

Roman Dowry: Some Economic Questions

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[This paper looks at an important Roman institution during the first three centuries of the Roman Empire: roughly 30 BCE to 235 CE. The sources are, for the most part, the writings of the Roman jurists, who were legal experts (not judges or professors) who had charge of compiling and developing Roman law. Their holdings had considerable, but not unqualified influence in Roman trials.

[During this period, most private trials took place within a loose-knit legal framework provided by the Edict of the Urban Praetor. The Praetor was an annually elected magistrate who had a general jurisdiction over private lawsuits between Roman citizens; however, the Praetor actually allocated lawsuits for decision by (depending on the case) one or more “judges,” *iudices*, who are really just laymen asked to determine an issue that the Praetor has determined to be justiciable. If the Praetor, the *iudex*, the litigants, or their advocates had difficulty with the law applicable to the case, they often turned to the jurists for authoritative advice. By 200 CE or so, however, the Roman emperors also frequently provided authoritative opinions on law.

[This paper is really just a sketch for a book on Roman dowry law. Dowry, the passage of property from the bride-side to the groom-side in conjunction with marriage, is a strange institution in most of the modern world, except for the Indian subcontinent (India, Pakistan, Bangladesh, Nepal, and Sri Lanka) where it is currently widespread among both Hindus and Moslems despite legal curbs or prohibitions, and, less pervasively, for a swath of the Moslem world stretching from Morocco through Egypt and Turkey to Afghanistan. Some of the problems discussed in this paper turn up also in scholarship on dowry in the Indian subcontinent.]

I. Roman Marriage and Dowry.

Roman marriage is not easily understood from a modern perspective.¹ Although the Roman state set requirements and restrictions for marriage, there was no process for registering marriage. At least in the writings of the jurists, marriage (provided it was permitted in a given case) rested only on the agreement, *consensus*, of the two parties to the marriage, plus the agreement of the male head of the household, the *paterfamilias*, if either party was still under his power. But beyond this agreement there was no formal requirement for making a marriage binding: no registration, no prescribed ceremony. For example, in one decision made by the Emperor Probus in about 280 CE, a man is held to be married because his neighbors or other third parties

¹ For standard accounts, see Percy Ellwood Corbett, *The Roman Law of Marriage* (1930); Susan Treggiari, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (1991).

“knew” that he had in his home a “wife” in order to bear him children, even though no marriage documents existed; and their daughter is therefore held legitimate even though her birth was not registered.²

If marriage results mainly from mental agreement, it can also be dissolved by disagreement, and this to an extent that is, by modern standards, astounding: either party can initiate a divorce at any time. As the Emperor Alexander Severus explains in 223 CE, “Long-standing tradition holds that marriages are free. So it is settled that agreements preventing divorce are invalid, and stipulations imposing penalties on the party who divorced are not considered licit.”³ Thus not only can divorce be executed by either spouse at any time, but the parties are not able to prevent this through private agreement. A married couple’s divorce is also not supervised or registered by the government, and allegations of fault play no role in the divorce itself.

This “easy in, easy out” form of marriage is associated with a property regime that is clearly of a piece, but equally perplexing. There is in principle no community of property between husband and wife. Each party retains control of whatever property each had prior to the marriage, and any subsequent acquisitions accrue to the appropriate originating party. Within the marital household, every single piece of property, from the dearest to the most mundane, belongs to husband or wife, whether or not it was within the household; and each spouse was left to manage the property for him- or herself, with, it should be stressed in particular, husbands exercising no disciplinary authority over their wives in general and no automatic control over their property. Every effort is therefore made, from a property law perspective, to facilitate exit from marriage. However, because Roman law also created a presumption that property within the household belonged to the husband unless the wife could prove ownership of it,⁴ women commonly used inventories to keep track of their possessions. As one would anticipate, the law gave actions for recovering property that either spouse alleged had misappropriated at the marriage’s end.

In order to reinforce this boundary between the spouses’ property, Roman law accepted “the customary rule that gifts between husband and wife were invalid.”⁵ The jurists give various explanations for this rule: that gifts motivated by love would drain the spouses’ estates, distract the couple’s attention from procreation, introduce a venal element into the continuation of marriage, and operate to the benefit of the morally unscrupulous; none of these explanations seems entirely convincing. In practice, the rule – to which, it may be observed, there were numerous exceptions for practical reasons – operated to allow recall of gifts when a marriage ended through divorce or the death of either spouse.

Thus far, Roman marriage law may sound like the latest thing out of California; a law student once described it to me as “the pre-nup from hell.” It is doubtless worth spending a bit of

² Probus, C. 5.4.9 (276-282 CE).

³ Alexander, C. 8.38.2 (223 CE).

⁴ Pomponius (5 *ad Q. Muc.*), D. 24.1.51 (citing Q. Mucius).

⁵ Ulpian (32 *ad Sab.*), D. 24.1.1. This rule was later partially relaxed by Septimius Severus: Diocletian and Constantius, *Frag. Vat.* 276 (290 CE); Ulpian (33 *ad Sab.*), D. 24.1.32.2.

time contemplating the wisdom of this legal institution, particularly in a society that had strong public policies favoring marriage and childbirth.

At this point, however, the institution of dowry, *dos*, enters as a major complication. In classical Roman law, dowry is always a transfer of property from the bride-side (usually the bride herself or her family) to the groom-side (the groom or his *paterfamilias*), occurring in close temporal proximity to the marriage itself. The dowry property enters into the control of the groom for the duration of the marriage, subject to some exceptions I will presently discuss. At the end of the marriage through divorce or the husband's death, the dowry was usually returned to the wife in entirety or in large part; on the wife's death, the surviving husband usually kept it.

Here are three social facts that need to be born in mind when thinking about this institution. First, economic studies of dowry in historical and modern societies indicate a wide range of typical values, from about a low amount approximately equal to a bride-side household's annual household income, up to half or even two-thirds of that household's total assets; in the high-end societies, dowries had often become an object of social competition, with tragic consequences when, as is said to occur in modern India, wives are murdered for their dowries. The Roman statistics are quite poor, but seem to indicate that Rome fell at the low end of this scale, at about one year's household income; nonetheless, unsurprisingly, literary sources often speak of the difficulty of coming up with such an amount either when the dowry was created or when it had to be repaid; and payments in either direction seem frequently to be spread out over several years. It should be stressed that dowries were the subject of intense interfamilial negotiation in the often protracted period leading up to a marriage, and that they are also described by Cicero as a major source of interfamilial property transfer.

Second, Roman marriages frequently did not occur between persons of approximately the same age. Rather, a husband was often considerably older than his wife, an age-disparity that tended to increase as the husband aged and remarried. What demographic statistics we have indicate that Roman women normally married for the first time starting in their mid-teens and with increasing frequency, until most were married by their mid-twenties; men, by contrast, often did not marry for the first time until their mid-twenties to early thirties. Life tables indicate that, under Roman mortality conditions (life expectancy at birth probably about 25 or so), when marriage ended by a spouse's death, it was considerably likelier to be the husband than the wife who died; hence return of the dowry was often a live legal issue for the surviving wife.⁶

Third, although information becomes progressively worse for the lower strata of society, dowry appears to have been practiced in all social classes as a normal part of the marriage process. Indeed, in a world where official marriage registration does not exist, "marriage tablets," including dowry documents, frequently created a presumptive proof that a marriage existed, as well as providing a presumptive proof as to its date. For instance, the jurist Scaevola considers a case in which a woman gave her fiancé a money gift on their wedding day, but before she had

⁶ Jens-Uwe Krause, *Witwen und Waisen im Römischen Reich I: Verwitwung und Wiederverheiratung* (Heidelberger Althistorische Beiträge und Epigraphische Studien, Bd. 16; 1994).

been ceremonially led into his house and before the “dowry documents” (*tabulae dotis*) had been signed and sealed. Although Scaevola allows for possible equivocation as to exactly when they reached agreement (*consensus*) on their marriage, it is clear that the signing of marriage documents was considered strong evidence.⁷

2. Why Dowry?

Let me turn, at this point, to the first of the economic questions I wish to raise. Ever since the publication of Gary Becker’s *Treatise on the Family* in 1981 (enlarged edition 1991), dowry has been intensely debated among economists and economic historians: what is its purpose, and how can it be reconciled with basic concepts of economic rationality. After all, the corresponding and historically well attested institution of “brideprice” seems to make quite good sense as compensation to the bride-side for the loss of a daughter. But dowry seems much less sensible, at any rate in something approaching a free market, a “marriage market,” if you will, where men and women are traded between families rather as if they were common chattels.

Becker regarded marriage as a kind of joint venture that offers greater production efficiency, with men and women each possessing varying qualities and each choosing a mate who maximizes their utility; this usually involves a process of “assortative matching” in which high-quality men are matched with hi-quality women, and low-quality men with low-quality women. An efficient marriage market maximizes aggregate output, so that no person can improve their marriage without making others worse off; and these conditions determine the equilibrium division of the surplus generated by marriage. But the division of this marital surplus can be rather inflexible because many household commodities (such as housing or children) are difficult to divide. If this inflexibility obtains, such that the share of income of each spouse is not the same as under the market solution, then an up-front compensatory transfer will be made between the spouses (or their kin) in order to restore efficiency. On this theory, if the wife’s share of family income is above her shadow price in the marriage market, then a dowry will be paid by the bride’s family to the groom or his family.

This theory is obviously rather coarse, but it has a certain amount of predictive value. In particular, it helps to explain why dowry frequently occurs, as an almost embedded social institution, in societies that are evolving from relative primitivism to the early stages of modernism. In George Murdock’s 1967 *World Ethnographic Atlas* of 1167 preindustrial societies, about two-thirds are characterized by bride-price, a payment proceeding from the groom-side; while dowry occurs in only about four percent. The dowry societies, however, tend to be far larger, more populous, richer, and more complex than the brideprice societies; they range from ancient Greek city states and Rome, through to Edo Japan and traditional China in the East, and, in the West, the Byzantine Empire and the Arab states in the Mediterranean, and later Medieval Western Europe (where dowry was reintroduced after a long period of brideprice prevalence in the Germanic

⁷ Scaevola (9 *Dig.*), D. 24.1.66 pr., compare 1; Aurelian, C. 5.3.6 (270-274 CE).

kingdoms⁸), and thence outward into European colonies such as Mexico and Brazil, and even today in the Indian subcontinent.⁹

The general theory, which is outlined in a 2007 article by Siwan Anderson,¹⁰ is that in relatively primitive “tribal” societies, women usually have an economic value of their own through their input into agricultural production; hence their families receive a brideprice in compensation for the loss of a producer. But in the early stages of modernization “dowry payments emerge due to quality differentiation amongst grooms as found in socially stratified societies and are consistent with a development process where women do not directly reap the benefits of modernization and men are the primary recipients of new economic opportunities.”

This generalization is, admittedly, still fairly coarse, but it deserves note that, indeed, dowry societies are usually highly stratified, monogamous, and socially endogamous (meaning that most marriages involve men and women of roughly equal status) – all factors that tend to reinforce the economic logic of dowries. It is commonly recognized that the early stages of modernization do sharply increase the income inequality of men across generations. As Anderson theorizes, “where men have economic value but women do not, ... [w]ealthier parents tend to give higher dowries which in turn render their daughters more attractive to grooms. Grooms who have higher incomes are in turn more attractive to brides. As a result, grooms with high incomes match with daughters from families where the optimal size of [the dowry] is large, implying positive assortative matching in the marriage market.”¹¹

Three final points should be made about this model. First, most dowry-paying societies enforce strong limits on divorce once marriage has been entered, and they also prevent women from receiving inheritances from their birth families. Both these types of restrictions raise the stakes in marriage negotiations, and, it may be plausibly conjectured, thereby put upward pressure on the size of dowries. Since Rome, by contrast, divorce was free (as we have seen), and women were able to inherit equally with men both upon intestacy and, if named as heir or legatee, under a will; therefore it is perhaps unsurprising that the value Roman dowries apparently fell towards the low end of the scale in dowry-paying societies – although it must also be conceded that Rome also exhibits none of the social competitiveness that drove dowries sky-high in Renaissance Florence and currently seems to afflict South Asian dowries.

Second, the decline of dowry is usually explained, somewhat vaguely, as a further result of modernization or “industrialization” as increasing the work input of women within marriage;

⁸ See esp. Diane Owen Hughes, “From Brideprice to Dowry in Mediterranean Europe,” in Marion A. Kaplan, ed., *The Marriage Bargain: Women and Dowries in European History* (1985) 13-58; Susan Mosher Stuard, “Brideprice, Dowry, and Other Marital Assigns,” in Judith M. Bennett and Ruth Mazo Karras, *The Oxford Handbook of Women and Gender in Medieval Europe* (2013) (published online). See also Jutta Gisela Sperling and Shona Kelly Wray, eds., *Across the Religious Divide: Women, Property, and Law in the Wider Mediterranean (ca. 1300-1800)* (2009).

⁹ For a survey, see G. Robina Quale, *A History of Marriage Systems* (1988) 127-184 (“Marriage in Commercializing and Urbanizing Societies”).

¹⁰ Siwan Anderson, “The Economics of Dowry and Brideprice,” *Journal of Economic Perspectives* 21 (2007) 151-174. The quotation is from p. 165.

¹¹ Anderson, (2007) 167.

and detailed studies of this decline in Mexico and Brazil tend to support this inference.¹² However, it is also tempting to implicate the changing nature of modern marriage, which has deemphasized the importance of purely material considerations in the formation of marital households, in favor of romantic attachments between husband and wife.¹³ Sources of Roman marriage indicate that ideals of marriage based on companionship were by no means unknown, although probably always secondary to ideals based on procreation. But, of course, neither Greece nor Rome succeeded in passing beyond the early stages of modernization.

Finally, it's worth noting that dowry, in the context of marriage, is more than just an economic institution; it functions also as a richly textured social institution that can vary substantially between different societies. As Vijayendra Rao has observed for India,¹⁴

The term dowry ... has many different meanings: It is a gift made to cement bonds between two families – usually given in the form of jewelry or clothing. It is an investment to assist the newlyweds in setting up their homes – in the form of durable goods, or contributions towards a new business venture. It is a 'pre-mortem' bequest to a daughter – enabling her to obtain a *stridhan* [a share of her birth-family's wealth] that she would not customarily be entitled to on the death of her father. It is a symbolic expense used to celebrate the marriage in an appropriate manner. And it is a 'groomprice' – a transfer made to the groom's parents as an inducement to agree to the marriage. The academic and popular discourses on dowries both tend to confuse these different meanings, but they have extremely different implications for marital incentives, household bargaining, and the status of women.

In this connection, it is worth noting that Roman dowries most commonly comprise, not items intended for immediate consumption (like food and clothes, frequent in Indian dowries), but rather income-producing property. Under Roman law, virtually any asset can be included in a dowry: not just land or cash (apparently by far the most frequent items), but even property possessed without title, or a right over another's property such as a usufruct (a right of enjoyment), or the dowry giver's claim to an inheritance, or a debt owed to the giver, even the discharge of a debt owed to the giver by the recipient, and so on.¹⁵ The aggregation of such assets constitute the corpus of the dowry, described in Roman law as a *universitas*; it is this corpus, or its fair value, that frequently must be returned, in its entirety or in part, to the bride-side at the end of marriage.

¹² Asuncion Lavrin and Edith Couturier, "Dowries and Wills: A View of Women's Socio-economic Role in Colonial Guadalajara and Puebla, 1640-1790," *Hispanic American Historical Review* 59 (1979) 280-304; Muriel Nazzari, *Disappearance of Dowry: Women, Families, and Social Change in Sao Paulo, Brazil (1600-1900)* (1991). See also Quale, *Marriage Systems* (1988) 185-210.

¹³ Jennifer S. Hirsch and Holly Wardlow, *Modern loves: the Anthropology of Romantic Courtship & Companionate Marriage* (2006), esp. Chapter 1 ("Love and Jewelry") contrasting a dowry and a bride price.

¹⁴ Vijayendra Rao, "The Economics of Dowries in India," in Kaushik Basu, ed., *Oxford Companion to Economics in India* (2007) 118-121; (=?) Kaushik Basu and Annemie Maertens, *The New Oxford Companion to Economics in India* (2 vols. 2012) ---.

¹⁵ Pietro Bonfante, *Corso di Diritto Romano: vol. I, Il Diritto di Famiglia* (1925) 296-297.

The jurists contrast this corpus with the income generated from the dowry either in direct physical form (like crops from a farm) or indirectly through contract (like interest on a loan); these sources of income are the “fruits” (*fructus*) of the dowry, and they belong to the husband so long as the marriage lasts. The parties cannot escape this rule, for instance by agreeing that the fruits will be reinvested in the dowry.¹⁶

The emphasis that Roman sources place on income from the dowry, and on the husband’s right to this income, gives an important clue as to how they conceived the dowry: as primarily an income-generating fund that is designed to operate within the marriage for its entire duration, rather than simply as a one-off transaction in conjunction with the wedding. In a somewhat picturesque phrase, the jurists constantly describe a dowry as offsetting, for the husband or his family, the “burdens of marriage” (*onera matrimonii*) associated with accepting the wife into their household: the additional expenses of maintaining a marital household, particularly food, clothing, and shelter for the wife, her attendant slaves, and perhaps even the couple’s children as well. As the late classical jurist Paul observes, “[T]he fruits of a dowry should relieve the burdens of marriage”;¹⁷ and his contemporary Ulpian adds, “Fairness requires that the fruits of the dowry (*fructus dotis*) should accrue to the husband. Since he bears the burdens of the marriage, it is fair that he also receive the fruits.”¹⁸ As will emerge, however, this approach is largely a juristic construction that should perhaps not be taken entirely literally.

3. Property Rights in the Dowry

Who owns the dowry during marriage? As economists working on South Asian dowry have long noted the importance of this question; they distinguish between what might be called “dowry proper” (in which the bride-side contribution legally remains with the wife) and so-called “groomprice” (in which the husband receives ownership or at least control).¹⁹ In fact, however, this legal distinction turns out to be very delusive; although “dowry proper” might seem to give the wife a degree of economic independence (as a sort of “pre-mortem bequest” from her family), husbands who do not initially have control of the dowry not infrequently resort to violent spousal abuse, or even murder, in order to obtain control of it – a grievous situation, deeply worrisome to policy makers, that is said to result in as many as 8,000 deaths per year in India, and possibly as many as 25,000 cases of serious spousal abuse.²⁰

¹⁶ Ulpian (31 *ad Sab.*), D. 23.4.4, albeit with some fine distinctions.

¹⁷ Paul (5 *Quaest.*), D. 23.4.28.

¹⁸ Ulpian (31 *ad Sab.*), D. 23.3.7 pr. Compare Paul (6 *ad Plaut.*), D. 23.3.56.1-2.

¹⁹ See, for instance, Siwan Anderson, “Dowry and Property Rights” (BREAD Working Paper No. 080, 2004), arguing that “modernisation necessarily leads to the emergence of dowry as a direct transfer to the groom.”

²⁰ Ignatius Pereira, “Rising Number of Dowry Deaths in India: NCRB,” *The Hindu* (August 7, 2013): “While 6,851 dowry deaths were reported in the country in 2001, the figure reached 7,618 in 2006 and touched 8,233 in 2012.” See, e.g., Vijayendra Rao, *Wife-Beating in Rural South India: A Qualitative and Economic Analysis*, *Social Science & Medicine* 44 (1997) 1169-1180 (1169: “one study estimates that dowry-related murders account for up to 25% of deaths of women between the ages of 15 and 30 in Bombay”); Ruchira Tabassum Naved and Lars Ake Persson, “Dowry and Spousal Physical Violence Against Women in Bangladesh,” *Journal of Family Issues* 31

In Roman law, at any rate, ownership of the dowry property seems, at first, to be firmly fixed in the husband for as long as the marriage lasts. For example, constituting the dowry usually involves conveyance of title from the bride-side of those items that require special ceremonies.²¹ As the dowry is conveyed, the property items “become the husband’s.”²² During the marriage, the husband has wide-ranging powers of disposition with respect to dowry property, although he remains accountable for the dowry’s overall value; he can sell items from the dowry or use dowry money for purchases, although the proceeds from such transactions remain within the dowry.²³ His wife, by contrast, cannot sell or give away items in the dowry.²⁴ The husband can also manumit dowry slaves.²⁵ Although he is obliged to return dowry property at the end of the marriage, this reversion is not automatic; the property must be sued for by his ex-wife or some other entitled party.

Nonetheless, in many sources the Roman jurists seem to recognize the existence of a property interest also in the wife. A good example is set up by the late Classical jurist Tryphoninus (ca. 220 CE).²⁶ As part of her dowry, a woman has contributed a farm that she purchased, the seller giving her a stipulation that, in the event of a subsequent eviction, he would pay her twice the farm’s price as, so to speak, liquidated damages. After her husband received the farm, a third party true owner brought suit and took it away from him. Naturally, the husband was aggrieved. But who should sue the original seller on the stipulation: the husband or the wife? Tryphoninus rules in favor of the wife, the recipient of the seller’s stipulation, but his justification for this decision takes a strange turn:

Although the dowry is part of the husband’s property, it is still the wife’s. ... [I]t was in her interest that there be no eviction from the dowry property (by its true owner); and since she is considered to suffer the eviction herself because she ceases to have it in the dowry, while the marriage lasts the husband has ownership (*dominium*) but she is regarded as having the power of receiving financial advantage, even where her husband bears the burdens of the marriage itself.

This decision starts from the recognition that she will have to have to compensate her husband for the lost property (this is “her interest” in eviction not occurring in the first place); but she is plainly allowed to keep any additional amount realized from the lawsuit. Tryphoninus shuffles uneasily in justifying his decision, twice recognizing the husband’s ownership, but off-

(2010) 830-856; Kirti Singh, *Separated and Divorced Women in India: Economic Rights and Entitlements* (2013) (describing “the extremely dire conditions faced by separated and divorced women in India, and the abysmally inadequate legal entitlements generally obtained by them” (Jayati Ghosh)). The scholarly literature is enormous.

²¹ See, e.g., Gaius, *Inst.* 2.62-63.

²² Ulpian (31 *ad Sab.*), D. 23.3.7.3 and 9 pr.

²³ See, e.g., Gaius (*ad Ed. Praet. de Praed.*), D. 23.3.54 (“Property purchased with dowry money is regarded as dowry.”).

²⁴ Diocletian and Maximian, C. 5.12.23, 8.53.21 (294 CE).

²⁵ Gordian, C. 7.8.7 (238-244 CE).

²⁶ Tryphoninus (6 *Disp.*), D. 23.3.75.

setting this with the wife's abiding "power of receiving financial advantage" from the dowry, irrespective of the "burdens of marriage" assumed by the husband.

Many other juristic sources display the same equivocation. Ulpian, for instance, refers to the dowry as her "quasi-property" (*quasi patrimonium*) or even as "her own property" (*proprium patrimonium*).²⁷ Paul states that a woman who receives her dowry after a marriage ends "is held to recover her own property" (*proprium recipere videtur*).²⁸ Here it is important to be clear on one point where Common Law may mislead. A Common Lawyer might easily slip into the habit of regarding the husband/wife dowry relationship as an instance of a trust, with a fiduciary owner (the husband) and a beneficiary or beneficial owner (the wife). Although Classical Roman Law is comfortable with the idea of undivided ownership of shares in property, it does not have the idea of what one might call "layered" ownership, as in Common Law trust, where one party holds title but is expected to exercise that title to the benefit of another. Only very late in Roman law, in a constitution of the early Byzantine emperor Justinian, is fiduciary language used in discussing dowry.²⁹ So the earlier sources that seem to equivocate on the wife's property interest do not appear to have a firm doctrinal basis.

It is for this reason, presumably, that the jurists are careful in spelling out the nature of the wife's interest in the dowry. They locate two main forms of interest. The first is a future one, since the dowry may return to the wife upon the dissolution of her marriage. As Paul says, "It is in the public interest (*rei publicae interest*) that women's dowries are secure, since they can marry because of them."³⁰ The availability of remarriage is considered important in that it is tied to the pro-natalist policies in force at Rome: "It is in the public interest that dowries be preserved for women, since for the procreation of offspring and the replenishment of the state with children, it is emphatically necessary that women have dowries."³¹ This emphasis on the link between dowry and procreation is a little surprising; one might have assumed, rather, that the wife's primary interest in return of the dowry lay in her own financial wellbeing, whether or not she remarried; for instance, she might be already beyond the age of childbirth. Further, dowry was not required for contracting a legal marriage in Rome, although a dowry could not exist without a subsisting legal marriage.³² But pro-natalism was a well established public policy in the Roman Empire, so the tie had considerable emotive force as an explanation.

The wife's second interest is based in the present, and it is somewhat more complex. As was observed earlier, the Roman jurists tend to explain dowry as intended to offset "the burdens of matrimony," including maintenance of the wife as an additional member of the household; and, for the most part, it seems to be the case that husbands did pay for the normal expenses of their wives. However, this connection is not a legal one. In fact, and a somewhat extraordinary

²⁷ Ulpian (25 *ad Ed.*), D. 11.7.16; (11 *ad Ed.*), D. 4.4.3.5 (respectively).

²⁸ Paul (1 *Resp.*), D. 50.1.21.4.

²⁹ Justinian, C. 5.12.30 pr. (529 CE).

³⁰ Paul (60 *ad Ed.*), D. 23.3.2.

³¹ Pomponius (15 *ad Sab.*), D. 24.3.1.

³² Ulpian (63 *ad Ed.*), D. 23.3.3.

fact it is, Roman law imposes no duty of maintenance between spouses (and, in particular, no duty on the husband toward his wife), even though a duty of maintenance is imposed as to ascendants and descendants who are in need.³³ This failure arguably derives from the separation of the spouses' estates, but it can produce very harsh results, as in a case discussed by Ulpian where a wife had gone violently insane and hence lacked legal capacity to initiate a divorce; her husband, who was determined to keep control of her dowry, "cunningly" (*calliditate*) refused to divorce her, but also deprived her, as it seems, not only of basic subsistence but of medical aid.³⁴ More ordinary is the situation that underlies another text of Ulpian, in which the husband supplies an allowance to his wife for her needs, on an annual or monthly basis; if the amount turns out to be inordinate and beyond the income-producing potential of the dowry, he can retrieve the surplus.³⁵

Nonetheless, despite the legally tentative relationship between dowry and maintenance, the jurists seem to regard the wife as having a present interest in the dowry because of her expectation of maintenance. This issue will return below.

4. Roman Dowry and the Problem of Agency

For the most part, both the wife's present and her future interest in the dowry appear to be a juristic construction aiming to offset the reality of the property relationship in dowry: that the husband has effective control, and even ownership, during the marriage itself. Further, the purpose of this juristic construction is also clear, at least from a modern perspective: if the wife has an interest in her husband's control of the dowry, then the relationship can be described in the terminology of economic (distinct from legal) agency, as it is conceived in New Institutional Economics (NIE).³⁶

³³ See, e.g., Ulpian (2 *De Off. Cons.*), D. 25.3.5 pr.-4. This duty of maintenance was established by imperial enactments in the mid-second century CE (see Antoninus Pius, C. 5.25.1, for a quotation from one of these).

³⁴ Ulpian (33 *ad Ed.*), D. 24.3.22.8. The text allows her relatives or her guardian to intervene.

³⁵ Ulpian (32 *ad Ed.*), D. 24.1.15 pr.-1.

³⁶ On agency theory in NIE, it is probably sufficient to refer to Thráinn Eggertsson, *Economic Behavior and Institutions* (1990) (40-45 on agency theory); Peter G. Klein, "New Institutional Economics," in Boudewijn Bouckaert and Gerrit De Geest, eds., *Encyclopedia of Law and Economics* (1999), at <http://encyclo.findlaw.com/0530book.pdf>; Eirik G. Furubotn and Rudolf Richter, *Institutions and Economic Theory: The Contribution of the New Institutional Economics* (2nd ed. 2005), esp. 162-170; Lee J. Alston, "New Institutional Economics," in *The New Palgrave Dictionary of Economics* (2nd ed. 2008), on-line at http://www.dictionaryofeconomics.com/article?id=pde2008_N000170&edition=current&q=new%20institutional%20economics&topicid=&result_number=1. Many of the essential NIE writings are in Claude Ménard and Mary M. Shirley, eds., *Handbook of New Institutional Economics* (2005); The agency model is discussed in more detail by Kenneth J. Arrow, "Agency and the Market," in *Handbook of Mathematical Economics* 3 (1986) 1183-1196; Jean-Jacques Laffont and David Martimort, *The Theory of Incentives: The Principal/Agent Model* (2001), and Bernard Salanie, *The Economics of Contracts: A Primer* (2nd ed. 2005); see also Susan P. Shapiro, "Agency Theory," *Annual Review of Sociology* 31 (2005) 263-284.

NIE follows the theories of Ronald Coase³⁷ on the importance of transaction costs in the construction of institutions. These problems are especially intense in the presence of strong information asymmetry, as when one person manages another person's affairs both on behalf of that person and on behalf of himself,³⁸ and particularly when the non-managing person (the principal) has relatively restricted access to the actual conduct of the managing person (the agent). Such relationships are ubiquitous in modern life, of course. We might think, for instance, of an employee in relation to an employer, or of the manager of a firm in relation to stockholders; in these cases, the agent is paid for the handling of the principal's affairs, but the principal may lack close oversight. But agency relationships are much more diverse than this. Consider a lawyer acting for a client, or a doctor for a patient, where the principal (the client or patient) seeks out and hires the professional expertise of the agent; or even, for instance, a legislator acting on behalf of constituents, but also usually concerned about the prospects of reelection.

A moment's reflection will suggest the two major problems with agency relationships from the principal's perspective.³⁹ First, even if the agent is entirely upright and sincere in handling the principal's affairs, the agent may well be less vigilant or industrious because he receives only a portion of the gain from diligence. Assume, for the moment, that the husband handles the dowry both in his own interests and on behalf of his wife; and that he also handles his own property. The husband receives all the income ("fruits," *fructus*) from the dowry as a matter of law; in that respect, the dowry is no different from his own property, except that he may have incentive to draw a short-term profit at the expense of the property's long-term profitability, and issue that worried the jurists.⁴⁰ But maintenance of the dowry corpus, or investment in it, is a more difficult problem, since the husband may well not receive full recompense in the case of increased profitability; thereby he may endanger at least the future interests of his wife. We can refer to this as the problem of *shirking*.

Second, what if the agent is not upright, but instead seeks to take advantage of his greater knowledge by aspiring to maximize his own interests, often through cunning and deceit. That is, he seeks profit beyond what he is entitled to under his arrangement with the principal. We can call this the problem of *opportunism*.

These two forms of behavior are predictable in themselves, and a principal is therefore likely to take steps to protect her interests from the agent's shirking or opportunism. In particular, when the marriage is being arranged, she (or someone bargaining on her behalf) is likely to

³⁷ See esp. Ronald Coase, "The Nature of the Firm", *Economica* 4 (1937) 386–405, and "The Problem of Social Cost," *Journal of Law and Economics* 3 (1960) 1–44; both articles have often been reprinted.

³⁸ Because of the nature of dowry, I will assume, in general discussions, that the agent is male and the principal is female.

³⁹ See Jayne Barnard, "Shirking, Opportunism, Self-Delusion and More: The Agency Problem Lives On," *Wake Forest L. Rev.* 48 (2013) (forthcoming)

⁴⁰ Several texts deal with the vexed issue of a farm on which the husband opens a stone quarry, thereby potentially destroying the agricultural land: Paul (7 *ad Sab.*), D. 24.3.8 pr.; Javolenus (6 *ex Post. Lab.*), D. 23.5.18 pr.; Ulpian (31 *ad Sab.*), D. 24.3.7.13-14.

find it in her interest to structure their contract in a way that reduces the *agency costs* associated with the transaction, especially by monitoring the husband's behavior.

To put the point more generally:

A net reduction in agency costs can sometimes be achieved by designing contracts where the interests of principal and agent overlap – for example, by sharing profits – or by the introduction of accounting systems to monitor agents. Contracts often include terms that delineate permissible behavior by agents (which risks tying the agents' hands when some contingency arises). Also, agents may find it to their advantage to offer the principal some collateral as a security against opportunistic behavior by them (referred to as *bonding*).

The marginal rate of return on resources invested to constrain agents fails after a point, and in most cases it does not pay to try to eliminate all opportunistic behavior. Therefore, the performance of an agent is seldom measured in its entirety, and measurement takes place only at margins where measurement costs are relatively low.⁴¹

The dilemmas here cannot always be easily resolved to the principal's satisfaction. As a first approach to thinking about them in the context of Roman dowry, it is helpful to note that the information asymmetry was potentially quite risky for Roman wives. Not only does her husband effectively control the dowry for the duration of the marriage, but she also seems to have no practical way to audit his conduct either, by, for instance, demanding an accounting; at any rate, we do not hear of such a mechanism imposed either by law or by dowry contract, and it may perhaps have been thought of as overly intrusive on the institution of marriage. We are told that if it became obvious that her husband was in distress, she could demand that her husband provide security for return of the dowry; and if it then became evident that his funds were insufficient, she could also sue for return of the dowry even while the marriage continued.⁴² But this would depend on her having adequate knowledge about the state of her husband's finances; that is, it would depend both on the availability of information about his finances, and on her own vigilance. Otherwise, during the marriage the only real weapon she had to hand was to threaten divorce, because the husband's behavior could then be examined minutely, in a lawsuit if necessary, as part of a property settlement after divorce. (We will return to this process momentarily.)

Problems associated with the administration of the dowry during marriage are obviously significant, but significant difficulties can also arise for the wife in recovering the dowry at the end of the marriage: in determining the husband's prior disposition of dowry property, and then in separating the dowry from other property of both spouses that had been effectively held in common during the marriage, and in compelling the dowry's surrender.⁴³ Often at issue in these

⁴¹ Thráinn Eggertsson, *Economic Behavior and Institutions* (1990) 42-43.

⁴² Ulpian (33 *ad Ed.*), 24.3.24 pr.-2, with Scaevola (*lib. sing. Quaest. Publice Tract.*), D. 24.3.65

⁴³ Max Kaser, *Das Römische Privatrecht* vol. I (1971) 336-341. This issue is considerably complicated by the husband's right to retain portions of the dowry on a variety of grounds, including support of children who remain with him (note that this reverses the familiar modern presumption) or because the wife's immorality has caused the di-

retrospective disputes was whether the husband's conduct matched what was expected of him. However, for simplicity's sake, problems with the return of dowry itself will largely be ignored in what follows.

5. Legal Regulation of the Husband's Conduct

I have now teed up what will be, for the remainder of this paper, the central economic issue. Granted two things: that Roman dowry represented an agency relationship with respect to dowry property, and that this relationship was also of public importance because it was considered important to foster marriage as a public institution. (In other words, this is not like an ordinary private contract for, e.g., the sale of a horse.) From an economic perspective, how should the law relating to dowry then best be devised? I will not even attempt to answer this question, but instead I want to examine a number of different ways that the basic problem manifested itself in Roman law, as a basis for further discussion. These ways can be divided into two general types: 1) rules of law that directly prescribe how husbands are expected to handle dowry property; and 2) general contractual rules that instead allow the parties to set up their own rules through prenuptial negotiation, and thus require parties to observe and protect their own interests. This section deals with the first of these forms of regulation.

1. Standards of Care. As a general rule, the jurists impose on husband's a fairly high standard of care for dowry property. They deploy a standardized vocabulary which needs explanation. Roman law has two basic objective standards for establishing liability: *dolus* (literally, "deceit"), meaning, in this case, deliberate damage to dowry property; and *culpa* (literally, "fault"), meaning usually carelessness, failure to observe the standards of an upright person (*bonus* or *diligens paterfamilias*; roughly, a reasonable person in Common Law) in handling the property. Both these are required of the husband:

Paul (7 *ad Sab.*), D. 23.3.17 pr.: "As to dowry property, the husband should be responsible for both his deliberate misconduct (*dolus*) and his fault (*culpa*), since he received the dowry for his own benefit; but he will also be responsible for the (level of) carefulness (*diligentia*) that he exercises for his own property."

In accord with a more general Roman legal principle, the extent of imposed liability is correlated with the degree of the property holder's interest. Since the husband draws direct benefit from the dowry, he is held to a fairly high standard of care, both *dolus* and *culpa*; but this is normally the standard associated with property in which another person – in this case, obviously his wife – is also recognized as having an interest.⁴⁴

voiced; retentions of the latter type reintroduce the element of fault into divorce, which was technically valid without regard to fault. See, e.g., Ulpian, *Tituli* 6.9-17.

⁴⁴ See also Paul (8 *Resp.*), D. 23.3.72.1, and *Scholia Sinaitica* 31 (both restricting liability to only *dolus* and *culpa*). In other areas of law, Roman law knows still higher standards of care: safekeeping (*custodia*), in which the holder of property assumes liability for any property loss except what is caused by *vis maior* (roughly, Acts of God); and strict

However, at least in this text, Paul presses further, imposing a curious subjective standard, called *diligentia*, that requires the husband also to exercise care that is at least commensurate with that he uses for his own property; i.e., he must treat the dowry property as he treats his own. This standard actually ratchets up the degree of care required, since property owners are generally presumed to show great care with respect to their own property; but, as Ulpian states in another fragment,⁴⁵ the husband is not excused if, in fact, he is less than careful in treating his own property, since “a brutality that is blameworthy as to his own property must be curbed as to that of others, that is, the dowry.” Here Ulpian simply presupposes the wife’s interest in the dowry property during the marriage.

The full extent of the husband’s liability for *culpa* is unknown, but one remarkable ruling has been much discussed in this regard.⁴⁶ It is reported, apparently with approval, by a jurist writing ca. 100 CE, but the actual ruling was made around 120 BCE, after the violent suppression of Gaius Gracchus and his followers in 121. Gaius had been married to a woman named Licinia, whose “dowry property had perished during the uprising in which Gracchus was killed”; i.e., apparently the Senatorial mob that put down the “uprising” (*seditio*) had in the process destroyed it. Licinia sued for compensation, and the jurist – not coincidentally, a political enemy of Gracchus – holds that “Licinia should be compensated because Gracchus was at fault (*culpa*) for the uprising. This holding suggests a rather wide concept of proximate cause and duty of care.

2. Compensation for Expenses. This is the reverse of the husband’s liability for fault. At issue is whether the husband can seek compensation from his wife for expenditures on the upkeep of the dowry.

The jurists recognize three types of expenditures, which are handled differently:

- *necessary expenditures*, defined as “those where the dowry will lose value unless they are made, for example, if someone repairs a dilapidated building.”⁴⁷ If the husband fails to make these *impensae necessariae*, it counts effectively as *culpa*, and his wife is entitled to claim “the extent of her interest in these expenses being made.”⁴⁸ But if he did make them, such expenditures are held to reduce the corpus of the dowry automatically by operation of law, and thereby the amount that he is obliged to repay after the marriage ends; and this is true even if the expenditures, though reasonable, do not avert threatened damage.⁴⁹

liability for all loss. The parties could not contract away the husband’s liability for *dolus*: Ulpian (4 *ad Ed.*), D.23.4.6.

⁴⁵ Ulpian (33 *ad Ed.*), D. 24.3.24.5.

⁴⁶ Javolenus (6 *ex Post. Lab.*), D. 24.3.66 pr.

⁴⁷ Ulpian, *Tituli* 6.15; see also Ulpian/Paul, D. 25.1.1.3-3 pr. (discussed below), and Paul (6 *ad Plaut.*), D. 50.16.79 pr.

⁴⁸ Paul (36 *ad Ed.*), D. 25.1.4.

⁴⁹ Ulpian (36 *ad Ed.*), D. 25.1.5 pr, 2. Paul (6 *ad Plaut.*), D. 23.3.56.3, indicates that if such expenditures became so heavy that they exhausted the dowry corpus, the property would cease to be in the dowry if the wife failed to compensate for the expenditures within one year; but the authenticity of this text has been questioned.

- *useful expenditures* are defined as “those the husband made usefully, that improve the wife’s property”; or, a bit differently to draw out the distinction from *impensae necessariae*, “those that make the dowry better, not those that do not allow it to worsen, (i.e., those) from which return is acquired for his wife.”⁵⁰ The latter formulation is more interesting. Such *impensae utiles* would ordinarily result in an increased income stream from the property, all of which will go to the husband during the marriage; but the jurists think still in terms of the wife’s present and future interest in the dowry.⁵¹
- *luxury expenditures*, for which the husband is not compensated. Such *impensae voluptuariae* are defined as “those whereby the dowry does not deteriorate if they are forgone, nor is it made more profitable if they are made; this happens in the case of pleasure gardens, wall paintings, and the like.”⁵² If these improvements are not infixed, the husband is allowed to remove them unless the wife compensates him; but otherwise they remain with the structure.⁵³

In themselves, these categories are easily enough understood, but there is some evidence that the jurists found them difficult to apply in practice. A good example is a fragment of Paul holding that redecoration expenses on a house, if undertaken in order to make it more saleable, are not luxury but useful expenses;⁵⁴ the criterion seems to be the husband’s purpose in spending his money, a purpose that might be rather difficult to make out. Other sources also seem to hesitate on classification; for example, Ulpian (quoting an earlier jurist) counts as “necessary” bringing an abandoned olive orchard back into cultivation, or planting vines, or constructing a plant nursery; by contrast, Paul lists as “useful” expenditures on constructing a plant nursery, or adding a bakery or shop to a house, or teaching a skill to a slave.⁵⁵ It is easy to understand the confusion; long-term capital investments, in particular, may be thought of as either “necessary” to maintaining long-term property value, or as “useful” in increasing it above its current level,

These equivocations may also involve the size of a husband’s expenditures. Paul, for instance, holds that a judge, in settling a lawsuit over return of dowry, “should not bother about (the wife’s paying for) moderate expenses on constructing buildings, on replanting and cultivating vines, and on the health of slaves. Otherwise, the trial will seem to be on administration of affairs rather than on dowry.”⁵⁶ Paul’s point appears to be that the husband cannot be accurately

⁵⁰ See, respectively, Ulpian (36 *ad Sab.*), D. 25.1.5.3, and Paul (6 *ad Plaut.*), D. 50.16.79.1. Examples are discussed below. The parties could not contract around the husband’s right to compensation for necessary expenses: Paul (7 *ad Sab.*), D. 23.4.5.2.

⁵¹ Paul (6 *ad Plaut.*), D. 50.16.79.1, raises the interesting question whether the wife must be consulted about such expenditures, and indicates disagreement among jurists; this is discussed below.

⁵² Ulpian, *Tituli* 6.17. Other sources give as examples the installation of gardens, fountains, wall paneling, pictures, and baths: Paul (6 *ad Plaut.*), D. 50.16.79.2; Ulpian (5 *Reg.*), D. 25.1.14.2.

⁵³ Ulpian (36 *ad Sab.*), D. 25.1.9.

⁵⁴ Paul (36 *ad Ed.*), D. 25.1.10.

⁵⁵ Ulpian (36 *ad Sab.*), D. 25.1.1.3, 3 pr.; Paul (7 *ad Sab.*) D. 25.1.6.

⁵⁶ Paul (7 *ad Sab.*), D. 25.1.12.

described as administering the dowry on behalf of his wife, since he himself derives a profit from it and hence can be expected to contribute modest costs for its improvement.

Much greater difficulties arise when the economic interests of husband and wife conflict, as when the husband seeks short-term gain from the property, while the wife's interest in its productivity is more long-term. A larger number of Roman sources deal with this issue in the following hypothetical form: a husband opens or expands a stone quarry on farm land in the wife's dowry.⁵⁷ Initially, these sources seem contradictory, and they probably cannot be fully reconciled; but they appear to go off on a number of relevant considerations: whether already quarried stone should be regarded as part of the farm's "fruits"; the extent to which the husband can profit by extracting and selling stone from an already opened quarry; whether he can open a new quarry; is he obliged to compensate his wife if the overall value of the land is lowered by a new quarry; whether the wife must compensate him for the expenses of opening a quarry; and when extracted stone becomes the husband's, at the time of its separation from bedrock or when it is actually removed. The deeper issue is the husband's desire to make a quick profit from the farm, as against the wife's interest in maintaining the future profitability of the land. The jurists seem to be having trouble at exactly the right place, where the equities are hard to judge.

Throughout an examination of sources, an economist is likely to be interested in whether the Roman rules provided effective encouragement for the efficient exploitation of dowry property. Although the Roman rules probably reflect a more "ethical" allocation of expenditures between husband and wife, they don't seem obviously defective from an economic perspective; but whether they fully solve the underlying agency issue is harder to determine. For the most part, in any case, these are default rules that could be varied by dotal contract.

3. Consultation with the Wife. Very gradually during the Empire, statutes introduced limits on the husband's power to dispose of dowry property. The *Lex Julia de Adulteriis* of 18 BCE is one of the earliest such laws; it forbade husbands from alienating dowry land in Italy if his wife was unwilling; and the same law also prohibited a husband from manumitting dowry slave's without his wife's consent.⁵⁸ What is novel about this statute is its requirement of spousal cooperation at least for "big ticket" transactions affecting the dowry's value. This seems an ingenious way to tackle agency issues.

A bit hesitantly, the jurists took up this idea:

Paul (7 *ad Sab.*), D. 25.1.8: "Some (jurists) say that a deduction (from the dowry) should be made for useful expenses only if his wife was willing to have them made. For it

⁵⁷ See Alfenus (3 *Dig. a Paolo Epit.*), D. 23.5.8; Javolenus (6 *ex Post. Lab.*), D. 23.5.18 pr.; Pomponius (16 *ad Sab.*), D. 23.3.32; Ulpian (3 *ad Sab.*) D. 24.3.7.13-14; Paul, (7 *ad Sab.*), D. 24.3.8 pr.

⁵⁸ Selling land: Gaius, *Inst.* 2.62-63 (whether this was extended to provincial land was disputed); see also Papinian (3 *Quaest.*), D. 41.3.42 (sale in contravention of the statute was void). The husband also could not use the dowry land as security: Justinian, *Inst.* 2.8 pr., citing C. 5.13.1.15 (530 CE). Manumission: Papinian/Ulpian/Paul, D. 24.3.61-64.

is unfair that the wife be forced to sell property to pay expenses made on it if she cannot otherwise pay. This reasoning is eminently fair.”⁵⁹

As Paul makes clear, not all jurists shared this view; it may actually have been a minority opinion during the classical period in the early Empire. Ulpian, for instance, seems to hold, in the text as transmitted, that a husband could demand payment from his wife for both necessary and useful expenditures.⁶⁰

Many issues are simultaneously in play here: the desirability of the wife’s consent to any long-term improvements in her dowry property; the instability of the Roman marriage structure (high death rates and the ease of divorce), which mean that the husband may not profit from long-term improvements; the husband’s capacity to engage in embezzlement and other forms of opportunism, and the wife’s limited means to prevent such misconduct during the marriage; and the perspective of public policy on all these issues. It should matter, for instance, whether the husband’s “useful expenditures” were reasonable, and perhaps also whether they led in fact to increased income.

6. Private Ordering: The Parties’ Ability to Regulate Dowry through Dotal Contract

The parties have only limited ability to depart from default rules in constituting a dowry; However, the jurists often succeeded in relativizing these rules by introducing exceptions and finely drawn distinctions; and their frequent aim was to increase the ambit of party freedom. One illustration of this is:

Ulpian (31 *ad Sab.*), D. 23.4.4: “If it is agreed that the income (from the dowry) become part of the dowry, would the agreement be valid? Marcellus, in Digests 8, says that the agreement is invalid, since by this pact the wife seems virtually without dowry. But he made this distinction: if indeed the wife gave a farm as dowry on the condition that the husband return the income, the pact is void; and the same is true if she gave a usufruct as dowry under this pact.

“But if they had reached agreement about returning (just) the income, i.e., that whatever income he took should be in the dowry, and the farm or its usufruct was handed over not in order that the farm or usufruct become dowry, but that he would take the future income of the dowry, he can be forced by the action on dowry to return the income (to his wife when the marriage ends). Therefore the income will be in the dowry and he will enjoy the use of what can be taken from income gathered and converted into principal.

“In either case, I think it matters what the intent behind the giving of the dowry was, so that if the wife gave him a larger dowry because she wished the income to be part

⁵⁹ Similarly, Paul (6 *ad Plaut.*), D. 50.16.79.1. This view is also adopted by Justinian, C. 5.13.1.5e (530 CE).

⁶⁰ Ulpian (31 *ad Sab.*), D. 24.3.7.16; see also Javolenus (6 *ex Post. Lab.*), D. 23.5.18 pr.

of the dowry and the husband to remain content with the money collected from the interest on profits, the agreement can be regarded as valid, since it (the dowry) does not appear to be barren (i.e., without income). Suppose that he gets an annual return of 40, but that he would not receive more than 300 as dowry if this had not been agreed; certainly (*utique*) he would take it in good part to obtain such a handsome dowry.

“And what do we say if there was a pact to the effect that the husband convert the income into dowry and that the wife maintain herself and her people and pay all her own expenses? Why should you say that the agreement is invalid?”

This long fragment begins by discussing a prenuptial agreement whereby the husband will receive the dowry corpus (e.g., a farm), but agrees that any income from it will be used to enlarge the dowry; that is, he will not receive the income for himself. (Alternatively, he receives the usufruct – analogous to an estate for a term — and agrees to place the income in the dowry.) Ulpian, writing ca. 215 CE, cites Marcellus (ca. 160 CE) for the rule that such an agreement is void. The husband must receive the dowry income or the arrangement is simply, by definition, not a dowry; his wife counts as “undowered.”

But Marcellus presses on, imagining an alternative arrangement whereby the farm or the usufruct itself is not in the dowry, but the fruits, i.e., the income, is, becoming part of the principal; and the husband agrees to accept, as fruits from the dowry, the income from the income, so to speak, as it subsequently piles up. Ulpian, commenting on Marcellus, may well have been struck by the arcane nature of this alternative; but he struggles to produce an example, in which the husband rationally prefers an annual return of 40 (thousand sesterces) from the interest on the dowry’s income (which becomes part of the dowry), rather than a dowry of 300 (thousand sesterces), which, on typical Roman rates of return for prudent investments, would yield an annual income of about 15-20 thousand sesterces.

Lurking here is a legal point that Ulpian does not expressly make, but that his more sophisticated readers would undoubtedly have seen at once. On Marcellus’ analysis, the alternative arrangement involves three parts: the farm itself; the income from the farm (which forms the dowry corpus, and which must therefore often be surrendered in an action on the dowry following dissolution of the marriage); and the fruits from the invested dowry corpus (which the husband takes absolutely). But are interest is in the farm, which evidently is envisaged as not becoming part of the dowry, but remaining with the wife (or the bride-side) during the marriage – thus effectively circumventing one aspect of the agency problem at least insofar as the wife is concerned. The general point is that the wife may be willing to surrender to her husband the income from more of her property, in return for not surrendering the property itself.

The final portion of this fragment – Ulpian’s two rhetorical questions – seems tacked on, but it is not. Ulpian envisages a further twist on the alternative arrangement, in which the income from the farm accrues to the dowry (and the income on the income to the husband), in exchange for which the wife agrees to undertake her own maintenance. This, he implies, is also legally permissible.

As was discussed above, a husband had no duty to maintain his wife during marriage, but was regarded as assuming “the burdens of matrimony” – an informal duty that was not legally mandated. He was not required to use any of the proceeds of the dowry for this purpose, nor was the amount of the dowry tied to the level of his wife’s maintenance. Nonetheless, a loose association between dowry income and maintenance of his wife grew up not only in law, but also by custom. For example, Ulpian discusses a hypothetical situation in which a husband provides an annual or monthly allowance to his wife for her maintenance; Ulpian adds the caution: “any surplus will be revoked if its amount is inordinate, that is, beyond the dowry’s capacity (*supra vires dotis*).”⁶¹ The jurists cautiously accepted further extensions of this idea. Paul holds that it is also acceptable if during a marriage a husband restores to his wife the entire dowry so that she can maintain herself and her slaves, so long as she was “not the profligate type” (*non perditura*).⁶²

In this context, the argument in the following fragment becomes clearer:

Ulpian (32 *ad Sab.*), D. 24.1.21.1: “If a wife promised to her husband a dowry along with the interest on it, it must undoubtedly be held that he can claim the interest, since this is no gift because it is claimed in compensation for the burdens of marriage.

“But what if the husband remits to his wife the claim for this? The same question will arise about whether it is an impermissible gift. Julian says that it is, correctly.

“Obviously, if they had agreed that the wife support herself and her slaves, and he allowed her to use her dowry for the purpose of maintaining herself and her slaves, there will be no difficulty; for I do not think that a compensatory payment can be reclaimed from her as a gift.”

At first sight, the problem set by Ulpian seems odd. The wife has promised to her husband both a dowry corpus and the interest upon it; but the husband is seeking only the interest. Why is he not also seeking the dowry corpus, since, if he had it, the interest would come to him automatically? The likely reason is that the parties had agreed that the dowry corpus⁶³ remain with the wife during the marriage, but that the income from the dowry go to the husband. Arrangements of this sort are, in fact, described by the jurists as common and, at times, even implied by law.⁶⁴ For instance, Paul states that, in one form of these agreements, a woman promises to support herself with her own dowry, which her husband is not to claim from her while the marriage continues.⁶⁵ Such a promise does create a dowry, since, if the marriage ends through the wife’s death, the husband can then claim the dowry from her estate; however, during the mar-

⁶¹ Ulpian (32 *ad Sab.*), D. 24.1.15 pr.

⁶² Paul (2 *Sent.*), D. 23.3.73.1. Such arrangements could be very complex: see Papinian (8 *Resp.*), D. 24.1.54; Julian (2 *ad Urs. Fero.*), D. 23.4.22. On the other hand, it was a violation of the “no-gift” rule for a wife to give an allowance to her husband, and, furthermore, “inconsistent with and contrary to the nature of her sex”: Ulpian (36 *ad Sab.*), D. 24.1.33.1.

⁶³ Or a portion of the corpus: Papinian (4 *Resp.*), D. 24.3.42.2; Paul (35 *ad Ed.*), D. 23.4.12.2.

⁶⁴ Papinian (4 *Resp.*), D. 23.2.69 pr.

⁶⁵ Paul (1 *de Adult.*), D. 23.4.12.1 (a troubled text).

riage the wife keeps the dowry capital in her own hands and uses it to maintain herself, independently of her husband.

Arrangements of this type needed to be very carefully drawn in order to meet legal requirements. For example, suppose that a woman promised a dowry to her husband-to-be with the following language: “When I die, a sum of money is owed to you as a dowry.” Is such a promise valid? Julian, the great jurist writing ca. 140 CE, said yes, noting that such agreements are common. But two generations later Paul, citing several other jurists, disagrees.⁶⁶ He argues: “It is one thing to delay collection, but quite another to stipulate from the outset for (collection at) a time when the marriage will not exist.” The issue here seems to be this agreement’s outright acknowledgement that the money would not be payable unless and until the wife predeceased her husband; but if the promise had been absolute with a rider that actual collection would be delayed until after her death, that would have been enforceable. In other words, the form a dowry still mattered.

To return to Ulpian’s argument in D. 24.1.21.1, it is also clear that the parties had to observe formal rules as to income on the dowry. Even though the wife retains control of the dowry corpus during the marriage, her husband cannot simply remit to her his claim to the dowry income (the fruits) without violating the rule against spousal gifts during marriage. But if her retention of the income is formally described as intended to offset her maintenance during marriage, then the arrangement is considered acceptable.

The upshot, therefore, is that, through juristic construction and contrivance, the parties were granted considerable latitude to create an arrangement that seemed, at first and even second glance, to transgress against traditional dowry rules. Under the arrangement in D. 24.1.21.1, the wife, during the marriage, retains control both of the dowry corpus and the dowry income, exactly reversing the disposition envisaged by the normal rules of dowry; and this control, from her perspective, substantially mitigates the issues of agency for dowries. On the other hand, ironically, such solutions largely invert the agency problem, in that the dowry interests of husbands during the marriage are now somewhat poorly protected.

As a few extremely complicated juristic sources show, the jurists were not unaware of this issue. For example, in one fragment⁶⁷ Paul discusses a situation where Lucius Titius promised to Gaius Seius, his would-be son-in-law, a dowry of 100 (thousand sesterces) for Titius’ daughter; but Titius and Seius agreed that Seius would not demand payment of the dowry during Titius’ lifetime. Some time later Seius was at fault for divorcing his wife, as a result of which he was legally obliged to pay the amount of the (still uncollected) dowry to his former wife. But soon thereafter, before Seius had paid anything to his wife, Titius died, and Seius hence became entitled to collect the dowry from Titius’ estate; however, Titius’ will appointed several third parties as his heirs while disinheriting his daughter. Paul discusses several questions. First, can

⁶⁶ Paul (*lib. sing. ad Orat. Divi M. Aur. et Comm.*), D. 23.3.20 (whence Julian’s argument).

⁶⁷ Paul (5 *Quaest.*), D. 24.3.44.1. Lucius Titius and Gaius Seius are lay (John Doe) names.

Seius successfully seek the dowry from Titius' heirs; and second, what remedies does Seius' ex-wife have?⁶⁸

In another situation, a father promised a dowry and simultaneously agreed that he would support his daughter, evidently by retaining the dowry but paying her support out of it. But the father then failed to carry out his agreement as to the daughter's maintenance. Her husband, reasonably believing that his father-in-law would eventually pay for her support, lent her money to spend on necessities for herself and her slaves, and she also dipped into some household funds that had been entrusted to her. She then died. Because (by a special rule of law) the dowry came from his wife's father, the husband was unable to claim it from his father-in-law after the wife's death. But can he at least demand that his father-in-law repay the money spent on his wife's support?⁶⁹

7. Legal Regulation vs. Private Ordering

The question that now arises, one to which I do not yet have a solution, is this: Granted the two forms of legal rule-making that are observable in the case of Roman dowry, which form is generally preferable from the perspective of law and economics? Or do they somehow complement one another? If so, what is the optimal mix?

Rather than answering these questions, I want to conclude with two observations. First, although the Roman jurists, like the Romans themselves (and like most pre-modern societies), think of marriage first and foremost in terms of its property implications, Gary Becker's market orientation still seems extremely awkward here. Perhaps it is right to speak of a "marriage market" similar to other markets; but it is hard to find a point of comparison. The real estate market (for houses, say) admittedly has some of the same properties: what is usually a one-off transaction, with the buyer envisaging the "acquisition" to remain with him for a long period; hence, relatively few "repeat players," and, let us suppose, a similar set of economic problems stemming from asymmetry of information. But the marriage market is very different, since it is overlaid with rich social complexity, including, in the Roman case, alliance between the families of the spouses. The intensity with which the Romans pursued dowry negotiations is almost legendary in the sources; and it is clear that the process of negotiation is often marked not just by asymmetry of information, but by gross "asymmetry of desire," as when the proposed match is more desirable for one party than for the other – an imbalance, it should not be forgotten, that is also subject to change over time. Analyses of the Becker type don't really capture this complexity.

⁶⁸ Answer: Titius' daughter is entitled to bring an action for dowry against Seius, who can either sue the heirs for this amount (as a debt against the estate) or cede his action to his ex-wife. This outcome is not affected by the daughter being disinherited; she is entitled to her dowry over and above her inheritance.

⁶⁹ Scaevola (1 *Resp.*), D. 15.3.20 pr., (5 *Dig.*) 15.3.21 (the same case). The answer is yes.

Second, in this paper I have treated Roman law as largely static during the three centuries of the early Roman Empire. This treatment is not uncommon in Roman legal history, but, at least with respect to dowry law, it may overlook some deeper underlying changes in the law. Most of our sources date from what is called the Late Classical Period, running roughly from 150 to 235 CE. But these sources, if examined critically, appear as the culmination of two parallel trends. First, the jurists, invoking the wife's present and future interest in her dowry, tend to impose gradually increasing responsibilities on her husband in caring for the dowry, and even to shrink, in some respects, his ability to deal with dowry property as he wishes. Obviously, this would make his holding of a dowry somewhat less desirable to him. At the same time, however, the jurists display great creativity in devising methods to circumvent the traditional mandatory rules for dowry, and thereby to accord the parties greater freedom in devising dowries on a more individualized basis. (This is a more general phenomenon, not confined to the example examined above.) It seems reasonable to suppose, for instance, that a husband, faced with considerable constraints on his dealings with the dowry, would more readily acquiesce in an arrangement whereby the agency problem was avoided through allowing the dowry corpus and income to remain with his wife during the marriage; and this might be so even though a new agency problem is immediately created, in which his wife manages the dowry also for him.

These two considerations provide some help in approaching the issue of "institutional environment," conventionally defined as "the framework in which human action takes place."⁷⁰ In the scholarship of New Institutional Economics, there is sometimes a tendency to treat legal rules and institutions as exogenous and somewhat arbitrary givens. So, for instance, in the following passage from Douglass North:⁷¹

Institutions reduce uncertainty by providing a structure to everyday life. ... In the jargon of the economist, institutions define and limit the set of choices of individuals. Institutional constraints include both what individuals are prohibited from doing and, sometimes, under what conditions some individuals are permitted to undertake certain activities. ... They are perfectly analogous to the rules of the game in a competitive team sport.

This view, it seems to me, may have led economics to marginalize law as an active part of the on-going economy. As Peter Klein observes,⁷²

[U]nlike the 'legal centralism' tradition, which holds that disputes are primarily settled by the courts as official agents of the state, NIE often focuses on private solutions, holding that 'in many instances the participants can devise more satisfactory solutions to their disputes than can professionals constrained to apply general rules on the basis of limited knowledge of the dispute ...

⁷⁰ Peter G. Klein, "New Institutional Economics," 458.

⁷¹ Douglass C. North, *Institutions, Institutional Change and Economic Performance* (1990) 3-4.

⁷² Peter G. Klein, "New Institutional Economics," 459, citing Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law," *Journal of Legal Pluralism* 19 (1981) 1-47, at 4.

Under many circumstances, this observation (which adheres to NIE's general doctrinal preference for strict methodological individualism) leads to interesting and important results, especially for early societies that often solved agency problems through kinship or other close social ties. An outstanding example is Avner Greif's famous study showing how eleventh-century Jewish traders in the Mediterranean enforced codes of conduct by maintaining close social relationships, using the threat of ostracism as a disciplinary device.⁷³ Even in modern economies, NIE points to studies like R.C. Ellickson's of informal solutions to disputes between cattle ranchers and farmers in Shasta County, California, for the proposition that "Law solves the problem of cooperation by altering the payoff structure in each game; relationships solve the problem by repeating the game. In Shasta County, where both solutions are available, relationships prevail over law."⁷⁴

I certainly do not wish to derogate the accuracy and importance of scholarship along these lines. However, my strong sense is that such arguments may be erroneous, or at any rate misleading, if they tend to reduce law and litigation to backup mechanisms for resolving disputes that cannot be resolved privately. At least in legal systems such as Rome's, where (so I believe) there is both a modest but measurable degree of responsiveness by law-finders to smaller demands upon the law and some effort to adjust legal rules that prove to be ineffective or even counterproductive, the boundary between "law" and "relationships" may itself be the subject of continuous negotiation, and, for many portions of the economy, such negotiation may involve a modicum of implicit economic analysis. This theory, if it is correct, is particularly likely to have observable consequences in institutions, such as dowry, where the Roman jurists were, as a result of their high social position, especially well-informed about the general nature of the underlying agency problems and the available legal alternatives for handling them. Whether their solutions were always optimal is, of course, quite another question.

⁷³ Avner Greif, "Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders," *Journal of Economic History* 49 (1989) 857-882.

⁷⁴ Ronald D. Cooter, "Against Legal Centralism," *California Law Review* 81 (1993) 417-429, at 423, drawing on R.C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991).