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# DECIUS S. WADE'S *THE COMMON LAW*

Andrew P. Morriss\*

## I. INTRODUCTION

Decius S. Wade played important roles in Montana's legal history as Chief Justice of the Territorial Supreme Court (1871-1887), member of the Code Commission (1890-1895),<sup>1</sup> and prominent lawyer. Wade wrote *The Common Law* sometime in late 1894 or early 1895 for a February 1895 address to Helena bar members celebrating the 1895 passage of the Civil, Political, Penal, and Civil Procedure Codes by the Montana Legislature. Although I disagree with much of Wade's analysis, his manuscript deserves attention now for two reasons.

First, Wade played a critical role in the development of Montana's legal system and his views on the law remain relevant. Wade wrote more than half of the first six volumes of the Montana Reports as Territorial Chief Justice. His contemporaries found his opinions "had much to do with perfecting the practice of law in the courts of Montana."<sup>2</sup> Decius Wade also played a significant role in the 1895 codification of Montana's law, both as a member of the Code Commission and as a bar leader. Wade's 1894 speech in favor of codification, for example, played an important role in the Codes' passage.<sup>3</sup> Wade's views on the common law's relationship with codified law are thus still relevant to understanding Montana law, and the Codes in particular, today.<sup>4</sup> Second, Montana's nineteenth century legal history is

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\* Decius Wade's *The Common Law* is edited and annotated with an introduction and conclusion by Andrew P. Morriss, Associate Professor of Law and Associate Professor of Economics, Case Western Reserve University. Thanks to Alice Hunt for her usual efficiency, to Kathy Otto and the Montana Historical Society for assisting in locating the published version of *The Common Law*, to the Montana Bar Association for permission to republish Wade's essay, to Peter Junger with help on Roman Law sources, and to Robert G. Natelson for comments and assistance with Roman history and law.

1. Wade replaced Judge N. W. McConnell on the Commission after McConnell resigned in 1890. See Jesse B. Roote, *The Courts and Lawyers of Montana*, in 1 HELEN FITZGERALD SANDERS, *A HISTORY OF MONTANA* 605 (1913).

2. C. P. Connolly, *Three Lawyers of Montana*, 14 MAG. OF W. HIST. 59, 59-60 (1891).

3. See ROBERT G. RAYMER, *MONTANA: THE LAND AND THE PEOPLE* 383 (1930); Roote, *supra* note 1, at 602.

4. For more detailed discussions of Montana's codification see Robert G. Natelson, *Running With the Land in Montana*, 51 MONT. L. REV. 17 (1990) and Andrew P. Morriss, "This State Will Soon Have Plenty of Laws"—Lessons From One Hundred Years of Codification in Montana, 56 MONT. L. REV. 359 (1995) [hereinafter Morriss, *Plenty of Laws*].

regrettably sparse and relatively few of Wade's papers have survived. Because this manuscript presents a synthesis of Wade's thoughts on a central feature of Anglo-American jurisprudence, and one undergoing a significant change in Montana when he wrote, *The Common Law* is an important historical document. Moreover, its significance is enhanced because evidence of American legal culture in general in this period is lacking.<sup>5</sup>

Because I believe *The Common Law* is best presented as a historical document, I provide it relatively unedited,<sup>6</sup> opting instead to annotate in footnotes. Since Wade's original manuscript contains no footnotes, all footnote material is my annotation.

I provide four types of annotations. First, where Wade refers to a source, I add a complete citation in place of his incomplete, in-text references, which I deleted. Second, where Wade makes significant factual statements which I believe are incorrect, I include a footnote indicating the error and citing the historical sources that support my position. Third, where Wade refers to history without a date or context—something that might not have puzzled a nineteenth century audience whose education included more exposure to the classics than most people (including myself) have today—I add explanatory notes.<sup>7</sup> Finally, where Wade's analysis is relevant to his role in the Montana codification debate, I provide an explanation in a footnote.

A brief biographical background will help put Wade and his views in perspective. Decius Wade was born in Ohio on January

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5. See M. H. Hoefle, *Roman Law in American Legal Culture*, 66 TUL. L. REV. 1723, 1724 (1992) (noting that study of U.S. legal culture in eighteenth and nineteenth centuries generally has been "neglected").

6. Wade's longhand manuscript is in the Wade File, Box 2, Folder 2-4, Montana Historical Society. The printed version appears in PROCEEDINGS OF THE MONTANA BAR ASSOCIATION which notes that the address had never been printed before the 1914 publication of the proceedings. Decius S. Wade, *The Common Law*, Address before the Montana Bar Association (February 1895), in PROCEEDINGS OF THE MONTANA BAR ASSOCIATION 173, 198 (1914) [hereinafter *The Common Law*]. I made the following minor editorial changes: spelling and capitalization have been conformed to contemporary usage; lengthy quotes placed in block format; names of books italicized; quotes verified and corrected; and ellipses substituted for Wade's use of "xx." Finally, where the longhand manuscript differs significantly from the printed version, I have included the longhand version in {}.

7. Indeed, one of the more striking aspects of Wade's speech is the high level of historical knowledge he assumed among his listeners. Although Wade was speaking to part of Montana's economic and political elite rather than Butte miners, the extent of shared knowledge about Roman, British, and Anglo-Saxon history is far more than likely to be shared among a similar elite group today.

23, 1835.<sup>8</sup> His parents came from an important Massachusetts family dating back to 1634. He grew up on a farm and began studying law under the supervision of his uncles, Senator Benjamin F. Wade and Congressman Edward Wade. Decius Wade was admitted to the Ohio bar in 1857. He practiced law in Ohio until 1861, became a probate judge in 1860 and served until 1867. In 1861, he enlisted in the Union Army. He married in 1863 and had one daughter. In 1869, Wade was elected to the Ohio Senate and he served until his appointment to the Montana Territorial Supreme Court by President Grant in 1871. After retiring from the Territorial Supreme Court in 1887, Wade practiced law in Helena. In his early days in Montana, Wade wrote a novel, *Clare Lincoln*,<sup>9</sup> on a Civil War theme.<sup>10</sup>

Wade delivered this address on February 25, 1895 before the Helena bar. Two years earlier, Wade and his fellow code commissioners had been disappointed when the Third Legislature had failed to take action on Civil, Political, Civil Procedure, and Penal Codes the commission drafted.<sup>11</sup> After a significant electoral shift in 1894, the Montana republicans controlled both houses of the legislature, allowing for the codes to receive attention. By the time of Wade's speech, all four codes had passed both houses and three had been signed by Governor Robert Smith.<sup>12</sup>

Wade's speech was thus concerned not with advocacy, as his influential 1894 address, *Necessity for Codification*,<sup>13</sup> had been. Rather, *The Common Law* was a speech celebrating the success of codification. In the course of his talk, Wade developed three important themes: (1) the success of Roman law as a model and justification for American codification; (2) the importance of precedent and its proper role; and (3) the supremacy of law.

According to Wade, both pre-codification Rome and Montana in the 1890s, and the common law jurisdictions generally, struggled with too much precedent. Rome struggled with "a vast fab-

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8. The facts here are taken from Connolly, *supra* note 2, at 59-60 and JAMES MCCLELLAN HAMILTON, FROM WILDERNESS TO STATEHOOD: A HISTORY OF MONTANA 1805-1900, 329 (1957).

9. DECIUS S. WADE, CLARE LINCOLN (1876).

10. For a summary of the plot see Morriss, *Plenty of Laws*, *supra* note 4, at 449 n.428.

11. The Montana Codes were derived from California's version of the codes, which originally were drafted by New York attorney David Dudley Field in the 1860s. *See id.* at 382.

12. *See id.* at 394, 396-97.

13. Decius S. Wade, *Necessity for Codification*, Address before the Helena Bar Association (April 5, 1894) [hereinafter *Necessity*].

ric" of law "contained in as many books. . . as that of the English common law" during the mid-1800s.<sup>14</sup> "[T]wo thousand volumes and three million verses" were reduced by the Roman codifiers to sixty-six books.<sup>15</sup> The resulting "temple of human justice,"<sup>16</sup> Wade noted, earned praise from Emperor Justinian, Chancellor Kent, and Sir Matthew Hale.<sup>17</sup>

Looking to Roman law would have been an obvious comparison for Wade and his generation of lawyers.<sup>18</sup> While "Roman law was very seldom a part of the everyday law of the eighteenth and nineteenth centuries . . . [it] was, however, an essential part of the legal high culture of this period."<sup>19</sup> Roman law was seen as "in some senses universal;" this view "accounts for the influence of Roman law in the United States in the eighteenth and nineteenth centuries."<sup>20</sup> Secondary sources on Roman law, like those relied upon by Wade, were widely available in nineteenth century America<sup>21</sup> and at least an antiquarian interest in Roman law was common among lawyers across the country.<sup>22</sup> (Wade had not, of course, applied principles of Roman law to cases tried before him as a judge.<sup>23</sup>) Moreover discussing codification in Roman terms avoided the necessity of addressing the objections codification's critics made in New York, California, and elsewhere. As I have described elsewhere, the codification "debate" in Montana was remarkably one-sided,<sup>24</sup> unlike the decades-long controversy in New York, for example.<sup>25</sup> The Montana codification proponents' failure to discuss those objections, of which they were surely aware,<sup>26</sup> suggests an unwillingness to

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14. See *The Common Law*, *supra* note 6, at 175-76.

15. See *id.* at 176.

16. See *id.*

17. *Id.*

18. Wade had briefly discussed Roman law as an exemplar a year earlier. See *Necessity*, *supra* note 13, at 3-4.

19. Hoeflich, *supra* note 5, at 1724.

20. ALAN WATSON, *ROMAN LAW & COMPARATIVE LAW* 92 (1991) [hereinafter WATSON, RL & CL].

21. See Hoeflich, *supra* note 5, at 1725, 1738-43.

22. See Hoeflich, *supra* note 5, at 1725-1738 (describing various circles of interest). "[M]ost Romanists of the nineteenth and early twentieth centuries analyzed Justinian texts as the legal encyclopedia of a bygone age" and not as a source of specific rules. Harold J. Berman and Charles J. Reid, Jr., *Roman Law in Europe and the Jus Commune: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century*, 20 SYRACUSE J. INT'L L. & COM. 1 (1994).

23. I have skimmed or read most, if not all, of Wade's published opinions and find no evidence he relied upon Roman law as authority.

24. See Morriss, *Plenty of Laws*, *supra* note 4, at 386-409.

25. See *id.* at 366-372.

26. In his 1894 address, Wade cited arguments in codification proponents' state-

argue the merits of codification publicly.

From the Roman experience Wade drew two important lessons for Montana. First, codification was possible. Although infrequently articulated in Montana, much of the debate in New York and elsewhere in the United States over codification centered on the opponents' claim that reducing the common law to statutes was impossible.<sup>27</sup> For Wade the success of the Roman experience, which produced codes that lasted for centuries and that were still celebrated by giants like Kent, made that argument appear nonsensical. Second, in Wade's view, the Roman example demonstrated compatibility with the common law ideals of the rule of law and protection of the fundamental rights of life, liberty, and property.<sup>28</sup> Roman law's success, Wade erroneously believed, came from its reliance on juries, common law-like precedent, and its comprehensive procedures, furthering the comparison to the common law jurisdictions.<sup>29</sup> Not only was Wade mistaken about some of the institutions of Roman law, but Wade's analogy ignores the importance of the common law's adaptive ability, focusing instead on particular substantive rules. For societies in transition, as Montana and all of America were in the late nineteenth century, the legal system's ability to adapt to economic, technological, and political change was more important than the specific content of many rules. The same remains true today.

Wade undoubtedly found other benefits in the parallel between Rome and Montana. By locating the key components of justice in codified Roman law and not "in the crude Saxon annals" Wade lifted Montana society, in which he was an important figure, to a higher plane. At a time when national popular images of the West generally, and Montana in particular, were centered on vigilantes,<sup>30</sup> Indians, and on Butte and battles between copper kings,<sup>31</sup> the comparison to Rome would have been a reassuring claim that Montana was at least the equal of the East. For a former probate judge from Ohio, that was likely an

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ments made during an 1884 ABA debate, for example, and hence was also aware of the opposing arguments. See, e.g., *Necessity*, *supra* note 13, at 4.

27. See Morriss, *Plenty of Laws*, *supra* note 4.

28. See, e.g., *The Common Law*, *supra* note 6, at 177, 190-91.

29. See *id.* at 178-79.

30. In 1892, a Chicago paper sent a reporter to accompany a group of Wyoming vigilantes attempting to rid Johnson County, Wyoming of alleged rustlers. See HELENA HUNTINGTON SMITH, *THE WAR ON POWDER RIVER* 197-200 (1966). Similar activity occurred through the 1880s in central Montana. See *infra* notes 53-54.

31. See generally MICHAEL P. MALONE, *THE BATTLE FOR BUTTE* (1981).

important subtext.

The successful "transplant" of Roman law throughout continental Europe, where codification was popular as well, must have also heartened Wade as he contemplated his role in transplanting substantial amounts of New York and California law into Montana through the codes.<sup>32</sup> Although Wade and other proponents argued throughout Montana's codification debate that the Codes represented little new, as a Code Commissioner Wade must have known better. (The significant degree to which the Codes changed Montana law became clear after their adoption.)<sup>33</sup>

Wade's second theme was the importance of precedent. Precedent was "a vast storehouse of knowledge, to which lawyers and judges resort for the discovery of principles to unravel the tangled and complicated affairs of human life."<sup>34</sup> Through records of decisions "the sages of the law" are "call[ed] back to earth" to guide modern judges.<sup>35</sup> Not every opinion breaks new ground, of course, and Wade longed for selection of "the settled and well established principles" from the mass of reports so that the "majestic principles of morality, reason and justice" could be accessible to all.<sup>36</sup> Unlike New York's David Dudley Field, who included a provision announcing that there was no common law on any subject covered by his codes (a provision dropped by the Montana codifiers), Wade's writings revealed a great affection for the common law. Indeed his own opinions made wide ranging use of precedent from diverse jurisdictions.<sup>37</sup> The value of such precedent was, of course, its persuasive articulation of principles as it lacked binding force. Reducing such principles to a few volumes also would have had great practical benefit to a judge required to hear cases across a territory as vast as Montana. Again, Wade was echoing a theme from his earlier address.<sup>38</sup>

Wade viewed precedent's role in Roman law as essentially similar to its role in a common law system like Montana's. He

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32. Ironically, codification in Europe was generally seen as an alternative to Roman law rather than a legacy, based on Roman law's role after the Reception and before codification. See JAMES Q. WHITMAN, *THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA* 54 (1990).

33. See Morriss, *Plenty of Laws*, *supra*, note 4, at 397-402.

34. *The Common Law*, *supra* note 6, at 193.

35. *See id.*

36. *See id.* at 194.

37. *See, e.g., Diamond v. Northern Pac. R.R. Co.*, 6 Mont. 580, 13 P. 367 (1887).

38. *See Necessity*, *supra* note 13, at 5-9.

made no distinction between Roman judicial opinions and those he worked with as judge and lawyer in Montana. This view is based on some degree of misunderstanding of the Roman legal system.<sup>39</sup> Wade's discussion of Roman codification, for example, is based on a mischaracterization of the XII Tables and Justinian's compilation of Roman law. The former was "not so much new law as authoritative settlement of doubtful cases which had arisen in the application of the traditional customary law."<sup>40</sup> The latter is often called a codification but, except for the small fraction in the Institutes, "is neither systematic nor coherent," and largely consists of "an anthology of extracts from the works of legal writers consisting principally of case discussions."<sup>41</sup> Neither represented anything like the attempt at systematic revision of the entire body of law made by the Montana codifiers. Perhaps most notably, the striking feature of precedent in Roman law is how unimportant it seems to have been.<sup>42</sup> Wade's analogy is thus flawed. Wade drew too close a connection between the pre-code societies and Montana. He also misstated the connection between the codification attempts.

Wade's praise for the common law seems to contradict his role in the codification of Montana's law. His views are less contradictory than they first appear, however. Wade's idea of the common law differed from both other American codification proponents like New York's advocate David Dudley Field and modern views. Wade saw the common law not as a *process* of decision making but as a set of particular rules which were administered by courts whose power was independent of the executive and legislature and whose own decision making was divided between judge and jury. This narrow view of the common law may be what allowed Wade to see evidence of the common law in the historical record where even his sources did not.<sup>43</sup> Perhaps, however, it was an unconscious recognition of the tension be-

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39. As Professor Peter Stein has shown, although there are important similarities between Roman law of the first two centuries A.D. and the common law, it is important to view the similarities in context with the significant differences as well. See Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 TUL. L. REV. 1591 (1992) [hereinafter Stein, *Roman Law*].

40. Peter Stein, *Interpretation and Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. 1540 (1995).

41. Stein, *Roman Law*, *supra* note 39, at 1595.

42. See ALAN WATSON, *THE SPIRIT OF ROMAN LAW* 60 (1995) [hereinafter WATSON, *SPIRIT*].

43. See *infra* text accompanying note 111 (Wade's rejection of Finlason's characterization of the Saxons).



tween his role as code commissioner and his efforts as a judge and lawyer in a common law system that prompted Wade to write this speech as he did.

Wade's view of the unbroken chain of connections between Roman law and institutions and the common law of his day is at odds with the views of his contemporaries in Europe who were also advocating codification. Professor James Whitman traced how Germans in the late nineteenth century saw codification as a means of curing the "destructive infections" of their legal systems by Roman law.<sup>44</sup> Germans in the 1890s saw Roman law as "an 'alien' or 'foreign' force" tied to "the rise of 'soulless,' 'commercial,' 'materialistic' values" and as overly rationalistic.<sup>45</sup>

This last argument is particularly interesting in light of the source of Montana's codes. "A favorite charge against Roman law in the pre-modern world had been that it used reasoning to distort simple truths—that lawyers trained in Roman law were 'Rabulistae,' casuists who could make of any bad cause a good one."<sup>46</sup> Such arguments would have sounded familiar to anyone knowledgeable about leading American code proponent David Dudley Field's career, as Wade surely was. Field's representation of Boss Tweed and Jay Gould had earned him similar criticism.<sup>47</sup> Wade's reliance on analogies to Roman law to justify codification at the same time that continental Europeans argued in favor of codification to cure problems they attributed to the reception of Roman law illustrates how far from the general debate of codification Montana's limited public discussion lay.

Wade's third theme was the supremacy of law: "Kings and rulers, and the beggar in the streets, are alike subject" to the common law.<sup>48</sup> Although Wade rejected the claim that the petite jury was a Saxon innovation,<sup>49</sup> he attributed to "the Saxon hatred of arbitrary power" the grand jury<sup>50</sup> and to the "invigorat[ing]" impact of "the spirit of Saxon liberty"<sup>51</sup> the firm establishment of the "principle of absolute equality before the law."<sup>52</sup> The rule of law may seem well established in Montana

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44. See James Q. Whitman, *The Disease of Roman Law: A Century Later*, 20 SYRACUSE J. INT'L L. & COM. 227 (1994).

45. *Id.* at 228.

46. *Id.* at 229.

47. See Morriss, *Plenty of Laws*, *supra* note 4, at 367-68 n.32.

48. The Common Law, *supra* note 6, at 192.

49. See *id.* at 196.

50. *Id.* at 191.

51. *Id.*

52. *Id.* at 192. Interestingly, Montana's Constitution, adopted in 1972, does not

today but it was not so clear in Wade's time. Montana's founding was inextricably intertwined with a successful vigilante campaign.<sup>53</sup> Many of the leaders of that vigilance movement were still active in Montana politics, and one prominent vigilante, Wilbur F. Sanders, was a close ally of Wade's in the push for codification.<sup>54</sup> One of Wade's predecessors as Chief Justice of the Territorial Supreme Court had praised the earlier vigilantes when he arrived in the territory, while warning them not to continue their activities now that his court was established.<sup>55</sup> More recently, Granville Stuart, a central figure in early Montana and a powerful force in Montana politics into the 1890s, had led a vigilance campaign during the 1880s against rustlers in eastern Montana, to widespread popular acclaim.<sup>56</sup>

Perhaps more importantly for Wade, Montana's lengthy stay in the purgatory of territorial status had produced repeated conflicts between the branches of territorial government.<sup>57</sup> Wade, as a Republican appointee of the national government, would have regularly found himself on the wrong side of the predominantly Democratic legislative branch in struggles over the right of self-government. When Wade arrived in 1871, the Territorial Court and Congress had only recently quelled an attempt by the Montana Territorial Legislature (with the assistance of Acting Governor Thomas Meagher) to redistrict the territory to solidify Democratic control.<sup>58</sup> That struggle ensnarled Montana's statutes in a tangled web of conflicting provisions,<sup>59</sup> which must have continually exasperated the new Chief Justice. Finally, while other legislative bodies may have earned reputations as careful deliberative bodies, Wade's observation of Montana's territorial and state legislatures over his more than twenty years in Helena undoubtedly convinced him of the need for judicial supremacy. The 1893 legislature, for example, had accomplished

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provide for grand juries to be generally used.

53. See Andrew P. Morriss, *Private Actors & Structural Balance: Militia & the Free Rider Problem in Private Provision of Law*, 58 MONT. L. REV. 115, 127-30 (1997) [hereinafter Morriss, *Private Actors*].

54. See, e.g., Morriss, *Plenty of Laws*, *supra* note 454., at 382.

55. Chief Justice Hezekiah L. Hosmer, Dec. 5, 1864, praised the vigilantes as "an organization, which, in the absence of law, assumed the delicate and responsible office of purging society of all offenders against its peace, happiness and safety." LEW L. CALLAWAY, MONTANA'S RIGHTEOUS HANGMEN: THE VIGILANTES IN ACTION 125 (1982).

56. See Morriss, *Private Actors*, *supra* note 53, at 153-54.

57. See, e.g., Morriss, *Plenty of Laws*, *supra* note 4, at 378-81.

58. See *id.* at 379 n.93.

59. See, e.g., *id.* at 380 n.96.

almost nothing, spending the entire session deadlocked over the selection of a U.S. Senator.<sup>60</sup>

Wade fundamentally misunderstood Roman law and the development of the common law, as the annotations repeatedly demonstrate. To take just one important example, Wade seems to have had no concept of the importance of the competing jurisdictions in the medieval English system and the total lack of such competition in Roman Law.<sup>61</sup> Indeed, Alan Watson concludes his comparison of the development of the two systems by noting that "the striking fact is how differently Roman law and English law evolved."<sup>62</sup>

Why should we read Wade's manuscript today? Aside from historical interest, modern readers will find several benefits. Wade played a critical role in shaping Montana's jurisprudence during its formative period, earning him the unofficial title of the "father of Montana jurisprudence."<sup>63</sup> As Chief Justice, he saw the operation of common law principles and statutes, helping shape them with his opinions. Even more importantly, as a Code Commissioner, he used his experience to shape the basic structure of Montana's legal system, a structure that persists to this day. Montana's jurisprudence has coexisted uneasily with the Codes for over one hundred years.<sup>64</sup> Understanding the vision of the architects of the Codes may shed light on problem areas.

Moreover, Montana occupies a unique place in American jurisprudence. Riven by sectional rivalries at its birth, born from the gold rush, sustained by copper and cattle, and kept in semi-colonial territorial status for decades past its natural evolution into a state, nineteenth century Montana experienced most of the forces that transformed the West. Simultaneously industrial and immigrant, agricultural and nativist, Montana's economy

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60. See *id.* at 384-86.

61. See WATSON, RL & CL, *supra* note 20, at 265.

62. WATSON, RL & CL, *supra* note 20, at 265. In contrast to medieval English systems, "the Roman citizen who believed he had a legal claim did not have available to him a large number of courts with competing jurisdictions operating legal systems that had conflicting legal rules. The Roman private law system was almost totally unitary—there was only one system of private law for the citizen." *Id.* at 251.

63. HAMILTON, *supra* note 8, at 329.

64. See, e.g., Morriss, *Plenty of Laws*, *supra* note 4, at 424-442 (employment law); Natelson, *supra* note 4 (problems with provisions concerning covenants running with the land); Robert G. Natelson, *Condominiums, Reform, and the Unit Ownership Act*, 58 MONT. L. REV. 495 (1997) (problems with condominium provisions).

and culture in the nineteenth century shaped a legal culture that remains unique. Finally, understanding how Montanans like Wade envisioned the evolution of the common law into the Montana codes can shed some light on what others contemplating the assimilation of a "foreign" body of law can expect. The experience of the rapid restructuring of legal systems is an increasingly general one. Many post-communist societies have looked to western sources for entire bodies of law rather than "growing" their own indigenous legal culture.<sup>65</sup> While I believe Montana's experience with the codes sounds a cautionary note in general about the ability to produce rapid beneficial change in legal culture, examining Wade's views sheds some light on why Wade and his contemporaries believed the transition would be smooth.

## II. THE COMMON LAW

The common law of the English speaking race, considering its age, its vitality, and its influence among men, is one of the marvels of human history. It has behind it a thousand years of continuous growth, and it might well be said to date from the Saxon invasion, A.D. 449. In a larger sense it dates from the beginning of civilization, for it has appropriated to its use all legal knowledge and all that men have learned of the principles of justice and civil liberty. It was the offspring of Roman jurisprudence, and through its child and heir Rome resumes her Empire of the world. Rome borrowed from Greece, and Greece from India, Egypt, and all the East, from the beginning of history. There has been no halt in the progress and development of jurisprudence. From the laws of the Twelve Tables to Magna Charta [sic], and from thence onward to the Constitution of the United States, which was born of the English common law, there has been continuous expansion, purification and growth.

To find the source of the English Common law, we must go back more than seven hundred years before the Christian era, to the banks of the Tiber, at the place where Romulus and Remus, under the guardianship of the gods, founded a city. It is not material to inquire in what respects mythology and fable have given a false coloring to these great events in the world's history. A city was founded and became the seat of a system of jurisprudence as imperishable as the human conscience or the sense of right and wrong.

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65. See, e.g., Paul H. Rubin, *Growing a Legal System in the Post-Communist Economies*, 27 CORNELL INT'L L.J. 1 (1994).

The laws of the Twelve Tables cover a period extending back to the beginning of that system. These laws were compiled and prepared by three commissioners,<sup>66</sup> properly code commissioners, appointed after the expulsion of Tarquin [the Proud],<sup>67</sup> to reduce to writing what might be called the Roman common law,<sup>68</sup> which had existed in an unwritten condition, from thence, to the period of Numa<sup>69</sup> and Servius Tullius.<sup>70</sup>

This attempt at codification, this effort to rescue the Roman law from the uncertainty and obscurity of traditional decrees, decisions, usages and customs, and to make it accessible and certain by reducing it to writing, in the form of statutes,<sup>71</sup> was opposed by some of the Roman lawyers and Judges,<sup>72</sup> upon pret-

66. The Twelve Tables date from approximately 450 B.C. See ALAN WATSON, *THE LAW OF THE ANCIENT ROMANS* 12-13 (1970) [hereinafter WATSON, XII TABLES]. There were ten commissioners, not three. See WOLFGANG KUNKEL, *AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY* 23 (J. M. Kelly trans., 2d ed. 1973). Wade may have been confused by the claim that three visited Greece. See note 72 *infra*.

67. 509 B.C. See OLGA TELLEGEN-COUPERUS, *A SHORT HISTORY OF ROMAN LAW* 11 (Sheila McNab trans., 1993).

68. This is an inaccurate characterization since the Roman codifiers were empowered to make changes. See Kunkel, *supra* note 66, at 25. Wade and his fellow codifiers made numerous changes in Montana's laws but portrayed the codes as simply written forms of existing law. See Morriss, *Plenty of Laws*, *supra* note 4, at 388.

69. Numa was the second king of Rome (following Romulus) from 716-674 B.C. See I.J. CORNELL, *THE BEGINNINGS OF ROME* 119 (2d ed. 1973). "Tradition credited Numa with all the major religious institutions of the state. . . ." *Id.* at 120. Watson lists as the laws attributed to Numa that each individual mark the boundaries of his land, that the willful killing of a free man was murder, the establishment of a relatively light penalty for negligent killing, and a rule that fetuses must be cut from the bodies of deceased pregnant women to allow the fetuses a chance at life. See WATSON, RL & CL, *supra* note 20, at 10.

70. Servius Tullius was the sixth king of Rome (578-534 B.C.). See CORNELL, *supra* note 69 at 120. "He more than any other transformed the city, both in its physical aspect and in its political organization [sic], and is sometimes regarded as a second founder." *Id.* at 130-31. He came to the throne "by means of an illegal seizure of power." *Id.* 131. Watson notes that Servius Tullius was responsible for the rule that free slaves become Roman citizens and for the separation of public and private court actions. See WATSON, RL & CL, *supra* note 20, at 11.

71. Pre-XII Tables Roman law was almost entirely unwritten and the "codification" into the XII Tables certainly made the law more accessible. Similarly, much of the nineteenth century codification debate in the United States centered on the argument of codification proponents that creating a statute increased accessibility. Montana's Col. Wilbur F. Sanders, for example, argued that a citizen of Montana would need only three books—a Bible, a dictionary, and the Code—to understand morals, English, and "his rights as a member of civilized society." Letter to Henry Field, Jan. 24, 1896, reprinted in HENRY M. FIELD, *THE LIFE OF DAVID DUDLEY FIELD* 90 n.\* (Fred B. Rothman & Co., 1898). There are important differences, however. The Roman codifiers attempted codification only of a small portion of what the Montana codifiers completed. The Romans did not address the subject matter, for example, of the Political Code in the XII Tables.

72. See WATSON, XII TABLES, *supra* note 66, at 12-14 (describing development

ty much the same grounds as codification of the English common law is opposed,<sup>73</sup> but at length the Senate and Tribunes united in the appointment of this first code commission. These commissioners seem to have been given extensive powers, for besides reducing the Roman law to writing they were given authority to improve, correct and enlarge it,<sup>74</sup> for they visited Greece<sup>75</sup> and

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of the XII Tables.) Watson's summary of the creation of the XII Tables has parallels to the Montana codification experience. In both cases, a group of men (three in Montana, ten in Rome) were appointed to draft a proposed code. In both cases they studied "foreign" codes, although Watson suggests that the Roman reliance on the Greek code of Solon is implausible. There are also important differences, however. The Roman codifiers placed their proposed code in the marketplace, and "asked the people to read the tablets, to consider each individual point and discuss it among themselves, and to declare publicly the faults of the codification." *Id.* at 13. There is also no record of any "debate" over the issue of codification. Some scholars believe the primary purpose of the XII Tables was to weaken the power of the patrician *pontifices* (priests) who had a monopoly on the existing law. See THE OXFORD CLASSICAL DICTIONARY 1219-20, 1565-66 (3d ed. 1996). In Montana, by contrast, the codes were difficult to obtain until months after enactment, passed with little substantive debate and there was little public awareness of their contents. See Morriss, *Plenty of Laws*, *supra* note 4, at 386-394. Watson also notes that the Roman account stresses the fair-mindedness of the Roman codifiers; a characterization Wade undoubtedly felt appropriate to Montana as well.

73. Although there was no significant opposition to codification in Montana, New York experienced a heated debate over Field's proposed codes during the late 1870s and 1880s. Montana's code proponents never publicly addressed the issues raised in New York, but Wade appears to have been aware of the objections. James Coolidge Carter, the most prominent opponent of codification in New York, argued that the common law was superior to "written law" because it made rules only provisionally, leaving the courts free to adopt rules to new circumstances. Codes, Carter argued, "are not subject to change or modification however ill-adopted they may prove to be to the business of the future." JAMES C. CARTER, THE PROVINCES OF THE WRITTEN AND UNWRITTEN LAW 29-30 (1889).

Wade is inaccurate in his characterization of the opposition to the XII Tables. The authoritative, and roughly contemporaneous to Wade, essay on Roman law in the eleventh edition of the *ENCYCLOPEDIA BRITANNICA*, for example, describes the dispute over codification at the time of the XII Tables as between the plebians, who "complained that they were kept in ignorance of the laws, and that in particular the consuls used their magisterial punitive powers (*coercitio*) unfairly and with undue severity when a plebian was the object of them." *Roman Law*, 23 *ENCYC. BRITANNICA* 537 (1911). Watson summarizes the traditional version (with criticisms). See WATSON, *RL & CL*, *supra* note 20, at 11-12. There is no evidence that ordinary Montanans clamored for any similar relief from Wade and his fellow judges' exercise of their powers. Moreover, the *ENCYCLOPEDIA BRITANNICA* essay points out, "[t]he structure of the provisions of the Tables was not such as to enable the plain citizen to apply them to concrete cases, or to know how to claim the benefit of them in the tribunals, without some sort of professional advice." 23 *ENCYC. BRITANNICA* at 538. Yet, this was exactly the claim made by the Montana codifiers.

74. This description parallels Field's interpretation of his mandate from the New York Legislature. A significant difference between various nineteenth century codifications was whether a code commission attempted to "improve" as well as summarize the law. California's code commission, for example, "went a little beyond what

studied the laws of Solon<sup>76</sup> and Lycurgus,<sup>77</sup> and finished their labors by producing and submitting to the Senate and Tribunes the laws of the Twelve Tables, which were approved, and after having been written upon tables of stone, became the law of the Roman world.<sup>78</sup>

It is difficult to overestimate the effect which this codification had upon subsequent judicial history and the history of mankind. It was the beginning of the reign of reason in determining the rights and settling the controversies between men. It was a triumph over arbitrary power.<sup>79</sup> It brought in the era of enlightened justice, in which precedents were preserved to serve as guides for the future.

Progressive jurisprudence must depend for its growth and expansion upon precedents. The reasoning by which Judges arrive at conclusions, and the learning brought to bear in attempting to reach the truth and to do exact justice became guides for the future, and as time adds its treasures, the sanctuary of the law. Precedents and the principles upon which they rest are perpetual builders; {they reach into new fields, and

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was contemplated by the Governor," and adopted a modified version of Field's 1865 draft. CHARLES LINDLEY, CALIFORNIA CODE COMMENTARIES, App. at ii (1874). The Georgia Code Commissioners, on the other hand, had a more limited mandate "to reconcile, harmonize, render consistent" the state's law. R. H. Clark, et al., Report of the Committees, *Preface to the Revised Edition* of THE CODE OF THE STATE OF GEORGIA at xi (David Irwin ed., 1867).

75. Watson concludes that "the idea of an embassy to Athens is most implausible," citing the lack of any evidence of such an embassy in Greek sources. WATSON, XII TABLES, *supra* note 66, at 13.

76. Solon undertook a major reform of Athenian law around 594 B.C. See THE PRAEGER ENCYCLOPEDIA OF ANCIENT GREEK CIVILIZATION 435 (1967).

77. Lycurgus was a mythological legislator in Sparta, possibly based on an actual man who lived sometime between the eleventh and eighth centuries B.C. See *id.* at 273.

78. The Tables were a *lex*, so submission of the Tables would have been to the people, who had sole authority to make law, although the Senate probably would have examined the work first. The role, if any, of the tribunes would have been minimal. Livy says the Tables were adopted by the *Comita Centuriata* (one of the popular assemblies). See LIVY (TITUS LIVIUS), THE EARLY HISTORY OF ROME 221, 224 (Penguin ed., Aubrey de Selincourt, tr. 1979). This assembly was presided over by a consul, not a tribune. It is possible that the Twelve Tables did not have to be approved by the people because the commissioners themselves had supreme authority (*summum ius*) to change the law during their tenure. See DIG. 1.2.2.4 (Pomponius, Manual). (Perhaps this is what Decius Wade wished he had.) TELLEGEN-COUPERUS, *supra* note 67, at 20, suggests a vote of the people was dispensed with.

79. This is incorrect. As Watson summarizes the impact of the XII Tables, the means of creation and the Tables' interpretation by the patrician pontiffs "ensured that law would always retain a tinge of the aristocratic and that the notion of authority would always be prominent." WATSON, SPIRIT, *supra* note 42, at 40.

apply old principles to new facts and situations; they make the administration of justice uniform and steady; they bring to the aid of lawyer and Judge the learning, the reasoning and the logic of other minds; these searchers after justice and truth do not stand alone, but have the companionship and kindly instruction of the fathers of the law, while a disregard of the value of precedents puts out the friendly lights and beacons along the troubled way, and necessarily makes the law capricious, arbitrary and uncertain.

The preservation of the opinions of the Judges, and a recognition of the value of precedents, are among the gifts of Roman jurisprudence, following which the voice of the English common law is heard around the world.<sup>80</sup>

The laws of the Twelve Tables were very far from perfection. They were no better than the civilization that produced them. Some of their provisions could not be improved, others were barbarous and cruel.<sup>81</sup> They were an improvement upon all that had gone before them, and were prophesies of the future. Roman jurisprudence was in its infancy when these laws were reduced to writing, but the succeeding centuries under the republic built up a vast fabric of jurisprudence, having the Twelve Tables for its foundation, as is shown by the opinions and decisions of the judges and the commentaries of the sages, which in the Augustan age<sup>82</sup> had grown to vast proportions, being contained in as many books, it is estimated, as that of the English common law in the middle of the nineteenth century.<sup>83</sup>

80. Roman law, at least in the period of the codified version of it, took a quite different approach to precedent than Wade suggests. Judicial rescripts were still issued after the codes but "they were no longer authoritative except for the parties to whom they were addressed." 23 ENCYC. BRITANNICA, *supra* note 73, at 509. Moreover, as Watson concludes, "[t]he role of interpretation given to the pontiffs entailed . . . little scope for customs and judicial precedent in lawmaking." WATSON, *SPIRIT*, *supra* note 42, at 39.

81. For example, debtors could, "after the performances of various legal rites and the passage of a certain amount of time," divide a debtor's body among themselves. See WATSON, XII TABLES, *supra* note 66, at 15.

82. Approximately 27 B.C.-14 A.D.

83. All the juristic material in the *Corpus Juris*, except for a few extracts in the Digest, is post-Augustan. However, the Digest does contain a lengthy extract from Pomponius' *enchiridium* (manual), which lists numerous Augustan and pre-Augustan jurists and their works, some of which are extensive. DIG. 1.2.2.35-47 (Pomponius, Manual).

More importantly, the books used in the Roman legal system were primarily the writings of scholars, not judges. Watson describes the production of these works as follows:

The first 250 years of the empire was the great period of juristic activity.



Cicero conceived the idea of codifying this vast mass of law into convenient form, and a similar situation and obvious necessity inspired Lord Bacon with the same thought as to the English common law, even when its reports and commentaries were in their infancy.

Codification finally took place under Theodosius, the younger,<sup>84</sup> and later under Emperor Justinian<sup>85</sup> in the first part of the fifth century. At that time the Roman or civil law was dispersed in two thousand volumes and three million verses, detached from the writings of the sages.<sup>86</sup> The codification under Justinian,<sup>87</sup> which contains the body of the civil law, is as fol-

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Books were produced in profusion by one renowned jurist after another. These books might be complete commentaries on the whole of the Edict or on the whole of the civil law, or they might be monographs on one branch of law, or collections of replies to problems (actual problems or theoretical ones invented by colleagues or pupils), or they might, like Gaius's *Institutes*, be textbooks.

WATSON, RL & CL, *supra* note 20, at 24-25.

84. As explained by Watson:

Theodosius had appointed a nine-man commission in 429, with instructions to compile a collection of all the statutes since the time of Constantine which had been meant to be of general application. When this was completed, the compilers were to extract from it and from [other sources] all that was still useful and not obsolete, and this second collection was to be given statutory effect. The scheme was overambitious and was dropped, but in 435 a new commission, this time of sixteen men, was set up, with the more limited aim of collecting all the general imperial constitutions, but with power to alter them to bring them up to date. This commission completed its task in two years.

WATSON, XII TABLES, *supra* note 66, at 91.

JAMES KENT, COMMENTARIES ON AMERICAN LAW (10th ed. 1860), a frequently used source for Wade, discusses Theodosius' codification at 1 KENT, *supra*, at 598. There are numerous editions of Kent's COMMENTARIES but Wade's page references appear to refer to this one, which he probably first read as a young lawyer. As Watson notes, this was hardly a comprehensive codification, but was more akin to creating a revised volume of statutes.

85. Justinian engaged in codification from his ascension to the throne in 527. See WATSON, XII TABLES, *supra* note 66, at 92. Justinian forbade commentaries to keep the body of law manageable. See *id.*

86. These figures are from 1 KENT, *supra* note 84, at 599.

87. Justinian reigned 527-565. Codification occurred early in his reign, with publication of the *Codex* in 529 and a revision in 534; the Digest and Institutes in 533; and the *Quinquaginta Decisiones* (Fifty Decisions) in 530. See KUNKEL, *supra* note 61, at 166-68. Justinian added *Novellae Constitutiones* ("Novels"—new imperial decrees), but never published a collection of them. The novels survive only in fragments. See TELLEGEN-COUPERUS, *supra* note 62, at 146; OXFORD CLASSICAL DICTIONARY, *supra* note 67, at 257.

Watson describes Justinian's codification project as follows:

Justin instructed Tribonian to form a commission in December 530. Tribonian appointed sixteen members, including the great professor Theophilus and Dorotheus. They were to make excerpts from the ancient

laws: The Code in twelve books; The Institutes or Elements of the Law in four books; the Digest or Pandects, which is a vast abridgment of the decisions of the Praetors, and the writings and opinions of the ancient sages of the law, in fifty books.<sup>88</sup>

The civil law thus compiled, codified and arranged, the Emperor Justinian pronounced the very temple of human justice.<sup>89</sup> Into this venerable temple lawyers and Judges of later times have entered with uncovered heads, to find, as said by Chancellor Kent, "the greatest repository of sound legal principles, applied to the private rights and business of mankind, that has ever appeared in any age or nation."<sup>90</sup> He said of the Digest that

[i]t is supposed to contain the embodied wisdom of the Roman people in civil jurisprudence for near twelve hundred years, and the European world has ever since had recourse to it for authority and direction upon public law, and for the exposition of the principles of natural justice.<sup>91</sup>

Sir Matthew Hale said that the grounds and reasons of the lawyers were so well delivered in the Digest that a man could never well understand law as a science without first resorting to the Roman law for information.<sup>92</sup>

If the law is in any sense an index to the intelligence, moral-

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writers of authority. . . . The excerpts were to be grouped according to subject matter in fifty books, and the books were to be subdivided into titles. The commission was given full and unhampered power to choose the best view on each point and was instructed to cut out all dissensions and all that was obsolete or superfluous. . . . Justinian's aim was not to change and modernize the writings of the classical jurists. They were not to be brought up to date. . . . The haste shown by its compilers made it inevitable that the work [the Digest] would contain defects. . . .

WATSON, RL & CL, *supra* note 20, at 84-85.

88. This paragraph is a close paraphrase of material in 1 KENT, *supra* note 84, at 599-600, with significant amounts of material omitted. "Fifty books" should not be read as the equivalent of fifty volumes of the Montana Reports. Roman "books" were much shorter.

89. Kent said that Justinian directed that the compilation should be made with such care "that it might hereafter be regarded as the temple and sanctuary of justice." 1 KENT, *supra* note 84, at 601. Interestingly Justinian's "temple" was written in Latin at a time when the language of the empire was, and had been for centuries, Greek, suggesting that the Roman codifiers had little interest in communicating the law clearly to the citizenry. See WATSON, RL & CL, *supra* note 20, at 113-14.

90. 1 KENT, *supra* note 84, at 602.

91. 1 KENT, *supra* note 84, at 600.

92. See GILBERT BURNET, THE LIFE OF SIR MATTHEW HALE: SOMETIME LORD CHIEF JUSTICE OF HIS MAJESTIES COURT OF KINGS BENCH 10 (London, C. & J. Rivington 1823) (1682). Wade probably took the comment from 1 KENT, *supra* note 84, at 607 as this is a direct quote from Kent.

ity and justice of a people, then we know that the Romans were highly civilized and enlightened. And though the Roman world has passed away, the principles of its jurisprudence remain. Time has not obscured the light which they placed upon the seven hills of the Eternal City. Wherever justice is administered according to the law of the land in the temples of the law; wherever oratory inspires to grand achievement and endeavor; wherever patriotism teaches men to die for country and home; where there is a probing of the human heart and conscience for principles of natural justice; wherever philosophy seeks to explain the mysteries of nature and life; wherever literature, poetry and song bring consolation, hope or joy—there is old Rome, pleading for patience and courage in every noble effort.

What was the magic power of this jurisprudence which has caused it for so many centuries to hold supreme sway over the minds and hearts of men? The answer must be, that it discovered and applied the principles of natural justice to a solution of the questions and controversies which arise in the infinitely varied transactions and affairs of civilized man. It was the application of reason instead of force, in the settlement of difference and disputes. And a principle when discovered and applied was preserved, and added another treasure to the law. Such a course in time builds a system of jurisprudence.

Another principle which is alike necessary to the preservation of order, to the protection of human rights and to judicial growth, is that the law is supreme and must be obeyed. Mr. Finlason in his introduction to *Reeves' History of the English Laws*<sup>93</sup> says that "[i]t was a first principle of the Roman law to uphold the supremacy of [the] law as a means of redress for injury or wrong, and to treat as a serious offense against the state any recourse to force or arms for that purpose."<sup>94</sup>

This principle—the protection of life, liberty, and property, by the law of the land, or by due course of law—was sacred to

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93. W.F. Finlason, *Introduction to REEVES' HISTORY OF THE ENGLISH LAW FROM THE TIME OF THE ROMANS TO THE END OF THE REIGN OF ELIZABETH* (American ed., M. Murphy 1880) (1784-85). This history was first published in a two volume edition in 1784-85 which covered only through Henry VII. Several editions later, an edition written by Finlason was issued in 1869 covering through Elizabeth I. This 1869 edition was the basis for the 1880 American edition which divided the work into five volumes instead of three and corrected cross references in Finlason's notes. Wade probably used either the 1869 or 1880 editions, my page references are to the five volume 1880 edition. (Since the two editions are identical in substance, it did not matter which was used.) Finlason's introduction appears in the first volume.

94. *Id.* at xxxv.

Roman jurisprudence, and subsequently became the dearest right of the people under the English common law.

In many other respects the Roman law set up a great light for the guidance of future ages and peoples. Chancellor Kent in speaking of that law said

The rights of . . . property, and the various ways by which it may be acquired, enlarged, transferred, and lost, and the incidents and accommodations which fairly belong to property, are admirably discussed by the Roman law, and the most refined and equitable distinctions are established and vindicated. Trusts are settled and pursued through all their numerous modifications and complicated details, in the most rational and equitable manner. So, the rights and duties flowing from personal contracts, express and implied, and under the infinite variety and shapes which they assume in the business and commerce of life, are defined and illustrated with a clearness and brevity without example. . . . [T]he civil law shows the proofs of the highest cultivation and refinement; and . . . has been the fruitful source of those comprehensive views and solid principles which have been applied to elevate and adorn the jurisprudence of modern nations.<sup>95</sup>

Upon all matters which could be the subject of civil rights or claims in a civilized country, the Roman law made ample provisions. All property in land must emanate from the state,<sup>96</sup> and upon "all matters relating to the origin, the succession, or the transfer of property in lands," there were copious provisions and careful regulations.<sup>97</sup> Descent of land was controlled by principles of equality and equity.<sup>98</sup> "The right of testament was one of the privileges of Roman citizenship,"<sup>99</sup> and there were ample regulations as to the authentication and proof of wills. Gifts, all matters of contract, as to real or person property, bailments, leases and loans, and all matters of prescription, and the rights

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95. 1 KENT, *supra* note 84, at 608-09.

96. This portion of the sentence is based upon one of Finlason's notes in his introduction. See Finlason, *supra* note 93, at xxxv n.3 ("It was a first principle of the Roman law that the property in land must emanate from the State. . . .") It is contrary to Montana's nineteenth century experience, however. Early Montanans simply appropriated land in many cases because there was little or no government. Even when there were government rules regarding land, they frequently contradicted local land use practices and were ignored as far as possible. See Morriss, *Private Actors*, *supra* note 53, at 138-44.

97. Finlason, *supra* note 93, at xxxv.

98. This is a close paraphrase of a sentence in Finlason, *supra* note 93, at xxxvi.

99. Finlason, *supra* note 93, at xxxvi.

acquired thereby; "[i]n short, upon all the multitudinous affairs and transactions of life there were copious provisions . . . sufficient for the regulation of any civilized community. . . ." <sup>100</sup>

In order to learn something of the source of the English common law on the subject it is important to inquire how the rights thus secured by the Roman law were ascertained and adjudicated. For this we must enter a Roman court room and look upon a trial there. How were the facts of the case found, and how was the law arising thereon applied? <sup>101</sup> This inquiry involves one of the highest departments of the law, for it were idle to declare rights, duties and obligations, unless ample means are provided for their actual enforcement, whereby justice is obtained and administered. In nothing is the advancement from barbarism to civilization more apparent than in the processes employed to determine the right from the wrong in controversies between men.

Upon this subject the author last named [Finlason] speaks as follows:

In nothing was the Roman law more remarkable than in the importance it attached to procedure, the practical part of [the] law, the actual means and processes by which justice is obtained and administered. The Roman law provided a remedy for every injury, and a proper procedure for every remedy. It gave civil actions by way of obtaining compensation; it had a rational system of procedure under which the questions in dispute were first ascertained, and then, if there was any fact in dispute, they were remitted to a rational trial by sworn judges, upon sworn evidence, and the parties could examine each other as witnesses. <sup>102</sup>

"[T]he principle of the Roman system was the separation of the law from the fact, which is essential to anything like a science of law, or any regular procedure." <sup>103</sup>

The system of trial under the Roman law was the original of trial by jury, with which, in all essential respects, it was identical. The essence of it was trial by sworn judges taken from the people, and open to objection by either party. <sup>104</sup>

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100. Finlason, *supra* note 93, at xxxvii.

101. This sentence and the preceding sentence are reversed in the manuscript.

102. Finlason, *supra* note 93, at xxxvii n.2.

103. Finlason, *supra* note 93, at xli.

104. Finlason, *supra* note 93, at xli.

There were "regular jury lists—that is, lists of those qualified to act as . . . jurors."<sup>105</sup>

All this would apply to trials under the English common law, and in the every day language of our court-rooms means, that the issues to be tried must be clearly stated in the pleadings, which are the written allegations of the parties; that the law of the case must be determined by the judge who presides at the trial; that the controverted facts must be determined by a jury chosen from the jury lists of those citizens qualified to act as jurors; that the judge must apply the law to the facts found.

Guizot in his *History of Civilization*<sup>106</sup> in speaking of trials under the Roman law says:

He to whom the jurisdiction appertained, preator, provincial governor, or municipal magistrate, on a case being submitted to him, merely determined the rule of law, the legal principle according to which it ought to be adjudged. He decided, that is to say, the question of law involved in the case, and then appointed a private citizen, called the *judex*, the veritable juror, to examine and decide the question of fact. The legal principle laid down by the magistrate was applied to the fact found by the *judex*, and so the case was determined.<sup>107</sup>

Sandars in his introduction to *The Institutes of Justinian*<sup>108</sup> says:

In enforcing rights two very different functions have to be exercised by those to whom the powers of the State are delegated. First, there must be someone invested with magisterial authority, giving the sanction and solemnity of his position to the whole proceeding, who shall represent the law and say what the law is, and who shall have power to employ the force which the State places at the disposal of those it selects to administer

105. Finlason, *supra* note 93, at xxxix.

106. F. GUIZOT, THE HISTORY OF CIVILIZATION FROM THE FALL OF THE ROMAN EMPIRE TO THE FRENCH REVOLUTION (William Hazlitt trans., 1894). Wade's references to this book included mention of "parts." The edition I used was divided into four volumes, each containing multiple "lectures," but no parts. I therefore omitted the references to "Parts" from the text.

107. This quote from Guizot is taken from Finlason, *supra* note 93, at xl-xli. The original material is found at 2 GUIZOT, *supra* note 106, lecture 2, at 36-37. Wade probably used one of the earlier American editions (the 1894 edition indicates that the Third American edition had been published in 1842). Aside from minor changes in note material, the text apparently did not change among editions.

108. Thomas Collett Sandars, *English Introduction, Translation, and Notes to THE INSTITUTES OF JUSTINIAN* (Wm. G. Hammond ed., 1st American ed. 1876).

justice. Secondly, an inquiry has to be made into particular facts, evidence has to be received and weighed, and an opinion formed and pronounced as to the real merits of the case. The person who exercised the one function was spoken of by the Romans as *magistratus*; the person who exercised the other as *judex*.<sup>109</sup>

Phillimore in his *Introduction to the Study and History of the Roman Law*<sup>110</sup> says:

It is hardly possible to conceive a stronger proof of that ignorance of the most ordinary topics connected with general jurisprudence, which has so long been the characteristic of the most eminent lawyers in this country [England], than the notion, so vehemently entertained and so popularly received, that the jury is of a peculiarly English origin. . . . [T]he principle and essence of the jury, which involves the selection of judges, unknown beforehand to the executive magistrate, from a particular body, and which gives to those judges the power of deciding, with certain restrictions and under the direction of certain rules, on the question in dispute, is to be found in the institutions of many other countries; . . .

The trial of a citizen by other citizens, and a judicial authority in causes civil as well as criminal, inherent in every free member of the community, was the cornerstone of the Athenian Constitution; it was thence transferred to [Rome] . . . .<sup>111</sup>

And we might say, with hardly the possibility of being wrong, that from Rome this system of trial was transferred to Britain and became a part of the English common law.

In the light of these authorities it seems idle to search for trials by compurgators and the ordeal, in the crude Saxon annals, or for trials by Thanes as described in the Code of Alfred,<sup>112</sup> or for the Norman trial by battle, for the origin of the

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109. *Id.* at 48. This quote from Sandars' work is present in Finlason, *supra* note 93, at xxxviii. There are many editions of Sandars' work. Given the quote in Finlason, however, and Wade's incorporation of minor changes in punctuation from that quotation, it is likely that Wade relied on Finlason's excerpt of Sandars.

110. JOHN GEORGE PHILLIMORE, *INTRODUCTION TO THE STUDY AND HISTORY OF THE ROMAN LAW* (1848).

111. *Id.* at 17-19. This quote from Phillimore is taken from Finlason, *supra* note 93, at xlii. (Wade omits the phrase "inherent in every freeman" from the final sentence without indicating an ellipsis, added the parenthetical England to the first sentence, and introduced numerous small errors into the text, which have been corrected here.)

112. The trial by Thanes is part of the treaty between Alfred and Guthrum, not the earlier code of Alfred. See *Alfred and Guthrum*, in *THE LAWS OF THE EARLIEST ENGLISH KINGS* 99, ¶3 (F. L. Attenborough ed. and trans., 1922). It is likely Wade

English common law trials by judge and jury. Long before Saxon, Dane or Norman had occupied Britain, trials were taking place, and rights were being adjudicated on that island under a system of law that had about it the essential elements of the English common law trial by judge and jury.

In the year 55 B.C. Caesar carried Roman law and civilization to ancient Britain. The conquest of the island and the barbarous tribes that inhabited it, was not fully accomplished until A.D. 79-84 under Julius Agricola. From that time until the Saxon invasion Britain was a Roman province. It was an important addition to the Empire,<sup>113</sup> and the law was administered there by such illustrious praetorian prefects as Papinian,<sup>114</sup> Paulus<sup>115</sup> and Ulpian.<sup>116</sup>

knew of the Saxon laws through Finlason, *supra* note 93, which includes extensive quotations from compilations of Saxon laws.

113. 1 KENT, *supra* note 78, at 606. This characterization is inaccurate. English historian F. J. Haverfield, for example, concluded that the Romans "have left little permanent mark on the civilization and character of [Britain]. The ruins of their forts and fortresses are on our hill-sides. But, Roman as they were, their garrisons did little to spread Roman culture here." THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 6 (1956) (quoting from F.J. HAVERFIELD, CAMBRIDGE MEDIAEVAL HISTORY i. 370). The Celtic language, for example, "remained in general use as the everyday language in Britain throughout the Roman period," at least in the countryside where most people lived. SALWAY, *supra* note 113, at 18.

114. "Papinian was an important legalist who left a lasting impression on Roman law." He traveled to Britain. See MATTHEW BUNSON, ENCYCLOPEDIA OF THE ROMAN EMPIRE 312-13 (1994). While in Britain with the Emperor Severus, however, Papinian accompanied the emperor on military campaigns rather than serving as a legal administrator. See PETER SALWAY, A HISTORY OF ROMAN BRITAIN 174 (1997).

115. Paulus was an assistant to Papinian, wrote more than 300 books on Roman law, "most centered on the codes and were known for their excellent style, brevity and ease of reading. Large portions were used by Justinian." BUNSON, *supra* note 113, at 317. Paulus was sent to Britain to arrest military men who had supported an unsuccessful rival to the Emperor Constantine. While in Britain he:

extended his operations without warning, trapping some who had been implicated, but also imprisoning many on trumped-up charges. Though it appears that he [did] exceed his orders, the emperor subsequently approved of his actions and did nothing to prevent the conviction and punishment of those whom Paul [Paulus] had seized. The methods employed were so extreme, and the injustices so blatant that the *vicarius* of Britain, Martinus, himself a loyal supporter of the emperor, attempted to persuade Paul [Paulus] to release those who were not guilty. . . . This only resulted in false accusations against himself and other senior officers in Britain. As a final desperate act, Martinus was driven to attack Paul [Paulus] with a sword. Unsuccessful, he committed suicide.

SALWAY, *supra* note 113, at 262-63. Such an administration of the law is hardly a tribute to the rule of law.

116. A "brilliant legalist" who "authored nearly 300 books which were the basis for a large part of the Code of Justinian." BUNSON, *supra* note 113, at 432. Ulpian was murdered by the Praetorian Guard in 224. See WATSON, RL & CL, *supra* note



It is not improbable that in the decline of the Empire, Britain situated remote from its great capital, and beyond the influences of the invasions of the northern tribes, became a city of refuge to the Roman law, where it was administered in its purity as during the era of the Republic.<sup>117</sup>

The planting of the Roman law and civilization in Britain, is one of the most important events in history. It was a fateful event, and without much doubt, resulted in giving the English common law to mankind.

The Britons under the influence of the Roman law and civilization became civilized and enlightened. During the centuries that ensued they must have learned to cherish that law as their birthright, and as the source of their prosperity and wealth.<sup>118</sup> Laws, usages and customs that bring happiness and peace are revered by the people and are never surrendered to the conqueror. They live around the hearth stone and are transmitted from generation to generation.

In describing Britain under Roman rule, at the time of, and before the Saxon invasion, Green in his *A Short History of the English People*<sup>119</sup> says:

The conquered population was grouped in great cities such as York or Lincoln, cities governed by their own municipal officers, guarded by massive walls, and linked together by a net-work of magnificent roads, which extended from one end of the island to the other. Commerce sprang up in ports like that of London; agriculture flourished till Britain became one of the great corn-exporting countries of the world; its mineral resources were explored in the tin mines of Cornwall, the lead mines of Somerset, the iron mines of Northumberland and the Forest of Dean. The wealth of the island grew fast during centuries of

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20, at 82.

117. Salway makes a convincing case that the reverse is true, noting that by the mid-fifth century at the latest "a distinctively 'post-Roman' society had emerged in Britain [and that Roman society] in Britain disintegrated fairly rapidly after the revolt [of Britain against Constantine in 409]." SALWAY, *supra* note 113, at 332. With respect to law, Salway quotes Zosimus that the rebelling Britains were "no longer obeying Roman laws." *Id.* at 323. Similarly, Keeton concludes that "the pre-[Norman] conquest law . . . owed practically nothing to Roman Law. . . . Nowhere in the British Isles was the survival of any important trace of the Roman Empire discoverable." GEORGE W. KEETON, *THE NORMAN CONQUEST AND THE COMMON LAW* 17 (1966).

118. This is an overstatement. In agriculture, for example, most of the techniques needed for large-scale production predate the Roman conquest. See SALWAY, *supra* note 113, at 450.

119. J. R. GREEN, *A SHORT HISTORY OF THE ENGLISH PEOPLE* (1884).

unbroken peace. . . .<sup>120</sup>

These were the wonderful effects of enlightened law upon the barbarous tribes of the island. Under its influence they were formed into prosperous communities, built cities, commenced lasting internal improvements, opened trade and commerce with foreign nations, accumulated wealth and entered upon the high-way of civilized life.<sup>121</sup>

It was the policy and habit of the Roman government under the republic and empire, to secure the conquests of her legions, by bestowing upon the vanquished people, the blessings and benefits of her law. This was the secret of Roman greatness. Rome became mistress of the world by the force of her arms, and the inherent power of her jurisprudence.

In the fifth century the great empire, situated about the Mediterranean sea, and comprising most of the known world, was in its decline. Five centuries before Caesar had passed the Rubicon and paved the way to Empire. The Empire brought with it seeds of death. Luxury and wealth had undermined republican virtue, and liberty went down before the tyranny and selfishness of despotic power. The glories of the Augustan age were followed by degeneration, debauchery and decay. Nor would the Republic, if it had not been succeeded by the Empire have long endured. Enlightened and learned as was its jurisprudence, its people were half slave and half free. This condition made then, as it has ever since such an irrepressible conflict, as sooner or later would have overthrown the Republic.<sup>122</sup>

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120. *Id.* at 42-43.

121. Roman influence waned quickly after Roman authority ended. Salway concludes, for example, that it is "extremely difficult to point to any convincing examples of unbroken urban life in Britain from the Roman period to the revival of towns in the mid-Saxon times." SALWAY, *supra* note 113, at 341. The economy also changed dramatically. By 430 "society in Britain had effectively stopped using coins and had no source of factory-manufactured pottery other than the very occasional import." *Id.* at 338.

122. Wade as noted earlier, was a Union veteran and had written a novel about the Civil War period. Montana was heavily Democratic during its early years (delaying statehood under post-Civil War Republican federal Administrations) and thus even in the 1890s, echoes of the War were undoubtedly frequent.

Wade is confusing the collapse of the Roman Republic with the gradual decline of the Empire centuries later. The decline also started much later than the end of Augustus' reign. Gibbon's *Decline and Fall of the Roman Empire*, for example, puts the height of the Empire in 98-180 A.D., well after Augustus' death in 14 A.D. Moreover, while Romans long lamented the evils of slavery, it is generally not thought to have been a major cause of the decline. The fall of the Republic is more commonly linked to corruption and the concentration of political power in Caesar, Pompey, and Crassus. See SALWAY, *supra* note 113, at 22. Finally, one of the striking features of

In the year 449 the Saxons, taking advantage of the absence of the Roman legions, which before then, had been withdrawn for service in Italy against the Goths, invaded Britain.<sup>123</sup>

Whatever can be learned of the Saxons, as the parents of the English speaking race and of their manners and customs, before they came under the influence of Roman civilization, is of undying interest.<sup>124</sup> The origin of the common law cannot be traced, except by learning something of who they were, from whence they came, the character and quality of their laws, and the degree of civilization to which they had attained in their native home. Their movement upon Britain seems to have been a race migration, for after that event we hear nothing of Saxons in their fatherland.<sup>125</sup> The historian already quoted [Green] makes this interesting picture of the Saxons before their movement on Britain.

For the fatherland of the English race we must look far away from England itself. In the fifth century after the birth of Christ, the one country which bore the name of England was what we now call Sleswick, a district in the heart of the peninsula which parts the Baltic from the Northern seas. . . . The dwellers in this district were one out of three tribes, all belonging to the same Low German branch of the Teutonic family, who at the moment when history discovers them were bound together into a confederacy by the ties of common blood and a common speech. To the north of the English lay the tribe of Jutes, whose name is still preserved in their district of Jutland. To the south of them the tribe of Saxons wandered over the sand-flats of Holstein, and along the marshes of Friesland and the Elbe. . . . Although they were all known as Saxons by the Roman people who touched them only on their southern border where the Saxons dwelt, and

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Roman law is that for a society built on slavery there was "almost no such thing as a distinct body of law of slavery." WATSON, RL & CL, *supra* note 20, at 116.

123. The last Roman troops were withdrawn in 407 by Constantine III. See BUNSON, *supra* note 113, at 61. Salway concludes that "it is extraordinarily difficult to match the idea of a major Saxon take-over in the 440s either with the archaeology or with other literary evidence that indicates a slow end often halted or reversed spread of Anglo-Saxon occupation, which did not really extend over most of England until the sixth century." SALWAY, *supra* note 113, at 338.

124. This is not Finlason's view. Finlason thought the Saxons were barbarians who contributed little to the development of English law. See *infra* note 128.

125. Some Saxons remained in Germany and engaged in a series of wars with Charlemagne in the eighth century. In the ninth century, a Saxon duchy was established under Frankish sovereignty; it was dissolved in the twelfth century and its name shifted to present day Saxony. 8 ENCYCLOPEDIA BRITANNICA; Micropedic 936 (1977).

who remained ignorant of the very existence of the English or the Jutes, the three tribes bore among themselves the name of the central tribe of their league, the name of Englishmen.<sup>126</sup>

And so at the very dawn of their history, these three English-speaking tribes had discovered and put into use the principle of confederation or union, whereby they were bound together as one people. Was this the prophesy and promise, that in another hemisphere, in the far distant future there should arise another Saxon Union of independent states, a grand republic covering a continent, the home of freedom and self-government, the hope of humanity?<sup>127</sup>

It is important to know something of the common life, the government, the laws, and the sense of justice of this first English-speaking Republic.<sup>128</sup> The basis of their society was the free landholder. Ownership of land was necessary to full freedom. The landless man ceased to be free.

The actual sovereignty within the settlement resided in the body of its freemen. Their homesteads clustered round a moot-hill, or round a sacred tree, where the whole community met to administer its own justice and to frame its own laws. Here the field was passed from man to man by the delivery of a turf cut from its soil, and the strife of farmer with farmer was settled according to the "customs" of the settlement, as its "elder-men" stated them, and the wrong-doer was judged and his fine assessed by the kinsfolk. Here, too, the "witan," the Wise Men of the village, met to settle questions of peace and war, to judge just judgment, and frame wise laws. . . .<sup>129</sup>

126. See GREEN, *supra* note 119, at 39-40.

127. During the period between 400 and 600, the Angles, Saxons, and Jutes conquered Britain. In doing so they acted not as a confederation but as individual tribes, establishing at least ten different kingdoms. See PLUCKNETT, *supra* note 118, at 8. Only after 600 did the kingdoms gradually unite; Plucknett calls this unification the "one fact of capital importance" about the period 600-1100. *Id.* at 9. Wade's rhetorical flourish here thus has no basis in fact.

128. The Saxon period in Britain can hardly be called either a Republic or English speaking. Interestingly, in this section Wade rejects Finlason's views, in contrast to his embrace of Finlason's history of Roman institutions. Finlason saw little worthwhile in the Saxons, aside from their adoption of Roman-based institutions after their arrival in England. He wrote:

The Saxons, therefore, did not bring any institutions or laws worthy of the name with them. They brought only rude barbarian usages, as will be seen in their written laws, which express for the most part their own usages: such, for instance, as the ordeal. It is manifest that they created nothing civilized.

Finlason, *supra* note 93, at lv.

129. GREEN, *supra* note 119, at 41. This is incorrect. "The Witan seems to have

The Saxon plan of government by assemblies of all the people, or of all the land-holding free men, is no doubt the origin of representative assemblies for the purpose of law-making-parliament-legislature-congress. Representatives were elected after the people became too numerous in their settlements of villages to meet and act together.<sup>130</sup> This was the origin of representative government by the people. Here was the same principle of self-government—the right of the people to meet and make their laws—which in that far away republic, founded by descendants of the same people, ripened into the election by the people, of legislative, judicial and executive officers, to make, interpret, and enforce the laws.

The Saxon conception of justice and the plan of ascertaining and enforcing it, and the punishment of crime, were those of an ignorant, barbarous people. Ignorance often tinctures its justice with superstition and cruelty. Mr. Green makes in substance the following statements concerning Saxon justice and how it was arrived at and administered.

Justice had to spring from each man's personal action; and every freeman was his own avenger. But, even in the earliest forms of English (Saxon) society . . . this right of self-defense was being modified and restricted by a growing sense of public justice. The "blood-wite," or compensation in money for personal wrong, was the first effort of the tribe as a whole, to regulate private revenge. The freeman's life and freeman's limb had each . . . its legal price. . . . The price of life or limb was paid, not by the wrong-doer to the man he wronged, but by the family or house of the wrong-doer to the family or house of the wronged. Order and law were thus made to rest in each little group of English people upon the blood-bond which knit its families together; every outrage was held to have been done by all who were linked by blood to the doer of it, every crime to have been committed to all who were linked by blood to the sufferer from it. From this sense of the value of the family bond as a means of restraining the wrong-doer by forces which the tribe as a whole did not as yet possess, sprang the first rude forms of English justice. Each kinsman was his kinsman's keep-

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played little part either in the preparation or in the promulgation of [the various Saxon Kings'] collections of laws." KEETON, *supra* note 117, at 13.

130. In the late Saxon era both the shire-moot and the hundred, two of the three main local governing bodies, were made up of religious authorities and representatives of the King together with the "best men" of the district. See KEETON, *supra* note 117, at 14-15.

er, bound to protect him from wrong, to hinder him from wrong-doing, and to suffer with and pay for him if wrong were done. So fully was this principle recognized that, even if any man was charged before his fellow tribesmen with crime, his kinsfolk still remained in fact his sole judges; for it was by their solemn oath of his innocence or his guilt that he had to stand or fall.<sup>131</sup>

Here is the faint beginning of the English common law doctrine, that crime against an individual is an offense against the state. The crime against an individual member, being an offense against his family or kinsman, the step was natural and easy, to make the crime an offense against society or the state.<sup>132</sup>

In Forsyth's *History of Trial by Jury*,<sup>133</sup> it is stated that among the Saxons every freeman was deemed to possess a certain pecuniary value, which varied according to his rank; and this determined the amount of compensation which he was entitled to receive for a wound or a blow. Every bodily injury from the loss of a nail to the destruction of life had its appropriate price, which must be paid by the offender; and it was only on failure of this payment that he could be punished for his wrongful acts. A regular tariff of penalties was thus established, which gave rise to appellations by which different classes were distinguished.

[B]y a law of Alfred, if any man attempted private redress by vengeance before he had shown his readiness to accept the

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131. GREEN, *supra* note 119, at 40. Wade did not indicate that this is a direct quote.

132. Wade's analysis here is incorrect. The shift from family responsibility to state responsibility was a Norman innovation. See HAROLD J. BERMAN, *LAW AND REVOLUTION* 449-50 (1983). It was not a small step because it shifted criminal law from a tort-based system dependent on the action of the aggrieved party for enforcement to a state-based system which required the power to coerce the aggrieved party's cooperation. Moreover making a crime an offense against the victim's family is the only practical way to enforce a tort-based criminal system; if it were not, killing the victim would extinguish the tort since there would be no one to threaten vengeance.

The change also made criminal prosecutions a source of revenue for the state, a phenomenon that is repeating itself under civil forfeiture laws today. See Bruce L. Benson et al., *Entrepreneurial Police and Drug Enforcement Policy* (unpublished manuscript on file with author). Wade's discussion of this undoubtedly had particular resonance with some Montanans since during both the gold rush (1862-65) and the free range cattle boom (1870-1890) Montanans, including prominent figures, successfully took the law into their own hands. See Morriss, *Private Actors*, *supra* note 53, at 149-54.

133. WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* (James Appleton Morgan ed., 2d ed. 1971).

wergild if offered to him, he was to be severely punished. If, however, the offender refused to pay the legal compensation, he was exposed to the vengeance of the injured party and his friends; and this alternative was expressed by an old Anglo-Saxon proverb . . . "Buy off the spear or bear it."<sup>134</sup>

In the case of an affray an account was taken and balance struck of the amount of slaughter, and of the numbers and value of the slain. If on both sides these were equal, then no vengeance could be taken, or demand made for compensation; but if one side had sustained greater loss than the other it was entitled to compensation, or failing that to vengeance to the extent of the surplus.<sup>135</sup>

"[T]rial by jury was unknown to our Anglo-Saxon ancestors."<sup>136</sup> It required several centuries to bring their civilization up to so intelligent a form of administering justice. They had to learn that the demands of justice could not be satisfied by a money compensation for life or limb according to the class to which the injured person belonged. According to their ideas, the life or the toe-nail of the land-holding freeman was much more valuable than of the landless man. Their society seems to have been divided into class according to the appraised value of life and limb.<sup>137</sup>

They sought to ascertain the truth by a system of compurgators as follows: If a person was charged with a debt or crime, which he denied on oath in court, and could get a certain number, generally twelve, of his kinsman, or in default of these, other persons, to swear that they believed him, he had judgment given in his favor, unless the opposite party could produce more compurgators on his side. No witnesses who knew anything of the facts of the case in hand were ever called into these early courts, if courts they may be called, but the trials seem to have been contests of oaths, in which on one side, witnesses were called to sustain, and on the other to impeach the oath and character of the party charged with a debt or crime.

If the party was unable to vouch a sufficient number of compurgators, he was declared to have taken a false oath, and

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134. *Id.* at 49. Wade used the word "compensation" for "wergild."

135. This is a close paraphrase of FORSYTH, *supra* note 133, at 49.

136. FORSYTH, *supra* note 133, at 45.

137. Wade is correct that the Anglo-Saxons divided society into classes. The values in the compensation schedules reflected the division, and were not the source of it.

lost his suit in a civil case, or was convicted in a criminal. If convicted he was required to submit to the ordeal of hot iron, hot water, or the corsnead or ordeal of the accursed morsal, as tests of his innocence.<sup>138</sup>

What an immeasurable distance these Saxon trials seem from the common law trial by judge and jury, in which the issues to be tried are clearly stated in writing, and an impartial jury, upon the sworn testimony of witnesses who speak from personal knowledge of what they have seen, find the facts under the direction of a learned judge who declares the law.

The Saxon government in its native home, seems to have been an aristocracy of land-owners. The landless man while not a slave who might be bought and sold, had no voice in the government; his life and his limbs were of less value than were those who owned land; and these class distinctions and disabilities must have made him a mere serf. There does not appear to have been in their government, in their administration of justice, or in their civilization the faintest belief in or knowledge of the natural and inalienable rights of humanity; or that a man was valuable beyond measure or price, because he was a man, or that human life, whether of serf or land-owner was sacred, and not the subject of inventory and appraisal. Saxon liberty must have been a thing of later growth.<sup>139</sup>

But they were a brave and hardy people; they had never been conquered, and the narrow limits of the fatherland became too small for their spirit of enterprise and adventure. Besides being farmers, hunters and fishermen along its shore, they had ventured out upon the sea, and became pirates pillaging along the British Channel, before they attempted the conquest of the island.

The driving spirit of their race already broke out in the secrecy and suddenness of their swoop, in the fierceness of their

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138. See FORSYTH, *supra* note 133, at 65-66. In the ordeal of hot iron, the accused had to carry a heated iron nine feet. Afterwards, his hands were bandaged for three nights. The bandages were then removed—if the hands were clean the accused was innocent. If “unhealthy” matter appeared, he was guilty. Similarly, with the ordeal of hot water, the accused had to take a stone from a bowl of boiling water. The ordeal of the “cursed morsel,” however, was used only for clergy. The accused was given a morsel of food which concealed a feather or similar impurity. If he choked, he was guilty. See PLUCKNETT, *supra* note 116, at 114. As Plucknett notes, these ordeals were surrounded by religious ceremonies which may have added to the accuracy of the test through psychological pressures. *See id.*

139. The Saxon practice of using payments and fines to resolve disputes was actually a significant advance for civil society since it replaced blood feuds.



onset, and in the careless glee with which they seized either sword or oar.

"Foes are they" sang a Roman poet of the time, "fierce beyond other foes, and cunning as they are fierce: the sea is their school of war, and the storm their friend; they are seawolves that live on the pillage of the world."<sup>140</sup>

Under Hengest and Horsa who no doubt were the foremost pirates and plunderers of their time and tribe, the Saxons, taking with them their ideas of government, and the administration of justice, entered upon the conquest of Britain.<sup>141</sup> Then for the first time they came within the range and influence of Roman jurisprudence and civilization. They were in a new world, the world of the Justinian code and the civil law, in which learned judges administered those ever-living principles of justice, which even unto this day, have not been more clearly defined or strongly expressed. They were in contact with an old civilization, alive with all the memories and traditions of Roman greatness and glory; with the splendors of the Republic; with the fame of Fabius,<sup>142</sup> Scipio<sup>143</sup> and Caesar; with the eloquence of Cicero,<sup>144</sup> and with the philosophy of Seneca.<sup>145</sup> They saw great cities, a country flourishing with agriculture, whose products had opened the highways of commerce, production mines of

140. GREEN, *supra* note 119, at 44.

141. Hengest and Horsa were:

the two leaders of the first band of Teutonic settlers which came to Britain. . . . [They] came to Britain, probably (though the chronology is very uncertain) about the year 450. It is possible they may have been exiled . . . from Germany, or may have been actually invited over by Vortigern [a British king]. At all events, they . . . agreed to assist the British king against the Picts. In these wars they were invariably successful, and as a reward obtained the Isle of Thanet. But shortly afterwards we find them turning their arms against Vortigern.

SIDNEY J. LOW AND F.S. PULLING, THE DICTIONARY OF ENGLISH HISTORY 546 (1910). After Horsa was slain, Hengest ultimately prevailed and conquered Kent. *See id.* Hengest was the King of Kent until his death about 488. *See HANDBOOK OF BRITISH CHRONOLOGY* 6 (Sir F. Maurice Powicke & E.B. Fryde eds., 2nd ed. 1961).

142. Fabius was a "Roman general and statesman, known as the Delayer or the Shield of Rome." BETTY RADICE, WHO'S WHO IN THE ANCIENT WORLD 52 (1971). He used delaying tactics to protect Rome during the Second Punic War. *See id.* at 52-53.

143. Scipio was the hero of the Second Punic War, defeating Hannibal in 202 B.C. at the Battle of Zuma. *See id.* at 128.

144. "One of the most important Roman orators, who wielded enormous philosophical, intellectual and political influence in the final years of the Republic." BUNSON, *supra* note 113, at 88.

145. "Poet, writer, one of the major literary figures and one of the foremost Stoic philosophers of the first century A.D." BUNSON, *supra* note 113, at 382.

iron, tin, and lead and a people of wealth busy pursuing the avocation of peace.

This condition of Britain at the time of the Saxon invasion, indicates beyond question, that the four centuries of unbroken peace and prosperity under Roman occupation and rule, had accomplished much for the civilization of the people of the island. Barbarous tribes do not build cities, construct roads, engage in commerce or work mines.

Mr. Green, the historian before cited, is of the opinion that the Saxons exterminated the Britons and swept away all the evidences of this civilization. In declaring the effect and result of the Saxon conquest he says

In Britain alone Rome died into a vague tradition of the past. The whole organization of government and society disappeared with the people who used it. The villas, the mosaics, the coins which we dig up in our fields are no relics of our English fathers, but of a Roman world which our fathers' sword swept utterly away. Its law, its literature, its manners, its faith, went with it.<sup>146</sup>

This declaration of the historian can hardly be true. At the time of the Saxon invasion, Britain must have contained a large population.<sup>147</sup> The same author speaks of its great cities, its flourishing agriculture, its extensive commerce and of its vast mineral resources and production. This population was of native Britons, descendants of the people who were conquered four hundred years before then by Agricola. All this indicates in a manner that cannot be a mistake, not only a large population, but thrift, wealth and prosperity. When, if ever, was such a population utterly swept away by the conqueror? The system of government and law that produces this degree of civilization must have been very dear to the people; they were of superior numbers, and equal in courage to the Saxons. It is therefore highly improbable that this brave people were exterminated by the Saxons. Races of men are not so easily blotted out.<sup>148</sup> Old

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146. GREEN, *supra* note 119, at 49.

147. Roman Britain's population was likely between 2.5 million and 3.7 million. See SALWAY, *supra* note 113, at 388. By the Norman conquest, however, Britain had a population of 2 million, perhaps considerably less. See *id.* at 389. As Salway notes, it is unlikely that there was no increase in population during the Saxon period, leaving a large drop in population in Roman times or shortly thereafter to be explained. See *id.*

148. Wade's contemporaries throughout the West were doing their best to "blot

civilizations reaching back through centuries, and nourished by the accumulated memories of generation after generation are tenacious of life. Laws, usages and customs that become a part of the common life of a people, survive every disaster. The Britons may have been vanquished on the field of battle, but the people at large, in their homes, in the great cities and on their farms, with their women and children did not perish. It would be much more reasonable to suppose that the Saxons, coming in contact with the higher civilization and superior laws and customs of the Romanized Britons would have adopted such superior laws, customs and civilization, and their subsequent history shows conclusively that they did.<sup>149</sup>

The ancient Britons were a patriotic people. After the Roman legions had been withdrawn, and they were left to their own resources and courage to defend their country against invaders, it required five centuries for the Saxons to conquer them.<sup>150</sup>

This long period of the conquest is full of significance. During that period new generations on either side were born to the conflict, it gave ample time for the Saxons to become civilized by contact with the Britons; it gave time for race amalgamation, and a commingling of manners, customs and laws,<sup>151</sup> so that at the end of the period there could have been no Saxons or Britons, both having become Englishmen.

The great Saxon, Alfred, who was king more than four hundred years after the Saxon invasion, reigned over but a small part of Britain.<sup>152</sup> A little more than a century later, the Danes

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out" the prior inhabitants of the area. A bill aimed at restricting Indians to reservations was introduced in the next legislature, for example. See *Lo, Poor Indian*, HELENA DAILY HERALD, January 30, 1897, 1 (describing bill "to confine the Reds on their reservation.") Many Americans in the nineteenth century believed the Indians would "pass away." See EDWARD LAZARUS, *BLACK HILLS WHITE JUSTICE* 40-41 (1991).

149. This is inaccurate. As Salway makes clear, Roman Britain disintegrated into numerous tiny statelets:

Unlike the Germanic masters of Gaul, the Saxons who gradually took over what had been the most Romanized parts of Britain had no unitary political or economic structure to acquire and adapt. . . . By the middle of the fifth century Britain was materially more impoverished and institutionally more primitive than it had been when Claudius' army landed in AD 43."

SALWAY, *supra* note 113, at 354.

150. It took two centuries. See PLUCKNETT, *supra* note 116, at 8.

151. This phrase about race amalgamation appears to be a paraphrase of Finlason, *supra* note 93, at lxvi ("Thus it followed, that through the long period occupied by the Saxon invasions, there was ample time for amalgamations of races and of usages, of laws and of institutions. . . .").

152. Alfred was King of Wessex and English Mercia (871-899). See HANDBOOK OF

were masters of the country for a generation, and brought with them their Danish laws and customs.<sup>153</sup> Under Edward the Confessor,<sup>154</sup> and Harold,<sup>155</sup> there was a temporary restoration of Saxon rule, but the Norman conquest of 1066, again subjected the country to the rule of foreign kings,<sup>156</sup> who for the purpose of blotting out English nationality, laws and customs, brought in the Feudal system, which in its beginning was a military organization, instituted or adopted and put in force for the purpose of holding in subjection the country that had been won by conquest. The effects of the feudal system still linger in many institutions of the common law. It was an oppressive system, making a government of king, baron and serf, supported by slavish feudal tenures.<sup>157</sup> The Normans left other marks upon the laws of the country, in the trial by combat, in the separation of the ecclesiastical and civil courts, and in the oppressive forest laws.<sup>158</sup>

The hardships and oppressions of Norman rule were not

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BRITISH CHRONOLOGY, *supra* note 141, at 24. By the time of his death he controlled approximately half of England. See O.F. ROBINSON ET AL., EUROPEAN LEGAL HISTORY: SOURCES AND INSTITUTIONS 125 (1994).

153. Danes held significant influence in Britain between 879 and 1035. See PLUCKNETT, *supra* note 116, at 10. Plucknett summarizes Danish influence, strongest in the portion of Britain they ruled longest, as follows:

They independently developed a sort of grand jury. . . ; they arrived earlier than the rest of the country at the stage where land could be freely bought and sold; they had a marked tendency to form clubs and guilds; their peasantry were less subject to the lords; borough institutions seem to have

*Id.* flourished peculiarly under their rule.

154. Ruling during the years 1042-1066. See HANDBOOK OF BRITISH CHRONOLOGY, *supra* note 141, at 30.

155. Ruling during the year 1066. See *id.*

156. William "had a better lineal claim to the [English] throne" than Harold, who had promised to assist William in taking the throne. ARVEL B. ERICKSON & MARTIN J. HAVRAN, ENGLAND: PREHISTORY TO THE PRESENT 29, 30 (1968). He was thus no more "foreign" than Harold. Lineal claims were less important in eleventh century Britain than they became later, however, because the choice of king rested with the witan. See KEETON, *supra* note 117, at 36.

157. Feudalism in Britain was not oppressive in the sense of state power. Plucknett notes that in feudalism "the power of the State" was "very weak" because it depended on the good faith of undertenants. PLUCKNETT, *supra* note 116, at 507. Moreover, the Roman system of estates in Britain had, by the fourth century, begun "to look very like the medieval relationship of lord and peasant." SALWAY, *supra* note 113, at 437-38.

158. Plucknett, by contrast, calls "the introduction of precise and orderly methods into the government and law of England" the "greatest result" of the Conquest. PLUCKNETT, *supra* note 116, at 11. William introduced the feudal system, "but his greatest contribution was the Norman spirit of clever administration and orderly government, and his own stern enforcement of royal rights. Upon this basis was the common law to be built in later days." *Id.* at 13.

without compensation. They finally resulted in the year 1215 in giving to Englishmen the Great Charter, which for centuries has stood the rock and anchor of their liberties. That instrument made England a nation. It was such a recognition of human rights as before than the world had never seen.<sup>159</sup> It gave to England something besides lords and peasants. It created what has become the great heart of the country—the common people.

In view of this scrap history, what becomes of the theory that the English common law is exclusively of Saxon origin? From whence came the rights and liberties which the Great Charter declared and guaranteed? {They were of ancient origin and the product of many influences.} At that time English nationality and English life, the character and manners of the people, and their system of jurisprudence, was the result of the race blending and mixture of Britain, Saxon, Dane and Norman, and a like mingling of their customs and laws. On the early battlefield of the Saxon conquest, the Britons under the banners of the Cross, fought for their country and the supremacy of the Roman or civil law, against the pagan Saxons who were worshippers of Woden and Thor. Subsequently the faith of the vanquished subdued the conquerors, the gods of the Saxon fatherland disappear from English history and Rome, by Bishop, monk and monastery recovered her lost province.<sup>160</sup> Not only in a spiritual sense did Rome resume her ancient sway, but during the 766 years that elapsed between the Saxon invasion and Magna Charta, her civil law as it existed in Britain when the strangers came, had won an equal conquest over Saxon, Dane and Norman.<sup>161</sup>

The assertion of the historian that the sword of the Saxons swept away the ancient Britons, their faith and their law, as

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159. As Plucknett notes, the Magna Carta was far from unique in Europe—"[m]any Kings and nobles about this time were granting charters to their tenants and subjects, and their general character was not dissimilar even in different countries." PLUCKNETT, *supra* note 116, at 25. The difference was "the use made of it in subsequent history." *Id.*

160. This is incorrect. As Plucknett notes, "the English invaders crushed the British Christians and maintained their own ancient mythology. England therefore had to be converted anew." PLUCKNETT, *supra* note 116, at 8. Not until 597 did St. Augustine arrive to reintroduce Christianity. See *id.* Indeed, Salway suggests that the church in Roman Britain was largely a late development, primarily among immigrants and not necessarily widespread among the Romano-British gentry. See SALWAY, *supra* note 113, at 538, 545-48.

161. Again, this is simply inaccurate. To take but one example, English property law, the foundation of English common law, has almost no connection to Roman law. See WATSON, RL & CL, *supra* note 20, at 139-45.

given to them by Rome, in view of the following authorities, seems to be wholly untrue.<sup>162</sup>

In Spence's *Origin of the Common Law* it is said:

As the Roman jurisprudence, polity and government existed in ancient Britain, as a Roman province for upwards of three centuries and a half, the Roman civilization, with its laws, usages, language, arts, and manners, must have left a deep and permanent impression, and have become intermixed and incorporated with Saxon laws and usages, and constituted the body of the ancient common law. . . . [In] political government, the civil jurisprudence, and the judicial establishments which prevailed in England in the Anglo-Saxon period, had their main source in the Roman law. In *Lane v. Cotton*<sup>163</sup> Lord Holt said "that the laws of all nations were raised out of the ruins of the civil law, and that the principles of the English law were borrowed from that system, and governed upon the same reason."<sup>164</sup>

In Goldsmith's *Doctrine of Equity*<sup>165</sup> it is said:

It is scarcely possible to suppose any well-read lawyer, captivated as he may be with the notion of Saxon liberty, can proceed far in the study of either system, without perceiving a striking analogy between the civil law of Rome and the common law of England, not only as to their maxims and principles, and their technical phraseology, but also their method of practice, showing how early, and to what extent one system became the instructor and guide of the other. To some minds there is a black letter witchcraft in the expressions, "Anglo-Saxon liberty," "ancient constitution," and the like, while the chances are, that in furnishing an example they may fall into the whimsical position of seizing upon some relic of Roman jurisprudence to prove the perfection and justice of their own.

When we remember that the Romans held possession of this island nearly five hundred years—and during that period some of the most celebrated lawyers administered justice among the conquered Britons, upon the like footing and according to the same system adopted by the conquerors in their own

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162. As noted earlier, Plucknett disagrees with Wade on these points. See *supra* note 160.

163. 12 Mod. Rep. 473, 482 (1796). Kent discusses this case in identical terms at 1 KENT, *supra* note 84, at 607, and I have added quotation marks to Wade's manuscript.

164. 1 KENT, *supra* note 84, at 607 n.(e). This quote is from a footnote in Kent's Commentaries discussing Spence's article.

165. G. GOLDSMITH, THE DOCTRINE AND PRACTICE OF EQUITY (6th ed. 1871).

country—we cannot be surprised that such an event had its due influence in stamping a character upon the future institutions of this country. . . .<sup>166</sup>

In Finlason's introduction it is said "They (the Saxons) . . . left the entire fabric of Romanized laws and institutions, save that the Saxons infused into the Roman institutions their own rough spirit of freedom, which gave them fresh life and vigor."<sup>167</sup>

But though the ancient common law may properly be called the offspring and heir of the Roman civil law, it did not learn all its lessons from that law. In Guizot's *History of Civilization* it is said:

The Saxons conferred upon us the spirit of liberty—of liberty as we conceive of and are acquainted with it—in the present day; as the right and property of each individual: master of himself, of his actions, and of his fate, so long as he does not injure others.<sup>168</sup>

This author must have been speaking of the liberty of the Saxon landholder, for the landless man, who had no voice in making the laws, could not be said to possess that individual personal liberty, that made him master of his own actions and of his fate.<sup>169</sup>

From the Saxon hatred of arbitrary power came the grand jury,<sup>170</sup> the election of law-makers and magistrates by the people, township and county courts, and the descent of land equally to the male heirs.<sup>171</sup> Primogeniture was of Norman birth, and designed to perpetuate the power of wealth of the nobility.<sup>172</sup>

166. Finlason, *supra* note 93, at cxlviii-cxlix (quoting GOLDSMITH, *supra* note 165, at 8). Based on the errors in Wade's quotation of Goldsmith, which follow Finlason's, it seems that Wade took the language from Finlason's quotation of Goldsmith. The quoted material does not appear in the 1843 edition of Goldsmith, but only in later editions, although I was unable to determine which edition introduced it.

167. Finlason, *supra* note 93, at lxxv. Wade added the parenthetical "the Saxons."

168. *Id.* at lxxxix n.1 (quoting 2 GUIZOT, *supra* note 101, lecture 7 at 166). Guizot uses "The Germans" rather than "The Saxons" and Finlason quotes Guizot correctly, adding the parenthetical "(including of course the Saxons)" to his quote. Wade simply changed the text.

169. See *infra* note 175 for a comment on the accessibility of the Montana law-making process.

170. Keeton concludes that no link has yet been established between the grand jury and Saxon institutions, attributing the grand jury to the Assize of Clarendon in 1166. KEETON, *supra* note 117, at 206-07. Robinson, et al., however, argue that the roots of a sworn jury of accusers go back to Anglo-Saxon times. See ROBINSON, ET AL., *supra* note 152, at 134.

171. This was a Kentish custom. See ROBINSON, ET AL., *supra* note 152, at 125.

172. Plucknett notes that there is disagreement about whether primogeniture

From whence then came the rights and liberties secured and guaranteed by Magna Charta? They came from the ancient common law that prevailed in England during the Anglo-Saxon period, which as said by Spence and the other authors quoted, had its main source in the Roman law.

And thus the common law, linked forever to Roman jurisprudence,<sup>173</sup> and invigorated by the spirit of Saxon liberty, began its onward march to domain and empire.<sup>174</sup> The generation of Danish rule did not disturb, but quickened its growth; the Norman kings did not destroy it, but after their one hundred and fifty years of misrule and administrative despotism, its life and vigor were restored, and its rights and liberties perpetuated on the meadows of Runnymede. The dawn of modern life had come. The people could demand their rights "according to the law of the land" and have justice administered by "due course of {the common} law."<sup>175</sup>

The growth of the common law has been remarkable in many respects, battles and conquests, civil strife, revolution,

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was a Norman imposition, quoting Maitland, for example, that the English "could not blame the Normans for 'our amazing law of inheritance.'" PLUCKNETT, *supra* note 116, at 527. Contrary to Wade's claim, the fundamental purpose of primogeniture was not preserving the wealth of the nobility but to support the military obligations of the nobility to the crown. See *id.* Wade earlier so characterized the feudal system of which primogeniture was a crucial part. See *The Common Law*, *supra* note 6, at 189.

173. It is puzzling that Wade did not discuss or mention the reception of Roman law in other European countries. Germany, France, Scotland and other countries replaced their mediaeval customary law with classical Roman law. Henry VIII considered the issue important enough to establish Regius Professorships in Roman law at Oxford and Cambridge. See PLUCKNETT, *supra* note 116, at 43-44. Given Wade's belief that the common law was truly linked to classical Roman law, the failure of England to receive it surely deserved comment. Moreover, Wade does not mention the primary indirect path of Roman law. As Keeton notes, "[f]or two centuries after the Conquest the royal administration was predominantly in the hands of able clerics, learned in both civil and Canon Law." KEETON, *supra* note 117, at 72. Similarly, Roman law as it existed in other European states influenced English law, both through negotiations between English kings and Popes, for example, and through contact between English legal authorities like Bracton and their civil law contemporaries. See KEETON, *supra* note 117, at 72-74.

174. Compare Van Caenegem's conclusion on the origins of the common law: "It was a species of continental feudal law developed into an English system by kings and justices of continental extraction." R.C. VAN CAENEDEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 110 (2nd ed. 1988).

175. Contrary to Wade's argument here, the common law's development owed a great deal to the administrative improvements of the Norman Kings. As R.C. Van Caenegem puts it, "[t]he sorry state of the traditional courts and the contrasting power and prestige of royal majesty, combined with Norman toughness" led people to seek redress from the royal courts rather than the old Anglo-Saxon institutions and to the development of a truly common law throughout England. *Id.* at 34.



conspiracy and rebellion, have not affected it, or prevented its onward course. The wars of the Barons, the wars of the Roses, the beheading of a king and the establishment of a commonwealth, did not shatter or cripple it. It has lived a charmed life, because its principles founded upon reason and justice can never die. It is loved by the people because none are so high, and none so low, as to escape its guardian care or its justice. Kings and rulers, and the beggar in the streets, are alike subject to {its jurisdiction, its supreme strength, and} its protection.<sup>176</sup>

This principle of absolute equality before the law, is one of the chief sources of its power and influence. At the bar of justice it has abolished all class distinctions of birth and blood, wealth and poverty, and there, if no other place all men are equal.<sup>177</sup> This fact has inspired a feeling of security and safety that permeates the home and the business world, and has made men willing to fight and to die for their country and the law that makes them equal in its temples of justice.

In supremacy of the law and the protection of liberty by enforcing it, were early principles of Roman jurisprudence, and the common law in its infancy learned the lesson, and made the law the supreme power in the state, commanding what is right and prohibiting what is wrong. The enforcement of these principles educated and enlightened ignorant and barbarous men and called into being all the better elements and powers of civilized life. The love of home, {the desire for improvement and education,} the establishment of schools and churches, and the cultivation of morality, virtue and charity, all flow from the fact that the law is supreme, that none is above or below it or beyond its reach; and the quality and character of the law is improved by these powers and forces which it calls into being. The progress

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176. Plucknett suggests a less glamorous reason for the common law's survival: Henry II's reforms, which gave the common law "its firm grip upon the land . . . the more elaborate the land law became and the more subtly it contrived to entangle both present and future generations in the maze of real-property law, the more impossible it became for the landed classes to contemplate any interference with the system which assured to them and their children the complicated benefits of inheritance." PLUCKNETT, *supra* note 116, at 44.

177. Men were certainly not equal irrespective of wealth in the Montana legislature. Michael Malone's history of the political struggle over Montana mining sums up the third Montana legislature by quoting Montanan Lee Mantle: a "band of bribe takers and bribe givers . . . a stench in the nostrils of all honest men, and a by-word and jeer through the Union." MALONE, *supra* note 31, at 97. The marathon legal struggles over Butte mining interests that continued throughout the 1890s suggest Montana courtrooms were also susceptible to corrupt influences as well. *See id.* at 143-47.

and development of civilization, and the law have gone hand in hand.

Another element of the power and influence of the common law exists in the fact of the preservation of the decisions and opinions of the judges. Fitzherbert's *Abridgment* goes back to the reign of Henry III A.D. 1217. Glanvill's *Treatise*<sup>178</sup> was written during the reign of Henry II A.D. 1154-1189. The *Year Book* begins with the reign of Edward II, A.D. 1302. From that date until the present time, only six years less than six hundred, the decisions of the judges and the reasons therefor stated in their opinions have been preserved, and are now contained in about 8,000 volumes of Reports in England and the United States. This makes a vast storehouse of knowledge, to which lawyers and judges resort for the discovery of principles to unravel the tangled and complicated affairs of human life. These opinions and decisions call back to earth the sages of the law, and their voices uttering the language of reason, point the way to justice and truth. Directed by these guides, and heeding the landmarks, along the way, there is not much danger of going astray. Counting the Digest of Justinian, which covers a period of 1200 years, there are in this great repository, all the treasures of the law for the period of 1800 years.<sup>179</sup>

Sir Matthew Hale says "the common law of England is not the product of the wisdom of some one man or society of men in any one age; but is the wisdom, counsel, experience, and observation of many ages of wise and observing men."<sup>180</sup>

Cicero in like manner ascribes the excellence of the Institutes of the Roman Republic to the gradual and successive improvements of time and experience.

The common law has grown to be what it is by "the application of the dictates of natural justice and cultivated reason to particular cases."<sup>181</sup> There are preserved in the reports more than one million of these cases, together with the opinions of the judges showing in what manner they have applied to their decisions the principles of justice and reason.

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178. THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL (G.D.G. Hall ed. 1983). Glanvill's *Treatise* was probably written between 1187 and 1189. See *id.* at xxx-xxxi. Whether the author was actually Rannulf Glanvill or not is unclear. See *id.* at xxxi-xxxiii.

179. It is these same "treasures," whose proliferation motivated the American codifiers, and particularly Field, to promote their codes.

180. 1 KENT, *supra* note 84, at 533.

181. *Id.*

In all the world of intellectual effort and endeavor, in the domain of reason, and in the fields of literature, there is no monument of learning equal to this.

It is a picture and representation of human nature and of human life. The fact that these decisions and opinions have been preserved and are open to study and inspection, has been a mighty power in the world, promoting the progress and development of the law, and holding civilization on its upward course.

Not all of these decisions and opinions are valuable; not all of them have discovered new principles of justice or new process of reasoning or analysis; many of them are but the application of old and settled principles to novel facts or situations; not a few of them are mere repetitions; some are obsolete or obscure; and others are contradictory making the law uncertain. If from this mass the settled and well established principles could be selected and reduced to the form of statutes, and the contradictory and obscure ones made certain by legislation, if a Justinian would codify the body of the common law, and thereby reduce it to such convenient form that its majestic principles of morality, reason and justice might be taught in the universities and schools, and so be brought to the homes and hearth-stones of the people, its power over the minds and hearts of men, and its influence in uplifting humanity, and in calling into activity all the elements and forces that lead to noble lives, would be increased and magnified a thousand fold.

Another remarkable quality of the common law and one which makes it capable of world-wide jurisdiction and universal authority, is its elasticity and power of adaptation. It does not depend for its usefulness upon the people, country or climate of its native land, but is equally efficient under other suns and among other people. In all its long history it has been master of every situation, and equal to every emergency; it has adapted itself to surrounding conditions, facts and circumstances however novel or strange; it has kept pace with all progress and development; its adjudications have followed the pathway of every discovery, and have been the companions of all achievement; it has entered the gateways of the sciences and of the arts, and has protected and guarded the workings of the human intellect, and of human hands; and it has made laws for the regulation and control of these mysterious forces of nature which intrepid man has harnessed to the business of the world.<sup>182</sup>

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182. Wade's analysis here is puzzling because of his earlier focus on the sub-

The common law is a pure democracy. It is the law of freedom and equality. The people administer its justice and are sovereign in all its domains. It was for this law that our fathers fought; it was for it that they framed a constitution and founded a Republic.<sup>183</sup>

The instrumentalities by which this law is enforced and applied, the arms of the strength and the source of its veneration among the people, are the Grand and Trial juries.

The grand jury originated in Saxon England, before the Norman Conquest.<sup>184</sup>

The constitutions of Clarendon (A.D. 1164), provided that where a party was suspected whom no one dared openly to accuse, the sheriff, on the requisition of the bishop, should swear twelve lawful men of the neighborhood or vill in the presence of the bishop, and these were "to declare the truth thereof according to their conscience."<sup>185</sup>

In the reign of Edward I the bailiffs of each bailiwick,

in order to get ready for the periodical circuits of the justices [in eyre], were required to select four knights who were to choose twelve of the better men of the bailiwick, and it was the

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stance of the rules rather than the common law's process of reasoning. In an earlier article for a history of Montana written before the codes were adopted, Wade resolved this tension by concluding that "In this age of the world the discovery of new principles of law is rare, but there is a constant application of old principles to new facts and conditions." Decius S. Wade, *The Bench and Bar of Montana*, in JOAQUIN MILLER, *AN ILLUSTRATED HISTORY OF THE STATE OF MONTANA* 634, 670 (1894). Because the common law was fully developed in Montana (and the United States generally), Wade argued, all that remained was the application of principles to facts. The flexibility mentioned here seems therefore to be in the institution's ability to adapt to other nations' circumstances.

183. Founding a republic is, of course, inconsistent with "pure democracy." Moreover, the common law itself is inconsistent with "pure democracy" because it protects rights, such as life and property, which the state in a "pure democracy" might abridge.

184. Plucknett dates the grand jury to the period around the Assize of Clarendon (1166). See PLUCKNETT, *supra* note 116, at 112. Rejecting claims that British juries generally date back to Scandinavian institutions, he cautions that "[t]he appearance of a principle or institution in one age, followed by the appearance of the same or a similar institution at a considerably later age, must not lead one to suppose that the later is derived from the earlier [without further evidence of continuity]." *Id.* at 109. Similarly, Van Caenegem concludes that Henry II deserves credit for the grand jury, but that "a certain native tradition may have prepared the way for his initiative." VAN CAENEDEM, *supra* note 174, at 80.

185. FORSYTH, *supra* note 133, at 161. The Constitutions of Clarendon were a list of customs proposed by Henry II in 1164 as a compromise in the church-state conflict which began with Henry I and Archbishop Thomas Becket. See PLUCKNETT, *supra* note 116, at 17.

duty of the latter to present all of those who were suspected of having committed crimes.<sup>186</sup>

These provisions were an outgrowth from the laws of the Saxon code of Ethelbert,<sup>187</sup> which were the first laws written in the English language, and published A.D. 600, by the terms of which twelve Thanes were to make accusations of crime.<sup>188</sup> The code of Alfred<sup>189</sup> contained similar provisions.

It is a grave and serious matter at any time, or in any manner to accuse of crime, but in an ignorant and turbulent age, when the spirit of revenge is stronger than the law, and the ties of blood and kinship divide society into jealous and suspicious clans and factions, this first step towards the punishment of crime becomes of still graver concern, not only to the accused but to the accuser. Hence the necessity for causing the accusation of crime to be made by such a number of the "better men of the bailiwick," as to place their actions beyond the suspicion of bias, prejudice or passion. This was the beginning, in England, of orderly procedure in the punishment of crime. It is doubtful if any better plan or method could have been, or could be devised for making a criminal accusation or charge. During the entire period of its life, the common law has been at war with the exercise of arbitrary and despotic power, and attempts in that direction. For a large part of that period, Plantagenet, Tudor, and Stuart, claiming power and prerogative superior to the law, often attempted arbitrary arrests for alleged crime, but in the stress of

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186. FORSYTH, *supra* note 133, at 163.

187. See *Alfred*, in THE LAWS OF THE EARLIEST ENGLISH KINGS, *supra* note 112, at 62-93. The laws of Ethelbert, King of Kent, is "the earliest document written in the English language" although the manuscript through which modern scholars know them was written more than four centuries later. *The Kentish Laws*, in THE LAWS OF THE EARLIEST ENGLISH KINGS, *supra* note 112, at 2-3. Although Wade dates them to 600, the exact year is unknown. The laws were probably issued sometime between 596 and 604. It seems unlikely that Wade used the laws as a primary source; it is more likely that he learned about them from secondary sources.

188. This appears to be an error. Attenborough's edition, for example, includes no such provision for either Ethelbert or Alfred. Indeed, since both sets of laws are primarily lists of payments required as compensation for various injuries, there were no "crimes" other than torts. The peace treaty between Alfred and King Guthrum, also called the Laws of King Alfred, do contain a requirement that twelve Thanes clear a Thane accused of homicide. See *Alfred and Guthrum*, in THE LAWS OF THE EARLIEST ENGLISH KINGS, *supra* note 112, at 99.

189. See *Alfred*, in THE LAWS OF THE EARLIEST ENGLISH KINGS, *supra* note 112, at 62-93. The laws of Alfred the Great (who ruled from 871-900) were promulgated around 892, or perhaps earlier. See *The Laws of Ine and Alfred*, in THE LAWS OF THE EARLIEST ENGLISH KINGS, *supra* note 112, at 35. As with the laws of Ethelbert, Wade probably learned about these laws from secondary sources like Kent.

the conflict, and at all times, the people stood for the supremacy of the law over King and subject alike, and in the end were victorious, and established beyond recall, the principle, that crime must be ascertained and punished, by due course of law. In bringing about this result, and from the very beginning of its long life, the Grand Jury, has stood like a wall of fire, protecting and shielding the people from arbitrary arrest and punishment.

In the institution of the Grand Jury, the common law reposes one of the most important functions of government in the body of the people, and it could not be in safer hands. There is danger in placing the exclusive right to accuse of crime in the power of any one man, or one set of men. Notice as to who must make the accusation, if it is made at all, opens the door to the operation of bias, passion, prejudice, and a thousand other influences, which could never enter the Grand Jury room, for the reason that the members of the Grand Jury, come from the body of the people, are changed at each term of court, and are not known beforehand, or until they are charged and sworn in open court, and enter upon their duties.

Perhaps the plan of a public prosecutor, whose duty it is to charge with crime, and to prosecute the charge, will supplant the grand jury, but before that ancient and time-honored institution is overthrown beyond recall, modern experiments ought to be thoroughly tried and tested for a sufficient period to demonstrate their superiority.

The common law trial by jury is of still more ancient origin. Something similar to this mode of trial existed in the Roman Republic,<sup>190</sup> and Empire, and in the Roman province of Britain for centuries before the Saxon invasion, as the authorities quoted amply demonstrate. It is probable that this great example finally wrought out the common law jury trial, as established under the reign of Henry II, and as known to Magna Charta.<sup>191</sup> This

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190. To the contrary, it is "traces of ordeals" that have been found in early Roman history. VAN CAENEGEM, *supra* note 174, at 63.

191. There is another, more compelling explanation for the substitution of jury trials for ordeals. During the twelfth century, theological opinion turned against the ordeals, even suggesting they were diabolical practices. More importantly, "[k]ings and other rulers objected to them, because they allowed criminals to go scot-free in an age when kings and princes began to enforce state prosecution of crime, until then often left to private initiative." VAN CAENEGEM, *supra* note 174, at 69-70. The mass acquittal of fifty men for violation of the forest laws by the ordeal of hot iron in 1100, for example, led the King to vow not to be tricked again. Unsurprisingly, Henry II added banishment for even those who were successful at the ordeal of wa-

probability is greatly increased when we recall the Saxon trials by compurgation, the tests of innocence by the ordeal of red-hot iron and boiling water, the crude notions of a jury as expressed in the Code of Alfred, and the Norman trial by wager of battle. These do not seem to be the hopeful seeds of any rational system of trial.

But the fact that among all English-speaking peoples, the common law jury trial has existed for seven or eight hundred years, as it now exists is of more importance than to know from whence it came. The influence of these trials upon the common life and affairs of the people has been controlling. They have made the people a part of the government, a part of the machinery for administering it and for the enforcement of the law. This has given to them a sense of power and a feeling of security, without which, improvement and growth were impossible.

More clearly than anything else, jury trials have brought home to the people the fact of liberty and equality. Neighbors and strangers, the rich and the poor, are upon a level and their voices and their ballots are absolutely equal, in this tribunal, where rights are ascertained and adjudicated.

It is said that all the machinery of government has for its sole object and end, the bringing of twelve men into the jury box. And government could have no higher purpose, for before this tribunal of the people, all the people come, for the protection of their rights and for the redress of their wrongs. Take away the grand and trial jury, and government seems to be carried on for, and not by, the people. In other branches they elect agents and officers to do their work, but they do not trust the administration of justice, which is the paramount purpose and final object of government, in any hands but their own. The zealous care with which this right and power (of the people) has been guarded, and the battles they have fought for its protection, has been the parent of constitutional governments and a progressive civilization.

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ter in the Assize of Clarendon in 1166 and the Assize of Northampton of 1176. *See id.*

The decline of the ordeals, however, was not limited to England, but as part of a broader trend across Europe. *See id.* at 70. The ordeal's decline required a new institution to replace it, and England was not alone in turning to jury—similar institutions grew up in Sweden, the Low Countries, and northern France. *See id.* at 71. In the end, Van Caenegem concludes that the most likely source of the English petite jury was a combination of sworn royal inquests, introduced by the Normans, with local customary institutions of England. *See id.* at 79.

The jury trial has been and is an efficient system of education. It is the college of the people and the attendance is compulsory. There is no better school than the court room. Jurors listening day after day to the great maxims (and principle) of the law, as discussed and expounded in their presence, by lawyer and judge, are taught lessons of morality and justice that they cannot forget, and which abide with them during the period of their lives. They are also taught how to weigh evidence, how to reason, and correct habits of thought, which awakens a desire for knowledge that leads to reading and study.

Education of the people is the strength of every nation; a strong national life springs from the diffusion of general knowledge; the spirit of manhood which lifts up humanity is born of equality of condition; men progress and move the world along, which they are free.

The jury trial is not among the least of the causes that produce these results.

And so the common law and the people go hand in hand. Acting together, their pathway is victory and progress, a higher civilization and better human lives, a broader benevolence and charity, a quickened morality and intellectual development, a keener sense of right and wrong, better schools and churches, more intelligent labor, a truer adjustment of rights, and a more speedy and careful administration and justice.

The English-speaking race is in the infancy of its achievement, but whatever peaceful victories and conquests are before it, and to whatever heights it may attain, the kindly spirit of the common law, with its enlightened reason and justice, will hover near, to share in its triumphs.

Feb. 25, 1895.

### III. CONCLUSION

In the end, I believe Wade's analysis is deeply flawed and that those flaws played a significant role in Wade's support for codification. The fundamental characteristics of Roman law, what Alan Watson terms "the spirit of Roman Law," were quite different from the account of the Roman system propounded by Wade. Central to the Roman legal psyche was tradition:



There are no breaks in Roman legal history, only gradual evolution. The law was recognizably the same product around 200 B.C., in the late Republic, in Augustus's principate, in the disastrous later third century, in Diocletian's revival, and even in Justinian's codification. It was recognizably the same in a small republic and in a world empire, in economic growth and economic chaos, under paganism and Christianity, in Latin Rome and in Byzantine Constantinople.<sup>192</sup>

The contrast with Montana's brief legal history could not be greater—the Codes alone introduced hundreds of significant changes in the law. Similarly, other aspects of the spirit of Roman law from the method of reasoning<sup>193</sup> to the overarching goal of clarity of reasoning even at the expense of practicality<sup>194</sup> have little to connect them to Montana's law in the 1890s.

Similarly, Wade seems to have misunderstood much of the history of the common law's development. In his quest for an unbroken lineage back to Rome for his work as code commissioner, he created links between Rome and Britain that far exceeded even those claimed by his sources. Adding a mystical element of a primitive Anglo-Saxon hatred of arbitrary power to the legal skills of the Romans, Wade concocted a theory of legal evolution which culminated in his own labors.

There were (and are) important lessons Wade might have drawn from Roman law and the history of the common law that would have led Wade, and possibly Montana, in quite a different direction. Both the early Roman legal system and the early common law were pluralistic, polycentric legal systems.<sup>195</sup> Roman law was the law of the Romans not of the conquered peoples and coexisted for centuries with other legal systems.<sup>196</sup> Similarly, the early common law was but one of several competing legal systems.<sup>197</sup> Roman law texts in the Middle Ages were not law

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192. WATSON, SPIRIT, *supra* note 42, at 40-41.

193. *See id.* at 38-39.

194. *See id.* at 40.

195. *See* Berman and Reid, *supra* note 22, at 2-3; BERMAN, *supra* note 132, at 135-36.

196. *See* Berman and Reid, *supra* note 22, at 2-3. When Roman citizenship was extended to most free inhabitants in AD 212, Roman law's reach theoretically expanded greatly but still did not displace local law. *See* ROBINSON, ET AL. *supra* note 152, at 3-4.

197. *See* BERMAN, *supra* note 132, at 127-28.

in the sense of statutes but provided principles to fill gaps and aid in the interpretation of laws.<sup>198</sup> "The continuing usefulness of the *Corpus* (Iuris Civilis) as a source of law lies not only in its rich store of ideas, but also in its bringing together different views and arguments, showing law as something dynamic, not as mere rules."<sup>199</sup> As such, Roman law's rules provided a common base of principles for Europe's many legal systems—a base that, ironically, the nineteenth century codification movement reduced by attempting comprehensive statutory enactments.<sup>200</sup>

If Wade had focused on these aspects of Roman and early common law, he could have led Montana jurisprudence away from over-reliance on statutory law. His emphasis on statutory law, however, meant that instead of Montana's laws developing through the shared common law experience of the multiple jurisdictions in the United States, codification imposed a set of distorted lenses between Montana's courts and the common law by requiring them to read the developing common law together with the comprehensive codified law.

One important difference this introduced was to devalue a reasoned approach to the law. Precedent is persuasive because the facts of a new case can be shown to be analogous to the facts of an earlier case. A statute, on the other hand, simply sets forth a rule. While disputes can, of course, develop over the applicability of a statute to particular facts, reasoning in a system of law dominated by statutory law is quite different from reasoning in a system dominated by common law. Statutory reasoning is ultimately about the statute—what the legislature meant or said—while the common law requires reasoning about the facts of the case and the meaning of the common law rule.

Wade might have also looked to the experience of Roman jurists with written and unwritten law. As Professor Stein has shown, Roman legal writers treated written law quite differently from unwritten (customary) law, developing the latter through case-by-case analysis.<sup>201</sup> If Wade had been less sure of his own and his fellow code commissioners' (and by implication, David Dudley Field's) abilities, he might have considered whether limiting future Montana judges with the codes was desirable. Per-

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198. See Berman and Reid, *supra* note 22, at 6-7.

199. ROBINSON, ET AL. *supra* note 152, at 3.

200. See Berman and Reid, *supra* note 22, at 28-31.

201. See Stein, *supra* note 40, 1541-42.

haps because he saw the law's development as akin to an unbroken chain stretching back to before the XII Tables, rather than as the product of Montana's brief existence, the greater abstraction, loss of history, and rigidity of the statutory codes did not trouble him.

Alan Watson concludes his explanation of Roman law's post-Roman impact on Western legal systems by noting that "[t]o a considerable extent law is an expression of the culture of the lawmaking elite, and in making law one lawmaker signals to another: judges write opinions for other judges or top practitioners, jurists write texts for other scholars, legislators legislate to impress other parliamentarians."<sup>202</sup>

I believe this best explains Wade's participation in Montana's codification. Secure in their reputation at home, Wade and the other codifiers seem to be reaching for recognition on a larger stage, forgetting the particular needs and circumstances of Montana in the process. Codification ultimately was a message to the legal elites across the United States and beyond that Montana's legal elite was capable of a feat of legal science equal to or exceeding that of the great legal minds of the past.

For whatever reasons, Wade drew the lesson from history that he sets out in this speech rather than the possible alternatives. In doing so he played a significant role in providing Montana with, in the *Anaconda Standard's* words, "plenty of laws." As Montanans soon discovered, however, the sheer volume of statutes is a poor substitute for the careful consideration and cautious adaptation of the common law.

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202. WATSON, RL & CL, *supra* note 20, at 272.