

**CHI MING CHOICES**  
**ARTICLE 36: A COASEAN ANALOGUE**



*There are two dilemmas that  
rattle the human skull; how do you  
hang on to someone who won't stay?  
And how do you get rid of someone  
who won't go?*

—Danny DeVito,  
*War of the Roses*

At first blush, the constitutionalization of a state policy on the family appears innocuous: just another one of those hortatory norms that have become part of the Filipino myth-system. So when the Constitution declares that “[t]he State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution,”<sup>2</sup> one would expect near-unanimous approval, except from those who would avoid sanctifying the family to the level of the religious or those who would deny, from a normative position, the recognition of the family as a basic unit of community. But the Filipino family is, in fact, the dominant and fundamental form of social organization in the Islands. And this isn’t really saying much. Even when Article XV starts talking about the family as the foundation of the nation and vows to strengthen its solidarity and actively promote its total development,<sup>3</sup> such fighting words still do not constitute an out and out call for constitutional combat. The constitutional sleight of hand appears somewhere else. It is when the Constitution declares marriage as an inviolable

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<sup>2</sup> CONST. art. II, §12.

<sup>3</sup> CONST. art. XV, §1.

institution, the foundation of the family, and subject to protection by the State<sup>4</sup> that the overweening politicization of a social organization begins.

Let's start with the obvious: one does not need to get married to establish a family. Marriage is, after all, simply a legal institution. By this, I do not mean that marriage is a trivial legal artifact. It isn't. What I mean is that marriage is one of those projects of the legal system that seeks to order social organizations through control of micro units like the family. I therefore take it as presumptuous of the Constitution to hold marriage--the template--as the foundation of family, for marriage is, at best, either symbolic or confirmatory: it is the symbol of a bond between two desiring bodies (and by desiring I'm simply referring to the will of these bodies to associate) or the confirmation of such desire (for whatever purpose this desire to associate may be deployed).<sup>5</sup> It is no controversy to say that people could get married for any reason that suits them, so long as they comply with the formal and substantial requirements of the statute.<sup>6</sup> People get married for love, sex, children, companionship, money, god, country, meaning, fulfillment, the heck of it, out of sheer boredom or, perhaps, even spite. They do.

The point I'm driving at is that for the Constitution to conflate marriage with the family is a fallacy—it's a non sequitur. The family is not about marriage, which is but the form that legalizes the relationship. The institution of marriage is not indispensable to having a social organization such as the family, functional or not, although such an institution might arguably be a feasible ground for regulating property relations. Indeed, the most significant parts of the Family Code are those that affect the configuration of the property regime between the spouses.<sup>7</sup> The line about marriage being the foundation of the family is a normative masquerading as a descriptive; in the guise of an Is, it actually operates as an Ought—it is not a description, but a policy.

At some level, however, those who see legalized marriage itself as a problematic regulatory institution would have to concede that marriage is here to stay, at least for quite a while. The smaller project, therefore, is to theorize certain aspects of the institution to show that, even under the assumption that legalized marriage is acceptable, society does not have to accept hook, line, and sinker all the accessory regulations that presently go with it. It is possible to lessen the invasive

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<sup>4</sup> CONST. art. XV, §2.

<sup>5</sup> I diverge from doctrine here. A commentator on the Civil Code enumerates the characteristics of marriage as a legal institution: (1) it is *civil* in character, because it is established by the State independently of its religious aspect; (2) it is an institution of *public order or policy*, governed by rules established by law which cannot be made inoperative by the stipulation of the parties; (3) it is an institution of *natural* character, because one of its objects is the satisfaction of the intimate sentiments and needs of human beings for the organic perpetuation of man. ARTURO M. TOLENTINO, THE CIVIL CODE OF THE PHILIPPINES: COMMENTARIES AND JURISPRUDENCE (1987) VOL.I, 222-223.

<sup>6</sup> See FAMILY CODE, art. 3-4

<sup>7</sup> See FAMILY CODE, art. 74-148

impact of legalized marriage by looking at how some of its aspects counter the very goals sought to be achieved through the institutionalization of marriage.

My aim in this paper is to study ‘exit mechanisms’ to marriage under the Family Code. By exit mechanisms, I refer to those parts of the law on marriage that regulate the various ways by which the legalized aspects of the relationship may be severed by the contracting parties. More specifically, my focus will be on the intersection between statutory text and judicial legislation in the area of those marriages that are null and void on the basis of the ‘psychological incapacity’ of one of the contracting parties. Under Article 36 of the Family Code, psychological incapacity refers to the inability of one of the contracting parties to perform any of the essential marital obligations. Article 36 is a unique piece of legislation not only because of its late appearance in our system of family regulations, but also—and more importantly—because the interpretation given to it by the Supreme Court has produced a veritable sub-culture of divorce which, while allowing contracting parties to marriage a relief generally denied by the legislature, simultaneously produces corrosive effects on the judiciary as well as the legal and medical professions.

To explain the foregoing thesis, I will employ a law and economics approach. From this perspective, both Article 36 and the various decisions of the Supreme Court shall be viewed *ex-ante*, as legislative pieces that produce an incentive mechanism affecting the behavior of legal actors and social institutions alike.<sup>8</sup> As ‘rational actors’ seeking to maximize utility that may be gained from taking advantage of rules and decisions, especially in a legal regime generally viewed as tainted with high levels of rent-seeking, party litigants have been incentivized by Article 36 jurisprudence into creating a divorce sub-culture in the Philippines. Although progressives might see this result positively, I caution that this divorce sub-culture is not without cost. In fact, the social cost just might be too high in comparison to what society could get by simply relaxing, at the level of both statutes and jurisprudence, exit mechanisms to marriage.

The first part of this paper discusses the existing jurisprudence and rules created by the Supreme Court fashioned around a conservative interpretation of Article 36. I argue that the way the Court shaped Article 36 has produced a crisis of jurisprudence, with the rules tied to a rigid conceptualism that can never work given the inherent difficulty in clarifying the term psychological incapacity. The second part explains Coase’s Theorem, the idea from which I draw my analysis of Article 36 as the machine that drives the present institutional practices around which the law evolves. The third part focuses on the ‘costs of Article 36’ by applying the Coasean analogue to the interpretation of the rules on psychological incapacity, and argues that regardless of the rules, decisions among certain spouses will tend

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<sup>8</sup> For a general introduction, see RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* (2001); KENNETH G. DAU-SCHMIDT & THOMAS S. ULEN, *LAW AND ECONOMICS ANTHOLOGY* (1998).

towards a regime that mimics private, cooperative bargaining. The fourth part analyzes the effect of the present rules on institutions and institutional actors in a country where rent-seeking is a dominant policy concern.

## I. THE PSYCHOLOGY OF THE INCAPACITATED

### A. SIGNIFIER WITHOUT A SIGNIFIED

The original proposal of the Civil Code Revision Committee of the University of the Philippines Law Center<sup>9</sup> for what now stands as Article 36 of the Family Code was as follows—

Those marriages contracted by any party who, at the time of the celebration, was wanting in the sufficient use of reason or judgment to understand the essential nature of marriage or was psychologically or mentally incapacitated to discharge the essential marital obligations, even if such lack or incapacity is made manifest after the celebration.<sup>10</sup>

It appears that this text was a compromise between the CCRC's original intention of proposing a no-fault divorce regime<sup>11</sup> and the demands of pragmatism. Considering what it believed to be the traditional Christian concept of Filipino marriage as a permanent, inviolable, and indissoluble social institution upon which the family and society are founded, and also realizing the strong opposition that any provision on absolute divorce would encounter from the Catholic church and the some conservative groups in the country, the CCRC decided against the idea of an absolute divorce and instead opted for an action for judicial declaration of invalidity of marriage based on grounds available under Canon law.<sup>12</sup> The overarching policy embedded in Article 36, according to Justice Romero, was "to add another ground to those already listed in the Civil Code as ground for nullifying a marriage, thus

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<sup>9</sup> Hereinafter CCRC.

<sup>10</sup> Separate Opinion of Justice Flerida Ruth-Romero who was a member of both the Family Law Revision Committee of the Integrated Bar of the Philippines and the Civil Code Revision Committee of the University of the Philippines Law Center. *Santos v. Court of Appeals*, 240 SCRA 20 (1995), at 38; hereinafter SANTOS.

<sup>11</sup> "During its early meetings, the Family Law Committee had thought of including a chapter on absolute divorce in the draft of a new Family Code (Book I of the Civil Code) that it had been tasked by the IBP and the UP Law Center to prepare. In fact, some members of the Committee were (sic) in prepare. In fact, some members of the Committee were in favor of a no-fault divorce between the spouses after a number of years of separation, legal or *de-facto*." SANTOS, at 39. This is a quote from a letter dated April 15, 1985 of then Judge Alicia V. Sempio-Diy written on behalf of the Family Law and Civil Code Revision Committee to then Assemblywoman Mercedes Cojuangco-Teodoro regarding the background of the inclusion of Art. 36 in the Family Code.

<sup>12</sup> SANTOS, at 40.

expanding or liberalizing the same. Inherent in the inclusion of the provision on psychological incapacity was the understanding that every petition for declaration of nullity based on it should be treated on a case-to-case basis; hence, the absence of a definition and an enumeration of what constitutes psychological incapacity. Moreover, the Committee feared that the giving of examples would limit the applicability of the provision under the principle of *ejusdem generis*.<sup>13</sup> The importance of these animating policy considerations on Article 36 cannot be overemphasized as they are the very policies that have produced the problems associated with the present divorce culture we now experience.

The Court elaborated on this in the case of *Santos v. Court of Appeals*.<sup>14</sup> Here, an army lieutenant was married to a nurse who decided to pursue her profession in the United States. The issue was whether the refusal of the wife to return home, or at the very least communicate with him, for more than five years were circumstances indicative of psychological incapacity under Article 36. The Court, through Justice Vitug, a devout Catholic, said no. At the core of the Court's reasoning was the fact that the Family Code did not define the term psychologically incapacitated.<sup>15</sup> It went on to cite the tortuous discussion of the CCRC regarding the difficulty associated with any precise definition of the term—

Judge Diy raised the question: Since “insanity” is also psychological or mental incapacity, why is “insanity” only a ground for annulment and not for declaration of nullity? (In reply, Justice Caguioa explained that in insanity, there is the appearance of consent, which is the reason why it is a ground for voidable marriages, while [psychological incapacity] does not refer to consent but to the very essence of marital obligations); (Justice Reyes pointed out that the problem is: Why is “insanity” a ground for voidable marriage, while “psychological or mental incapacity” is a ground for void ab initio marriages? In reply, Justice Caguioa explained that insanity is curable and there are lucid intervals, while psychological incapacity is not.); (Prof. Romero opined that psychological incapacity is still insanity of a lesser degree. Justice Luciano suggested that they invite a psychiatrist, who is the expert on this matter, Justice Caguioa, however, reiterated that psychological incapacity is not a defect in the mind but in the understanding of the consequences of marriage, and therefore, a psychiatrist will not be a help.); (Justice Diy suggested that they also include mental and physical incapacities, which are lesser in degree than psychological incapacity. Justice Caguioa explained that mental and physical incapacities are vices of consent while psychological incapacity is not a species of vice of consent).<sup>16</sup>

In an attempt to contain the meaning of the text, Vitug held that psychological incapacity “should refer to no less than a mental (not physical) incapacity that causes a party to be truly incognitive of the basic marital covenants that concomitantly must be assumed and discharged by the parties to the marriage

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<sup>13</sup> *Id.*, at 41.

<sup>14</sup> *Supra* note 10.

<sup>15</sup> *Id.*, at 26.

<sup>16</sup> *Id.*, at 26-30.

which, as so expressed by Art. 68 of the Family Code, include their mutual obligations to live together, observe love, respect and fidelity and render help and support. There is hardly any doubt that the intendment of the law has been to confine the meaning of ‘psychological incapacity’ to the most serious cases of personality disorders clearly demonstrative of an utter insensitivity or inability to give meaning and significance to the marriage. This psychologic condition must exist at the time the marriage is celebrated. The law does not evidently envision, upon the other hand, an inability of the spouse to have sexual relations with the other.”<sup>17</sup>

To be sure, this description did not in any way provide a meaningful standard for a lower court judge to follow. But linguistic precision was not what the Court was aiming for; rather, it was the tone of the declaration that hinted: in case of any doubt, dismiss; better yet, just dismiss. A lower court faced with an Article 36 petition is thus directed to impose the highest threshold possible by granting only those that involved ‘the most serious cases of personality disorders’ where there is ‘an utter insensitivity or inability to give meaning and significance to the marriage.’ In reality, this was not a standard, but a command to deny all nullification petitions.

Recognizing that despite Vitug’s formulation in Santos ‘still many judges and lawyers find difficulty in applying [Art.36] in specific cases,’<sup>18</sup> the Court in Republic v. Court of Appeals,<sup>19</sup> through Justice Panganiban, another devout Catholic, decided to legislate by way of the following guidelines<sup>20</sup>—

(1) The burden of proof to show the nullity of the marriage belongs to the plaintiff. Any doubt should be resolved in favor of the existence and continuation of the marriage and against its dissolution and nullity....

(2) The root cause of the psychological incapacity must be: (a) medically or clinically identified, (b) alleged in the complaint, (c) sufficiently proven by experts and (d) clearly explained in the decision. Article 36 of the Family Code requires that the incapacity must be psychological—not physical, although its manifestations and/or symptoms may be physical....

(3) The incapacity must be proven to be existing at the “time of the celebration” of the marriage....The manifestation of the illness need not be perceivable at such time, but the illness itself must have attached at such moment, or prior thereto.

(4) Such incapacity must also be shown to be medically or clinically permanent or incurable. Such incurability may be absolute or even relative

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<sup>17</sup> *Id.* at 34.

<sup>18</sup> 268 SCRA 198 (1997).

<sup>19</sup> *Id.*, at 201. Hereinafter MOLINA.

<sup>20</sup> Hereinafter *Molina Rules*.

only in regard to the other spouse, not necessarily absolutely against everyone of the same sex. Furthermore, such incapacity must be relevant to the assumption of marriage obligations, not necessarily to those not related to marriage....

(5) Such illness must be grave enough to bring about the disability of the party to assume the essential obligations of marriage....

(6) The essential marital obligations must be those embraced by Articles 68 to 71 of the Family Code as regards the husband and wife as well as Articles 220, 221, and 225 of the same Code in regard to parents and their children....

(7) Interpretations given by the National Appellate Matrimonial Tribunal of the Catholic Church in the Philippines, while not controlling or decisive, should be given great respect by our courts....

(8) The trial court must order the prosecuting attorney or fiscal and the Solicitor General to appear as counsel for the state. No decision shall be handed down unless the Solicitor General issues a certification, which will be quoted in the decision, briefly stating therein his reasons for his agreement or opposition, as the case may be, to the petition....<sup>21</sup>

The Court has been highly consistent in enforcing this conservative policy, refusing to find psychological incapacity in habitual alcoholism and abandonment,<sup>22</sup> failure to provide material support and physical abuse,<sup>23</sup> immaturity and lack of intention (sic) of procreative sexuality,<sup>24</sup> blatant display of sexual infidelity,<sup>25</sup> self-centeredness.<sup>26</sup> In fact, no petition other than those in *Chi Ming Tsoi v. Court of Appeals*<sup>27</sup> and *Antonio v. Reyes*<sup>28</sup> has ever been granted by the Supreme Court.

What these cases clearly indicate is that the term psychological incapacity is a signifier without a signified—a term without a concept—that this ‘serious psychological illness...so grave and so permanent as to deprive one of awareness of the duties and responsibility of the matrimonial bond’<sup>29</sup> is an empty description of a nebulous idea. The term is not only open-textured; it is also, and more importantly, deliberately made to be so. Both the CCRC and the Supreme Court know that something amounts to a justification for annihilating the marital tie, but neither

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<sup>21</sup> *Supra* note 20, at 209-213.

<sup>22</sup> *Hernandez v. Court of Appeals*, 320 SCRA 76 (1999); *Pesca v. Pesca*, 356 SCRA 588 (2001); *Republic v. Quintero-Homano*, 428 SCRA 735 (2004); *Republic v. Iyoy*, 470 SCRA 508 (2005).

<sup>23</sup> *Marcos v. Marcos*, 343 SCRA 755 (2000); *Republic v. Dagdag*, 351 SCRA 425 (2001).

<sup>24</sup> *Choa v. Choa*, 392 SCRA 641 (2002).

<sup>25</sup> *Dedel v. Court of Appeals*, 421 SCRA 461 (2004).

<sup>26</sup> *Villalon v. Villalon*, 475 SCRA 572 (2005).

<sup>27</sup> 266 SCRA 324 (1997).

<sup>28</sup> G.R. No.155800, 10 March 2006.

<sup>29</sup> *Marcos v. Marcos*, *supra* fn. 23, at 765.

really know what. In this sense, the compound test of ‘gravity, incurability, and juridical antecedence’ is to psychological incapacity as ‘prurient interest’ is to pornography in free speech cases.<sup>30</sup>

## B. THE CRISIS OF JURISPRUDENCE

A large part of the reason for this is that there really is no such thing as psychological incapacity. As is evident from the records of the proceedings of the CCRC, the phrase is an invention necessitated by the concurrence of a clear intention to liberalize the rules on exit with the fear that such an intention might run counter to the expectations of what was perceived to be a conservative Filipino culture and a reactionary Catholic church. The result is a relief that a lot of people need, but is frustratingly difficult to implement and therefore equally difficult to obtain.

For certain medical conditions that serve as qualifying characteristics (insanity, death, disability) for a legal status (an insane person’s marriage is voidable, declaration of legal death results in the opening of the decedent’s succession, disability within the ambit of law entitles one to welfare compensation), there are relatively clear or, at least, manageable standards for determining the existence of that medical condition. At the same time, the existence of such standards also furnishes a basis for a possible challenge to medical/legal findings. What this implies is that legal contests about the meaning of such terms as insanity, death, disability are relatively constrained because they can be given substance by the sciences to which they are related. The expertise provided by science thus provides a certain level of determinacy to technical concepts as they are reduced to the level of facts. This note assumes greater importance for lower court proceedings that are highly fact-dependent. Moreover, such standards provide judges a measure of anchor for whatever conclusions they may draw from established evidence. Finally, it provides appellate courts a similar basis for determining whether to affirm or reverse in case of an appeal from the lower court’s judgment.

This interpretive constraint is absent in the use of the term ‘psychological incapacity’ because it does not correspond to any known medical condition—there is no established disease or medical condition called psychological incapacity. As should be apparent by now, even the Court’s decisions on the matter are

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<sup>30</sup> Justice Potter Stewart, speaking about hardcore pornography in *Jacobellis v. Ohio*, 378 U.S. 184 (1964) famously stated, ‘I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*, and the motion picture involved in this case is not that.’ (emphasis added)



conflicting. In one case, it held that ‘psychological incapacity must be medically or clinically identified and proven by experts, since no psychiatrist or medical doctor testified as to the alleged psychological incapacity.’<sup>31</sup> In another, it held that the Molina Rules do not require examination by a physician to be declared psychologically incapacitated; the requirement ‘is the presence of evidence that can adequately establish the party’s psychological condition.’<sup>32</sup>

Therefore, a judge hearing an Article 36 petition is confronted by a mix of contradictory signals from the Court. It is worth mentioning that this problem is not the usual one associated with indeterminacy (the lack of clear precedent or the malleability of texts); this indeterminacy is intentional and, as I will show, this crisis of jurisprudence significantly affects how party litigants manipulate the rules in order to extract favorable results.

### C. PROCEDURAL GLITCHES

On 15 March 2003, the Supreme Court promulgated A.M. No.02-11-10-SC (Rule On Declaration of Absolute Nullity of Void Marriages and Annulment of Voidable Marriages), section 2(d) of which provides—

What to allege.—A petition under Article 36 of the Family Code shall specifically allege the complete facts showing that either or both parties were psychologically incapacitated from complying with the essential marital obligations of marriage at the time of the celebration of marriage even if such incapacity becomes manifest only after its celebration.

The complete facts should allege the physical manifestations, if any, as are indicative of psychological incapacity at the time of the celebration of the marriage but expert opinion need not be alleged.

Interestingly, Justices Vitug and Panganiban, the authors of Santos and Molina, respectively, had reservations about the new rule. Vitug qualified his vote, saying ‘it is my understanding that neither Santos nor Molina has been made irrelevant, let alone necessarily overturned by the new rules.’ Panganiban dissented and his opinion is a window to the apparent ideological tension that surrounded the drafting of the rule. What he wanted encoded in the new rule was a reiteration of

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<sup>31</sup> Republic v. Dagdag, 351 SCRA 425 (2001)

<sup>32</sup> Marcos v. Marcos, *supra* note 23, at 764.

the Molina Rules, and not simply a requirement to allege ‘the complete facts’ indicative of ‘the physical manifestations, if any.’<sup>33</sup>

The second procedural change had to do with the role of the public prosecutor and the Solicitor General in nullification petitions. The Molina Rules require the active participation of the Solicitor General, either directly or through a public prosecutor. The additional requirement of the issuance of a certification from the Solicitor General as to her opposition or agreement to the petition, which certification is also required to appear in the judge’s decision, served as a check on the Solicitor General in case of an appeal. The new rules decentralized the power of the Solicitor General through several mechanisms: (1) participation at the outset is now given to the public prosecutor<sup>34</sup>; (2) it leaves to the judge the determination

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<sup>33</sup> ‘First, how can the facts be termed complete, if the plaintiff is not required to state the root cause of the claimed psychological incapacity? Be it remembered that psychological incapacity is a mental, not a physical ailment. Though psychological in nature, it is as much an illness as medical conditions like cancer, tuberculosis, or the common cold. I believe that a plain allegation of the psychological incapacity of one party or both parties to the marriage is insufficient, because it is a mere inference, not a statement of fact. As such, it must be supported by the plaintiff with ‘complete facts.’

... ..  
 Second, it is claimed that tracing the root cause is too scientific and burdensome a question for petitioners; hence, they need only to state the physical manifestations of the psychological malady. While I agree that such manifestations are part of the ‘complete facts,’ I respectfully submit that the root cause—or at the very least the reasons or circumstances that impelled the plaintiff to infer the presence of the psychological incapacity—should be stated with even more cogency. Requiring the allegation of ‘physical manifestations’ but not the root cause is to mistake the effect for the cause of the ailment.

... ..  
 Third, it is argued that requiring a statement of the root cause in medical or clinical terms is prejudicial to the poor who cannot afford the fees of psychiatrists or psychologists. Well I believe the proper remedy to the problem of high cost is the provision by the government of free medical or clinical services. If the State now provides free health services and even medicines to cure physical ailments, should it not also give such service for mental ailments like psychological incapacity?’

<sup>34</sup> Sec.7. Answer.—

(3) Where no answer is filed or if the answer does not tender an issue, the court shall order the public prosecutor to investigate whether collusion exists between the parties.

Sec.9. Investigation report of public prosecutor.—(1) Within one month after receipt of the court order mentioned in paragraph (3) of Section 8 above, the public prosecutor shall submit a report to the court stating whether the parties are in collusion and serve copies thereof on the parties and their respective counsels, if any.

(2) If the public prosecutor finds that collusion exists, he shall state the basis thereof in his report. The parties shall file their respective comments on the finding of collusion within ten days from receipt of a copy of the report. The court shall set the report for hearing and if convinced that the parties are in collusion, it shall dismiss the petition.

(3) If the public prosecutor reports that no collusion exists, the court shall set the case for pre-trial. It shall be the duty of the public prosecutor to appear for the State at the pre-trial.

Sec.11. Pre-trial.—

of the extent of the participation of the Solicitor General at the end of the trial<sup>35</sup>; and (3) the Solicitor General is not required to file any cautionary appeal.<sup>36</sup> In his dissent, Panganiban questioned the effectiveness of these post facto remedies—“if the OSG does not oppose the petition at the first opportunity, participate during the trial, or present contradictory evidence – or at the very least, does not cross-examine the witnesses – ‘the truth, whole truth and nothing but the truth’ may not be ferreted out.”

The final source of conflict in the drafting of the rules was with respect to what they did not require the judge to place in her decision on the petition, favorable or not. Apart from the requirement of the Family Code as to the effects of a decision to nullify a marriage, nothing in the new rules require the judge to particularize how she arrives at a finding of psychological incapacity. It must be noted that Molina itself, while reigning in the discretion of the judge, did not specifically require anything to appear in the decision other than the general constitutional requirement that she base her decision on facts and laws and include the certification from the Solicitor General. Justice Panganiban, on the other hand, would have wanted the judge to specifically detail in her decision compliance with the Molina Rules.

That Justices Vitug and Panganiban did not agree with the majority of the members of the Court in the drafting of the rules does not necessarily augur a change in the ideological stand of the Court in actual Article 36 cases. Indeed, almost three years after the effectivity of the rules, the Court has favorably acted only on one such petition, and on the ground that the respondent-wife was a

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(b) The notice shall be served separately on the parties and their respective counsels as well as on the public prosecutor. It shall be their duty to appear personally at the pre-trial.

Sec.13. Effect of failure to appear at the pre-trial.—(a) If the petitioner fails to appear personally, the case shall be dismissed unless his counsel or a duly authorized representative appears in court and proves a valid excuse for the non-appearance of the petitioner.

(b) If the respondent has filed his answer but fails to appear, the court shall proceed with the pre-trial and require the public prosecutor to investigate the non-appearance of the respondent and submit within fifteen days thereafter a report to the court stating whether his non-appearance is due to any collusion between the parties. If there is no collusion, the court shall require the public prosecutor to intervene for the State during the trial on the merits to prevent suppression or fabrication of evidence.

<sup>35</sup> Sec.18. Memoranda.—The court may require the parties and the public prosecutor, in consultation with the Office of the Solicitor General, to file their respective memoranda in support of their claims within fifteen days from the date the trial is terminated. It may require the Office of the Solicitor General to file its own memorandum if the case is of significant interest to the State....

<sup>36</sup> Sec.20.—Appeal.—

(2) Notice of appeal.—An aggrieved party or the Solicitor General may appeal from the decision by filing a Notice of Appeal within fifteen days from notice of denial of the motion for reconsideration or new trial....

pathological liar.<sup>37</sup> That Santos and Molina cases are still cited in decisions of the Court denying Article 36 petitions is a testament to the continuing validity of these precedents.

The importance of this discussion on the governing rules and interpretation of Article 36 significantly affects the operation of these regulations at the level where it really matters—the trial court. As I will show in my later discussion, it is precisely these ‘rules from above’ that influence the dynamic of the situation down below, the level mostly invisible to the Supreme Court and the legislature. In the meantime, I shall proceed to my discussion of how economic analysis could serve as a heuristic for understanding the interplay between high-level and low-level institutional actions.

## II. THE COASE THEOREM

In 1960, Ronald Coase published what is now the most cited article on law and economics, *The Problem of Social Cost*.<sup>38</sup> Ostensibly, the paper is about actions of business firms which have harmful effects on others.<sup>39</sup> In sum, the theorem can be reduced to two propositions:

First, if there are zero transaction costs, the efficient outcome will occur regardless of the choice of legal rule.

Second, if there are positive transaction costs, the efficient outcome may not occur under every legal rule. In these circumstances, the preferred legal rule is the rule that minimizes the effects of transaction costs. These effects include actually incurring transaction costs as well as the inefficient choices induced by a desire to avoid transaction costs.<sup>40</sup>

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<sup>37</sup> The menu of lies enumerated by the Court included: concealment of an illegitimate child, a reported attempt by her brother in law to rape and kill her, presenting herself as a psychiatrist, claiming she's a free-lance voice talent, having friends named Babes Santos and Via Marquez, being a person of greater means.

<sup>38</sup> 3 J.L. & Econ. 1 (1960); available at <http://www.sfu.ca/allen/CoaseJLE1960.pdf>. For easy reference, citations of this article will be from the public version of the essay, accessible at the link provided herein. Hereinafter COASE.

<sup>39</sup> *Id.*, at 1.

<sup>40</sup> MITCHELL POLINSKY, *AN INTRODUCTION TO LAW & ECONOMICS* (1989), Ch.3. An alternative proposition is that: in a world of perfect competition, perfect information, and zero transaction costs, the allocation of resources in the economy will be efficient and will be unaffected by legal rules regarding the initial impact of costs resulting from externalities. DONALD H. REGAN, *THE PROBLEM OF SOCIAL COST REVISITED*, 15 J.L. & ECON. 427 (1972).

For example,<sup>41</sup> a factory emitting soot causes damage to laundry hung outdoors by five downwind residents, amounting to 75 pesos in damages to each of them (and thus a total damage of 375 pesos). The damage can be eliminated in either of two ways: installing a smokescreen on the factory's chimney at a cost of 150 pesos, or each resident can buy an electric dryer at the cost of 50 pesos per resident. In this case, the 'wealth maximizing' solution is to install the smokescreen which only costs 150 pesos compared to the total cost of 250 pesos for the dryers. In other words, society is better off with the former solution because it is able to 'save' 100 pesos (the difference between the cost of installing smokescreen and that of buying dryers). Thus, from a detached observer's viewpoint, the efficient outcome for the community is produced by the selection of the first option.

Note, however, the efficient outcome was arrived at *in the absence of* the assignment of a liability rule. The question Coase tried to provide a solution for was whether or not the assignment of a liability rule—one that makes a party liable—could lead to the same efficient outcome. If the liability is assigned to the factory, then it has three choices: (a) to buy the right to pollute by paying 375 pesos in damages, (b) to install a smokescreen for 150 pesos, or (c) purchase the dryers for 250 pesos. The factory, being a rational maximizer—one that seeks to extract profits at lowest cost—would install the smokescreen, thereby achieving the efficient outcome arrived at by the detached observer.

On the other hand, if the liability were assigned to the residents, they would face three choices: (1) suffer 375 pesos worth of damages, as they cannot sue the factory, (2) purchase five dryers for 250 pesos, or (3) buy a smokescreen for the factory for 150 pesos. The residents, themselves being rational maximizers, will choose the cheapest alternative—install the smokescreen—and thus achieve the same efficient outcome arrived at by the detached observer *and* the example where the liability was assigned to the factory. Thus, according to Coase, the ultimate result (which maximizes the value of production) is independent of the legal regime if the pricing system is assumed to work without the cost of transacting. This set of examples explains the first rule adverted to above, the regime without transaction costs or the costs of market transactions.<sup>42</sup>

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<sup>41</sup> The example here is essentially Polinsky's, with certain amendments for clarity's sake.

<sup>42</sup> The argument has proceeded up to this point on the assumption that there were no costs involved in carrying out market transactions. This is, of course, a very unrealistic assumption. In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost. Coase, p. 7. Transaction costs are the costs of exchange. An exchange has three steps. First, an exchange partner has to be located. This involves finding someone who wants to buy what you are selling or sell what you are buying. Second, a bargain must be struck between the exchange partners. A bargain is reached by

In the presence of transaction costs, the efficient outcome might not necessarily be reached. Thus, following Polinsky's example, suppose that this time around the residents have to incur individual costs amounting to 60 pesos for the value of meeting as a group to deal with the problem associated with the activities of the factory. This amount would cover the costs of time, effort, and, say, transportation needed to actually organize the meeting. If the liability were assigned to the factory, the efficient outcome (buying the 150-peso smokescreen) would be arrived at because it would not have to incur transaction costs which pertain only to the collective action of the residents.

A different result would be reached if the liability were assigned to the residents. If they decide to do nothing and simply bear the damage to them, they would each incur a cost of 75 pesos (totaling damages amounting to 375). If they individually bought dryers for 50 pesos, the collective cost would be 250. But, if they decided to meet together to ascertain whether they ought to buy a smokescreen instead (and actually decide to do so), they would have to incur, per person, an extra 60 pesos for the cost of transacting in addition to the 30 pesos contribution of each and every member for the purchase of the smokescreen. In the last instance the total cost would be 300 pesos (the cost of transacting) plus 150 pesos (the cost of the smokescreen), totaling 450 pesos. As rational maximizers, the residents would choose to buy individual dryers (for a total cost of 250 pesos) because it constitutes, in this situation, the cheapest alternative. Thus, there is a divergence between the rational choice (from the perspective of the individual residents) and the efficient or wealth maximizing choice. Viewed as a matter of social cost, the choice of the residents to incur 250 pesos worth of dryers is inefficient compared to the choice of the factory to spend 150 pesos worth of smokescreen.<sup>43</sup>

This is where the second portion of the Polinsky formulation of Coase's Theorem comes in. Although the simple version of the theorem makes an unrealistic assumption about transaction costs, it provides a useful way to begin thinking about legal problems because it suggests the kinds of transactions that would have to occur under each legal rule in order for that rule to be efficient.<sup>44</sup>

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successful negotiation, which may include the drafting of an agreement. Third, after a bargain has been reached, it must be enforced. Enforcement involves monitoring performance of the parties and punishing violations of the agreement. We may call the three forms of transaction costs corresponding to these three steps of an exchange: (1) search costs, (2) bargaining costs, and (3) enforcement costs. ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* (2004), at 91-92. (Hereinafter COOTER & ULEN)

<sup>43</sup> Of course, there is that important issue, apart from allocative efficiency, of the question of justice in assigning the liability to the residents considering that the factory 'seems' to be the party at fault here. The question of changes in income distribution, which is irrelevant from the point of view of Coase's Theorem, is in fact the main critique of the invention. But, as I will show later, this controversial aspect of the theorem is actually irrelevant for purposes of this Article. I am, therefore, able to have my cake and eat it, too.

<sup>44</sup> *Supra* note 38, at 14.

More importantly, the theorem places a higher value on cooperative action between economic agents engaged in bargaining than on a knee-jerk reaction to engage in government intervention. In a sense, the highlighting of transaction costs as an impediment to efficient allocation of resources is actually a pitch for the adoption of rules that lower transaction costs in order to mimic the first part of the Polinsky formulation.

### III. THE COSTS OF ARTICLE 36

It is possible to analogize a marital relationship as a binding transaction between two economic agents, both of whom are trying to maximize their utility from the marriage while at the same time retaining their individuality. Whereas economic agents enter and exit transactions based on perceived economic utility, people enter and exit marriage based on some Benthamite felicific calculus, a traditionally non-quantifiable measure of personal happiness. As I will later show, the incentive mechanism generated by Article 36 and the accompanying Molina Rules can actually quantify, at least to some extent, this level of personal happiness. For the present, however, my task is to show why a married couple, troubled by a claim of psychological incapacity on the part of one of the parties, actually fits the Coasean exemplar.

#### A. *CHI MING TSOI* AS A NUISANCE

Because *Chi Ming Tsoi* is the most significant case to date in which the Supreme Court sustained a claim of psychological incapacity on the part of one of the contracting parties, it may be likened to an instance where the actions of the party suffering from psychological incapacity cause a felicity reduction on the part of the other party. His<sup>45</sup> actions, therefore, amount to what economists refer as a negative externality.<sup>46</sup> Because of the damage caused by this externality, the ‘victim’ can be expected to react in such a way as to lessen or eliminate the externality and thus increase her felicity.

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<sup>45</sup> I’m using the word “his” purely to allow the facts of the *Chi Ming Tsoi* case to match my example here.

<sup>46</sup> Simply put, an externality is an effect on others that is not reflected in the market price. It could be positive if beneficial or negative if it imposes a cost on others. See, COOTER & ULEN, Ch.2.

Under a free marriage system—or a system where entrance and exit to marriage is unregulated—both parties to the relationship can bargain for a mutually acceptable solution. In a case where one party is suffering from psychological incapacity (with all the attributes the Supreme Court attaches to the term—gravity, incurability, and juridical antecedence), we can expect the aggrieved party, as a rational maximizer of her own happiness, to release herself from the relationship, and thus will no longer be affected by the externality, the psychological incapacity of the husband. This indicates that, in the absence of a legal rule assigning liability to either of the parties, the situation will be resolved in a felicity-maximizing fashion. The effect of the new situation is that the husband, left alone, will end up internalizing his externality.<sup>47</sup> Thus, the wife will be better off, while the husband, being psychologically incapacitated, will be neither better nor worse off, *for purposes of marriage*. The result is akin to an economically efficient outcome, or a Kaldor-Hicks efficient result.<sup>48</sup> But if, and only if, played out in a regime without legal rules—that is, without any imposition of liability.

#### B. *CHI MING TSOI* WITH LIABILITY RULES AND COSTLESS TRANSACTION

One of the most important insights made by Coase in his paper is the reciprocal nature of problems involving externalities—

The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should B restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.<sup>49</sup>

Justice Torres asked in *Chi Ming Tsoi*, ‘who is to blame when a marriage fails?’ This query transforms Coase’s insight into a matter of the heart—or the penis, as was in Chi Ming Tsoi’s case. Because it takes two to tango, it is easy to see that the problem confronting the Court was, as in Coase’s example, reciprocal. The ‘case was instituted by the wife whose normal expectations of her marriage were frustrated by her husband’s inadequacy,’ according to the Court of Appeals.<sup>50</sup>

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<sup>47</sup> I must emphasize that I am referring to a special and grave case where one party is suffering from psychological incapacity as defined by the Supreme Court. The marital promise of companionship “in sickness and in health, for richer or for poorer,” is not covered by this situation I am analyzing.

<sup>48</sup> For an explanation of this cost-benefit analysis, See COOTER & ULEN, at 48.

<sup>49</sup> COASE, *Supra* fn. 36, at 1.

<sup>50</sup> *Supra* note 27, at 333.



There could be many reasons for Chi Ming Tsoi's inability to perform. For instance, he claimed in the trial court that 'every time he want[ed] to have sexual intercourse with his wife, she always avoided him and whenever he caress[ed] her private parts, she always removed his hands.'<sup>51</sup> Even with the size of his package, it still would have been possible for him to be intimate with his wife. To be sure, his wife *could*—and I'm not saying that she should—have opted to live a life without sex with him and remained assured of Chi Ming Tsoi's professed love for her.<sup>52</sup> But precisely because she wouldn't, the problem of the heart became a problem of the law. This final example is similar to the situations described by Coase in his article.<sup>53</sup> The question is: should Chi Ming Tsoi be allowed to remain married (and therefore harm Gina Lao Tsoi) or should Gina Lao Tsoi be allowed to leave her marriage (and therefore harm Chi Ming Tsoi)?

The task of the policymaker—legislator, executor, or judge—crafting rules related to the situation above is essentially to answer Justice Torres's earlier question; her charge is to assign liability on the basis of her answer. This policymaker must first assign the liability to the husband or to the wife. The next question is: will the assignment of liability change the felicity conditions of the parties? The answer here, consistent with Coase's analysis, is in the negative. This answer can be explained using as basis the limited test enunciated by the Court in *Chi Ming Tsoi*. According to the Court, 'the senseless and protracted refusal of one of the parties to fulfill the above marital obligation is equivalent to psychological incapacity.'<sup>54</sup>

Suppose that, consistent with the decision in *Chi Ming Tsoi*, the policymaker assigned the liability to the husband by finding him psychologically incapacitated because of his 'abnormal reluctance or unwillingness to consummate his marriage.'<sup>55</sup> This would have meant the dissolution of the marriage, leaving the

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<sup>51</sup> *Id.*, at 328.

<sup>52</sup> *Id.*, at 327.

<sup>53</sup> "I instanced in my previous article [The Federal Communications Commission, *J. Law and Econ.*, II (1959), 26-27] the case of a confectioner the noise and vibrations from whose machinery disturbed a doctor in his work. To avoid harming the doctor would inflict harm on the confectioner. The problem posed by this case was essentially whether it was worthwhile, as a result of restricting the methods of production which could be used by the confectioner to secure more doctoring at the cost of a reduced supply of confectionery products. Another example is afforded by the problem of straying cattle which destroy crops on neighboring land. If it is inevitable that some cattle will stray, an increase in the supply of meat can only be obtained at the expense of a decrease in the supply of crops. The nature of the choice is clear: meat or crops. What answer should be given is, of course, not clear unless we know the value of what is obtained as well as the value of what is sacrificed to obtain it. To give another example, Professor George J. Stigler instances the contamination of a stream. If we assume that the harmful effects of the pollution is that it kills the fish, the question to be decided is: is the value of the fish lost greater than the value of the product which the contamination of the stream makes possible. It goes without saying that the problem has to be looked at in total *and* at the margin."

<sup>54</sup> *Supra* note 27, at 333.

<sup>55</sup> *Id.*, at 331.

husband to internalize his psychological incapacity, and allowing the wife to leave the marriage (presumably leaving her better off).

On the other hand, the policymaker could choose to assign the liability to the wife by believing the statement of the husband that it was the wife who refused to 'consummate' the marriage with him. This choice would reverse the situation between the spouses, resulting in the wife being labeled 'psychologically incapacitated.' This solution tracks the result reached in the first case from the standpoint of social welfare, that is, the wife ends up internalizing her externality and the husband, released from marriage, increases his felicity.

### C. *CHI MING TSOI* WITH LIABILITY RULES AND TRANSACTION COST

From an economics perspective, government regulation has a price, equivalent to the cost of transacting with the government operating within a particular regulatory framework. In the context of marriage, Article 36 is a regulation that imposes a high economic burden on any party wishing to be relieved of its consequences. Someone filing an Article 36 petition is similar to any other person transacting with the government in order to get a lawful license, in this case, the certification of nullification of the contested marriage.

Article 36 and the Molina Rules impose on petitioners the costs of searching and paying for a lawyer, hiring a psychologist/psychiatrist, going to court and testifying, and appealing in case the trial court denies the petition. In addition, there is the associated economic and administrative burden of dissolving the conjugal property of the spouses should the petition be granted. Together, these costs serve to quantify, in pecuniary terms, the concept of felicity, which is the economic/psychological good being bought by an Article 36 petitioner. These costs are variable, depending on both the ability of a party to pay as well as the specific circumstances of each case.

The transaction costs associated with prosecuting an Article 36 petition substantially alters the net distribution of felicity, depending on the ability to pay lawyers and other fees, the skill of opposing counsel, the availability of witnesses, the aggressiveness of the Solicitor General in defending the interests of the government, and, most importantly, the temperament of the judge.

Furthermore, the economic barrier to litigating in a country with a high level of poverty (and thus minimal and mostly superficial access to justice) means that, on one hand, many of those who would have successfully been granted leave to do away with their marriage will not be able to transact with the government for such license and thus be relegated to lives of 'quiet desperation' and unhappiness.

On the other hand, those who are able to pay for litigation expenses will most likely not get what they want *if* the government regulators do their job. The Molina Rules are essentially crafted to ensure a 100% casualty rate among Article 36 petitions, as shown by the experience of litigators before the Supreme Court. Assuming that the public prosecutors, the Solicitor General, and lower court judges strictly follow the guidelines of the Supreme Court, all Article 36 petitions will be expensive, time-consuming, frustrating, and ultimately disappointing. Indeed, the Molina Rules operate as a filtering mechanism designed to select only the most egregious cases of marital irresponsibility, and even in cases, like in *Santos*, where it is difficult to envision a more notorious instance of marital irresponsibility, the Supreme Court has acted quite conservatively, preserving the marriage bond.

Procedurally, an Article 36 petitioner will have to win at least once—either at the Regional Trial Court or at the Court of Appeals—to have a fighting chance before the Supreme Court. If she loses at both the trial and appellate level, her petition for review will probably not even merit consideration as the two losses make it entirely discretionary upon the Supreme Court to accept the appeal. If the petitioner wins in the RTC and loses in the Court of Appeals, then she has a decent chance of reaching the Supreme Court. If the petitioner loses in the RTC and wins her appeal in the Court of Appeals, she has a sure audience in the Supreme Court because it will be the Solicitor General that will most likely file the appeal. But this is only about the chances of the petitioner's case being *considered* by the Supreme Court. None of this has any relation to the probability of her petition being granted which is, based on the record of the Supreme Court in such cases, close to zero.

Apart from the real economic costs inherent to litigation and most other government transactions, there is the strong element of fortuity involved in Article 36 petitions. This element of chance has less to do with the skill of the lawyers and merits of one's case than with the personal philosophy—call it 'marriage ideology'—of judges handling Article 36 cases. This variable of marriage ideology similarly applies to the Solicitor General and the public prosecutor assigned to the judge.

Judges (both trial and appellate), the Solicitor General, and the public prosecutor have considerable discretionary space in hearing, prosecuting, and appealing Article 36 cases. While discretion forms part and parcel of judging and prosecuting, the discretion of judges and prosecutors is usually constrained by the nature of the adversarial system. For example, judges need strong grounds for deciding in favor of either plaintiff or defendant; otherwise the losing party will appeal her decision, and the judge's professional reputation could be affected by a record of frequent reversals and, perhaps, even insinuations of incompetence or corruption. More significantly, because losing parties have material interests that are opposed to each other—only one can get the house, only one is the true owner of the land, etc.—they have an incentive to argue as strongly as they can to win their case. This situation of real adversity functions as a constraint on the discretion of the judge to pick and choose facts to the extent that it pushes her to decide.

The same adversarial system furnishes some guarantee that public prosecutors will take the position of adversity from that of the respondent/accused. In a trial for a criminal offense, the prosecutor's work is to present evidence that will result in the conviction of the accused. The presence of a private complainant minimally ensures that such trials will be adversarial because the private complainant herself has an interest in getting the kind of justice she thinks she deserves. Indeed, in many cases, the trial is conducted by a private prosecutor hired by the private complainant, though 'under control and supervision' of the public prosecutor. In truth, however, such arrangement means that it will be the private party doing everything to win her case, with lip service-guidance from the prosecutor participating on behalf of the state.

he situation is entirely different in the case of an Article 36 petition where *both* parties, while nominally occupying adversarial positions, have concurrent interests. As may be gleaned from the slice of Article 36 cases that have reached the Supreme Court, the overwhelming majority involves marriages that have already irreparably or substantially broken down. The petitioner who wants out is usually on the receiving end of the other spouse's irresponsibility, violence, infidelity, or immaturity. On the other hand, the respondent cannot reasonably be expected to act like a regular defendant in acting to prevent the relief sought by the petitioner. In many, if not most, cases, the respondent would be just as happy to see the marriage nullified. This strange situation does not fit snugly into the paradigm of the adversarial system, which relies on the central rig of the market system—the pursuit of competing self-interests—as the guarantee of its successful operation.

In most Article 36 petitions, the reason for the designation of parties as 'plaintiff-petitioner' and 'defendant-respondent' is not the opposition between the parties' material interests but the pragmatic desire to simply comply with the labeling mechanism under the Rules of Court: someone has to be pointed to as being psychologically incapacitated, and someone must claim the victim's status. This need to comply with the labeling system has little to do with the adversity of the parties' position with respect to relief or to whether the declaration of nullity of the marriage ought to be granted.

The implication of all this is that one cannot expect the defendant to argue against the dissolution of the marriage. In fact, one might even expect the parties to argue together for the granting of the petition, with the petitioner providing 'evidence' of psychological incapacity and the respondent providing token resistance to 'irrefutable evidence.' The only real barriers that remain are the judge, the public prosecutor, and the Solicitor General, those government regulators provided with the greatest possible leeway in acting as they see fit because of the absence of effective systemic constraints. Of course, from an ideological perspective, especially from one that favors the least possible restriction on exit rights to marriage, this presents a rather favorable situation, for any effective exit mechanism to marriage weakens the stranglehold of the state on the private affairs of its citizens. Nonetheless, there is a collateral cost to this system, one that just

might be more costly than any perceived benefit of maintaining this culture of quasi-divorce.

#### IV. TRANSACTION COSTS AND RENT-SEEKING

So far I have limited my discussion to situations where legal rules are used legitimately by the parties in an Article 36 situation. Thus, the case of *Chi Ming Tsoi* was used to analyze the operation of the Molina Rules where psychological incapacity as defined by the Supreme Court itself, however doctrinally unsound, does exist. The previous section also imagined lawyers and litigants who, more or less, followed the rules and did not explicitly use the rule to simply get what they want. This present section drops this picture of angelic legal participants and analyzes the regime created by Article 36 jurisprudence from the perspective of Holmes' 'bad man.'

The analysis that follows will make the following assumptions:

(1) That litigants, as rational maximizers of their individual felicity, will not care whether or not they break the law.<sup>56</sup> What they do care about is knowing the price they have to pay for getting what they want and determining whether it's worth it. If the risk involved in breaking the law is high (or if the probability of sanction is real), then they will follow it; otherwise, they will probably view compliance as permissive.

(2) That judges, while aware of the need to comply with the Molina Rules as a form of directive from a higher court, will themselves engage in cost-benefit analysis, that is, they will also analyze whether compliance with the Molina Rules is worth it.

(3) That the Solicitor General and the public prosecutor also care about the Molina Rules (because it is judge-made law to which they are bound as officers of the court) but would be open to case-by-case analysis of the situation, applying the same risk analysis employed by the litigants.

Legal rules entail costs; at times, they operate as the price of getting something from the biggest monopolizer of public benefits and licenses—the government. In the context of Article 36, and from the perspective of the Holmesian legal participant, the Molina Rules provide a system of incentives that

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<sup>56</sup> The standard economic explanation is that rational people are amoral or that just because they are rational does not mean that they will never violate the law. On the contrary, compliance with law is a matter of weighing the costs of non-compliance.

allow both litigants and judges an opportunity to ascertain the cost of granting or not granting the certification of nullity of marriage, regardless of whether or not the rule is violated. In short, the Molina Rules may be likened to a rent-seeking mechanism (mildly put) or an opportunity for corruption (bluntly stated). This is especially true in a country widely regarded as a haven for rent-seekers, where institutions of accountability are weak and where illegal practices are usually perceived as not necessarily incompatible with culture.<sup>57</sup>

First. The Molina Rules incentivize bogus Article 36 petitioners. Once a marriage breaks down, the parties to a marriage have the following options—

a. Stay married.—the spouses could grin and bear it, continue living together or separate informally. This option can be chosen for many reasons: an inability to afford the legal expenses in severing the marital tie; the need to keep an appearance of unity for the children's sake; the desire to sustain the myth of a family within the community. In those cases where there are not enough community property to divide in the first place or where neither of the spouses feels the need for formalizing any new relationships, this option stands as an inexpensive remedy.

b. Petition for Legal Separation.<sup>58</sup>—Contrary to what the term seems to imply, this procedure is actually a remedy for separation of properties.<sup>59</sup> That the

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<sup>57</sup> See BETRAYALS OF THE PUBLIC TRUST, SHEILA CORONEL, ED. (2000); PORK AND OTHER PERKS (CORRUPTION AND GOVERNANCE IN THE PHILIPPINES), SHEILA CORONEL, ED. (1998); RENTS, RENT-SEEKING AND ECONOMIC DEVELOPMENT (THEORY AND EVIDENCE IN ASIA), KHAN & JOMO, EDS. (2000); CORRUPTION AND GOVERNMENT (CAUSES, CONSEQUENCES, AND REFORM), SUSAN ROSE-ACKERMAN (1999).

<sup>58</sup> FAMILY CODE, art. 55. A petition for legal separation may be filed on any of the following grounds:

- (1) Repeated physical violence or grossly abusive conduct direct against the petitioner, a common child, or a child of the petitioner;
- (2) Physical violence or moral pressure to compel the petitioner to change religious or political affiliation;
- (3) Attempt of respondent to corrupt or induce the petitioner, a common child, or a child of the petitioner, to engage in prostitution, or connivance in such corruption or inducement;
- (4) Final judgment sentencing the respondent to imprisonment of more than six years, even if pardoned;
- (5) Drug addiction or habitual alcoholism of the respondent;
- (6) Lesbianism or homosexuality of the respondent;
- (7) Contracting by the respondent of a subsequent bigamous marriage, whether in the Philippines or abroad;
- (8) Sexual infidelity or perversion;
- (9) Attempt by the respondent against the life of the petitioner; or
- (10) Abandonment of petitioner by respondent without justifiable cause for more than one year.

For purposes of this Article, the term 'child' shall include a child by nature or by adoption.

<sup>59</sup> FAMILY CODE, art. 63. The decree of legal separation shall have the following effects:

spouses have the right to separate from each other, regardless of what the Family Code says, is firmly established in our jurisprudence.<sup>60</sup> The obligation to live with one's spouse is purely personal and cannot be enforced by legal process. From a practical standpoint, the impact of legal separation is on the right of one of the parties to ask for separation of properties, with a pecuniary penalty for the erring spouse. The incentive to resort to this remedy will therefore be present only in those cases where (1) fault may reasonably be established, and (2) where the community property to be dissolved is significant and the plaintiff-spouse wants to take advantage of the fault-clause to penalize the erring spouse.

c. Petition for Annulment.—Annulment is a general contractual right of exit from a contractual obligation upon the finding of a defect in consent at the time of entry into the contract.<sup>61</sup> Depending on whether the ground relied upon is defect in consent or fraud,<sup>62</sup> this procedure might affect the distribution of property

(1) The spouses shall be entitled to live separately from each other, but the marriage bonds shall not be severed;

(2) The absolute community or the conjugal partnership shall be dissolved and liquidated but the offending spouse shall have no right to any share of the net profits earned by the absolute community or the conjugal partnership, which shall be forfeited in accordance with the provisions of Article 43 (2);

(3) The custody of the minor children shall be awarded to the innocent spouse, subject to the provisions of Article 213 of this Code; and

(4) The offending spouse shall be disqualified from inheriting from the innocent spouse by intestate succession. Moreover, provisions in favor of the offending spouse made in the will of the innocent spouse shall be revoked by operation of law.

<sup>60</sup> *Arroyo v. Vasquez de Arroyo*, 42 Phil. 54 (1921).

<sup>61</sup> FAMILY CODE, art. 45. A marriage may be annulled for any of the following causes, existing at the time of the marriage:

(1) That the party in whose behalf it is sought to have the marriage annulled was eighteen years of age or over but below twenty-one, and the marriage was solemnized without the consent of the parents, guardian or person having substitute parental authority over the party, in that order, unless after attaining the age of twenty-one, such party freely cohabited with the other and both lived together as husband and wife;

(2) That either party was of unsound mind, unless such party after coming to reason, freely cohabited with the other as husband and wife;

(3) That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband and wife;

(4) That the consent of either party was obtained by force, intimidation or undue influence, unless the same having disappeared or ceased, such party thereafter freely cohabited with the other as husband and wife;

(5) That either party was physically incapable of consummating the marriage with the other, and such incapacity continues and appears to be incurable; or

(6) That either party was afflicted with a sexually-transmissible disease found to be serious and appears to be incurable.

<sup>62</sup> FAMILY CODE, art. 46. Any of the following circumstances shall constitute fraud...

(1) Non-disclosure of a previous conviction of a conviction by final judgment of the other party of a crime involving moral turpitude;

between the spouses.<sup>63</sup> Moreover, a statute of limitations applies to the cause of action for annulment of the marriage.<sup>64</sup> The incentive to resort to this kind of an action is present where (1) fault may reasonably be established, and/or (2) where the community property to be dissolved is significant and the plaintiff-spouse wants to take advantage of the fault-clause to penalize the erring spouse.

d. Petition under Article 36.—

*No-Fault.* The greatest advantage of Article 36 is that it operates as a no-fault divorce clause. As held by the Supreme Court, the nullification of marriage under this provision does not arise from willful error or deliberate misconduct. Because of this characterization, psychological incapacity may be likened to a defect in consent, as if the psychologically incapacitated spouse were incapable of acceding to a contract of marriage.

This no-fault character of Article 36 distinguishes it from a petition for legal separation or annulment, both of which are essentially fault-based. From a procedural standpoint, this distinction matters. The fault-based character of petitions for legal separation and annulment (and the pecuniary penalty that goes with a favorable judgment) assures to some extent that proceedings under these rules will be adversarial. A respondent in a petition for legal separation or annulment might not care about being labeled wife/husband-beater or an alcoholic, but s/he will probably care about losing a chunk of her/his share in the community property. This incentive mechanism does not apply to Article 36 petitioners, who potentially get nothing other than freedom from a failed marriage. Because psychological incapacity is not a fault that entitles an Article 36 petitioner to any pecuniary relief, a respondent in such a suit might actually even welcome the prospect of freedom.

In addition, the procedure for the dissolution of the community property of marriages nullified on the ground of psychological incapacity is the same as those for unions without marriage where both parties are fully capacitated.<sup>65</sup> This

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(2) Concealment by the wife of the fact that at the time of the marriage, she was pregnant by a man other than her husband;

(3) Concealment of a sexually-transmissible disease, regardless of its nature, existing at the time of the marriage; or

(4) Concealment of drug addiction, habitual alcoholism or homosexuality or lesbianism existing at the time of the marriage.

No other misrepresentation or deceit as to character, health, rank, fortune or chastity shall constitute such fraud as will give grounds for action for the annulment of marriage.

<sup>63</sup> FAMILY CODE, art. 50.

<sup>64</sup> FAMILY CODE, art. 47.

<sup>65</sup> See FAMILY CODE, art. 147. When a man and a woman who are capacitated to marry each other, live exclusively with each other as husband and wife without the benefit of marriage or under a void marriage, their wages and salaries shall be owned by them in equal shares and the property acquired by both of them through their work or industry shall be governed by the rules on co-ownership.



procedure insures the integrity of the properties of the parties coming into the marriage and generally provides for a fair disposition of the properties acquired after the marriage. As both parties will be considered 'innocent,' the likelihood of a substantial re-distribution of the properties from one party to another is quite low.

*Bogus Petitioners.* As adverted to earlier, there are incentives to filing either a petition for legal separation or annulment if fault can be established and there is property that may be taken as the prize for a successful petition. However, that these incentives are purely economic and have to be balanced with another, perhaps more powerful, incentive that usually accompanies these suits—the desire to be 'legally free.' In the case of a petition for legal separation, this relief will not be fully available and the most that a petitioner would be able to get is the right to be free from one's spouse. Thus, the right to separate carries the continuing taint of a failed marriage, for the *vinculum matrimonii* will not be severed. On the other hand, a petition for annulment holds both the prize of freedom and pecuniary penalty but comes at a very high price—the opposition of the spouse and a clear evidentiary burden of proving defect in consent.

To reiterate, these remedies are available only to those who can actually prove the existence of any of the grounds for legal separation or annulment. They will not be available to those who cannot furnish any such proof but are nevertheless living miserable lives because of their marriage. This means that all failed marriages not covered by the remedies of legal separation and annulment are technically or legally incurable, the only remedy being separation *de facto*. While this situation might be acceptable to some for pragmatic, religious, or some other reasons, it is really here that Article 36 assumes greatest significance.

For those marriages that have broken down for whatever reasons, and where the perception is mutual between the parties, the incentive to take advantage of Article 36 is highest, especially when the parties are, at the very least, contemplating the possibility of remarrying. Where the spouses agree that they ought to be legally free from each other, but unfortunately their marriage suffers *no*

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In the absence of proof to the contrary, properties acquired while they lived together shall be presumed to have been obtained by their joint efforts, work or industry, and shall be owned by them in equal shares. For purposes of this Article, a party who did not participate in the acquisition by the other party of any property shall be deemed to have contributed jointly in the acquisition thereof if the former's efforts consisted in the care and maintenance of the family and of the household.

Neither party can encumber or dispose by acts *inter vivos* of his or her share in the property acquired during cohabitation and owned in common, without the consent of the other, until after the termination of their cohabitation.

When only one of the parties to a void marriage is in good faith, the share of the party in bad faith in the co-ownership shall be forfeited in favor of their common children. In case of default of or waiver by any or all of the common children or their descendants, each vacant share shall belong to the respective surviving descendants. In the absence of descendants, such share shall belong to the innocent party. In all cases, the forfeiture shall take place upon termination of the cohabitation.

legal defect, then their best possible strategy is collusion, to band together for purposes of disbanding their foundering relationship. For purely instrumental reasons, this is not such a bad strategy, especially considering the weak enforcement of ethical rules against lawyers who collude with each other on these types of cases and the lack of public incentive to prosecute bogus Article 36 petitioners.

Indeed, even in instances where there is cause for legal separation or annulment, there is still an incentive for such spouses to go for an Article 36 petition, for a variety of reasons: first, many of the faults enumerated in the statute as grounds for legal separation or annulment conceivably fall under the vague penumbras of Article 36, thereby providing some factual basis for a finding of psychological incapacity on the part of one of the parties; second, in the case of a petition for legal separation, the right to legally separate—which need not be judicially established—does seem like a weak statutory remedy for a failed relationship; third, in cases where fault (for purposes of legal separation or annulment) may be attributed to a spouse, resort to Article 36 might be a good compromise between the parties, with the erring spouse trading the shame of being labeled psychologically incapacitated in exchange for not having to bear the pecuniary consequences of providing the ground for legal separation or annulment.

Second. Both the procedural and substantive rules on Article 36 are a virtual invitation for judges, lawyers, and doctors to engage or participate in rent-seeking, if not downright corruption.

a. Judges.—Article 36 jurisprudence is crafted in such a way as to give judges virtual monopoly over the freedom to remarry. They control the remarriage highway, with ability to restrict traffic of Article 36 petitions in almost any way they want, thereby heightening private parties' incentive to corrupt the judicial process. Several factors contribute to this fact:

The first is the inherent vagueness of Article 36. The truth is that no one really knows what 'psychological incapacity' is all about. The term is so radically indeterminate that judges, with any perversion established during trial, could easily justify granting a petition. By justify, I do not mean that her decision will be upheld by an appellate court, but that her wide discretionary space allows her to both accept a bribe and avoid the possibility of being administratively sanctioned for malicious application of the law. Thus, the judge is effectively able to hide behind her discretion to justify a partial decision.

Furthermore, bribery in an Article 36 case presents a different dynamic between the parties and the judge. In an ordinary suit, where the parties stand in positions of real adversity, a judge accepting a bribe from one of the parties is open to attack by the losing party because the loser suffers real damage as a consequence of the unfavorable decision. However, in an Article 36 suit where both parties are in collusion and might even share in the amount of the bribe to be given, the judge is in a relatively safer position. Not only can she cover her tracks through the exercise of discretion, she can also rest assured that both parties will have an

interest in not disclosing the corrupt activity. In such a case, the decision of the judge becomes akin to a regular license (say, a regular business permit) obtained by a private person in a transaction with the government, the only difference being that in addition to the 'regular cost' of transacting with the government, private parties also have to transact with the judge.

Lastly, there might not be as strong an incentive to proselytize against bribery in Article 36 cases than in other cases, considering both the public and private interest involved. In a prosecution for violation of the internal revenue code (for example, tax evasion) a private party bribing the judge so that she may be let off the hook is clearly damaging the material interest of the government in recovering taxes not paid. In the same manner, in civil suits for recovery of property, a defendant paying off the judge is bribing the magistrate to disable the plaintiff from regaining possession/ownership of her property. In cases such as these, the unjust character of the bribe is clear. But in an Article 36 petition, although a bribe is of course a violation of a penal statute, some circumstances tend to mitigate, in a moral sense, the commission of the crime: there is no private interest that is damaged because both parties actually want the same result; and neither is there damage to the material interest of the government—it is not as if the government loses money if a marriage is annulled. This dampens the moral impact of the act of bribery. The only interest of the government in this case is its desire to protect *all types of marriages*, successful or not. Only fundamentalists bent on policing other people's marriages would raise this as a matter of government concern.

b. The Solicitor General.—The source of the Solicitor General's power in Article 36 cases is her right, as the chief government counsel, to appeal. This right to appeal favorable decisions rendered either by the RTC or the Court of Appeals in nullification cases affects not only the costs of litigation but also the litigants' chances of winning. Considering the record of the Supreme Court in Article 36 cases, the Solicitor General has no real professional reason not to appeal a case that she is almost guaranteed to win. In fact, in view of the jurisprudence in this area, the Solicitor General need not even file a decent appellate brief to win such cases. The strictness of the Molina Rules itself guarantees that nearly all her appeals will be granted by the Court despite an insufficiently argued brief.

This authority is, by itself, a monopoly that could serve as a source of rent-seeking. Thus, the second task of a couple who successfully wins their case before the RTC or the Court of Appeals, legitimately or not, is to ensure that the Solicitor General will not file an appeal. What this means is that every instance of a successful Article 36 petition all over the country results from the failure of the Solicitor General to file an appeal. The unintended consequence of the Molina Rules is that it has transformed the Solicitor General into a one-person Vatican, with the power to issue dispensation to every Article 36 petitioner. Of course, it is possible, if not likely, that the decision not to file an appeal from a lower court judgment granting an Article 36 petition is the result of something other than an out and out bribe—it could be a personal plea on the part of the petitioners, a

suggestion from a lawyer known to the Solicitor General, oversight, sheer incompetence, or an unreasonably heavy caseload. This notwithstanding, the problem is still that Article 36 petitions are ultimately decided not by the judge but by the Solicitor General, and not on the basis of a fairly established system of public procedures but on something else largely invisible to scrutiny.

In any case, *if* one were to comply strictly with the extremely high standards set by the Supreme Court, no Article 36 case should be able to pass through the procedural gauntlet. And yet, it is now public knowledge that a lot of couples do get final and executory judgments nullifying their marriages on Article 36 grounds from the lower courts. This is only possible because judges, public prosecutors, and the Solicitor General were in on it, whether illicitly or not. This is a very important issue not because it raises a question of competence on the part of judges and government lawyers to follow judicial legislation but because it ought to make us worry about the *reasons* why many Article 36 petitions are granted. Lest I be misconstrued, the claim I am trying to make here is not that lower courts shouldn't grant petitions for nullification—in fact, I think all such petitions should be granted regardless of merit—but that the price society is paying to release couples from failed marriages might be too high. The truth is that no one knows exactly why judges grant petitions for nullity and why the Solicitor General does not appeal all of these decisions.

This situation is illustrated in *Tuason v. Court of Appeals*<sup>66</sup> where the marriage of the parties was declared null and void by the lower court, and which decision became final. It could very well be assumed that the Solicitor General did not find the need to appeal that decision considering that it had attained finality without any further appellate proceedings. The respondent in that case, the husband, seemed to have been initially happy with the decision of the lower court nullifying his marriage of almost twenty years, as he himself did not file any appeal within the prescribed period. Trouble seems to have started when his wife sought the dissolution of their property relations, with plea to adjudicate to her the conjugal properties.<sup>67</sup> The husband thereafter sought a petition for relief from judgment. On appeal to the Supreme Court, the Court denied the petition on the ground that the husband was given his day in court, thus following the general procedural rule against re-opening of cases. What is interesting to note, however, is that had the Solicitor General filed the appeal within the proper period, there is very little doubt that the appeal would have been successful. The bases relied upon by the trial court in granting the petition for nullification—infliction of physical injuries on the wife, the use of prohibited drugs by the husband, womanizing, failure to give support, misuse of conjugal assets<sup>68</sup>--are grounds that the Supreme Court has repeatedly rejected in Article 36 cases it has decided on the merits.

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<sup>66</sup> 256 SCRA 158 (1996)

<sup>67</sup> *Id.*, at 164.

<sup>68</sup> *Id.*, at 161.

c. Public Prosecutor.—The new rules of the Supreme Court give the public prosecutor the power to nip a nullification petition in the bud. Her job is two-fold: to participate actively in the proceedings and to determine the presence (or absence) of collusion between the parties. To some extent, therefore, her conduct during the trial exerts an indirect influence on the Solicitor General, as her participation in the proceedings furnish the latter with a discernible basis for determining whether or not to appeal a decision.

This authority of the public prosecutor to participate and possibly call out the parties for collusion and sound off the judge, the appellate court, and the Solicitor General creates a market for litigants who need to keep her from flexing her legal muscles. Litigants in Article 36 petitions rarely qualify and the aggressive participation of the public prosecutor will definitely not help their cause. It would not, therefore, be controversial to posit that every instance of a successful Article 36 petition is quite possibly an instance of prosecutorial misconduct.

d. Psychiatrists/psychologists.—Although the testimony of a psychologist/psychiatrist is not absolutely required, it actually is for purposes of rationalizing the decision of the judge to grant the petition and of the Solicitor General not to appeal. It provides a justification, albeit formal and superficial, for the exercise of their favorable discretion.

Someone with a jaded sense of economics might actually see the practice surrounding Article 36 as beneficial to the medical profession, for indeed the requirements of the Molina Rules have spawned a lucrative sub-specialization—a cash cow if you will—for psychologists/psychiatrists. The practice in trial courts is to require the testimony of an ‘expert’ who will testify on facts that might establish psychological incapacity on the part of the respondent who herself is not prevented from producing her own expert witness to testify to the contrary. Several points may be raised about this practice:

The first is that these experts are hired by the parties themselves. Legal representation for Article 36 cases through family law practitioners is actually done by way of ‘package deals’: everything is arranged by the lawyer, including contracting the expert who is guaranteed to find some basis for saying that the respondent suffers from some psychological incapacity. This practice demeans both the legal and medical profession, for obvious reasons.

Furthermore, psychological incapacity is not a disease or a medically established deficiency—it is (supposed to be) a legal category. This brings to the level of the absurd the use of ‘medical experts’ testifying on a purely legal (that is, non-medical) abstraction. There is, in fact, no such thing as an expert on psychological incapacity considering that the term was merely an invention of the CCRC. The Supreme Court has continued defining the term on an *ad hoc* basis.

A final point can be made about these experts and their relation to the problem of collusion. Not only are they not absolutely necessary (from the

perspective of the Supreme Court), they are also not required to be produced by both parties. Only the petitioner is required (as a matter of good strategy) to produce her own expert witness; there is nothing in the rules of the Supreme Court mandating the respondent to produce an expert for purposes of rebuttal. Naturally, even when the respondent produces his own version of an expert, that testimony will more than likely simply buttress the testimony of the petitioner's expert.

### V. EASING THE BOTTLENECK: A PRAGMATIC PERSPECTIVE

Let's be honest about it. Article 36 is a mess. The jurisprudence surrounding it is nothing less than blindness to the realities of married life and the institutional practice it has engendered bear the marks of pecksniffery. The Molina Rules are a compromise only corrupt public officials would enjoy. As I have tried to show, this practice of dishonesty is driven by the bottleneck created by the Court itself. The fact is that, whether the Congress or the Catholic church likes it or not, so long as 'psychological incapacity' is in the books, couples in failed marriages will buy their way out of marriage, regardless of whether they are breaking the law in the process. The marking off of the word *breaking* is intentional and meant to problematize the larger question of meaning: is the law of Article 36 the text and the Molina rules, or is it what actually happens in the trenches—in the trial courts and the public prosecutors'/Solicitor General's office? In this instance of deep divide between the positions of text and human practice, which should prevail?

Spouses in failed marriages (and who do not have any plausible Article 36 case) will not see the Molina Rules as an absolute barrier to the nullification of their legal relation but rather as an invitation to transact in order to get the good that they want from the government. Sure, in an ideal world, people will follow the rules because they *are* rules. We can proclaim, as jurists would, the existence of a moral obligation to obey valid law. But this kind of idealism is illusory, especially in the case of Article 36. Indeed, to a large extent, the formal no-divorce regime of the government is somewhat akin to the Prohibition Era during the early 20<sup>th</sup> century United States, when the United States, also for purely parentalistic reasons, made the consumption of alcohol illegal. The rule only inflated the price of the substance because it drove up the transaction costs of getting alcohol, without actually eliminating its sale. In the meantime, massive corruption between private entrepreneurs, public officers, and private individuals was a daily occurrence. The significant difference is that while the prohibition was absolute, Article 36 provides an easily manipulable legal loophole, a slight supply opening to a large demand market. One can imagine that if, during the Prohibition, an exception was made allowing those suffering from clinical depression to take alcohol, then the number of medical certifications for depression would rise significantly.

The Coasean analogue I presented in this paper presents a descriptive theory from which we can now draw a normative position, at least insofar as Article 36 cases are concerned: if the costs of transacting are not high, the legal rules will be irrelevant; whereas, if the costs of transacting are considerable, only those who can afford the transaction costs will contract. In either case, transactions will nonetheless occur, regardless of the rules. Therefore, regulators should lower the transaction costs, most of which are converted into rent profits anyway. The benefit of this heuristic is that it provides any open-minded policy maker with a different lens through which to view the reality of the situation both from bottom-up and top-down, showing how such a perspective problematizes the interplay between these arenas of policy-making. Of course, it is presumptuous to claim that only a Coasean analogue will allow a policy-maker to see how problematic Article 36 is, but it is nonetheless important to present such angle precisely because Coase's idea is such a powerful organizing principle through which Article 36 may be analyzed.

One implication of Coase's analysis is the need for clear delimitation of property rights as a condition for lowering transaction costs. The Molina Rules implementing Article 36 goes against the grain of this insight. The deliberate vagueness of what constitutes psychological incapacity effectively creates a platform for the skyrocketing transaction costs which in turn build up the problematic practices in the lower courts. I suggest some remedies through an *ad hoc* restatement of the top-level rules.

The Court can simply grant more Article 36 petitions that come its way where (1) based on the facts on record, there is clearly no more marriage to save, and (2) the reason for marital failure can be grounded on the obligations enumerated in Articles 68 to 71 of the Family Code (pertaining to the spouses) and Articles 220, 221, and 225 of the same Code (pertaining to parents and their children). These simple mechanisms provide legal participants a practical and a plausibly operational set of rules that can reasonably lessen the transaction costs associated with Article 36 cases and reduce the corrupting tendency of the Molina Rules. A quick survey of Article 36 petitions shows that the Supreme Court has dismissed many petitions where the marriage between the parties has completely broken down because of the clear refusal of one of the parties to comply with the marital obligations. For example, in the case of Santos, where the wife completely abandoned her husband for more than five years, it is utter injustice to compel the husband—or any partner for that matter—to continue to recognize a marriage treated as non-existent by his wife, despite the former's diligent efforts to make the relationship work. Clearly, the Court, consistent with the avowed intention of the CCRC, could have declared the intransigence of Leouel Santos's wife as psychological incapacity, thereby giving him a fresh slate and license to start his life anew.

Applying this two-step level of analysis to the situation of Leouel Santos, it is clear that his marriage had already broken down due to circumstances not of his own making. Furthermore, the shortcomings of his wife could be textually

grounded on the marital obligations essential to the success of the marriage. This kind of analysis has the potential to give substance and meaning to Article 36, unlike the present flat rule where the Court seems to be saying, in deliberate blissful ignorance: the lower courts can do anything they want, so long as it doesn't reach us. With the retirement of the Justices Vitug and Panganiban, it is possible to see a movement away from the Court's present judicial policy, and towards a more rational, if not pragmatic, approach to failed marriages.

The added advantage of this proposal is that it does away with the use of 'experts' in Article 36 cases, thus lowering the cost of litigation. At present, the rules promote a kind of marriage deluxe for people with money to litigate nullification petitions. This situation is unfair not only because it entrenches an economic hierarchy but also because there is no sound reason why those with material endowments should have a divorce lane while those who don't are brushed off by the system. Psychological incapacity is a term of art, not a medical condition, and so no amount of scientific expertise will qualify anyone as an expert. The use of psychiatrists/psychologist only serves to mask what really happens before the lower courts. I think that judges, as human beings, are themselves qualified to reasonably determine whether the marriage between the parties has broken down and whether the ground raised by a petitioner can be tied to the provisions on marital obligations outlined in the Family Code.

This method of using the personal obligations of the spouses in the Family Code provides legal bite to obligations which, though encoded in the statute, are generally not presently considered sources of enforceable relief, other than a possible claim for damages. Article 36, however, speaks of 'essential marital obligations,' the same obligations that make up the Molina Rules. It thus makes sense to use a spouse's failure to comply with such basic obligations as a ground for establishing psychological incapacity, minus the assistance of some expert.