The Mercer Girls Guide to Immigration

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Kerry Abrams's engaging article *The Hidden Dimension of Nineteenth Century Immigration Law* sheds new light on the mythologized tale of the "Mercer Girls."[1] These citizens of Massachusetts, who despite their popular labeling were not, in fact, a group of "girls,"[2] traveled to the frontier town of Seattle in the Washington Territory as a result of the efforts of Asa Shinn Mercer.[3] Although the story of the Mercer Girls is a well-known historical tale, Professor Abrams's article contributes to a much richer understanding of the event in two important ways. First, she provides one of the first sustained scholarly inquiries into the story,[4] mining a rich archival

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1. Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353 (2009).

2. *Id.* at 1361.

3. *Id.* at 1358, 1366.

4. For another excellent account, see Lenna Deutsch, *Introduction* to ROGER CONANT, MERCER'S BELLES: THE JOURNAL OF A REPORTER 3–21 (Lenna S. Deutsch ed., 2d ed. 1992) (cited in Abrams, *supra* note 1, at 1361).

record that has not received much attention from previous historians.[5] Second, she recasts a story that has typically been framed as part of "settlement history" as part of the nation's immigration history.[6]

In framing this historical event as a story of the "Mercer immigrants," Professor Abrams recognizes that she runs the risk of anachronism. At the time that the Mercer voyages took place, there was no federal immigration law in the United States.[7] Moreover, the travelers on Mercer's voyages were not subject to any exclusionary laws at the territorial level—although some unsuccessful efforts were made to put such exclusionary provisions into place in response to Mercer's endeavors.[8] Finally, although the Washington Territory was not a formal part of the United States, it was a U.S. territory. Just as it would be incorrect to think of migration between contemporary U.S. territories like Puerto Rico and the United States as "immigration," as a formalistic matter, it may be equally problematic to think about state-to-territory migration as "immigration."

On the other hand, as Abrams notes, in the mid-nineteenth century, the states and territories routinely regulated state-to-state and state-to-territory migration, which is clearly not the case today. Abrams makes a convincing case that this requires us to think differently about state-to-territory migration.[9] Moreover, thinking about the Mercer resettlements not as part of "settlement history" but as immigration also has some theoretical payoff that Abrams is right to highlight. As she notes in both her introduction and her conclusion, reframing this historical moment as an immigration story provides a more useful template for understanding immigration law than conceiving of immigration law solely as a history of exclusion. In particular, such reframing allows for a better understanding of the degree to which immigration laws are not simply about excluding certain people, but are instead part of a network of legal and social tools aimed at "produc[ing] a population."[10] By framing the history of the Mercer voyages as an immigration story, Abrams's work deliberately echoes the historical narratives of immigration scholars like Aristide Zolberg, who focus not only on the history of immigration law exclusions, but also on public and publicly-facilitated private

5. Abrams, *supra* note 1, at 1359–61.
6. *Id.* at 1356–58.
7. *Id.* at 1354–55.
8. *Id.* at 1386–87.
9. *Id.* at 1355–56.
10. *Id.* at 1361.

efforts to encourage certain forms of migration while discouraging others.[11]

In the final section of her article, Professor Abrams expounds upon her view that immigration law should be understood and studied not in isolation, but instead as part of a network of laws and policies that have shaped the nation. Within such a framework, "settlement" histories are immigration histories. In particular, Abrams mentions the ways in which marriage laws (including antimiscegenation laws), suffrage laws, and property laws operated to induce the settlement and growth of certain populations while discouraging that of others.[12] In short, Abrams promotes a vision of immigration law that is broadly conceived. Her account focuses not only on the laws that define whether and how individuals are admitted, excluded, or deported, but also on the broader legal and social mechanisms that channel and shape populations.

The primary purpose of this Response is to situate Professor Abrams's article in the context of a significant and growing literature that has sought to understand immigration law—both historically and contemporarily—in just the way that Abrams suggests. Immigration scholars influenced by or working squarely within the traditions of ethnic studies, critical race theory, feminist legal theory, and Latina/o critical theory have engaged in projects that present immigration laws as part of a larger legal and social system designed to produce certain social results. In this body of work, immigration law is always understood as part of a larger bundle of laws and policies—formal and informal—designed to engineer the population of the nation through both exclusion and inducement. Scholars working in this tradition have identified the project of immigration law (broadly conceived) as centrally concerned with race-making.

Using the final section of Abrams's article as a roadmap, this Response explores the work of critical scholars who have tackled the challenge of analyzing the immigration laws within the context of a broader legal framework. This Essay embraces Abrams's suggestion that a more expansive understanding of immigration law is imperative. As the work of critical scholars suggest, accounting for immigration law within the larger socio-legal context is essential not only to understanding our past, but also to charting our future.

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11. ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA (2006). Abrams explicitly places her work in this tradition. Abrams, *supra* note 1, at 1357 n.15.

12. Abrams, *supra* note 1, at 1401–14.

I. THE PAYOFFS (AND LIMITATIONS) OF RECONCEIVING IMMIGRATION HISTORY

Professor Abrams is certainly right to assert that most immigration histories have focused primarily on exclusion as the core of immigration law.[13] Before the United States had a uniform federal law regulating immigration, individual states and territories enacted exclusionary provisions to regulate migration.[14] Such regulations included legal exclusions aimed at those likely to become public charges[15] and "lewd and debauched women,"[16] as well as the many other groups deemed undesirable by the dominant political caste, including criminals, individuals who were seen as posing a threat to public health, slaves, and others who were deemed racially undesirable.[17] As Abrams notes, these exclusionary rules are at the fore of many histories of immigration law regardless of the period they cover.[18]

Nevertheless, it would be wrong to conclude that scholars who study and write about immigration law have ignored the ways in which these exclusionary schemes are complemented by schemes to encourage migration. Nor have all scholars failed to see how immigration policy is shaped by a vast network of laws outside of formal immigration regulation. In particular, those scholars who have sought to locate immigration law within the framework of colonialism and racial production have added to a more robust understanding of what "immigration law" is and how it has defined not only who

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13. *Id.* at 1354.

14. *Id.* at 1355.

15. Gerald Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1846 (1993); *see also* Abrams, *supra* note 1, at 1388–92 (noting that such laws were not deployed against the Mercer immigrants because under the assumptions of the law of coverture, "Washington residents . . . would have understood that . . . any 'Mercer Girl' marrying a pioneer would be supported by her husband, not the Territory.").

16. Abrams, *supra* note 1, at 1392–1401 (discussing the racialized history of such exclusions and explaining why such laws would not apply to a group of immigrants that were understood as "wives," not prostitutes); *see also* Neuman, *supra* note 15, at 1892.

17. See Neuman, *supra* note 15, at 1842 (discussing the prevention of the immigration of criminals). The last category—"racially undesirable"—included restrictions on free blacks as well as the exclusion of Chinese immigrants. *Id.* at 1866–73. Abrams notes that Washington Territory enacted laws to exclude Chinese immigrants and attempted to enact laws excluding "free negroes and mulattoes." Abrams, *supra* note 1, at 1387. Such efforts were common in the West at that time. *Id.* at 1387–88.

18. Abrams, *supra* note 1, at 1353–54 & n.1; *see also* Neuman, *supra* note 15 (focusing on exclusionary regimes in reconstructing the "lost history of immigration regulation in the United States").

belongs, but also where they belong, in the U.S. body politic.[19] In her conclusion, Abrams identifies five goals that can be served through a more expansive account of immigration history.[20] This Response uses Abrams's five goals as an organizing principle, mapping the existing work of critical scholars on to Abrams's goals. As this Response will demonstrate, an existing body of work provides a strong foundation upon which future immigration scholars can build in answering Abrams's call to create a more complete account of immigration history.

A. Reframing Settlement

Abrams first goal is to rethink traditional "settlement history" as part of immigration history. Abrams argues that the retelling of the history of the Mercer migration as immigration rather than settlement reveals that certain incentive structures created by the legal regime to attract migrants were at least as important as exclusionary "immigration" policies in shaping the population of the territories, and ultimately, the nation.[21] Abrams observes that territories had a stake in shaping populations that would be acceptable to political elites in the United States, since their entry into the Union was contingent upon this acceptance.[22] These territories developed a set of laws and policies consciously designed to influence the color and character of migration into their borders. This is not a "pre-immigration" story, Abrams urges, it is *the* immigration story.[23]

Abrams's insight is shared by critical scholars who have already moved to reframe the nation's settlement history through the lens of "immigration."[24] For example, in his book *Almost All Alien: Immigration, Race and Colonialism in American History and Identity*, Paul Spickard expressly rejects the use of the term "settlers" in his own "immigration" history because he argues that it "implies that

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[19] *See generally* IAN HANEY-LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (detailing how immigration law and other laws—such as naturalization laws, antimiscegenation laws and segregation laws—functioned to create race and to order the racial hierarchy).

20. Abrams, *supra* note 1, at 1415–17.

21. *Id.* at 1415.

22. *Id.* at 1401–02.

23. *Id.* at 1415.

24. *See, e.g.*, PAUL SPICKARD, ALMOST ALL ALIENS: IMMIGRATION, RACE AND COLONIALISM IN AMERICAN HISTORY AND IDENTITY 133–43 (2007) (discussing the intertwined phenomenon of European in-migration throughout the North American continent and the often forced out-migration of native peoples).

there was no one there before the 'settlers' came, or . . . that it was a wild land in need of settling by civilized people."[25] Thus, he frames settlement history as an immigration history.[26]

However, the work of critical scholars also suggests that characterizing this history as an immigration history is sometimes too soft an understanding of the dynamics at work in "settlement." The utility of the immigration lens is that it allows us to "denaturalize" assumptions about a shared national vision and purpose.[27] The problem is that an immigration narrative can provide a misleading account of a history that, at its core, is sometimes better characterized as a tale of colonization, not immigration. Laura Gómez's recent historical account of the New Mexico territory, for example, also reframes "settlement" history, but her account demonstrates the ways in which "immigration" fails to capture comprehensively the forces at work in territorial "settlement."

Gómez's exploration of the history of the New Mexico Territory inverts the traditional "immigration story" of Mexican migration to the United States. Her account reminds the reader that the New Mexico Territory was a place occupied by tens of thousands of Mexicans and Native Americans at the end of the Mexican-American War, and that these occupants greatly outnumbering the 1,000 Euro-American settlers present at that time.[28] It was the Euro-American settlers who came to the land as "immigrants." Like other critical scholars, however, Gómez goes beyond characterizing the history of New Mexico as an "immigration" story, instead noting that this is a history of colonization:

> Americans tend not to think of themselves as colonizers . . . [and] tend, perhaps conveniently, to forget that their nation attacked Mexico in a war of aggression and that Americans were unwelcome invaders of Mexico's northern frontier. Popular culture and mainstream American history teach that the "frontier" (a concept connoting an empty, unpopulated region) was "settled" by brave and hearty pioneers (with the notion of settlement itself implying a benign presence, rather than a military occupation).[29]

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25. *Id.* at 26.

26. *Id.* at 26–27.

27. Kristin A. Collins, *Go West, Young Woman! The Mercer Girls and Legal Historiography*, 63 VAND. L. REV. EN BANC 77, 78–79 (2010).

28. LAURA GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE 6–7 (2007). New Mexico's population included "15,000 Pueblo Indians and perhaps 60,000 other Indians." *Id.* at 6. Nearly two-thirds of the Mexicans living in the territory known as the Mexican Cession at the end of the Mexican-American War lived in New Mexico Territory. *Id.* at 6. A total of 115,000 Mexicans received a grant of U.S. citizenship at the end of that war. *Id.* at 139.

29. *Id.* at 16; *see also* PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST (1987).

In Gómez's account, an interplay of factors such as state-sponsored violence, citizenship laws, slave laws, and the law governing the incorporation of New Mexico to the United States helps to explain the racialization of Mexican Americans and the formation of racial hierarchies that have continued ramifications to the present day.[30] Gómez's narrative, like Abrams's, reveals the inability of the "settlement" concept to account for what happened on the ground. But Gómez's research also reveals that "immigration" can sometimes be an incomplete way to characterize these events as well.

B. Reframing Immigration Law

Abrams's second goal in telling the Mercer story as an immigration story is to "help us rethink how immigration law actually works."[31] Such rethinking allows us to "reassess seemingly individual, private decisions to immigrate through the lens of . . . nation-building," and requires us to acknowledge that "what the law *encouraged* mattered just as much as, if not more than, what the law prohibited."[32] Here again, scholars in different traditions have begun to tell this tale in a variety of ways, although more work obviously remains to be done. Zolberg's account of U.S. nation-building explains how incentives created by shipping regulations, land laws, and naturalization laws,[33] as well as policies and practicalities related to the railroad,[34] created incentives for particular populations to migrate into and throughout the present-day United States. And Gómez's account of the Southwest reminds the reader that it was *Mexico*'s liberal immigration policies—designed to encourage Euro-Americans to settle in what was then Mexico's northern regions—that helped to reshape the population of those regions.[35]

While a focus on incentives is certainly important to the development of a more robust understanding of the nation-building project, the development of a more comprehensive understanding of what constituted exclusionary policies also needs to be included in the

30. GÓMEZ, *supra* note 28, at 151–61.

31. Abrams, *supra* note 1, at 1415.

32. *Id.* at 1415.

33. ZOLBERG, *supra* note 11, at 117–19; 131–32; 150–53.

34. *Id.* at 131–32.

35. GÓMEZ, *supra* note 28, at 6–7, 18 (discussing how these policies attracted sufficient numbers of Euro-American settlers ultimately to outnumber Mexicans in the then-Mexican territory of Texas). These policies ultimately proved counterproductive for Mexico. *Id.* at 18 (discussing the eventual revolt of Euro-American settlers).

equation. Fortunately, some scholars no longer confine themselves to the exclusionary policies that are part of formal "immigration law"—whether at the federal, state, or territorial level. By taking a broad view of what constitutes deportation or exclusion—focusing on events like the forced relocation of the Cherokee and the "colonization" plans for freed blacks in the mid-nineteenth century, as part of an overall immigration story[36]—scholars have illuminated the inextricable linkages between immigration schemes, colonialism, and the legal enforcement of racial hierarchies.

C. Expanding Immigration Law

The third goal that Abrams hopes to achieve by reframing the traditional settlement story is to require an understanding of immigration law not as an exclusionary regime that operates in isolation, but as a body of law that operates "in tandem with other legal institutions and regimes to produce particular results."[37] She highlights this dynamic in her story of the Mercer immigrants, and urges similar exploration in other contexts. Obviously, there are many possibilities here. Abrams provides one suggestion, urging that farm subsidies and NAFTA provide examples of laws that immigration law scholars should consider in their assessment of immigration law and policy.[38]

In his recent book *Ethical Borders: NAFTA, Globalization and Mexican Migration*, Bill Ong Hing directly tackles this very question. Hing begins by describing the impact of NAFTA and farm subsidies on the Mexican economy and patterns of migration from Mexico.[39] He

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36. *See, e.g.*, DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007). As Kanstroom notes, "[f]orced removal from U.S. territory was a central feature of Indian law long before it became such for immigrants." *Id.* at 64. By analyzing the relocation of native inhabitants of the territories as establishing the practical and doctrinal precedent for deportation in formal immigration law, Kanstroom illustrates how deportation law can be understood, at least "in part, as a system of social control largely deployed against people of color." *Id.* at 74. Thus, not only the forced relocation of native peoples, but also the Fugitive Slave laws (which drove blacks out of the country in search of freedom), the "colonization" efforts that attempted to reshape the population through the removal of free blacks to places outside the United States, and the whole network of "restrictions on the entry, movement, and residence of people of African ancestry were fundamentally related to the development of the post-Civil War deportation system." *Id*.

37. Abrams, *supra* note 1, at 1415.

38. *Id.* at 1416. Abrams cites to the work of writer Michael Pollan as an exception to this oversight. *Id*. at 1416 n.313 (citing Michael Pollan, *You are What You Grow*, N.Y. TIMES, Apr. 22, 2007, (Magazine), at 15).

39. BILL ONG HING, ETHICAL BORDERS: NAFTA, GLOBALIZATION AND MEXICAN MIGRATION (2010). In his introduction, Hing writes that "because of the lifting of tariffs under NAFTA and

then uses the remainder of his book to explore how immigration law, trade law, and foreign policy should be reimagined and restructured in light of these realities to build a more effective structure for managing migration.[40] Hing is not the first to comment upon the indisputable interplay between NAFTA and immigration. Kevin Johnson presciently urged the need to understand the linkages between NAFTA and immigration at the time of NAFTA's passage.[41]

Other immigration scholars also applied their critical lenses to a variety of laws and policies that have interacted with immigration law to produce specific social outcomes. Abrams observes how land laws influenced settlement in the territories.[42] Property laws have frequently interacted with exclusionary immigration policies and restrictive citizenship policies to create disincentives to migration and to structure the geography of migration flows. By way of contemporary example, municipalities around the country have adopted, or tried to adopt, local ordinances that prohibit landlords from entering into residential lease agreements with noncitizens unlawfully present in the country.[43] In a recent article, Professor Rose Cuison Villazor states that "the intersection of property, race, immigration, and citizenship that these local ordinances reflect is far from new."[44] Villazor notes that a nexus between restrictive immigration and citizenship laws and property laws operated in the mid-twentieth century enforcement of the Alien Land Laws to the detriment of Japanese immigrants and

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continued U.S. farm subsidies . . . Mexico is now importing most of its corn from the United States. Mexican corn farmers have gone out of business, undercut by U.S. prices. So farm workers who once harvested corn in Mexico lost their jobs, and where did they look for work? Across the border." *Id.* at 5. Hing expands upon and substantiates this statement in the first chapter of the book. *Id.* at 9–28 (esp. 12–19).

40. *Id.* at 133–161.

41. *See* Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 940–42 (1994). While government officials wanted to view the immigration issue as distinct at the time NAFTA was under discussion, immigration scholars have long recognized and written about the linkages between trade policy and migration. *See generally* HING, *supra* note 39 (especially at 11); *see also* Douglas S. Massey, *Backfire at the Border: Why Enforcement without Legalization Cannot Stop Illegal Immigration*, CTR. FOR TRADE POL'Y STUD. (Cato Inst., Washington, D.C.), June 13, 2005, at 5, *available at* http://www.freetrade.org/pubs/pas/tpa-029.pdf (observing that NAFTA actually fuels the social networks that facilitate migration).

42. Abrams, *supra* note 1, at 1403–06.

43. *See, e.g.,* FARMERS BRANCH, TEX., ORDINANCE No. 2952, § (B)(5) (enacted January 22, 2008) (this ordinance was struck down); ESCONDIDO, CAL., ORDINANCE No. 2006-38R, § 16E-1 (enacted Oct. 10, 2006) (struck down); HAZLETON, PA., ORDINANCE 2006-40, § 7 (enacted December 28, 2006). The Third Circuit recently affirmed a district court decision striking down the Hazelton ordinance on preemption grounds. Lozano v. Hazleton, 620 F.3d 170 (3d Cir. 2010).

44. Rose Cuison Villazor, *Rediscovering* Oyama v. California*: At the Intersection of Property, Race and Citizenship*, 87 WASH. U. L. REV. 979, 984 (2010).

U.S. citizens of Japanese descent.[45] At the end of World War II, the state of California vigorously enforced its Alien Land Law, adopted in the early 1900s, with the goal of expelling from the state Japanese citizens and their U.S. citizen children whom the government had recently released from internment camps.[46] Villazor argues that contemporary local property restrictions "may be understood to be the alien land laws of our time."[47] They, too, discriminate against U.S. citizen children of unauthorized migrants.[48] To address this discrimination, she encourages a reexamination of the validity of linking property rights and citizenship—an issue that was not addressed when the Supreme Court invalidated California's enforcement of its Alien Land Law against U.S. citizen property-holders.[49]

Other scholars have pushed the boundaries of these arguments even further, noting the ways in which property laws interact with other forms of local government law to structure the geography of migration. Quite recently, Rick Su has written persuasively about the way that laws governing municipal boundaries operate as a pervasive form of immigration regulation.[50] Su notes the similarities between immigration and zoning regulations—both in their doctrine and effect.[51] He then goes on to show that, "[a]side from the doctrinal connections, the two also share deep historical roots. Indeed, it can be argued that immigration and local spatial controls were envisioned as counterparts of a broader regulatory regime from the very start."[52] Su's argument, which traces the parallel development of both zoning and immigration regulations in the early part of the twentieth century, successfully illustrates that

> the legal structure responsible for the fragmentation of our lived environment into segregated neighborhoods and differentiated communities can be understood as a second-order immigration regulation. It is a mechanism that allows for finer regulatory controls than those that can be implemented with the crude tools of boundary and

45. *Id.* at 1003.

46. *Id.* at 985; *see also* Keith Aoki, *No Right to Own?: The Early Twentieth Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998) (arguing that the denial of civil rights to Asian immigrants that was wrought by the passage of the land laws earlier in the century facilitated the denial of civil rights to Japanese-American citizens during internment).

47. Villazor, supra note 45, at 988.

48. *Id.* at 988–89.

49. *Id.*; *see* Oyama v. California, 332 U.S. 633 (1948) (holding only that Fred Oyama, a U.S. citizen by birth, was denied equal protection by the operation of California's land laws, but not addressing the denial of property rights to Oyama's noncitizen father).

50. Rick Su, *Local Fragmentation as Immigration Regulation*, 47 HOUS. L. REV. 367 (2010).

51. *Id.* at 373–83.

52. *Id.* at 383.

> membership controls at the national level. It also serves as a means by which, in the absence of a national consensus, the competing interests surrounding immigration can still be negotiated and reconciled on the ground.[53]

The work of Rose Villazor, Rick Su, and Keith Aoki provide just a few examples of the productive value of understanding exclusionary immigration law in context. These scholars are keenly attuned to the interplay between immigration law, alienage law, and other legal regimes. Their work provides an excellent guidepost and jumping off point for the kinds of scholarly inquiry that Abrams encourages in her own article.

D. Understanding the Role of Marriage in Immigration History

Abrams's fourth goal in this retelling is to encourage scholars to understand the ways in which "legal status of marriage substitutes for more piecemeal or nuanced regulation" of migration.[54] Abrams's own work certainly leads the way. What is interesting, however, is that in Abrams's account, it is not just the law of marriage that does the work. Marriage law can only function in this role in conjunction with the criminal law, which regulates relationships outside of marriage. Abrams's account ably demonstrates how the criminal law has interacted with immigration regulations and racial assumptions to channel and control migration. She discusses two ways in which the civil and criminal laws regulating intimacy targeted certain kinds of women and certain kinds of population production.

First, Abrams describes how the regulation of prostitution largely emerged as a means of regulating the migration and settlement of Chinese and Mexican women.[55] She notes the ease with which the marriageable white women among the "Mercer immigrants" avoided such regulation. Because these women were understood to have the characteristics of "wives" they avoided the exclusions for "lewd and debauched" women that, with increasing frequency, were

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53. Su, *supra* note 51, at 370; *see also* Keith Aoki et.al., *(In)visible Cities: Three Local Government Models and Immigration Regulation*, 10 OR. REV. INT'L L. 453, 458 (2008) (exploring immigration and its regulation—broadly written to include "English-only" ordinances, sanctuary ordinances, policies on noncitizen voting, and "illegal immigration" ordinances—as sites where the local regulation meets and modulates international and transnational forces).

54. Abrams, *supra* note 1, at 1416.

55. *Id.* at 1393–95. Indeed, in an earlier work, Abrams brilliantly illustrates the way in which the Page Law—the first federal immigration restriction, which was aimed at the importation of women for prostitution—actually functioned as a mechanism for excluding Chinese women from immigrating long before the passage of the Chinese Exclusion Act. *See generally* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005).

used to bar the admission of women of color.[56] They also avoided exclusion as "paupers" thanks to the operation of the doctrine of coverture.[57] Thus, the criminal law buttressed marriage law to achieve desired social outcomes.

Second, Abrams describes the ways in which antimiscegenation laws operated in tandem with the legal mechanisms that encouraged the migration of white settlers while discouraging the migration of non-white settlers "to foster some forms of population development and discourage others."[58] Policies encouraged white settlement.[59] Restrictive citizenship policies discouraged or barred the citizenship of Indians and Asians.[60] Cementing these policies of exclusion were laws that selectively excluded from the polity the children of these mixed marriages.[61] In sum, immigration and nationality laws "which expressly countenanced racial quotas and race-based bars to admission and naturalization, operated in tandem with antimiscegenation laws to construct and enforce racial boundaries within the United States."[62]

Abrams is quite right to urge scholars to look more carefully at these interacting legal regimes. Critical scholars—some of whom Abrams relies upon in her own account—have already begun to tell these immigration stories.[63] Much more work should be done to

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56. Abrams, *supra* note 1, at 1398.

57. *Id.* at 1390–92, 1416.

58. *Id.* at 1413. Of particular concern to the political elite in the Washington Territory was the intermarriage of white male settlers with native Indian women. *Id.* at 1409–12.

59. *See, e.g., id.* at 1403, 1414.

60. *Id.* at 1414.

61. *Id.* at 1413 (discussing laws that denied the vote to "half-breeds" who failed to adopt "the habits of whites.").

62. *See* Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of* Loving, 2007 WIS. L. REV. 345, 347–48 (2007).

63. *See, e.g.*, HANEY-LÓPEZ, *supra* note 19, at 34 (1996) ("Until . . . 1931, marriage to a non-White alien by an American woman was akin to treason against this country: either of these acts justified the stripping of citizenship from someone American by birth. Indeed, a woman's marriage to a non-White foreigner was perhaps a worse crime, for while a traitor lost his citizenship only after trial, the woman lost hers automatically."); Shirley Hune, *U.S. Immigration Policy and Asian Americans: Aspects and Consequences*, *in* CIVIL RIGHTS ISSUES OF ASIAN AND PACIFIC AMERICANS: MYTHS AND REALITIES 283, 285 (1979) (characterizing the combination of immigration restrictions and antimiscegenation laws as an intentional form of genocide of the Chinese immigrant community); KEVIN R. JOHNSON, THE HUDDLED MASSES MYTH: IMMIGRATION AND CIVIL RIGHTS 126 (2004) (also taking account of this phenomenon); RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE 33–34, 37–39 (2001) (noting that Chinese and Filipino immigrants were barred from marrying outside their racial groups by antimiscegenation laws but were also unable to marry within their groups because immigration exclusions prohibited the entry of women in these immigrant groups); Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L.

understand how the laws regulating intimacy in and outside of marriage contributed to immigration policy. Fortunately, there is already a scholarly tradition that can facilitate further thinking and research to this end.

E. Gender and Family Structure in Immigration Law

Finally, Abrams urges that a robust understanding of immigration law requires us to understand "how our ideas about gender and family structure influence legislative choices in immigration law."[64] Abrams herself has written eloquently about this issue elsewhere.[65] Other scholars have explored the ways in which assumptions about gender and gender roles have not only embedded questionable assumptions about the earning power of women into immigration laws,[66] but have also constrained the protective force of asylum and refugee laws[67] and have skewed the interpretation and application of laws aimed at preventing human trafficking.[68] Clearly, scholars have started to grapple with the role of gender in shaping immigration policy, but there is more work to be done. "When one inflects citizenship, sovereignty, and migration theories with gender analysis, new questions emerge both about feminist conceptions of women and men and about political theories of the state."[69]

REV. 795, 803–806, 813–823 (2000) (discussing successful efforts to create legal barriers to intermarriages between Whites and Filipinos who could not be barred by formal immigration law because the Philippines was an American colony); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 U.C.L.A. L. Rev. 405, 405 (2005) (narrating "a sorely neglected legal history, that of the intersection between race, gender, and American citizenship through the first third of the twentieth century" and explaining how marriage to racially excludable noncitizens "once functioned to exile U.S. citizen women from their country.").

64. Abrams, *supra* note 1, at 1417.

65. Kerry Abrams, *Becoming a Citizen: Marriage, Immigration, and Assimilation*, *in* GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP 39 (Linda C. McClain & Joanna L. Grossman, eds., Cambridge University Press 2009) [hereinafter GENDER EQUALITY].

66. GENDER EQUALITY, *supra* note 65.

67. Talia Inlender, *Status Quo or Sixth Ground? Adjudicating Gender Asylum Claims*, *in* MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER 360–63 (2009) (demonstrating ways in which the traditional refugee definition fails to provide meaningful protection for gender-based persecution).

68. Jennifer M. Chacón, *Misery and Myopia, Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3029–32 (2006) (observing that governmental efforts to combat labor trafficking have not kept pace with efforts aimed at sex trafficking).

69. Seyla Benhabib & Judith Resnik, *Introduction: Citizenship and Migration Theory Engendered*, *in* MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER 5 (2009).

Moreover, such work should be done with attention to the ways in which racial stereotyping often compounds gender stereotyping in the creation of law and policy. This is particularly true since restrictive immigration policies can generate a feedback loop that compounds the very race and gender stereotypes that led to the exclusive policies in the first place.[70]

II. CONCLUSION

In the end, Abrams's article is rewarding both because it provides a story around which the reader can reorient her understanding of the past and because it provides a means of better understanding the present. Contemporary debates about immigration policy have focused narrowly and almost obsessively on the questions of who should be kept out and how they should be kept out of the country.[71] With very few exceptions, recent amendments to immigration law have sought to increase the categories of inadmissible and excludable noncitizens and to strengthen the physical and technological means of keeping them out. But Abrams's work serves as a reminder that the complex socio-legal structure that drives migration and that privileges some migrants over others should not be overlooked when evaluating immigration law and policy. This is a useful reminder not only for scholars evaluating the nation's past, but also for those who are interested in shaping its future.

70. Chacón, *Loving Across Borders*, *supra* note 62, at 374–75 ("Rather than moving to expand immigration categories to facilitate family unification, many legislators and policy makers have proposed their further contraction. Meanwhile, stereotypes about immigrant men and women as sexually threatening and hyperfertile exist precisely because their familial relationships are sundered by law and obscured from public view. Ironically, the same stereotypes have also become the basis for claims that migrant men and women are unsuitable for citizenship.").

71. KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 6 (2007) (lamenting this phenomenon).