

1990

Rebuttal to Malloy

Richard A. Posner

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Richard A. Posner, "Rebuttal to Malloy," 24 Valparaiso University Law Review 183 (1990).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

REBUTTAL TO MALLOY

RICHARD A. POSNER

The question I would like to leave with you is, if we took the word "moral" out of Professor Malloy's vocabulary, would he be rendered speechless? I do not think moral discourse is productive, and I do not think the fame and Nobel Prizes of Friedrich Hayek and Milton Friedman are due to their side-careers as moralists. Milton Friedman received the Nobel Prize for his work on the consumption function, in which he showed that the propensity to save does not increase as one's income rises, which was a key tenet of Keynesianism; and also for his work on monetarism, that is, on the effect of the money supply on the price level and on output. Now in addition to being a first class economic scientist, Milton Friedman is a person of strong political convictions and a great articulator of those convictions. As an advisor to Presidents, as a spokesman for the free-market philosophy, as a popularizer and advocate of a variety of political and economic principles and policies, he has relied heavily on a moral vocabulary. Friedrich Hayek also has had a dual career. His Nobel Prize is for the work that he did in the 1930s on the role of the market as a means of generating information. His somewhat counterintuitive proposition, which history has proved correct, is that a decentralized market is more efficient at generating information about the economic system than a centrally planned economy is. Now Hayek, in addition, is a polemicist, a political advocate, the author among other things of a famous historically flawed book, *The Road to Serfdom*, written right after World War II, where he predicted that England would become a totalitarian state as a consequence of its socialist policies. He predicted communist totalitarianism and history delivered Margaret Thatcher.

I do not agree that the way to start in thinking about surrogate motherhood or the Department of Housing and Urban Development is by first taking a moral stand. I think the way to look at these issues is factually; and because there is, in fact, a high degree of moral consensus among Americans on a lot of issues, often the appearance of moral controversy will dissipate if only one can find the facts.

For example, to deal with the question raised by Professor Malloy of whether women are incapable of giving informed consent to participation in surrogate motherhood arrangements because of the history of discrimination against women, why do we not look factually at what the surrogate mothers do with the money they get for surrogate motherhood? Do they use

it to buy food or medicine? Are they desperate people? Or in fact do they use it to build a wing on their house, or a garage, or send their children to private school? In fact, of course, it is the latter sort of thing, because the people on the buying side of the surrogate-motherhood market, the prospective father and his wife, do not want to deal with a poor woman. They do not trust her to deliver herself of a healthy child. The surrogate mothers like Mrs. Whitehead of the *Baby M* case are middle-class women. I think that middle-class women are capable—with some exceptions, as is true for everyone—of making rational choices with regard to procreation. But I do not want to defend surrogate motherhood here. I want simply to assert that the productive way to look at these problems is factually. Let us look at what we gain and what we lose by forbidding surrogate motherhood contracts. Perhaps we gain very little because, in fact, the law has no effect on these deals. These are victimless crimes so to speak. If there is money to be had for surrogate motherhood there will be surrogate mothers. It might be that efforts to outlaw surrogate motherhood will prove as quixotic as efforts to prohibit the drinking of alcoholic beverages. With any question you care to address—rights to medical care, rights to housing, whatever—if we are very careful to consider the cost and likely benefits of the proposed government policy, I believe that nine times out of ten most people will come to the same conclusion. The great power of wealth maximization, and of economics generally, is in clarifying the costs and the benefits of a proposed course of action, eliminating or at least reducing the element of factual uncertainty, and in that way minimizing, the area of genuine irreducible moral debate. Once we get down to that genuine irreducible element of moral debate, I do not think economics will help; nor I think, will moral philosophy. But I do not think we will have that large a residuum of the irresolvable if we attend carefully to the economics of these proposals.