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MARRIAGE AND MONEY ENTANGLED: Commodification, Agency, and Economic Analysis in Chinese Marriage Payment Lawsuits

Yiran Zhang

ABSTRACT

Lawsuits about groom-to-bride marriage payments are arriving in Chinese courts, challenging traditional ideas about marriage formation. Through the lens of case files, I examine the dissolution of marriages (or quasimarital relationships) formed by marriage payment agreements and analyze the anticommodification views expressed by feminists and legal scholars. In these cases, judges wrestle with two competing considerations: their own antimarriage payment and pro-groom views on one hand and the litigants' economic conception of marriage on the other. The former urges judges to rule for the grooms, and the latter for the brides. In balancing these two considerations, judges generally order a partial or full repayment of the payment when the relationship dissolves. I also examine feminist concerns of voluntariness and fairness in the commodification of sexuality. The current theoretical and judicial frameworks do not account for the divergent power dynamics in individual cases; as a result, the case rulings do not respond appropriately to brides and grooms with differing degrees of agency. These blind spots may have unintended consequences, including inflating prices and reinforcing gender-based asymmetries. In this Article, I argue that judges should rely on economic analysis rather than moral judgment to better account for the actual dynamics of marriage payment arrangements. Framing my analysis is a transactional conception of marriage and an economic approach to family, both of which have the potential to further our understanding of marriage and to advance gender equality.

ABOUT THE AUTHOR

Yiran Zhang, S.J.D. candidate, Harvard Law School. I am most grateful to Janet Halley for her generous guidance. I thank Duncan Kennedy, William Alford, Carol Sanger, Deborah Davis, Mark Jia, Jane Fair Bestor, Susannah Barton Tobin, Guanchi Zhang, and Yueduan Wang for reading and commenting on my earlier drafts. I have presented this Article at the Stanford Program in Law and Society's Fifth Junior Researcher Workshop, and I appreciate the feedback that I received from the faculty commentator, Ralph Banks, and from the participants. I have also received useful comments at Harvard's Graduate Student Gender and Sexuality Workshop and Harvard Law School's Dissertation Writing Workshop. All the errors are undoubtedly mine.

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INTRODUCTION

Let us begin with an ordinary story about marriage and money in rural China.

At the Lunar New Year of 2016, Cheng, a 22-year-old man, met Zhou, a young woman.¹ Cheng and Zhou were introduced by their families, who thought the two might be well-suited to marry. The meeting satisfied all parties. Shortly thereafter, Cheng and his parents brought the equivalent of 21,500 USD² cash and a debit card with 15,700 USD to Zhou's home. The Zhou family was pleased by this gesture, which it took as an indication of the Cheng family's commitment to the relationship. The Zhou family thus returned the debit card to the Cheng family, along with an additional gold ring. That same day, Cheng accompanied Zhou to deposit the cash into her personal bank account. She later spent over 2,900 USD purchasing beddings, clothes, and furniture in preparation for the marriage.

One week later, Cheng gave a gold ring and another 2,300 USD to Zhou in an engagement ceremony. That same month Zhou moved into Cheng's home, bringing her recent purchases with her. According to Zhou, she spent 1,400 USD from the marriage payment on daily expenses over the course of four months. Though the two never obtained their official marriage registration, Zhou soon became pregnant with Cheng's child.

When Cheng learned of Zhou's pregnancy in April 2016, he promised to buy Zhou a car. She picked a car worth 18.5K USD and paid the deposit. A short while later, Zhou had an abortion because of Cheng's alleged "wrongdoing." Zhou received abortion-related medical treatment that cost 2,900 USD and took medical leave that cost her 1,000 USD in lost wages. As Zhou recovered from the abortion, Cheng paid for the promised car and registered it under his name.

1. Both Zhou and Cheng are family names. In China, women do not change their surnames after marriage. In this case narrative, I refer to Zhou and her parents as the Zhou family and Cheng and his parents as the Cheng family out of convenience, even if their mothers have different surnames.

2. While all the sums discussed were originally in Chinese Yuan, or RMB, they have been converted to U.S. dollar values.

Their relationship grew strained, and Cheng suggested that they terminate the relationship, and that she return all money he had transferred to her prior to their cohabitation. Zhou rejected this idea. After several months of failed negotiations, Cheng left their home without notice. In October 2016, Zhou withdrew 21,500 USD from her account. Two months later, her father deposited 14,300 USD into his own personal account. Four days later, Cheng brought a suit against Zhou and her parents to reclaim the marriage payment, including 21.5K USD cash, 2.3K USD in cash gifts given at the ceremony, and the gold ring. Zhou claimed that the cash was a gift to her, and that she spent most of it while they were cohabitating. Zhou also requested a half share of the recently purchased car. Zhou's parents moved to have themselves dropped as defendants, because they were not parties to the relationship.³

Disputes like this play out across rural China every day, driving litigation around a controversial practice. Around 100,000 case records from 2013 to 2018 can be found under the keyword “groom-to-bride marriage payment”⁴ in China's official database of court decisions.⁵ Marriage payment, a centuries-old practice, has made a

3. A summary of the fact finding in Case 56. For the source of cases, see Subpart I.A.

4. “彩礼” in Chinese; it is often called “bride price” or “bride wealth” in anthropological literature though the usage of these two terms is contested. See JOHN L. COMAROFF, *THE MEANING OF MARRIAGE PAYMENTS* 7 (1980). The Chinese term “彩礼”; “聘礼” or “礼金” can also be translated into “betrothal gift,” “marital payment” and “gift money.” See Yunxiang Yan, *The Individual and Transformation of Bridewealth in Rural North China*, 11 J. R. ANTHROPOL. INST. 637, 641–2 (2005); LIHONG SHI, *CHOOSING DAUGHTERS: FAMILY CHANGE IN RURAL CHINA 107–127* (2017), at chapter 5.

In the context of Chinese law, neither The Supreme People's Court's (SPC's) judicial interpretation nor lower courts' interpretations discern between the payment from groom's side to the bride herself and to her maternal family. The former is usually called “betrothal gift” while the latter is “bride price” in anthropological literature. In this Article, I use the term “marriage payment” or “groom-to-bride marriage payment” to refer to the payment from groom and/or his family to bride and/or her family for the purpose of marriage. I use “bride-to-groom marriage payment” to refer to the transaction, mostly in-kind, from the bride's side to the groom's side, which is also called “dowry.”

5. Starting from January 1, 2014, every level of Chinese courts became responsible for uploading judicial decisions to a centralized website run by the SPC, according to SPC's regulation in 2013. Under the same rule, local courts have discretion not to post “inappropriate” cases, whose range was expanded to divorce cases according to a 2016 judicial interpretation. Nevertheless, many divorce cases are posted by local courts. See Zuigao Renmin Fayuan Guanyu Renmin Fayuan Zai Hulianwang Gongbu Caipan Wenshu De Guiding (最高人民法院关于人民法院在互联网公布裁判文书的规定)[Provisions of the Supreme People's Court on the Issuance of Judgments on the Internet by the People's Courts].” (2013); Zuigao renmin fayuan guanyu renmin fayuan zai

resurgence in contemporary China, in part due to the unbalanced sex ratio among the marriage-age population.⁶ While prevalent, this practice is also widely criticized. A human rights advocate blogging for the London School of Economics has warned that marriage payment practices combined with labor migration put “both the personal safety of the brides and the national security of China” at risk because it encourages the transportation of “prostitutes, drugs and other illegal belongings.”⁷ A Chinese feminist scholar has argued that the practice “objectifies women” and “increase[s] gender inequality.”⁸ Meanwhile, the Chinese party-state is more concerned about the practice’s purported effect on morality in rural regions. For example, the Chinese Ministry of Civil Affairs claims that the skyrocketing price of marriage payments has caused “moral decline” and negatively “affected the spiritual and civil quality of the people” in many regions.⁹ Some local governments placed a cap on marriage payments, and in several of these localities a violation of the cap resulted in a charge of human trafficking or in property forfeiture.¹⁰ Most criticisms of marriage payments

hulianwang gongbu caipan wenshu de guiding(最高人民法院关于人民法院在互联网公布裁判文书的规定)[Supreme People’s Court Regulations Regarding Placing Judicial Decisions on the Internet]” (2016). For an introduction to the online database of Chinese court decisions, see Benjamin L. Liebman et al., *Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law* (2017). For limitation of the database, see the discussion in Subpart I.A.

6. For the cohort born between 1990 and 2000, the male-to-female ratio is 118:100 according to the official statistics. Both son-preference culture and the family planning law contribute to the skewed sex ratio, see Yong Cai, *China’s New Demographic Reality: Learning from the 2010 Census*, 39 *Popul. Dev. Rev.* 371, 382–88 (2013); See also Therese Hesketh & Jiang Min Min, *The Effects of Artificial Gender Imbalance: Science & Society Series on Sex and Science*, 13 *EMBO Rep.* 487, 488 (2012).

7. Jason Hung, *Marriage Migration in Rural China: Daughters Have a Price Tag*, LSE Human Rights (Dec. 4, 2017) <https://blogs.lse.ac.uk/human-rights/2017/12/04/marriage-migration-in-rural-china-daughters-have-a-price-tag> [<https://perma.cc/A6SR-QLYS>].

8. Hongxiang Li, 彩礼返还之规定的社会性别分析 (Caili Fanhuan zhi Guidingde Shehui Xingbie Fenxi) [A Socially Constructed Gender Analysis on the Rules of Bride Price Repayment] 02 *法学杂志*[*Law Science Magazine*] (2005).

9. BJ News, 民政部要求改革婚俗：向“天价彩礼”说不 (Minzhengbu Yaoqiu Gaige Hunsu: Xiang “Tianjia Caili” Shuobu) [Ministry of Civil Affairs Requires Reforming Marriage Customs: Say No to “Sky-high Bride Price”] (Dec. 3 2018) <http://www.bjnews.com.cn/news/2018/12/03/527085.html>.

10. Amanda Erickson, *The ‘Bride Price’ in China Keeps Rising. Some Villages Want to Put A Cap on It* WASH.POST (Sep 23, 2018), https://www.washingtonpost.com/world/asia_pacific/the-bride-price-in-china-keeps-rising-some-villages-want-to-put-a-cap-on-it/2018/09/22/000257b0-a9ad-11e8-8f4b-

are grounded in anticommodification arguments that oppose the explicit entanglement of money and sex.¹¹ This moral judgment informs public discourse and influences judicial outcomes.

In what follows, I first lay out the different normative frameworks to evaluate commodification of intimacy. Feminists emphasize individual agency and fairness in sexuality-related transactions. I adopt a feminist evaluation framework but argue against a categorical rejection of such transactions based on these concerns. Rather, I argue that legal scholars should consider both the different levels of agency each individual has and the distributive outcomes of marriage payment lawsuits for individuals and families involved in the process. Taking these factors into account may result in a more nuanced understanding of these issues.

To lay the groundwork for my discussion, I present a close reading of 150 marriage payment cases from the online database compiled by China's Supreme People's Court (SPC). In doing so, I offer the first systematic investigation of groom-to-bride marriage payment adjudications in China. I find that judges generally disagree with the practice of marriage payments and find for the grooms, with some notable exceptions. My findings also indicate that, despite their reluctance to recognize marriage as an exchange of resources, judges are still highly influenced by the litigants' underlying transactional or financial understanding of the marriage formation process.

After analyzing marriage payment litigation, I evaluate the cases along with concerns of agency and fairness. The primary feminist concern with this practice is that when a woman takes money in exchange for any aspect of her sexuality, she may not be acting voluntarily. Specifically, those concerned believe that the commodification of marriage also monetizes sexuality, which inevitably introduces a degree of coercion into the marriage transaction. Because such transactions should be free from coercion, marriage payments are categorically problematic. However, my own analysis suggests that that women's experiences with marriage payments do not preclude the existence of full agency. While some marriage payments are intertwined with arranged marriages in which the bride lacks power to control the transaction, in others the bride is able to leverage the negotiations in order to achieve economic empowerment or resist oppressive community norms. I thus argue that a categorical feminist rejection of marriage payments may well dismiss the agency of these rural Chinese women.

ae063e14538_story.html [https://perma.cc/M2N9-MLLP].

11. For a broad description of the rationale behind such criticisms, see VIVIANA A. ROTMAN ZELIZER, *THE PURCHASE OF INTIMACY* (2005).

In the subsequent Part, I analyze how judicial ideology affects the distribution of bargaining power among brides and grooms¹² with different levels of agency. I also evaluate whether marriage payment judgements ultimately lead to a more equitable distribution. Based on the presumption that the groom has less bargaining power than the bride in negotiating the marriage payment, judges tend to place the financial risk arising from early-stage relationship dissolution on the bride to deter the practice. However, I find that though the bride may have more bargaining power than the groom during the marriage payment negotiation, she has less control over their relationship once she moves into the groom's household. Thus, adjudications are not likely to lead to a lower prevalence of marriage payments nor to an alleviation of gender asymmetry, both of which the judges see as unfair. In fact, the judicial preference for repayment may reinforce both. Through this analysis, I argue that the fairness evaluation shall not only weigh the substantial fairness of the transaction, but also the distribution outcome from the proposed intervention.

By examining this particular type of legal dispute, I focus on the transactional aspects of marriage. And while I acknowledge that marriage has many noneconomic aspects, legal actors should understand the economic forces at play when evaluating and adjudicating marital disputes. This is true for disputes over marriage payments and also for the many other contexts in which legal analysis intersects with marriage and money.

I. THE COMMODIFICATION DEBATE: IS MARRIAGE TRANSACTIONAL?

This Part lays out the common reasons to set limits on the entanglement of money and intimacy: corruption, fairness, and voluntariness. The second and the third are interrelated and have concerned many feminist scholars. Anticommodification arguments also reject an economic framework when analyzing marriage payments because the usage of economic language itself is demeaning or harms women's interests.¹³ I propose combining feminist frameworks and an economic framework in order to evaluate the measures that set limits on marriage payments.

12. Throughout this Article, I refer to the male and female individuals whose relationships are at stake in the lawsuits as the "bride" and "groom," as they are in this particular social phase when they are turning into "husband" and "wife." The temporariness of these roles and its meaning for family law is the central issue in the litigation.

13. Robin West, *Sex, Law and Consent*, ETHICS CONSENT THEORY PRACT. OXF. UNIV. PRESS OXF. UK 221–49 (Franklin G. Miller et al. eds 2010).

A. *Corruption and Fairness: Two Reasons for Setting Limits on Commodification*

In his book *What Money Can't Buy*, Professor Michael Sandel provides two common reasons for setting moral limits on commodification: corruption and fairness.¹⁴ The corruption critique argues that the commercialization of goods fundamentally changes their nature by treating them as instruments of profit and use. For some goods, such as friendship or the Nobel Prize, introducing monetary exchange “dissolves it, or turns it into something else.”¹⁵ For others, like a kidney transplant or child adoption, the good “survives the selling but is arguably degraded, corrupted, or diminished,” because the market relation crowds out the desired altruistic attitudes and social norms.¹⁶ Intimacy falls under both categories. The fairness critique raises the concern that overcommodification will exacerbate inequality in a society in which wealth is not evenly distributed.¹⁷ These two critiques reflect two differing ideals: the moral importance of the goods at stake and the fair outcome from the transaction through genuine consent.¹⁸

The corruption arguments, as the sociologist Viviana Zelizer observes, presume and preserve a pure division between economic and intimate activities, and between the market and other spheres of society, such as the family.¹⁹ These separate spheres are supposed to host distinct human activities as well as different halves of human beings' subjectivities, one side being a sphere of “sentiment” and “solidarity” while the other is of “rationality” and “self-interest.”²⁰ Thus, commodifying intimacy is problematic in two senses: it degrades intimacy by throwing its authenticity into doubt and it corrupts market efficiency by making the pricing process inaccurate.²¹

The fairness arguments, as law professor Glenn Cohen observes, can be further broken down into two categories: whether the seller's consent to the transaction is truly voluntary—the “voluntariness argument”—and whether the individuals in the

14. MICHAEL J. SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* 8 (2012).

15. *Id.* at 103.

16. *Id.* at 105.

17. *Id.* at 9–11.

18. *Id.* at 93–98.

19. ZELIZER, *supra* note 11, at 20–26.

20. *Id.* at 23–24; *see also* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1497–1578 (1982).

21. *Id.* Zelizer also describes another cluster of economists as “nothing-but” theorists, as they perceive intimate social relations as “nothing but” economics. I critically engage with this idea in Part V; *see id.* at 29–35.

population have equal access to the traded good as buyers, or the “access argument.”²² Feminists are especially concerned about the former. Especially when women are the providers, critics worry that, given an unfair background distribution before the transaction, the seller’s consent to the transaction is not truly voluntary.²³ Indeed, as Prabha Kotiswaran observes, “strong anti-commodification arguments have been a hallmark of feminist legal theorizing on the market.”²⁴ Anticommodification anxiety is focused primarily on the exchange of money for sex, but it extends to other marriage-related activities as well, such as household labor.²⁵ As subjective voluntariness is hard to test, the substantive equality or inequality between buyer and seller is often used as an indicator of how free the consent really is.²⁶

However, the presumption of the divide underlying the corruption criticism does not hold in reality: it is common for people to use monetary means to create and renegotiate important ties—especially intimate ties—to other people.²⁷ This is apparent when reviewing the marriage payment case files. I also argue that the moral debate about corruption provides inadequate guidance to specific decisionmaking, especially in *ex post* decisions, like adjudications. The corruption concern, which is especially common in the Chinese party-state’s discourse,²⁸ is the kind of normative argument that I want to steer the discussion away from, which is why I evaluate marriage payment disputes by scrutinizing the voluntariness and distributive fairness of the parties involved.²⁹

22. Note, I. Glenn Cohen, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. LAW REV. 689, 689 (2003).

23. *Id.*

24. Prabha Kotiswaran, *Do Feminists Need an Economic Sociology of Law?*, 40 J.L. & Soc. 115, 115–36 (2013).

25. *Id.*

26. Cohen, *supra* note 22.

27. ZELIZER, *supra* note 11, at 20–26.

28. Aside from the critique from the Ministry of Civil Affairs, multiple party-state sponsored organs had condemned the practice for its “corruption” of the society, including the National Health Commission, the Central Publicity Department, the Central Committee on Spiritual Civilization, and so on. See the introduction in Subpart I.A.

29. Many anticommodification arguments against marriage payment practices fall under the access argument, *e.g.*, “Bride price is giving rise to millions of poor involuntary bachelors in rural China.” See Adam Minter, *Marriage in China Shouldn’t Break the Bank: Exorbitant “Bride Prices” Aren’t the Necessary Evil They’re Made out to Be*, BLOOMBERG (Sep 29, 2018) <https://www.bloomberg.com/opinion/articles/2018-09-29/why-marriage-costs-in-china-are-out-of-control> [<https://perma.cc/9LHQ-JFPN>]. I engage with these arguments by examining the agency of, and distributive consequences for, both men and

B. *Voluntariness and Fairness: Feminist Arguments Against Commodifying Sexuality*

Dating back to the second-wave feminism of the 1970s, western feminists framed marriage payments as a cultural battlefield, along with other practices that subordinated women like forced and child marriage.³⁰ Kathleen Barry placed anticommodification on the feminist agenda, first through her landmark work on prostitution and then by extending the same framework to other practices of “prostitution of sexuality,” including marriage.³¹ Her objection to prostitution engages both the fairness and corruption arguments. First, she argues that when a human being sexually services another, it is a “violation of the human being,” regardless of consent.³² More importantly, she argues that a liberal theory of justifying the transaction with the parties’ consent is problematic because it does not address the structural power inequality both in prostitution and in marriage. As both institutions “actually invoke[] consent, collusion or some form of cooperation from the oppressed,”³³ women learn to establish the terms of their own commodification as an “element of survival.”³⁴

In her 1975 work *The Traffic in Women: The “Political Economy” of Sex*, anthropologist Gayle Rubin ushered in critiques of marriage payments.³⁵ She argued that the practice of forming kinship based on the exchange of women “implies a distinction between gift and giver,” between women and men. Men obtain the benefit of the “quasi-mystical power of social linkage,” but while women are the ones being exchanged, they do not benefit from the newly formed relationship. The “traffic” in women is the ultimate locus of women’s oppression.³⁶ Rubin contends that the structure was not constrained to the “primitive” world, but it becomes more common and further commercialized in the “more ‘civilized’ world.”³⁷ Thus, the transaction does not just exacerbate the difference between men and women—it constructs the difference.³⁸

women in the process of negotiating and making marriage payments.

30. See SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN'S LIBERATION MOVEMENT (Robin Morgan ed., 1970).

31. KATHLEEN BARRY, FEMALE SEXUAL SLAVERY (1984); KATHLEEN L. BARRY, THE PROSTITUTION OF SEXUALITY (1996).

32. KATHLEEN L. BARRY, THE PROSTITUTION OF SEXUALITY 23 (1996).

33. *Id.* at 23–24.

34. *Id.* at 33.

35. Gayle Rubin, *The Traffic in Women: Notes on the “Political Economy” of Sex*, in TOWARD AN ANTHROPOLOGY OF WOMEN (Rayna R. Reiter ed., 1975).

36. *Id.* at 36–38.

37. *Id.* at 38.

38. Rubin’s work was highly influenced by the structuralist approach to

Within legal academia, radical feminists argue that women are defined by their structurally subordinated status in society; they lack the fundamental agency to even consent to sexual transactions, a key institution of commodification. Feminist legal theorist Robin West writes that “power imbalances poison all transactions which occur within them—desired and undesired both—so the distinctiveness of harms caused by undesired consensual transactions get subsumed within a larger problem: desires that run contrary to interest.”³⁹ She refuses to use the expression of consent as a token that the transaction is free of harm, *per se* desirable, or leads to desirable welfare consequences. Rather, consensual transactions, especially when sex is involved, “can alienate us from our bodies, from our subjective pains and pleasures, from our needs, our interests, our true preferences, our histories and our futures.”⁴⁰ West also resists the turn from harm to a more economic language of cost when discussing women’s suffering, because, to her, it excludes women’s virtue of altruism.⁴¹

The feminist anticommodification arguments have influenced legal scholarship on marriage payments.⁴² The arguments often draw on the discourse around harm, force, sexual exploitation, and human trafficking, and focus on the suspension of female agency, with the mail-order bride as the central topic. The mainstream legal discourse depicts mail-order brides as victims coerced into domestic servitude, entering into a marriage for predominantly socioeconomic reasons. Even when brides consent to matchmaking, the grooms

kinship among anthropologists. Judith Butler, *Sexual Traffic*, 2 DIFFERENCES: A J. OF FEMINIST CULTURAL STUD. 62, 65–65 (1994). The structuralist anthropologists argued that the reciprocal exchange of women outside the family, or a “circulation of women,” constituted the base of societal structure. See Claude Lévi-Strauss, *THE ELEMENTARY STRUCTURES OF KINSHIP* (1949). However, in an interview with Judith Butler twenty years later, Rubin reflected on her own “kind of naïve tendency to make general statements about the human condition,” and she has since moved toward a more recognizing attitude of women’s diverse experiences. *Sexual Traffic: Interview with Gayle Rubin* by Judith Butler, in *DEVIATIONS* 276 (Duke University Press 2012).

39. Robin West, *Sex, Law and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICES* (Franklin Miller and Alan Wertheimer eds., 2010), at 39.

40. *Id.* at 38.

41. ROBIN WEST, *CARING FOR JUSTICE* (1999), at 166–68; Janet E. Halley, *The Politics of Injury: A Review of Robin West’s Caring for Justice* 1 Unbound 65 (2005).

42. The more recent trend in family law scholarship is toward viewing marriage in a contractual framework. Anita Bernstein, after a holistic survey of marriage-related laws, concludes that marriage is not transactional but imbues individuals with a comprehensive legal status. See Anita Bernstein, *For and Against Marriage: A Revision*, 102 Mich. L. R. 129, 134 (2003).

and brokers are seen as traffickers because they exploit the brides' economic, social, and legal vulnerabilities and force them into submission.⁴³ This is considered analogous to other forms of sexual exploitation like prostitution and female sex slavery.⁴⁴ Following this rationale, scholars proposed a number of normative reforms to address the issue with nontransactional laws, such as anti-human trafficking rules,⁴⁵ domestic violence frameworks,⁴⁶ or a total abolition of commercial matchmaking.⁴⁷ The mail-order bride industry and the marriage payment practice have a number of interrelated implications. Journalists and human rights groups outside China criticize the Chinese marriage payment practice because it creates a need for many brides from adjacent countries, spurring a mail-order bride industry and human trafficking-related crimes.⁴⁸ Even when cross-border movement is not involved, traditional practices of marriage payments are considered central to female subordination⁴⁹ and are often connected to other forceful forms of illiberal dominance, such as domestic violence.⁵⁰ In China, some local-

43. ABIGAIL STEPINITZ, *THE POPPY PROJECT, MALE-ORDERED: THE MAIL-ORDER BRIDE INDUSTRY AND TRAFFICKING IN WOMEN FOR SEXUAL AND LABOUR EXPLOITATION* (2008); Jane Kim, *Trafficked: Domestic Violence, Exploitation in Marriage, and the Foreign-Bride Industry*, 51 VA. J. INT'L L. 443 (2011) (comparing mail-order brides and domestic violence); Suzanne H. Jackson, *To Honor and Obey: Trafficking in "Mail-Order Brides,"* 70 GEO. WASH. L. REV. 475 (2002) (discovering human trafficking in the mail-order bride industry); Kirsten M. Lindee, *Love, Honor, or Control: Domestic Violence, Trafficking, and the Questions of How to Regulate the Mail-order Bride Industry*, 16 COLUM. J. GENDER & L. 551 (2007) (arguing for more restrictive regulation of mail-order bride industry); Heidi Stöckl et al., *Trafficking of Vietnamese Women and Girls for Marriage in China*, 2 GLOBAL HEALTH RES. POL'Y 28 (2017) (taking for granted cross-border marriages involving payment as human trafficking).

44. Jackson, *supra* note 43.

45. Kim, *supra* note 43; June JH Lee, *Human Trafficking in East Asia: Current Trends, Data Collection, and Knowledge Gaps*, 43 INT. MIGR. 165 (2005) (mentioning cross-border marriage as a venue for human trafficking).

46. Jackson, *supra* note 43; Lindee, *supra* note 43.

47. Kathryn A. Lloyd, *Wives for Sale: The Modern International Mail-order Bride Industry*, 20 NW. J. INT'L L. & BUS. 341 (2000).

48. *Myanmar: Women, Girls Trafficked as 'Brides' to China*, HUMAN RIGHTS WATCH (Mar. 21, 2019), <https://www.hrw.org/news/2019/03/21/myanmar-women-girls-trafficked-brides-china> [<https://perma.cc/67KU-WJFZ>]; Pakistani Christian Girls Trafficked to China in New 'Bride Market,' ASSOCIATED PRESS (May 7, 2019), <https://nypost.com/2019/05/07/pakistani-christian-girls-trafficked-to-china-in-new-bride-market> [<https://perma.cc/T8NE-ZD2Q>].

49. For example, see Angeline Shenje-Peyton, *Balancing Gender, Equality, and Cultural Identity: Marriage Payments in Post-Colonial Zimbabwe*, 9 HARV. HUM. RTS. J. 105 (1996) (arguing marriage payment in Africa is central to the subordination of women and must be abolished).

50. Gill Hague, Ravi K. Thiara & Atuki Turner, *Bride-Price and its Links*

ities proposed charging marriage payment practices as human trafficking crimes.⁵¹

Feminists' concerns are by no means unsubstantiated. Gender asymmetry underlies the majority of marriage payment practices,⁵² and certain sociolegal backgrounds, like migration, exacerbate the power disparity between men and women. Heterosexual marriage itself, despite abolishing *de jure* distinctions between the duties of husbands and wives, remains an institution that bifurcates bread-winning and caregiving roles even in a modern liberal society.⁵³ It would be naïve to presume that the practice of marriage or marriage payment is egalitarian and void of exploitation. However, feminists' concerns become overreaching when the concerns transform into a presumption that women lack agency or a categorical rejection of transacting intimacy.

C. *Agency and Distribution: Reevaluating the Commodification Debate*

The anticommodification argument can be challenged on multiple levels.⁵⁴ Outside legal academia, the thread of scholarship

to Domestic Violence and Poverty in Uganda: A Participatory Action Research Study, 34 WOMEN'S STUD. INT'L F. 550 (2011).

51. Two towns passed laws criminalizing marriage payments in excess of 20k RMB, charging the involved parties as human traffickers. The laws were removed after being criticized for abusing local executive power. Sina News, “河北这地贴彩礼标准：超2万按贩卖妇女或诈骗论处” (*Hebei zhedi tie caili biao zhun: chao 2 wan an fan maifunv huo zhapian lun chu*) [*Hebei's marriage payment rule: above-20k request will be penalized as woman trading or fraud*] June 22, 2018; Sina News, “河南兰考一街道规定：彩礼超2万或以贩卖人口论处” (*Henan Lankao yi jiedao guiding: caili chao 2 wan huoyi fan mairen kou lun chu*) [*Henan Lankao's new rule: above-20k marriage payment might be penalized as human trafficking*], Aug. 1, 2018.

52. Siwan Anderson, *The Economics of Dowry and Brideprice*, 21 J. ECON. PERSP. 151, 158–60 (2007).

53. Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 747–57 (2012).

54. One crucial pushback to American feminists' critiques of marriage payments is from postcolonial and third-world feminists. They argue that local women situated in the culture of marriage payment often have a more nuanced attitude toward it and can possibly draw more positive interpretation from the practice. For example, see Sisonke Msimang, *African Feminisms II: Reflections on Politics Made Personal*, 54 Agenda 3 (2002). Their claims are substantiated by some empirical findings. For example, a group of economists found that practicing bride price in Zambia and Indonesia increased the probability for girls to receive education. See Nava Ashraf et al, *Bride Price and Female Education*, THE NATIONAL BUREAU OF ECONOMIC RESEARCH, <https://www.nber.org/papers/w22417> [<https://perma.cc/HW5J-UYY5>]. In the context of China, however, due to the relatively small feminist scholar community, a parallel debate has not emerged.

resisting the anticommodification rationale focuses on the marginal forms of commodification of intimate relations and renders alternative means of understanding intimacy and social relationships. For example, these scholars study the transactional nature of certain relationships, such as sex and care work in the global labor market,⁵⁵ the economic value of children to their parents and the society,⁵⁶ and commercial surrogates as labor.⁵⁷

Family law scholars also recognize that the transactional dimension of marriage has the potential to empower each party involved. For example, law professor Brian Bix argues that marriage itself is now a contractual or near-contractual relationship so that enforcement of premarital agreements and other domestic agreements can enable parties to order their domestic life according to their individual wills.⁵⁸ Likewise, legal scholar Mary Anne Case argues that marriage should go beyond its current love-it-or-leave-it regime. Judges shall consider enforcing bargains even when they are adjudicating an ongoing marriage, which can halt grossly unequal bargains and benefit bargains contrary to traditional gender norms.⁵⁹ Both propose that a purely private ordering of intimate relationships enabling parties to construct the factual, legal, and moral contours of their marital life is not unimaginable, as long as such an ordering steers clear of violence, abuse, or exploitation.

55. See generally BARBARA EHRENREICH & ARLIE RUSSELL HOCHSCHILD, *GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY* (2002) (studying nannies in a global chain of care work); KIMBERLY KAY HOANG, *DEALING IN DESIRE: ASIAN ASCENDANCY, WESTERN DECLINE, AND THE HIDDEN CURRENCIES OF GLOBAL SEX WORK* (2015) (describing the sex industry in Vietnam as a site of wealth contestation between declining Westerners and the ascending Asian new rich after the 2008 financial crisis).

56. See VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* (1994) (examining the changing value calculation of children through contested issues like child labor and life insurance); NANCY FOLBRE, *VALUING CHILDREN: RETHINKING THE ECONOMICS OF THE FAMILY* (2008) (arguing that children, a product of the family, provide macroeconomic benefits to the economy beyond conventional economic measurements).

57. See Arlie R. Hochschild, *Childbirth at the Global Crossroads*, in *AT THE HEART OF WORK AND FAMILY: ENGAGING THE IDEAS OF ARLIE HOCHSCHILD* (Anita Iltis Garey and Karen V. Hansen eds., 2011) (exploring the global surrogate mother industry).

58. Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think about Marriage*, 40 WM. & MARY L. REV. 145, 146–47 (1998); Brian Bix, *Domestic Agreements*, 35 HOFSTRA L. REV. 1753, 1771 (2007).

59. Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225, 245–55 (2011).

According to Bix, entering into legal contracts can also bring equal treatment to all sexual relationships.⁶⁰

Dismissing the transactional nature of marriage can sometimes hurt women's material interests.⁶¹ For example, while studying the changing legal rules around engagement in the 20th century, Professor Rebecca Tushnet observed that a growing judicial distaste for the economics of marriage led to the abolition of actions for breach of promise to marry, ultimately harming women's material interests.⁶²

Thus, the challenge is to reevaluate the transactional framework without dismissing the feminists' valid concerns about voluntariness and fairness. One approach is to examine an individual woman's agency in the problematized transactions. Even the highly exploitative mail-order bride industry provides feminists "another opportunity to learn from the multiplicity of women's experiences."⁶³ Indeed, by studying migrant brides in Singapore, Amanda Chong discovered that female agency in the entanglement of money and marriage fell onto a spectrum shaped by contextual legal rules and multiple social factors, rather than the "yes/no" dichotomy described by radical feminists.⁶⁴ Chong found that the marital union floated between an individualistic transaction and romantic altruism, allowing the brides to strategize and earn benefits for themselves.⁶⁵

Another approach is to scrutinize the substantial fairness of the transaction and legal intervention through an economic analysis that identifies the distribution of stakes among interested parties and evaluates the consequences of introducing a change in the distribution.⁶⁶ Thus, an economic analysis addresses whether a legal intervention can improve the distributional fairness in question,

60. Bix, *supra* note 58, at 167–68.

61. The transactional framework undeniably hurts some women's marital interest. For example, Gail Brod argued that enforcement of premarital contracts undermines the precarious socioeconomic status of women and sharpens gender inequality in the distribution of wealth. See Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEM. 229, 295 (1994).

62. Rebecca Tushnet, *Rules of Engagement*, 107 YALE L.J. 2583, 2584 (1997).

63. Kate O'Rourke, *To Have and to Hold: A Postmodern Feminist Response to the Mail-Order Bride Industry*, 30 DENV. J. INT'L L. & POL'Y 476, 479 (2002).

64. Amanda Wei-Zhen Chong, *Migrant Brides in Singapore: Women Strategizing within the Family, Market, and State*, 37 HARV. J.L. & GEND. 331, 355–66 (2014).

65. *Id.*

66. Janet Halley, *Distribution and Decision: Assessing Governance Feminism*, in GOVERNANCE FEMINISM: AN INTRODUCTION (J. Halley, P. Kotiswaran, R. Rebouché, & H. Shamir eds., 2018).

which in turn evaluates the limits set on commodifying intimacy. I apply these two approaches to scrutinize marriage payment transactions and adjudications respectively in Parts IV and V.

II. THE POLITICAL ECONOMY OF MARRIAGE PAYMENTS IN CHINA

The practice of marriage payments in China dates back to early imperial dynasties.⁶⁷ In imperial China, exchanging marriage payments was required to validate a marriage;⁶⁸ it was one of the few societies in which both bride-to-groom and groom-to-bride marriage payments coexisted.⁶⁹ When the Chinese Communist Party took power in 1949, it abolished many traditional practices, including arranged marriage, marriage payments, and wife trading.⁷⁰ Despite the party-state's efforts to eradicate them, marriage payments remained a common practice in rural areas. According to researchers, 79 percent of rural marriages from 1950 to 2000 involved marriage payments, whereas only 9 percent of urban marriages from 1933 to 1987 did.⁷¹ The average price amounted to around one person's annual income.⁷² Since the 1980s, individual families have gained more autonomy and are thus better able to

67. Marriage payment has been a widely studied topic among anthropologists. Early works focused on looking for the function of marriage payment in the social structure, such as Jack Goody, *Bridewealth and Dowry in Africa and Eurasia*, in Jack Goody and Stanley Tambiah (eds), *BRIDEWEALTH AND DOWRY* (1973) (arguing that bride wealth is an exchange of funds among elder men); Ester Boserup, *Women's Role in Economic Development*, 53 *AM. J. AGRIC. ECON.* 536 (1970) (viewing dowry as a payment by women to ensure future support). The functionalist approach was critiqued for overlooking the contextual social meaning of marriage payment. See Stevan Harrell and Sara Dickey, *Dowry Systems in Complex Societies*, 2 *ETHNOLOGY* 105 (1985); Duran Bell, *Marriage Payments: A Fundamental Reconsideration*, 1 *STRUCTURE AND DYNAMICS* 1 (2008). Specifically, research about marriage payments in contemporary China stressed the dramatic societal changes brought by the market reform and the rise of individual's agency in the practice. See Helen Siu, *Reconstituting Dowry and Brideprice in South China*, in Joint Committee on Chinese Studies (eds), *CHINESE FAMILIES IN THE POST-MAO ERA* (1993); Yan, *supra* note 4; Shi, *supra* note 4.

68. PATRICIA BUCKLEY EBREY, *THE INNER QUARTERS: MARRIAGE AND THE LIVES OF CHINESE WOMEN IN THE SUNG PERIOD 99–113* (1993).

69. Anderson, *supra* note 52, at 152.

70. See NEIL J. DIAMANT, *REVOLUTIONIZING THE FAMILY: POLITICS, LOVE, AND DIVORCE IN URBAN AND RURAL CHINA, 1949–68* (2000).

71. Philip H. Brown, *Dowry and Intrahousehold Bargaining Evidence from China*, 44 *J. HUM. RESOURCES* 25, 30–31 (2009); Martin King Whyte, *Wedding Behavior and Family Strategies in Chengdu*, in *CHINESE FAMILIES IN THE POST-MAO ERA* 195 (Martin King Whyte ed., 1993).

72. Stevan Harrell, *Aspects of Marriage in Three South-western Villages*, 130 *CHINA Q.* 323, 335 (1992).

order their private lives and private property. As a result, groom-to-bride marriage payments have regained popularity and legitimacy among the population, especially in rural areas in which the amount and prevalence of marriage payments has rapidly grown.⁷³

Contemporary marriage payment practice resurged in a society in which individualism and consumerism are rapidly growing and the traditional family system is collapsing.⁷⁴ The practice functions by counterbalancing the lopsided sex ratio among the marriage-age population. Among those born between 1990 and 2000, there were 10 million more men than women. This imbalance is most pronounced in rural areas.⁷⁵ The imbalance is caused by the son-preference culture and exaggerated by the state's restrictions on the number of children a family may have.⁷⁶ In spite of this imbalance, Chinese society expects heterosexual marriage for everyone.⁷⁷ This pressure is especially acute in rural areas, where unmarried persons over thirty years old are considered socially and economically deficient and are thus stigmatized or even estranged from the community.⁷⁸ However, because marriage payments are more often groom-to-bride rather than bride-to-groom, marriage payments help counterbalance the social privileges associated with having sons.⁷⁹

This reality has also had various effects on family economics and human behavior. For example, studies show that families with sons have a stronger incentive to save money compared to families with daughters.⁸⁰ Likewise, many rural households invest heavily in housing in order to attract a wife for their son, even well before he

73. Yan, *supra* note 4.

74. See generally YUNXIANG YAN, 77 THE INDIVIDUALIZATION OF CHINESE SOCIETY (2009), at Chapter 10.

75. Sources: 2010 National Population Census. In some hinterland provinces like Henan and Anhui, the sex ratio at birth was as high as 130. See National Bureau of Statistics of China, 2010 Population Census of People's Republic of China (2010). The high sex ratio is arguably caused by unregistered girls at birth due to birth control policies, but the underreporting of girls only accounts for a small part of the imbalance. For a discussion about the statistics, see Cai, *supra* note 6. See also Therese Hesketh & Jiang Min Min, *The Effects of Artificial Gender Imbalance: Science & Society Series on Sex and Science*, 13 EMBO REP. 487, 488 (2012).

76. *Id.*

77. DEBORAH S. DAVIS & SARA L. FRIEDMAN, WIVES, HUSBANDS, AND LOVERS: MARRIAGE AND SEXUALITY IN HONG KONG, TAIWAN, AND URBAN CHINA (2014); SHI, *supra* note 4.

78. SHI, *supra* note 4.

79. *Id.*

80. Shang-Jin Wei & Xiaobo Zhang, *The Competitive Saving Motive: Evidence from Rising Sex Ratios and Savings Rates in China*, 119 J. POL. ECON. 511 (2011).

is ready to marry.⁸¹ The imbalance has even catalyzed many Chinese men to search for wives outside of China through commercial agencies.⁸² Notably, this “surplus” of men places women and their families in a relatively superior bargaining position in the marriage market.⁸³ Chinese women can leverage their relative scarcity and set material requirements on marital choices.⁸⁴ Thus, the practice of marriage payment serves as a cultural instrument that redistributes resources from grooms and their families to brides and their families.

The payment amounts vary by region because most marriages that include marriage payments take place between two individuals from the same county.⁸⁵ In the 1980s, the average payment for one marriage was roughly equivalent to one person's annual income.⁸⁶ In the late 1990s, the price climbed up to 20K RMB in northern rural China, which, at the time, exceeded the typical household's yearly income.⁸⁷ According to a marriage payment map published in 2017 by *People's Daily*, the Chinese Communist Party's official newspaper, the “market price” ranged from 1.5K USD to 28K USD in different locales; these figures did not include any provision for housing.⁸⁸ It is therefore not unusual for the marriage payment to equal the whole family's earnings over several years.⁸⁹ Some families even take out loans to accommodate their son's marriage payment.⁹⁰

The party-state disapproves of marriage payments, but it has not enforced any bans or laws outlawing the practice. The official discourse includes a number of arguments against the practice: anti-feudalism, the corruption of spiritual life, and poverty creation. The most enduring criticism of anti-feudalism from the communist era is best illustrated in Article Three of the People's Republic of China

81. Tamara Jacka, *Translocal Family Reproduction and Agrarian Change in China: A New Analytical Framework*, J. PEASANT STUD. 1341, 1346–47 (2017).

82. Stöckl et al., *supra* note 43; Laura K. Hackney, *Re-evaluating Palermo: The Case of Burmese Women as Chinese Brides*, ANTI-TRAFFICK. REV. (2015).

83. Quanbao Jiang & Jesús J. Sánchez-Barricarte, *Bride Price in China: The Obstacle to 'Bare Branches' Seeking Marriage*, 17 HIST. FAM. 2–15 (2012).

84. *Id.*

85. SUSANNE YUK-PING CHOI & YINNI PENG, MASCULINE COMPROMISE: MIGRATION, FAMILY, AND GENDER IN CHINA 61–62 (2016).

86. Harrell, *supra* note 72.

87. Yan, *supra* note 4.

88. People's Daily, 中国彩礼地图出炉 (*Zhongguo Caili Ditu Chulu*) [*Here Comes the China's Marriage Payment Map*], People's Daily, Feb. 20, 2017.

89. Jiang and Sánchez-Barricarte, *supra* note 83.

90. Xinhua Daily Telegraph, “解锁”农村彩礼:婚嫁“穷讲究”把老乡“讲究穷” (“*Jiesuo*” *nongcun caili: hunjia “qiongjiangjiu” ba laoxiang “jiangjiuqiong”*) [*Revealing Rural Marriage Payments: High-Maintenance Marriage Practices are Impoverishing Rural Population*] Xinhua Daily Telegraph, Feb. 7, 2017.

(PRC) Marriage Law that prohibits “arranged marriage, wife purchasing, and extracting property for marriage.”⁹¹ The second critique is that overemphasis on the material aspects of marriage, including marriage payments and luxury weddings, contradicts an ideal family model of a spiritual and cooperative marriage that ultimately serves the nation’s governance goals. *People’s Daily*, the party’s official newspaper, presented rural couples marrying with “zero marriage payment” as role models for the “new youth,” touting their marriages as “simple, frugal, and staying true to the real heart.”⁹² Another article in *People’s Daily* about “zero marriage payment” directly contrasts money spending and marriage based on love.⁹³ A government document released in 2016 supporting increased procreation population policies also criticized marriage payments and luxurious weddings for corrupting the spiritual environment of rural China.⁹⁴ Third, the party-state claims that marriage payments drive rural poverty. The central government’s yearly guideline “No.1 Document on Rural Work in 2019” lists high marriage payments as a negative phenomenon hindering rural development.⁹⁵

In the official discourse about marriage practices, women and their families are widely blamed for the falling rate of marriage and reproduction. State-sponsored institutions present two caricatures of unmarried women: they stigmatize urban women by calling them “leftover women”⁹⁶ and they disparage the high marriage payments paid for rural women as an attempt to bankrupt the grooms and their families.⁹⁷ This reifies the persistent stereotype of women as

91. PRC Marriage Law, Article 3; DIAMANT, *supra* note 70.

92. *People’s Daily*, Nov. 27, 2017. <http://opinion.people.com.cn/n1/2017/1127/c1003-29668314.html>.

93. *People’s Daily*, “激活”零彩礼”背后的乡风文明” (*Jihuo “Ling Caili” beihou de Xiangfeng Wenming*) [*The Rural Culture Behind Vitalizing ‘Zero Marriage Payment’*] Mar. 2018.

94. National Health and Family Planning Commission et al, 关于“十三五”期间深入推进婚育新风进万家活动的意见 (*Guanyu “shisanwu” qijian shenru tuijin hunyu xinfeng jin wanjia de yijian*) [*The Opinion on How to Promote New Marriage and Reproduction Culture Among Households During the Thirteenth Five-year Plan*] (2016).

95. State Council of People’s Republic of China, 中共中央国务院关于坚持农业农村优先发展做好“三农”工作的若干意见 (*Zhonggongzhongyuan Guowuyuan guanyu Jianchi Nongye Nongcun Youxian Fazhan Zuohao “San-nong” Gongzuo de Ruogan Yijian*) [*Several Opinions on Developing Agriculture and Rural Areas*] (2019), sec. 6–2.

96. See generally LETA HONG FINCHER, *LEFTOVER WOMEN: THE RESURGENCE OF GENDER INEQUALITY IN CHINA* (2016) (arguing that state-sponsored institutions are pushing women into marriage through the stigmatization of single urban women).

97. See, e.g., *People’s Daily*, “沉重的彩礼” (*Chenzhong de Caili*) [*The*

“gold-diggers” seeking strategic marriages.⁹⁸ Since Chinese courts are deeply embedded in the same political and social environments that produce these political and academic norms,⁹⁹ this negative understanding of marriage payments thus influences litigation and judicial decisionmaking.¹⁰⁰

III. MARRIAGE PAYMENTS IN DISPUTE: RULES AND ADJUDICATIONS

This Part surveys the case records. I find that judges wrestle with two competing considerations: their own antimarriage payment and pro-groom views on one hand and the litigants' economic conception of marriage on the other. In balancing these two considerations, judges generally order a partial or full repayment of the payment when the relationship dissolves.

A. *Methodology: Case Selection, General Description, and Limitations*

To survey the adjudication of groom-to-bride marriage payment lawsuits, I have assembled a set of cases decided between 2014 and 2017 from the database *China Judgements Online*.¹⁰¹ The selection criteria are that the adjudication falls under the keyword of “marriage payment” and under the category of “premarital property” or “divorce” within civil lawsuits. The total number of qualified

Burden of Marriage Payment] Feb. 20, 2017.

98. Deborah S. Davis, *Privatization of Marriage in Post-socialist China*, 40 MODERN CHINA 551, 567 (2014); Valerie L. Chang, *No Gold Diggers: China's Protection of Individual Property Rights in the New Martial Property Regime*, 45 GEO. WASH. INT'L L. REV. 149 (2013).

99. While there is limited legal scholarship on marriage payments, most scholars oppose it based on their textual interpretation of the civil law: marriage payment is either the illegal income from a prohibited arranged marriage, wife selling, or a gift without a counter-duty in the law. See, e.g., 张学军 (Zhang Xuejun), 彩礼返还制度研究—兼论禁止买卖婚姻和禁止借婚姻索取财物 (*Caili Fanhuan Zhidu Yanjiu—jianlun Jinzhi Maimai Hunyin he Jinzhi jie Hunyin Suoqu Caiwu*) [*The Study of Marriage Payment Repayment—and a Discussion on Marriage Transaction and Prohibition Against Using Marriage to Exact Property*], 05 PEKING UNIV. L.J. (2006).

100. For Chinese adjudication on family law disputes, see generally Xin He, *'No Malicious Incidents' The Concern for Stability in China's Divorce Law Practice*, 26 SOC. LEGAL STUD. 467 (2017) (finding Chinese judges take into consideration political factors like social stability even in divorce cases); KWAI HANG NG & XIN HE, *EMBEDDED COURTS: JUDICIAL DECISION-MAKING IN CHINA* (2017) (arguing judicial decisionmaking is embedded in political, administrative, and social contexts).

101. For an introduction to the database, see Liebman et al., *supra* note 5.

cases was 88,695. I randomly selected 150 of those cases.¹⁰² The set covers more than 20 provinces and all of the cases were adjudicated in local courts. The cases that appear in the database fall into two categories: (1) pre-marriage or engagement property disputes, or (2) divorce disputes wherein repayment of the marriage payment was one of several claims. In the former, grooms are always the claimants, while the bride, and perhaps her family, are always the defendants. In the latter type of case, three-fifths of the 55 claimants are grooms, and restitution of the marriage payment is raised as a counterclaim when the bride initiates the breakup.¹⁰³

All cases followed a similar pattern of transactions. With the underlying expectation of marriage, the groom or his family transferred a significant piece of family wealth to the bride or her family. The bride aggressively requested or tacitly expected this transfer, often with the facilitation of a matchmaker, who was usually a relative or a neighbor of either family. Soon after the transfer, there was an engagement ceremony and/or a wedding. Some couples received a marriage certificate, while others did not. Then, the bride moved into the groom's home with some "dowry"¹⁰⁴ purchased as part of the marriage payment. The couple then cohabitated in the house for a period, or they migrated to another region for work together, with the understanding that they were a couple. For a variety of reasons, the relationship soon fell apart. After the separation, the groom wanted his wealth back. After some failed negotiations, the groom went to court to reclaim the marriage payment, or whatever he had spent on marriage formation.

There are two things to note about this data set. First, adjudication by the court was by no means the only, or the most representative, resolution for marriage payment transactions. There were at least four other alternatives: continuation of the marriage and thus completion of the transaction, the termination of the relationship without a dispute about the payment, a dispute settled through negotiation or community mediation, or a judge-led mediation. For reference, in 2017, over 85 percent of divorces in China happened outside the courtroom.¹⁰⁵

102. Though all of the case files are accessible to the public in the online database, I only cite the cases by their number in the sequence in my set instead of by their full names to maintain the individuals' privacy.

103. Both types of disputes, especially the ones at divorce, could involve other legal issues, such as division of marital property, child custody, and torts, among others. This Article does not address these other types of legal issues.

104. For the discussion on dowry, see Subpart I.B.

105. Ministry of Civil Affairs of People's Republic of China, Statistical Bulletin on the Development of Social Service (2017).

Second, the database itself can be biased. The SPC has mandated that case files be uploaded to the database since 2013, but it carved out an exception for cases related to personal privacy. Nevertheless, judges have the discretion to upload individual cases and can, of course, be biased in doing so.¹⁰⁶ Thus, the database does not contain all divorce cases in China;¹⁰⁷ however, it is the only available database.¹⁰⁸

Another limitation comes from the quality of the adjudication documents themselves. A typical Chinese adjudication includes both party's factual statements, the cause of action, the evidence submitted, the court's factfinding and legal reasoning, and the decision. In reality, however, the cases vary in their level of detail, and some cases provide more factual details and legal reasoning than others. Also, the database records nothing beyond the judicial record, which might not completely reflect what happened in the courtroom.

B. *The Laws Governing Marriage Payment Repayments*

The SPC issued the Second Judicial Interpretation of the Marriage Law in 2003 (Second Judicial Interpretation). It stipulates three conditions that, if met, require the bride to return the marriage payment: (1) if the couple has not officially registered as husband and wife; (2) if they have not lived together, despite registering their marriage; or (3) if delivery of the marriage payment happened before the marriage and has caused difficulty in the giver's livelihood. The second and third conditions are based on the

106. According to a 2013 decision by the SPC, every court is now responsible for uploading all of their adjudication documents to an official database unless the case is somehow "inappropriate." A 2016 judicial interpretation by the SPC specified that the cases related to personal privacy, like divorce, were "inappropriate" and should not be uploaded. Nevertheless, many judges still have uploaded these cases since. See *Zuigao Renmin Fayuan Guanyu Renmin Fayuan Zai Hulianwang Gongbu Caipan Wenshu De Guiding* (最高人民法院关于人民法院在互联网公布裁判文书的规定) [Provisions of the Supreme People's Court on the Issuance of Judgments on the Internet by the People's Courts] (2013). *Zuigao renmin fayuan guanyu renmin fayuan zai hulianwang gongbu caipan wenshu de guiding* (最高人民法院关于人民法院在互联网公布裁判文书的规定) [Supreme People's Court Regulations Regarding Placing Judicial Decisions on the Internet]" (2016).

107. Liebman et al., *supra* note 5.

108. The author had tried to obtain adjudication documents directly from some local courts in China in 2018. However, the courts declined to disclose adjudications involving privacy issues such as family disputes.

parties' divorce.¹⁰⁹ Almost all of the cases I discuss center on interpretation of this particular rule.¹¹⁰

The cases draw on a few other rules. The first is the abolishment of de facto (or unregistered) marriage. Despite the party-state's best efforts,¹¹¹ unregistered marriage remains a common arrangement among the rural population.¹¹² When a couple that is de facto married goes to court to dissolve their relationship, the court requires ex post registration to categorize the dissolution as a divorce, even when the couple fulfills the substantial requirement of marriage.¹¹³ As a result, many marriage payment disputes fall under the pre-marriage category when the couple would otherwise be deemed already married per community norms. Other background rules have also shaped the power dynamic of marriage formation: a 2011 judicial interpretation that extends stronger protection of individual property from marriage, which mostly benefits the husband's family at the cost of the wife;¹¹⁴ a comparatively long judicial process of divorce;¹¹⁵ and patrilineal inheritance and patrilocal residence, which often results in the different economic and social status for men and women inside the family system.¹¹⁶

109. Second Judicial Interpretation of the Marriage Law (Second Judicial Interpretation), art. 10.

110. Notably, a local anthropologist found that the adjudication rule directly contradicts the community norms in its silence on "fault," which the local society perceived as decisive in the repayment. Na Kang, 婚约彩礼习惯与制定法的冲突与协调—以山东省为例 (Hunyue Caili Xiguan yu Zhiding Fa de Chongtu yu Xietiao—yi Shandong Sheng wei Li) [The Conflicts and Coordination between Customs and Written Law on Marriage Marriage Payment—Shandong Province as an Example] 01 FOLKLORE STUDIES (2013).

111. DIAMANT, *supra* note 70.

112. Michael Palmer, *Transforming Family Law in Post-Deng China: Marriage, Divorce and Reproduction*, 191 CHINA Q. 675, 677–78 (2007) (rural populations ignoring the registration requirement poses challenges to the compulsory registration system).

113. Supreme People's Court of People's Republic of China, *First Judicial Interpretation on Marriage Law*, art.5 (2001). "De facto married" means cohabitation and holding out as a married couple. Substantial requirement of marriage includes consent, marriage age, and that the individuals not be closely related.

114. Davis, *supra* note 98; Chang, *supra* note 98.

115. Xin He, *Routinization of Divorce Law Practice in China: Institutional Constraints' Influence on Judicial Behaviour*, 23 INT'L J.L. POL'Y FAM. 83, 84 (2009).

116. Jiang and Sánchez-Barricarte, *supra* note 59, at 2. One example is rural women's land rights. Upon marriage, brides are often denied collective membership and land rights in their parents' villages, while no such change happens for grooms. See Ellen R. Judd, *No Change for Thirty Years: The Renewed Question of Women's Land Rights in Rural China*, 38 DEV. CHANGE 689–710 (2007).

C. *The Adjudications: Anti-Marriage Payment Views and the Economic Exchange Framework*

A closer examination of the case records shows that the legal texts are not the only factor influencing the adjudication. Though the Second Judicial Interpretation did not mention partial repayment as remedy, the majority of the adjudications chose such a remedy.¹¹⁷ Moreover, judges' findings on several specific issues, such as marriage registration and the social meaning of weddings, directly contradicted the written law or ran counter to societal consensus.¹¹⁸ These peculiar results can only be understood beyond the legal texts. Judges appeared to struggle with their own anti-commodification beliefs and the litigants' transactional conception of marriage, apparently reconciling the two by ordering partial repayments.

The litigants' transactional understanding of marriage payments was evident throughout the cases. Consider this father's defense in the marriage payment adjudication of his daughter:

"The defendant was a maid¹¹⁹ just turning 20 when she began the relationship with the plaintiff. During their romantic relationship, she got pregnant, had an abortion, and was hospitalized for it, enduring severe harm in both her body and psyche. In society's eyes, she was already 'married.' To remarry requires lowering her requirements and picking somebody beneath her. If the law adjudicated to return the marriage payment according to some social customs, it shall also take into consideration the defendant's '*depreciation*' according to the same social customs . . . which shall transform into RMB compensation."¹²⁰

Marriage formation was seen as an exchange of more than promises; it included the exchange of sex, material contribution, and other marital duties. Any monetary payment from the groom was gradually offset by the financial and nonfinancial contribution

117. 124 out of 150 cases were adjudicated for a partial repayment, ranging from 10 percent to 90 percent of the total value. In the rest of the cases, judges ruled for no repayment in only 2 out of 96 premarriage cases and 7 out of 54 divorce cases, and full repayment in 14 out of 96 premarriage cases and 3 out of 54 divorce cases.

118. Marriage Law of People's Republic of China, art. 8. For example, 47 adjudications found against a valid marriage between the couple with marriage registration, even though official registration is the only requirement to form a marriage in the written law. In 58 cases, the judges dismissed the brides' defense that part of the marriage payment was spent in preparation for the wedding or the new household, finding the spending not related to the repayment.

119. Implying she was a virgin.

120. Case 7, emphasis added by the author.

of the bride and her family. As much as judges might want to resist this conception of marriage, they could not fully insulate themselves from the realities of these exchanges. And this economic framing, as demonstrated by the father's statement above, made a broader range of the bride's activities compensable. Judges were thus forced to monetize the bride's contributions to the marriage and ultimately subtract that amount from the groom's repayment. Evidently, judges were compelled to do this, despite their pro-groom and anticommodification biases.¹²¹

I examine four aspects of this tension between litigants' insistence on an economic approach and the judicial distaste for marriage payments: Who is the proper defendant to the dispute, the parents or the bride? What should the payments consist of? When does a marriage payment transaction reach completion? And finally, should the marriage payment be repaid and, if so, why?

Other than the ideological tension, I also include in my analysis the sociological discussion about marriage payments to show that many social facts are genuinely debated. Accordingly, I am not necessarily accusing the judge's interpretation of being utterly wrong or sinful in the sense that it directly contradicts the legal texts or falls out of the spectrum of possible interpretations enabled by the law or the societal consensus.¹²² What I argue here is that the judges' findings on multiple issues and their selection of the specific reasoning cannot be explained by reasons within the law, but only by their political tendencies influenced by the public discourse, which, in this case, is their pro-groom sympathy and anti-marriage payment rhetoric. These judges tended to stretch the rules on one issue while narrowing them on another, and in the process they adopt different evidentiary standards to reach such a conclusion. Their incoherence in interpretation techniques can only be explained by their policy preference on substantial distributional issues, which is not wrong per se.¹²³

121. Here, I need to clarify my usage of the term "bias" in analyzing the adjudications. I adopt the legal realist understanding of adjudications that a judge's interpretation and application of the legal rules cannot be reduced to deductions from the rule or a system of legal rules. Thus, adjudications unavoidably perpetuate certain political agendas beyond the written laws, be it policy or ideology. "Bias" here also presumes that the ambiguity in legal texts and the variety of interpretation techniques always enable multiple possible adjudications on specific issues in favor of one party or another. Thus, the legal rules and the common sense do not render an undisputed answer. *See generally* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEG. EDUC. 518 (1986).

122. For judicial interpretations, *see id.*

123. I further challenge the desirability of such preference in Parts III and IV.

1. Who are the Parties?

Most cases in the data set first determined who the parties to the marriage payment dispute were, a question that was not always easily resolved. The law is vague on this issue: SPC's Second Judicial Interpretation does not distinguish between payments to the bride and to her parents. Nor does it specify whether the term "parties" refers to the couple or the parents.¹²⁴ A majority of grooms¹²⁵ chose to list both the bride and her parent(s) or other parental figures as joint defendants, alleging that the bride's family was the beneficiary of the payment.¹²⁶ Involving the bride's parents in the lawsuit often enhanced a groom's chances of receiving a financial payment. How courts had answered this question revealed varying judicial perceptions of the marriage payment practice. If the court perceived marriage payment as feudal and familistic, then it would name the families as parties and generally hold the bride's family liable for repayment. If the court saw the practice as modern and individualistic, then it would find the bride and groom as the distinct parties.¹²⁷

Indeed, this legal issue illuminates a contested social issue: the changing structure of the family in contemporary China. As anthropologist Yan Yunxiang found, the nature of marriage payments was undergoing a substantial change along with the rise of the conjugal family and a more individualist conception of marriage among the rural population. Originally, marriage payments were understood as a transaction between two stem families or family-clans. Around the turn of the 21st century, they functioned more as a distribution process from parents to the newly formed conjugal family. The brides' parents usually spent most of the price they received on providing for a better livelihood for the newly married couple rather than on enriching their own family.¹²⁸

As a result, I found that the bride's economic affiliation (i.e., whether she is part of the groom's or her parent's household when it comes to financial matters) was especially contested in the courtroom.¹²⁹ While the grooms generally assumed that the marriage payment was an interhousehold transfer, the brides and their parents stressed the practice's individualist nature and the bride's individual agency in the scenario. The brides' parents often distanced themselves from the marriage payment, arguing that "they

124. Second Judicial Interpretation, *supra* note 109.

125. 77 of the 96 premarriage disputes and 7 out of 54 divorce cases.

126. The groom's parents, though equally active in the transaction, are never a party as the claimant has more power to structure the lawsuit.

127. Yan, *supra* note 4.

128. *Id.*

129. *Id.*

are not the parties to the marriage” and thus “not the parties to the marriage payment transfer.” Even if the transfer happened at the home they shared with their daughter, they made clear that they were not the recipients of the marriage payment. Even when they were the recipients of the marriage payment, they “did so on behalf of the bride” at the ceremony and the money was spent on the relationship or handed to the bride thereafter.¹³⁰ Brides often joined their parents’ motion, claiming that “she was the only person who negotiated, received and ultimately spent” the marriage payment.¹³¹

Most of the parents also distanced themselves from the bride while stressing the social and legal significance of conjugality. According to these parents, the daughter’s legal capacity as an adult, symbolized by the wedding, disconnected her from her parents’ household and established her new bond to the husband’s household. Thus, the dispute happened inside the groom’s household and therefore her parents were not liable. In one case, the bride left the temporary lodge that she shared with the groom and lost connection with her natal family as well. The dispute ultimately turned into a riskshifting fight between the groom and the bride’s parents. Her father argued that “when [the bride] moved into [the] claimant’s home, the marriage was sealed; she became a member of that household, who now has the responsibility to locate her; we the parents, as outsiders, have no stance to stand in a dispute between a married couple.”¹³²

This case exemplified a dilemma that judges often faced in marriage payment cases: where to draw the boundary between the modern individualist principle of marriage in the national law and the remnant familial flavor in the local practice. The official law is that marriage is a legal act between two individuals, the husband and the wife.¹³³ Relatives’ overinvolvement in a marriage can render it voidable¹³⁴ and even lead to its criminalization,¹³⁵ something judges were probably hoping to *avoid*. However, marriage payment negotiations necessitated familial involvement, even if the parents were not the sole decisionmakers or direct beneficiaries. The courts sought to involve the parents because they were usually more financially solvent than the brides themselves and this was the only way they could better protect the financial interests of the grooms.

130. For example, Case 28.

131. For example, Case 51.

132. Case 52.

133. Marriage Law of People’s Republic of China, art. 5.

134. *Id.* at art. 7.

135. Criminal Law of People’s Republic of China, art. 275.

The majority of judges¹³⁶ disentangled the two: marriage payments were customary transactions or conditional gifts between two families in expectation of a marriage between two individuals. Thus, parents were recognized as parties to the transaction in a legal sense, with judges emphasizing certain facts, such as the marriage payment being sent to the parents' home or being transferred in their presence. In a few exceptional cases,¹³⁷ the court even went as far as finding that only the bride's parents, not the bride herself, were the proper defendants to the lawsuit because they had actively requested gifts in the negotiations. Consequently, the judges managed to rescue the individualistic legal marriage from the "regressive" monetary practice and to hold the bride's whole family liable to ensure returning the groom's family wealth.

2. What are the Payments?

Studying the payments across cases reveals the connection between the commodification rhetoric and the legally recognized scope of the transaction. In most cases, the bride's side contested the scope of the monetary transaction. They argued for acknowledgment of marriage payments as startup capital for the married couple, rather than a mere transfer to the bride's family.¹³⁸ However, courts framed the transaction narrowly around the groom-to-bride cash transfer and disconnected it from in-kind and post-cohabitation transfers, leading to a pro-groom calculation.

Over two-thirds of the brides¹³⁹ argued that they had spent a large portion of the marriage payment on the expected marriage, which, they claimed, should counterbalance the payment from the groom's side or at least count as a deduction. They paid for furniture, electronic appliances, bedding, the wedding ceremony and wedding dress photos, cash or in-kind gifts given to the groom's family as courtesies, and many other monetary investments needed for a new family. Some of the expenditures were even conducted in the groom's or his relatives' company. For the couples who had started cohabitation, some brides claimed that they had spent the money on rent, house maintenance, medical bills, social networking costs, milk powder for the couple's child, entertainment, and above all, the family's unaccountable daily expenses. Thus, the newly composed household, rather than the bride and her parents, made use of the majority of the marriage payment.

136. 51 out of 77.

137. 3 out of 77.

138. The social scientist's study also partially confirms the rise of this understanding among the population. *See Yan, supra* note 4.

139. 106 out of 150.

The following account of “getting married” illustrates the various back-and-forth spending for the process of “getting married.”

Mr. Zhang and Ms. Zhu got acquainted through a matchmaker and soon established a romantic relationship on October 4, 2014.

One week later, Mr. Zhang transferred 11k RMB cash to Ms. Zhu as the “first gift” via the matchmaker.

On October 18, they went shopping together and spent 8.5k from it on two iPhone 5s. The rest 2.5k was spent on clothes together gradually, as Ms. Zhu claimed.

Later in the month, Mr. Zhang, together with the matchmaker, officially sent the “bride price” to Ms. Zhu’s home, including 40k RMB cash and 10k RMB worth of in-kind gift, including wines, cigarettes, several foods and another 3.8k “cash in the box.”¹⁴⁰ Ms. Zhu’s family gave a “return gift” worth 3k.

On the wedding day, December 1, Mr. Zhang’s parents gave 20k cash to Ms. Zhu during the ceremony, which she returned to them later in private rooms, and another 4k RMB for changing the titles; Mr. Zhang also received 2k from Ms. Zhu’s parents.

In preparation for the wedding, Ms. Zhu paid 12k RMB for a gold necklace, 2.2k for her wedding ring and 3.2k for Mr. Zhang’s wedding ring; two commercial insurance plans with Ms. Zhu as insurant for 6k; a 2.9k washing machine and 2k beddings for Mr. Zhang’s house.

After the wedding, they spent 4k on a tourism trip (probably their honeymoon trip) and 5k on daily expenses from the marriage payment, for which Ms. Zhang’s claim was unsupported with evidence to the court.

Ms. Zhang also paid 4k for medical expenses, including one early-month abortion; and 3.6k for gifts to relatives and friends under the couple’s name.¹⁴¹

The courts were divided as to how to account for this spending on the bride’s side. In 21 out of 106 cases in which brides listed spending as a defense, as in the case described above, the judges worked out an accounting formula for the monetary transaction. First, the court would find out the composition of the marriage payment transferred to the bride and would then identify the meaningful consumption costs made by the bride’s side and subtract it from the original marriage payment. Out of the back-and-forth transfers between the bride, the groom, their parents, and the

140. “压箱钱 (yaxiang qian).” Following the local custom, the money is placed in the gift box.

141. Case 72, emphasis by the author. The parties disputed whether the emphasized economic activities should enter the calculation in the adjudication.

matchmaker in the case above, the court ruled that only the 11k RMB “first gift,” the 40k RMB “bride price,” and the 3.8k “cash in the box” composed the “marriage payment” with legal significance. That is, the other transfers were “customary gifts” falling out of the legal scope of the marriage payment. On the bride’s side, the expenditures on jewels, insurance plans, home appliances, and iPhones were subtracted from the marriage payment, while the tourism and daily, medical, and social expenses were not taken into account by the court.

In order to distinguish legally cognizable transfers from the others, judges used some common standards: high value, standardized forms of commodities,¹⁴² and for the purpose of marriage. As in this case, the court tended to recognize a large amount of cash and rule out smaller payments or in-kind transfers.

Although payments from both sides were often interwoven, most judges interpreted only the groom’s cash payment as the marriage payment transaction. Thus, any spending by the bride’s side was undercounted, leading to a more favorable calculation for the groom. In this narrow framing of the transaction, judges found the transfer of the marriage payment complete once the money entered the bride’s hands. How brides spent it was a separate issue that fell outside the scope of the adjudication, regardless of whether they spent the money together with the groom, or whether both sides had a mutual understanding that the money was to be spent for and in the marriage. In an extreme case, even when the bride’s side spent it on the wedding, the spending was not considered relevant to the marriage payment transaction, as a “wedding is not a necessary step to form a marriage.”¹⁴³ This exceptionally narrow framing thus departed from a common understanding of marriage formation. The most common judgment¹⁴⁴ was silence on the disposition of spending and dowry arguments. In another eight cases, the judges explicitly disconnected the issue from marriage repayment claims, urging the brides to resolve it in a separate lawsuit. Twenty-one cases used the approach described above, subtracting payments made by the bride’s side from the marriage payment, while other courts¹⁴⁵ found that the bride side’s dowry constituted only her personal belongings, which could be collected from the groom’s place. Judges thus narrowed marriage payment transactions as much as

142. For example, cash and gold jewelry were more likely to be recognized than clothes and food.

143. Case 31.

144. 50 out of 106.

145. 23 out of 106.

possible, evidently wanting to exclude the range of economic transfers that normally animate these arrangements.¹⁴⁶

Additionally, judges chose to adopt a stricter interpretation of evidentiary rules to make it harder to recognize in-kind transfers and daily expenditures, which were disproportionately from the bride's pocket. The groom's payment was usually placed at the center of the ceremonies, publicly exposed or even exaggerated for ritualistic concerns. Thus, abundant evidence was available to prove the marriage payment's existence: bank records, wedding videotapes, gift lists, the matchmaker, and wedding guests. However, the consumption expenses, usually overseen by the bride, were discretionary and often occurred in private settings. Moreover, these expenses were not seen as culturally significant, even though they were necessary to the couple setting themselves up in married cohabitation. The courts asked for invoices documenting marriage expenses in order to prove that the money had been spent specifically for the marriage formation.¹⁴⁷ Many judges ruled that brides and their families needed receipts to prove that commodities were consumed specifically for the purpose of marriage. Even receipts for the dowry purchase were not "formal enough" to prove its value to some judges.¹⁴⁸ One judge ruled that the medical report for an abortion and the lease for the cohabitation were not substantial enough to prove the bride's spending.¹⁴⁹

3. What is a Complete Marriage Payment Transaction?

Judges often struggled to provide a legal definition for a completed marriage payment, illustrating their anticommodification and their pro-groom biases. Generally, judges dodged the idea that marriage itself was a substantial part of the transaction.

146. The judges' dismissive attitude of the bride-to-groom marriage payment could find roots in the recent social trend that bride-to-groom marriage payment, or dowry, had become less important in the past few decades when compared to contemporary groom-to-bride marriage payment. Bride-to-groom marriage payment had played a much more important role in history. Dowries often appeared in the form of valuable chattels, such as silk products, jewels, and furniture with compatible value to the marriage payment. Historians have found that dowries were very central to women's economic lives and household economics in imperial China. Apart from the use value, a dowry also functioned as a quasi-insurance fund for family emergency uses as well as a significant proportion of family wealth passing down through the female lines. See SUSAN MANN, *THE TALENTED WOMEN OF THE ZHANG FAMILY* 60–61 (2007).

147. Judges' general tendencies are more explicit compared to judges' application of evidentiary rules on Second Judicial Interpretation's pro-groom third condition. See the discussion in Part II.

148. Case 59.

149. Case 43.

Some judges chose to romanticize the payment, by finding the payment a symbol of the bride and groom's "happy expectations for the future."¹⁵⁰ By doing so, judges could frame the marriage payment as a precursor to marriage, rather than as a consummation of it. Other judges fashioned a definition that stressed the coercion of the groom, distinguishing the transaction from a voluntary gift. While the latter was a loving gesture from a willing groom, the former was something he "has to pay" out of external pressures.¹⁵¹ Emphasis on the groom's coercion provided the ground for repayment. In a minority approach, some judges saw the marriage payment as a civil law arrangement—a "conditional gift" or a "conditional legal act." The conditional requirement was met only if there was significant cohabitation and the express fulfillment of spousal duties. If this condition was not met, the marriage payment exchange was seen as "unjustly enriching" the bride.¹⁵² One judge even went further to recognize the existence of a "standard market price" for marriage payments, thereby analyzing the practice as a transactional act.¹⁵³

However, all judges refused to acknowledge the contractual underpinnings of this arrangement. No judge was willing to say that the continuation of marriage for a certain period and some related performances constituted consideration for the cash transfer. Furthermore, the judges were also unwilling to declare a complete transaction when a marriage certificate was sealed, because under those circumstances no repayment to the groom could be justifiable. Instead, the judges construed "getting married" as a lengthy process with a range of procedural steps and specific performances. This conception directly contradicts written law, which states that official registration is the only procedural requirement to form a marriage.¹⁵⁴ Under this law, a marriage can be voided only if there is a showing of physical coercion within one year of marriage or

150. "The purpose of the traditional practice is to facilitate the marriage, which shows the husband and wife's happy expectations for the future." Case 4.

151. "If the groom isn't spending money to improve the affection between the two or voluntarily giving a gift to demonstrate his love, it doesn't count as marriage payment." Case 30. *See also* Case 123.

152. "The condition [of the gift] is the formation of marriage, which means that the two live together and fulfill the husband's and wife's duty respectively. When the formation of marriage was impossible, the gift turns into unjust enrichment." *See* Case 16, Case 31, and Case 38.

153. Case 131.

154. 中华人民共和国婚姻法 [Marriage Law of People's Republic of China], (promulgated by Standing Comm. Nat'l People's Cong. Sept. 10, 1980, effective Jan. 1, 1981), art.8.

the regaining of personal freedom.¹⁵⁵ Many judges in these suits found the marriage void even though none of the above conditions were met.

Instead of relying on the marriage law, the judges used the first two conditions in the SPC's Judicial Interpretation¹⁵⁶ to scrutinize the everyday lives of the couples. In doing so, they distinguished between adequate conjugal bonding and that which fell short. In an attempt to find the transaction incomplete, judges adopted a strict interpretation of the first condition (official registration) with a broad interpretation of the second (living together).

Admittedly, the litigants themselves also struggled to define the boundary between establishing a relationship, cohabitation, and marriage. In most premarital disputes,¹⁵⁷ the parties had held a ceremony and moved in together soon after the delivery of the marriage payment without officially registering their marriage. Some had been cohabitating for as long as two years. It was unclear whether their ceremony signaled the promise to marry or the formation of the marriage itself. Equally unclear was whether post-ceremony cohabitation was the equivalent to marriage or just a temporary stage before the final realization of full marriage. Many rural couples lived together and presented themselves to the community as married couples for years without ever obtaining an official marriage certificate.¹⁵⁸

In response, judges uniformly chose a strict interpretation of the formal registration requirement under the first condition of Second Judicial Interpretation. The lack of registration was taken as *prima facie* evidence of an incomplete marriage, and the presumption was irrebuttable.¹⁵⁹ In the rest of the premarriage cases, the judges refused to recognize the informal marriage, which resulted in full repayment of the marriage payment from bride to groom.

But when marriages were registered, official registration was not the end of the judicial inquiry. Judges also looked into the length and quality of "living together," which required "supporting each other in economics, in daily life, and in spirit."¹⁶⁰ More

155. *Id.*, art. 10.

156. Second Judicial Interpretation, *supra* note 109.

157. 83 out of 96.

158. Palmer, *supra* note 112.

159. The only exception where the judge found for the bride was a case where both parties had "held out to the community as husband and wife for over 3 years" and had two children together. There, the judge held that the groom's claim for marriage payment was "unsupported" even if there was no valid marriage. Case 66.

160. Case 1.

practically, the judges scrutinized the length of cohabitation and the existence of sexual intercourse, evidently looking for ways to make satisfaction of this condition difficult for the brides.

In an increasingly mobile world, cohabitation in the physical sense is often not easy to establish. A 2006 survey found that over 47 million rural women were left behind in their hometowns while their husbands migrated to cities for work.¹⁶¹ Some couples migrated together to a city for work, but their unstable livelihood often required living separately.¹⁶² This is also reflected in my dataset, as the length of cohabitation was widely variable, and the bride and groom would often arrive at different calculations in the same case.¹⁶³ Meanwhile, judges imposed a lengthy cohabitation requirement: in one case, even two years of cohabitation after official registration was insufficient to establish termination of the transaction.¹⁶⁴

Additionally, judges explicitly considered sexual relations when ruling on cohabitation. Judges were sympathetic to grooms who reported a scarcity of sex: in these cases,¹⁶⁵ judges found that the lack of sex justified repayment of the marriage payment. In one divorce dispute, the couple dated for around two years before marriage, and then shared a bed in the groom's parents' house for over 10 months at the beginning of the marriage. Their relationship went well leading up to and after the marriage. Both parties presented evidence of romantic bonding, such as accompanying one another to work and supporting the groom's disabled parents. The only problem was their sex life. Both were inexperienced, and the bride refused to have sex with the groom after a few failed attempts. The bride declined to seek medical advice, preferring to solve the problem privately. They separated over this disagreement and she returned to her maternal home. It was unclear whether she agreed to divorce. The court ruled that, despite the fact that they had officially registered and that they had been sharing a bed for some months, they "were not substantially living together." As a result, she had to return any amount remaining in the marriage payment.¹⁶⁶

In another premarital case, the groom emphasized that "no sexual relationship happened despite the fact that the bride moved to another city with him and the two cohabitated at his workplace."¹⁶⁷

161. Jingzhong Ye et al., *Left-behind Women: Gender Exclusion and Inequality in Rural-Urban Migration in China*, 43 J. PEASANT STUD. 910, 911 (2016).

162. CHOI AND PENG, *supra* note 85.

163. Case 6.

164. Case 145.

165. 8 out of 54.

166. Case 134.

167. Case 46.

And in yet another dispute, parties counted cohabitation time only after the occurrences of sexual intercourse.¹⁶⁸ Judges usually supported grooms' claims that a lack of sexual satisfaction negated the marriage.¹⁶⁹ In combining a pro-groom stance with a narrow framing of the transaction, judges justified finding the nonformation of marriage in almost every premarital case and the majority of the divorce cases.

4. Is the Payment Repaid, and If So, Why?

The judges made their distaste for marriage payment transactions explicit in their opinions. They wrote that marriage payment transactions were a “regressive practice,”¹⁷⁰ “incompatible with the modern idea of marriage,”¹⁷¹ and “not protected by the law.”¹⁷² One adjudication explicitly explained its attitude against it: “the couple should have followed the new marriage norm of civility and equality, living a diligent and thrifty life. Rather, they followed the tradition and ran contradictory to the modern conception of marriage, which shall be discouraged.”¹⁷³

Though both the bride and the groom were complicit in the transaction, judges demonstrated far more sympathy for the groom. In addition to interpreting the marriage in a way that disadvantaged the bride, judges loosely interpreted the Second Judicial Interpretation's third condition—the “impoverishing” condition—to benefit the groom.¹⁷⁴ The judges allowed any proof of economic difficulty on the groom's side to satisfy the impoverishing condition, including a medical diagnosis for the groom's parent, a debt note, or a poverty certification issued by village cadres. Though the third condition mandates the causal link between the marriage payment and the economic difficulty, the courts rarely required the grooms to submit any proof of causation. Some courts accepted evidence, such as medical expenses, that were clearly caused by other factors.¹⁷⁵ And in six cases, the court cited the third condition as cause for repayment, even when the grooms did not invoke it themselves.

Despite their groom-friendly views, judges usually ordered partial repayment based on the fairness principles by balancing

168. Case 19.

169. For example, Case 75 and Case 81.

170. Case 69.

171. Case 91.

172. Case 67.

173. Case 91.

174. Second Judicial Interpretation, *supra* note 109.

175. Compare with the discussion in Subpart III.C.2 on judges' stricter application of evidentiary rules on brides' spending.

a list of factors.¹⁷⁶ The actual amount of repayment varied vastly, and the average repayment was more than half of the original marriage payment.¹⁷⁷ First, the courts considered both quantifiable and unquantifiable factors in their analysis under the fairness principle. This list included, but was not limited to, the following factors: the length of the cohabitation period, economic contribution from the bride's side, fault in the breaking up, pregnancy and reproduction, the amount of the marriage payment, and the economic hardship experienced by the groom's family.

Table 1: Factors Listed by the Adjudications

Premarriage Total: 96		Divorce Total: 54	
<i>Factor listed by the adjudication</i>	<i># of cases</i>	<i>Factor listed by the adjudication</i>	<i># of cases</i>
Length of cohabitation	64	Length of cohabitation	40
Economic contribution	24	Economic hardship	18
Fault	21	Economic contribution	8
Abortion, sexually transmitted diseases (STDs) or other bodily harm	14	Amount of price	12
Amount of price	14	Reproduction	3
Wedding or holding out to the community as husband and wife	14	Fault	3
Reproduction or the lack of it	10		
Economic hardship	7		

Most of the influential factors could be categorized into three groups. The first group of factors was invoked to avoid extreme financial hardship for the groom's family, following the Second Judicial Interpretation's third condition. The second group looked into fault and the cause of the breakup. Though not a legal component according to the adjudication rule and only a minor factor in judges' balancing consideration, the parties rigorously disputed fault in their claims.¹⁷⁸

176. 124 out of 150 cases ruled for partial payment.

177. Based on the author's calculations, the repayment percentage ranges from 10 percent to 90 percent of the total value. The average repayment rate is 56 percent for premarital disputes (median 60 percent, standard deviation 20.80 percent), and 47 percent for divorce cases (median 50 percent, standard deviation 16.18 percent).

178. This corroborates the social science finding that fault plays a crucial role in the community norm of marriage payment repayment, diverging from

Table 2: Fault Claims by the Parties

Premarriage Total: 96				Divorce Total: 54			
<i>Arguments Made by Groom</i>	<i># of cases</i>	<i>Arguments Made by Bride</i>	<i># of cases</i>	<i>Arguments Made by Groom</i>	<i># of cases</i>	<i>Arguments Made by Bride</i>	<i># of cases</i>
Unwilling to enter marriage	16	Unwilling to enter marriage	30	Running away from home	15	Domestic violence	16
Running away from home	15	Abortion or other bodily harm	13	Marriage payment fraud	8	Getting kicked out of the house	5
Unwilling to fulfill wifely duty (sex implied)	4	Domestic violence	13	Unwilling to engage in sex	8	Abortion or other bodily harm caused by the groom	4
Marriage payment fraud	2	Duty to support/care	4	Unwilling to do household chore	4		
Affair	2	Psychological harm	5				
		Family's intervention	5				
		Reputational harm	5				
		Affair	3				
		Disappearance	3				

In the third group, judges acknowledged the bride's "depreciation" argument by inquiring into several factors such as (1) her economic contribution; (2) whether she had conceived a child, been pregnant, or had an abortion; (3) whether she had an STD (presumably transmitted from the groom); and (4) the nominal status of the marriage. The length of cohabitation was disproportionately¹⁷⁹ cited as a crucial factor in judges' balancing. Longer cohabitation time hinted at more substantial detriment to the bride, sometimes in the form of suffering, weighing toward a lower percentage of repayment to the groom of the marriage payment. The "amount of price" factor in fairness balancing also fell under the same economic perception, weighing the groom's monetary contribution against the costs to the bride as commonly perceived in the

SPC's judicial interpretation. See Na Kang, *supra* note 110.

179. 104 out of 150.

community. A judge even wrote in his decision that “there exists a comparatively uniform market price and a common practice for marriage payments.”

Some brides and their families made a “depreciation” argument,¹⁸⁰ which was based on the belief that the bride lost some value as a result of the failed relationship and that women’s suffering from this loss should be compensable. The argument reflected the community conception that a bride’s value is diminished by pregnancy, bodily harm, and reproduction.¹⁸¹ But this list did not exhaust the loss that a bride endured when a marriage dissolved—the relationship itself constituted a cost to her. The longer the relationship lasted, the greater the loss she endures when the relationship ends. And the loss was tightly tied to the logic of the marriage market: she was now worth less as a bride and could acquire only a lower-value second husband. In a few cases, the brides explicitly counterclaimed for “youth loss,” arguing that the nonfinancial loss she had suffered from the relationship was more than the monetary value of her marriage payment.¹⁸² No groom raised any nonfinancial loss in the case set. It appeared that, when the couple had a longterm relationship, the courts expressly or implicitly internalized this logic and calculated a lower percentage of price repayment.

Contrary to the feminist assertion that gender-based suffering could not be reduced to the language of economic cost, brides appeared to translate their loss into a concrete monetary figure.¹⁸³ Nor did the women challenge the notion that their suffering arose from their lack of consent to the original marriage payment arrangement.¹⁸⁴ Rather, they consciously calculated the harm according to the “marriage market.” The longer cohabitation period caused a highly predictable opportunity cost to invest in a marriage. To make matters worse, the relationship was harmful to the bride’s status in future bargaining. Surely, divorced women could still get married

180. Like the argument, made by the father in the beginning of Subpart III.C, that remarrying would require the bride to lower her standards and choose a husband below her potential social status.

181. Ang Sun & Yaohui Zhao, *Divorce, Abortion, and the Child Sex Ratio: The Impact of Divorce Reform in China*, 120 J. DEV. ECON. 53–69 (2016) (finding that women bear most of the cost of abortion in marriage).

182. Case 19.

183. WEST, *supra* note 13; Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUM. J. GENDER & L. 357 (2007) (presenting feminist objections to Becker’s theories couching economic models of the family in sex-specific terms).

184. See radical feminists’ critique of mail-order bride industry. Lindee, *supra* note 43; O’Rourke, *supra* note 63; Jackson, *supra* note 43; Kim, *supra* note 43; Lloyd, *supra* note 47.

easily when there was a large supply of surplus men, but remarriage is always accompanied by a lowering of standards, a reduced marriage payment, or both.¹⁸⁵ In other words, brides claimed to suffer from harm in marriage but had agency in the marriage payment decisions, without seeing the two as incompatible.

If an adjudication did not take into account the gendered contribution and suffering in the process of marriage formation, even a pro-groom court would find that repayment violated fairness principles. American property law in the early twentieth century provides an interesting parallel to the asymmetry between bride and groom in the process of engagement. A judge wrote: “A (male) donor’s promise is worth something different from a [female] donee’s reciprocal promise.”¹⁸⁶ That is, the male was required to give her a ring to create the engagement, but the woman did not have an identical obligation.¹⁸⁷ Similarly, there is a gender asymmetry here: social norms dictate that a woman’s consent to the marriage has a different value than the man’s.

Because of their distaste for this contractual framework, judges did not respect parties’ willful specification of the marriage payment terms through explicit agreements. In one case, the parties agreed that they had reached an express oral agreement during the bargaining around the conditions for repayment. The bride’s side argued that “at the time of engagement, we ha[d] reached an agreement through the matchmaker. If the bride wants to break up, all of the payment shall be repaid; if the groom wants to break up with the bride, none shall be returned. Now that it is the groom who wants to break up with the bride, we shall return nothing.” However, the judge refused to honor this agreement and instead included it in the balancing test and the Second Judicial Interpretation.¹⁸⁸ In another case, the parties reached an express agreement during the premarital negotiation that required the groom to opt out of the patrilineal lineage and patrilocal residence custom. He was going to marry into the bride’s household. Still, the court found that the two “had fulfilled some obligations between husband and wife during cohabitation” and thus should discount the repayment.¹⁸⁹

185. Yuqin Huang, *Remarriage, Gender, and Life Course in Contemporary Inland Rural China*, 43 J. CONTEMP. FAM. STUD. 313, 326 (2012) (observing widows and female divorcees remarried sooner than widowers and male divorcees out of the economic necessity to support their livelihood).

186. Tushnet, *supra* note 62, at 2604.

187. *Id.*

188. Case 53.

189. Case 31.

To conclude, though anticommodification beliefs and pro-groom views permeate the judges' reasoning in the marriage payment lawsuits, some of their balancing alluded to an economic framework that more genuinely reflected the litigants' and the communities' perception of marriage payment.

IV. WOMEN'S DIVERSE EXPERIENCES: STORIES OF AGENCY AND COERCION

In contrast to most feminists' concerns about commodification, anthropologists have found that marriage payment negotiation is often a site of economic empowerment and is conducted in pursuit of meaningful companionship.¹⁹⁰ Since the turn of the 21st century, young women have acquired a more legitimate position in the process of marriage payment negotiation. They have employed certain strategies to assert agency over the marriage payment, such as asking for more cash conversion for material gifts and employing the ideological language of Western individualism.¹⁹¹ Since the price not only contributes to the bride's financial wellbeing, but also signals her value to the community, she is not hesitant to confront the matchmaker, often a senior relative with community-wide authority, about an unsatisfactory term, nor to threaten to refuse the marriage if the offered price falls short of her expectations.¹⁹²

Through reading the parties' stories in the court records, I found that the individual experience of agency fell along a wide spectrum,¹⁹³ ranging from underage daughters entering arranged marriage to capable women purposefully pursuing financial gains. Meanwhile, love and money sometimes came hand-in-hand. Below, I explore two cases at the extremes: one about an arranged marriage and the other about a stereotypical "gold-digger." Then, I provide two more complicated cases. In one, the bride's assertion of agency clashed with the community's expectation. In the second, the parties' transactional and loving incentives were intertwined and constantly changing in the process of marriage formation. In analyzing these cases, I hope to provide a more nuanced picture of female agency in the marriage payment practice.

Here is a story that falls on one end of the agency spectrum—the "feudal arranged marriage."

190. Yan, *supra* note 4.

191. *Id.*

192. SHI, *supra* note 4.

193. This is similar to Amanda Chong's finding of migrant brides in Singapore. See Chong, *supra* note 64.

S, a 16-year-old girl, was introduced to J, a 22-year-old man. Because S had never worked or earned her own income, she was “too financially illiterate to either participate in the marriage payment negotiations or to receive the marriage payment,” according to her parents. Six days after the couple’s first meeting, an engagement ceremony was held. Per an agreement between both parents, J and his parents paid 198k RMB “bride price,” 10k “first meeting gift,” and a set of gold jewelry to S’s family. They also paid 2k RMB to S’s grandmother, 3.3k RMB to the matchmaker, and 14k to S’s relatives through her parents. S moved into J’s family home immediately after the ceremony. The couple lived together for six months, during which “they didn’t have sexual intercourse at all,” according to J. S returned to her family’s home after J swallowed pesticide, a common way of threatening suicide in rural China.

Five months after the couple broke up, J, together with his father and other relatives, came to S’s family home to convince S to return to J’s home and to negotiate repayment with S’s father if the reconciliation failed. S rejected the idea of going back. The two sides, through the facilitation of village leaders, reached a deal of repaying 60k RMB. J, and perhaps his parents, were unsatisfied with this agreement and brought S and her parents to court.¹⁹⁴

Multiple signs suggest the bride’s lack of agency in this case: her underage status, her lack of social experience, the short period between the couple’s initial meeting and engagement, and the families’ strong presence throughout the negotiations. All of the involved parties treated the marriage and payment as an issue with significant influence over the two families, broadly defined. However, the bride’s lack of agency did not imply the groom’s coercive power. Both J and S displayed resistance. He resisted by threatening suicide, a strategy often employed by older women, the most vulnerable population in Chinese villages. She resisted by returning to her parents’ house. The bride and groom were situated in a similarly, if not equally, powerless position over their bodies, sexuality, and other living conditions. In similar cases involving boys and girls under legal marriage age, it was indeed questionable whether the individual’s agency was expected, tolerated, or encouraged significantly enough to differentiate the process from a “feudal arranged marriage.” However, even in extreme cases like this, the desire of both the bride and groom to separate was ultimately respected and realized before the community.

194. Case 15.

Some brides¹⁹⁵ who were embedded in more traditional settings were insulted by the groom's request for repayment at all; for them, the marriage payment sealed a more permanent change of status. The pregnant bride in another arranged marriage case claimed that she "would never get a divorce" and that the repayment claim "significantly affected her life, destroyed her mentality, traumatized her heart, and seriously insulted her dignity."¹⁹⁶ These women denounced the marriage payment lawsuits themselves as bringing disgrace to them and their families.

Throughout the cases, both sides claimed to be deprived of agency for a range of reasons. Ten grooms from the dataset alleged that they had been defrauded by their brides. They accused the brides of being uncommitted and unfaithful. In 29 cases, the brides claimed that they had suffered domestic violence during the relationship, suggesting at least some degree of physical coercion. One bride alleged that she was raped on her wedding night.¹⁹⁷ Three grooms also reported violence threatened the brides' family members. These cases suggest that the deprivation of agency was a major concern throughout the cases, and as such, should not be dismissed in the evaluation.

The following case fell on the other end of the agency spectrum:

M, a man, and S, a woman, met on their own and soon started a relationship. S explicitly asked for 200k RMB to become M's bride, an amount far above the local "market price," the court later found. M didn't have enough savings. He struggled to find another bride and so turned to his family for help. However, S was unsatisfied with the 70k price from M's mother, claiming she was not ready to marry yet. Desperate, M borrowed 100k from his elder sister to pay S, who finally consented to the wedding but not to the marriage registration. They spent most of the payment on the wedding and a vacation abroad but separated after four months.¹⁹⁸

This case presents a strategic woman full of bargaining techniques who leverages the scarcity of potential brides and the groom's determination to marry her in order to maximize her financial gain. Her for-profit intention paints her as a "gold-digger" in the public imagination, and she corners the groom's side in a highly strategic manner. When the man and his family's transfer failed to deliver on the original bargain, she did not hesitate to use exit as a threat. She also divided the promise to marry into several steps,

195. Five brides raised similar arguments.

196. Case 67.

197. Case 150.

198. Case 49.

and by doing so, efficiently created multiple windows to reinstate the threat and to enforce the bargain. And her strategy to threaten actually worked, showing the relative powerlessness on the groom's side. Paradoxically, she spent the earnings on a luxurious vacation for the two, among many other preparations for the new family, which was meant, arguably, to cultivate the conjugal bonds. The rational calculation in extracting the money did not, evidently, preclude the spontaneous, even emotional, behavior of spending. Even the groom seemed to benefit from his bride's gaming strategy, though at the expense of his family, particularly his sister.

Many other brides were reported to have vigorously set the specific composition of the marriage payment. Some specifically requested "an iPhone and a ring,"¹⁹⁹ selected gold jewelries themselves,²⁰⁰ or set aside a portion of the price for marten coats.²⁰¹ Others invested with the bank a portion of the price immediately after receiving it²⁰² or used it to open up a small business.²⁰³ The diverse usage of the payments shows that the parties had a range of financial motivations and their behavior cannot be explained by a singular community tradition or an idea of marriage as a merger of interests.

Across the range of the agency spectrum, questions of male and female agency are vague and contestable. Coercion and individual agency collide and coincide.

D, a 16-year-old girl, met B, an 18-year-old worker, at her father's construction site. After the couple had sexual intercourse on the site, B brought D back to his lodging. Later in the day, D's grandfather reached out to B's father, requesting the marriage payment "if B likes D" or they "will call the police." One week later, B, together with his father and stepmother, two middlemen, and 41k RMB cash, visited D's family. On the site, D's grandfather asked B whether he "liked her." According to the middleman, D voluntarily responded that she "really liked him," to which her grandfather yelled, "I am not asking you at all." B then gave an affirmative answer and handed over the price.

One week later, D returned to her parents' home and was told by her family that she was not to see B again. In the same month, she had an abortion. Two months after, she filed a rape complaint against B at the police station. The police investigated the case but did not find sufficient evidence to prosecute

199. Case 48.

200. Case 64.

201. Case 92.

202. Case 106.

203. Case 46.

the crime. At the end of the investigation, B filed a civil lawsuit to get the marriage payment back while D's grandfather claimed that the payment was compensation for the rape, falling outside the scope of a traditional marriage payment.²⁰⁴

There are at least two possible readings of this story. In the first, this was an acquaintance rape and kidnapping of a minor victim. Instead of rescuing the girl, her family's first concern was an attempt to liquidate the value of her virginity by marrying her to the rapist, who was obliged to marry her and negate the rape allegation. In the second version, it was consensual sex and a burgeoning romantic relationship between two teenagers. Her nascent agency ("I really like him") motivated her to pursue a boy she had chosen for herself. However, her choice was quickly dismissed by her family ("I am not asking you at all") and she was separated from her young lover and ultimately persuaded to report him as a rapist.

In either interpretation, the girl was not considered the owner of her body. In one interpretation, her consent to sex was not relevant to the family and community in defining the nature of the encounter. In the other, she was an object rather than a subject in the transactions of money and sex. Still, despite the coercion from her own family, the marriage payment negotiation allowed her to exert her countercoercive power by willfully refusing the traditional community expectation of her as a passive participant. However, this was later adopted as a piece of evidence against the groom's criminal charge and her family's financial interest, which illustrated the paradoxical clash of value in the marriage payment lawsuits.

The following case illustrates how intimacy and money are deeply intertwined and how women on both sides can leverage this entanglement to advance their separate yet shared objectives.

T and her groom went to the same school and started a relationship on their own. During the marriage payment negotiation, T specifically asked for 60k RMB to pay for the down payment of a car, aside from other payments, and claimed that "without the payment of the car, I will not marry him." The groom's family agreed and transferred two-thirds of the payment at the engagement ceremony.

On the wedding night, immediately after the "bridal chamber play," a traditional practice during which guests sexually tease the couple to symbolize the consummation, the groom's mother came to the bridal chamber with the rest 20k RMB in cash. The groom's mother asked for a receipt, but T responded that "there shall be no need for a receipt because we two are classmates."

204. Case 45.

The two broke up after a year of living together and ended up in the courtroom. They had never registered a marriage. T later denied the existence of the 60k RMB car payment in the courtroom.²⁰⁵

In this case, the two sides engaged in arms-length bargaining even when a seemingly loving relationship preexisted the marriage payment arrangement. The groom's side was strategic in choosing the timing of the payments, using the last one-third of the car payment as a "retainer" to assure the symbolic consummation. How shall we interpret the bride's rejection of using the receipt, a formal transactional instrument?

One interpretation is that, on her wedding night, the bride held a bona fide belief that the receipt was unnecessary. The love between two high school sweethearts was strong enough to rule out the possibility of breaking up and a nasty legal battle. Alternatively, the bride may have considered this a game, taking advantage of the trust in their longtime relationship in order to avoid a formal record that might have disadvantaged her in the future. Or, perhaps, the two incentives, the sacredness of pure love and the excitement of stinking money, were so fundamentally intertwined during the formation of marriage that it was impossible to discern one from the other. The two both calculated for love and with love, highlighting a new link between agency and marriage payment: the overlapping of intimacy and economics not only tolerates individual agency, it also provides a venue to fulfill and extend it.

An investigation of these narratives paints a complex picture: while coercion and exploitation permeate the marriage payment practice—as it does many other economic practices—individual women and men experience different degrees of agency throughout the marriage payment process. The investigation of real world cases suggests that marriage payment should not be rejected outright; to do so would deny the complicated life experiences of the litigants, who have more agency than superficially perceived. Except for the cases in which there is a total lack of agency and clear coercion, the economic framework proposed in this Article is a useful means of analysis that reveals how these arrangements can actually empower the participants and advance women's interests to varying degrees.

205. Case 54.

V. AN ECONOMIC ANALYSIS OF MARRIAGE PAYMENT ADJUDICATIONS

In this Part, I use economic analysis to survey negotiations and litigation around marriage payments. In doing so, I endeavor to evaluate the distributional outcomes of the legal intervention. How do adjudications of partial repayment redistribute bargaining power between brides and grooms with differing levels of agency? How do these outcomes affect their families' strategies? And ultimately, does it enhance the fairness for the parties involved, given that the fairness concern incentivizes such interventions in the first place?

While the courts, the party-state, and the public discourse all share a strong sympathy for the grooms who are, in fact, burdened by an ever-shrinking marriage market, I find that their apparent presumption—that the groom is the disadvantaged party—does not reflect the whole picture. Brides and grooms have different types of leverage at different stages of the bargaining process. I find that the judicial decision of partial repayment shifts most of the financial risk of early-stage relationship dissolution from the groom and his family to the bride's side. The shift can have complicated and even contradictory consequences for the parties and the practice. Based on this deductive result, I argue that the majority of partial repayment orders will not lower marriage payments in the “market” as courts expect and, instead, partial repayments will further enhance gender asymmetry in the process of marriage formation.

A. *The Economics of Marriage Payment*

Economics literature sheds light onto the distribution of bargaining powers in marriage payment and the determinants of its amount. Gary Becker finds that marriage payment is an instrument to reflect the difference between a spouse's contribution and her returns in the new household. Since some form of the output from a marriage, such as housing and children, is not flexible, a spouse's input is sometimes not sufficiently rewarded within the institution. In order to incentivize her to enter and to contribute to the household, the other party pays the compensation to her beforehand.²⁰⁶

206. Households, according to Becker, are formed to facilitate the efficient production of household commodities. The marriage market equilibrium assigns mates and the distribution of returns among them in accordance with their heterogeneous household productivity. However, the division of marital output, such as housing and children, is inflexible due to either cultural or social constraints or their availability only as public goods, so that the share of income of each spouse is not the same as under a market solution. Then, a compensatory transfer is needed between the spouses or their kin to restore the market

Thus the frequency and magnitude of groom-to-bride marriage payments should be greater when the wives' input into households is relatively high and in societies in which there is greater competition among men for wives.²⁰⁷

Contemporary economists offer two explanations for the sharp growth in the amount of marriage payments in some societies,²⁰⁸ one based on demographic shifts and the other based on social status.²⁰⁹ The demographic explanation says that when society witnesses a "marriage squeeze," meaning an excess of grooms compared to brides, the surplus of grooms necessarily leads to marriage payment inflation.²¹⁰ The social status theory argues that dowry inflation persists when modernization causes an asymmetrical heterogeneity of men and women. Men have a more heterogeneous value in the marriage market when they are evaluated on differentiating factors like earning power and inherited status. In contrast, women have a more homogenous value because society evaluates them on factors such as reproductive and sexual value that do not distinguish one woman much from another. According to this model, marriage payments persist when men and women both have economic value but when the quality distribution of men, as understood in the society, is more disparate.²¹¹ Chinese economists use this social status theory to explain the marriage payment phenomenon, arguing that marriage payment signals the groom's

equilibrium. Thus, if the wife's share of family income falls short to reflect her value in the marriage market, then a marriage payment will be paid by the groom's family to the bride or her family, and vice versa, in the form of a dowry. See Gary S. Becker, *A TREATISE ON THE FAMILY* 126–129 (enlarged ed. 1991).

207. For example, Ester Boserup found that the price in light-tool agricultural areas, where women were more actively engaged in the field, were usually higher than heavy-tool ones. See Kusum Nair, *Book Review*, 53 *AM. J. AGRIC. ECON.* 536 (1971) (reviewing ESTER BOSERUP, *WOMAN'S ROLE IN ECONOMIC DEVELOPMENT* (1970)). In some other cultures, marriage payment was also considered to be the payment for her reproductive capabilities and/or her virginity. See Anderson, *supra* note 52, at 156–57.

208. The price of marriage payment stays stable in most circumstances across time and place; however, some societies, such as contemporary India and China, have witnessed a sharp growth in dowry and bride price respectively, despite their similar shortfall of men to women. See Anderson, *supra* note 52.

209. Vijayendra Rao, *The Rising Price of Husbands: A Hedonic Analysis of Dowry Increases in Rural India*, 101 *J. POL. ECON.* 666 (1993) (arguing population growth resulted in larger and younger groups of marriage-eligible people and thus a "surplus" of women, which contributed to the increase in dowry amounts).

210. *Id.*

211. Anderson, *supra* note 52.

heterogeneous social capital to the less differentiated brides in the marriage market.²¹²

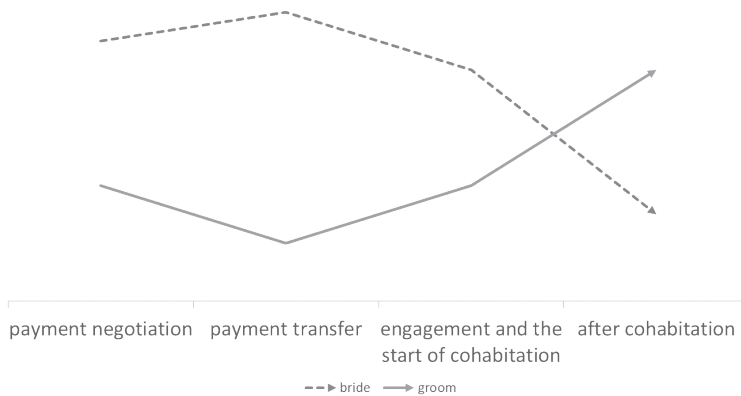
Here, I use the two factors to discuss the fluctuating power dynamics between the bride and the groom throughout the process without taking into account the adjudications.²¹³ First, the “marriage squeeze” substantially decreases grooms’ bargaining power vis-à-vis the brides when both sides are searching for a potential spouse. Second, the heterogeneous evaluation standards of brides and grooms in the market have a different pattern over time. Grooms are primarily evaluated based on their economic status, which includes earnings and family financial support, while brides are mainly evaluated in terms of their reproductive and sexual value, often signaled by youth and chastity.

These two factors lead to brides and grooms experiencing two different curves of bargaining power along a timeline. At the stage of marriage payment negotiation, brides have a significant upper hand due to their scarcity in the local market. When a groom secures an agreement and transfers the price to the bride, he accordingly experiences a substantial downgrade in family wealth, his core capital in the market. This is also the time when he is most vulnerable to marriage fraud—that is, paying for the marriage payment without securing a bride. At the same time, the bride gains economic leverage but also puts her reputation at risk. At this particular point, the bride can actively exert her power to request additional gifts aside from the agreed-upon marriage payment from grooms.

212. 魏国学(Wei Guoxue), 熊启泉(Xiong Qiquan), 谢玲红(Xie Ling-hong), 转型期的中国农村人口高彩礼婚姻—基于经济学视角的研究(Zhuanxingqi de Zhongguo Nongcun Renkou Gaocaili Hunyin—jiyu Jingjixue de Yanjiu) [*The High-Bride-Price Marriages Among Chinese Rural Population—From the Perspectives of Economics*], CHINESE J. POPULATION SCI., 2008 Issue 4, at 30.

213. I adopt Becker’s assumption that the two kinds of payment are two sides of one coin; see Becker, *supra* note 206 and Anderson, *supra* note 52. I also assume convergence of interest between the bride and her parents and relatives in the bargaining process, which is corroborated by social scientists’ findings. See SHI, *supra* note 4.

The Changing Power Dynamic of Marriage Payment



The two curves of bargaining power start turning at the beginning of cohabitation, usually symbolized by a marriage ceremony signaling to the community the formation of a new household. This also cuts off future matchmaking to both sides. Here, the groom and bride pool their resources, some of which are perceived as gender-specific, in order to realize the common goals of establishing a household and benefiting from it. There is a general consensus among litigants and judges that this householding process is costlier to the bride than to the groom. The groom, through this new household arrangement, begins to benefit from the bride's noneconomic capital, either her labor, sex, or reproductive ability. As a result, her value in the matchmaking market, mediated by the community reputation system, decreases precipitously after the ceremony. She is also exposed to risks not calculated enough into the original bargain, such as physical violence, gynecological disease, and abortion, all of which can further lower her bargaining power if she reenters the marriage market. In general, the household-building process is costlier to the bride than to the groom. Even though both spouses are bringing in wages, assuming both of them are working, the bride is expected to invest a substantial part of the marriage payment into their household. For newly-formed households, the marriage payment usually constitutes a more substantial source of wealth than the couple's earnings.

It is less clear how the official marriage certificate tips the balance in favor of the bride or the groom. The official declaration of household formation creates more transaction costs for both parties

if either or both of them want to depart from the relationship, as a divorce usually involves year-long litigation.²¹⁴ Considering that youth plays a more significant role in evaluation of the bride than of the groom, this period is of greater cost to the bride.²¹⁵ However, official registration also forces the couple into a community property regime if no other agreement applies. Thus, in a society in which the groom's family generally puts more toward the marital house, official marriage registration can be beneficial for the bride.²¹⁶ Consequently, both parties may want to avoid marriage registration at an early stage.

B. *A Power Dynamic Analysis of Marriage Payment Adjudications*

Next, I survey the impact of these partial repayment adjudications on the power dynamics in the Chinese marriage payment "market." Assuming that all of the parties are "bargaining in the shadow of the law,"²¹⁷ the adjudication leads to a readjustment of bargaining powers among the parties. In other words, they probably negotiate, transact, bond, and divide outside of the courtroom with a conscious understanding of potential legal outcomes if the relationship is to sour. I first discuss the individualist brides and grooms with sufficient capacity to lead the bargains and then turn to the familial or lack-of-individual-agency scenarios.

First, per the courts' intentions, the adjudication of partial repayment protects the groom and his family ex post from losing a major part of the family wealth as a result of the failing relationship. The groom can thus sustain his capital by regaining some of the

214. He, *supra* note 100.

215. Marjorie B. McElroy, *The Empirical Content of Nash-Bargained Household Behavior*, J. HUM. RESOURCES 559 (1990) (arguing that intramarriage bargaining is affected by individual's utility outside marriage); Nancy Folbre, *Gender Coalitions: Extrafamily Influences on Intrafamily Inequality*, in INTRAHOUSEHOLD RESOURCE ALLOCATION IN DEVELOPING COUNTRIES: MODELS, METHODS, AND POLICY (Lawrence Haddad, John Hoddinott, & Harold Alderman eds., 1997) (arguing women's status outside marriage affects the gender equality inside marriage).

216. This benefit to the bride is restrained after a law change on the ownership of the marital house. In the 2011 Judicial Interpretation on Marriage Law, SPC stipulates that if the marital house is bought before the marriage registration without registering the bride on the ownership certificate, the bride will be precluded from ownership. Scholars have found that this rule negatively influenced women's financial interest from the marriage. SPC's Third Judicial Interpretation on Marriage Law. For a discussion on its implications for women's rights, see Chang, *supra* note 98; Davis, *supra* note 98.

217. Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-72 (1979).

marriage payment and then reentering the market to begin another round of wife-hunting. This lowers the foreseeable earnings from bride-side marriage fraud and thus decreases financial risk for the grooms. With these kinds of protections, grooms have more incentive to enter marriage payment agreements and to complete the transfer in the early phase.

Second, the current pattern of adjudication produces more incentives to the bride than to the groom to enter an official marriage after the marriage payment transfer. Under the current rule, which requires repayment if a marriage fails to form, the lack of official registration provides a ground for the court to rule for at least partial repayment to the groom in almost every circumstance. Grooms are thus disincentivized from officially registering the marriage so that they can prolong the “trial period.” Meanwhile, the bride is unlikely to secure the wealth transfer even after the marriage registration, since partial repayment is always possible, though less probable, in the adjudication.

Third, from the bride’s perspective, the courts increase the cost of leaving the relationship; any litigation is likely to decrease her financial status after exiting the relationship, since most judges rule for at least partial repayment, which inherently affects her initial bargaining position.²¹⁸ The history of a marriage or a quasimarrriage lowers her desirability in the market and diminishes her chances of a better second marriage, but this is only partially accounted for in the litigation. The bride has a higher stake in the relationship compared to the groom because her contribution to the relationship is undercalculated if it dissolves. Meanwhile, her power to construct the relationship is not relationally increased after the wedding ceremony. This limits the bride’s agency in her marital life, despite her agency before it starts. For example, she might be more tolerant of a violent husband because leaving him will lead to the loss of marriage payment. Future brides, therefore, may have less incentive to enter the institution in the first place, as the risk is not adequately ensured under the rule.

In sum, if the bride is ordered to repay more than half of the marriage payment to the groom regardless of the cause of the dissolution, then the financial risk of a breakup is redistributed from the groom to the bride. Awareness of this potential outcome increases the asymmetry of incentives between the bride and the groom:

218. For a negotiation model for marital decisions, *see generally* Marilyn Manser & Murray Brown, *Marriage and Household Decision-Making: A Bargaining Analysis*, 21 INT’L. ECON. REV. 31 (1980); Marjorie B. McElroy & Mary Jean Horney, *Nash-Bargained Household Decisions: Toward a Generalization of the Theory of Demand*, 22 INT’L. ECON. REV. 333 (1981).

it enhances the grooms' already high bargaining power after the cohabitation, while the brides maintain the upper hand in the negotiation period. However, it is the power imbalance in the negotiation period, rather than the post-cohabitation period, that results in surging marriage payments. Thus, the power redistribution does not directly alter the pricing.

The brides and grooms can respond to these asymmetrical incentives in a number of ways. Brides may prolong the information collection period and diversify insurance methods before entering the transaction in order to counterbalance the unpredictability of the future. For example, as Professor Margaret Brinig has observed, the abolition of the breach-of-promise action led to the rise of diamond engagement ring industry. Because the court provided no legal recourse for women if her fiancé ended the engagement, American women moved to seek other signs of financial commitment from men before consenting to premarital sex.²¹⁹ Thus, bride-price substitutes may nonetheless emerge. Brides may also raise the price during the negotiation, the phase when she has the highest bargaining power. If the dissolution of the relationship will result in forfeiture of half of her economic gain, over which she has weak and now weaker control, doubling the original request can reduce the amount of forfeiture later. The grooms are also more likely to accept this price on the other side, with the similar expectation of adjudications. As a sociologist noticed, once a single bargain reached a higher price, the other brides in the local community responded quickly to "match" the price.²²⁰ This means that only a few individuals can significantly influence the local market. These dynamics suggest that adjudications can possibly enhance the value of marriage payments, contradictory to the judges' initial goal.

The analysis above is based on the presumption of a rational, strategic bride with sufficient agency. The results are more complicated when the players are powerless brides and grooms and their families embedded in a highly familial context.

For families of brides and grooms, the incentives are not that different from those of the bride and groom as individuals: the two houses inherit the gender asymmetry inherent in the transaction and potential adjudication. For the individuals in the familial setting, the implications are more complicated. For the bride, her agency might be limited by her own family members who may

219. Margaret F. Brinig, *Rings and Promises*, 6 J.L. ECON. & ORG. 203 (1990) (arguing the factor that most significantly explains the increase in demand for diamonds is the abolition of the breach of promise action that allowed the prospective bride to sue the groom for breaking the engagement).

220. SHI, *supra* note 4.

prevent her from leaving the marriage in fear of the financial and reputational cost. The groom's family, in contrast, can be more supportive of his will to leave, as their risk is alleviated by the potential of a court-ordered repayment. In other words, instead of or in addition to the economic incentives discussed above, the brides and grooms are also facing family members persuading them to act in different directions.

The couple's parents are also likely to adopt different strategies to ensure the family's interest. Through repayment orders, courts signal to prospective brides that they should spend less on dowry, given that this payment will not likely be considered in the repayment if the relationship dissolves. Even when the bride's parents plan to transfer a large proportion of the price to the bride, they are persuaded to transfer in a risk-averse way. For example, they might wait a few years until the risk of early-stage separation disappears, or they might transfer the benefit specifically to their daughter instead of the couple. The groom's parents, on the other hand, are incentivized to induce as much spending and contribution as possible from the bride's side, especially when the relationship faces the risk of dissolution. These adjudications ultimately strengthen the coalition between young spouses and their parents at the cost of the nascent conjugal ties. Even a few years after the wedding, the bride and her parents might still be liable for repayment to the groom and his parents. This antagonism, coupled with the aligned intergenerational interests, makes the new union especially tenuous for the bride.

In sum, the court's pro-groom adjudication creates a "trial period," during which men have more bargaining power to exit while women are incentivized to stay. This has likely induced "over-committing" grooms and greedier brides, as both know that partial repayment will be available to the groom in the first few years of their relationship. And on a more abstract level, the power imbalance between brides and grooms is amplified by partial repayment adjudications rather than narrowed. Though the judges are concerned with the substantial fairness and gender-based asymmetry in the marriage payment transaction, I find that their approaches are not likely to solve the issues at hand.

CONCLUSION

The practice of marriage payments is a cultural site in which wealth and marriage become inextricably intertwined. Gender has a particular value and money is equated to love and commitment. Courts then enter the fray with explicit sympathy for rural men who

have struggled to find a wife. As a result, they issue decisions favorable to grooms that include a strong anticommodification rhetoric. Meanwhile, feminists have valid worries about women's voluntariness when they are involved in such practices. This Article argues for switching the focus from categorical discussions about individual agency to case-by-case analyses, and from moral debates to a realistic power dynamics analysis in legal decisions. I also propose a more genuine recognition of the transactional dimension of marriage formation. It not only gives full recognition of both women's and men's contributions to the process, but also more accurately reflects the actual impact of the adjudications.

As for the normative solution, I believe that anticommodification anxieties can be lessened if the pretransaction distribution appears more equal. If the two parties are more equitable in the background distribution, the transaction is likely to be more fair and more voluntary. Remedying the inequities of marriage payments requires looking outside the practice itself, such as seeking a more balanced sex ratio,²²¹ a change in the normative marriage culture, and more protection for women's interests in Chinese marriages. Finally, with regards to the commodification debate, this case study illustrates that when setting limits on certain practices out of anticommodification reasons, it is also meaningful to scrutinize whether the limits themselves will enhance the moral goods in dispute.

221. Paradoxically, the high marriage payment is dissuading rural families from the traditional son-preference culture. Many young couples are satisfied with a single daughter even when the family planning policy allow them to have a second child. See Shi, *supra* note 4.