

The Hidden Dimension of Nineteenth-Century Immigration Law

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I. INTRODUCTION

Most histories of immigration law are histories of restriction.¹
This emphasis is hardly surprising: beginning in 1875, Congress

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passed increasingly draconian acts, mostly targeting Chinese immigrants, which ultimately led to the outright exclusion of nearly all Asian immigrants. Then, in the 1920s, Congress enacted quotas aimed at keeping the U.S. population primarily white, with an emphasis on immigrants from northern and western European stock. And throughout history in general, immigration law has focused not only on excluding but also on deporting those immigrants deemed undesirable.

In addition to focusing on exclusion, immigration law history has also been preoccupied with federal law after 1875. This emphasis is explained in large part because immigration law is exclusively federal today, and the first restrictive federal immigration law, which banned Chinese prostitutes and criminals, was passed in 1875. Before 1875, restrictive federal immigration law was virtually nonexistent.²

But immigration was widespread and actively encouraged at all levels of government in the mid-nineteenth century. Immigrants from Europe flooded the East Coast of the United States, partly as a result of the revolutions of 1848 and the Irish Famine of 1845-1849.³ By 1870, forty percent of the residents of several major cities, including New York and Chicago, were foreign-born.⁴ Immigration was even more important to the development of the West Coast. Approximately 250,000 Chinese immigrated to the United States between 1850, when the Gold Rush began, and 1882, when Congress passed the Chinese Exclusion Act.⁵ And many others—including Europeans, Mexicans, and Americans—immigrated to California, which became a state in 1850. In addition, immigrants from the East

1. See, e.g., BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* (2004) (showing how restrictive immigration policies functioned to define America by shaping ethnicity); JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925*, (2d ed. 2002) (exploring how ideologies of nativism affected exclusionary immigration law); KEVIN R. JOHNSON, *THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS* (2004) (documenting how immigration law has barred racial minorities, the poor, political dissidents, actual and alleged criminals, and homosexuals, and discriminated against women); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004) (arguing that immigration restrictions helped to create new categories of racial difference and gave greater emphasis to the nation's borders and land borders); LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995) (exploring courts' responses to the enactment of restrictive immigration policies).

2. Before 1875, the federal government did almost nothing to regulate immigration. See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 665, 668-69 (2005).

3. HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 19 (2006).

4. *Id.* at 19-20.

5. *Id.* at 16.

Coast and around the world traveled to the newly conquered western territories.⁶

Despite this extensive immigration, the laws regulating it largely have been passed over by legal scholars. As Gerald Neuman has shown, this omission can be explained partly as category confusion: because immigration law is now federal, we no longer have a state-to-state conception of immigration, which makes intra-state and state-to-territory migration difficult to think of as immigration.⁷ Prior to 1875, restrictive immigration law did exist, but it was promulgated by states, not the federal government. Moreover, it looked very different from federal immigration statutes today, and has therefore not always been identified by scholars as “immigration law.”⁸

Unlike the federal immigration law of today, state-based immigration law regulated immigration to individual states and applied equally to someone coming from a neighboring state or halfway around the world.⁹ It commonly took the form of laws banning the importation of slaves or the entrance of free blacks, paupers, or convicts.¹⁰ For instance, a state or territory could refuse to allow a shipload of immigrants to disembark if it suspected that the immigrants would be a drain on the local economy.¹¹ In such cases, the captain of the ship would either be required to post a substantial bond on behalf of each passenger considered likely to become a “public charge” or find another state or territory in which to dock.¹² State-to-state migration, then, was treated identically to international migration, even though this concept may seem counterintuitive to a twenty-first-century mind. State-to-territory migration, somewhat more understandably, was also considered “immigration”: there was no guarantee that the western territories would ever become a part of the United States, both because of border disputes with other nations and because the territories needed to demonstrate that they were

6. These included Minnesota Territory, admitted as a state in 1858; Oregon, admitted 1859; Kansas, 1861; Nevada, 1864; Colorado, 1876; Montana, North Dakota, South Dakota, Washington, all 1889; Idaho, 1890; Utah, 1896; and Arizona, New Mexico, both 1912.

7. GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 20 (1996).

8. *Id.* at 19–20; see also Kunal Parker, *State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts*, 19 *LAW & HIST. REV.* 583, 590 (2001) (showing how state-based immigration law developed out of townships’ ability to regulate settlers in order to protect the integrity of their poor relief administration).

9. NEUMAN, *supra* note 7, at 34–40.

10. *Id.*

11. *Id.* at 27–29.

12. *Id.* at 28–29.

capable of becoming “civilized” enough to achieve statehood.¹³ Thus, moving to a territory was, in important ways, like moving to another country.

But most historians have not treated intra-country migration (or, for that matter, European immigration to the American West) as immigration. Instead, historians have treated this period of immigration history as *settlement* history, thus obscuring in its very naming the element of immigration that infused the development of the West as an American property. As Moses Rischin put it many years ago, the early settler to the American West sought “avidly and . . . desperately to quick-freeze the pioneer era into a super-American past.”¹⁴ We do not see settlement as a part of immigration history because, in hindsight, it seems inevitable that the western territories became a part of the United States.

Conceived of as “settlement history” in social and political accounts, the migration and settlement of the West has been all but ignored in the legal literature. One would think that there simply was no law in the new territories or, at least, no law that would contribute to an understanding of the history of the legal regulation of immigration. But law is not only about restriction and prohibition. If we look closer, we can see law operating in two important ways during this period. First, we can look to see not only which people states and territories restricted, but also at particular immigrations to pinpoint when and where the law *refused* to intervene. Which groups were *not* prohibited from entry, even when states and territories had valid reasons for excluding them?

Another way we can see law operating to regulate immigration during this period is by broadening our idea of what counts as immigration law. The purpose of immigration was different during the expansion period than it was decades later when federal exclusion began. Restrictive immigration policy makes sense only in a world of scarcity. In times of great expansion, immigration—at least the “right” kind of immigration—is encouraged. The legal history of *fostering* immigration is more difficult to trace than the legal history of

13. The border between Washington Territory and Canada, for example, was contested several times, including during the famous “pig war” of 1859, when an American living on San Juan Island (now in Washington State) shot a pig rooting in his garden that was owned by an employee of the British Hudson’s Bay Company, which in turn led to American and British military escalation in a dispute over the ownership of the island. See San Juan Island National Historical Park Home Page, http://www.nps.gov/archive/sajh/Pig_War_new.htm (last visited Sept. 12, 2009). And the Mexican-American War, fought between 1846 and 1848, was a dispute over whether Texas belonged to Mexico or the United States.

14. Moses Rischin, *Beyond the Great Divide: Immigration and the Last Frontier*, 55 J. AM. HIST. 42, 44 (1968).

restriction. Restriction is effectuated by laws that state clearly who may or may not enter, and who may be deported. In times when government encourages immigration, however, the law plays a more subtle role. Although states did make the classic restrictive move of discouraging immigration of people deemed undesirable, they could also foster immigration by offering incentives—property, civil rights, employment—to desirable immigrants. States could also use other forms of law to discourage the integration of people deemed undesirable—rather than banning those people from entering a state or territory—by, for example, passing anti-miscegenation statutes prohibiting new settlers from intermarrying with the Indian population. Indeed, several scholars have recently turned from studying the restrictive aspects of immigration to exploring the way in which immigration law functioned to produce a population or, as Aristide Zolberg puts it, to create “a nation by design.”¹⁵

This Article aims to study these two ways in which immigration law operated in the American West. To do so, it analyzes a particular group of immigrants in detail, both to answer the question of why the law refused to intervene and also to ascertain whether other laws—laws that do not look like restrictive immigration laws—functioned to shape the desired population in the new territories. Of course, large-scale immigrations are rare because so many people immigrated in small, private parties. There were several large-scale ventures, however, many of which involved the importation of white women.¹⁶ Here, I focus on a particular immigration, that of

15. ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* (2006); see also MOTOMURA, *supra* note 3, at 8–9, 115–19 (demonstrating that in the nineteenth century, U.S. immigration policy thought of some immigrants as future citizens and worked to incentivize their assimilation); Kunal M. Parker, *Making Blacks Foreigners: The Legal Construction of Former Slaves in Post-Revolutionary Massachusetts*, 2001 UTAH L. REV. 75, 81 (showing how town communities in Massachusetts constructed former slaves as “immigrants” from “Africa” in order to avoid having to give them benefits under poor relief administration); AZIZ RANA, *SETTLER EMPIRE AND THE PROMISE OF AMERICAN FREEDOM* (forthcoming 2010) (discussing relationship between immigration and settlement).

16. For example, Catharine Beecher, the educator and activist (and sister of Harriett Beecher Stowe, the author of *Uncle Tom’s Cabin*), began to send groups of women teachers west in 1835. JULIE ROY JEFFREY, *FRONTIER WOMEN: “CIVILIZING” THE WEST? 1840-1880* 20 (1998). In 1846, the Mount Vernon Congregational Church in Boston organized a group to facilitate training “competent female teachers, of unquestioned piety” and ultimately sent at least 109 women west. *Id.* at 46. In 1862 and 1863, two parties of women from England arrived in British Columbia. COLONIST (Victoria, B.C.), Sept. 29, 1862 and Jan. 12, 1863, cited in ROGER CONANT, *MERCER’S BELLES: THE JOURNAL OF A REPORTER* 19, n.51 (Lenna A. Deutsch ed., 1992). Another activist, Eliza Farnham, was famously unsuccessful: she expected that “hundreds, if not thousands” of women would want to bring their “kindly cares and powers” to the men who had flocked to California during the Gold Rush, but only managed to recruit three. *Ship Angelique: California Association of American Women* (Feb. 2, 1849), reprinted in ATTENTION, PIONEERS!:

the so-called "Mercer Girls." They were so named because their voyages were planned by a resident of Washington Territory named Asa Shinn Mercer.

In 1864 and 1866, Mercer traveled to Massachusetts and New York to bring back boats full of young women to Washington Territory. His explicit aims were to help civilize the fledgling territory by introducing into the community well-educated young women who could serve as teachers and moral exemplars, and to help populate the territory by bringing brides to the pioneers, who had begun to intermarry with Indian women to the detriment, Mercer believed, of the Territory's future. The Mercer immigrants caused a sensation in the press across the country: newspaper articles and editorials commented on the immigration, discussing the potential gains from the importation of white women to the Pacific Northwest and warning of the possible calamities that might befall the travelers and the Territory.

The expeditions are especially useful for a legal history of westward immigration because they came so close to being regulated. Like a "teflon" politician, the Mercer Girls appeared to be vulnerable to exclusionary immigration law, but every attempt to regulate them faltered. The Massachusetts Legislature actively debated their emigration and issued a fifty-two-page proclamation condemning the voyage, but passed no law preventing them from leaving. When rumors circulated that some of the immigrants were black mill workers, the Washington Territorial Legislature quickly passed a restrictive immigration bill that was later vetoed by the territorial governor. Citizens of Washington Territory made arrangements to exclude the immigrants upon arrival and send them instead to Oregon, but these plans were never carried out. Although Mercer apparently kidnapped several of the immigrants when they tried to leave the ship and tricked many of the passengers into giving him additional money to finance his voyage, he was never prosecuted for any of these activities. Indeed, the only way the law directly affected the voyage was when customers who had paid Mercer to immigrate with him to the Pacific Northwest but were left behind sued Mercer for the return of their fares and belongings. The private law of contract, and not the public law of immigration, was the only way the

FACSIMILE REPRODUCTIONS OF TWELVE RARE CALIFORNIA BROADSIDES OR POSTERS (Oscar Lewis ed., 1952) [hereinafter *Ship Angelique*] (reproducing Farnham's circular); see also CATHY LUCETTI, I DO!: COURTSHIP, LOVE AND MARRIAGE ON THE AMERICAN FRONTIER 100 (1996) (noting that Farnham's plan was met with "snickering innuendo" and that she brought only three women to San Francisco).

voyages were touched, and, in this case, it was the people who did *not* immigrate who had the claims against Mercer.

But it would be a mistake to believe that the failure to regulate these voyages placed the Mercer immigrants outside the realm of immigration law history. To the contrary, this Article argues that it was precisely because the Mercer immigrants were perceived to be desirable immigrants that they did not need to be regulated. The public perception that they were female mattered greatly. Although the Mercer immigrants included widows, married couples, single men, and children as well as never-married young women, the public imagined them as “brides.” As such, they were bound for a collective future as wives to the pioneers. The law of marriage, which required a husband to support his wife, would ensure that they were desirable immigrants who would not overly tax the purse strings of the Territory. In the case of the Mercer immigrants, it was the law of marriage, not the exclusionary law of immigration, which did the lion’s share of the work in regulating the incoming population.

The Mercer voyages are certainly not the only examples of seemingly unregulated immigration to the American West. However, they are an especially useful example because of the abundant sources available documenting their voyages. Because of their notoriety, there is a wealth of archival material available about the Mercer Girls that can help us to understand the scope of public awareness of them, the possibilities for legal intervention, and the reasons their immigration was not restricted. These sources include the reports of the Massachusetts Governor and the Massachusetts Legislature,¹⁷ newspaper accounts of the immigrations on both coasts,¹⁸ trial records

17. Governor John A. Andrew, Message of the Governor (Jan. 6, 1865), in MASSACHUSETTS ACTS AND RESOLVES 733 (Wright & Potter 1865) [hereinafter Message of the Governor]; EMIGRATION OF YOUNG WOMEN, S. REP. NO. 156, (Mass. 1865) [hereinafter Massachusetts Senate Report].

18. *The Load of Females for Washington Territory*, ALTA CAL., Sept. 8, 1865, at 1 [hereinafter *Load of Females*]; *The “Mercer” Expedition*, ALTA CAL., Feb. 4, 1866, at 1 [hereinafter *Mercer Expedition*]; *A Woman’s Plea for Mercer’s Victims*, ALTA CAL., Jan. 28, 1866 (quoting the Springfield, Mass., REPUBLICAN); *The Female Emigration Scheme—“Hagar,”* ALTA CAL., Jan. 20, 1866, at 1; *Mercer’s Speech*, PUGET SOUND DAILY, May 25, 1866, at 2; *Arrival of Mercer’s Emigrants* [sic], PUGET SOUND DAILY, May 12, 1866; *Untitled Article*, PUGET SOUND WKLY., May 26, 1866, at 6; *Untitled Article*, WASH. STANDARD, Oct. 14, 1865, at 2; *Female Emigration*, PAC. TRIB., Sept. 23, 1865; *Arrival of the Continental*, PAC. TRIB., Apr. 27, 1866, at 2; *The Emigrant Agent*, WASH. DEMOCRAT, Jan. 14, 1865; *Importation of Contrabands*, WASH. DEMOCRAT, May 13, 1865 [hereinafter *Importation of Contrabands*]; *Untitled Article*, COMMONWEALTH (Boston), Nov. 18, 1865, at 3; *Untitled Article*, LOWELL DAILY COURIER, Jan. 23, 1864; *Untitled Article*, LOWELL DAILY COURIER, Jan. 26, 1864; *News Items*, HARPER’S WKLY., May 5, 1866, at 275; *General City News: A Novel Shipment*, N.Y. TIMES, July 26, 1865, at 2; *General City News: Female Emigration*, N.Y. TIMES, Oct. 4, 1865, at 8; A.S. Mercer, Letter, *Mr. Mercer’s Emigration Scheme*, N.Y. TIMES, Oct. 24, 1865, at 5 [hereinafter *Mr. Mercer’s*

from fraud cases brought against Mercer that were reprinted in the *New York Times*,¹⁹ diaries kept by two of the immigrants and a newspaper reporter who accompanied them,²⁰ and historical journal articles and newspaper feature articles from the late nineteenth and early twentieth centuries.²¹ These sources have previously gone unnoticed by legal historians; because the law did not ultimately intervene in their immigration, the Mercer immigrants appear to be outside of the territory that immigration law scholarship has claimed as its own. Indeed, there is a dearth of scholarship, legal or otherwise,

Emigration Scheme]; *Mercer's Circular, Office of the New-England Emigrant Aid Company*, Boston, Sept. 8, 1865 (reprinted in the N.Y. TIMES, Jan. 26, 1866, at 2); *Female Emigration: Women Colonizing the Far West*, N.Y. TIMES, Sept. 30, 1865, at 8 [hereinafter *Women Colonizing*]; *Female Emigration: Visit to the Steamer Continental*, N.Y. TIMES, Oct. 2, 1865, at 8 [hereinafter *Visit to the Steamer Continental*]; *General City News: The Female Emigration Scheme*, N.Y. TIMES, Nov. 21, 1865, at 2; *The Female Emigration Scheme*, N.Y. TIMES, Dec. 4, 1865, at 8; *The Mercer Emigration Scheme*, N.Y. TIMES, Dec. 16, 1865, at 4; *The Emigration of Eastern Women*, N.Y. TIMES, Jan. 26, 1866, at 4; *Arrival of Mercer's Female Emigrants*, N.Y. TIMES, May 22, 1866, at 1 (reprinted from *San Francisco Bulletin*, Apr. 21, 1866).

19. *The Washington Territory Emigration Scheme – Charges of Fraud on the Emigrants, Superior Court – Special Term – Jan. 25*, N.Y. TIMES, Jan. 26, 1866, at 2 [hereinafter *Charges of Fraud*]; *The Mercer Emigration Scheme: Argument on the Motion for an Injunction against the Steamship Company*, N.Y. TIMES, Jan. 28, 1866, at 8 [hereinafter *The Mercer Emigration Scheme*]; *Plaintiff's Affidavit*, N.Y. TIMES, Jan. 26, 1866, at 2 [hereinafter *Plaintiff's Affidavit*]; *Local News*, N.Y. TIMES, Feb. 3, 1866, at 4 [hereinafter *Local News*]; Sterne Chittenden, Letter, *The Washington Territory Emigrants: An Appeal to the Public*, N.Y. TIMES, Feb. 8, 1866, at 5 [hereinafter Chittenden]; *Decisions—Superior Courts—Special Term*, N.Y. TIMES, Feb. 16, 1866, at 2 [hereinafter *Decisions*]; *Suit Against Asa S. Mercer of the Steamer Continental*, N.Y. TIMES, May 4, 1866, at 1 [hereinafter *Suit Against Asa S. Mercer*]; *Attachment Suits Against A.S. Mercer of "Continental" Fame*, N.Y. TIMES, June 3, 1866, at 3 (reprinting the April 30, 1866 *San Francisco Bulletin*) [hereinafter *Attachment Suits*]; *Court Proceedings: The "Continental" Mercer Again in Trouble*, DAILY ALTA CAL., May 4, 1866, at 1 [hereinafter *Mercer Again in Trouble*].

20. ROGER CONANT, *MERCER'S BELLES: THE JOURNAL OF A REPORTER* 19, n.51 (Lenna A. Deutsch ed., 2d ed. 1992); Flora A. P. Engle, *The Story of the Mercer Expedition*, 6 WASH. HIST. Q. 225, 235-37 (1915); Harriett F. Stevens, *A Journal of Life on the Steamer "Continental"*, PUGET SOUND DAILY, May 27–30, June 5–9, 1866; Harriet F. Stevens, *Letter to the Editor*, PUGET SOUND DAILY, June 2, 1866 [hereinafter Stevens, *Letter*].

21. Clarence B. Bagley, "The Mercer Immigration:" *Two Cargoes of Maidens for the Sound Country*, 5 OR. HIST. SOC'Y Q. 1 (1904); Charles W. Smith, *Asa Shinn Mercer, Pioneer in Western Publicity*, 27 PAC. NW. Q. 347 (1936); *Two Shiploads of Girls: They Went from Boston to Puget Sound and Married the Pioneers*, WASH. POST, Apr. 23, 1893, at 16 [hereinafter *Two Shiploads of Girls*]; *The Strangest Cargo of "Calico" Ever Shipped West*, CHI. DAILY TRIB., Jan. 23, 1910, at G3.

studying the Mercer Girls.²² Their history instead has been told in popular histories, television series, and romance novels.²³

By tracking down and using the available archival materials to reconstruct the Mercer voyages, I take an important step in this Article toward reconstructing immigration law history in a time before restriction was the primary domain of immigration law and before immigration law was exclusively federal. In this pre-federal era, immigration law was remarkable not because of whom it restricted, but because of whom it did *not* restrict. The function of immigration law was not to keep people out or send people away, but instead to produce a population. To civilize and tame the territory, and ultimately to achieve statehood, it was believed, this population needed to include marriageable white women of upstanding character.

A note on language before we begin. Throughout this Article, I use the term “immigration” to describe the Mercer voyages, and refer to the passengers themselves as the “Mercer immigrants.” This linguistic choice is intentional. The Mercer immigrants have usually been referred to as the “Mercer Girls” or “Mercer’s Belles,” terms that obscure the diversity of the immigrants, who were not all single, marriageable women. But the terms “girls” and “belles” also obscure how Mercer’s passengers were considered to be immigrants, not tourists. Indeed, most of the contemporaneous sources refer to them not as the “girls” (such terminology would come later) but as the “emigrants.” Emigration is the flip side of immigration: to “emigrate” is “to leave one’s place of residence or country to live elsewhere.” Thus, for example, someone would say she “emigrated from Canada to the United States.” To “immigrate” is “to enter and usually become established,” as in “immigrate to the United States.”²⁴ Similarly, an “emigrant” is someone who has left his or her homeland behind, while an “immigrant” is someone who has settled somewhere else. During the mid-nineteenth century, the terms “emigrant” and “immigrant” seem to have been used interchangeably, with “emigrant” being used

22. The one exception is Lenna Deutsch’s superbly edited version of the New York Times reporter Rod Conant’s diary of the voyage, which includes an introduction that references many newspaper articles about the voyage, and annotations to the text referencing other sources. See Lenna Deutsch, *Introduction* to ROGER CONANT, *MERCER’S BELLES: THE JOURNAL OF A REPORTER* 3–21 (Lenna A. Deutsch ed., 2d ed. 1992).

23. See MURRAY MORGAN, *SKID ROAD: AN INFORMAL PORTRAIT OF SEATTLE* 58–66 (1951) (popular history); CHRIS ENSS, *HEARTS WEST: TRUE STORIES OF MAIL ORDER BRIDES ON THE FRONTIER* 15–22 (2005) (popular history); HELEN RUCKER, *CARGO OF BRIDES* (1956) (romance novel); *Here Comes the Brides!* (ABC television broadcast 1968–69) (Sony Pictures Home Entertainment DVD).

24. See definitions of “emigrate” and “immigrate” in MERRIAM-WEBSTER’S DICTIONARY, available at <http://www.merriam-webster.com/dictionary>.

much more frequently than immigrant, at least in print media. Today, “immigrant” is the more commonly used term. Then, there were “emigrant aid societies” (some of which assisted immigrants from Europe in coming to the United States, and others of which helped Americans to emigrate to the territories); now we have “immigrant’s rights organizations.” This linguistic shift may also be a factor in obscuring the importance of “emigrants” to immigration history. It is important to remember that someone referred to as an emigrant in 1866 would be called an immigrant today. Because I want to retrieve the Mercer story as an important moment in immigration history, I use today’s terminology and refer to the voyages as “immigrations,” realizing, of course, that this usage may be somewhat anachronistic.

This Article proceeds as follows. Part II uses the archival materials to tell the stories of the Mercer voyages, focusing especially on the public reaction to them. Part III examines closely the moments in the Mercer episode where the law threatened to intervene, and examines why this intervention failed to occur. Part IV then takes a broader look at how law was functioning to produce a population in the western territories. Part V ties the Mercer story to contemporary immigration law, offering connections between the theory of population production set forth through the Mercer story and how scholars and lawmakers conceive of immigration law today.

II. MERCER’S TWO VOYAGES

In the 1860s, Washington Territory had a problem. Other regions of the West, such as Oregon’s fertile Willamette River Valley (south of Portland, Oregon) had been relatively easy to populate. Arable land such as that in the Willamette Valley attracted farmers, and farming communities included men, women, and children; during the 1840s and 1850s, thousands of families immigrated to the Valley on the Oregon Trail in covered wagons.²⁵ Other areas, however, where the dominant mode of economic production involved more transient pursuits (such as logging, mining, and fur trapping), were not as conducive to permanent settlement. Hence, in what would become Washington State, as well as in areas of Montana, Wyoming, and Colorado, the ratio between men and women was often wildly disproportionate.²⁶ In 1853, when Washington was recognized as a

25. See Bagley, *supra* note 21, at 1.

26. See, e.g., JEFFREY, *supra* note 16, at 204 (reproducing census data showing in 1870 a population in Montana of 16,771 men to 3,824 women and in Wyoming of 7,219 men to 1,899 women).

territory separate from Oregon, its population was still relatively sparse; indeed, Seattle's first white settlers had arrived only two years earlier in 1851. By 1860, the first federal census showed only 302 people living in Seattle, and fewer than 12,000 in the entire Territory.²⁷ The non-Indian population of Washington Territory consisted primarily of pioneer loggers and farmers; it was largely male, with estimates ranging from nine to twenty men for every woman.²⁸ To embark on its long road to statehood, Washington Territory needed to produce a stable population. But its white residents believed that, if anything, Washington Territory seemed to be going down the wrong track: white pioneers were marrying Indian women, having Indian children, and adopting Indian ways.

A Seattle resident named Asa Shinn Mercer decided to do something about it. A native of Illinois, Asa Mercer immigrated to Seattle in 1859, when he joined his brother Judge Tom Mercer, a prominent citizen who had arrived in 1852.²⁹ Tom Mercer was the namesake of both Mercer Street, now located in downtown Seattle, and Mercer Island, now a prominent Seattle neighborhood.³⁰ The idea to procure women from the East Coast appears to have originated with Tom Mercer, who enjoyed joking that someone ought to appropriate public funds to bring a party of acceptable young ladies west.³¹ Asa Mercer took his older brother at his word and even met with the Territorial Governor, William Pickering, who agreed with him in spirit but was unable to provide him with public funds. Mercer then decided to do privately what he could not do officially.³² He looked to the "the large surplus of young women of the crowded cities of the Northern and Eastern States, where all branches of female labor are reduced to starving rates of pay," for a supply of women to immigrate west.³³ The women could be given jobs as "milliners, dressmakers, school teachers, seamstresses, laundresses, housemaids,

27. See 1 NINTH CENSUS: STATISTICS OF THE POPULATION OF THE UNITED STATES 3 tbl.1 (Norman Ross Publ'g Inc. 1990) (1872) (showing a population of zero in Washington Territory in 1850); *id.* tbl.2, at 71 (showing population figures for 1860).

28. MORGAN, *supra* note 23, at 21, 58; Bagley, *supra* note 21, at 3. Throughout this Article, I use the term "Indian" to refer to indigenous Americans. I use this term, as opposed to "Native American" or "indigenous American," to avoid confusion since it is the term that the primary source documents of the time used.

29. MORGAN, *supra* note 23, at 61; Bagley, *supra* note 21, at 7.

30. Alan J. Stein, *Mercer's Island is named in 1860*, HistoryLink.org Essay No. 3723 (Mar. 13, 2002), http://historylink.org/index.cfm?DisplayPage=output.cfm&file_id=3723 (last visited Sept. 12, 2009).

31. Bagley, *supra* note 21, at 7.

32. MORGAN, *supra* note 23, at 62.

33. Bagley, *supra* note 21, at 4.

etc.” until they married.³⁴ “Here is the market to bring your charms to, girls,” *The Puget Sound Herald* declared.³⁵

The first group of “girls,” who arrived in Seattle in 1864, included eleven single women from Massachusetts and two fathers of some of the women. The second group, which arrived in 1866, was reported to include over 700 single women. But when it ultimately arrived it included approximately twenty single women out of the total of sixty-three passengers, which included many couples and children, almost all of whom were from the Northeast.³⁶ Although Mercer brought both men and women to Seattle, as well as families with children, and although some of the single or widowed women were as old as seventy, the immigrants he recruited have almost always been referred to as “the Mercer Girls.” Samuel Crawford, “an old newspaper man of Seattle,” explained the etymology of the term “Mercer Girl” as follows:

Some of the wealthiest and most representative ladies of the older cities of this section, like Seattle and Olympia, are those same plucky New England girls that came out and married the pioneers. We always called them the girls, for they were the first cargo of sweetmeats ever freighted to these shores. There is no word but “girls” that the old pioneers could ever think of applying to them.³⁷

For his first voyage, Mercer targeted Boston as a likely site of a surplus of women.³⁸ But it was in the nearby dried-up mill town of Lowell that he found women actually willing to immigrate west. The death of hundreds of thousands of soldiers in the Civil War in the 1860s left many communities in New England economically devastated and with severe gender imbalances.³⁹ Some cities, such as Lowell, went from being major urban centers with an active industrial life to economic wastelands.⁴⁰ A flourishing textile mill town for many years, Lowell had suffered serious economic hardship as a result of the Civil War, when cotton ceased to be available from the South.⁴¹ Many women had lost husbands, fathers, and brothers in the war and, without the mill work, had no means of support.⁴² In addition, the imbalance in Lowell was particularly acute because it had experienced

34. *Id.* at 5.

35. *Id.*

36. *Id.* at 8 (listing members of the first voyage); Engle, *supra* note 20, at 235–37 (listing members of the second voyage).

37. *Two Shiploads of Girls*, *supra* note 21, at 16.

38. Bagley, *supra* note 21, at 7–8.

39. CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 370 (1980).

40. *Id.*

41. *Id.*

42. *Id.* at 371.

a wave of Irish immigration prior to the Civil War driven by the abundance of mill work that was then available.⁴³ Most of the women who immigrated with Mercer, however, appear to have not been Irish newcomers but rather daughters of old New England families.⁴⁴ This composition would have been in keeping with the offer of teaching positions in the west, which would have required educated applicants.⁴⁵

When Mercer arrived in Lowell, he arranged to speak not to immigrants at the Catholic Church but instead at the vestry of the Unitarian Church “to meet those interested in his object” of “procuring female teachers to go to Washington Territory.”⁴⁶ According to the diary of Flora Pearson Engle, a fifteen-year-old whose father and sisters sailed with Mercer on his first voyage and who herself, along with her mother and brother, sailed with him on his second, Mercer made no mention of “matrimonial advantage” in his Lowell talk. Rather, “every appeal was to the pocket.”⁴⁷ Mercer’s speech used the language of conquest and manifest destiny, describing Puget Sound as “full of ample resources, only awaiting development” and already populated by immigrants “for the most part of eastern and New England origin.”⁴⁸ The Pacific Northwest, explained Mercer, had “a great want of teachers” and the women would obtain “remunerative employment immediately on their arrival.”⁴⁹ Mercer found eight women in Lowell willing to immigrate to Washington Territory, many of whom had previously worked as teachers in the Lowell public schools.⁵⁰

43. By 1850, female immigrants from Ireland made up over half of the mill workers, and by 1860, the percentage was much higher. *Id.*

44. Of the eleven women who traveled on the first voyage, for example, only two names appear to be Irish: Ann Murphy and Sarah Jane Gallagher. The others appear to have English or Scottish surnames: Antoinett Josephine Baker, Sarah Cheney, Aurelia Coffin, Lizzie Ordway, Georgiana Pearson, Josephine Pearson, Katherine Stickney, Catherine Stevens, and Annie May Adams. The two men on this voyage, Daniel Pearson and Rodolphus Stevens, also do not appear to be Irish. See *Gone to Washington Territory*, LOWELL DAILY COURIER, Mar. 14, 1864 (listing names of passengers on first Mercer voyage). Similarly, the names we have from the second voyage seem English or Scottish in origin: Martin, Horten, Griffith, Chase, Thorn, Balch, Peterson, Stewart, and McEwen. See CONANT, *supra* note 20; sources cited *supra* note 19 (reproducing court papers from Thorn and Balch cases).

45. Indeed, newspaper editorials remarking on Mercer’s second voyage echoed the idea that the women were not “of the industrious order, but school marms, and other ornamental rather than useful members of society.” *Female Emigration*, PAC. TRIB., Sept. 23, 1865.

46. LOWELL DAILY COURIER, Jan. 23, 1864; see also LOWELL DAILY COURIER, Jan. 26, 1864.

47. Engle, *supra* note 20, at 226–28.

48. LOWELL DAILY COURIER, Jan. 23, 1864.

49. *Id.*

50. *Id.*

These eight boarded a train for New York City, where they were joined by two women from Pepperell, Massachusetts, and one woman from Boston. Together with Mercer and the fathers of some of the women, the company numbered fourteen. They set sail from New York on March 14, 1864, for Aspinwall, Panama, from which they traveled by train to Panama City, where they then sailed to San Francisco. The final leg of the trip was also by ship, from San Francisco to Seattle. The entire trip from New York to Seattle lasted almost exactly two months; they arrived in the Port of Seattle on May 15, 1864, at around midnight.⁵¹ It was an expensive trip: Mercer charged each passenger \$250.⁵²

The success of Mercer's first trip made him very popular in Puget Sound. Although the women had ostensibly arrived to find work as teachers, their potential as wives and mothers was lost on no one. A week after his arrival, the *Seattle Gazette* endorsed him for political office, explicitly linking his immigration scheme to Washington Territory's future role as a state in the Union:

The thanks of the whole community, and of the bachelors in particular, are due Mr. Mercer for his efforts in encouraging this much-needed kind of immigration. Mr. Mercer is the Union candidate for joint councilman for King and Kitsap counties, and all bachelors, old and young, may, on election day, have an opportunity of expressing, through the ballot box, their appreciation of his devotedness to the cause of the Union, matrimonial as well as national.⁵³

Indeed, his success propelled him to higher office than the county council: he was unanimously elected to the upper house of the Territorial Legislative Assembly, defeating a prominent Seattle citizen by a "considerable majority."⁵⁴

Not content with bringing merely eleven women to the Pacific Northwest, Mercer planned a second, more ambitious voyage. As Flora Pearson Engle put it, this time "he would endeavor to import, if the word may be so used, to the Northwest a goodly number of numerous widows and orphans of the soldiers of the Civil War, for the express purpose of furnishing wives to the many unmarried men of that region."⁵⁵ Advertising to local men that he was traveling to New England to bring back women, Mercer offered to bring a man a wife

51. MORGAN, *supra* note 23, at 62.

52. Mercer presented the trip as a bargain: the immigrants would be required to pay their passage only to San Francisco; beyond that, Mercer would take care of expenses. LOWELL DAILY CITIZEN & NEWS, Jan. 27, 1864.

53. Bagley, *supra* note 21, at 9.

54. *Id.*; see also 12 J. PROCEEDINGS COUNCIL WASHINGTON TERR. 4-5 (1864) (noting that Asa S. Mercer was present at roll call, representing the counties of King and Kitsap for a two-year term).

55. Engle, *supra* note 20, at 228.

for \$300.⁵⁶ Rather than signing individual contracts with the residents, Mercer drafted a single document and collected money from all who signed it:

I, Asa Mercer, of Seattle, Washington Territory, hereby agree to bring a suitable wife, of good moral character and reputation from the East to Seattle on or before September 1865, for each of the parties whose signatures are hereunto attached, they first paying me or my agent the sum of three hundred dollars, with which to pay the passage of said ladies from the East and to compensate me for my trouble.⁵⁷

No one knows how many people signed the “contract.” According to a somewhat cheeky 1948 article in *Woman’s Day* magazine, “How many of the single men of Puget Sound signed the contract is not known, though it is still debated, eighty-three years after, in Seattle.”⁵⁸ The women Mercer sought out were not informed that they had been contracted for; Mercer charged them separately for their voyage without mentioning their “benefactors” in the West.

Perhaps because of his own financial motives, Mercer made enormous efforts to convince as many women as possible to accompany him on the second voyage. When he arrived in New York on April 14, 1865,⁵⁹ he immediately began recruiting passengers. He set up his headquarters in New York and then traveled around Massachusetts, Connecticut, New Hampshire, Maine, New York, and New Jersey, holding meetings with interested women in each town he visited.⁶⁰

Even the *New York Times* caught the Mercer fever, emphasizing the civilizing force that women would exert on the West through marriage. “Female Emigration: Women Colonizing the Far West,” blared the paper on September 30, 1865; “Hundreds of Marriageable Young Women Going to Washington Territory.”⁶¹ The women were characterized as conquerors rather than economic migrants, helping to fulfill America’s manifest destiny through participation in the institution of marriage. By September 1865, according to the *Times*, Mercer already had “seven hundred young women, thirty or forty families and twenty young men” planning to set

56. Three hundred dollars was a significant sum in 1864. According to the Quartermaster’s Department, wages in 1864 averaged \$25-30 a month for teamsters and \$75-100 a month for clerks, and a horse cost an average of \$110. Lt. Col. A.B. Warfield, Q.M.C., *The Quartermaster’s Department, 1861–1864*, QUARTERMASTER REV. (Sept.–Oct. 1928), available at http://www.qmfound.com/quartermaster_1861-63.htm.

57. Bagley, *supra* note 21, at 23–24.

58. Stewart Holbrook, *Mercer’s Maids for Marriage*, WOMAN’S DAY, Dec. 1948, at 46, 89.

59. *Women Colonizing*, *supra* note 18.

60. Engle, *supra* note 20, at 228; *Women Colonizing*, *supra* note 18.

61. *Women Colonizing*, *supra* note 18.

sail for Washington Territory in October.⁶² The prospect of so many young women in one place appears to have generated substantial interest among the men of New York City. In October 1865, the *Times* published the location of the vessel that was to carry the women westward in response to the “number of young and enthusiastic gentlemen” who had “anxiously inquired at this office where the steamship *Continental* . . . is to be found.”⁶³

Most of the early reporting was quite favorable, even fawning at times. For example, in an early *Times* piece, Mercer was represented as the West’s great benefactor, transporting women from the East to a place where they could be put to procreative use:

This is the grandest moral and beneficial female excursion ever inaugurated, and will no doubt be very beneficial in its results. Mr. Mercer seems like a whole-souled, honest man, and has no other object in view than the good of the community of which he is an honored member. And if life is spared, he can look back at three score and ten, and in almost every face of the youth [see] the results of his enterprise in 1864-65. He will be the godfather of Washington Territory.⁶⁴

Similarly, the *Boston Commonwealth* encouraged women to join Mercer’s expedition and promised they would all have husbands in no more than three months.⁶⁵ Likewise, although the *Times* noted that the trip was “not a matrimonial adventure,” it opined that the women would, in all likelihood, find husbands quickly.⁶⁶ The paper noted that Mercer’s 1864 mission had proved successful for its female participants, both monetarily (“[n]early all taught school and received for their services from fifty to eighty dollars a month”) and matrimonially (“[s]everal of them are now married and their places as teachers are vacant”).⁶⁷ The paper failed to mention that some of the women did *not* marry immediately. Mary Elizabeth “Lizzie” Ordway, for example, never married; instead, she became a prominent member of the suffrage movement, was a close friend of Susan B. Anthony, and frequently lobbied the state legislature at Olympia.⁶⁸

62. *Id.* Later in the article, the number of women dwindles somewhat: “[T]he whole number of emigrants who have up to this time agreed to go, is about seven hundred, six hundred and fifty of whom are women. Negotiations with other persons are in progress, and it is considered certain that the number of women will be not less than seven hundred.” *Id.*

63. *General City News*, N.Y. TIMES, Oct. 4, 1865, at 8.

64. *Visit to the Steamer Continental*, *supra* note 18.

65. *Untitled Article*, COMMONWEALTH (Boston), Nov. 18, 1865, at 3.

66. *Women Colonizing*, *supra* note 18 (“there is not the most distant probability that any young woman who desires to marry will be prevented”).

67. *Id.*

68. James R. Warren, *Ordway, the Unwed “Mercer Girl,” Was Still Well-loved*, SEATTLE POST-INTELLIGENCER, Oct. 16, 2001, at B1. Ordway was thirty-five years old when she made the 1864 voyage to Seattle. In 1870, she opened Seattle’s first public school, and she later became

Yet even though the *New York Times* was still reporting in September that “seven hundred” young women would go west, Mercer’s plans appear to have become slightly more modest by July. He wrote a letter to the editor of the *Seattle Gazette* announcing that he would sail on August 19 from New York with “upwards of three hundred war orphans” and asking the good citizens of the Pacific Northwest to appoint committees to meet the ship in Seattle and furnish homes and employment for its passengers.⁶⁹ In September, the *Alta California* reported that Mercer would sail with “300 lady passengers,” that the expedition would be “entirely free,” and that the women were promised upon arrival “good wages, to be paid in gold,” and “probable marriage within three months if they wish.”⁷⁰

In a letter he wrote to the *New York Times* to advertise his plan, Mercer emphasized the importance of women as a civilizing force; their very *nature*, he argued, as women and as wives would prove transformative of the region. Describing his first impression of Washington Territory, Mercer explained that the morals of the men were actually in decline for lack of women:

Churches and school houses there were, but the great elevating, refining, and moralizing element—true woman—was wonderfully wanting. . . . Young men were there fresh from the home circles and families of the East, with fond memories of prayerful mothers and watchful fathers; yet distance and time were rapidly changing those memories and altering character. The tendency with both young and old was to forget their associations, and in a certain degree to depart from their former course of conduct.⁷¹

Women by their mere presence, Mercer argued, could save the West from falling into debauchery. In fact, they had a *duty* to immigrate:

I appeal to high-minded women to go into the West to aid in throwing around those who have gone before the restraints of well-regulated society; to cultivate the higher and purer facilities of man by casting about him those refining influences that true women always carry with them; to build up happy homes, and let true sunlight shine round the hearthstone. It is simply a matter of duty on the part of Eastern women to go to the West, where their presence and influence are so much needed.⁷²

Despite his collection of \$300 from each of the would-be husbands in Seattle, Mercer’s plans were thwarted by repeated delays and resultant financial difficulties. To rectify the problem, Mercer attempted to draw from the public coffers to finance his expedition. He offered to pay for the women’s food if the federal government would

superintendent of the Kitsap Public Schools. One commentator states that Ordway described herself as “[t]he Mercer Girl who reserved her affections for her students.” *Id.*

69. Bagley, *supra* note 21, at 10.

70. *Load of Females*, *supra* note 18.

71. *Mr. Mercer’s Emigration Scheme*, *supra* note 18, at 5.

72. *Id.*

provide a ship.⁷³ The government refused, but the voyage went forward when the government agreed to condemn the *Continental*.⁷⁴ Mercer also sought aid from Washington Territory. In December 1865, a bill was reported by the Ways and Means Committee to the Territorial House of Representatives that read as follows:

1. The reputation of the Territory is in a measure at stake.
2. The bare idea that 500 ladies should be left in the city of New York, disappointed and unprovided for when they have come from their homes in good faith, is not to be entertained for a moment by any man claiming to be actuated by the feelings of humanity.⁷⁵

The bill was defeated by a vote of eighteen to eight.⁷⁶ Mercer appears to have tried again almost immediately; a bill entitled “An Act appropriating moneys to ladies in New York [C]ity, awaiting transportation to the Pacific coast,” was introduced on January 2, 1866, but never mentioned again.⁷⁷ The same bill was introduced to

73. Mercer appears to have been a cagey spin-doctor. Arriving in New York the day after President Lincoln was fatally shot, Mercer told the *Times* that he had intended to go directly to Lincoln for federal assistance in his female emigration scheme. Although Lincoln no doubt would have been quite surprised by Mercer’s request for assistance, the *Times* took Mercer’s claim that Lincoln would have supported him at a *fait accompli*: “Although somewhat discouraged at *losing the support of Mr. Lincoln*, he so confidently believed he would have received it from the President, had he lived, still Mr. Mercer did not lose hope in the ultimate feasibility and success for his novel undertaking”. *Women Colonizing*, *supra* note 18, at 8 (emphasis added). Most commentators have uncritically accepted Mercer’s assertion that he knew Lincoln, though to varying degrees. Compare MORGAN, *supra* note 23 (“Lincoln was shot, and Asa, who had known him slightly, lost a potential ally.”), with Holbrook, *supra* note 58, at 89 (“he had been counting on the President to help him, he who had sat on Lincoln’s knee as a boy in Illinois”). In an interview with the *Chicago Tribune* conducted in 1910, Mercer elaborated further on the story. According to this interview, Mercer had been “dandled” on the knees of Lincoln in his childhood, and Mercer arrived in New York with a lengthy letter he was prepared to give to Lincoln. *A Contract for 500 Wives: How Colonel Asa S. Mercer Supplied Seattle’s Need in the Pioneer Days*, WASH. POST, Jan. 30, 1910, at M2 (reprinting *Chicago Tribune* article). Eventually, by selectively lobbying various presidential advisors, Mercer appears to have secured General Ulysses S. Grant’s approval for the plan; Grant in turn allegedly persuaded President Johnson to support it. Somewhere along the way, this support evaporated. When he arrived again in New York to prepare to sail, there was no vessel. His supporter, General Grant, had disappeared to Canada, and those remaining could not spare the \$50,000 they estimated providing a vessel would cost. *Women Colonizing*, *supra* note 18, at 8.

74. Accounts differ as to whether the government provided the vessel or sold it to the man who served as Captain on Mercer’s voyage, Ben Holladay. Compare *Women Colonizing*, *supra* note 18, (“Gen. Meigs finally said that he would allow the vessel to go if Mr. Mercer would man, coal and provision her.”), with *The Strangest Cargo of “Calico” Ever Shipped West*, CHI. DAILY TRIB., Jan. 23, 1910, at G3 (“[T]he *Continental*, worth \$250,000, was condemned by the Government and sold at private sale to Capt. Holladay for \$120,000.”); see also *The Female Emigration Scheme*, N.Y. TIMES, Dec. 4, 1865, at 8 (describing the *Continental*).

75. Journal of the House of Representatives of Washington Territory 72 (1855–56).

76. *Id.* at 73.

77. *Id.* at 87.

the Territorial Council (the equivalent of today's Senate) but indefinitely postponed.⁷⁸

The *Times* reported that Mercer was receiving no more than \$10,000 from the “girls and from the other emigrants,” and that he would make up the rest of the \$70,000-to-\$80,000 cost of the voyage himself.⁷⁹ No mention was made of his \$300-a-head “investors” back in Seattle.⁸⁰ An advertising circular Mercer had printed in Boston and elsewhere stated that “[c]omfortable accommodations can be had for \$150; other ladies at the very low rate of fare of \$125 each.”⁸¹ That was in September; by December, he was advertising passage at a “very low rate of \$200; orphan and poor girls, \$50.”⁸² He also advertised in November for “25 able-bodied men, who have families” for “immediate employment at good wages as soon as they land in the Territory.”⁸³ Presumably able-bodied men with families could pay their way without jeopardizing the virginity or marital status of the single women on board.

By the time the voyage was actually underway, Mercer's passenger list had dwindled substantially from his promised seven hundred “brides.” Approximately one hundred travelers left with Mercer from New York harbor on January 16, 1866, less than half of whom were single women.⁸⁴ Eager to make good on his promise to bring an ample number of wives to Washington Territory but short on

78. Journal of the Council of the Territory of Washington, 13th Sess. at 70 (1866).

79. *Women Colonizing*, *supra* note 18.

80. See *supra* note 56 and accompanying text.

81. *Mercer's Circular*, *Office of the New-England Emigrant Aid Company*, Boston, Sept. 8, 1865 (reprinted in the N.Y. TIMES, Jan. 26, 1866, at 2).

82. *The Mercer Emigration Scheme: A.S. Mercer, Emigrant Agent, W.T., Letter*, N.Y. TIMES, Dec. 16, 1865, at 4.

83. *General City News*, N.Y. TIMES, Nov. 21, 1865, at 2.

84. According to Flora Pearson Engle's diary, the number of passengers was “an even hundred,” although her list includes a few over that number. Engle, *supra* note 20, at 232. Engle includes in her list

five childless couples, six couples each with one son, two couples with two or three children, seven widows with offspring numbering from one to three, three unencumbered widows, one woman with two children coming to join her husband, thirty-six unmarried women, and fourteen single men [and] eighteen children between four and fifteen.

Id. Newspapers reported ninety-four passengers “most of them women” arriving in San Francisco. Arrival of Mercer's Emigrants [sic], *Puget Sound Daily*, May 12, 1866, at 2; *The Emigration of Eastern Women*, N.Y. Times, Jan. 26, 1866, at 4 (“At the very first it was announced that a thousand women had been found who were eager to go. . . but instead . . . there were but seventy-five female passengers, and nearly as many of the other sex.”). Harriet Stevens' diary has more information: “are all the unmarried ladies young ladies? Certainly not! Besides your humble correspondent there are several equally venerable.” Harriett Stevens, *A Journal of Life on the Steamer “Continental”*, *Puget Sound Daily*, May 30, 1866.

cash to pay the ship owners for the passengers' fare, Mercer appears to have tried to fill the gap between the money he had collected and the actual cost of the trip by ejecting or leaving behind those passengers whom it would be difficult to sell on the marriage market—women who already had husbands and widows with several children—while absconding with their belongings and cash. Indeed, several of the aggrieved passengers filed lawsuits against Mercer in New York and San Francisco.

In January 1866, just a few days after the *Continental* set sail, Elizabeth Thorn, one of the victims of Mercer's fraud, sued for an injunction against the California, Oregon and Mexican Steamship Company (the company owned by the *Continental's* buyer, Ben Holladay), claiming that Mercer had collected \$400 in cash for the passage of herself and her children, and demanding that the company return bedding and furniture valued at \$200 that she had given its agents to transport for her.⁸⁵ She claimed that Mercer had repeatedly agreed to apprise her of the time of the vessel's sailing, but that instead "the steamship *Continental* put to sea . . . in an unusual manner . . . covertly and secretly."⁸⁶ According to the court, Mrs. Thorn was not the only victim: it appeared "from affidavits that a large number of women, after having paid from \$600 to \$700 for a passage thither, ha[d] been left behind."⁸⁷ Sarah Balch, who also claimed to have been defrauded of approximately \$600 by Mercer, filed a separate suit against Mercer and the steamship company.⁸⁸

On January 27, 1866, a judge heard argument in the Elizabeth Thorn case and examined the affidavits presented by her attorney. According to the *Times*, Thorn presented evidence not only that Mercer had defrauded several ticket-holders, but also that he had overbooked the ship and then colluded with the steamship company to eject passengers from the ship when it stopped at Staten Island:

[Plaintiff's affidavits] tended to show that after the steamship *Continental* left her dock in this city, and before the vessel reached Staten Island, on her voyage out, the defendant Mercer and the agent of the steamship company were seen in close conversation; that from all that transpired during that short trip, there could be no doubt that the agents of the steamship company knew that Mercer had disposed of more tickets, than by the terms of the agreement between the company and Mercer, the latter had a right to sell; that when the steamer reached Staten Island, she was stopped and a large number of passengers were unceremoniously ejected from her; that they afterward

85. *Charges of Fraud*, *supra* note 19; see also *The Mercer Emigration Scheme*, *supra* note 19.

86. *Charges of Fraud*, *supra* note 19; see also *Plaintiff's Affidavit*, *supra* note 21.

87. *Charges of Fraud*, *supra* note 19.

88. *The Mercer Emigration Scheme*, *supra* note 19.

came back to New-York, where they found others who had been left in the city, not having been notified of the time of the sailing of the vessel.⁸⁹

The steamship company claimed that it had discovered, after setting sail, that there were passengers aboard who had not paid for their tickets, and that it had ejected them at Staten Island.⁹⁰ One of these passengers, a William Carleton of Maine, had left his business in Maine and had traveled to New York with his wife and children to sail to Seattle at the appointed time, but the ship was delayed. He explained, “I have spent all my money for the board of my family and . . . I have neither a roof to shelter them nor a cent to buy them a loaf of bread.”⁹¹ Understanding that he was becoming very unpopular with his passengers, Mercer hid in the ship’s coal bin until all of the ejected passengers had been removed from the ship.⁹²

Although neither the *Times* nor the litigants ever said so explicitly, it appears that those claiming to be defrauded by Mercer were primarily men and widows with several small children—those least likely to be desirable mates for the paying customers in Seattle. The transcript of the hearing as reported by the *Times* refers to those wronged as “injured and victimized widows.”⁹³ Thorn and Balch were also called widows by Thorn’s lawyer in court: “She is a widow, and there beside her sits another widow.”⁹⁴ Her attorney also implied that Mercer chose families with children as his victims, referring to Mercer’s project as “this most infamous, cruel, wicked scheme . . . to rob and ruin innocent women and helpless children.”⁹⁵ After the Thorn case attained notoriety, several other individuals sued Mercer; their names were reported in the *Times* as “Mrs. Agnes Peterson, Mrs. A.S. Stewart, Miss Stewart, Mr. Wm. McEwen, Mr. Arthur McEwen, and Mr. Peterson”—hardly the exclusively “feminine cargo” stereotypically associated with the Mercer voyages.⁹⁶ According to these plaintiffs, Mercer induced them to move west by promising to divide \$20,000 in gold among the emigrants “for the purpose of settling them handsomely when they reached their destination.”⁹⁷ And in April, Thorn filed yet another lawsuit against Mercer in San Francisco, this

89. *Id.*

90. *Id.*

91. CONANT, *supra* note 20, at 28; *see also* Engle, *supra* note 20, at 229. Both Conant and Engle recall the event, although they appear to have been unaware of the resultant lawsuits.

92. CONANT, *supra* note 20, at 29; Engle, *supra* note 20, at 229.

93. *The Mercer Emigration Scheme*, *supra* note 19.

94. *Id.*

95. *Id.*

96. *Local News*, *supra* note 19, at 4.

97. *Id.*

time with one J.W. Balch as co-plaintiff.⁹⁸ Mr. Balch alleged that he had paid Mercer \$650 to take him and his children to Washington Territory, and that Mercer refused to receive him on board when he arrived to set sail.⁹⁹ He also sought damages for his detention in New York and for the cost of storing his baggage in Jersey City during the multiple delays.¹⁰⁰

By the time the *Continental* set sail, the press had also begun to turn on Mercer. Papers insinuated that the women were chattel: one referred to them as “a Cargo of females”;¹⁰¹ another, as a “Hegira of Spinsters.”¹⁰² *Harper’s Weekly* commissioned a fanciful sketch of a ship filled with of young women, reporting that “[n]o more curious or suggestive exodus ever took place.”¹⁰³ According to the *Times*, the “newspapers of Massachusetts did not favor” Mercer’s plan, “and some of the people thought him a curious individual, with a curious scheme: they accused him of seeking to carry off girls for the benefit of miserable old bachelors.”¹⁰⁴ One *Times* article suggested that Mercer’s error lay in artificially hastening the natural process of immigration that would have occurred had he done nothing:

All the men in Washington Territory have emigrated from this side of the Rocky Mountains, and all of them had sisters, or sweethearts, or female acquaintances here—a fair proportion of whom would certainly go there if the inducements and attractions amount to anything. Thousands of Irish and German girls are brought to America from Europe annually by the efforts of male relatives or friends who had preceded them. By this plan the Washingtonians will have to wait longer for their coveted women than if

98. Her New York suit was apparently unsuccessful. The January 28 *Times* article suggests that Judge McCunn was reluctant to hold the steamship company liable for Mercer’s fraudulent activity. *The Mercer Emigration Scheme*, *supra* note 19 (“The court suggested that it was quite improbable that the officers of the steamship company who reside in this city had been guilty of any complicity with Mercer in the perpetration of the alleged frauds.”).

99. J.W. Balch’s relationship with the plaintiff Sarah Balch is unclear; she appears to be a widow, and he appears to be a widower with five children, as he paid \$650 for “himself and his family,” and Mercer in his circular advertised rates of \$150 per adult and \$100 per child. *Attachment Suits*, *supra* note 19. Perhaps Sarah Balch was distantly related or unrelated to J.W. Balch, or perhaps she was misidentified as a widow in the previous hearing and was really one of Balch’s daughters or his wife.

100. *Id.* Although the New York cases do not appear to have been successful, a jury in San Francisco returned a verdict against Mercer in a case brought by a hoodwinked male passenger, the San Francisco newspaper columnist W.F. Watkins, who loaned Mercer approximately \$8,000, which he failed to repay. See CONANT, *supra* note 20, at 26–27. Watkins sued Mercer; Mercer testified on his own behalf at the hearing and appears to have also testified about the San Francisco *Thorn* and *Balch* cases at the same time. *Mercer Again in Trouble*, *supra* note 19, at 1.

101. CATHY LUCHETTI, I DO!: COURTSHIP, LOVE AND MARRIAGE ON THE AMERICAN FRONTIER 101 (1996).

102. *Id.*

103. See Holbrook, *supra* note 58, at 46–47 (reprinting *Harper’s* sketch).

104. *Women Colonizing*, *supra* note 18.

the latter were dumped upon their docks by the ship-load; but they will get them in a way more advantageous and agreeable to all concerned.¹⁰⁵

For this author, the Mercer voyage represented a grave mistake not because the West did not need women, but because a woman's proper place was to follow her man, not to set out on a frolic of her own as an adventurer to an unknown place.

Women's rights activists were particularly vociferous in their condemnation of the voyage. Anna Dickinson, the orator known as "the Pythoness in Petticoats," gave a public lecture in San Francisco ridiculing the expedition. According to Dickinson, someone had asked Governor Andrew of Massachusetts what would be done with the women when they reached the Pacific Northwest, as "an extremely limited number of the [men living there] wanted wives, and necessarily had no occupation for servants."¹⁰⁶ The Governor "naively" replied, she explained in disbelief, that the women could be "set to work as *school teachers for the children*."¹⁰⁷ The columnist reporting on Dickinson's lecture shared her belief that teachers were hardly necessary in a land with few families:

How your Washington bachelors can be fathers is a subject rather for a hearty guffaw than for any serious debate. So it seems rather more likely than otherwise that when "the girls" reach their intended home, they will find they have been "carrying coals to Newcastle." I wish them every success in life, but don't really see how much of it is to be achieved in that remote region.¹⁰⁸

Some commentary was so vicious that citizens began to caution that heaping too much opprobrium on the immigrants would lead to difficulties integrating them into society once they arrived. One letter to the *Alta California*, signed simply "Navigator Bob," warned that "if we keep on joking about this adventure, it will make the thing uncomfortable for the poor girls when they *do* come. . . . [W]e are bound to believe they are honest women and we must speak of them as such, and decently avoid all beastly jokes as 'cargo of heifers,' 'sewing machines' and such miserable digs as have stolen into print."¹⁰⁹

Meanwhile, the *Continental* made for Rio de Janeiro and then continued further south, crossing through the Straits of Magellan and then sailing north through the Galapagos to San Francisco.¹¹⁰ The

105. *The Emigration of Eastern Women*, N.Y. TIMES, Jan. 26, 1866, at 4.

106. *The Mercer Expedition*, *supra* note 20.

107. *Id.*

108. *Id.*

109. *The Female Immigration Scheme—"Hagar"*, ALTA CAL., Jan. 20, 1866, at 1.

110. See CONANT, *supra* note 20, at 57–93; see also *News Items*, HARPER'S WKLY., May 5, 1866, at 275 (documenting arrival of Mercer expedition in Rio on February 10).

ship docked in San Francisco on April 24, 1866, a little over three months after it left New York.¹¹¹

The idea of hundreds of marriageable women pressed together in the confined space of a ship caused great excitement and was explored in detail in several *Times* features, which are remarkable for their fanciful descriptions of the details of shipboard life and their romanticization of the voyage. In one *Times* piece, the author imagined how the arrival of the ship in Seattle would look: “Expectant hearts, beaming eyes, and out-stretched arms await them at the end of their journey of twenty thousand miles. The[y] will come fresh, ruddy and browned after their life upon the ocean.”¹¹² The *Times* represented the women onboard alternately as sirens, singing “old and familiar songs, whose notes wil [sic] be wafted far over the rippling waters,” and as frightened children who, “when the storm howls around their bark . . . will tremble and wish they had never started.”¹¹³ Most commonly, however, the image was one of valuable cargo:

What a load of precious freight will the *Continental* carry. Just think of what a sight between decks—seven hundred, and perhaps more, females ranging in years from 18 to 50 Only think of the band-boxes, acres of crinoline, miles of bonnet ribbons, cases of calico, pieces of lace, feet of shoes, piles of trunks; of the Marys, the Janes, the Claras, Maggies, Essies, Julies, sweet little ones, ugly old ones, passably good ones, a quaint, queer, curious [sic] quotation from the human market.¹¹⁴

So titillating was the idea of this “load of precious freight” that reports of the passengers’ arrival at unplanned destinations began to circulate almost immediately after they set sail. On January 26, 1866, a New York paper printed a dispatch from Fortress Monroe, Virginia, reporting that the *Continental* had sailed by and docked in nearby Norfolk.¹¹⁵ The description of the women’s behavior upon landing in Norfolk was detailed and vivid: “[T]he young lady emigrants have already succeeded in making a decided sensation in their saunterings through the streets of Norfolk, where, unlike as it was in New York, such a thronging of crinoline, jaunty hats and furs, are necessarily an absorbing and historical event.”¹¹⁶ But this “historical event” turned out to be false: two days later, the same paper printed a correction:

111. *Arrival of the Continental*, PAC. TRIB., Apr. 28, 1866 (relaying telegraph message announcing the arrival of the *Continental* on April 24 with ninety-four passengers).

112. *Visit to the Steamer Continental*, *supra* note 18.

113. *Id.*

114. *Id.* The actual voyage was far from pleasant. According to Flora Pearson Engle, the vessel was in such terrible shape that the women on board had to go to work, scrubbing decks and walls. Engle, *supra* note 20. The basic rations were salt beef or parboiled beans served with tea steeped in sea water. *Id.* at 230.

115. *The Mercer Emigration Scheme*, *supra* note 19.

116. *Id.*

“The female emigrant ship *Continental*, from New York for the Pacific, has not been here, neither has she been heard from. The steamer *R.R. Cuyler* was mistaken for the *Continental*.”¹¹⁷ It was not only the Mercer emigrants who were (mis)read as “girls,” but other passengers on other ships as well. The idea of the Mercer Girls was larger than the fact; the sauntering women in their jaunty hats and furs turned out to be just ordinary steamer passengers.

Once onboard the ship, Mercer continued to protect his investment through methods that could be characterized in today’s terms as kidnapping or trafficking. For example, while the ship was docked in Lota, Chile, it was “completely overrun, night and day, with Chil[e]an officers.” According to Conant:

Some of them are very intelligent and well educated men. So intense has been their admiration of the ladies that every inducement has been held out to persuade them to remain in Chili [sic]. Offers of marriage, offers of schools at fabulous prices, and offers of positions as housekeepers flowed in abundance.¹¹⁸

At least some of the women decided to remain in Lota and accept work there. But when the officers arrived in a boat to pick them up, Mercer refused to allow them to disembark. According to Conant, Mercer exclaimed, “No one takes one of these girls from this ship except they passes [sic] over my dead body!” During the fray that followed, the captain quietly ordered the second mate to draw up the ladder, preventing the women from leaving. He then told them that they could go on shore the next day if they wanted to. At about three o’clock in the morning while they were asleep, the captain went out to sea, and when the women awoke, they found themselves speeding away from Lota in the middle of a storm.¹¹⁹

In addition to protecting his cargo, Mercer tried to supplement his profits by duping several of the women into signing promissory notes for hundreds of dollars, assuring them that their future husbands would be able to pay the notes. Some gave in to his demands. One woman, referred to only as “Poor old Aunt Berry,” was actually delighted to sign the note, according to Conant’s perhaps somewhat exaggerated telling:

After stating what he wanted, he told her with a beaming smile that she would find a husband in Seattle, who would pay the note. “Oh! Mr. Mercer,” she exclaimed. “[D]o you think that there is any body up there who would be willing to marry me?” “Certainly,” said he, “[C]ertainly. There is one nice old farmer who lives near me, who wants a wife, and he promised to take whoever I brought.” “If that is the case,” said she, “I will give you my note for any amount, if you will promise to recommend me to him.” “I picked you

117. *Id.*

118. CONANT, *supra* note 20, at 89 n.13.

119. *Id.* at 87.

out on purpose for him," said Mercer, at the same time handing her a note to sign, which she did without reading it.¹²⁰

Mercer later confessed gleefully to Conant that Aunt Berry had signed a note for \$550.¹²¹ But others were not so easily fooled. One woman, a Mrs. Chase, refused to sign a note for \$250, telling Mercer that she had been promised passage for herself and two children for sixty dollars, that she had paid that amount, and that she would pay nothing more. When Mercer told her that he could not see why she should object to signing the note, since she almost certainly would get a husband as soon as she reached Seattle, Mrs. Chase replied, "Yes, Mr. Mercer . . . if I can find a man with white hairs, his pockets well lined with gold, one foot in the grave and the other just ready to go in, I might get married, but mind, none of his money shall ever find its way into your pocket."¹²²

The *Continental* arrived in San Francisco on April 24, 1866, with ninety-four passengers (several appear to have disembarked in South America, including a Mr. and Mrs. Ralston who were returning to their home in Rio de Janeiro; in addition, one deckhand had fallen overboard during the voyage and drowned).¹²³ Upon its arrival in San Francisco, the *Continental* reportedly created a stir: "[A] large number of people rushed down to the wharves, whether to select wives or to satisfy their curiosity as to the personal appearance of the fair emigrants, or for what object is unknown to any but themselves."¹²⁴

Some of the women were surprised to discover that their reputations were in question. One San Francisco newspaper

120. *Id.* at 92.

121. *Id.* Unfortunately for Mercer, Berry refused to pay the note. According to Conant, after arrival in Seattle,

The old farmer which Mercer promised to Miss Berry did not come to time, and we very much doubt if he ever existed. She was considerably worked up about it, and told Mercer today that until he secured her a good husband willing to take care of her, he might whistle for his pay.

Id. at 103.

122. *Id.* at 91–92. Mrs. Chase, a widow from Lowell who emigrated with her son and daughter, did marry; she was engaged within two weeks of arriving in Seattle. The man she married, Mr. Harry Wiggins, was eight years her junior. *Id.* at 105.

123. See CONANT, *supra* note 20, at 33, 41–42 (mentioning Mr. and Mrs. Ralston and describing the man overboard incident); *Arrival of the Continental*, *supra* note 111 (relaying telegraph message announcing the arrival of the *Continental* on April 24 with ninety-four passengers); *Arrival of Mercer's Female Emigrants*, N.Y. TIMES, May 22, 1866, at 1, quoting S. F. BULL., Apr. 21, 1866 (announcing arrival of Mercer's ship with ninety-four passengers, but perhaps misdating the *Bulletin's* article); Harriett F. Stevens, *A Journal of Life on the Steamer "Continental"*, PUGET SOUND DAILY, June 9, 1866 (April 23 diary entry stating that "to-morrow evening we shall probably enter the Golden Gate").

124. *Arrival of Mercer's Female Emigrants*, *supra* note 18.

categorically branded women indecent if they emigrated in hopes of marriage:

[I]t may well be doubted whether any girl who goes to seek a husband is worthy to be a decent man's wife or is ever likely to be. It is worthy of notice that all the papers on the Pacific coast are down on the Mercer scheme. The men there who want wives think they can look them up for themselves.¹²⁵

Harriet Stevens, one of the Mercer immigrants, was told by one San Francisco woman upon her arrival there that “no respectable woman came on the *Continental*” and by another that she would “never be respected on the Pacific coast because [she] came in that disreputable ship.”¹²⁶

Mercer was perceived as conniving and untrustworthy by many of his passengers, and when the ship landed in San Francisco, at least fifteen of the women immediately deserted the party.¹²⁷ Several others deserted in the days following.¹²⁸ Some of the desertions may have occurred not only because of Mercer's actions but also because of the warnings of San Francisco residents about what lay ahead for the women in Washington Territory. Harriet Stevens, in a letter to the editor of the *Puget Sound Daily*, explained that within a few hours of arrival in San Francisco, the “greater part of the ladies” were in tears, in part because there was “no end of testimony as to the dismal character of Washington Territory; the ignorance, coarseness, and immorality of the people, and the impossibility of obtaining employment.”¹²⁹ Those women, Stevens explained, who had friends or family in San Francisco felt compelled to remain, given the warnings that “Puget Sound was the last place it [sic] the world for women” and the offering of “all sorts of inducements to remain.”¹³⁰

The remaining passengers—about two-thirds of the original group—sailed to Seattle on lumber schooners over the next month, most of them arriving by June 1, 1866.¹³¹ Despite reports that Mercer would be arriving with hundreds of marriageable women, the actual number of immigrants who reached Seattle was modest: eight couples, one woman joining her husband, twenty unmarried women, eight

125. *A Woman's Plea for Mercer's Victims*, DAILY ALTA CAL., Jan. 28, 1866, at 1 (quoting the Springfield, Mass. REPUBLICAN).

126. Stevens, *Letter*, *supra* note 20.

127. CONANT, *supra* note 20, at 96.

128. *Id.* at 98 n.11.

129. Stevens, *Letter*, *supra* note 20.

130. *Id.*; see also *Arrival of Mercer's Emigrants [sic]*, PUGET SOUND DAILY, May 12, 1866 (citing THE OREGONIAN) (“It is thought that the far greatest part of the fair cargo will not proceed farther north than San Francisco, as they would be induced by favorable offers to remain in California. Thus ends the closing chapter of the great King's County Emigration Scheme.”).

131. Stevens, *Letter*, *supra* note 20; Engle, *supra* note 20, at 234.

unmarried men, and eighteen children.¹³² When the ship finally arrived, many of the men who had paid Mercer \$300 each for a “wife” were sorely disappointed. Conant, the *New York Times* reporter who accompanied the immigrants, explained (perhaps with some hyperbole):

There were some men in the Territory who were foolish enough to take stocks in Mercer’s Company. He was not at all particular as to the character of the men who held stock, and it mattered little to him into whose hands he placed the happiness and keeping of the deluded females, who were crazy enough to place themselves under his charge, with the promise of a future home, so long as he obtained their money. . . . Among those who took stock in the company, and who, hearing of the arrival of the party, hastened to Seattle with the full expectation of receiving a wife from the hands of Mercer and upon being indignantly refused by the girls who wouldn’t even speak to them, went away vowing vengeance against Mercer for bringing women that wasn’t on the marry . . . [were] Humbolt Jack, Lame Duck Bill, Whiskey Jim, White pine Joe, and Bob tailed and Yeke.¹³³

Despite their disdain for some of the local population, many of the women on this second voyage did marry local men—and quickly. By Saturday, June 9, a little over a week after landing, at least ten weddings had already taken place.¹³⁴ Conant’s notes contain several comments on the matches. Of Miss Mary Martin’s marriage to Mr. Tallman of San Francisco, he commented, “[t]he lady is over 40 years of age, and the frisky youth who was over powered with her charms is about 25.” Of a Mrs. Horton’s marriage to a Mr. Buckley of Seattle, he said, “70 years have already sighed their gentle breezes over her head.” A Miss Griffith’s marriage to an unidentified man from Olympia, Washington evoked the statement, “This lady married a gentleman worth \$100,000. She has done well.”¹³⁵

When he arrived in Seattle, Mercer was met by an angry citizenry and forced to attend a meeting to refute the stories circulating about him. In a speech made at the meeting, Mercer explained that his motive in going east was to “introduce a permanent element of refinement into the society of Washington Territory.”¹³⁶ He finished his speech by blaming “the lying slanderers of the East” and the “Kloutchman lovers of this Territory” for the rumors about his financial shenanigans.¹³⁷ (A “Kloutchman” was an Indian woman who

132. Engle, *supra* note 20, at 235–37.

133. CONANT, *supra* note 20, at 100.

134. *Id.* at 104–05.

135. *Id.*

136. *Mercer’s Speech*, PUGET SOUND DAILY, May 25, 1866, at 2.

137. PUGET SOUND WKLY., May 26, 1866, at 6, *cited in* CONANT, *supra* note 20, at 115. Apparently Mercer continued to feel unwelcome in Seattle. After marrying Annie Stephens of Baltimore (one of the passengers from the second voyage) on July 15, 1866, he quickly relocated to Oregon where he worked on developing trade relations with the Atlantic Coast, then to Texas,

married or cohabited with a white man.¹³⁸) His critics, he said, could “wallow in their filth.”¹³⁹

III. THE LEGAL RESPONSE: REFUSAL TO RESTRICT

From their beginnings, the Mercer voyages threatened to provoke government intervention in numerous states: Massachusetts, the state that provided the greatest number of Mercer immigrants; Washington, the destination territory; and jurisdictions in between, ranging from New York to California. New England, and the Commonwealth of Massachusetts in particular, had strong interests in the emigration of its educated young women to the West. Similarly, Washington Territory had strong interests in the ability of arriving immigrants to be self-supporting and virtuous. Both Massachusetts and Washington had an interest in the safety of their current or future residents. And yet, in the case of the Mercer immigrants, no jurisdiction ultimately used restrictive immigration law to address the expeditions. The only legal claims against Mercer that stuck were the breach of contract claims brought by the passengers left behind in New York City. This Part takes a close look at the Mercer immigrants’ brushes with the law, exploring why immigration law had so little to say about the voyages.

A. The Response in the East: Massachusetts

Massachusetts, the largest sending state in both Mercer voyages, had an interest in the immigrations because of its interest in the welfare of its citizenry. It wanted to ensure that women were supported by husbands and that the state’s labor markets functioned effectively. In his 1865 inaugural address, Governor John A. Andrew announced that women should go west (specifically, to Oregon) to prevent the weakening and demoralization of the East. The Governor noted that in Massachusetts there were 257,833 men aged fifteen to forty while there were 287,009, “or a surplus of 29,166,” women of the same age.¹⁴⁰ The effect of this disproportion, Governor Andrew warned, was “disastrous”:

where he worked for a newspaper, and finally to Wyoming in 1883, where he established the *Northwestern Livestock Journal*. CONANT, *supra* note 20, at 115–16, (citing Charles W. Smith, *Asa Shinn Mercer, Pioneer in Western Publicity*, 27 PAC. NW. Q. 347 (1936)).

138. See *infra* notes 287–288 and accompanying text.

139. PUGET SOUND WKLY., *supra* note 137.

140. Message of the Governor, *supra* note 17, at 733.

[I]t disorders the market for labor; it reduces women and men to an unnatural competition for employments fitted for men alone, tends to increase the number both of men unable to maintain families, and of women who must maintain themselves unaided. In civilized, refined society, it is the office and duty of man to protect woman, to furnish her a sphere, a support, a home. In return, she comforts, refines and adorns domestic life, the family, and the range of social influences. This is also the plainly providential order. Where women are driven to the competitions of the market with men, or where men are left unsolaced and unrefined by the presence of women, society is alike weakened and demoralized.

I know of no more useful object to which the Commonwealth can lend its aid than that of a movement adapted in a practical way to open the door of emigration to young women who are wanted for teachers, and for every other appropriate as well as domestic employment in the remote West, but who are leading anxious and aimless lives in New England.¹⁴¹

Large numbers of unmarried women were not a problem simply because of their poverty. They were also a “weakening and demoralizing” threat to the social order itself.¹⁴² Without an adequate number of men to marry them, these women were left in limbo, “anxious and aimless.” Marriage was the institution by which women were regulated by the state; with large numbers of “surplus” women unable to pair off in marriage with men, the Governor suggested, Massachusetts was in trouble. His address also recommended that the Massachusetts Legislature consider giving financial assistance to the project: “[T]he Commonwealth can lend its aid . . . to open the door to emigration.”¹⁴³

Governor Andrew was not the only one to express such views. In December 1864, the New England Emigrant Aid Company issued a circular describing the “fatal” risks posed by the “surplus” of women in Massachusetts:

The competition of women with each other brings their wages to a starvation point. The presence in all our towns of a large surplus of women above the number of men, is fatal to all efforts to preserve the ancient high tone of the morals of New England.¹⁴⁴

In response to Governor Andrew’s address, the Massachusetts legislature conducted an investigation under a Joint Special Committee of the Senate and House, presumably to consider the Governor’s suggestion that it provide financial assistance to female

141. *Id.*

142. Reva Siegel made a similar observation about women’s fight for the vote. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002). Opponents of women’s suffrage were afraid that enfranchisement of women would destroy the family and that the destruction of the family would lead to the destruction of American civilization. *Id.* at 979–80. In Governor Andrew’s speech, the threat was wage labor instead of women voting, but the fear of women departing from their traditional roles was the same.

143. Message of the Governor, *supra* note 17, at 733.

144. Massachusetts Senate Report, *supra* note 17, at 6.

emigrants to the West. On March 29, 1865—a few days before Mercer began recruiting women for his second, more ambitious voyage—the legislature issued a “Report on the Emigration of Young Women.”¹⁴⁵ Unlike Governor Andrew, the Joint Special Committee did not favor sending women emigrants west; in fact, it was solidly against the idea.¹⁴⁶ The Report was quite lengthy—fifty-two pages—and offered extensive analysis of why westward emigration of young women could be disastrous for Massachusetts.

First, the Report disagreed with Governor Andrew’s conclusion that there was a surplus of women in Massachusetts. Although the authors of the Report could not deny that the total population of women exceeded men, it contested the importance of this fact. There had been an “excess” of females before, the Report stated, particularly after the Revolutionary War, yet Massachusetts did not suffer.¹⁴⁷ In many Massachusetts counties there were actually surpluses of men, so there seemed to be no reason for Massachusetts women to travel three thousand miles for husbands when they could simply find them in neighboring counties.¹⁴⁸ The authors of the Report also noted that in 1860 there was a great excess of males in the United States as a whole and questioned whether sending women from Massachusetts to other areas of the United States would do anything to alleviate this problem.¹⁴⁹ Even if a thousand women a year were removed (at a cost to the legislature estimated at \$400,000), it would yield only “a local, extremely limited, and temporary relief.”¹⁵⁰ Finally, the Report advanced the argument that the “surplus” was chimerical, inflated by the number of temporary immigrants working in factories in Massachusetts.¹⁵¹

The authors of the Report expressed still more anxiety over the class of women who would take advantage of an emigration scheme. They feared that the well-educated, Protestant women of Massachusetts would leave while the Irish immigrants would stay, presumably because the jobs being offered in the West were teaching positions, not mill work. “An inferior class of foreign females are continually coming among us, all of whom are illiterate, and likely

145. *Id.* at 1.

146. The signers of the Report were Samuel M. Worcester, Milo Hildreth, and Alden Leland of the Senate, and David Thayer and George W. Greene of the House. Edward H. Rogers of the House dissented from the report but concurred in the conclusion, without explanation. *Id.* at 52.

147. *Id.* at 22–28.

148. *Id.* at 7.

149. *Id.* at 28.

150. *Id.* at 13.

151. *Id.* at 31.

ever to be so,” the Report claimed.¹⁵² Although preserving the “ancient high tone of morals in New England” was a lost cause, for that tone had already been destroyed by the influx of undesirable immigrants, the legislature hoped that any greater “corruption and degeneracy” could be prevented.¹⁵³ The “emigration or semi-expatriation of our educated and estimable females of Massachusetts birth” would be a great obstacle to this restoration of morals.¹⁵⁴ Sending away the most moral of women was perverse, according to a mill agent from Salem who testified before the committee:

If you were to take away the indolent and disreputable, you would improve the moral and social condition of all remaining. If you take the virtuous and industrious, you would instantly check the growth and prosperity of the State, which would be felt in every branch of industry. If the excess of females is considered an evil, it seems to me vastly more proper to remedy that evil, by an import of men, rather than by an export of women.¹⁵⁵

Paradoxically, the same Report that warned of moral havoc in Massachusetts also questioned whether moral women would be willing to emigrate. “Such a scheme would not benefit women *who must maintain themselves*,” opined the City Clerk of Lowell.¹⁵⁶ “The access to Christian churches, of every denomination, the attractions of the home circle, and the influence of social life, would cause women of refinement and culture to shrink from taking such a step.”¹⁵⁷ It was for this reason, according to the Lowell clerk, that Mercer’s first expedition had garnered so few passengers:

M. Mercier [sic], a gentleman from Oregon [sic] interested in educational purposes, came to Lowell in the spring of 1864, to inform himself in regard to the school system of Lowell, and induce young women to go to Oregon as teachers. He remained here some time, and by public announcement gave information to those who desired it in regard to his scheme, visited teachers, etc., etc., and after offering every liberal inducement, was enabled to take out with him only seven (7) young ladies from Lowell as teachers. I am inclined to think the scheme impracticable.”¹⁵⁸

Finally, the legislature also expressed a concern about the destabilizing effects of the emigration. Even if in theory the “right” number of the “right” kind of women could be sent west, the transaction costs of the venture would be too steep. Single women, sent west without chaperones, might find themselves forced into prostitution, polygamous marriages, or the horrors of forced marriage.

152. *Id.* at 8.

153. *Id.*

154. *Id.*

155. *Id.* at 40 (testimony of John Kilburn, Agent of Naumkeag Mills, Salem, Mass.).

156. *Id.* at 37 (testimony of John B. McAlvin, City Clerk of Lowell, Mass.).

157. *Id.*

158. *Id.*

Although they never mentioned the word “prostitution,” legislators plainly were worried about that prospect:

[T]he bare fact of liabilities, to which we can only allude, ought to be fatal to any conceivable scheme of emigration, to be conducted by State or National authorities. Nothing more need be intimated to those who have known but a very little of the unpublished results of British female emigrations,—for example to Australia,—and of which it would be “a shame even to speak.” We may also just allude to the early history of our own Virginia.¹⁵⁹

Significant also was the fear that the women might find themselves in unfortunate marriages. Parents of single women should not be so desperate, the Report urged, as to force their daughters into “marriages of convenience of interest, without congeniality and sincere love,” which could only result in “unspeakable misery, and sometimes of revolting or shocking crime.”¹⁶⁰ The West was a particularly dangerous place for single young women, who might find themselves, like previous Massachusetts women, in a “household of abomination” in the “polygamous realm of Brigham Young.”¹⁶¹ The “chief magnates of the so-called ‘latter day saints,’ ” the Report explained, “have harems, which are but little inferior to that of the Mahometan Shah of Persia, and quite surpass, we believe, that of the present Sultan of Turkey.”¹⁶²

Despite the concerns it raised, the Report of the Massachusetts Legislature was toothless. Massachusetts was essentially helpless in preventing the Mercer immigrants from leaving, or, for that matter, forcing them to go, just as would be the case today.¹⁶³ Although women, especially married women, did not enjoy the same rights as men, their rights were circumscribed not through official state action but through subordination to their husbands in marriage. Thus, a woman had to share her husband’s domicile and could be prevented

159. *Id.* at 12–13. The early settlers in Virginia were employees of The Virginia Company, who were mostly male indentured servants. WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA, VOLUME 1: THE CHESAPEAKE AND NEW ENGLAND* 13–15 (2008). But both men and women were “sold here upp and downe [sic] like horses.” Edmund S. Morgan, *The First American Boom: Virginia 1618–1630*, 28 WM. & MARY Q. 170, 198 (1971); see also Robert C. Johnson, *The Transportation of Vagrant Children from London to Virginia, 1618–1622*, in *EARLY STUART STUDIES: ESSAYS IN HONOR OF DAVID HARRIS WILSON* 137, 137–51 (Howard S. Reinmuth, Jr. ed., 1970). Women convicts were also transported to Australia, in part to provide sexual services to male colonists there. See Raelene Frances, *The History of Female Prostitution in Australia*, in *SEX WORK AND SEX WORKERS IN AUSTRALIA* 27, 27–52 (Roberta Perkins et al eds., 1994).

160. *Id.* at 49.

161. *Id.* at 29.

162. *Id.*

163. See *Paul v. Virginia*, 75 U.S. 168, 180 (1868) (holding that the Privileges and Immunities Clause gives citizens of states the right of egress from their states, and of free ingress into other States).

from leaving the state by her husband.¹⁶⁴ But single women and married women whose husbands traveled with them or sanctioned their travel were outside this proscription and could travel freely.¹⁶⁵ The Report most likely was intended to repudiate Governor Andrew's request for funds. But it also had an expressive function: it served as a warning to the women of Massachusetts to stay away from Mercer and his plans, and to ensure that any women joining him would be doing so of their own volition, without the imprimatur of the state. This was the closest Massachusetts was able to get to regulating the emigration of its citizens.¹⁶⁶

B. The Response in the West: Washington Territory

As the immigrants came closer to their destination and rumors continued to swirl about their vast numbers and questionable morality, the residents of Washington Territory became worried. Unlike the helpless Massachusetts legislature, Washington Territory was actually in a position to do something to regulate the immigration of the Mercer immigrants.¹⁶⁷ Indeed, the Mercer immigration scheme *did* inspire the passage of a restrictive immigration statute, although not one targeting female immigrants. According to the *Washington Democrat*, the voice of the Democratic Party in Washington Territory, a rumor began to circulate as early as January 1865 that Mercer's true purpose in making a second voyage was to "ship out a lot of

164. See *Haddock v. Haddock*, 201 U.S. 562, 571 (1906) (holding that a wife has same legal domicile as her husband and it is her duty to be at the matrimonial domicile).

165. And, as divorce cases from the period show, many women abandoned their husbands without their permission. See, e.g., HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 157–59 (2000) (discussing a seventeenth-century English case and a nineteenth-century U.S. case in which the wife abandoned her husband without his permission).

166. Similarly, just a few years before, a private organization, the New England Emigration Aid Society, and not the state of Massachusetts, had been responsible for financing the emigration of Massachusetts residents to Kansas, in an attempt to prevent Kansas from becoming a slave state. See ELI THAYER, *HISTORY OF THE KANSAS CRUSADE: ITS FRIENDS AND ITS FOES* 135–36 (1889) (collecting letters from donors to the aid organization).

167. Territories frequently passed exclusionary immigration legislation during this period. See *infra* Part III.B.1. Whether these laws were constitutional was doubtful, and, indeed, at least one California law was struck down by the California Supreme Court. See *Chy Lung v. Freeman*, 92 U.S. 275 (1875) (striking down California statute requiring posting of bond by shipowners importing "lewd and debauched women"); cf. *Dred Scott v. Sandford*, 60 U.S. 393, 510–15 (1856) (stating that the Missouri Compromise, in which Congress purported to exercise power over the Territories in banning slavery in some of them, was an unconstitutional infringement on territorial authority). For a discussion of the shifting balance of power between the federal government and states and territories during this period, see Abrams, *supra* note 2, at 668–77 (discussing two federal laws that evidenced the beginnings of the federal immigration bureaucracy that would develop in later years).

negroes, to be employed as laborers at several Milling establishments on the Sound.”¹⁶⁸ The paper went on to report that local mill owners had expressed interest in the scheme and that letters had been sent to the Freedmen’s Bureau, “making enquiry what disposition can be made of several hundred negro laborers in this Territory and asking mill owners to employ them in preference to white laborers.”¹⁶⁹ Although there is no evidence the rumor was true, it created enough controversy to generate a bill that would have made it a misdemeanor to encourage the importation of blacks who were not house servants:

*Be it enacted by the Legislative Assembly of the Territory of Washington, That any person who shall encourage the immigration of negroes or mulattoes into this Territory, or Import the same or pay for the importation thereof, except as house servants of the person so importing, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail, of not to exceed one year, and in case of fine, one-fourth shall go to the informer.*¹⁷⁰

Although the bill was approved by the Territorial Legislature, Acting Governor Elwood Evans vetoed it without explanation (leading the *Democrat* to surmise, probably without basis, that he was trying to help his friend Mercer profit from the scheme).¹⁷¹

The bill, although it never became law, is typical of immigration statutes of the time in that it attempted to shape the racial composition of a new territory’s population through exclusion of immigrants. Indeed, Washington Territory had previously voted down a law that would have “prevent[ed] the immigration of free negroes and mulattoes.”¹⁷² And during the two years in which the Mercer voyages took place, the Washington Territorial Legislature passed laws that attempted to discourage Chinese immigrants from entering by taxing them.¹⁷³ Washington was not alone in these efforts. Throughout the 1850s and 1860s, Oregon, California, and other

168. *The Emigrant Agent*, WASH. DEMOCRAT, Jan. 14, 1865, quoted in *Importation of Contrabands*, supra note 18.

169. *Id.*

170. An Act to discourage the Importation of Negroes and Mulattoes, and to punish Importers thereof of Jan. 19, 1865, reprinted in *Importation of Contrabands*, supra note 18.

171. *Importation of Contrabands*, supra note 18.

172. See JOURNAL OF THE HOUSE OF REPS. OF THE TERR. OF WASH., 1 Sess. 1854, Olympia, 113 (George B. Goudy, Public Printer, 1855) (noting that a Mr. Chapman introduced a bill to “prevent the immigration of free negroes and mulattoes, [w]hich was rejected”).

173. An Act to protect free white labor against competition with Chinese coolie labor, and to discourage the immigration of the Chinese into this territory, 1864 Wash. Sess. Laws 56, 56 § 1 (establishing a \$6.00 “Chinese Police Tax”); An Act to Amend an Act to protect free white labor against competition with Chinese coolie labor, and to discourage the immigration of the Chinese into this territory, 1866 Wash. Sess. Laws 116, 116 § 1 (raising tax to \$16.00); An Act to Amend an Act to protect free white labor against competition with Chinese coolie labor, and to discourage the immigration of the Chinese into this territory, 1867 Wash. Sess. Laws 143, 143 § 1 (lowering tax back to \$6.00 in selected counties).

western states and territories passed law after law attempting to exclude immigrants of specific races or national origins from entering or to discourage them from immigrating through harsh taxes.¹⁷⁴

In the case of the Mercer immigrants, who appear to have all been white, Washington Territory could have pursued other avenues of regulation. The two most common methods used by states and territories at the time that would have applied to the Mercer immigrants were statutes prohibiting the immigration of people who were “likely to become a public charge,” and statutes prohibiting the immigration of “lewd and debauched women.” That neither kind of exclusionary law was passed in response to the Mercer immigrants appears to have resulted from the public perception that the Mercer immigrants were future wives.

1. The Public Charge Exclusions

The Mercer expeditions threatened to bring an unprecedented number of single women to Washington Territory. The sudden arrival of 700 women without work in a town whose population totaled 302 would have been a traumatic economic event for the region. As one local paper put it, “the citizes [sic] of Seattle will have a chance to house an elephant when Mercer arrives.”¹⁷⁵ For a short time, it looked as if the Mercer immigrants might not be allowed to land. According to Conant, the citizens of Seattle had made arrangements with the Governor of Oregon to send 500 of the 700 reported passengers to Oregon.¹⁷⁶ The hope was that Oregon, with a larger population, might be able to accommodate them into its workforce.¹⁷⁷ Washington Territory would not have been doing anything unusual in excluding such a ship; states and territories frequently required ship captains to post bond for immigrants likely to be paupers, and no one would be more likely to be a pauper than an unmarried woman arriving without

174. See, e.g., Act of Apr. 26, 1858, ch. 529, 1858 Cal Stat. 295 (preventing immigration of Chinese or Mongolians to the State) (repealed 1955); Act of April 26, 1862, ch. 339 § 1, 1862 Cal. Stat. 462, 462 (repealed 1939) (taxing “each person, male and female, of the Mongolian race” \$2.50 a month); Act of Jan. 11, 1866, § 6, quoted in JOHN HAILEY, THE HISTORY OF IDAHO 102 (1910) (“all Mongolians, whether male or female” subject to a foreign miner’s tax of \$5.00 a month); Rose Jade, *Voter Registration Status as a Jury Service Employment Test: Oregon’s Retracted Endorsement Following Buckley v. Am. Constitutional Law Found., Inc.*, 39 WILLAMETTE L. REV. 557, 563 nn.18–19 (2003) (discussing an 1849 law passed by the Oregon Territorial Legislature prohibiting African Americans from entering or residing in the state).

175. WASH. STANDARD, Feb. 24, 1866.

176. CONANT, *supra* note 20, at 100.

177. WASH. STANDARD, Oct. 14, 1865, at 2.

a job in an area that needed laborers for work understood to be suitable for men only.

Because turning away some of the passengers seemed inevitable, both Seattle, Washington and Portland, Oregon prepared for the Mercer immigrants' arrival. In Seattle, the population prepared for what they thought would be an onslaught of young women incapable of self-support, and Portland churches and societies began organizing in anticipation of the arrival of the overflow.¹⁷⁸ As one editor commented, "While we do not fully appreciate Mr. Mercer's motives in bringing so many really helpless people to our doors, and no families, yet we are pleased to believe they will be taken care of, if not among our own people, by our neighbors in Oregon."¹⁷⁹ Some residents did not want to share the "cargo": the men of Vancouver, Washington, just on the other side of the Columbia River from Portland, told the Portlanders: "If you want a shipload of girls, go and get them. There are just 39,301 left in Massachusetts, and if you can get a recommendation from Mr. Mercer, you can probably get some of them, but you can't have the choice of our load."¹⁸⁰ One Oregon paper reported the sailing of Mercer's ship with the comment, "Let 'em sail; we're satisfied with home productions." A Washington newspaper referenced the available supply of Indian women, replying, "You prefer 'brown sugar,' do you?"¹⁸¹ (As we shall see in Part IV, fears about the mixing of Indian women and white pioneers animated a series of anti-miscegenation laws in the western territories contemporaneous with the Mercer voyages.)

When the boats arrived, it became clear that the numbers were far less than feared, and no one was turned away. Nonetheless, the impact of the immigrants—nearly sixty new residents in a town of three hundred, twenty of whom were unmarried women—on Seattle and the surrounding area was enormous.¹⁸² Upon arrival, reported one witness, "the general and in fact only remark we heard" was "I don't see what Mercer meant by bringing all those women up here for, where there is nothing for them to do."¹⁸³ One editor urged the citizens of Seattle to be kind to the immigrants and "give the lie to the foul aspersion that the people here are a set of half civilized barbarians."¹⁸⁴ Nevertheless, he insisted, "Another emigration scheme of this

178. *Id.*

179. *Id.*

180. VANCOUVER REG., Oct. 21, 1865, at 3.

181. WASH. STANDARD, Feb. 24, 1866.

182. Engle, *supra* note 20, at 235–37.

183. CONANT, *supra* note 20, at 99.

184. *Arrival of the Continental*, PAC. TRIB., Apr. 28, 1866, at 2.

character should and will be promptly frowned down.”¹⁸⁵ It was the *numbers* of women that ended up mattering: if there were enough men to marry them, then Washington need not worry that women would become public charges.

The legal ideology supporting this idea was the doctrine of coverture, a creature of English common law with origins in medieval Normandy that became a part of the common law of the colonies and, ultimately, the states.¹⁸⁶ Under William Blackstone’s famous formulation of coverture, a married woman performed everything under the “wing, protection, and cover” of her husband; therefore, she was referred to as a “feme-covert,” or “covered woman,” and her condition during marriage was called “coverture.”¹⁸⁷ The legal effects of coverture on married women were extensive. An unmarried woman (a “feme-sole”) could enter into contracts, own her own property, change her place of residence or domicile, and earn and keep her own income. A feme-sole was, in effect, a public economic actor. Married women (“femes covert”), however, did not enjoy a legal existence separate from their husbands: their husbands were the managers of any property they brought to the marriage, controlled their income if they earned any, determined where their wives would live, and had the right to engage in “domestic chastisement.”¹⁸⁸ Wives could not enter into contracts without their husbands’ consent, enter a profession, sue or be sued, make a will, or testify for or against their husbands.¹⁸⁹ Coverture imposed duties on husbands to support their wives.¹⁹⁰ Husbands also had the authority to determine the place of the family domicile.¹⁹¹ Essentially, marriage was a promise by the

185. *Id.*

186. See Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346, 347–48 (1979) (discussing the doctrine’s development and some loopholes used to avoid its application).

187. *Id.* at 350.

188. *Id.*; see also 2 JAMES KENT: COMMENTARIES ON AMERICAN LAW 39 (George Comstock ed., 11th ed. 1867) (arguing that because the husband is the natural guardian of the wife, “the law has given him a reasonable superiority and control over her person, and he may even put gentle restraints upon her liberty”).

189. HOMER CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 219–20 (1968).

190. See *id.* at 220–21 (explaining that a husband was responsible for any debts incurred by his wife before or during the marriage, for any torts she had committed before or during the marriage, and for her support).

191. See IRVING BROWNE, ELEMENTS OF THE LAW OF DOMESTIC RELATIONS AND OF EMPLOYER AND EMPLOYED 15 (The Boston Book Co., 2d ed. 1890) (1883) (“The husband is entitled to select the mutual domicile, where the wife is bound to reside, and whither she is bound to follow him”); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 218 (O.W. Holmes, Jr. ed., Little, Brown, & Co., 12th ed. 1873) (“The husband is the best judge of the wants of the family, and the means of supplying them; and if he shifts his domicile, the wife is bound to follow him wherever he chooses to go.”).

husband to protect and support his wife and a promise by the wife to serve and obey her husband.¹⁹²

Coverture was alive and well in Washington Territory when the Mercer immigrants arrived. When it first became a territory in 1853, Washington, by congressional order, adopted the law then in effect in Oregon Territory.¹⁹³ Oregon's law had been based on the common law of Iowa as it existed in 1839, when Oregon Territory first adopted it.¹⁹⁴ Iowa courts in 1839 followed a typical law of coverture: married women could not be sued, enter into contracts, or maintain control over personal property. These disabilities were removed in Iowa only with the Revised Statute of 1860, and Washington did not pass a similar statute until 1881.¹⁹⁵ In addition to this common law of coverture, Washington Territory passed statutes regulating entry into marriage and divorce as early as 1855.¹⁹⁶ The 1855 Act made the "neglect or refusal of the husband to make suitable provisions for his family" grounds for divorce.¹⁹⁷ Washington residents, then, would have understood that, for a woman, marriage meant a legal loss of identity, and that any "Mercer Girl" marrying a pioneer would be supported by her husband, not the Territory. Because the Mercer Girls were eligible young women who were likely to be married quickly, they did not threaten to become "public charges."

Of course, there were some potential difficulties with this vision. What if, for example, the husbands were not able to support their wives? But the common understanding of marriage as a form of privatized welfare appears to have been so dominant that no one looked too carefully at the specifics of the Mercer situation. If enough

192. NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 12 (2000).

193. Act of Mar. 2, 1853, ch. 90, § 12, 10 Stat. 172, 177 (1853).

194. Ray August, *The Spread of Community-Property Law to the Far West*, 3 W. LEGAL HIST. 35, 61 (1990).

195. See IOWA REV. STAT. § 2215 (1860) (wife may convey her real property in the same manner as other persons); *id.* § 2499 (wife's personal property does not vest at once in her husband); *id.* § 2771 (married woman may sue and be sued without joining her husband with her); *id.* § 2505 (neither husband nor wife liable for debts of other entered into prior to marriage); *id.* § 2506 (wife may enter into contracts and incur liabilities); *Musselman v. Galligher*, 32 Iowa 383, 1871 WL 550, at *2 (Oct. 5, 1871) (discussing Iowa Revised Statute of 1860 section 2220 (wife may receive gifts and grants directly from husband without intervention of trustee)); *Rosencrantz v. Territory*, 2 Wash. Terr. 267, 274, 5 P. 305, 306 (1884) (discussing 1881 "Act to define the rights of married persons" as intending to "abolish all the disabilities of the wife as a member of the family which had been imposed upon her by the common law, and to provide, instead of said common-law rule, a new relation between husband and wife as members of the family").

196. An Act to Regulate Marriages, 1854–55 Wash. Terr. Stat. 404 (1855); An Act Regulating Divorces, 1854–55 Wash. Terr. Stat. 406 (1855).

197. 1854–55 Wash Terr. Stat. 406 § 1, cl. 6.

would-be husbands came forward, the townspeople supposed, then the women would be taken care of and there would be no need to find them public support (or, for that matter, employment). The logical leap was the transformation in the public imagination of a shipload of various people—male and female; married, single, and widowed; children and adults—into a “boatload of brides.” The Mercer immigrants were not thought of as potential public charges because they were perceived as marriageable girls. Newspapers persistently refused to acknowledge the diversity of immigrants aboard the ship, ignoring the large numbers of single men, couples, and older widows with children. As for the young women the newspapers imagined the immigrants to be, it was inconceivable that they would have traveled so far into the wilds of Washington Territory with the aim of remaining single, and there was an abundant supply of local men willing to provide for them. As wives, they would not compete for jobs in the labor market, but would play a supportive, domestic role for their husbands. The gender roles that had been disrupted by the epidemic of male deaths from the Civil War would be righted; in Lowell, mill workers were women, but in Washington Territory, mill jobs would be returned to men while the women provided a reproductive function, both biologically, by helping to create a white citizenry, and culturally, by bringing civilization to the frontier. Even when they were understood as potential laborers in media reports, white female immigrants’ labor was presumptively civilization-building: as teachers, church organists, and community leaders, women would provide stability, morality, and culture to a lawless place.

2. The “Lewd and Debauched Women” Exclusions

Had the Mercer immigrants not been excluded as likely paupers, there was another strategy Washington Territory could have used to exclude them had it so desired—a statute prohibiting unmarried women from entering because they were “lewd and debauched women.” As unmarried women, they were therefore likely to become prostitutes. Just a few years later, California passed a law requiring female immigrants to demonstrate that they were “good person[s] of correct habits and good character” in order to disembark in a California port.¹⁹⁸ Another law further banned any “lewd or debauched woman” from entering the state by boat.¹⁹⁹ And beginning

198. Act of Mar. 18, 1870, ch. 230, 1870 Cal. Stat. 330, 330–31, § 1.

199. 1873–74 Acts Amendatory of the Codes of California 39, § 70.

in 1875, when immigration became a question of federal law, Congress made importing a woman for “purposes of prostitution” a felony.²⁰⁰

There was plenty about the Mercer voyages that might have caused a close observer to worry that the women on the ships were being trafficked for nefarious ends. Mercer’s collection of \$300 each from pioneers in Washington certainly looked like wife-selling, and his kidnapping of some of the women after they tried to abandon the voyage in Lota would lend credence to an argument that they were being trafficked. Indeed, one of the reasons cutting against westward immigration articulated by the Massachusetts legislature was that women might end up as prostitutes or in polygamous Mormon marriages.²⁰¹ The defrauding and abandonment of those passengers who would not fetch a high price in the marriage or prostitution markets might have aroused further suspicion that Mercer was planning to profit by selling the women. Certainly the promise to the passengers of \$20,000 in gold resembled the promises made to trafficked women, from China and elsewhere, that good jobs would await them in the western states and territories.²⁰²

Understanding why the Mercer voyages did not result in anti-prostitution immigration regulation requires a brief look at the arc of history of this kind of regulation. In early frontier towns before very many white women arrived, prostitution was generally welcomed. Even in towns where it was regulated, this was usually done by a slap on the (prostitute’s) wrist.²⁰³ The *immigration* of prostitutes was not regulated at all. Local newspapers even noted the docking of ships full of prostitutes with great enthusiasm. The following story, for example, appeared in the *Alta California*, a San Francisco newspaper, in 1850, just a year after the Gold Rush began, when San Francisco had been flooded with young, single men:

We are pleased to notice by the arrivals from sea Saturday, the appearance of some fifty or sixty of the fairer sex in full bloom. They are from all quarters —some from Yankee-land, others from John Bull country, and quite a constellation from merry France. One Frenchman brings twenty—all they say beautiful! The bay was dotted by flotillas of young men, on the announcement of this extraordinary importation.²⁰⁴

200. Act of Mar. 3, 1875 (Page Law), ch. 141, 1875 Cal. Stat. 447, § 3 (repealed 1974).

201. See Massachusetts Senate Report, *supra* note 17, at 29 (discussing Massachusetts women in the “households of abomination”).

202. See *Local News*, *supra* note 19.

203. See ANNE M. BUTLER, DAUGHTERS OF JOY, SISTERS OF MISERY: PROSTITUTES IN THE AMERICAN WEST, 1865-90, at 75–76, 81 (1985).

204. *Enlargement of Society*, DAILY ALTA CAL., May 7, 1850, quoted in JACQUELINE BAKER BARNHART, THE FAIR BUT FRAIL: PROSTITUTION IN SAN FRANCISCO 1849-1900, at 15 (1986).

Jacqueline Baker Barnhart has noted that newspapers used many euphemisms for “prostitute,” including “the fairer sex in full bloom” as in this *Alta* passage, as well as “the frail but fair” and “the daughters of old mother Eve.”²⁰⁵ Also note that the passage even references the pimp of the French prostitutes (“one Frenchman brings 20”), but there is no concern that he is doing something disreputable or illegal.

By the mid-1850s, when wives and families had begun to arrive in significant numbers in San Francisco, more derogatory words began to come into use to describe prostitutes: cyprian, harlot, or whore.²⁰⁶ This pattern appears to have been widespread in frontier towns: as more families arrived, the social mores of the towns shifted, and prostitution became more regulated. This regulation, however, took the form of criminal law and not immigration law until the early 1870s. The focus was on the individual prostitute’s moral degeneracy, not on the system that might have forced her into prostitution. In addition, most cases never went to trial, or resulted only in the imposition of minimal fines. This focus on the woman’s behavior and the insignificant sanctions can be largely explained by the degree to which most of the respectable citizens of a given town were dependent on prostitution at least in part for their own livelihood. Prostitution houses paid government officials handsome sums to stave off raids and paid off judges when they were prosecuted.²⁰⁷ By periodically fining brothel owners without shutting the houses down, officials were able to fill public coffers while maintaining the stream of income.²⁰⁸ Prostitutes in towns like San Francisco were fashion trendsetters and needed fine furnishings for their brothels, giving large amounts of business to milliners, carriage makers, carpenters, bricklayers, jewelers, silk merchants, shoemakers, musicians, florists, and servants.²⁰⁹ There were few concerns about the voluntariness of prostitution, and virtually no prosecution of men who frequented prostitutes.

The two exceptions to the relatively lax prosecution in San Francisco were Chinese prostitutes and Mexican prostitutes. Jacqueline Barnhart has speculated that Mexican prostitutes, generally on the bottom of the prostitute hierarchy, contributed so little to the economy in general and bribes in particular that they were

205. *Id.* at 1, 15, 76.

206. *Id.* at 30.

207. *Id.* at 75–76.

208. JAN MACKELL, BROTHELS, BORDELLOS, & BAD GIRLS: PROSTITUTION IN COLORADO, 1860-1930, at 198 (2004).

209. BARNHART, *supra* note 204, at 73.

singled out for ill-treatment.²¹⁰ In addition, much has been written about the targeting of Chinese prostitutes. Like the Chinese in general, Chinese prostitutes were seen as particularly dangerous, disease-ridden, and slave-like.²¹¹ By drawing an analogy between Chinese “coolies” who were seen as essentially slaves because of the draconian work contracts that they had signed with employers, and Chinese prostitutes, who were often duped into immigration to the West Coast and then unable to pay their way out of the profession before it killed them, lawmakers began to see prostitution as a systemic problem: what we today would refer to as “trafficking.”²¹² The individual Chinese prostitute was not at fault (although that did not mean she would not be prosecuted); it was the Chinese *mindset*, by conceiving of human beings as chattels to be bought and sold rather than citizens entitled to decide for themselves how their lives would unfold, that caused that problem. As one Congressman put it in the very year the second Mercer immigrants arrived, the Chinese “buy and sell their women like cattle, and the trade is mostly for the purpose of prostitution. That is their character. You cannot make citizens of them.”²¹³

The result of this refiguring of prostitution as a form of slavery was a series of immigration laws specifically targeting prostitutes. In 1870, California passed a law entitled “An Act to prevent the kidnapping and importation of Mongolian, Chinese, and Japanese females, for criminal or demoralizing Purposes.”²¹⁴ The Anti-Kidnapping Act made it illegal to bring a Chinese woman to California by ship without first obtaining a license from the California Commissioner of Immigration. To grant a license, the Commissioner would have to be satisfied that the woman “desire[d] voluntarily to come into this State, and [was] a good person of correct habits and good character.”²¹⁵ The preamble to the law emphasized that Chinese women were being imported without their consent—“kidnapped . . . and deported at a tender age, without their consent and against their will”—which explained the need to determine whether their immigration was voluntary.²¹⁶ The easiest way for a Chinese woman

210. *Id.*

211. See Abrams, *supra* note 2, at 657–59, 709 (“Polygamy and prostitution were taken as evidence that Chinese culture embodied a slave-like mentality.”).

212. See *id.* at 657–58, 694, 713–14 (describing the problem and discussing the congressional response).

213. CONG. GLOBE, 39th Cong., 1st Sess. 1056 (1866) (statement of Rep. Higby).

214. Act of Mar. 18, 1870, ch. 230, 1870 Cal. Stat. 330, 330-31.

215. *Id.* § 1.

216. *Id.*

to demonstrate that she was a “person of correct habits and good character” was to show that she was a wife.²¹⁷ The Anti-Kidnapping Act provided a template for the first federal immigration restriction, the Page Law of 1875, which made it a federal crime to import a woman for purposes of prostitution and set up a similar licensing scheme whereby Chinese women had to demonstrate that they had not signed contracts for “lewd or immoral purposes.”²¹⁸

Following these early attempts at regulation, the notion that prostitution was a form of slavery was expanded from Chinese prostitutes to others. In 1874, four years after the passage of the Anti-Kidnapping Act, California amended its list of immigration restrictions (which included those likely to become a public charge) to include “lewd or debauched” women coming from *any* port, regardless of their ethnicity or national origin.²¹⁹

The federal Page Law itself made it a felony to knowingly and willfully import *any* woman for purposes of prostitution, but it set up an enforcement mechanism that applied only to Asian women and appears to have been enforced only against Chinese women.²²⁰ Slowly, the idea that Chinese prostitutes were duped and forced into sexual slavery expanded to the notion that *all* prostitution was nonconsensual. The first signs of this change came with the social purity movement of the 1880s and 1890s, which sought to reform the sexual mores of society, not only by abolishing prostitution but also by censoring pornography, providing sex education, and abolishing the marital exemption in rape law.²²¹ In 1890, social purity reformers asked Congress to form a national crime commission to investigate the causes and extent of prostitution; by 1917, forty-three cities had conducted their own formal investigations of prostitution.²²² An integral part of the anti-prostitution movement was the attempt to explain why women became prostitutes in the first place. With increasing frequency, the answer provided was that women were kidnapped and sold into prostitution as “white slaves.” By century’s end, an international movement to abolish white slavery had taken

217. See Abrams, *supra* note 2, at 681 (describing various tactics Chinese men and women used to cause officials to believe they were married and thus all the women to stay).

218. Act of Mar. 3, 1875 (Page Law), ch. 141, 1875 Cal. Stat. 447 § 3 (repealed 1974).

219. 1873-74 Acts Amendatory of the Codes of California 39, § 70 .

220. Act of Mar. 3, 1875 (Page Law), ch. 141, 1875 Cal. Stat. 447 § 1, 3 (repealed 1974); Abrams, *supra* note 2, at 698–702 (describing enforcement of Page Law).

221. RUTH ROBSON, THE LOST SISTERHOOD: PROSTITUTION IN AMERICA 1900-1918, at 11 (1982).

222. *Id.* at 14.

force.²²³ “White slaves” were defined as prostitutes who were “literally slaves—those women who [were] owned and held as property and chattels—whose lives [were] lives of involuntary servitude.”²²⁴

This movement toward a model of non-consent was reflected in the passage of new immigration laws: In 1903, an immigration statute deleted the words “knowingly and willfully” from the Page Law, thereby making it a felony to import women for purposes of prostitution regardless of intent.²²⁵ In 1907, a sweeping Immigration Act prohibited, among many other things, “women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose,” banned “the importation of women for prostitution or other immoral purpose, and made prostitution a deportable offense.”²²⁶ The 1907 Act also further broadened the felony provisions to include associations, not just individuals, and expanded the crime to include “directly or indirectly . . . persuading, inducing, enticing or coercing” a woman into prostitution.²²⁷ And, of course, in 1910 the famous Mann Act was passed, extending the prohibition on trafficking from the immigration context to interstate travel and further broadening the acts made felonious in the immigration context. The Mann Act made consent irrelevant: it made it a felony to “persuade, induce, entice, or coerce” a woman “whether or without her consent” to engage in “prostitution or debauchery” or “for other immoral purposes.”²²⁸ By the early 1900s, prostitution had gone from a moral failing of individual women to something that could not be consented to, “de facto nonconsensual and violent.”²²⁹

223. *Id.* at 12.

224. WHITE SLAVE TRAFFIC, H.R. REP. NO. 61-47 (1909).

225. PAMELA HAAG, CONSENT: SEXUAL RIGHTS AND THE TRANSFORMATION OF AMERICAN LIBERALISM 65 (1999).

226. Immigration Act of 1907, ch. 1134, §§ 2–3, 34 Stat. 898, 899 (1907).

227. *Id.*

228. White-Slave Traffic (Mann) Act, Pub. L. No. 61-277, §2, 36 Stat. 825, 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–24). For discussion of the Mann Act, see Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 789 (2006).

229. HAAG, *supra* note 225, at 65. Ruth Robson has argued that the white slavery panic may have functioned to deflect attention away from the economic factors that forced women into prostitution. ROBSON, *supra* note 221, at 133. Projecting blame for economic inequality onto faceless procurers, usually foreign, was a convenient way to avoid more sweeping social change. *Id.* It was also a way of maintaining Victorian ideas about female sexual passivity and morality: surely no woman would “voluntarily” choose prostitution over other (extremely underpaid) female professions; she must instead have been duped into it and then held as a captive. *Id.* Indeed, Mann’s report noted that that the victims of the white-slave trade “are those women and girls who, if given a fair chance, would, in all human probability, have been good wives and mothers and useful citizens.” Dubler, *supra* note 228, at 789 (quoting WHITE SLAVE TRAFFIC, H.R. REP. NO. 61-47, at 11 (1909)).

Had Mercer attempted his scheme thirty, forty, or fifty years later, he might have been met with a markedly different response. Collecting money from men to “buy” wives, defrauding customers who did not appear young and attractive enough to do well on the marriage market, kidnapping women who attempted to abandon the voyage, talking the women into signing promissory notes with the assurance that he would find them husbands to pay the notes for them—all of these acts could have set off alarm bells in the minds of Progressive-era social reformists had Mercer attempted such a scheme at the turn of the century. And it likely would not have mattered that not one of the Mercer immigrants appears to have been a prostitute. As Ariela Dubler has shown, laws such as the 1907 Immigration Act and the Mann Act added the language “and other immoral purposes” precisely because prostitution alone did not cover all of the perpetrators the acts intended to include. It was not trafficking in prostitution alone that these laws prohibited; these laws also prohibited a woman to cross a national or state border with the intention of engaging in *unmarried* sex.²³⁰ Just as the Chinese women seeking licenses under the Anti-Kidnapping Act and the Page Law had to demonstrate that they already were married in order to show that they were not “lewd or debauched,” so too was marriage a defense against charges under the 1907 Act and the Mann Act.²³¹ The Mercer Girls’ claim that they planned to marry, especially when coupled with the fact that they had paying customers waiting to marry them in Washington Territory, would not have absolved them under any of these later laws.

But at the time Mercer brought his “cargo of brides,” prostitution was still largely seen as a character defect, not as a systemic problem. The Mercer voyages simply occurred too early to generate the kind of agitation that inspired the Mann Act. To be sure, citizens were curious about the women’s morals, and some of the newspaper accounts of their voyage had a voyeuristic, almost pornographic flavor.²³² The public at large, however, did not understand the Mercer women to be “lewd or debauched” or victims of trafficking, even though these descriptions could easily have applied just fifty years later. Just as the public understood the Mercer immigrants as unlikely to become public charges because it perceived them as brides, the public understood the Mercer immigrants to be upstanding women—not lewd or debauched—because it understood the status of “wife” to preclude prostitution. As historians have well

230. Dubler, *supra* note 228, at 763.

231. *Id.*

232. *See supra* Part II.

documented, domesticity and prostitution were separate rhetorics, seemingly incompatible with one another.²³³

And the Mercer Girls—at least those of them who really were “girls”—lived up to the expectations heaped upon them. Many married, had several children, and played important roles in their communities as teachers, church organists, hotel owners, and piano teachers—one was even a lighthouse keeper.²³⁴ In so doing, they were not only fighting for their own survival but also living out a role they had embraced for themselves. Flora Pearson Engle, recalling the Lowell speech attended by the schoolteachers who went with Mercer on his first expedition, described the immigrants’ motives as threefold: a desire for financial security, a yearning for adventure, and a sense of moral obligation. By immigrating as teachers, “[w]hat an influence for good might they not exert over the children committed to their charge in those far Western wilds!”²³⁵ Another, referred to as “Miss J—”, reportedly framed the voyage as a divine project, stating upon sailing through the Straits of Magellan that “the waters opened to the Israelites, but the mountains to the Yankee women.”²³⁶ And Harriett Stevens, one of Mercer’s only champions, tells with approval in her diary the story of Mercer planting an American flag at Port Gallant in the Straits on the belief that “the principles indicated by that precious bunting are destined to reach to the extremes of the continent.”²³⁷ Mercer himself, despite his underhanded ways, at least publicly presented his immigration scheme as an act of public service. Reminiscing about his experience years later in an interview with the *Chicago Tribune*, Mercer’s rhetoric as reported by the interviewer echoed the women’s self-assessment. “He realized,” the *Tribune*

233. See, e.g., AMY DRU STANLEY, FROM BONDAGE TO CONTACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 223 (1998) (stating that “rhetorically, domesticity and prostitution were usually dissociated”).

234. Peri Muhich, a genealogist, has done extensive research on the first group of Mercer Girls and made her findings public. Peri Muhich, They Called Them the “Mercer Girls”: Washington Territory’s Cargo of Brides, <http://www.mercergirls.com> (last visited Oct. 5, 2009). Muhich recounts the stories of several of the first migrants, including Antoinette Baker, teacher, mother of four, and the first woman to be School Superintendent of Cowlitz County, Washington; Sarah Gallagher, school teacher, piano teacher, and owner of the Russell House, the only hotel to survive the Seattle fire of 1889; Sarah Cheney, art and music teacher, mother of four, and church organist for fifty years; and Georgie Pearson, teacher, mother of five, and assistant light-keeper at Admiralty Head. *Id.*; see also *Gone to Washington Territory*, LOWELL DAILY COURIER, Mar. 14, 1864 (listing names of passengers on first Mercer voyage), available at http://www.geocities.com/TelevisionCity/Stage/5101/hctb_ref/MercerNews.html.

235. Engle, *supra* note 20, at 226.

236. Harriet Stevens, *A Journal of Life on the Steamer “Continental”*, PUGET SOUND DAILY, June 7, 1866.

237. Harriet Stevens, *A Journal of Life on the Steamer “Continental”*, PUGET SOUND DAILY, June 6, 1866.

reported, “that a second refining influence must be added to the one of education. Woman, gentle, loving and lovable woman, must come into the wilds if the new country was to grow and flourish. Without women the country was a desert.”²³⁸

The Mercer Girls’ status in the legal and public imagination as wives and mothers has not only obscured their arrival as an important moment in the history of immigration law. It also helped to obscure their status as *immigrants*. They were seen as completing an unfinished project of settlement. Even when they were referred to as “emigrants,” this reference emphasized their leaving the security of New England to participate in a colonizing project; it did not connote a sense of the cultural “other” suggested today by terms such as “immigrant” or “alien.” Immigrants come to be assimilated; the Mercer Girls came to assimilate *others* to their example. It is perhaps not surprising that the Mercer Girls themselves resisted being called emigrants at all. In his diary, Conant tells the story of working on a piece for the *Times* entitled *The Female Emigration Expedition*, which aroused the ire of one of the passengers reading it. “A fair haired girl,” he wrote, “leans over our shoulder and exclaims: ‘We do not wish to be classed, Sir, as an emigrant.’”²³⁹ In response, Conant re-entitled his piece *The Cruise of the Continental*.

Ultimately, then, the Mercer immigrants generated no legal response that we would today identify as sounding in restrictive immigration law. The lawmakers in Massachusetts were incapable of preventing them from emigrating, and lawmakers in Washington Territory decided against using immigration law to prevent their arrival. The only way in which the law directly regulated the Mercer voyagers—the private law of contract—is striking in its irrelevance to the immigration aspect of the voyage. Several of the passengers who were left behind in New York sued Mercer, with limited success, for breach of contract.²⁴⁰ Thus, it was the private law of contract and not the public law of immigration that touched the Mercer voyages. Furthermore, it was not the immigrants who were the purported victims, but instead those who had tried to immigrate and failed. Thus, law played an extremely limited role in directly regulating the Mercer voyages. Unlike the ships of Chinese immigrants that inspired both state and eventually federal exclusion acts, the Mercer immigrants were not perceived as threatening enough to warrant

238. *A Contract for 500 Wives: How Colonel Asa S. Mercer Supplied Seattle’s Need in the Pioneer Days*, WASH. POST, Jan. 30, 1910, at M2 (reprinting CHICAGO TRIBUNE article).

239. CONANT, *supra* note 20, at 77.

240. *See supra* notes 85–100 and accompanying text.

restrictions. It is this failure of public law intervention that has made the Mercer immigration appear to have occurred outside of law. But direct regulation is not the only place to look for the law in this story. The Mercer immigrations also help to elucidate how other legal forces, in addition to the failure to invoke restrictive immigration law, affected the voyages.

IV. THE PRODUCTIVE ROLE OF LAW

Although immigration law as we understand it today—focused on restriction—was absent from the Mercer immigrations, the immigrants were in actuality surrounded by law from the moment they agreed to emigrate. The law’s goal during this period, however, was not just to restrict the incoming population. It was in the United States’ interest and Washington Territory’s interest to produce a population in Washington Territory that would make it fit to become a state. In order to achieve this goal, white Christian women needed to be induced to immigrate. And in addition to inducing the “right” sort of immigration, Washington Territory needed to ensure that the wrong sort of population did not take hold in the territory. This was done not only by excluding Chinese and black immigration; Washington Territory lawmakers also believed that they needed to prevent the mixing of whites and Indians. Thus, several kinds of law that immigration scholars would normally ignore—including homestead acts; anti-miscegenation laws; and laws giving women the right to vote, the right to serve on juries, and other property rights—played an important role, quite possibly a much more important role than did restrictive immigration law, in producing a white, Christian population in Washington Territory.

In order to gain statehood, a territory needed to demonstrate that the inhabitants of the proposed new state were “imbued with and sympathetic toward the principles of democracy as exemplified in the American form of government.”²⁴¹ White pioneers in Washington Territory needed to show that they were capable of establishing the right kind of civilization. The experiences of other territories are illustrative on this point: a failure to demonstrate “American-ness” led to long delays on the road to statehood and, even when statehood was ultimately achieved, those future states that still seemed less loyal to

241. Northwest Territory Ordinance of 1787, art. V, *in* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (1789). For further discussion, see ALFRED H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 71 (1989) (discussing how the requirement was met in various states).

American values had harsh conditions imposed upon them by Congress.

For example, in the case of Utah, where polygamy thrived and the Mormon Church held considerable sway over state political processes, admission as a state was delayed until the Mormon Church had formally renounced polygamy. Even when Congress eventually granted statehood, it did so on the condition that Utah agree that “polygamous or plural marriages are forever prohibited.”²⁴² Achieving statehood took even longer for New Mexico, which was admitted as a territory in 1850 but did not achieve statehood until 1912. For New Mexico, the problem was the racial composition of the population; unlike other Western territories, “where Anglo pioneers had slowly filled the frontiers with a fairly homogenous population of Western European stock,” New Mexico remained stubbornly Hispanic.²⁴³ When it finally did attain statehood, it had to agree to provide schools “free from sectarian [i.e., Catholic] control,” to conduct school in English, and to require state officers and members of the state legislature to read, write, speak, and understand English.²⁴⁴ Eric Biber has recently argued that these kinds of conditions on statehood functioned to allay fears of a “disloyal, non-homogenous, and un-American population in a new state.”²⁴⁵

In addition to the exclusionary immigration laws discussed in Part III, western states and territories had other weapons in their arsenals for encouraging the “right” sort of population development. These laws can be grouped loosely into two categories, the first of which were laws—predominantly property statutes—intended to induce women to immigrate by giving them additional benefits for doing so. The other weapon was the passage of anti-miscegenation statutes, intended to prevent the growth of a mixed-race population.

242. Act of July 16, 1894, 28 Stat. 107, 108 ch. 138, § 3 (enabling people of Utah to form a constitution and state government and to be admitted into the Union on equal footing with the original states). For further discussion, see SARAH BARRINGER GORDON, *THE MORMON QUESTION* 127–29 (2002) (describing congressional acts aimed at the Mormon Church before Utah was granted statehood); DEAN L. MAY, *UTAH: A PEOPLE’S HISTORY* 1–15 (1987) (discussing the issue in the context of the Constitution).

243. ROBERT W. LARSON, *NEW MEXICO’S QUEST FOR STATEHOOD 1846-1912*, at 303–04 (1968).

244. Enabling Act for New Mexico, Act of June 20, 1910, 36 Stat. 557, 558–59 (1910) ch. 310, § 2.

245. Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 *AM. J. LEGAL HIST.* 119, 168 (2004).

A. *Laws to Induce Immigration*

Throughout the mid-nineteenth century, the federal government made strategic use of property law through homestead acts to encourage the westward immigration of whites and, in particular, women. In 1843, the Senate passed a bill that would have granted 640 acres to each white male inhabitant of Oregon Territory, plus another 160 acres if he was married, and 160 more for each child.²⁴⁶ Although the bill stalled in the House, it set a precedent for donation acts that would give greater amounts of land to married men than single men, so as to induce both men and women to make the difficult and often dangerous trip west.²⁴⁷ The first such homesteading bill to become law was the Oregon Donation Land Act of 1850.²⁴⁸

The Donation Land Act had two important goals: the inducement of white settlers in general and the inducement of white female settlers in particular. The Act set forth its land grants in explicitly racial terms: settlers claiming land before 1851 could be “white . . . American half-breed Indians included”; those claiming land after 1851 had to be “white.”²⁴⁹ The Act explicitly provided that foreign whites could claim land: a claimant needed to be only “a citizen of the United States,” or someone who had “made a declaration according to law, of his intention to become a citizen.”²⁵⁰ Thus, the Donation Land Act encouraged immigration not only from the United States proper, but from other countries as well.

In addition to encouraging whites to emigrate from the East and Europe, the Act also attempted to make settlement attractive to white women in particular. One problem encountered in Oregon Territory was the instability of communities lacking adequate

246. CONG. GLOBE, 27th Cong., 3d Sess. 24 (1843).

247. Richard H. Chused, *The Oregon Donation Act of 1850 and Nineteenth Century Federal Married Women's Property Law*, 2 LAW & HIST. REV. 44, 58 (1984).

248. Oregon Donation Act, ch. 76, 9 Stat. 496 (1850), amended by Act of July 17, 1854, ch. 84, 10 Stat. 305 (extending the statute to Washington Territory). The Donation Land Act was made famous in the case of *Pennyoy v. Neff*, in which an illiterate settler from Iowa successfully litigated a claim all the way to the United States Supreme Court demanding the return of his homestead on the theory that the court that granted it to an opposing party on a default judgment did not have personal jurisdiction over him. 95 U.S. 714, 721 (1877); see also Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennyoy Reconsidered*, 62 WASH. L. REV. 479, 480–90 (1987) (discussing history of *Pennyoy* case).

249. *Id.* at 497–98. The flip side of the Donation Land Act was the negotiating of treaties with individual Indian tribes to extinguish their land rights. See Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 426–27 (1998) (discussing the series of treaties by which the government extinguished Indian title to the vast majority of their land).

250. Oregon Donation Land Act, ch. 76, 9 Stat. 496, 497 (1850).

numbers of women. In Roseburg, Oregon, for example, only one-third of single men stayed for more than five years, but about two-thirds of married men did.²⁵¹ The Act attempted to solve this problem by giving single white men parcels of 320 acres if they claimed land before 1851 and 160 if they claimed it after that date; married couples, on the other hand, could claim 640 or 320 acres depending on their date of arrival, half of which was to be surveyed as a separate estate for the wife.²⁵² The couple had to marry by December 1, 1851 to receive the full parcel, even if both had been in the territory long before. This appears to have led to hasty marriages (often between grown men and child brides) as eager pioneers hoped to qualify for the larger land claims.²⁵³

Although there is little discussion of motive in the legislative history of the bill, Samuel R. Thurston, the delegate to Congress from Oregon Territory, appears to have been centrally involved in its drafting.²⁵⁴ In a letter to Congress in support of the bill, Thurston justified the independent grant of property to wives, explaining that

emigrating to Oregon from the States, places the female beyond the reach of her kindred and former friends; and it is certainly no more than right to place some little means of protection in her own hands. But the object is to produce a population, and this provision is an encouragement of the women to peril the dangers and hardships of the journey.²⁵⁵

The Donation Land Act appears to have successfully induced women to immigrate west, either with their husbands or to search for husbands and land.²⁵⁶ But in 1862 Congress went even further, extending the right to claim land to single women in the Homestead Act. The Act provided that any “person” who was “the head of a family, or who ha[d] arrived at the age of twenty-one years” could obtain a homestead if he or she lived there for five years and farmed the property.²⁵⁷ The effect was to give never-married, widowed, and divorced women, but not married women (who were not the “head of a

251. JEFFREY, *supra* note 16, at 103.

252. Oregon Donation Land Act, ch. 76, 9 Stat. 496, 497 (1850).

253. ROBERT CARLTON CLARK, HISTORY OF THE WILLAMETTE VALLEY, OREGON 406, 409 (1927); *see also* JEFFREY, *supra* note 16, at 84 (noting that following the passage of the Act, some women were besieged with suitors); *id.* at 76 (describing a proposal to a thirteen-year-old girl, who rejected it, saying “Why I’m only a *child*[,] I have never given marriage a thought yet”).

254. *See* Chused, *supra* note 247, at 59–60, n.78 (citing Thurston’s diary and letters).

255. Letter from Samuel R. Thurston to the Members of the House of Representatives, Thurston Papers, MSS 379, Oregon Historical Society, *quoted in* Chused, *supra* note 247, at 65.

256. Opponents of the bill insisted that families were moving to Oregon Territory without this inducement, and Chused argues that they may well have been correct. *See* Chused, *supra* note 247, at 67 (citing CONG. GLOBE, 31st Cong., 1st Sess. 1080 (1850)).

257. Homestead Act, 12 Stat. 392, 394 (1862).

family”), the right to 160 acres of their own.²⁵⁸ Married women, however, were no longer entitled to a separate estate. Between 1850, when the Donation Land Act was passed, and 1862, when the Homestead Act was passed, the amount of land available for homesteading had diminished, and giving 320 acres to a married couple was no longer tenable. Thus, the Homestead Act encouraged single women, as well as single men, to immigrate west and claim land, but took away the ownership advantages previously given to married couples.²⁵⁹

Like the Donation Land Act, the Homestead Act allowed white immigrants from Europe to make homestead claims so long as they filed a declaration of intent to become a citizen. The United States government went on a major publicity campaign in Europe, distributing pamphlets that advertised the high wages available to U.S. workers and publicizing the land available to European immigrants through the Homestead Act.²⁶⁰ This history is indicative of the peculiar sense of what it meant to be American that was developing during this period: whiteness, it seems, was more important in marking the West as American than a history of presence on American soil. European immigrants were far more

258. See James Muhn, *Women and the Homestead Act: Land Department Administration of a Legal Imbroglia, 1863-1934*, 7 W. LEGAL HIST. 283, 287 (1994).

259. The privileging of unmarried women had the perverse effect of forcing women to choose between marriage and land; the Act required them to reside on the land for five years before they could own it outright, and if they married during this period they would no longer be a “head of household” residing on the land. The historian James Muhn has chronicled the cases brought by married women to the General Land Office, hoping to keep their land. See generally *id.* One woman wrote:

If I wait until I ‘prove up’ I am afraid I shall be left for a handsome girl, for I am now 26 years old, and I don’t want to give up my homestead for any fellow I have seen since I came west . . . we are in rather a quandary whether to give up the land or the fellows, and we would like to have you assure us that we need do neither.

Id. at 292 (citing Letter from Mary Strong to Sec’y of the Interior (September 28, 1886), in DEPARTMENT OF THE INTERIOR, LAND AND RAILROADS DIVISION, LETTERS RECEIVED, 1881-1907, File 1886-7499, RG 48, Records of the Secretary of the Interior, NA). The Department of the Interior ultimately decided that “the policy of the law is to encourage matrimony” and that it could not “put anything in the way of what is evidently for the good of the country.” *Id.* (citing Letter from Assistant Sec’y of the Interior to Mary Strong (October 5, 1886), DEPARTMENT OF THE INTERIOR, LETTERS SENT BY THE LAND AND RAILROADS DIVISION, Microfilm Publication 620, NA). Therefore, women who claimed homesteads and later married would be entitled to keep their land.

260. KITTY CALAVITA, U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR, 1820-1924, at 36 (1984). Calavita notes that this campaign may have been more successful than desired; in 1864, just two years later, Congress passed The Act to Encourage Immigration, which made pre-emigration contracts binding and thus prevented new immigrants from leaving industry for homesteading or enlistment with the Union army. *Id.*

desirable citizens than Chinese immigrants, or even Indians or blacks whose ancestors had lived in the United States for hundreds of years. Although European immigration—especially immigration from southern and eastern Europe—became a highly contested issue in the East later in the nineteenth and early in the twentieth century, European immigrants to the West in the 1860s were highly sought after commodities who were considered more capable of becoming “American” than members of other races. Indeed, in 1863, President Abraham Lincoln encouraged Secretary of State William H. Seward to find ways to encourage immigration from Europe, in part to replenish the population being killed by the Civil War and in part to provide a population to expand to the western territories. Seward persuaded Congress to approve a partnership between the private sector and the federal government to import European workers.²⁶¹

In addition to federal legislation, state and territorial laws were passed in an attempt to induce women to immigrate west. Laws granting women the right to vote, well before it was constitutionally required with the passage of the Nineteenth Amendment in 1920, as well as experiments in seating women on juries, both appear to have been motivated, at least in part, by the desire to attract the right kind of women to the western territories. The first laws granting women the right to vote were almost all passed in the West, with territories—not states—leading the way. Such laws were easier to pass in territories because there the legislatures could grant women the right to vote. But in states such changes required constitutional amendments, and even when legislatures submitted amendments to the people, the voters often rejected them.²⁶² Wyoming Territory led the movement when it gave women the right to vote and hold public office in 1869; it also passed laws forbidding sex discrimination in the hiring of teachers as well as a resolution allowing women to attend legislative sessions.²⁶³ Members of the Wyoming legislature claimed that the bill had been passed in part because “the territory desperately needed immigrants, particularly the feminine variety.”²⁶⁴ A suffrage law would give “the struggling territory, whose population was declining, much free advertising and would attract women who up

261. See ZOLBERG, *supra* note 15, at 166 (describing the mechanics of the partnership).

262. T.A. Larson, *Woman Suffrage in Western America*, 38 UTAH HIST. Q. 7, 9 (1970) [hereinafter, Larson, *Woman Suffrage*].

263. An Act to Grant to the Women of the Wyoming Territory the Right of Suffrage and to Hold Office, ch. 31, 1869 Wyo. Sess. Laws 371; see also T.A. LARSON, HISTORY OF WYOMING 78–79 (1978) [hereinafter LARSON, HISTORY OF WYOMING].

264. JOHN D. W. GUICE, THE ROCKY MOUNTAIN BENCH: THE TERRITORIAL SUPREME COURTS OF COLORADO, MONTANA, AND WYOMING, 1861-1890, at 131 (1972).

to that time had been in very short supply.”²⁶⁵ Upon the bill’s approval by the governor, the local Cheyenne, Wyoming newspaper announced: “We now expect at once quite an immigration of ladies to Wyoming. We say to them all, come on. There is room for a great many here yet.”²⁶⁶ Washington and Utah followed suit: Utah in 1870 and Washington in 1883.²⁶⁷

In Washington, pro-suffrage activists had made many of the same arguments that legislators had made in Wyoming. In a speech addressed to the territorial legislature in 1871, Susan B. Anthony argued that woman suffrage would be followed by “the most gratifying of results—the immigration of a large number of good women to the territory.”²⁶⁸ She also promised that women would vote against prostitution and intemperance.²⁶⁹ But when a woman suffrage bill finally garnered a majority in the legislature in 1883, the success did not last long.²⁷⁰ Nevertheless, almost all of the states that granted women the right to vote before the passage of the Nineteenth Amendment were western states: Wyoming (as a territory) in 1869;²⁷¹ Utah (as a territory) in 1870; Colorado in 1893;²⁷² Idaho in 1896; Washington (as a territory) in 1883;²⁷³ California in 1911; Kansas, Oregon, and Arizona in 1912.²⁷⁴ By 1914, the only state west of the

265. Larson, *Woman Suffrage*, *supra* note 262, at 12.

266. *Id.*

267. *Id.* at 10, 18. Utah women lost the right to vote with the passage of the Edmunds-Tucker Act in 1887. 24 Stat. 637 (1887). The denial of woman suffrage in the territories was part of a larger Congressional goal to stamp out polygamy and decrease the Mormon Church’s power in Utah. See GORDON, *supra* note 242, at 169 (“[T]he downfall of polygamy is too important to be imperiled by experiments in woman suffrage.”).

268. T.A. Larson, *The Woman Suffrage Movement in Washington*, 67 PAC. NW. Q. 49, 50 (1976) [hereinafter, Larson, *Movement in Washington*].

269. *Id.* at 51.

270. The 1883 law had also given women the right to serve on juries, and a man who was convicted by a jury that included women challenged his conviction on the basis that the title of the 1883 act did not describe its content. *Id.* at 54; see also *Harland v. Territory*, 13 P. 453, 458–59 (1887) (striking down suffrage law because title inadequately described content of law). When the legislature attempted to reenact the law under a new title, “An Act to Enfranchise Women,” the Washington Territorial Supreme Court struck down the Act as contradicting the Territory’s Organic Act imposed by Congress. *Bloomer v. Todd*, 19 P. 135, 140 (1888).

271. Larson, *Woman Suffrage*, *supra* note 262, at 11. Wyoming became the first state to enter the union with woman suffrage written into its constitution in 1890. *Id.* at 19.

272. An Act to submit to the qualified electors of the State the question of extending the right of suffrage to women of lawful age, and otherwise qualified, according to the provisions of Article 7, Section 2, of the constitution of Colorado, Library of Congress, Apr. 7, 1893 (adopted by referendum on November 7, 1893 by 35,798 votes to 29,451, *ratified by the Governor* on Dec. 2, 1893), available at, <http://memory.loc.gov/ll/misc/awh/awh0001/0001001u.tif>.

273. And again as a state in 1910. Larson, *Movement in Washington*, *supra* note 268, at 61.

274. In addition, New Jersey gave women the right to vote in the 1790s but later repealed it. Acts of the 15th New Jersey General Assembly 670 (Nov. 18, 1790), available at

Rockies that did not have woman suffrage was New Mexico; the only state east of the Rockies that *did* was Kansas.²⁷⁵

In addition to passing some of the earliest suffrage statutes, both Washington and Wyoming engaged in experiments with mixed male-female juries in the 1880s. Some people appear to have thought that passing such laws would be “a good advertisement for the territory” (in the case of Wyoming).²⁷⁶ Letters between various actors, including judges, suggest that the judiciary supported women jurors because they perceived them to have a potential civilizing effect.²⁷⁷ For example, one Wyoming justice noted that the women jurors had rid the territory of the perpetrators of vice: “After the grand jury had been in session two days, the dance-house keepers, gamblers and demi-monde fled out of the city in dismay, to escape the indictment of women grand jurors!”²⁷⁸

Thus, an important body of law, not easily recognized as “immigration law,” sought not to restrict immigration but instead to foster immigration through inducements. By offering property, the right to vote, and jury service to women, both the federal government and the territories themselves hoped that more women would immigrate. Just as in the case of the Mercer Girls, it was not *any* women who were welcome, but women of fine morals and breeding who would help the territories enforce the rule of law.

www.scc.rutgers.edu/njwomenshistory/documents.htm. Kansas gave women the right to vote in local school elections when it entered the Union in 1861; Kentucky gave widows with school-aged children suffrage in local school elections in 1837 but repealed the right in 1902 and restored limited school board election suffrage rights in 1912.

275. Larson, *Woman Suffrage*, *supra* note 262, at 19. Western territories may also have passed married women’s property acts in part to induce women to immigrate. In 1874, Colorado Territory passed such an act, which removed many of the disabilities of common law coverture, giving married women the right to “bargain, sell and convey real and personal property,” enter into contracts, and sue and be sued. An act concerning married women (Feb. 12, 1874), *cited in* *Wells v. Caywood*, 3 Colo. 487, 493 (1877). As one Colorado court put it, the “statute asserts her individuality, and emancipates her, in the respects within its purview, from the condition of thralldom in which she was placed by the common law.” *Id.* at 493. Wyoming and Washington passed similar acts, in 1869 and 1881, respectively. *See* Property Rights of Married Persons, Code of Wash., ch. 183, §§ 2396–2418, 413–16 (1881).

276. Letter from C.G. Coutant to Frank W. Mondell (n.d.), *in* LARSON, HISTORY OF WYOMING, *supra* note 263, at 80. For a comprehensive study of the Wyoming and Washington experiments with mixed juries, see generally Cristina Rodriguez, Note, *Clearing the Smoke-Filled Room: Women Jurors and the Disruption of an Old Boy’s Network in Nineteenth Century America*, 108 YALE L.J. 1805 (1999).

277. Rodriguez, *supra* note 276, at 1811.

278. *Id.* (quoting Letter from J.H. Howe to Myra Bradwell (Apr. 14, 1870), *in* 3 HISTORY OF WOMAN SUFFRAGE 736–37 (Elizabeth Cady Stanton et al. eds., 1886)).

B. Laws to Prevent Population Development

In addition to a lack of white women, Washington Territory was perceived as having a second problem: white men had begun to intermarry with Indian women.²⁷⁹ These marriages were useful to fur traders since Indian women had skills that white wives would not have possessed.²⁸⁰ Indian women, for example, were skilled in the preservation of food, navigation, and the manufacture, paddling, and steering of canoes used by fur traders.²⁸¹ In addition, marriages to Indian women cemented trade relations with new bands or tribes.²⁸² And, perhaps just as importantly, there was a serious dearth of white women; marriage to an Indian woman was often the only way for a trader to have a domestic life, which by convention required a wife and children.²⁸³ From the perspective of an Indian woman and her family, marriage to a white pioneer also made strategic sense as a way of cementing friendly relationships: marriage with whites created “a means of entangling strangers in a series of kinship obligations. . . . [R]elatives by marriage were expected not only to deal fairly, but to provide protection, hospitality, and sustenance in time of famine.”²⁸⁴ Intermarriage also may have given Indian women an increased sense

279. See, e.g., *Wilbur's Estate v. Bingham*, 8 Wash. 35, 36 (1894) (discussing the validity of a reservation marriage ceremony between a white man and an Indian women with whom he resided).

280. Sylvia Van Kirk, *The Role of Native Women in the Creation of Fur Trade Society in Western Canada, 1670-1830*, in *WOMEN IN PACIFIC NORTHWEST HISTORY* 187 (Karen J. Blair ed., 1988). Although Kirk's article focuses on Canadian fur traders, those on the American side of the border adapted in similar ways. Indeed, the border between Canada and the United States was not even established until 1846. See *Treaty with Great Britain in Regard to Limits Westward of the Rocky Mountains*, U.S.-Eng., June 15, 1846, 9 Stat. 869.

281. Kirk, *supra* note 280, at 187–88.

282. *Id.* at 186; see also GLENDA RILEY, *CONFRONTING RACE: WOMEN AND INDIANS ON THE FRONTIER 1815-1915*, at 202 (2004) (characterizing these relationships as containing “an element of mutual exploitation”); *Connolly v. Woolrich*, 17 R.J.R.Q. 75, 120 (Que. Sup. Ct. 1867), *aff'd sub nom. Johnstone v. Connolly*, 17 R.J.R. 266, 1 R.L.O.S. 253 (Quebec 1869) (finding a marriage between a Cree woman and a French-Canadian fur trapper in the Western Canadian territories valid where the husband's nephew testified that his uncle had told him he would not have been able to trade with the Cree people had he not “bought” his wife from them).

283. Kirk, *supra* note 280, at 186.

284. JACQUELINE LOUISE PETERSON, *THE PEOPLE IN BETWEEN: INDIAN-WHITE MARRIAGE AND THE GENESIS OF A METIS SOCIETY AND CULTURE IN THE GREAT LAKES REGION, 1680-1830*, at 87–88 (1981), *quoted in* Bethany Berger, *After Pocahontas: Indian Women and the Law, 1830-1934*, 21 AM. INDIAN L. REV. 1, 25 (1997); see also Matthew Aeldun Charles Smith, *Wedding Bands and Marriage Bans: A History of Oregon's Racial Intermarriage Statutes and the Impact on Indian Interracial Nuptials* 20, 22–23 (1997) (unpublished M.A. Thesis, Portland State University) (on file with Portland State University Library). (reviewing literature on Indian-white marriages in the Pacific Northwest); JEFFREY, *supra* note 16, at 139.

of power as the “broker[s] between two worlds.”²⁸⁵ Regardless, white men who entered into these relationships were pejoratively labeled “squaw men.”²⁸⁶ Indian women who entered into them were commonly referred to as “Kloutchmen” or “Kloutch,” which appears to be a misuse of the generic Chinook term for “woman.”²⁸⁷

The legal response to these marriages was mixed. On the one hand, some white assimilationists encouraged intermarriage “as a way both to assimilate the Indians and to improve the white race.”²⁸⁸ Assimilation was not a revolutionary idea: intermarriage between whites and Indians for assimilationist purposes had been suggested as early as 1784, when Patrick Henry sponsored a Virginia bill that would have created financial incentives for Indians and whites to intermarry.²⁸⁹ Similarly, in 1803, Thomas Jefferson suggested that the “Indian problem” could be solved if “our settlements and theirs meet and blend together, to intermix, and become one people,” with Indians “[i]ncorporating themselves with us as citizens of the United States.”²⁹⁰ And, in 1816, William H. Crawford, then-Secretary of War, argued that encouraging intermarriages between whites and Indians would help Indians to learn the idea of holding property as individuals rather than collectively.²⁹¹

Despite these assimilationist theories, in the Pacific Northwest, Indian-white marriages threatened the dream of forming civilized,

285. Berger, *supra* note 284, at 26; *see also* RACHEL MORAN, *INTERRACIAL INTIMACIES* 49 (2001) (noting that Indian women who married whites assumed a role of “cultural mediator”).

286. *See* *Watson v. Watson*, 161 P. 375, 377 (Wash. 1916) (describing the relationship wherein the man lived with an Indian woman but was not married to her); *see also* RILEY, *supra* note 282, at 203 (discussing the term “squaw man”).

287. *See* Chinook Jargon Phrasebook, <http://www.cayoosh.net/hiyu/people.html> (last visited Sept. 14, 2009); *see also* *Wilbur's Estate v. Bingham*, 8 Wash. 35 (1894) (discussing how in 1867 “there were almost no white women in the country, and many of the men had Indian women living with them,” whom they referred to as “Kloutchmen”).

288. Berger, *supra* note 284, at 73.

289. WILLIAM WIRT, *LIFE AND CHARACTER OF PATRICK HENRY* 258 (1818). For further discussion, *see* MORAN, *supra* note 285, at 49; Karen M. Woods, *A “Wicked and Mischievous Connection”: The Origins of Indian-White Miscegenation Law*, 23 *LEGAL STUD. F.* 37, 55–56 (1999) (describing Henry’s belief that intermarriages could help race relations and eliminate the constant warfare between the groups). The Henry bill further encouraged the “whitening” of Indians by granting the offspring of mixed marriages “the same rights and privileges” as if they had “proceeded from intermarriages among free white inhabitants.” WIRT, *supra*, at 258–60; Woods, *supra*, at 56.

290. Letter from Thomas Jefferson to Colonel Benjamin Hawkins (Feb. 18, 1803), in *THE WRITINGS OF THOMAS JEFFERSON* 363 (Andrew A. Lipscomb & Albert Ellery Berg eds., 1903–1904); *see also* MORAN, *supra* note 285, at 49; Woods, *supra* note 289, at 54–55.

291. S. Doc. No. 14-142, at 26–28 (1816); *see also* Victoria Sutton, *American Indian Law – Elucidating Constitutional Law*, 37 *TULSA L. REV.* 539, 550 (2001) (describing Crawford’s proposals, beliefs, and their impact); Woods, *supra* note 289, at 57 (discussing Crawford’s report and his suggestions for helping Indian’s “become white”).

Anglicized territories and states. Julie Roy Jeffrey has suggested that “squaw men” were particularly disturbing figures because they “symbolized the possibility of racial intermingling and cultural compromises. . . . [T]heir choices suggested the allure of another way of life.”²⁹² In 1859, Charles Prosch, the editor of the *Puget Sound Herald*, published an editorial entitled “Scarcity of White Women,” in which he argued that intermarriage between “white folks” and “Indian squaws” was “the principal cause . . . operat[ing] to check [the] growth and development” of Washington Territory:

The intermarriage of whites with Indians is fraught with many and serious evils. It has been asserted that it elevates the Indian at the expense of the white race. While we question the fact of its morally elevating the Indian race, we are fully sensible of its demoralizing influence upon the white. The effect of this species of amalgamation, as seen here, and we believe, everywhere else, has been an almost instantaneous degeneration of the white, with no visible improvement of the Indian; while the offspring are found to possess not only all the vices inherent in the Indian, but unite with them the bad qualities of the whites.²⁹³

One strategy for dealing with these intermarriages was the passage of anti-miscegenation statutes.²⁹⁴ Prior to the 1860s, most anti-miscegenation statutes, which either voided or criminalized marriages between whites and people of other races, targeted marriages between whites and blacks.²⁹⁵ But beginning in the 1860s, a raft of expansive anti-miscegenation statutes in western territories targeted marriages between whites and blacks, Indians, or Chinese.²⁹⁶

292. JEFFREY, *supra* note 16, at 60 (describing responses of white women to “squaw men”).

293. Charles Prosch, *Scarcity of White Women*, PUGET SOUND HERALD (Steilacoom, Wash.), Aug. 26, 1859, *cited in* Bagley, *supra* note 21, at 4.

294. The term “miscegenation” was first coined—as a pejorative term—in 1864. See Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 599, 560 n.1 (2000) (“[M]iscegenation is an awkward term [T]he implication it carries is that ‘race’ is a meaningful construct and that sex and reproduction between the races is something akin to bestiality. But it is impossible to write about anti-miscegenation laws without using the term.”).

295. There were a few exceptions: Massachusetts, Rhode Island, and Maine each passed laws banning Indian-white marriages during the late 1700s. Woods, *supra* note 289, at 58–60. And a Virginia law made an exception for the “descendents of Captain John Smith and Pocahontas by allowing those Caucasians with 1/16 Indian blood to marry Caucasians.” See Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law*, 12 MICH. J. RACE & L. 351, 270–71 (2007) (describing the exception and its limits).

296. Hrishikesh Karthikeyan and Gabriel Chin have persuasively argued that anti-miscegenation laws were frequently passed even without large numbers of non-whites in the population. For example, they show that in virtually all states with black-white anti-miscegenation laws on the books, if Asians reached 1/2000 of the population, an Asian-white anti-miscegenation law would be added. Hrishikesh Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910-1950*, 9 ASIAN L.J. 1, 2 (2002). They theorize that anti-miscegenation laws were intended to “jealously guard the benefits flowing to the white population and to relegate Asian Americans to the subordinate social stratum occupied by other non-white populations, particularly blacks.” *Id.* at 4.

For example, in 1854, just three years after the first settlers came to the area and one year after Washington was granted territorial status independent from Oregon, Washington Territory passed a law that made any marriage void if one spouse was a “white person” and the “other possessed one-fourth or more negro blood, or more than one-half Indian blood.”²⁹⁷ In 1866 (the year of the second Mercer voyage), this law was amended to cover marriages between “a white person and the other a negro or Indian, or a person of one-half or more negro or Indian blood.”²⁹⁸ Several other western territories passed similar statutes: Nevada in 1861,²⁹⁹ Idaho in 1864,³⁰⁰ Arizona in 1865,³⁰¹ and Oregon in 1866.³⁰² In all cases but Oregon, an anti-miscegenation law was passed within three years of obtaining territorial status, often in conjunction with the territory’s organic act. Indeed, in later years when the offspring of Indian-white marriages tried to gain a share of their white fathers’ estates, these laws were frequently used to invalidate longstanding marriages.³⁰³

The concern with racial mixing appears to have shifted along with the population. In the early years of Oregon Territory, when many immigrants were French-Canadian fur traders, intermarriage

297. An Act to Amend an Act, Entitled: “An Act to Regulate Marriage,” § 1, 1854-55 Wash. Terr. Stat. 33 (1855).

298. An Act to Regulate Marriages, § 2, cl. 3, 1866 Wash. Terr. Stat. 81. This clause was stricken by legislative act in 1868 An Act to Amend An Act Entitled An Act to Regulate Marriages, § 1, 1868 Wash. Terr. Stat. 619. It is unclear why this happened (the law was passed by the legislature without comment). Perhaps an important local politician with an Indian wife had objected to it?

299. 1862 Nev. Terr. Laws ch.32, § 1 (making it a misdemeanor for a white to “intermarry with any black person, mulatto, Indian, or Chinese”), *amended in* 1919 to read “any person of the Caucasian or white race to intermarry with any person of the Ethiopian or black race, Malay or brown race, or Mongolian or yellow race.” 1919 Nev. Stat. 124, 124 § 1 .

300. 1864 Idaho Terr. Gen. Laws § 1, at 604 (misdemeanor for “any white man or woman” to “intermarry with any person of African descent, Indian or Chinese”). In 1867, Idaho added an additional provision making “all marriages of white persons with negroes, mulattoes, Indians or Chinese” illegal and void. 1867 Idaho Terr. Gen. Laws ch. 11, § 3, at 72; *see also* 1921 Idaho Sess. Laws 291 ch. 115, § 1, (H.B. No. 3) (adding “Mongolians”).

301. Acts, Resolutions and Memorials Adopted by the Territory of Arizona (1865 session), ch. 30, § 3 at 58; *see also* 1901 Ariz. Terr. Rev. Stat. tit. XLV, ch. 1, § 3092 (Sec. 6) (“all marriages of white persons with negroes, mulattoes, Indians, or Mongolians are declared illegal and void”).

302. Statutes of the State of Oregon (1862) (prohibiting marriages between whites and blacks); Statutes of the State of Oregon (1866) (prohibiting marriages between whites and those people with more than a quarter Indian blood or more than a quarter Chinese or Hawaiian blood).

303. *See, e.g.,* Wilbur’s Estate v. Bingham, 8 Wash. 35, 41 (1894) *aff’d sub nom.* Follansbee v. Wilbur, 44 P. 262 (Wash. 1896) (holding that Washington Territory’s 1866 anti-miscegenation law applied even to a marriage that took place on a Swinomish Indian reservation); *In re Walker’s Estate*, 5 Ariz. 70, 75 (1896) (finding marriage between Pima Indian woman and white man invalid due to Arizona’s anti-miscegenation statute).

with Indian women was popular and accepted, but as more Americans immigrated to the region to set up farms in the Willamette Valley, and existing residents shifted from fur trapping to farming, public sentiment turned negative, and anti-miscegenation statutes targeting Indians became increasingly popular.³⁰⁴ Similarly, as more Chinese began migrating to the West, anti-miscegenation laws targeting Chinese-white marriages also became common. As with Indian-white marriages, many people argued that intermarriage between whites and Chinese would put American institutions and culture in danger of being “overwhelmed by the habits of people thought to be sexually promiscuous, perverse, lascivious, and immoral.”³⁰⁵

Anti-miscegenation laws were not the only tool for shaping the population in ways designed to improve the chances for statehood. Some territories, such as Wyoming, gave the vote to white women but specifically withheld it from “colored women and squaws.”³⁰⁶ When Washington Territory attempted to grant women the vote for a second time in 1888, it included “all American half-breeds, male and female, *who have adopted the habits of the whites.*”³⁰⁷ Through these statutes, the territory was attempting to influence the developing culture in the West by rewarding those who were spreading white, Christian culture and punishing those who failed to do so. The 1888 statute is a good example of a law that embodied *both* immigration functions: it simultaneously fostered the immigration of white women by giving them the right to vote and discouraged “half-breed” men and women from maintaining ties to tribal culture by giving them the franchise only if they adopted white ways, thus excluding from the polity those who failed to conform.

On the surface, anti-miscegenation law appears to have little to do with immigration. But, taken in context, the development of these statutes underscores the way in which various legal strategies were used to foster some forms of population development and discourage others. By 1884, the U.S. Supreme Court was able to say with confidence that despite the Fourteenth Amendment’s grant of automatic citizenship to any person “born . . . in the United States, and subject to the jurisdiction thereof,” Indians who were members of

304. Smith, *supra* note 284, at 20, 22–23.

305. Leti Volpp, *American Mestizo: Filipinos and Anti-Miscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795, 802 (2000).

306. See LARSON, HISTORY OF WYOMING, *supra* note 263, at 78–79 (discussing the failure of a bill that would have given these women the right to vote).

307. *Bloomer v. Todd*, 19 P. 135, 137 (1888) (emphasis added).

tribes and born on American soil were not citizens.³⁰⁸ The Court relied on a theory of tribal sovereignty: Indians were citizens of their tribes, not the United States itself.³⁰⁹ Similarly, Asian-Americans were ineligible to become naturalized citizens until 1943,³¹⁰ having been believed to have “no appreciation of [republican] government; it seems to be obnoxious to their very nature.”³¹¹ Contrast these notions of citizenship with the lenient attitude toward Europeans, who could file a “declaration of intent” to become a citizen and reap many of the benefits of citizenship, including a free homestead and the right to vote, even before citizenship had been granted.

These approaches to citizenship were not territorial but racial. There were, in essence, two tracks during this period: the law of encouraging citizenship for white Europeans, and the law of restrictive immigration for other ethnic groups.³¹² The restrictive attitude toward non-whites did not limit itself to laws explicitly targeting immigration, but also arose in other contexts, such as the anti-miscegenation laws discussed above. The overall goal was not to limit the numbers of people entering the country or even to encourage a particular number, but rather to produce a white, Christian population, especially in the western territories. A population can be produced not only by restricting immigration of some, but also by discouraging intermarriage between ethnic groups and inducing immigration by those deemed desirable through strategic land grants, voting rights, and—in the case of the Mercer immigrants—simply looking the other way when the appearance of abuse or exploitation emerged.

308. *Elk v. Wilkins*, 112 U.S. 94 (1884). Congress legislatively solved the problem in 1887 with the passage of the Dawes Act, which conferred statutory citizenship on Indians who established homesteads or took residence “separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life.” Dawes Act, ch. 119, §6, 24 Stat. 388 (1887). But the purpose of the Dawes Act was not to extend land rights to Indians but to break up the reservation system to open up more land to white settlement. *Id.* For a critique of the Dawes Act’s effect on Indian women’s property rights, see Allison Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters’ Last Stand: American Indian Women’s Resistance to Domestication and the Denial of their Property Rights*, 77 N.C. L. REV. 637, 683 (discussing reasons that Dawes Act gave largest grants to male heads of households, including the theory that “in many Indian tribes, the wife was recognized as the head of the family and inheritance was through the female line, while among civilized nations families were headed by men, inheritance passed through the male line, and women assumed their husbands’ names and became subordinate to them”).

309. Dussias, *supra* note 308, at 683.

310. See IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 43 (1996) (explaining that, from 1790-1870, only Whites could naturalize; in 1870, naturalization was extended to “persons of African nativity, or African descent”).

311. CONG. GLOBE, 42d Cong., 1st Sess. 499 (1866) (statement of Sen. Cowan).

312. See MOTOMURA, *supra* note 3, at 123 (discussing the two tracks).

V. CONCLUSION

The Mercer story provides several challenges to scholars, both of immigration history and contemporary immigration law. First, it may lead us to rethink our narratives of westward immigration and settlement. Instead of seeing the relocation of whites to the West as “settlement” or “travel,” we can see it as “immigration,” albeit largely unrestricted immigration. The decisions by state and territorial legislatures to exclude Chinese and American blacks are clearly important to immigration history, but the Mercer story highlights how important the decision to encourage free immigration of whites was to the development of the West. The incentives provided by the Homestead Act may have been far more important to antebellum immigration history than any state-based immigration exclusion. The Mercer story also may help us to rethink our immigration law timeline. Although federal immigration restrictions were not implemented until the 1870s and 1880s, territories were very active in policing their borders and constructing their ethnic identity through various legal mechanisms as they prepared themselves for admission to statehood. The period of settlement of what became the United States thus becomes an important facet of immigration history and not merely settlement history or “pre-immigration” history.

Second, the Mercer Girls can help us rethink how immigration law actually works. The study of immigration law is usually the study of restriction—who gets left out and who gets deported—rather than the study of population production. Under this approach, immigration policy focuses on whether particular newcomers will be detrimental to an already established state. But the Mercer story helps us to reassess seemingly individual, private decisions to immigrate through the lens of participation in a project of nation-building and cultural change. The Mercer immigrants might have eschewed the immigrant label, but they were of national significance precisely because they promised to transmit European-American culture to an as-yet unassimilated territory. The Mercer story helps us to see that what the law *encouraged* mattered just as much as, if not more than, what the law prohibited.

Third, the Mercer story expands our notions of what counts as “immigration law” by showing how it works in tandem with other legal institutions and regimes to produce particular results. Mid-nineteenth century immigration laws passed by states did not regulate in isolation. Rather, they coexisted with laws that prohibited interracial marriage, encouraged westward immigration from the East and Europe by whites, and made marriage the primary way in which

women exercised citizenship. There may have been just a handful of “immigration laws” passed by the states and territories, but marriage and property law interacted with immigration law to produce a particular population at a particular time. The Mercer story helps anti-miscegenation, immigration, and homestead laws take their place in a fuller and more textured story of the settlement and construction of an American identity in the West. Today, immigration law scholars might want to consider not only the set of laws designated immigration law (i.e., the Immigration and Nationality Act and the portions of the Code of Federal Regulations that interpret it) but also, among many other things, farm subsidies and NAFTA, which together have tilted the economic balance between the United States and Mexico, leading to increased undocumented immigration.³¹³

Fourth, the story of the Mercer Girls highlights the way in which the legal status of marriage substitutes for more piecemeal or nuanced regulation. The public perception that the Mercer Girls were a group of wives rather than a diverse assortment of people meant that no immigration restriction was necessary. Marriage as a status category obviated the need for piecemeal regulation of female immigrants; wives would be financially supported, cared for, and disciplined by their husbands and so would not fall into the category of “pauper,” and wives were by their very nature morally fit people. Wives, or those who occupied the position of future wives in the public imagination, could therefore immigrate without further scrutiny. Those whom the public could not envision as proper wives were, as the Chinese discovered, presumptively excludable, with no need for any individualized inquiry about the individual’s ability to be self-supportive or contribute to the receiving state.

Contemporary federal immigration law incorporates similar features, such as the requirement that citizen sponsors of immigrant family members produce an “affidavit of support” promising that their

313. Farm subsidies and NAFTA are most commonly discussed in legal scholarship as problems of international economic development and international trade, not as immigration issues. See, e.g., Caitlin Firer, Comment, *Free Trade Area of the Americas and the Right to Food in International Law*, 1 U. ST. THOMAS L.J. 1054, 1057 (2004) (drawing connection between NAFTA and food shortages in Mexico but not between NAFTA and illegal immigration from Mexico to the United States). *But cf.* Michael Pollan, *You are What You Grow*, N.Y. TIMES, Apr. 22, 2007 (Magazine), at 15 (“By making it possible for American farmers to sell their crops abroad for considerably less than it costs to grow them, the farm bill helps determine the price of corn in Mexico and the price of cotton in Nigeria and therefore whether farmers in those places will survive or be forced off the land, to migrate to the cities — or to the United States. The flow of immigrants north from Mexico since NAFTA is inextricably linked to the flow of American corn in the opposite direction, a flood of subsidized grain that the Mexican government estimates has thrown two million Mexican farmers and other agricultural workers off the land since the mid-90s.”).

family member will not become a public charge.³¹⁴ The citizen-spouse steps into the position of the state, assuring that state that the immigrant spouse will be “covered” by the citizen-spouse and will not have to make recourse to the state for support. Similarly, spouses of U.S. citizens can themselves obtain naturalized citizenship in a shorter period of time than immigrants who are not married to citizens. Presumably, the contact with the U.S. citizen through marriage transmits some level of “American-ness” to the immigrant spouse that makes a more extended residency in the country unnecessary.³¹⁵ Immigration law thus continues to rely on marriage to assist in its regulatory work.

Finally, the Mercer story has something important to tell us about how our ideas about gender and family structure influence legislative choices in immigration law. In the case of the Mercer immigrants, lawmakers and the public at large imagined the immigrants to be women—and young, unmarried (but very eligible) women at that. The majority of the immigrants did not fit this description, yet the regulatory choices made by Washington Territory reflected this inaccurate understanding. A ship full of single men, single women, two-parent families, and widows with children was transmuted in the public imagination to a ship full of brides, thus transforming the entire group into individuals who would soon be regulated through marriage, with no need for scrutiny as immigrants.

Today, immigration law is still full of examples where lawmakers’ assumptions, often inaccurate, about the family lives of immigrants appear to have influenced their choices. For example, the affidavit of support that citizen-spouses must file to sponsor their relatives for green cards does not allow the immigrant-spouse’s prospective salary to be included when considering whether the citizen-spouse can protect him or her from becoming a public charge. If the citizen-spouse does not make enough money annually to keep the family significantly above the poverty line, then the immigrant is inadmissible, regardless of his or her income potential.³¹⁶ This requirement seems to presume a family structure with a citizen-breadwinner and an immigrant-housewife or a secondary earner, even though most couples today depend on the income of both spouses. The ability of an immigrant-spouse to be self-supporting—essentially, her

314. See Immigration & Nationality Act § 213A(1)(A), 8 U.S.C. § 1183(a)(1)(A) (2000); U.S. Citizenship & Immigration Servs., Dep’t of Homeland Sec., Form I-864P (2006), *available at* <http://www.uscis.gov/files/form/I-864p.pdf>.

315. Immigration & Nationality Act § 319(a), 8 U.S.C.A. § 1430(a) (2005).

316. See Immigration & Nationality Act § 213A(1)(A); Form I-864P, *supra* note 314.

desirability as an immigrant—is measured not through a test calibrated to measure her actual income potential but rather by assessing whether her husband has the means to support her. The gender neutrality of the requirement only highlights the work that marriage is doing here: while in the days of the Mercer Girls the economic dependence of wives was so assumed that the idea of considering them as independent economic actors was unthinkable, in the case of contemporary immigrants, assessing an immigrants' fitness by looking to the financial capabilities of his or her spouse seems particularly archaic and unlikely to produce an accurate description of a family's true economic health. The Mercer Girls can help us to see that the *assumption* that marriage will do particular work, even where Congress's vision of marriage is not consonant with the reality of individuals' lives, may further entrench outdated notions of marriage even where the meaning of marriage has changed.

Immigration scholars have been missing an important, hidden dimension in immigration law by focusing primarily on restriction. The story of the Mercer Girls can help us put restrictive immigration law in context as part of a broad set of legal of strategies used to produce and maintain populations. These immigrations provide a window into how restrictive immigration law, coupled with laws designed to induce immigration by whites and shape the racial makeup of the population, worked together to produce a desired population on the frontier. And even more importantly, they show us that the study of restriction only tells part of the story of our country. To understand whether immigration law is meeting its goals, we must look to see whom it includes as well as whom it excludes.