

# Beyond the “Black Hole”—A Historical Perspective on Understanding the Non-Legislative History of Washington Community Property Law

Kelly M. Cannon\*

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“They say white women are scarce out here. The best thing we can do  
is to go to work to provide shelter for those we have.”<sup>1</sup>

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\*. Ms. Cannon is a graduate of Whitman College and the University of Washington School of Law. She is a former associate in the law firm of McNaul Ebel Nawrot Helgren & Vance, P.L.L.C. where her practice focused heavily on commercial litigation. She currently practices as an attorney in the corporate legal department of SAFECO Insurance Company of America.

1. This comes from the traditional account of the founding of the city of Seattle.

On November 13, 1851, the steamer *Exact*, on its way from Portland, Oregon, to the Queen Charlotte Islands, off the Canadian Coast, stopped at what is now called Alki Point. . . . Twenty-two people, ten adults and twelve children disembarked. They were met by two young men [who had come ahead as part of the advance party]. The men [immediately] set to work putting a roof on the cabin that had been begun by the advance party. . . .

ROGER SALE, SEATTLE PAST TO PRESENT 7 (1976). One of the men of this group is credited with the quote. *Id.*

## I. INTRODUCTION

There is perhaps no area of the law of Washington state where more speculation has been entertained than the historical background of its community property system. Ever since Washington became a state, it has had a system of community property law.<sup>2</sup> However, to state that Washington has had community property law since statehood was conferred is to imply that it was instituted then. This is not correct. There has been a system of community property in Washington since 1869.<sup>3</sup> The laws enacted after Washington became a state in 1889 merely effected a continuation of the property system, which had already been in existence for nearly twenty years.<sup>4</sup>

Unfortunately, not much else is known about this legislative event. Virtually no records were preserved that shed light on why the territory of Washington chose to pass a community property statute rather than follow the traditional common law.<sup>5</sup> In fact, one researcher went so far as to write that "a search . . . has been made but wholly without result. . . . [This] writer's efforts have uncovered nothing useful. . . ."<sup>6</sup>

The lack of direct information regarding this subject poses a serious obstacle to the study of Washington's community property statutes. Nevertheless, there is enough information regarding the adoption of community property by other western states to provide strong inferences as to what induced the Washington legislature to do so. There may be two overriding concerns held by the residents of Washington Territory that guided the decision to adopt a community property system. First, Washington Territory residents wanted to align their laws more closely with the laws of California. Second, the overwhelming majority of bachelors in the territory wanted to use the adoption of a community property statute to attract women to Washington.

In order to give context to the analysis of the development of community property in Washington, the first several sections of this paper are devoted to providing a factual understanding of the introduction of community property into the nine states where it now exists. The remaining sections discuss community property and how it came to pass in Washington.

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2. In this respect, Washington is different from most of the other states in the United States where the property relations of husband and wife are regulated by the principles of the common law. Aside from Washington, there are eight community property states: Nevada, Arizona, New Mexico, Texas, California, Louisiana, Idaho, and Wisconsin. See WASHINGTON COMMUNITY PROPERTY DESKBOOK § 1.10 (George T. Shields et al. eds., 2nd ed. 1989).

3. Act of Dec. 2, 1869, 1895 Wash. Laws 895.

4. ROBERT L. MENNELL & THOMAS M. BOYKOFF, COMMUNITY PROPERTY IN A NUTSHELL 17 (2d ed. 1988).

5. A possible explanation for the absolute lack of official information regarding not only this statute but others is that the records were reported as lost by the territorial governor. *Governor's Message: Codification of the Laws*, OLYMPIA TRANSCRIPT, Dec. 14, 1867, at 1.

6. M.R. Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 WASH. L. REV. 1, 9 (1936).

## II. ANCIENT ORIGINS OF THE COMMUNITY PROPERTY DOCTRINE

With few exceptions, the study of the ancient origins of community property systems of other countries provides little information relevant to the community property systems that currently exist in the United States.<sup>7</sup> Nevertheless, it is of some use to have a basic understanding of how the law of community property came to exist. The community property doctrine originated as part of the laws of the loosely organized Germanic tribes (also known as the Visigoths) that swept across western Europe during the decline of the Roman Empire.<sup>8</sup> Life was very hard and dangerous during this time period and, as a result, the women of these tribes worked side by side with the men in order to survive.<sup>9</sup> Rich in various forms of communal associations, the "community property" law of these tribes is said to have been based on the harsh reality of the circumstances rather than any organized or moralistic standard.<sup>10</sup>

Whatever the basis for the Visigoth's untraditional property system, these tribes introduced community property law to the western part of Europe as they settled in present-day France, Holland, and Spain.<sup>11</sup> Once an area was conquered by the Visigoths, their customs were integrated into the lives of the people living there.<sup>12</sup> The custom of community property was officially established as the law of Spain in the *Fuero Juzgo*, or Code of Judgments, which was that country's first attempt to codify its laws.<sup>13</sup> Similarly, the doctrine of community property was made the law of France by the Napoleonic Code.<sup>14</sup> It is believed that the introduction of the Spanish

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7. "The early history [of community property] is of minor importance." GEORGE MCKAY, A COMMENTARY ON THE LAW OF COMMUNITY PROPERTY § 4, at 38 (1910). The exceptions to this general statement might be the laws of Louisiana, New Mexico, and Texas. The laws of these states were likely inherited directly from Spanish law, which was in effect when these states were incorporated into the Union. See Charles Sumner Lobingier, *The Marital Community: Its Origin and Diffusion*, 14 A.B.A. J. 211, 215 (1928).

8. Although several ancient legal codes have comparable provisions to the community property law found in early America, the most likely origin is with the Germanic tribes. "When it is found in northern France and in Visigothic Spain by at least the seventh century of our era, the inference as to its Teutonic origin is a strong one." William Wirt Howe, *The Community of Acquests and Gains*, 12 YALE L.J. 216, 216 (1903). "It may be asserted upon excellent authority that the community system was introduced into Spain by the Visigoths." Walter Loewy, *The Spanish Community of Acquests and Gains and Its Adoption and Modification by the State of California*, 1 CAL. L. REV. 32, 33 (1913).

9. WILLIAM A. REPPY, JR. & WILLIAM Q. DE FUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES 5 (1975).

10. *Id.* at 6; see also MCKAY, *supra* note 7, § 7, at 41.

11. MENNELL & BOYKOFF, *supra* note 4, at 11.

12. *Id.*

13. Originally written in Latin, its formal title is *Liber Judiciorum*, or Book of the Judges. By order of Ferdinand III, the entire text was translated into Castilian during the thirteenth century and became known as the *Fuero Juzgo*. RICHARD A. BALLINGER, A TREATISE ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE, UNDER THE COMMUNITY OR GANANCIAL SYSTEM § 1, at 7 (1895).

14. GEORGE MCKAY, A TREATISE ON THE LAW OF COMMUNITY PROPERTY § 9, at 7 (Bobbs-

community property system on American soil was the result of Spain's conquest of Mexico and its subsequent possession of land in North America.<sup>15</sup> When Mexico became a republic, it did not change the community property system that had been in place since Spanish rule. Consequently, the Spanish civil law of community property continued to be the law in areas of the Republic that were eventually brought under the American flag.<sup>16</sup> It is interesting to note that throughout the history of the community property doctrine, "There have been few instances of intentional adoption of a community property system without invasion or colonization."<sup>17</sup>

### III. THE LAW OF COMMUNITY PROPERTY IN EARLY AMERICA

It has been commonly stated that the nine states with a community property system most likely acquired their community property laws from the same source, which is believed to be the marital property system of Spain.<sup>18</sup> While this statement is not necessarily incorrect, it requires further explanation to be accurate. Acceptance of the system in several of the nine states—Louisiana, Washington, Idaho, Nevada, and Wisconsin—was not motivated by direct links to the Spanish civil law.<sup>19</sup> In addition, the application of the community property doctrine changed, sometimes dramatically, as it spread from one state to the next.<sup>20</sup> As a result, there are not many "common threads" among the nine community property systems.<sup>21</sup> Nevertheless, in understanding the community property background of Washington, it is helpful to have a brief overview of the other eight states and the origins of their systems.<sup>22</sup>

France was the first country to colonize Louisiana and it remained under French rule until 1763.<sup>23</sup> "There followed a Spanish colonial period until 1803, when, after a

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Merrill Co. 2d ed. 1925).

15. BALLINGER, *supra* note 13, § 6, at 30.

16. WILLIAM QUINBY DE FUNIAK, *PRINCIPLES OF COMMUNITY PROPERTY* § 15 (1943).

17. MENNELL & BOYKOFF, *supra* note 4, at 12. The community property system in various forms exists in many other countries.

18. REPPY & DE FUNIAK, *supra* note 9, at v.; see also *In re Estate of Salvini*, 65 Wash. 2d 442, 447, 397 P.2d 811, 814 (1964).

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

20. MENNELL & BOYKOFF, *supra* note 4, at 13-14.

21. *Id.* at 13. Mennell and Boykoff note that the key to understanding the differences among all of the systems is found in the history preceding the admission of each state into the Union. *Id.* at 14-17.

22. An analysis of the history of Washington community property law can serve as an analysis of the history of Idaho because Idaho Territory was created by Congress in 1863 when the boundaries of Washington Territory were reshaped. Act of Mar. 3, 1863, ch. 117, § 1, 12 Stat. 808, 808-09 (1863).

23. Clarence J. Morrow, *Matrimonial Property Law in Louisiana*, in 2 *MATRIMONIAL PROPERTY LAW* 29 (W. Friedmann et al. eds., 1955).

very brief restoration of French control, the territory was sold to the United States.”<sup>24</sup> As expected, the law of Louisiana during these colonial periods followed the law of the particular European power in control at the time.<sup>25</sup> Therefore, the French Custom of Paris governed until 1763, followed by the civil law of Spain.<sup>26</sup> The number of Anglo-Americans in Louisiana significantly increased after the United States purchased the Territory in 1803 and, as a result, there was a growing pressure to adopt the common law.<sup>27</sup> The jurisdiction became an open legal battleground and rampant confusion resulted from the frequently changing law.<sup>28</sup> This confusion ultimately led to the passage of the Code of 1808, which adopted the French “Dotal System” with respect to separate property rights of the spouses, but retained the Spanish “*ganancial* system” regarding their common property.<sup>29</sup> In short, Louisiana combined different parts of the two competing systems of France and Spain and adopted a system unique to its jurisdiction.

In 1848, by the terms of the Treaty of Guadalupe Hidalgo, the United States acquired the land now consisting of the states of Arizona, Nevada, and part of New Mexico.<sup>30</sup> The location and Mexican heritage of all three of these states had a strong influence on their laws. Records indicate that the Territory of New Mexico adopted the Spanish civil law of community property in its entirety.<sup>31</sup> In 1863, when Congress carved out the territory of Arizona from the western part of New Mexico, the newly formed territorial government of Arizona enacted a community property statute that simply continued the law that had been in force while the area was part of New Mexico.<sup>32</sup> Nevada was organized as an independent territory in 1861 and became a state in 1864.<sup>33</sup> Its constitution contained a community property provision, which was largely modeled on those of neighboring states.<sup>34</sup>

California and Texas were also originally part of Mexico before their acquisition by the United States.<sup>35</sup> Both of these states employed the community property

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Morrow, *supra* note 23, at 30.

29. BALLINGER, *supra* note 13, § 6, at 30-31.

30. The Treaty of Guadalupe Hidalgo officially ended the Mexican-American War. The treaty also gave the United States the land now comprising the states of Utah, Colorado, and Wyoming—none of which are community property jurisdictions. MENNELL & BOYKOFF, *supra* note 4, at 14.

31. BALLINGER, *supra* note 13, § 6, at 31.

32. Kirkwood, *supra* note 6, at 5. It is interesting to note that, in 1864, the territory of Arizona repealed all of its civil laws in favor of the common law of England, but then re-enacted its civil statutes in 1865. *Id.*

33. *Id.* at 6.

34. *Id.*

35. MENNELL & BOYKOFF, *supra* note 4, at 14, 16.

system of Spain and Mexico before the adoption of their constitutions and both continued to follow that system after statehood.<sup>36</sup>

Washington and Idaho, however, did not have strong French, Spanish, or Mexican traditions like the other community property states.<sup>37</sup> Because of this, Washington and Idaho are said to have copied the idea from one of the other community property jurisdictions.<sup>38</sup>

While Wisconsin is a community property jurisdiction, its system does not have a long history because it did not adopt a community property statute until 1986.<sup>39</sup> Nevertheless, certain insights can be gained from the process by which the Wisconsin legislature adopted its marital property statute.

#### IV. THE EARLY HISTORY OF WASHINGTON TERRITORY

It is helpful to have at least a basic knowledge of the general history of Washington in order to understand how the doctrine of community property made its way into the laws of Washington Territory. Washington Territory started out as part of the territory of Oregon so its history antedates the year of its organization as an independent territory.<sup>40</sup>

The land along the Pacific Coast was originally claimed in whole or in part by four nations: Spain, Russia, England, and the United States.<sup>41</sup> The United States laid claim to the Pacific Northwest based on Lewis and Clark's western expedition as well as the existence of the trading post established by John Jacob Astor in 1811.<sup>42</sup> Although it took several years, the United States ultimately succeeded in laying claim to the Pacific Coast region.<sup>43</sup> As a result, the number of people moving into the

36. Upon statehood, both of these states adopted provisions in their respective constitutions that had the effect of rendering inoperative the Dotal System of the Spanish law. See BALLINGER, *supra* note 13, § 6, at 31.

37. Robert Emmet Clark, *Matrimonial Property Law in New Mexico and the Western United States*, in 2 MATRIMONIAL PROPERTY LAW 89, 102 (W. Friedmann et al. eds., 1955).

38. Kirkwood, *supra* note 6, at 8.

39. The Uniform Marital Property Act of Wisconsin is codified at section 766.001 of the Wisconsin Statutes. WISC. STAT. ANN. § 766.001 (West 2001). For a detailed discussion, see Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769. While the Wisconsin legislation uses the term "marital property" rather than "community property," the Internal Revenue Service has recognized that Wisconsin is a community property state. Rev. Rul. 87-13, 1987-1 C.B. 20.

40. Kirkwood, *supra* note 6, at 7-8.

41. *Id.* at 7.

42. *Id.*; see also August, *supra* note 19, at 60.

43. The United States acquired the land through a series of treaties. In 1819, Spain ceded its claims to the Pacific Coast in connection with a treaty regarding Florida. In 1824, the United States gained all of the land below the parallel of 54°40' after Russia waived her claims to it. Finally, in 1846, England and the United States signed a treaty establishing the present day Canadian border. See Kirkwood, *supra* note 6, at 7.

Pacific Northwest increased, the large majority of which were loggers, traders, trappers, and missionaries who settled on the Willamette River.<sup>44</sup> As more people came to the area, the local inhabitants felt the need for some form of organized government.<sup>45</sup>

The settlers' petitions urging Congress to acknowledge and organize the land as the Oregon Territory were of no avail.<sup>46</sup> Eventually, the settlers took matters into their own hands and called a public meeting in 1843 where a provisional government was established.<sup>47</sup> "The settlers adopted as their code 'the laws of Iowa Territory enacted at the first session of its territorial legislature in 1839.'"<sup>48</sup> Based on that, the common law of marital property was put in force in what was soon to become the Oregon Territory.<sup>49</sup> Despite continued petitions to Congress, the Territory of Oregon was not officially organized until 1848.<sup>50</sup> The territory itself comprised of a tract of land that included the present states of Oregon, Washington, and Idaho.<sup>51</sup>

The first territorial legislature promptly adopted the Iowa statutes of 1839 as the law of the newly-formed territory, thus continuing the common law tradition.<sup>52</sup> However, the territorial Supreme Court of Oregon questioned the propriety of the legislature's actions because it was discovered that parts of Iowa's revised statute of 1843 were incorporated into the statute of 1839.<sup>53</sup> As a result of this controversy, the legislature appointed a commission to draft a new code, which was not adopted until 1854.<sup>54</sup> The code that was adopted in 1854 was almost identical to the marital

44. August, *supra* note 19, at 60.

45. The Hudson Bay Company and the Methodist Mission provided a crude form of government for the earliest settlers. August, *supra* note 19, at 60. The settlers really felt the need for a formal government when an American settler named Ewing Young died and his will had to be probated. It was this man's death that prompted them to agree to begin drafting a code of laws. Arthur S. Beardsley, *Code Making in Early Oregon*, 23 OR. L. REV. 22, 24 (1943). For a detailed account of the early history of this area's provisional government, see also Lawrence T. Harris, *History of the Oregon Code*, 1 OR. L. REV. 129 (1922).

46. August, *supra* note 19, at 60-61.

47. *Id.* at 60.

48. *Id.* at 61 (quoting REAL PROPERTY STATUTES OF WASHINGTON TERRITORY FROM 1843 TO 1889 COMPRISING THE LAWS AFFECTING REAL PROPERTY ENACTED BY THE LEGISLATIVE COMMITTEE AND LEGISLATIVE ASSEMBLY OF OREGON TERRITORY PREVIOUS TO 1853 INCLUDING THE STATUTES OF IOWA OF 1839 AND 1843, TOGETHER WITH THE ORGANIC ACTS, ENABLING ACT, STATE CONSTITUTION AND TREATIES, PROCLAMATIONS AND SPECIAL LAWS OF CONGRESS, SUCH AS THE DONATION ACT, RAILROAD GRANT AND OTHER PRIVATE ACTS, INDIAN TREATIES, EXECUTIVE ORDERS, ETC., No. 94, ¶ 13, at 90 (Twyman Osmond Abbott comp., Olympia, Wash. 1892) [hereinafter REAL PROPERTY STATUTES OF WASHINGTON TERRITORY]).

49. "All the statutes of Iowa territory . . . shall constitute a part of the law of this land." REAL PROPERTY STATUTES OF WASHINGTON TERRITORY, *supra* note 48, No. 94, ¶ 13, at 90.

50. August, *supra* note 19, at 61.

51. *Id.* at 60.

52. *Id.* at 61.

53. *Id.*

54. *Id.*

property statutes of New York.<sup>55</sup> Like the Iowa statutes that had previously been in force in Oregon, the New York statutes recognized the common law, thus causing no significant change in the marital property laws of the territory.<sup>56</sup>

While the legislative controversy in the territory of Oregon was being settled, Congress began to reorganize the Pacific Northwest.<sup>57</sup> In 1853, Congress created the territory of Washington by carving the land north of the Columbia River out of the Oregon Territory.<sup>58</sup> Congress provided for the continuation of the laws of Oregon then in force until the new territory either repealed or replaced them.<sup>59</sup> Common law principles continued to govern Washington Territory for several years thereafter. However, the common law of Washington was different from the laws of Oregon, as the creation of the territory of Washington occurred before 1854—the year Oregon adopted the New York statutes.<sup>60</sup> Therefore, the laws of Washington were actually based on the statutes in force in Iowa, which were the source of Oregon's original legal code.<sup>61</sup> Thus, the traditional common law of marital property, not the New York Married Women's Property Act, became part of the law of the newly-formed territory of Washington.

Without explanation, the Washington Territorial Legislature repealed the laws derived from the territory of Oregon in 1856.<sup>62</sup> At the same time, the legislature made express provision for the continuation of the common law as the rule of decision.<sup>63</sup>

#### V. THE EARLY COMMUNITY PROPERTY STATUTES OF WASHINGTON

The first legislation providing for community property in the territory of Washington was, in 1869, when a statute modeled on the California Community Property Act of 1850 was adopted.<sup>64</sup> For the next twenty years, until statehood, the

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55. August, *supra* note 19, at 61.

56. There is no express evidence that the Oregon settlers held an interest in marital property reform so it is interesting to note that the adoption of the New York statutes in 1854 included New York's "progressive" Married Women's Property Act of 1848, thus making it part of the law of Oregon. *Id.*

57. *Id.*

58. *Id.*

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

60. August, *supra* note 19, at 61.

61. *Id.*

62. *Id.*

63. REAL PROPERTY STATUTES OF WASHINGTON TERRITORY, *supra* note 48, No. 116, at 126. Two years earlier, in 1854, the territory of Washington recognized dower. *Id.* No. 521, at 381. It went on to recognize curtesy in 1860. *Id.* No. 522, at 385. In 1860, the territory enacted a provision expressly providing for both. *Id.* No. 622, at 468.

64. *Id.* No. 623, at 471. See generally, Harry M. Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729, 733 (1974). The territorial government repealed the earlier dower and curtesy statutes at this time.



legislature of Washington Territory struggled with its community property provisions.<sup>65</sup> The legislative struggle began with the original statute of 1869—"An Act Defining the Rights of Husband and Wife."<sup>66</sup> Although it is often described as having been modeled after the Community Property Act of 1850 of California, a careful comparison of the two statutes reveals that Washington Territory copied California's provisions almost verbatim.<sup>67</sup>

The statute enacted in 1869 established the rights of husband and wife with respect to any property acquired during marriage.<sup>68</sup> The statute applied to all married persons, except in cases where the husband and wife agreed to different terms in a marriage contract, provided that they executed the contract prior to the marriage and duly recorded it.<sup>69</sup> In other words, the community property system was compulsory where no marriage contract was entered into prior to marriage containing contrary stipulations. Under this statute, the husband was granted the power to manage all of the marital property, community and separate, and the real and personal property and only on a showing of just cause by the wife would a trustee be appointed to manage her separate estate.<sup>70</sup> The husband also had the power of disposition over the community property, although the wife was a necessary party in any sale or encumbrance of her separate property.<sup>71</sup>

The community property statute that was passed in 1869 was followed by a Marital Partnership Property Act in 1871.<sup>72</sup> The provisions of this Act were compulsory, with no option to contract out of the community property system. Therefore, it affected the property rights of all married persons living in the Territory of Washington. Similar to the 1869 statute, this copartnership Act awarded the husband the power of disposition and encumbrance of all community property, requiring the wife to join only for sales of real estate.<sup>73</sup> The Marital Partnership Act departed from the statute of 1869, however, with respect to the treatment of each spouse's separate property. Under the Marital Partnership Act, each spouse retained the right to manage any separate property that he or she owned.<sup>74</sup> In other words, the wife could dispose of or encumber her separate property as she desired.

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65. For a detailed discussion of the efforts of the territorial legislature to refine the community property system of Washington, see Cyril Hill, *Early Washington Marital Property Statutes*, 14 WASH. L. REV. 118 (1939).

66. Act of Dec. 2, 1869, 1869 Wash. Laws 895.

67. But see Richard R. B. Powell, *Community Property—A Critique of Its Regulation of Intra-Family Relations*, 11 WASH. L. REV. 12, 35 (1935).

68. Hill, *supra* note 65, at 118.

69. *Id.*

70. *Id.* at 119.

71. *Id.*

72. *Id.*

73. Hill, *supra* note 65, at 120.

74. *Id.*

The Marital Partnership Property Act was repealed in 1873 and an act substantially the same as the statute of 1869 was adopted. Once again, the community property system was made optional because the 1869 version of the statute permitted married persons to enter into prenuptial contracts that either rejected or modified the provisions of the community property statute.<sup>75</sup> This Act was slightly modified in 1879.<sup>76</sup> Like its prior versions, the 1879 Act continued to allow married couples to execute contracts that modified how the law applied to their marital property. The Act of 1879, however, recognized postnuptial agreements as well as prenuptial agreements.<sup>77</sup> If no such contract was executed, however, the management of all property, whether deemed community or separate, was once again controlled by the husband.<sup>78</sup> The one exception to this assignment of management power was the separate personal property of the wife.<sup>79</sup> Although the management of most marital property continued to be statutorily granted to the husband, the Act of 1879 granted disposition powers to both husband and wife.<sup>80</sup> Each spouse could dispose of half of the community property by will in addition to any separate property he or she possessed.<sup>81</sup> In 1881, the legislature made community property compulsory again.<sup>82</sup> However, there was no prohibition against contracts providing for arrangements other than what was offered under the Act of 1881.<sup>83</sup> Therefore, a modification of marital property rights was most likely possible.<sup>84</sup>

## VI. POSSIBLE REASONS WHY WASHINGTON TERRITORY ADOPTED COMMUNITY PROPERTY

### A. *The Legislators of Washington Territory Wanted to Align Their Laws with those of California*

The proliferation of California law has been considered one of the reasons why Washington Territory adopted a community property statute.<sup>85</sup> California achieved statehood before all other Western States, which may mean that it was better organized than the other western territories. The rapid admission of California to the union resulted in the development of a fairly comprehensive body of case law as well

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75. *Id.* at 121.

76. *Id.* at 120.

77. *Id.* Without explanation, the Act of 1879 introduced the term "community property" in lieu of the previously used term, "common property." *Id.*

78. Hill, *supra* note 65, at 120.

79. *Id.* at 121.

80. *Id.*

81. *Id.*

82. *Id.*

83. Hill, *supra* note 65, at 121.

84. *Id.*

85. August, *supra* note 19, at 62.

as statutory law.<sup>86</sup> As other western states began to develop, particularly Washington Territory and the nearby Idaho Territory, they naturally borrowed the legislation of California.<sup>87</sup> In many respects, California law served as a prototype for the territory of Washington.

In view of the great differential between the legal system of Washington Territory and that of California, it is reasonable to believe that the legislators of Washington Territory wanted to align their territorial laws as close as possible with those of California. After all, it was "the dominant source of legal materials on the Pacific Coast" and exercised a "wide influence . . . upon its neighbors," especially Washington.<sup>88</sup> Indeed, Washington Territory copied California's statute of 1850 almost verbatim and the territorial courts of Washington relied heavily on California case law when citing precedent in support of their holdings.<sup>89</sup>

The adoption of a community property statute by Idaho Territory also lends support to the argument that Washington Territory adopted community property in an attempt to align its laws with those of California. The territory of Idaho, like Washington, abandoned the common law with respect to marital property rights and instituted a community property system in its place.<sup>90</sup> There is no explicit explanation for the decision of Idaho, but, again, it is clear that the California law of 1850 served as the model. Most scholars agree that the link between the community property laws of these two territories and that of California is not coincidental.<sup>91</sup> The dramatic changes made in the marital property law of these two territories becomes more logical when viewed as a practical method by which both legislatures could conform their systems to that of the dominant legal source—California.

Unlike either of the two territories created out of its vast boundaries, the territory of Oregon maintained its common law tradition.<sup>92</sup> The failure of Oregon to adopt a form of community property law is a meaningful aspect of the analysis why the territory of Washington adopted its statute. Once again, research offers no specific explanation why the legislators in Oregon chose not to adopt a community property system like the territories around it.<sup>93</sup>

There is some data indicating that a significant percentage of Washington's early settlers actually moved there from California rather than Oregon (from which Washington Territory was created).<sup>94</sup> If the population statistics on which this data is based are accurate, then the stark contrast between the laws of Oregon and those eventually adopted by Washington Territory is easier to explain—i.e., the people

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86. *Id.*

87. *See* Kirkwood, *supra* note 6, at 11.

88. August, *supra* note 19, at 62; Kirkwood, *supra* note 6, at 3.

89. *Id.*

90. *Id.*

91. Kirkwood, *supra* note 6, at 9.

92. August, *supra* note 19, at 60.

93. *Id.*

94. *Id.*

settling there were most familiar with the civil law system of California.<sup>95</sup> By repealing the laws that were automatically established with the formation of Washington Territory, these transplanted Californians were asserting a legal, as well as a cultural, affinity to the community property system. The same kind of cultural connection to California has been traced to the early settlers of Nevada.<sup>96</sup> An overwhelming majority of these settlers were miners from California.<sup>97</sup> Once in the territory of Nevada, these transplanted miners adopted the Constitution of California and community property laws as their own and did so seemingly without any hesitation.<sup>98</sup> The knowledge gained from the early populace reports is important because it offers another plausible explanation why Washington came to adopt a system rich in Spanish heritage when there is no evidence indicating that Washington had any connection to Spanish civil law.<sup>99</sup>

### B. *The Community Property Debate in California*

Given the evidence that Washington Territory attempted to align its laws more closely to those of California, the reasons behind California's decision to adopt a community property system become relevant to the history of community property in Washington. If the reasons behind California's adoption of community property can be identified, then that information may serve as a guide to understanding the reasons behind Washington's decision to implement a community property system.

What prompted California to include a community property provision in its Constitution? As mentioned above, California was acquired from Mexico in 1848.<sup>100</sup> Under ordinary principles of international law, not to mention the practical reality of the United States acquiring land that was already settled, the Spanish-Mexican law previously in force in California remained in effect after acquisition by the United States.<sup>101</sup> With the advent of the gold rush in 1848, there was a substantial increase in California's population.<sup>102</sup> The number of American settlers relocating to California rapidly exceeded the number of resident "Californians" in the area. Among the settlers who hoped to make a fortune in gold were judges and lawyers from the East. These men believed that California should follow the common law instead of the

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95. *Id.*

96. *Id.* at 59.

97. August, *supra* note 19, at 59.

98. *Id.* at 64.

99. The same can be said about Idaho. There was a substantial mining industry in that community and there is evidence showing that the majority of miners in Idaho had come from California. *Id.* at 62.

100. MENNELL & BOYKOFF, *supra* note 4, at 14.

101. See Powell, *supra* note 67, at 27.

102. On January 1, 1849, the population totaled 26,000. One year later the population was reported as 107,069, a four-fold increase. During the same period, the number of American settlers is believed to have increased from 8,000 to 76,069. See August, *supra* note 19, at 52.

civil law system that had been in place since Spanish rule. This opinion was based on the theory that the common law “was the legal system known to the majority of the settlers.”<sup>103</sup> As a result, the American settlers lived under the common law and the native Californians lived under the civil law.<sup>104</sup>

Based on territorial records, the California settlers seemed determined to achieve statehood as quickly as possible.<sup>105</sup> Congress, however, failed to provide for the government of the territory in 1848 and again in 1849.<sup>106</sup> In the hope of forcing the issue, the California settlers called for a convention to write a state constitution.<sup>107</sup> There was considerable debate in the convention as to whether common law or civil law should be the rule of decision.<sup>108</sup> While this important question was not explicitly settled by the constitution adopted at the convention, the question of whether community property should be adopted was clearly answered.<sup>109</sup> The debate over this constitutional provision was heated and the remarks made during the debate provide a lot of insight into why the legislators of Washington would choose to adopt such a system.

The first issue addressed by the delegates involved the conflicting legal backgrounds of the California settlers.<sup>110</sup> The controversy between the common law and the Spanish civil law became clear almost immediately after the delegates submitted proposals for a marital property provision.<sup>111</sup> One committee at the convention submitted a proposal that was an exact copy of the community property provision of the Texas State Constitution.<sup>112</sup> This proposal reflected the civil law system in force before the American settlers with common law backgrounds arrived in the territory. It provided:

All property, both real and personal, of the wife, owned or claimed by [her before] marriage, and that acquired afterwards by gift, devise, or descent,

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103. Kirkwood, *supra* note 6, at 3.

104. August, *supra* note 19, at 55.

105. *Id.* at 53.

106. Congress could not resolve the issue of whether to classify California as a free or a slave state so it simply did nothing. *Id.*

107. J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER, 1849 22 (1850).

108. August, *supra* note 19, at 53.

109. The debate over whether to implement the common law continued after the convention. Eventually, the California legislature adopted the common law as the general rule of decision in the state, but decided to maintain the civil law nature of the Community Property Act of 1850. Report on Civil and Common Law, 1 California Reports 594 (San Francisco, 1886).

110. See August, *supra* note 19, at 54-55.

111. *Id.*

112. Actually, the only difference between the two provisions was a grammatical correction made by the Committee on the Constitution for California. PETER THOMAS CONMY, THE HISTORIC SPANISH ORIGIN OF CALIFORNIA'S COMMUNITY PROPERTY LAW AND ITS DEVELOPMENT AND ADAPTATION TO MEET THE NEEDS OF AN AMERICAN STATE 7-8 (1957).

shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.<sup>113</sup>

A substitute for the committee's proposal was submitted by a San Francisco lawyer named Francis Lippett.<sup>114</sup> Lippett presented an alternative because, in his opinion, the proposal of the committee was contrary to the legal tradition of the majority of California's people.<sup>115</sup> Lippett believed that "The general rights of property must be considered with reference to the great mass of the [American] population . . . and that the smaller party, the Californians, must yield."<sup>116</sup> However, another delegate, Henry A. Tefft, disagreed with Lippett and his characterization of the committee's proposal as one that would change the current system.<sup>117</sup> From San Luis Obispo, an area with a high percentage of native Californians, Tefft argued that the delegates should "take into consideration the feelings of the native Californians, who have always lived under this law," namely, the civil system provided for in the proposal of the Committee.<sup>118</sup> The native Californians were, most likely, more favorably disposed toward the community property system than were the newcomers.

Many of the delegates in favor of community property believed that the decision had nothing to do with the civil law or common law, but rather whether the constitution was going to provide for security of the property of wives.<sup>119</sup> One such delegate, James McHall Jones, summarized this fundamental argument when he declared:

What is [this] principle so much glorified, [by the common law] but that the husband shall be a despot, and the wife shall have no right but such as he chooses to [give] her. It had its origins in the barbarous age, when the wife was considered in the light of a menial, and had no rights.<sup>120</sup>

Somewhat radical for the time period, this argument essentially encouraged the recognition of limited rights for women. This point of view was most likely the result

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113. CAL. CONST. OF 1849, art. XI, § 14. The reference to property "held in common with her husband" is an indication of the adoption of the community property scheme rather than that of the common law. *Id.* The debate in the constitutional convention confirms this view. CONMY, *supra* note 112, at 7.

114. Lippett's substitute provided that "Laws shall be passed more effectually securing to the wife the benefit of all property owned by her at her marriage, or acquired by her afterwards, by gift, demise, or bequest, or otherwise than from her husband." BROWNE, *supra* note 107, at 257.

115. August, *supra* note 19, at 55.

116. *Id.*

117. *Id.* at 54.

118. BROWNE, *supra* note 107, at 258.

119. August, *supra* note 19, at 55.

120. BROWNE, *supra* note 107, at 264.

of the Married Women's Rights movement that had become a strong force in other parts of the country where many of these men had lived prior to settling in California.<sup>121</sup>

Other delegates favored the common law and argued against the adoption of community property based on their belief that married women should be given minimal property rights under the law.<sup>122</sup> Most believed the proper place for a woman was under the protecting arm of her husband.<sup>123</sup> One such delegate was Charles T. Botts, who objected to both proposals. Botts stated that "there is no provision so beautiful in the common law, so admirable and beneficial, as that which regulates this sacred contract between man and wife."<sup>124</sup> Announcing to the convention that the common law reflected natural law, Botts declared that "the God of nature made woman frail, lovely, and dependant; and such the common law pronounces her."<sup>125</sup>

Statements such as those made by Botts are indicative of the real issue of the debate—the question of women's rights. Delegates like Botts were opposed to any such grant of property rights to married women.<sup>126</sup> Many agreed with Botts when he declared to the President of the convention:

This doctrine of woman's rights, is the doctrine of those mental héf-maphrodites, Abby Folsum, Fanny Wright, and the rest of that tribe... The only despotism on earth that I would advocate, is the despotism of the husband. There must be a head and there must be a master in every household; and I believe this plan by which you propose to make the wife independent of the husband, is contrary to the laws and provisions of nature—contrary to all the wisdom which we have derived from experience.<sup>127</sup>

Despite the strong words spoken by the likes of Charles Botts, there were a fair number of delegates who favored the law of community property because of its appeal to single women.<sup>128</sup> This issue was exactly why one delegate by the name of Henry Halleck favored the adoption of a community property system, proclaiming:

I would call upon all the bachelor in this Convention to vote for it. I do not think we can offer a greater inducement for women of fortune to come

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121. See generally August, *supra* note 19, at 47.

122. *Id.* at 54.

123. *Id.*

124. BROWNE, *supra* note 107, at 259. Charles Botts, like Francis Lippett, was a lawyer.

125. *Id.*

126. Botts concluded his arguments with the following: "If she had a masculine arm and a strong beard, who would love her? She had just as well have them as a strong purse; she is rendered just as independent by the one as the other, and as little loveable." *Id.* at 268.

127. *Id.* at 260.

128. August, *supra* note 19, at 56.

to California. It is the very best provision to get us wives that we can introduce into the Constitution.<sup>129</sup>

Although chided by some delegates for making such an argument in support of a serious constitutional provision, Halleck's statement was on point. The lack of women in California was a major concern. The settlers were overwhelmingly male and the number of suitable wives continued to decrease.<sup>130</sup> The desire to offer some kind of incentive for single women to move west was an understandable consequence of that imbalance.

As evidenced by the excerpts above, the delegates at the California convention were faced with at least three issues in their decision to include a community property provision. First, there was the question of whether the native Californians should be required to drop their legal system in favor of the common law.<sup>131</sup> Second, there was recognition of a growing unhappiness with the treatment of married women under the common law.<sup>132</sup> Finally, there was the reality of frontier life and the possibility that community property could attract more women to the West to address.<sup>133</sup> Whether it was the influence of one or all three of these issues, a majority of the delegates favored the recognition of wives' separate property, as provided in the proposal of the Committee. The original community property provision became the law of California in 1850.<sup>134</sup>

C. *Washington Territory May Have Intended to Attract "Suitable Women" to the Territory by Adopting a Community Property System*

The reasons behind the inclusion of community property in the Constitution of California are useful in analyzing the decisions of Washington Territory to become a community property jurisdiction. Just as the California delegates' comments regarding the state's marital property laws reflect a growing recognition of a woman's right to separate property, there is evidence to suggest that the adoption of community

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129. BROWNE, *supra* note 107, at 259.

130. Ray August refers to the fact that the frontier bachelor's need for a wife had been a matter of concern when California was under the control of Mexico as well. Quoting T.J. Farnham in his book *California*, August explained that "The Mexican males resented the Americans for taking away their women. 'Another cause of the general feeling against the American and Britons in California was the fact that the *Señoritas* . . . preferred [foreigners] as husbands.'" August, *supra* note 19, at 54 n.73.

131. *Id.* at 55.

132. *Id.*

133. *Id.* at 56.

134. California obviously followed Texas' lead, as the constitutional provision for the separate property of the wife was an exact copy of the Texas Constitution of 1845. See CONMY, *supra* note 112, at 8. While spouses' ownership rights in community property had been made equal, the husbands generally enjoyed exclusive management and control rights over community property. Until 1927, a wife only had an expectant interest in California community property. *Id.* at 22.



property by Washington Territory was a reflection of the larger movement toward improving the property rights of married women.

The era of the Married Women's Property Acts began several years prior to the formal adoption of community property in any of the western territories.<sup>135</sup> Beginning in 1839 and for the next fifty years, acts of this kind swept across the country in various forms.<sup>136</sup> Although this movement was given some form of attention almost everywhere, it should be noted that the eastern cities were influenced the most.<sup>137</sup> Many historians have described this nationwide trend as an outgrowth of increasing dissatisfaction with the common law of marital property.<sup>138</sup> The common law disabilities of married women did not mix well with the cooperative lives of pioneer husbands and wives. Justice Dunbar of the Supreme Court of Washington summarized the attitude of many in the state when he wrote that "the doctrine is really based upon the ancient idea of the comparative inferiority of the wife."<sup>139</sup>

At the same time that the common law treated married women poorly, it also worked hardship on married men who were out west without their wives. Under the common law of marital property, a buyer of land had to obtain a deed or release of dower rights from the wife in order to take title free and clear.<sup>140</sup> However, it was often the situation that the wife was left behind by the husband, to later be brought west or simply abandoned. This situation was not uncommon and "The possibility of procuring the deed or release of a distant and perhaps unknown woman was remote."<sup>141</sup> The effect of this aspect of the common law on husbands trying to do business on the frontier was potentially disastrous.<sup>142</sup> In short, there was an increasing number of issues, relevant to both men and women, motivating the modification of the common law.

There is evidence, mostly in the form of old newspaper articles, that suggests that the settlers of Washington Territory were aware of the women's rights movement in the East.<sup>143</sup> However, references made in the territorial newspapers involved how the movement was forming in the eastern states. There was no mention of any local reform movement. In all reality, there were probably not enough women in the

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135. August, *supra* note 19, at 46-47.

136. *Id.*

137. *See id.*

138. Powell, *supra* note 67, at 15-16.

139. *Beach v. Brown*, 20 Wash. 266, 268, 55 P. 46, 46 (1898).

140. *See Powell*, *supra* note 67, at 19.

141. Henry A. Dubbs, *The Unfolding of Law in the Mountain Region*, 12 A.B.A. J. 679, 685 (1926).

142. Powell, *supra* note 67, at 19.

143. *See, e.g.*, OLYMPIA TRANSCRIPT, Nov. 30, 1867, at 1 (describing how women's suffrage was starting up in Kansas); *see also* OLYMPIA TRANSCRIPT, Jan. 4, 1868, at 1 (stating that five women worked as newspaper editors in Iowa and including the pun that "Women have some of their 'writes' in that state"); *see also* OLYMPIA TRANSCRIPT, Jan. 2, 1869, at 2 (reprinting a letter from a woman in the East about elective franchise).

territory to even begin a local movement, if they had so desired. Additionally, there is evidence of some opposition to the women's movement, as it was reported from the East.<sup>144</sup> Besides, these acts were not meant to replace the common law, as did the community property statute of Washington.<sup>145</sup> For these reasons, it is unlikely that a local active women's rights movement was very influential in the decision of Washington Territory to adopt community property.

Although the adoption of the first community property statute in Washington was not reported in the local newspapers, one of the most likely reasons behind its adoption received a lot of journalistic attention—women. The newspapers reported on this subject in a variety of ways, ranging from articles entitled *Courting Under Difficult Circumstances* to articles about why a wife is better than the smell of tobacco.<sup>146</sup> This preoccupation with women provides insight as to a possible objective of the legislature in adopting community property—it viewed the statute as a practical way to attract women to the territory.

The lack of women suitable for marriage was a valid concern for men living in Washington Territory.<sup>147</sup> By most accounts, practically the entire territory was inhabited by bachelors of all ages.<sup>148</sup> The territory's main newspaper, *The Puget Sound Herald*, regularly printed columns that complained about the lack of "decent white women."<sup>149</sup> In one edition printed in the early 1890s, the newspaper estimated the ratio of men to women in the territory to be nine to one, regardless of marital status.<sup>150</sup>

Based on what little information there is regarding the lack of women in Washington Territory, it is clear that the bachelors of the territory were interested in a certain kind of woman. The conditions of frontier life meant that a woman had to be willing and capable to perform hard work and to live in difficult circumstances.<sup>151</sup>

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144. One article reported that even though there was local opposition to the movement, the paper supported the idea. *Women's Rights*, OLYMPIA TRANSCRIPT, Mar. 21, 1868 at 1. While there may have been opposition to the idea of granting equal rights to women, it is possible that women in Washington Territory had more rights than they would have had back east. For example, two of the fourteen people who graduated from the University of Washington Law School in 1901 were women. See Univ. of Washington School of Law Alumni List (on file with the Univ. of Washington School of Law).

145. See REPPY & DE FUNIAK, *supra* note 9, at 9.

146. *Courting Under Difficult Circumstances*, OLYMPIA TRANSCRIPT, Mar. 7, 1868, at 3; see also *Domestic Happiness of a Local Editor*, OLYMPIA TRANSCRIPT, Dec. 21, 1867, at 1.

147. Various references were made to the lack of "suitable" women in the territory. This most likely infers that there was some source of women who were considered unsuitable for marriage—probably either prostitutes or women with Mexican or Indian heritage. This view is supported by WILLIAM C. SPEIDEL, *SONS OF THE PROFITS* 110 (1967).

148. Stewart Holbrook, *Mercer's Maids for Marriage*, WOMAN'S DAY, Dec. 1948, at 46.

149. *Id.*

150. Holbrook, *supra* note 148, at 46.

151. In this sense, the causes which made the woman an equal partner to her husband were economic, not moral, in nature. See REPPY & DE FUNIAK, *supra* note 9, at 7.

The community property system gave more rights to women and was more likely to attract the strong-minded and adventurous women needed on the West Coast. In fact, it has been asserted that the continuation of the doctrine of community property in the Pacific Northwest was due to the challenges to survival that were faced by frontier settlers; challenges which were similar to those confronted by the Visigoths in western Europe.<sup>152</sup>

According to local reports, it was not unusual for lonely bachelors in the various Puget Sound settlements to hold meetings to discuss the severe shortage of women in the territory.<sup>153</sup> These meetings gave rise to formal pleas to the legislature asking for its help in bringing single women to the territory.<sup>154</sup> Newspapers printed articles intended to help those bachelors.<sup>155</sup> For example, one editor wrote that "there seems to be other ways of getting women besides advertising for one."<sup>156</sup> The newspapers also complained that government officials needed to get the word out about Washington Territory.<sup>157</sup> As one writer explained, "Easterners have no idea about Washington Territory and think it's unbearable. . . . Oregon and California don't have this problem because they sent out pamphlets."<sup>158</sup> Despite the concerns of its settlers, nothing was done by the territorial government to alter the situation.<sup>159</sup> Of course, the legislature passed community property law in 1869, but this can hardly be characterized as a response to the settler's complaints, especially since passage of this bill received no media attention.<sup>160</sup>

While the government took a sympathetic, but basically inactive approach to this problem, one man by the name of Asa S. Mercer made it his personal mission to bring women to the territory.<sup>161</sup> Asa Mercer was in the territory only a little while when he was named president of the territorial university.<sup>162</sup> After serving a second term as president, Mercer was commissioned to go east (where there was a surplus of young women) to recruit women to come west and settle in the predominantly male logging community.<sup>163</sup> Although the territorial governor at the time encouraged Mercer, there were not enough funds in the public treasury to help him in his

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152. See REPPY & DE FUNIAK, *supra* note 9, at 7.

153. Holbrook, *supra* note 148, at 46.

154. *Id.*

155. *But see id.* at 91.

156. *Modes of Proposing*, OLYMPIA TRANSCRIPT, Feb. 2, 1868, at 4-5.

157. Holbrook, *supra* note 148, at 46.

158. OLYMPIA TRANSCRIPT, Dec. 28, 1867, at 3; *see also* OLYMPIA TRANSCRIPT, Apr. 4, 1868, at 2 (indicating that a greater population in Washington Territory was desired).

159. Holbrook, *supra* note 148, at 47.

160. Hill, *supra* note 65, at 118.

161. JUDY GELLATLY, MERCER ISLAND HERITAGE 6 (revised ed., Mercer Island Hist. Soc'y 1989).

162. *Id.*

163. *Id.*; *see also* SALE, *supra* note 1, at 13.

efforts.<sup>164</sup> Instead, private contributions made by male citizens of the territory financed his trip.<sup>165</sup>

Mercer made his first trip back east in 1864.<sup>166</sup> He reportedly held a meeting in Lowell, Massachusetts where there was a large population of Civil War widows and orphans.<sup>167</sup> At that meeting, he emphasized to the women the good pay to be made in Washington Territory as teachers and seamstresses.<sup>168</sup> According to most accounts, Mercer made no mention of the matrimonial purpose of his trip.<sup>169</sup> Eleven women agreed to travel west with Mercer and they arrived in Seattle close to midnight on May 16, 1864.<sup>170</sup> Even at that late hour, they were given what was described as "a royal reception, with such music as the town afforded and a plenty of refreshments thought suitable for New England ladies."<sup>171</sup> When asked to describe the kind of reception awaiting them, one woman commented that the welcoming party looked like "a pack of grizzlies in store clothes."<sup>172</sup> Despite such first impressions, records indicate that ten of the eleven girls married shortly after their arrival.<sup>173</sup>

Mercer planned a second trip in 1865.<sup>174</sup> This time he allegedly entered into contracts with some of the men, promising to bring each of them back a wife "of good moral character and reputation . . . on or before September 1865" in exchange for three hundred dollars.<sup>175</sup> How many of the single men of Puget Sound signed the contract is not known. President Abraham Lincoln had been a friend of the Mercer family, thus Mercer sought financial backing for this second trip from him.<sup>176</sup> Unfortunately, President Lincoln was assassinated a few days prior to Mercer's arrival in New York and Lincoln's successor, President Johnson, refused to offer any aid to support Mercer's mission.<sup>177</sup> After much delay and difficulty, Mercer brought a shipload of approximately two hundred young women back to the territory of Washington where they became known as "the Mercer Girls."<sup>178</sup> In retrospect, for one man to go to such lengths to bring women to the Territory, there must have been

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164. Holbrook, *supra* note 148, at 47.

165. *Id.*

166. GELLATLY, *supra* note 161, at 6.

167. DOLORES GRAHAM DOYLE, *THREE HUNDRED YEARS IN AMERICA WITH THE MERCERS* 32 (1991).

168. Holbrook, *supra* note 148, at 47.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Holbrook, *supra* note 148, at 47. The eleventh girl died, unmarried. *Id.*

174. *Id.* at 80.

175. *Id.* at 89.

176. *Id.*

177. DOYLE, *supra* note 167, at 68.

178. *Id.* The Mercer girls became the aristocracy of the new city of Seattle, not to mention the wives, mothers, and teachers in the frontier town. There is conflicting information about the actual number of women who came back with Mercer. See SPEIDEL, *supra* note 147, at 109.

great concern over this issue. Mercer believed that he would be able to solve this complicated problem, but the number of men working in the logging camps kept increasing at an incredible rate.<sup>179</sup>

The next man to try to solve the problem of the imbalance between the sexes was Benjamin Sprague, captain of a boat called *Gin Palace Polly*.<sup>180</sup> Sprague operated a business which delivered women, wine, and song to the logging camps around Seattle.<sup>181</sup> On a rotating schedule, he delivered these luxuries to the camps seven days a week.<sup>182</sup> As to be expected, his arrival at a camp always caused a delay in production and the operators of these camps quickly came to dislike Sprague.<sup>183</sup> However, it was only a short time before Sprague was put out of business, as a result of his arrest for selling liquor to Native Americans and on Sunday.<sup>184</sup> Neither Mercer nor Sprague were able to solve the problem with their ingenious ideas. The general unrest lingered until the population of the territory naturally balanced over time.

## V. CONCLUSION

It is mystifying why nothing was written about the passage of the community property statute of Washington. Breaking from the common law in favor of a system which gave more rights to women was an important decision. Nonetheless, it appears that nobody knows why or how the community property decision was made.

Nevertheless, several circumstances that contributed to the adoption of a community property system by Washington can be identified. First, the influence of the rapidly developing legal system of California; second, the large number of Californians among the earliest settlers of Washington; third, the Women's Rights Movement; and finally, the serious imbalance of the sexes in the territory. In all likelihood, the decision to adopt community property law involved a combination of these reasons.

The serious imbalance of the sexes in the territory probably exerted the strongest influence on the legislators when it came time to vote on the community property statute. In the end, community property law gave women more rights and this was "an attractive notion in [the logging] communities [of Washington] seeking to lure industrious and independent women from the East."<sup>185</sup> Isolated by three months of travel time to the East, and unknown to few people outside of the Pacific Northwest, there was not much natural appeal to the Territory of Washington. As noted by the newspaper editorials, something had to be done to help the population of Washington

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179. "There must have been ten thousand men within a radius of fifty miles of Seattle—[that meant that] half the population of the entire Territory was to be on Puget Sound." *Id.* at 106.

180. *Id.* at 109.

181. *Id.*

182. *Id.*

183. SPEIDEL, *supra* note 147, at 109-10.

184. *Id.* at 110.

185. August, *supra* note 19, at 35.

grow.<sup>186</sup> Of the two systems considered by the territorial legislature—common law and community property—the latter was more likely to improve the situation. “The conditions of pioneer life, the relatively high sentimental value placed upon women, the increasing degree of social and domestic freedom which American women enjoyed—all were incompatible with the strict theories of the common law which placed a married woman and her property under the absolute control of her husband.”<sup>187</sup> “[A]s Henry Halleck put it, ‘it is the best provision to get us wives.’”<sup>188</sup>

At the same time that the Washington legislature was concerned about the population of the territory, it was probably also concerned with the development of its laws. California had been growing steadily since its admission into the Union. By virtue of its size and rapid development, the legislators of California had already addressed many of the organizational and statutory problems being faced by Washington Territory in the 1860s. Recognizing the dominance of California in many of those areas, the legislators of Washington Territory probably felt it wise to align the laws of Washington with those of California. After all, California had a community property system and its population surpassed that of all its neighbors.

In summary, the passage of the community property law of 1869 in Washington Territory most likely served two purposes: 1) to attract more women to settle in the region and 2) to aid in the development of the territory by keeping apprised of the legal trends of the West Coast. In any event, it was a remarkable development that remains largely a mystery, even today.

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186. See Holbrook, *supra* note 148, at 46.

187. Elizabeth Gaspar Brown, *Husband and Wife—Memorandum on the Mississippi Woman's Law of 1839*, 42 MICH. L. REV. 1110 (1944).

188. August, *supra* note 19, at 56.