismatic) at the foot. The other guests included Frederick Lodge, an able but not successful man, who a few days later penned an emotional letter of friendship to Brown. Another

13 'The Historic Sense', Brown papers.

Hobartian who wrote to Brown in similar terms was W. H. Dawson, balladist of Australian nationalism. These are the only letters of the kind among Brown's papers, suggesting that in the 1890s he knew such brotherhood (one of his own favourite terms) as at no other time. Young, successful, free to indulge a mildly bohemian streak, enjoying the island's natural beauty, the professor received from Tasmania as well as giving.

But in mid-1900 Brown left these shores. On his European trip of 1898 he had met Aimée Marie Loth, and now planned to marry her. Miss Loth evidently wished not to go to Australia. Brown may have felt that anyway it was time to move, although his resignation said that occupying the Tasmanian post 'he had always felt to be the greatest privilege of his life'. The marriage took place in England in August. Brown enhanced his honeymoon in France by studying that country's jurisprudence.

1900-1906: FULFILMENT IN BRITAIN

At year's end Brown was appointed to the Chair of Constitutional Law and History at University College, London. Referees from both Hobart and Sydney eulogized his teaching and his concern to uplift public life.[14] The selection committee responded especially to Brown's academic cast of mind. Some paradox lay in this, for the job was not academically oriented, being much less demanding and lucrative than its title might suggest. Brown apparently overlooked these limitations on accepting the post but soon became very conscious of them.

Some of his spare hours in London were spent as a resident lawyer at a 'social settlement' in London's East End. These settlements had developed over the past twenty years or so, largely under the aegis of upper-class philanthropists of the Oxford Idealist school. They were missions to the outcast, sometimes explicitly Christian, sometimes not. The fashion spread to the United States, there becoming the forcing-ground for the development of the modern social worker, product of the pragmatic response to human distress.

The experience moved Brown. His prose describing life in the East End was uniquely rich and resonant:[15]

> The new world seemed full of the strangest contradictions — pale haggard faces and respectable death rates, women at once debauched and heroic, men at once brutal and humane, and lives in which alternations of enjoyment and misery succeeded one another with barbaric promptitude.

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14 Relevant papers are held at the D. M. S. Watson Library, University College, London, whose custodians I thank.

15 'East and West London in the Early Days of the Twentieth Century', *Dragon*, vol. 26 (1903), pp. 54-7 at p. 54; see also, 'The East End and the Social Settlement', (1901) 24 *The University College of Wales Magazine*, 35-. (*Dragon* was a new name for the *Magazine*). I quote from pp. 42 and 46 of the latter article.

Brown's analysis of the passionate turbulence of popular life anticipated that advanced in recent years by Richard Hoggart.[16] 'Social ideals,' he commented, 'are local and personal rather than patriotic'; gang life was one expression of this. As generally, the position of women displayed society's character; they suffered much, and, worst of all, accepted their lot as natural. Meanwhile the bourgeoisie of the West End went on its way, corrupted by wealth and pleasure. The social settlements stood for high ideals, but were utterly inadequate for the task of regeneration. A total change of mind must come, founded on 'a new, more vivid, and more national consciousness of the responsibilities of citizenship'.

Disappointed with the London position, Brown soon moved again. A post opened with the establishment of a Law School at the University College of Wales at Aberystwyth. From October 1901 Brown was Professor of Comparative and Constitutional Law there, while a fellow Professor, T. A. Levi, handled the more professional subjects. The next four years were the most fruitful of Brown's life so far as concerned his work on theoretical aspects of law and on legal teaching. These two issues necessarily intertwined, most conspicuously in Brown's inaugural lecture at Aberystwyth. To aid clarity, however, it is best to separate them.

The inaugural made clear what no doubt Tasmanian students already knew — that Brown wanted a philosophy of English law of new subtlety and depth. He made the point by invoking the Italian philosopher Giambattista Vico (1668-1744). In terms of the new consciousness of the early twentieth century, this is extraordinarily interesting. Vico anticipated the notion, common to both Bergson and James, that an imperative of social enquiry was for the enquirer to absorb himself deep into his subject matter, thereby to gain sympathy with its inmost truth. That sympathy enabled the enquirer to distil wisdom which met the needs of his own world and being. The idea is somewhat mystical, and even ardent admirers of Vico like Benedetto Croce and R. G. Collingwood do not make it altogether convincing. But for Brown, Vico pointed towards truth:[17]

> Law, urged that great philosopher, is not the product of individual wills imposing their fiats on States, but the embodiment of the spirit of Nations. Interest and necessity, he contended, are no more than the occasions which awake in men that consciousness of right which is the constitutive principle of social life. Today we may not accept this view in its entirety, but we at least begin to see something of its truth. Law ceases to be regarded as the mere command of the State; and no analysis of law is held to be satisfactory which does not take account of the spirit which lives within it — a spirit which has not been always the same, but at least has been always something more than the dictates of fear — a spirit in which an increasing rationality becomes ever more and more apparent...

16 *The Uses of Literacy* (1957).
17 *The Study of the Law* (1902), p. 36.

> This broader view of the subject matter of juristic philosophy has achieved much, but the services which it has rendered up to the present are but an earnest of those which are to come. As I have already said, our philosophy of law has yet to be written; in the meanwhile the student must anticipate that philosophy as best he can by taking full advantage of the help that various schools afford. In his endeavours, he will probably pay more attention than has been usual in the past to the ends which law serves, the ideas and wants out of which law develops, the economic relations from which it draws its chief meaning. He will lay special emphasis upon the nature and purpose of law as shown by the motives of civil obedience, the justification of civil authority, and the relation of law to morals and politics. He will seek to gain, moreover, some intelligible idea of the evolution of legal systems. His interpretation of law will be primarily sociological . . .

Brown went on to cite the American, O. W. Holmes, as the great spokesman for sociological law; so he was, and if Brown has to bear a label, it must be as a sympathizer with the American realists, of whom Holmes was the pioneer and Roscoe Pound the supreme theorist. But he had affinities too with the school which stressed the value of legal history, not for justifying any current *stasis* but for indicating the future course of creative evolution. At the same time the ethical teaching of T. H. Green, explicitly praised in the inaugural, remained potent.

Through his years at Aberystwyth Brown contributed directly to the interpretation of law. This work he published first in articles and then as a series of 'excursus' to his edition of the major teachings of the English jurist, John Austin (1790-1859), *The Austinian Theory of Law* (1906). In this there was paradox. Austin was pre-eminently a teacher of that notion of 'law . . . as the mere command of the State' which the inaugural had contemned; his thought complemented Jeremy Bentham's and had that mechanistic coldness which Brown found in utilitarianism. Brown's own arguments tended more to correct and expand Austin than to uphold him. So why should Brown bother to edit Austin and publish original work within the same covers as that edition ? One answer probably was that Brown saw the need for an undergraduate text of Austin, and that this was the best way to bring his own thought before a wider audience. But as well Brown genuinely believed that Austin, while narrow in scope, had told part of the truth. He had been relevant, and therefore true, for his own times; his work freed jurisprudence from the obscurantism of natural law doctrines and so could be the base from which the creative jurist could follow the evolution of his subject. Moreover Austin's exegesis was richer than his conclusions, raising great issues powerfully and clearly. These arguments are sound, yet I still find it odd that Brown attached his star to Austin's wagon.

In so doing Brown perhaps inhibited himself from fully developing new ideas. His work hovers between calling for a new jurisprudence and asserting the virtues of the Austinian tradition against radicals who would cast it utterly aside. Still, such tensions are present in even the

most profound of thinkers. Our task is to comprehend the original ideas which Brown did offer.

Brown's central essay argued the issue of sovereignty — the ultimate sanction behind law. He insisted that sovereignty was a 'progressive' concept, changing as society itself changed and that the modern State knew no simple Austinian division between rulers and ruled; rather it was a totality in which all men were joined by common interest and obligation. Political sovereignty resided in this morally organic State. But sovereignty in jurisprudence was somewhat different from sovereignty in politics, being concerned with forms and palpable processes. The distinction seems very fine, however, for Brown proceeded to argue that in jurisprudence the ultimate authority lay in 'the State as a juristic person' and that the power of law-enforcement was 'an organ of the organized community', rather than something separate from and superior to it.[18]

Another paper developed this notion of 'the State as a juristic person'. It argued that the State was essentially a social group, akin to (although much more comprehensive than) any other corporation recognized by law. Having asserted this, there was particular point in Brown's tackling another of those eternal unanswerable puzzles: the nature in law of corporate personality. 'It is a representation of psychical realities which the law recognizes rather than creates,' declared Brown. 'The whole conception of group personality belongs to the world, not of material but of psychical realities'.[19] So Brown responded further to the new consciousness of the early twentieth century which — following James, Bergson, Sigmund Freud, and many others — paid enormous heed to the psyche of inward man. Very often, as in Brown's case, this 'psychical' stress signified above all an awareness of mysteries and subtleties impossible to embrace in normal language. The State was organic, but more than organic — more uplifting, more total, more sentient; in a word, 'psychical'.

Holding this expanded view of the State, Brown had correspondingly to revise the Austinian notion of law as a command of the State. That was but a small part of the truth. The grander truth was that:[20]

> The sum of the rules which go to make law is a *unity*; it is a unity which is also a *growth*; it is a growth which is also something distinguishable from a more natural product, being in fact an expression of human intelligence and design — '*a growth directed by conscious foresight*'.

Law always expressed the 'time-spirit of a people' and 'to reveal this psychic element in the law is the supreme triumph of legal science'. Good contemporary law had that organic vitality and benevolence which were essentials of the modern State.

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18 *Austinian Theory*, especially p. 287.
19 *Austinian Theory*, at p. 264.
20 *Austinian Theory*, at p. 346; following quotations from pp. 352 and 353.

These beliefs made it natural for Brown to heed the role of custom and of judges. He saw both as channels through which law could respond to social need and change. Yet Brown warned against exaggerating the potency of either. Custom only became law when declared as such by formal agencies, and judges were always subordinate to statute and other pressures. There were jejune conclusions, less impressive than the argument by which Brown reached them.

Earlier paragraphs have already suggested some of Brown's juridical mentors, especially Maitland, Green and Holmes. Others included James Bryce, whose brilliant writings ranged from ancient history to contemporary politics, and Rudolph Von Ihering, an early proponent of the organic character of law and the role of purpose-seeking in its formation. Among French theorists to influence Brown were François Gény and Edouard Lambert. Brown noted:[21]

> M. Gény appears to argue not for a non-logical interpretation but for a logic large as life. The interpretation must be one which satisfies the pure logic and also the experience of life. If life at times seems illogical it is because our minds cannot see the deeper logic of it which exists whether we can see it or not. *Cf* my review of Boutmy.

Emile Boutmy's work, translated, was *The English People: A Study of their Political Psychology.* Brown gave it a favourable review.[22] Both Ihering and the Frenchmen encouraged Brown's feeling for the psychical dimension.

As already suggested, Brown held opinions on the teaching of law, complementary to his view of law itself. These too owed something to earlier experience, but crystallized in the inaugural lecture and developed in the following years. Like his political thought, Brown's pedagogy was influenced by new ideas of the day, notably those associated in the English-speaking world with John Dewey.

At its simplest, Brown's opinion was that students should pursue subjects likely to reveal the true nature of law. In the inaugural he discussed the virtues of comparative law, legal history, and legal philosophy. He later sharpened his argument to contend that such studies should equip the student with a 'Particular or National Jurisprudence'.[23] By this he meant an understanding of the inner spirit of the laws of a particular polity. That in turn would both satisfy the aesthetic sense and serve the practical end of revealing how law interacted with society. The student would learn about economics, by 'the discovery of the conditions under which man adapts himself to his environment so far as these conditions are maintainable by the organized force of a political society'; and also confront the mighty ethical issue of how 'to realize man's idea of the just'.

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21 Gény notebook, Brown papers.

22 'An Imperial Race', (1904) 3 *Independent Review*, 149.

23 *Austinian Theory*, at p. 370; following quotation from p. 372.

Brown's argument at this point resolved what might otherwise appear as a contradiction in his thought. On one hand he was, in pragmatic style, a believer in the application of knowledge to human problems and so a protagonist for social-science disciplines; on the other he gave priority to the academic as against the professional-practical aspects of legal knowledge. For Brown these latter evidently ranked merely as by-products of understanding the essential spirit and relevance of the law. Only that understanding could make law a true social science, capable of assisting man in his economic and ethical evolution.

The inaugural gave even more attention to methods of teaching law than to its content. Brown eulogized the case-method study of the primary sources of law, rather than of their digestion in text-books. Just as he had made the classic case for the study of history in *A New Democracy*, so he now did for the study of documents:[24]

> In truth it is relatively unimportant how much a student knows when he leaves his University. It is of incalculable importance that he should have schooled himself in methods of thinking, that he should have learnt to give a reason for the faith that is in him, that he should have won his way to freedom of thought. It is easy to see how such educational ends are promoted by the study of case law. The student, instead of having his legal principles formulated by proxy, must discover them for himself. He must fight his own way to them by the light of the facts of the case, the argument of the counsel, the language of the judge, and the decision of the Court. At each step in the process the independence of his judgment is exercised. He learns to trust no authority. He acquires, perhaps, that rarest of possessions, a just confidence in his own opinion.

Brown saw that his arguments belonged to widespread current theories. 'They are perhaps little more than a practical expression of the profound aphorism of Vico that truth is only known by us in so far as we ourselves make it', he added, recognizing that these ideas came from the same fount as did his jurisprudence. More practically, his stress on case study prompted him to remark that it made every student his own researcher and that research was essential to good teaching and good learning alike.

Brown aspired to develop 'intellectual camaraderie between master and student'. He bewailed 'the extent to which we are enslaved in this country by the despotism of examinations, lecturers and students alike'. He explained that in teaching he divided his time between classes, where specific problems or cases were debated, and lectures, in turn split between precise statement of an issue, 'free explanation and illustration thereof', and checking on relevant reading earlier prescribed. He stressed that the quality of a teacher's performance depended on the student's effort. The whole passage is very impressive.

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24 *Study of the Law*, p. 17; following quotations from pp. 7, 38-9, and 40.

Brown strove to put these precepts into practice.[25] Aberystwyth was currently alone in Wales in having a Law School, which thus was the more able to play an important role in national life as well as being one of the College's most impressive features. Brown and Levi did much to shape this destiny, in the face of extreme financial and academic-political difficulties. Levi slogged harder, especially in travelling to Swansea and elsewhere, giving lectures to candidates for the Law Society's solicitors' examinations; this curried favour with the profession, whose subsidies were essential to the School's existence. Brown abhorred such work, but did fulfil the selection committee's hopes of giving intellectual depth to the Law course, while (as in Tasmania) finding time too to introduce Political Science. He and Levi spent enormous effort in constructing courses, fighting (and never altogether defeating) opposition in the College Senate to the idea of Law as a free-standing discipline rather than an adjunct to Arts. Meanwhile Brown developed a plan of continuous assessment, based on the student's classwork and reading. His sense of the inadequacy of British law schools heightened when he travelled to the United States for an international law congress in the summer of 1904.[26] The American model had long inspired him, Harvard being the forcing-ground for the development of case study. That school remained his ideal. But even where the production of efficient practitioners had become too strong a vogue, American schools boasted splendid equipment, dynamic teachers, purposeful students.

Brown strove to achieve 'camaraderie' outside the classroom, making his full contribution to that sense of belonging which has always distinguished the College at Aberystwyth. In one extra-curricular colloquium he urged students to venture with courage into the 'deep sea' of life, daring to be free, to seek truth for themselves and to have faith in humanity.[27] He had spells as editor of the college magazine and president of the literary society.

In a major series of public lectures, 1903, Brown continued his quest for a broader faith which might sustain modern society. Basic to his concern was sharpening awareness that new knowledge and new wealth had destroyed old beliefs — not only in Christianity, but in the worth of the family, in the glory and geniality of Nature, and in social rank as an object of reverence. Brown's essay to this effect belonged, at a superior level, to many commentaries of the day on the rise of the masses — or the mob. It left no doubt that he personally had discarded formal Christianity.[28]

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25 The excellent centennial history, E. L. Ellis, *The University College of Wales Aberystwyth* (Cardiff, 1972), gives some important data, pp. 134-7. The College Archives hold further relevant information, in having access to which I had the most gracious help of Dr Ellis and his colleague, Dr I. J. Sanders.

26 See 'The American Law School', (1905) 21 *L.Q.R.*, 69.

27 'Between the Devil and the Deep Sea', *Dragon*, vol. 27 (1904), pp. 75-9. This journal gives some general information on Brown's extra-curricular work generally, especially at vol. 27, pp. 3-5.

28 'The Passing of Conviction', *Hibbert Journal*, vol. 2 (1904), pp. 553-70.

What ideal might fill the vacuum created by new knowledge and new wealth?[29] Simple loyalty to Crown or political leaders did not come naturally to modern man, who sought inspiration from principles rather than persons. Patriotism likewise appeared to have reached its zenith: contemporary thought encouraged scepticism as to the particular virtue of any one people, and stressed past abuses of patriotic zeal; trade and transport now blended the nations together and made citizens of each reluctant to contemplate war; industrial opportunities likewise absorbed emotion which might otherwise fuel patriotism; and all the while 'an international conscience' was asserting itself against older, narrower loyalties. Imperial sentiment, while broader than patriotism, had no greater potential as a new faith. Men were too aware of the sordid side of imperial expansion, appreciating that subject peoples had often been exploited rather than improved. Even in the Anglo-Saxon colonies of settlement loyalty to Britain had strong constraints. Anyway, Empire was precarious and costly, more likely to arouse problems than to inspire altruism at a time when Britain's world economic supremacy was already declining.

Like most of us, Brown was more convincing in stating a problem than in answering it. 'The true democratic ideal,' he insisted, must embrace deeper appreciation of humanity and a broader concept of social justice. It must transcend liberty and equality, which were negative, stultifying, even counter-productive qualities, and find brotherhood. Without such virtue, democracy must die. In arguing thus Brown merits more sympathy than admiration. His idealism was even vaguer than in the 1890s, when at least it embodied such specifics as proportional representation and federalism.

Late in 1905 Brown endured the death of his only child, a daughter. His wife suffered even more than he. Under this strain, Brown finished *The Austinian Theory*, and was the more receptive to shifting his life's course. In the new year he provisionally accepted the Chair of Law at the University of Adelaide, and in the event held it until 1916.

1906-1916: FULFILMENT IN AUSTRALIA

Brown aspired to enrich his new academy, and had some reason for confidence in this hope.[30] The Adelaide Law School traced back to the 1880s, the Chair to 1890, and its latest incumbent, John Salmond, was a profound jurist whose fame survives brighter than does Brown's. The Chancellor of the University, Chief Justice Sir Samuel Way, had long

29 'The True Democratic Ideal', *International Journal of Ethics*, vol. 14 (1904), pp. 137-50. Brown had argued similarly before the 1900 meeting of the Australasian Association for the Advancement of Science.

30 Again, University archival material has helped me much, in the case of Adelaide my guide being Mr V. A. Edgeloe. Especially important data were found in the Faculty of Law minutes and the printed *Law School Report*, 21 August 1906. The Archives include valuable newspaper cuttings. Brown expounded his ideas to a wider audience in 'Law Schools and the Legal Profession', *Commonwealth Law Review*, (1968) 6.

been Brown's patron and admirer. To him, and to the wider community, Brown issued over the next few years various statements which distilled his considerable wisdom and vision as a pedagogue. Additional staff so as to allow specialism; facilities for research and deep reading; the case method; pleasant study environment; deepening the academic level and broadening the appeal of the law course, with corresponding reduction of articles: Brown argued for all these.

At first there was some progress. By funding part-time teachers, private philanthropy saved Brown from the ordeal (which, Way suggested, literally frightened him) of lecturing in practical subjects. The authorities at once agreed that the course should include a somewhat heavier law component. Writing back to Wales, Brown remarked on 'the compensation of being in a new country. You can get things done.' From the outset he used seminar teaching and continuous assessment in Adelaide. One able student who bridged the older regime and the new affirmed 'in comparing the struggle for existence system with the spoon fed system... I would think all the students except those who are not fond of work would vote for the former'.[31]

Soon professional demands clogged this progress. Throughout Brown's term, the School taught a sub-degree certificate, as well as the degree itself, an unhappy arrangement. Most students were part-time, spending their days at an office desk. Even Way was sceptical about further reform. The School probably did as well as circumstances allowed — but that was considerably less than Brown had hoped. That he applied for the Chair at Sydney in 1909, and commented on his defeat with a little rancour, were marks of this situation. He continued to uphold the United States as providing the model for law teaching and constructive professional interest in that teaching.

Brown suffered domestic difficulties too. His wife bore a son in December 1906. This did not reconcile her to Australia, and from 1907 until 1910 she lived in England. Then the marriage resumed, but this probably diminished rather than enhanced Brown's happiness. His wife was neurotic, especially over their son's health, and his mother-in-law a figure from the blackest stock comedy.

Yet Brown kept on working and in the early Adelaide years produced his major works of purely political thought: *The Underlying Principles of Modern Legislation* (1912) and *The Prevention and Control of Monopolies* (1914). The former Brown offered as a text book in the theory of legislation — a subject, he suggested, so important that all undergraduates should pursue it. Brown claimed to expound rather than to preach, but *Underlying Principles* is as sizeable a statement of a political creed as any Australian has made. It is this country's equivalent of Graham Wallas, *Human Nature in Politics* (London 1908), and

31 Letter of R. J. Rudall, 31 December 1906, Brown papers.

Herbert Croly, *The Promise of American Life* (New York 1909). It demands close study, even though it repeated themes which Brown had already stated.

Early chapters asserted that in modern Britain the dominant spirit of public life sought the achievement of liberty. In the earlier nineteenth century this drive had inspired extension of political democracy and the vogue of laissez-faire. Subsequently, men realized that these policies were too narrow, and, in the case of the latter, often hostile to freedom. So had developed a richer sense of liberty, promising to fulfil the self-in-society and requiring State action to help this process along. This new spirit showed itself further in sympathy for human weakness, social equality, and the ideals of womanhood. Discussing the last, Brown presented the feminist case well, especially in suggesting that apparently 'feminine' traits resulted from the social milieu rather than from biological determinants. He saw the theological complements to all these changes being in the presentation of God as Father rather than Sovereign and stress on the duty of man to his fellows.

Brown recognised that belief in the likelihood of men achieving new, richer liberty might appear just another ideal — no better based than those many ideals of which history recorded the failure. He therefore tried hard to establish, rather than merely assert, the two principles on which his argument ultimately rested — that man had essential worth and that society had essential unity. Arguing the first point Brown claimed that 'the supreme fact is man's capacity for being born anew... Around us every day men and women, steeped in vice, pass under the spell of some new influence, in the presence of which hidden and unsuspected possibilities of character reveal themselves, sweeping the soul onwards towards the higher levels where old things have passed away and all things have become new'.[32] Whatever the nature of this revivifying spirit, it was potent and benevolent.

To support his claim for the unity of society Brown proposed that man felt 'consciousness of kind', common purpose, and dependence on communal life. He was, in short, a social being, shaped by the group's inheritance, style, and pressures. Theoretical formulations of social unity in the past had depended too much on mechanical and chemical analogies. Biological terms were somewhat more meaningful, but still omitted much. Recasting the argument of *The Austinian Theory*, Brown insisted on the primacy of the mind and the psyche in creating social adhesion; correspondingly, the State itself was a person, sustained by a general or social will. The purpose of law and political institutions was at once to express and to develop this will. Representative institutions served this end well, although they could do it better — and here Brown repeated his case against the referendum and for proportional representation.

32 *Underlying Principles*, at pp. 107-8; following quotations from pp. 203, 241, 254, 297, and 328.

Having expounded these 'underlying principles', elements of the time-spirit as it were, Brown considered how well various political creeds chimed with them, and so were fitted to assist their effective working. Doctrines of anarchism, laissez-faire, and natural rights came under this scrutiny — sympathetic, but on balance critical of all.

Brown applauded the anarchists for their sense of liberty, their idealism, and their stress on mutuality as being central to human happiness. Their critique of State militarism and the frequently corrupt use of political power likewise won his approval. The rulers of contemporary Russia and Germany conformed to this critique, especially in showing readiness to engage in war and imperialism to stave off domestic reform. Brown paid particular heed to Tolstoy's adaption of Christian teaching. But Tolstoy himself showed the anarchists' besetting lack of proportion and realism.

Laissez-faire had anticipated many of the principles of anarchism, and so shared its virtues. Brown agreed that competitiveness was an innate quality in man, evoking effort and efficiency and so a condition of social progress. Conversely, government could easily become excessively 'maternal' — that is, over-protective of the subject — or excessively 'paternal' — that is, authoritarian. The State could not make men good, and should not attempt to do so. Brown recognized too that laissez-faire had the lofty intent of saving society from class despotism; he admitted the force of Nietzsche's warning against the triumph of the mob. Some contemporary socialists vindicated the warnings of laissez-faire just as some rulers vindicated anarchism: public ownership might be appropriate in some situations but was no cure-all.

Yet laissez-faire had its own fatal defects. In practice it had failed, allowing cruelty and oppression. The 'trust' was one particularly ugly result — often achieving efficiency and proving a benevolent employer, but threatening the social good in its greed for profit. The State had to control trusts, and indeed socio-economic life generally. It had to make competition real, and moral. Brown now said that laissez-faire philosophers could claim no sanction from Darwinism. Experience had shown 'that an unregulated, or inadequately regulated, system of industry does not work for the survival of desirable types'.[33] The State needed to shape circumstances to achieve these ends. Brown advocated sterilizing 'the vicious and diseased elements of society', so revealing that like many post-liberal reformers of the day, Fabians and Progressives especially, he upheld eugenics, that stark (and near-fascist) aspect of creative evolutionism.

Brown was less generous in his treatment of the natural rights school. It had, he thought, inspired some noble action for humanity, but in the current situation promised much more harm than good. Brown disputed its teachings as to human equality ('not the fiction of equality, but the

33 (1912) 26 *Harvard L.R.*, 186- at p. 188.

fact of human worth is the true basis for a sound theory of the rights of the individual'), as to the individual having rights independent of and superior to society, and as to such rights being valid in all times and places. These ideas were as extravagant as the anarchists' and the serious thinker must shape them anew:

> In the reconstructed doctrine of individual rights, the common good takes the place of consent as the justification for the exercise of civil authority. To base government on the sovereignty of the individual is to ignore the unity of society. To base it on the common good is to find a place both for the just claims of society and for the just claims of the individual. The case for any particular form of government stands or falls by reference to the degree in which it serves to promote the complete development of its subjects.

No doctrinaire creed, then, but pragmatic, purposeful intent was the guide to political wisdom.

Brown had the courage to suggest what he saw as the implications of this approach *vis-à-vis* some major issues. It led him to uphold the case for capital punishment; to recognize that slavery may have had justification in the past (although no longer); to deny the right of marriage to the unfit, while asserting the duty of family-raising for the fit; to claim the State's right to tax and even redistribute property in land; to deny that trade unions should have absolute control over the labour market and that the State *must* provide work for the unemployed (although certainly it should relieve distress). Brown affirmed that government should provide 'equity' of opportunity, a more realistic and qualified aim than absolute 'equality'; likewise it should encourage active citizenship, to which end politics and economics should be taught in schools. Such policies promised to evoke that spirit of human co-operation and effort, which was the essential of all progress. Next Brown considered the right of protest, allowing that individuals might sometimes have moral justification for disobeying the State, but stressing that even this was rare and that the State could never recognize this right. 'The citizen has no right to disobey the law unless it be for the true interest of the State, and such interest can hardly exist save where the law is obnoxious to claims which are completely acknowledged by the conscience of the community'.

A final chapter considered 'problems of today and tomorrow'. Inexorably, State activity was widening, and soon must broach new tasks. Chief among these were control of trusts, relief of unemployment, securing decent wages for all, and cherishing the welfare of children. The burgeoning of democracy and of communal responsibility would vest such matters with 'the intensity and emotion of a religious faith'. The nation must respond to this challenge, with unity and zeal.

Underlying Principles cited several of Brown's favourite authorities — Green and other Oxford Idealists, Ihering, Mazzini, his own earlier work. Of newer names the most prominent was Henry Jones, professor of philosophy at Glasgow and more definitely Idealist even than the Oxford school. Like Brown, Jones came from a fundamentalist back-

ground and had climbed the academic ladder from the humblest rungs; he too was an upholder of active citizenship, social welfare and educational reform. The American Progressives now appeared in Brown's argument more forcibly than before — James himself, E. A. Ross (especially his *Social Control*), R. T. Ely, Jane Addams.

Underlying Principles not only repeated themes of Brown's earlier writings, but went back over some of its own tracks. In other ways it showed Brown's difficulty in effectively articulating his work. Bothersome too was the author's varying stance between Britain and Australia. Nor, however great the effort, could the book *prove* its basic arguments. Yet its virtues outweighed these faults. Brown again showed himself a man of learning, of feeling and, above all, of thought. Vague and didactic he sometimes became, but perhaps only as much as his task made inevitable. Certainly these traits were less evident than in, say, the books of Henry Jones, who became a Fellow of the British Academy and a Companion of Honour.

Underlying Principles generally had the same measured praise from reviewers as did Brown's other work. Roscoe Pound was an example:

> One could wish that he had devoted more attention to the German philosophical jurists. One cannot but feel that the idealistic interpretation of jurisprudence and of the history of legislation, the finding of the end of law in liberty and much of the discussion of the idea of liberty, is too much in the vein of the metaphysical jurisprudence of the last century. But the task of the social philosophical jurist who write in English at present is a hard one, and much may be forgiven a pioneer whose work is as well done as Dr Brown's work in this book.

Another American, E. V. Abbott, was more critical, especially of the claim that some State action could enhance liberty, and the author answered him at length.[34] A. V. Dicey, whom Brown much admired, wrote politely on receiving his copy, while a Japanese group devoted to spreading 'healthy Western ideas' sought translation rights.[35]

The manuscript of *Underlying Principles* left Brown's desk in August 1911 and the book was published in London early in the new year, timing which proved significant. In September 1911 the Labor government of the Commonwealth of Australia had appointed a Royal Commission into the sugar industry. Its chairman was J. H. Gordon, judge of the Supreme Court in South Australia. Gordon was a radical, close to the federal Attorney-General, W. M. Hughes. Brown too was Gordon's friend, and in applauding *Underlying Principles*, the judge remarked that he would see it came under the notice of Hughes and Prime Minister Andrew Fisher. In mid-1912 Gordon became too ill to continue with the Sugar Commission. On 7 September the government appointed

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34 'Law and Liberty', (1912) 12 *Columbia Law Review*, at p. 613.

35 Letters, 1 December 1912 and 21 April 1913, Brown papers; Judge Gordon's letter, undated, is also here.

Brown in his place. Presumably Hughes had decided that the author of *Underlying Principles* was a man to secure the chief aim of the Commission — an indictment of the Colonial Sugar Refining Company. The Company was a major hate-object among those Australians for whom trusts were the supreme social enemy. While not so vehement as in the United States, anti-trust feeling was a vital force in contemporary Australian politics, especially within the Labor party. Brown's acceptance of the Commission probably indicated that, Alfred Deakin having joined with more conservative forces, his own current political preference was for the Hughes-Fisher type of Labor moderate.

The C.S.R. Company counter-attacked while Gordon was still in health. It claimed that the Australian constitution gave federal royal commissions no right to force businesses to divulge information. The Commission halted while the various parties manoeuvred, the issue finally coming before the High Court in late September 1912. The government argued that while the constitution did limit federal control over business, the sugar enquiry was justified because such control was likely to become an issue of constitutional amendment. In mid-October the Commission resumed and Brown took what evidence the Company agreed to give. On 22 October the Court, by the chief justice's casting vote, ruled for the Company. The Commission heard no more evidence.

Nevertheless it presented a forceful report,[36] Brown its designer. It began by stressing that the sugar industry was significant, not so much in economic terms, but as a factor of the White Australia policy and national defence security. These issues in turn implied 'due consciousness of the progress of Australia towards nationhood — the recognition of the ideal of a Commonwealth which shall be socially coherent, and politically self-supporting'. This ideal was expanding fast, and demanded new attitudes and new policies. The Commission attempted to meet this need for the sugar industry.

It proposed a changed structure of Commonwealth support. The current tariff imposed £6 a ton on imported sugar; bounty payments of £3 a ton went to growers who used decently paid white labour, which was now the case with 94 per cent of the crop; while an excise tax meant that the costs of this bounty (and more) were drawn from the relatively affluent miller or refiner. The Commission argued that the bounty had now done its work, and that as a clumsy, corruptible technique it should end. As a corollary so should excise. The tariff should be the difference between the ruling international market price and a standard based on Australian costs of production. The dominance of the C.S.R. Company should be clipped, by the Commonwealth acquiring power (through constitutional amendment) to control the price of both cane and raw

36 Report of the Royal Commission on the Sugar Industry, *Commonwealth Parliamentary Papers*, 1912, vol. 3, pp. 1035-1125; evidence and appendices, 1913, vol. 4, pp. 1169-2316. My comments relate only to Brown's remarks on cane sugar; beet sugar did come within his purview, but to little significant effect.

sugar; this power should then be exercised through the Inter-State Commission (an organ of federal government envisaged in the constitution, but only at this time coming into being). While price control would promise justice to the farmers, field and factory workers should be guaranteed at least eight shillings an eight-hour day, with overtime and decent conditions.

The Sugar Commission had little effect, the Commonwealth never acquiring those powers which were central to Brown's plan. The latter's approach may have annoyed Attorney-General Hughes: in November 1912 Judge Gordon remarked 'I felt my friend Brown has not impressed you', when assuring Hughes that Brown would be one of his own favourites for the High Court bench.[37] Brown did not win that honour, but other evidence indicates that Hughes and he came to respect each other.[38]

The Commission prompted *The Prevention and Control of Monopolies*. The slightest of Brown's books, its appearance at least signified that John Murray, the London publisher who had sponsored *The Austinian Theory* and *Underlying Principles* (itself republished in 1912 and in a cheaper edition again in 1914) had confidence in him. Nor was this unfounded. Brown again appeared as truly a thinking reed, with rare power of seeing all sides of a question. Like *The New Democracy*, this book presented Australian socio-political experimentation to the world and well suggested the temper of moderate radicalism in this country just before the holocaust of 1914. At the same time, Brown's citations confirmed his growing sympathy for the American socio-economists of the Progressive school.

Characteristically oblique, the book began with a study of syndicalist ideas, then gaining popularity among left-wing extremists throughout the Western world. If the syndicalist critique was true, argued Brown, then revolution alone could provide means for controlling monopoly capitalism. He admitted apparent strengths in the syndicalist case, notably the scant effect of Parliamentary social reform, above all in securing decent wage rates. But in the end he re-affirmed that society was an organism, infinitely more subtle and various than the syndicalists allowed. Careful and intelligent use of existing means of reform still gave the best promise of social welfare. The revolutionary syndicalist really stood alongside his avowed enemy, the parasite capitalist, for they were the two great impediments to this end.

Brown spent little time explaining the evil of trusts, almost taking for granted that, while often benevolent to their employees, they threatened the social good by exploiting the consumer and suffocating freedom of competition and opportunity. His emphasis, as the book's title promised, was on how to control and prevent them. The use of the two terms

37 L. F. Fitzhardinge, *William Morris Hughes: That Fiery Particle 1862-1914* (1964), at p. 273.

38 Fitzhardinge, *Hughes*, p. 272; correspondence of Christmas 1914, 29 September 1919, and 4 August 1920, Adelaide papers.

showed Brown's awareness that anti-trust thinkers split into two broad camps — those who felt trusts must be smashed and those who thought them inevitable and that government should merely ensure that they served social welfare rather than capitalist profit. Brown straddled the two schools — making his book sometimes difficult to follow, but also making good sense. To put an arbitrary limit on the size of any enterprise was impracticable, and might thwart efficiency and ability, he wrote, echoing his argument of the 1890s as to how 'the great state' could become an economic syndicate. But his greater emphasis was on how the State should constrain industry at large, even these 'good' monopolies. Competition should be safeguarded by the outlawing of predatory trade practices. Business must disclose its financial working and dealings. In some extreme cases nationalization might be apposite. Above all, expert tribunals should control tariffs, wages and, apex of the trinity, prices.

Brown used many Australian examples, and repeated much of the Sugar Commission Report. He described the Australian notion of New Protection — that any industry shielded by tariffs should in return pay decent wages. The policy had met many obstacles, he remarked, but its spirit survived and should entail an ever-widening responsibility for the State in industrial matters. Many pages reviewed the Australian Industries Preservation Acts (the major federal anti-trust legislation), the New South Wales *Gas Act* 1912 (which imposed a profit ceiling), and a Queensland Bill for controlling the price of sugar cane.

Brown extolled the potential value of the Inter-State Commission. It should tackle the crux of his programme, price control, and should operate with full powers, subject only to Parliament. This faith in government by expert commission was very much a product of Progressive-Fabian thinking, and recalled the elitist strand in Brown's philosophy; at the same time, the idea was a natural complement to the Arbitration Court system. Brown could write the more confidently, because in 1914 the Commission was busily at work, mainly as a Tariff Board, under the Chairmanship of A. B. Piddington, a man of very similar stamp to himself. Soon it was to wreck on the fearsome reef of High Court interpretation of the Australian constitution.

The aftermath of the Sugar Commission evoked an interesting article by Brown on that constitution.[39] The Commonwealth appealed to the Privy Council against the High Court's ruling in favour of the C.S.R. Company. The Council went further than the High Court in denying the federal government's power to compel co-operation with a royal commission, arguing that such rights over the subject remained with the States. Brown insisted that the Privy Council had shown gross incomprehension of federalism in general, and the Australian situation in particular; its decision over-rode the clear intent of the founding Fathers and earlier High Court decisions. Anyway, he said, the Council had

39 'The Nature of a Federal Commonwealth', (1914) 30 *Law Quarterly Review*, 301.

ruled on a question which had not been that submitted, and so its binding power was dubious. In fact, Australian federal governments since then have established royal commissions by specific statutes, rather than in terms of the Royal Commissions Act aspersed by the Council. Brown's hostility to the Privy Council spread widely in the decades ahead, and now appeal thither has shrunk almost to nothing.

Taking the chairmanship of the Sugar Commission was Brown's most important deed of 'active citizenship' in these years, but not his only service of that ideal. He was the University's representative on the Board of South Australia's Public Library, Museum, and Gallery from 1907, and his papers include two very interesting letters from Hans Heysen. In August 1907, at the invitation of Labor Premier Thomas Price, the Professor spoke at the Trades Hall — a venue even rarer for an academic then than now. As in Tasmania he gave extension lectures, beautifully prepared.[40] He addressed magistrates and teachers. These talks had some distinctive stresses. The need for better educational facilities and scholarships was one, and another his eugenicist enthusiasm for bodily purity and perfection. 'I presume that we all believe in eugenics', Brown told South Australian teachers in 1913;[41] sixty years later I have difficulty persuading fellow academics that pre-Nazi European man had any interest in the subject.

Nor did Brown relinquish his interest in more abstract thought. To the Adelaide University Christian Union he suggested that traditional Christianity had taken much of its colouring from the law of the Roman state within which it had first lived; now was the time for it to assume more generous and human style, in accord with the dictum that 'revelation is progressive'.[42] The most technical article he ever wrote (1909) studied an abstruse problem concerning disposal of a deceased person's property under private international law.[43] Several essays upheld his plea for a jurisprudence which recognised Austin's worth, yet built imaginatively on that foundation.[44] They said little that was new, however, and the most substantial (a denial of an argument that legal power derived from the public service performed by the instrumentality concerned) seemed somewhat to contradict his own earlier call for a purpose-conscious jurisprudence.

That article was written in October 1915 and perhaps signified that the Great War had already curbed the more adventurous elements of Brown's thinking, just as it soured much of Western civilization. Cer-

40 See especially the outline series on *The State and the Individual* (1909; sole copy located at the State Library of Victoria).

41 'The Growing Responsibilities of the Teacher', Brown papers.

42 'Roman Law and Christian Theology', (1908) 11 *Australasian Intercollegian* 8.

43 'In *re* Johnson', (1909) 25 *Law Quarterly Review*, p. 145-.

44 'Jurisprudence and Legal Education', (1909) 9 *Columbia Law Review*, 238; 'Austin, Korkunov and Mr Hastings — A Reply' (1911) 11 *Columbia Law Review*, 348; 'The Jurisprudence of M. Duguit', (1916) 32 *Law Quarterly Review*, 168. The last is what my text calls 'the most substantial'.

tainly the war affected his life deeply, and ultimately made him among its myriad victims.

Brown's earlier thought had been ambivalent as to issues raised by the war. As noted much earlier in this paper, in the 1890s he professed that 'the great state' in general tended to be pacific, but urged Australian federation because of the military strength it might entail. Over the years he argued that both national and imperial patriotism had lost their erstwhile potency — yet most of the time did so regretfully, hinting his readiness to espouse their revival. *Underlying Principles* had endorsed the anarchist critique of militarism, whereas Brown's favourite jurist, Rudolph von Ihering, had seen war as a necessary tactic to secure international order. In terms of his earlier thought then, Brown could have responded in several possible ways to the war.

In fact he became steadily more ardent in support of its prosecution. Doing so followed the pattern of bourgeois Australians of Protestant background and English connections. More specifically, Brown echoed most elitist Progressives of the English-speaking world in hailing the war as a noble cause in which all ranks of society could find that organic unity he held so dear, and thus march forward to the good life. This notion of the war as a communal regenerator is not easy for later generations to take seriously, but that must be done if Brown and his peers are to be understood.

As a jurist, Brown saw the conflict as an issue in international law, demanding punishment of the aggressors to uphold the rule of that law. This theme was present in a series of nine articles he published in the Adelaide *Register* in August-September 1914, although their prime interest was in telling the facts about current conventions on matters of capture, blockade, bombardment, and so on. While insisting that Germany had violated international law by invading Belgium, Brown's tone towards the enemy was then moderate enough, but stiffened as the years passed. As early as July 1915 he advocated a 'Court of International Arbitration' in the post-war world. In speaking on 'A League of Nations' in August 1918 Brown repeated this idea, and argued that Germany's fate showed the folly of violating international law, for this had provoked American intervention.[45]

While thus responsive to the international aspect of the war, Brown was more deeply involved in, and illuminating about its meaning for Australian society. A fascinating essay, published in February 1915, opened up this subject with a sketch of traditional Australian attitudes:[46]

> Vast open spaces, a prodigal wealth of sunshine, a winter too mild to be bracing, and the relative ease of the struggle for existence, go to the making of the Australian environment. The influence of this

45 'International Law' in H. Heaton (editor), *A League of Nations* (1918), at pp. 12-16.

46 'Australia and the War', (1915) 5 *Political Quarterly*, 41 at p. 45.

> environment serves to obscure some traits of racial origin while it develops others. We are, superficially at least, a sun-basking, sports-pursuing, and pleasure-loving people. Anxious to live and let live, to pass through life with a minimum of friction, we display more of pagan desire to have a good time, and less of reverence for the eternal verities, than are usually credited to British character. We may, in a tranquil hour, concede the beauty of goodness, but it is not 'the awful beauty' of which Milton sang. The goodness we honour in deeds is something less austere and more practical — a camaraderie which finds most apparent expression in an aversion from giving pain and a desire to please. The ethic may seem inglorious, but it has its merits. On the whole, it has worked not badly, though of course that may be due to the blood of a Puritan ancestry which still flows in our veins. In any case, the ethic springs naturally from a kindly environment. The strenuous struggle of the pioneer days is past. Dread drought we know, but we have learned to mitigate the distress which used to accompany it. The grim tragedies of Poverty and War have figured in the popular imagination as ills of an older civilization from which we may justly hope to be immune. 'Give peace in our time, O Lord', is a prayer not unknown, but usually uttered in time past with an altruistic regard for peoples less fortunate than ourselves.

All this, Brown suggested, the war had begun to change. Obviously enthused by the prospect, he suggested five pressure points of such change. The war, he forecast, would strengthen Australian support for military service, by virtue of its discipline acting 'as an agency in the making of national character'. Cohesion would strengthen further as the war forced Commonwealth-State co-operation. The control of monopolies should quicken too; already various governmental agencies were enforcing price-control, but as well there were suggestions of enhanced 'friendly co-operation... between the Trust and the State'. The alliance with Japan would probably entail not abandonment of the White Australia Policy, but mollifying of its more aggressive features. Finally, Brown claimed that since August 1914 there had overflowed long-welling streams of imperial patriotism, promising 'that the conclusion of the war will bring a great opportunity in the life of the Empire'. In terms of his 1890s ideas the prescription seemed to be that Australian federalism would give way to a closer union while imperial federation at last became a reality at a higher level of 'great state-ness'.

Brown became an even more active citizen in response to the war. With pen and voice he busily presented his view of the conflict to the public. In August 1915 he wrote to the South Australian government on behalf of the British Science Guild, an organization vehement as to the need to apply science to social and economic issues. Brown's plea was for a Royal Commission which might curb the import of luxuries and waste in business life. The government demurred, but next month did appoint Brown to the State War Council, concerned especially with the welfare of returned servicemen. This was not enough for the Professor, who in late 1915 sounded his English contacts as to war work he might do, even suggesting active service.

1916-1930: FRUSTRATION

Instead, in January 1916 Brown became President of the Industrial Court of South Australia. He first declined the job, saying that while having the qualifications of being an economist, impartial and incorruptible, he felt himself to lack requisite experience at the bar and knowledge of practical affairs. When he did relent, it was with the initial proviso that he might return to the University. Late in 1917 that return seemed certain as the Legislative Council refused the government's plan that the President have the rank of a Supreme Court judge. Brown had made this a condition of acceptance, for good professional and personal reasons, but Councillors alleged money-grubbing and status-seeking. Brown at least got an enlarged salary, £1700, and the storm allayed.

Industrial arbitration had long been a prime element in Australian reform thought, the supreme example of experimental law in the cause of social good. Its premise, in true Progressive spirit, was that a wise outsider would harmonize antagonisms of class and interest, thereby securing maximum justice, efficiency, and output. The idea had begun before Federation, and continued in all States thereafter, but its peak came in the Commonwealth Court of Conciliation and Arbitration. The most distinguished judge of that court, H. B. Higgins, expressed its ethos in entitling essays on his work, *A New Province for Law and Order* (1919).

Brown had long shared the Progressive sympathy for industrial arbitration. His writings often called for State action to secure decent wages, as the bedrock of social justice. Extolling the Inter-State Commission as a price-fixing agency, he had compared it to the Commonwealth Court. Beyond all doubt, he saw his new area of work as vital for society, the more so as the crisis of war demanded industrial peace and social cohesion. It was uniquely adapted to that purposeful judicial interpretation, which to him was the essence of modern law.

These concerns pervaded the first stage of Brown's judicial labours, through 1919. Over that period the war remained the dominant reality, for him and for society: in 1918 he again and publicly offered for active service, to be rejected on medical grounds. Meanwhile the Chair at Adelaide stood empty and Brown probably supposed that he might return to it, although his official leave-of-absence expired late in 1917. At this stage then, Brown as President was very much the outside expert, turning to a difficult and demanding task in a crisis.

Brown's first judgment, concerning wages in the salt industry, began with highly academic statement of a basic credo.[47] His main burthen was to insist that the profitability of an industry did not exclusively depend on wage rates. Efficient organization and the application of

47 1 *South Australian Industrial Reports*, 1-, following quotation from pp. 5 and 11. These Reports are abbreviated as SAIR. Under Brown's Presidency they ran into their ninth volume, and are the basic source for his work in this period.

science could help towards that end. (These old ideas of Brown's and such bodies as the Science Guild received a boost from the crisis of war and currently were leading to the establishment of the precursor of the CSIRO). On the other side, Brown continued, employees should increase their output; profit-sharing and co-partnership might serve this end. The State should encourage exploration of all such possibilities. It might decide to aid an industry, by tariff or, where the market was local, a consumer tax. The State must protect the consumer, however, especially against the ganging-up of trust and its workers 'to fleece the general public'. Otherwise the State's interference with employers should be minimal, especially in a struggling industry.

Brown considered the 1912 *Industrial Arbitration Act* under which his Court worked. It over-rode the common law right to strike. 'The worker is compelled to put his trust in this Court. The Court must not betray that trust'. In return the Act insisted on all men receiving a living wage. Brown interpreted that term as covering the needs of a family head, and having regard to the relative prosperity of Australia. Further, the living wage was a minimum rather than the norm.

Turning to the particular circumstances of the time and case, Brown was less benevolent. He refused to consider the effect of the war on the cost of living. In these days 'it is the imperative duty of every citizen, to whatever class he belongs, to exercise a rigid and abnormal economy'. As to the salt workers' peculiar trials, his own experience as a manual worker taught that all pursuits had them. So the men received only a little from the judgment, and historians can understand why working-class antipathy to the war strengthened all the while. Yet a few months later, in his first living wage case, Brown lifted the minimum for an unskilled man from 48s. to 54s. per week, because of rising prices. Only later did he spell out that the strict figures had justified another 2s.6d., but he had rounded the sum down as a war-time sacrifice.

Almost every early judgment had its interest. The *Plumbers Case* of late 1916 prompted Brown to insist that the thoroughly compulsory character of South Australia's arbitration system was an advance in legal evolution, in turn necessitating that 'industrial law should be a body of "progressive principles"... adapted to meeting the growing needs and practices of a progressive society'.[48] Then too he italicized his belief in the Court's duty to assist *'the smooth working of the industrial machine and to eliminate certain forms of waste'*. Often the President became eloquent as to the futility of supposing that mere nominal wage increases, irrespective of output, could mean higher living standards: Brown used the term 'pernicious circle' precisely to mean our present-day 'inflationary spiral'. Judging a striker in June 1917, he anticipated the deluge of anti-Bolshevism about to sweep Australia:[49]

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48 1 SAIR, 116, at p. 121; following quotation from p. 123.
49 1 SAIR, at p. 224.

> But for the action of a section of the Russian people, the end of the present war would now be in sight. As things are the war may last for years. I have no doubt that this section of the Russian people is acting from good intentions, but their treachery to the allied cause threatens the whole future of humanity, and, because of it, the Australian casualty lists will be continued for God knows how long. Our comrades at the front are being betrayed as a result of the action of a section of a great people pledged to a holy cause. They must not also be betrayed by us who stay at home while they are fighting in defence of our homes and our liberty.

Yet after all this emotion, the fine on the striker was only £10.

Brown failed to solve the fearfully difficult issue of payment for women.[50] Abstractly a believer in women's rights, he rejected the notion of an equal wage, and determined the women's minimum at 27s.6d. His arguments sound High Tory in retrospect, although they appealed to many Progressives, who considered themselves radical but gave high priority to the home and family as crucibles of racial welfare. Society determined that man should be the bread-winner, declared Brown, and until Parliament decided otherwise he must work within that frame. Women should not, therefore, receive a wage which might deflate the purchasing power of family income. Anyway, girls received apprenticeship for their life's work in domestic service rather than in industry. If they did not like the wages granted by the Court, they need not accept them, Brown said, implying that no woman really had to work. Further, he argued that the Court's duty was to encourage effective use of all resources, which seemed to be rationalizing a cheap labour rate. Likewise Brown said that as a South Australian he could not handicap local industries by imposing on them wages higher than elsewhere.

His State's particular situation further attracted Brown's attention in the *Furniture Trades Case* of mid-1919. In that industry Melbourne and Sydney had such advantages of scale that 'to a South Australian with a spark of local patriotism, the issue can hardly be less than appalling'.[51] The answer lay in 'the mind and will of man': South Australians must join in hard, purposeful efficient co-operation. The State should take an active role, both in immediate matters of economic function and in providing training and expertise. 'The day is past for regarding a University School of Commerce as a sort of Cinderella in the educational scheme of the country'. The Industrial Court could assist the State's role by being 'in effect an intelligence department of the Government'.

From the time of Brown's appointment, the Court's judgments were published, and he otherwise broadcast his view on industrial arbitration. His arguments on the 'pernicious circle' and women's wages went almost verbatim into academic journals.[52] An article on industrial arbitration

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50 See the *Printing Trades Case*, 2 SAIR, 31 (less importantly) the *Women's Living Wage Case*, 3 SAIR, 102.

51 2 SAIR, 198-, at p. 207; following quotation from pp. 208, 211, and 215.

52 'Effect of an Increase in the Living Wage by a Court of Industrial Arbitration . . .'. (1919) 32 *Harvard L.R.*, 892; 'Judicial Regulation of Rates of Wage for Women', (1919) 28 *Yale L.J.*, 236.

as 'the latest phase in legal evolution' appeared in a collection honouring the distinguished American jurist, J. H. Wigmore.[53] In an allied study, Brown considered the validity of jurists using 'evolution' in the same way as did the biologists; he concluded that while modern legal developments were often deliberate (rather than being survivors of struggle) the analogy still held good.[54]

Brown contributed also to *Australia: Economic and Political Studies* (edited by Meredith Atkinson; published in Melbourne, 1920), a milestone in the development of academic consciousness *vis-à-vis* this country. Experts, mainly university teachers, discussed a variety of aspects of Australian life — political systems, political consciousness, education, physiographic controls, the place of women, and so on. The book has had several successors, but no surpassers. Atkinson himself was a pioneer of the Workers Educational Association and of academic sociology, teaching that subject at the University of Melbourne. He, and several other contributors to his volume, joined in a surge of thought in the immediate post-1918 years which strove to realize that vision of the war as social regenerator, such as Brown himself held. Brown's own essay is probably the best brief statement of the ideals and functions of industrial arbitration in Australia.[55] Offsetting his claims as to the system's success, however, was an article by a scion of another of South Australia's old families, Elton Mayo. Currently Professor of Philosophy at the University of Queensland, Mayo argued that arbitration served more to harden class antagonisms in Australia than to mollify them. The point had been glimpsed before and has been regularly rediscovered since, but Mayo put it exceptionally well. He hinted his own view that nothing but satisfaction of the workers' psychical need for community would solve industrial problems. Soon Mayo was to go off to the United States, and achieve great acclaim in finding data to prove this insight, highly acceptable to the business Progressivism of that time and place.

Despite his apparent success in bestriding the industrial and academic worlds, Brown did not settle into his new role. Although he had a deputy to assist him, the work was hard. He tried to solve all disputes outside the Court, so spending enormous time and patience. In the nature of things, his major decisions often angered both sides rather than conciliating them. He never gained Supreme Court status.

In October 1918 Brown applied to the University for a return to his Chair. The war was nearly over, he said, and he had gone to the Industrial Court only as an act of service. But the University responded not. The filling of the Chair took another year, and no offer went to Brown. The Sydney *Bulletin*, annoyed at an Englishman getting the job, alleged

53 (1918) 13 *Illinois L.R.*, p. 160-. The relevant part of the *Review* was separately printed as *Celebration Legal Essays... to Mark the Twenty-fifth Year of Service of John H. Wigmore* (1919).

54 'Law and Evolution', (1920) 29 *Yale L.J.*, at p. 394.

55 'The Judicial Regulation of Industrial Conditions', at pp. 194-232.

that the authorities decided 'a more practical man was required'. The Registrar answered, but did not deny the charge.[56] Brown was now 51, perhaps he had his prickliness, but this was a dim moment for the University of Adelaide. Brown continued at what became ever a more wearisome grind.

The Industrial Code Act of 1920 altered the arbitration structure. While the Court would continue, a Board of Industry would henceforth supervise a number of lesser Industrial Boards, heirs of pre-existing Wages Boards but with enlarged powers over each particular occupation. The Board of Industry would also declare living wages. Originally the government intended that a Supreme Court judge add the Presidency of the Board to his duties. Whether this was meant, or taken, as a rebuff to Brown is unclear; anyway, after much debate the Presidency became an extra task for him. The Board being largely an administrative mechanism, the effect was to obscure an even greater part of his work from historical scrutiny. The Act granted him secure tenure in the Court, but his successors would have seven-year terms.

While this measure was still before Parliament, Brown, perhaps believing it was his last opportunity, gave a mammoth judgment in a further living wage case. Arguing primarily against employer interests he insisted that his Court had helped industrial peace and economic welfare. Laissez-faire was irrelevant to the modern age and workers had the right to aspire high, even if they sometimes lacked fineness of spirit and enlightened leaders. He lifted the wage to 87s. and appealed that all should strive to make this an increase in real purchasing power. His peroration restated the notion of an organic state:[57]

> We should avoid the confusion of caste (which is extinct), and class (which is becoming extinct), with the enduring necessity for a division of labor — a division which should be consistent with full and free opportunities for all, but which nevertheless exacts that each man of every calling (whether tradition may account that calling exalted or not) must serve as best he can the community of which he is a member, and in whose welfare his enduring interests are inextricably involved. We may change the economic structure of society. The obligation of SERVICE, apart from any moral basis, has an enduring economic basis in the existing and expanding needs of man.
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> . . . .
>
> In concluding this Judgment, it is pertinent to refer to the ideal of a White Australia. If that ideal is to hold good in a world of crowded Asiatic peoples, whatever may be said on the ethical side, the issue on the economic side is clear, and is directly relevant to my present point on the desirability of maintaining and even increasing the effectiveness of the living wage. If, as a community, we should trifle with ideals of individual service or with our national credit and honor — making of such things mere material for facile question and debates at the hustings — we are as a nation doomed.

56 *Bulletin*, 18 December 1919 and 8 January 1920.

57 *Living Wage (Printing Trades) Case*, 3 SAIR, 215, at pp. 303-4.

> Even if domestic conditions should permit us to 'run amok', the law of race survival would operate with ruthless force. There is no place for a fools' paradise in the midst of a turbulent world brought each day nearer our shores. There can be no shirking the issue — either an efficient, patriotic, and broad-visioned Australian manhood, or else the fair heritage we now possess will pass under alien control or subjection.

Brown's first major judgment after the 1920 Act attempted to give guidelines for action in the post-war wilderness. In modern terms, it analysed the working man's sense of alienation; as Brown said, his thought followed from the 1903 essay which argued that new knowledge and new wealth had created vacuum rather than satisfaction. Men were politically free and autonomous, but industrially nothing. Industrial citizenhood must become real. Brown had argued thus at least since his book on monopolies (a virtue of which, he then suggested, might be their freedom to experiment in such matters), and similar ideas had a tremendous vogue in the post-war world. Mayo's fame, Whitley councils, President Woodrow Wilson's Industrial Conferences — such were straws in this wind; an extreme, but logical development, was the Mussolinian concept of the corporative state. Brown's call was for 'Co-operative Councils', which would unite employer and employee in enriching their own particular segments of the economy. Answering potential critics, the President insisted that Australian trade unions were now strong enough to commit themselves to the general interest, rather than that of workers alone. Turning to the other side, he accepted that his scheme would alter the fact of traditional capitalism, 'but what the *community* needs is not what is so often vaguely described as "capitalism", but more wealth, better distribution of wealth or income, and a more intelligent appreciation of the conditions of producing wealth or income in a modern democratic community'.[58]

Thereafter Brown's judgments had less meat. A couple of cases prompted him to argue that the Court should enhance geographic decentralization and the appeal of country life,[59] a theme in his thought this account has underplayed. Old memories must have flowed strong in 1925 when he urged official generosity for teachers in government primary schools; many able people came through these schools, he remarked, and ten years of age saw peak susceptibility to stimulus.[60] At regular intervals the Board of Industry made living-wage declarations and all the while the humdrum work of both Board and Court proceeded.

It is plain why the interest of Brown's judgments diminished. No man can keep on producing novel social dicta. The work-load was damnably heavy. Criticism continued from both sides — rather more strongly from employers, and in 1922 the Liberal government prepared

58 *Trading Bank Clerks Case*, 4 SAIR, 169, at p. 213.

59 *Country Printers Case*, 4 SAIR, 102; *Whyalla and Iron Knob Case*; 8 SAIR 72.

60 *Public School Teachers Case*, 8 SAIR, 143.

to dismantle compulsory arbitration. The Bill failed, and the government later fell, but Brown must have been angry. More and more, he came to see the struggle of 1914-18 as having divided and embittered men, rather than exalting them. Likewise federalism, once Brown's ideal, confused arbitration even more than other aspects of Australian life. His judgments often urged joint action to overcome this, and in 1919 he was summonsed to a constitutional conference,[61] but nothing transpired. Whether the South Australian industrial system failed by workaday standards must remain an open question, pending close study; probably it did not, but Brown's standards were not workaday.

The Progressive ideal, crystallizing in the early years of the century and boosted by the notion of the war as regenerator, faded in the 1920s. Where transformed into Fascism it retained an ugly vitality, but in the English-speaking world it at best improved the material content of men's lives, never transformed their spirit. Such is the common fate of ideals; at bottom, Brown's tragedy was that South Australians of the 1920s were no more disposed than mankind of most times and places to behave as reformers would have them. His experience symbolized the Progressive decline.

Personal issues deepened the shadows. Brown's domestic and sexual life continued as a tragic farce. His health worsened; he drank too much, and depended on drug-heavy medicines. Working longer hours than ever in his life, he yet fell increasingly behind schedule. Government granted leave in 1923 and Brown spent some pleasant months in Britain, but this respite was brief. In January 1926 Parliamentary questions were asked about the back-log of Court business, and a few months later the President had again to take leave. The return of the Liberals in April 1927 was another twist, and in July Brown retired. In September 1916 he had remarked that ten years was about as long as a normal man could bear the Court's presidency. This prescience was characteristic and must have added its own gall.

Yet some happiness and achievement always remained. Brown loved his son, and the two especially shared pleasure in Nature. Brown played gentlemanly sport and cards. His closest friends were from University days — G. C. Henderson, Darnley Naylor, William Mitchell, E. H. Rennie, but he worked well with Court associates too. And still Brown published work of quality and interest.

Six major articles between late 1920 and 1924 developed themes direct from his professional work. The most complex of these studies considered whether the function of arbitration courts was or was not truly judicial as distinct from legislative or administrative.[62] At length Brown defined these categories, and insisted on an affirmative answer. Such

61 Telegram from W. M. Hughes, 29 September 1919, Brown papers.

62 'The Separation of Powers in British Jurisdictions', (1921) 30 *Yale L.J.*, 24.

courts, went his argument, essentially proceeded as did any others; admittedly they interpreted and adjusted law to meet particular conditions, but that 'progressive' quality was inherent in all judicial work. The theme that industrial arbitration harmonized with common law also underlay an article concerning strikes. 'Where legislation is passed making a strike or lock-out a criminal offence, statutory enactment should be regarded, not so much as a subversion of Common Law principles relating to the liberty of the subject, but as an expansion or adaptation of them to modern conditions', claimed Brown; '... the pursuit of social betterment by direct action substitutes force for law, violence for right, coercion for education by persuasion and enlightenment, sectional domination for the self-government of the community'.[63] His plan for Co-operative Councils was presented to the world under the title, 'Law, Industry, and Post-War Adjustments'.[64] For wider Australian audiences the idea was dressed-up as a *dénouement* to a Socratic dialogue which — half in smiles, half in scorn — discussed the national obsession with strife and assertion. This article appeared in the *Australasian Journal of Philosophy and Psychology*.[65] It was a sign of the 1920s that Brown's work could now appear in local academic journals, both this and the *Economic Record*.

In 1923 Brown published his chief item of imaginative writing, a play entitled *Who Knows*. Its central theme was the rights and nature of womanhood, one of Brown's permanent interests. His characters argued for easy, unilateral divorce; for the autonomy of women's lives; and for revolt against convention. 'The moral law has been of man's making', asserted the protagonist. 'Anyway, woman suffers more by its absurdities than man'.[66] Whereas some of Brown's legal judgments had seemed to endorse a narrowly domestic view of woman, *Who Knows* had a very different emphasis, congruent with Brown's earlier writings and with his encouragement of the few female students who entered his orbit.[67] Perhaps the greatest tribute to Brown's character was that his sympathy for women's rights survived his own domestic disaster.

Late in 1924 Brown published his last article on jurisprudence, presenting the major interpretations of law with thumb-nail potency.[68] He hinted at his own preference for Pound's 'engineering' approach, which saw law 'as a process, as an activity, not merely as a body of knowledge,

63 'Statutory Prohibition of Strikes in Relation to Common Law Rights', (1920) 36 *L.Q.R.*, 378, at p. 393.

64 (1922) 35 *Harvard L.R.*, 223.

65 'Strife', vol. 1 (1923), at pp. 34-44. The other two articles of this period to which the text alludes were 'Industrial Courts in Australia', *Journal of Comparative Legislation and International Law* series 3, vol. 2 (1920), at pp. 169-88; and 'The Judicial Settlement of Industrial Disputes', (1924) 2 *C.L.J.*, 51.

66 (1923), at p. 28.

67 See especially T. Bavin (ed.), *The Jubilee Book of the Law School of the University of Sydney* (1940), p. 62.

68 'The Riddle of Law in a Civilised Society', *Australasian Journal of Psychology and Philosophy*, vol. 2 (1924), pp. 289-93.

or as a fixed order of construction'. Thanking Brown for a copy of the paper, Pound suggested 'that there is much more juristic kinship between Australian writers and American writers than there is between Americans and Englishmen'.[69]

Brown's penultimate article repeated the old eugenicist cry for limiting marriage and parenthood to the fit.[70] The last deplored the waterside strike of 1928;[71] trade unions especially but also politicians of both parties received censure. Brown's final appearance before a public audience was in broadcasting nine talks on 'strife in industry'.[72] They had the same careful preparation as did his earliest lectures, and doubtless were delivered in the same precise, anglicized tones. They re-stated life-long ideas, although — as Brown recognized — the total effect was much gloomier than before. He presented the war as having intensified hatreds and corrupted society. The closing sentences called for a 'new spirit in industry'.

That word, 'new', had enormous vogue among the Progressive thinkers of the early twentieth century, Brown an exemplar. That he used it now marked the continuity of his thinking, but also the failure of the world to respond to his hopes. As the depression deepened, and his health worsened, life must have become ever more sombre. Brown died, 27 May 1930. The funeral was quiet, conducted by an Anglican minister.

Brown has left memorials. Obituarists recognized his virtues in apropriate, if conventional ways; 'he was a man who hid beneath an armor of whimsical gaiety, adventure, courage, and loyalty', wrote W. Harrison Moore.[73] His books remain on library shelves throughout the world; his articles span some of the most prestigious journals of Britain and the United States over a generation and more. Many a book of academic law has a footnote reference to him, although rarely more than that. Law schools at which he taught pay some heed to his memory. Cyril Maitland Ash Brown has honoured his father with rare devotion — which in turn has made it possible for me to study the man as I have.

Author's Note:

Throughout my preparation of this paper I have much depended on the work of C. M. A. Brown, son of W. J. Brown. Some years ago Mr Brown prepared both a 'personal biography' of his father and a 'bibliography of printed and published works'. The bibliography has perhaps been of even greater value than the biography, which, as its title declares, is oriented to Brown's private life. Nevertheless the latter is an extremely

69 Letter of 24 February 1925, Brown papers.

70 'Economic Welfare and Racial Vitality', (1927) 3 *Economic Record*, 15-.

71 'The Strike of the Australian Waterside Workers: A Review', (1929) 5 *Economic Record*, 22.

72 Manuscript, Brown papers.

73 *Australian Highway*, vol. 11 (1930), at p. 203.

important record, and is the source for much of my detail on relevant matters. I do not cite it specifically.

Copies of the memoir and bibliography are among Brown's papers which are held (on restricted access) at the South Australian Archives. These papers include letters, memoranda, copies of WJB's publications and lecture notes; and also photostats of various other relevant documents, notably from the Way papers and Brown's correspondence with government (the originals of both being in the South Australian Archives). I do not specifically cite this collection when it is patently the source of information.

Mr Brown originally undertook his work with the encouragement of Professor F. K. Crowley, who himself contemplated a complementary study somewhat on the lines I here attempt. Professor Crowley was so gracious as to forgo his own interest as I pursued my studies. I am deeply indebted both to him and to Mr Brown.

The references have been so constructed as to refer to all significant items from Brown's pen, yet avoiding cumbrous detail as to the variant forms in which Brown published some of his work.

Brown's Degrees

Cambridge: After graduating B.A. and LL.B. in 1890, Brown duly took his M.A. (1894) and LL.M. (1899). Meanwhile he had twice submitted thesis work towards qualifying for LL.D. As the text relates, the first submission failed; in 1898 Brown tried again, with work based on his studies on Australian federalism. This won acceptance, but not until 1905 did Brown take the degree.

Dublin: Brown proceeded by examination to an LL.D. in December 1890 and won a Litt.D. for *The New Democracy*.