



AARHUS UNIVERSITY



Coversheet

This is the accepted manuscript (post-print version) of the article.

Contentwise, the post-print version is identical to the final published version, but there may be differences in typography and layout.

How to cite this publication

Please cite the final published version:

Midtgaard, S. F., & Albertsen, A. (2021). Opt-Out to the Rescue: Organ donation and samaritan duties. *Public Health Ethics*, 14(2), 191–201. <https://doi.org/10.1093/phe/phab010>

Publication metadata

Title: Opt-Out to the Rescue: Organ donation and samaritan duties
Author(s): Søren Flinch Midtgaard, Andreas Albertsen
Journal: *Public Health Ethics*, 14(2), 191–201
DOI/Link: <https://doi.org/10.1093/phe/phab010>
Document version: Accepted manuscript (post-print)

General Rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognize and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Opt-Out to the Rescue: Organ donation and samaritan duties

Soren Flinch Midtgaard and

Andreas Albertsen

Department of Political Science, Aarhus University

aba@ps.au.dk

Article published by Public Health Ethics. [Please refer to published version.](#)

Midtgaard, S. F., & Albertsen, A. (2021). Opt-Out to the Rescue: Organ Donation and Samaritan Duties. *Public Health Ethics*, phab010.

<https://doi.org/10.1093/phe/phab010>

Abstract

Deceased organ donation is widely considered as a case of easy rescue—that is, a case in which A may bestow considerable benefits on B while incurring negligent costs herself. Yet, the policy implications of this observation remain unclear. Drawing on Christopher H. Wellman’s samaritan account of political obligations, the paper develops a case for a so-called opt-out system, i.e., a scheme in which people are defaulted into being donors. The proposal’s key idea is that we may arrange people’s options in specific ways for the sake of others.

Keywords samaritanism; opt-out; Wellman; organ donation; nudging.

I. Introduction

In recent years, several European countries, including Iceland, the Netherlands, and England, have changed their organ procurement policies for deceased donors. They have introduced the so-called opt-out donor registration policy, where donation is considered the default. Those who do not wish to donate are expected to opt-out. This policy differs from opt-in policies in which people are asked to register their wish to donate.¹ Such a policy-switch is widely considered to hold a considerable promise in terms of mitigating the undersupply of organs available for transplantation. To illustrate, the Netherlands had, while employing an opt-in system, only half as many organs available for transplantation than neighboring Belgium that has an opt-out system (EDQM/Council of Europe 2018, 8). A situation that undoubtedly contributed to the change of policy in the Netherlands.

The potential in implementing an opt-out system is corroborated by a much-cited review of the effects of alternative donor registration policies that identified four studies of sufficient quality and concluded that: ‘All four found an association between presumed consent legislation and higher

¹ In opt-in countries, it is often the case that for those who do not make a choice regarding donation their family is consulted.

organ donation' (Rithalia et al. 2009, 08). A later study by Sheperd et al., which compares 48 countries over 13 years and controls for many relevant background factors, finds a similar association (Shepherd, O'Carroll, and Ferguson 2014). A recent review of 26 studies (experimental and empirical) reached a similar conclusion (Steffel, Williams, and Tannenbaum 2019).² These analyses do not necessarily establish a causal relationship between opt-out and increased levels of donation. After all, some of the positive effects of opt-out systems may be driven by increased attention and information during the legislative process.³ But irrespectively of whether opt-out systems cause the increased donation rate or do this together with other initiatives, the studies still indicate the potential of the opt-out policy when conjoined with other reasonable measures. This policy stands a good chance of significantly increasing the supply of organs for transplantation. Hence, it might be an important contribution to meeting basic health care needs.

In describing the differences between opt-in and opt-out systems, the family's role should also be mentioned. In opt-in systems, the typical situation is that families are consulted in cases where people have not registered anything regarding organ donation.⁴ Opt-out countries are typically classified as having a soft opt-out model if they have a similar practice for those who did not actively register for or against organ donation. The alternative, referred to as hard opt-out, does not consult the family when consent is deemed to be in place. This practice is rarer. While we may expect the relatively similar role assigned to families across the two systems to diminish the difference

² This conclusion is corroborated by another recent review (Ahmad et al. 2019). For findings which point in the other direction, see (Arshad, Anderson, and Sharif 2019)

³ A thought which is supported by the fact that the Netherlands experienced a large increase in people registering their preferences regarding donation in the six months preceding the move to opt-out (cbs.nl 2020).

⁴ Often, the family is also consulted even when the deceased did in fact register a wish to donate. This, the so called family veto (M. Wilkinson and Wilkinson 2016), is a controversial practice (Albertsen 2020; D. Shaw et al. 2017; T. M. Wilkinson 2005; 2007; Zambrano 2017). In practice, a family veto can also be found in opt-out systems (Douglas and Cronin 2015).

between them, the reported differences in donation rates above are identified subject to legislation that assigns the family the indicated role.⁵

The opt-out scheme has, however, recently been the target of severe criticism. First, opt-out policies, although non-coercive, *shape* people's choices by the use of means other than rational persuasion or bypass their rational decision-making capacities (Blumenthal-Barby 2012; 2013; Glod 2015; Hanna 2015, 621–25; Hausman and Welch 2010; MacKay and Robinson 2016; Rebonato 2012; Scoccia 2019). That is, such interventions seek to use some of our biases or decision-making foibles, in this case, our status-quo bias (Camerer et al. 2003, 1224–26; MacKay and Robinson 2016, 4–5; Rebonato 2012; Sunstein and Thaler 2003; Sunstein 2014; 2015; 2016b; 2016a). Thus, they are not innocuous from the point of view of the liberal value of autonomy. For example, opt-out makes use of people's status quo bias more than alternative schemes do (MacKay and Robinson 2016).⁶ Secondly, opt-out may be seen as inferior to alternative schemes when it comes to ensuring consent (Sunstein and Thaler 2003; Sunstein 2016b).

One response to such criticism seeks to show that the policy in question is perfectly compatible with respecting people's autonomy and, at the same time, facilitates informed consent (Ben Saunders 2012).⁷ This article explores a different response.⁸ It consists of granting the importance of the autonomy concerns in question and arguing that considerations of beneficence or samaritanism *outweigh* those concerns. Specifically, opt-out is defensible, we shall argue, on samaritan grounds. Taking our cue from Christopher H. Wellman's ingenious samaritan account of

⁵ Of course our argument presented here about easy rescue may also have implications for which role the family should have. We reflect on this question towards the end of the paper.

⁶ These alternatives include 'voluntary active choice', where people are encouraged to make a choice whether or not to donate their organs (for example, by ticking a "Yes" or a "No" box). Here the default is not as obvious or transparent as in the case of 'opt-out' (or, for that matter, in 'opt-in'). Still, there is a default applicable in the case people decline to make the choice in question. Another alternative is mandatory active choice (or mandated choice), where there is no default.

⁷For debate about this view, see (De Wispelaere 2012; Den Hartogh 2011; B. Saunders 2011; T. M. Wilkinson 2011). For an interesting argument to the effect that the transparency objection or concerns about a lack of publicity regarding nudging policies can be met, see (Schmidt 2017).

⁸ In doing so we are open to the possibility that other justifications of opt-out systems may succeed.

state legitimacy and political obligations, we develop a case for the mentioned opt-out policy. This policy, we suggest, caters better than viable alternatives do to the urgent needs of those who depend on receiving a new organ; and it does so without unreasonably burdening donors.

The paper's key contribution is this. It connects the samaritan case for deceased organ donation to a certain policy or organ procurement system, to wit, opt-out. In this way, we hope to advance the literature on organ donation and easy rescues in important ways. Authors disagree or are insufficiently precise concerning the nature of the policy that may be justified if organ donation is a case of easy rescue. D. Micah Hester, for example, is non-committed regarding the exact policy-implications of a samaritan duty in the context of deceased organ donation (Hester 2006, 24). He argues that the duty is compatible with both opt-out policies and routine removal of organs (Hester 2006, 26–27). Jeremy Snyder argues that whether organ donation constitutes a case of easy rescue is more context-dependent than people usually allow for. However, he believes that under certain circumstances, the status of organ donation as an easy rescue requires the introduction of an opt-out policy (Snyder 2009). Cécile Fabre argues that there is a justice-based argument for routine removal of organs, even if the person in question objects to such a removal (Fabre 2008). P. Chouhan and H. Draper propose that a duty to rescue requires making it compulsory for people to make a choice regarding organ donation. This is supposed to take place, they argue, within an environment, where the available public information is pro-donation (Chouhan and Draper 2003). As stated, our paper aims to propose a compelling case for an opt-out scheme as the implication of considering organ donation as a case of easy rescue.

The structure of the paper is as follows. First, we highlight the features in virtue of which the case of organ donation is morally analogous to the paradigmatic case of an easy rescue (section II). Secondly, we present our central case for opt-out (section III). Finally, we conclude (section IV).

II. Samaritanism: opt-out as an easy rescue

In Peter Singer's famous example, you are to imagine yourself walking past a shallow pond where you see a child about to drown (Cullity 2004; Singer 1972; 2004; 2009). There is no one else around capable of undertaking a rescue.⁹ Rescuing the child is neither difficult nor dangerous to you. You might muddy your pants in the process, and you may be late for an appointment, but such costs are clearly insignificant compared to the costs that would materialize were you to refrain from aiding the child (i.e., the child dies). Accordingly, you have a duty to rescue the child. The principle Singer draws from the case is something like this: When it is in our power to prevent something very bad from happening, and we can exercise this power without incurring unreasonable or excessive costs to ourselves in the process, we are required to do so (Singer 1972). We take this to be a paradigmatic case of easy rescue.

We aim to bring the idea of a samaritan duty to bear on organ donation and donor registration policies.¹⁰ In doing so, we investigate whether there are relevant moral differences between the pond case and registering as a deceased organ donor. To do so, we must consider, first, the needs of those in jeopardy and the good bestowed upon them as recipients of organs, and, second, the costs to potential donors. Regarding the former, people in need of new organs are, on any reasonable account, in great peril.¹¹ In the absence of a transplant, either they die, or their health and well-being may be reduced to, or remain at, an unacceptably low level. Because of the seriousness of

⁹ If there were, Singer argues, this would not change matters fundamentally, morally speaking. For simplicity we focus on just you and the child.

¹⁰ Cf. Fabre 2006: 72-97; Gelinas 2016; Hartogh 2008, sec. 7; Hester 2006; Howard 2006; 2007; Snyder 2009. As is clear, there are important predecessors to our argument. Our argument is distinctive, though, in discussing whether samaritanism may be harnessed in support of nudging people to make the choice to donate (Gelinas' brief and illuminating essay, however, establishes important pieces of such an argument). We also believe that showing how Christopher Wellman's powerful argument for political obligation based on samaritanism may, *mutatis mutandis*, be brought to bear on the case at hand should be of interest.

¹¹ Kidneys remain the only organ, where an alternative to receiving a transplant exists – dialysis. However, comparisons between dialysis patients and those who receive a transplant reveal how the latter is preferable both in terms of mortality rate (Wolfe et al. 1999; Tonelli et al. 2011) and broader quality of life factors (Kovacs et al. 2011). For these reasons we find it reasonable to consider receiving a transplantation as a case of rescue, also for kidney transplant recipients.

the situation, the benefits that an organ transplant provides seem comparable to those bestowed on the rescued child. This is how matters stand from the point of view of the possible transplant recipient.

Secondly, consider the potential difficulties and costs incurred by the agent in aiding the transplant recipient. In the shallow pond example, it is relatively easy for the agent to conduct the rescue. Donating (or registering as a donor) seems comparable when it comes to difficulty. It requires merely signing up as a donor or refraining from opting out. This, of course, presupposes that the information about organ donation is widely available in ways also accessible to those who do not have functional literacy, do not speak the language of the majority etc.

The costs to the agent also appear reasonably low.¹² In the standard case, donating would not clash with any of the people's important values, beliefs, preferences, or projects. Organ donation is, for example, compatible with the belief systems of all major religions (Veatch and Ross 2015).

There are two crucial riders to these claims about costs and difficulties. First, we focus on cases in which the country in question has invested the resources necessary to facilitate successful transplantations. Where this is not true, one might still ask whether an individual might be obligated to try to make her organs available for transplantation, and here it is much less clear that rescues would be easy.¹³ Secondly, even though organ donation, as mentioned above, is apparently not ruled out by any major religious belief systems, some may, for personal reasons, including religious ones, be opposed to donating their organs as deceased donors. To them, donating would indeed involve considerable costs. Accordingly, samaritanism does not require that the people in question donate.

¹² For the distinction between something being difficult and something being costly, see (Cohen 2000, 238–39). In the matter at hand, we may say, for example, that signing up as a donor is easy or non-difficult in that it does not involve a complicated and challenging process. However, it might be costly if it, for example, is in tension with one's important convictions to register for deceased donation and thereby making one's organs available for transplantation. .

¹³ See (Snyder 2009, 38–42). Snyder also discusses other factors that might question the status of donation as a case of easy rescue.

Fortunately, as we shall see below, the opt-out policy, or a plausible version of this, is appropriately sensitive to such considerations.¹⁴

In addition to the factor of the needs at stake and the costs and difficulties involved for those in position to cater to the needs in question, we have to consider that the potential rescuer is confronted directly with the unfortunate person in the pond case. This means *inter alia* that compelling reasons obtain, particularly for you to intervene. In the organ donation case, the relationship between donor and victim is more tenuous. For instance, whether one dies in circumstances such that one's organs can be used for transplantation and whether there is a match with a certain susceptible recipient at the relevant time and occasion are uncertain matters. Moreover, even in the case that one turns out to be a suitable donor and is matched with an appropriate recipient, one is, of course, dead by the time this happens. This does not, of course, imply that donors can take no interest in the fact that their organs benefit a specific recipient or that the benefits that accrue to the recipient are somehow void of moral value.¹⁵ However, it does mean that the relation between the samaritan and the person benefitting from his or her act or omission is less substantial than is the relation between the child in the pond and the potential rescuer. This does not, however, go to show that the samaritan duty in question evaporates. To see this, consider a variation on the drowning child case in which the relation between potential rescuer and victim is less direct than it is in the original version. In this variation on the case, you cannot rescue the child by wading into the pond. Instead, you can only attempt to save the child by pulling one of several strings. You know that one of the strings will release a lifesaver, which will save the child. But you do not know which of the strings will do so, and there is only time to pull one. Adding this element of uncertainty, it seems, does nothing to let you off the hook. Faced with such a situation, we should, it seems clear, pull one of the strings, hoping for the best.

¹⁴ Later we also take up the problem that some might wish not to donate for reasons that seem unreasonable.

¹⁵ Cf. (T. M. Wilkinson 2011)

Another related possible disanalogy would be to suggest that the organ donor does not perform the rescue in the same way as you would do in the drowning child case. After all, the organ donor does not himself perform the rescue. The deceased donor makes the vital resource available. Does this alter the analogy in a significant way? To see why we do not believe this to be the case, consider a small variation on the case of the drowning child. Imagine that in the scenario with the strings just described, you are once again the only person who can pull one of the strings. But unlike before, doing so will not, if successful, release the lifesaver into the pond. Instead, it will be released on the shore, where another person is ready to throw it into the pond, thereby rescuing the child from drowning. Given that you have adequate knowledge regarding all of this, would you not have a duty to attempt the rescue and pull one of the strings – despite this division of labour and uncertainty about the outcome? We believe so and therefore also believe the organ donation case to be relevantly similar to the case of an easy rescue.

The upshot of this section is that the case of organ donation is arguably sufficiently analogous to the paradigmatic pond case to generate samaritan duties. The question for the next section is what this implies institutionally speaking.

III. Samaritanism and Opt-out

We have suggested that donating is, in important respects, morally analogous to our duty to undertake easy rescue, as illustrated in Singer's pond example. As already noted, even among those who agree to this, there is disagreement about what this implies for organ procurement. To make progress on this question, we connect the samaritan duty to the opt-out scheme. As announced above, we do so by drawing on Wellman's ingenious samaritan argument for political legitimacy and political obligations (Wellman 1996; 2001; 2004; Wellman and Simmons 2005).

Wellman's starting point is the observation that despite the fact that the state is the source of the important benefits of political stability – in fact, it is arguably *necessary* for ensuring such highly valuable stability – we have, as of yet, been unable to connect these benefits to the state's justification in a satisfactory way. One account that *does* forge such a connection is the paternalistic account. According to this, state coercion is justified by reference to the goods that accrue to the individuals that the state subjects to such coercion – the coercion in question is *for the sake of those* whose liberty is restricted. Yet many liberals, including Wellman, balk at such a justification. They believe that interfering in people's self-regarding matters, even if it is for their own good, is morally objectionable. It is so in that it infringes people's autonomy, disrespectfully implying that they are incapable of running their own lives (Anderson 1999; Begon 2016; Midtgaard 2016; Shiffrin 2000; Quong 2011).¹⁶

Yet, samaritanism offers an attractive nonpaternalistic path to connecting the benefits of state coercion to its justification. The state coercing those within its territorial border is not justified by reference to the benefits that accrue to the individual having his liberty restricted in this way – it is instead justified on the grounds that this exercise of coercion is necessary for ensuring political stability and the benefits of this to *others* within the same territory. Wellman's necessity claim rests on broadly Lockean grounds: 'peace would be unavailable unless we have a decisive and accepted method of enforcing common rules and adjudicating conflict' (Wellman 1996, 217).¹⁷ Now we have a duty to provide others with goods that are crucial to them or to prevent them from experiencing certain situations that would be detrimental to them and their interest if we can do so without incurring unreasonable costs to ourselves – this is where samaritanism enters the picture. Each of us has, so to

¹⁶ The indicated argument might not be problematic merely in virtue of it being paternalistic. As Wellman points out, under realistic assumptions, state coercion may not be mutually or individually beneficial, i.e. to some the costs of state coercion may outweigh the benefits (Wellman 1996, 212). For further discussion of the paternalistic argument for state legitimacy and perhaps political obligations see (Arneson 2013).

¹⁷ Cf. (Klosko 2008)

say, a duty to benefit others in the sense of rescuing them from the perils of a state of nature, and such rescue hinges upon the state subjecting each of us to its coercive apparatus. Accordingly, we do not enjoy a right not to be subjected to coercion by the state, and correlatively the state can permissibly thus coerce us, that is, the state's coercion is legitimate.¹⁸ Samaritan duties to others, as Wellman has it, 'curtail our own political liberty' (Wellman 1996, 216).¹⁹

In a parable that relates this argument clearly to samaritanism, Wellman imagines a driver A agreeing to take a hitchhiker B to a city along A's designated route. Arriving at the designated city, what meets them is a state of affairs akin to a Hobbesian state of nature. The question that now arises is whether A can permissibly unload B and drive on. After all, A has agreed to nothing beyond taking B to the city in question. A, therefore, has no consent-based obligations toward B. But A, it seems, is indeed bound by duty to transport B away from the dismal circumstances in the city in question. Why? Because B obviously faces great peril if A leaves B behind in the Hobbesian chaos. Furthermore, A bringing B along, even though A would, in fact, rather drive alone (and hence taking B involves some inconvenience to A), arguably involves costs to A of a kind that would appear to be reasonable.

Similarly, as mentioned above, each of us has a samaritan duty to assist others in escaping the perils of a Hobbesian state of nature, and the costs to each of us in doing so arguably fall within the range of the reasonable. Granted, each gets his liberty restricted in ways that would otherwise be impermissible, but in light of the benefits from political stability that accrue to each of us, the individual costs of being subjected to coercion are arguably reasonable and not excessive (Wellman and Simmons 2005). This accounts for political legitimacy, that is, for the state's right to coerce its citizens and their correlative lack of a right not to be coerced. Whether citizens are *morally*

¹⁸ Whether we have a moral obligation to obey the commands of the state, that is, whether political obligations obtain in this sense, is, as Wellman points out, a further question (Wellman 1996, 211–12, 219).

¹⁹ See also (Wellman 1996, 219 n3)

obligated to comply with the laws enforced by the state is a separate question; The state's generation of the important good of political stability does not hinge upon citizens' universal compliance with its commands. Individually, it is then unclear why we have moral obligations to obey those commands. Yet it is arguable, as Wellman points out, that everyone is, in fact, obliged in that if not, some would unfairly enjoy more discretion than others would. Samaritanism, in this way, adopts elements from the competing fairness account of political obligations(Wellman 2001).²⁰

Samaritan duties may, as Wellman plausibly suggests, ground state coercion in matters related to political stability. It is important to notice, though, as Wellman is adamant to point out that it only does so because the coercion in question is absolutely *necessary* to generate the important benefit in question or for avoiding the perils of political instability. At least to liberals, there is a strong presumption against restricting people's political liberty, meaning that if the good in question is achievable in non-coercive ways, such less restrictive options are preferable to coercive alternatives (Wellman 2001; 2001; Wellman and Simmons 2005).²¹ This is relevant in the organ donation case because, apparently, coercive measures are not needed, and hence uncalled for when it comes to meeting the demand for organs for transplantation. Affecting choice-architecture in the form of altering default-settings may, as the evidence quoted in the introduction suggests, suffice. The policy of opt-out, in particular, is promising in this respect. Yet, while non-coercive, such measures are not, as we made clear from the start, morally innocuous. In brief, shaping people's choices infringes their autonomy, where autonomy is understood along broadly Razian lines, according to which being subjected to the will of another is a paradigmatic affront to one's autonomy (Raz 1986, 148–57). However, we submit, doing so is justifiable on the basis of the very samaritan source Wellman appeals to in his account of state legitimacy. We have, as established in section II, a samaritan duty to donate

²⁰ See (Hart 1955, 190–91)

²¹ See also Dworkin, 1971. For critical discussion of Dworkin's principle of 'the least restrictive alternative', see (Conly 2014, 151–52)

our organs as deceased donors. Now, just as the state may *coerce us* because we have a duty to save others from the perils of political instability (recall Wellman's point that samaritan duties curtail our own political liberty), it may, we suggest, plausibly *nudge us* because we have a duty to assist those with organ defects (samaritanism here, we may say, circumscribes our autonomy). When we assess opt-out against the background of alternative, less efficient schemes, opt-out is necessary to ensure the great good of meeting to a significant extent the demands for organs for transplantation, in this way catering to people's important health-care needs and improving their well-being. Moreover, opt-out's virtues in this regard do not, as argued above, come at the price of imposing unreasonable demands on donors. Accordingly, adopting opt-out secures important, in some cases even vital, goods for others and does so at a reasonable price for each. Therefore, opt-out facilitates that we discharge important aspects of our samaritan duties. If we refrained from adopting opt-out, important health-care needs would go unsatisfied; needs which we could attend to at no undue costs to ourselves.

To be sure, even with opt-out in place, some people's needs for organs might still go unmet. Opt-out would plausibly not suffice to satisfy everyone's needs in this regard – perhaps no scheme would. This is not different, though, from the case of political stability and the samaritan argument for state coercion. The latter is plausibly a condition for political stability and this, we take it, establishes a compelling case for it (as long as subjecting people to state coercion does not impose undue burdens upon them). Yet even within the best system of state coercion and political stability, citizens must face some risk of having some of their rights violated by others (perhaps in some cases even by state institutions). This is true in part because a system that made no mistakes in this regard would simply be unreasonably expensive, jeopardizing other of our important values and goals. This fact, however, does arguably not serve to undermine that samaritan case for state coercion. Similarly, the fact that some people's needs for organs are not catered to even within a opt-out system does not, we submit, put in question our samaritan case for it.

The samaritan case for an opt-out system for organ procurement takes a rather broad form. It may be fleshed out in various ways while preserving consistency with the samaritan ethical foundation. For example, the non-paternalist nature of the samaritan conception means, as we have seen, emphasizing benefits to others and not to the person's whose liberty is infringed or whose autonomy is infringed by being nudged. Still, the costs to the latter are arguably limited, and part of the reason for it being so is that goods accrue also to individuals agent coerced or nudged by the scheme in question. This being so, it is both possible and plausible to regard an opt-out system for organ procurement (and for that matter state coercion) as a system of 'mutual assured benefit' in which each benefits from the scheme in question while submitting herself to similar constraints as those to which others are subject in this way making it the case that everyone benefits.²²

Opt-out justified in our preferred fashion has several virtues. For example, it is not overinclusive in the sense of enrolling people to whom donating their organs as deceased donors would be excessively costly. If it were, it would be in disaccord with the cost constraint integral to the samaritan duty. Our favoured scheme is not likely to have such problematic effects in that those to whom the costs in question appear excessive are likely to be among those who overcome the status-quo bias to stay with the default. Opt-out is not, of course, necessarily flawless in this regard: due to weakness of will and other decision-making foibles, some may not succeed in departing from the default, although donating their organs might be costly in light of some of their fundamental beliefs and values. Still, opt-out may be a good proxy in this regard, given that firmly held beliefs usually are not motivationally inert. That is, just as they play an essential role in other spheres of life for those holding them, they may be effective when it comes to avoiding activities in tension with these beliefs. For example, in some countries, including Denmark, one is in various ways defaulted into

²² We are grateful to an anonymous reviewer for asking us to clarify the relation between our favored samaritan view and other non-paternalistic accounts. In brief, we suggest that at least a subset of the latter can be subsumed under the former or may be seen as compatible with its ethical foundation.

contributing to and in other ways being associated with institutions of Christianity (for example, registration of childbirths). Now say that you hold convictions strongly at odds with Christianity or you are an agnostic and therefore find it inappropriate to be associated with certain religious institutions, it seems almost certain that you would get around to opting-out at some point. After introducing opt-out policies in Wales, around 6% opted out, suggests that people do not blindly follow whatever default they are presented with (Albertsen 2018; NHS Blood and Transplant 2018, 115). But again, some might be unattentive to their options, or they may forget to opt-out. Thus opt-out is a proxy. Yet, at least on some views, this is true of all policies or regulative principles (Cohen 2008); and for the stated reasons, opt-out does not seem to be a bad one.

What about the opposite danger of being underinclusive, that is, the problem that opt-in may fail to include people to whom donating is not, plausibly, overly costly? For example, people may opt-out for frivolous or even nefarious reasons such as racist ones (they may, for instance, opt-out to avoid any risk of their organs being given to people with a certain skin color). It is hard to say how widespread such reasons for opting-out might be. However, the evidence mentioned in the beginning suggests that this might not be much of a problem (i.e., few in fact opt-out). And even if some do for the obnoxious reasons mentioned here, this would not seem to justify an expensive system of filtering making sure that only those to whom donating is genuinely costly are allowed to opt-out (e.g., some sort of conscientious objection scheme).

The approach defended here seems to handle another potential issue, namely one related to trust, well. Ben Almassi argues that even if people have a *pro tanto* duty to donate, it may be undermined by the fact that parts of the population do not trust the health care system and can therefore have rational reasons not to donate (Almassi 2014). However, even if such fears are warranted, they do not speak against an opt-out system. Under such a system, people who do not trust, for example, that donors will receive adequate treatment, can opt-out. Some may suggest that

levels of distrust may be so high that people fear that their choice to opt-out would not be respected, and their organs removed contrary to their wishes. However, such sad circumstances do not give any reasons to prefer opt-in to opt-out, because if trust is missing, why should people trust that their decision not to opt-in would be respected?

Opt-out also avoids certain problems that mar alternative schemes. Thaler and Sunstein come down in favour of the so-called ‘mandatory active choice’ for reasons related to the misgivings about opt-out mentioned in the introduction. This involves compelling people to make an active choice between becoming a donor or not. For example, one may make citizens’ access to important goods, such as a driver’s license or a passport, conditional on making a choice with regard to their status as an organ donor. While there are reasons in favour of such a policy, it has, we believe, an considerable drawback vis-à-vis opt-out. The drawback is this. Making decisions that involve reflecting on one’s own mortality may be painful. For example, it might prompt existential anxiety; and some organ donation policies seem to be more prone than others to elicit emotions of this painful and challenging sort. To that extent, they are more problematic than others. The policy of mandatory active choice may, in this regard, seem especially problematic because it, so to say, forces people to contemplate the question that might give rise to the unpleasant emotions in questions. By contrast, opt-out in not prompting people to make any choice as such,²³ seems a lot less problematic in this regard. In a way, it allows people the sometimes considerable good, of not having to make a decision. As emphasized by, for example, Seana Valentine Shiffrin and George Tsai (Shiffrin 2000; Tsai 2014), certain of the decisions we have to make – for example, those related to our health, career options, choice of partner, etc. – require a certain space within which one is not hectored by others to make a certain decision or to make a decision at all, or where others even refrain from trying to persuade us

²³ For recent discussions of such policies, see (Sunstein 2015; 2014; Thaysen and Albertsen 2020). See also (Dworkin 1982). For important contributions to the debate over mandated choice policies and organ donation, see (Beraldo and Karpus 2021; Hansen 2012; Herz 1999; MacKay and Robinson 2016; Whyte et al. 2012).

rationality. The choice of whether or not to donate might perhaps be a decision of a kind with respect to which we should to some extent be left alone to make up our own mind, and even to be allowed to decide for ourselves whether to contemplate the issue at all. Mandatory active choice appears to run afoul of the implied constraints here. By contrast, opt-out leave us free not to think about the question, and of course, alternatively, think about it and decide to opt-out.

Finally, we would like to briefly reflect on what the above argument might mean for the role given to the family in the organ procurement system. It seems that there are several potential ways in which the argument may be relevant for the question regarding the family's appropriate role in an opt-out system. First, it could affect whether the family should have a veto in situations where we know that the deceased wanted to donate, but their family disagrees. Of course, we cannot settle the vast debate over the family veto here, but we can point to what the argument developed here, and the approach employed suggest in that regard. Concerning the family veto, little in the above would suggest that this practice follows from the samaritanian argument. As we have argued, opt-out is a good proxy for people's wishes in this regard, and it is not clear on what ground the family should be allowed to overrule those wishes. This points in the direction of the hard model mentioned in the introduction. However, completely side-tracking the family in this way may be too quick. Our framework allows that for the individual, there might be reasonable reasons to opt-out. If we, quite plausibly, assume that not all who might have such reasons get around to act on them, we should provide the family with the opportunity to correct such a mistake. While this does not amount to embracing soft opt-out (because we do not, in our view, need the family to sanction donation before it is carried out), it is also somewhat short of a hard opt-out system.²⁴

²⁴ It could also be considered whether the choice faced by the family in a soft opt-out system (and indeed in opt-in systems) is one that could be considered an easy rescue. We set this question aside here, remarking only that the choice is generally harder (and therefore more costly) for the family, if they do not know the preferences of the deceased. Opt-out, as we have suggested, provides the family and others with sufficient knowledge of the nature of these preferences, while allowing also for certain mistakes to be corrected. For the importance of correcting mistakes, see (D. M. Shaw 2016)

Conclusion

Despite their great potential for reducing suffering amongst those who need an organ transplant (a potential recognized even by most who oppose the policies in question), opt-out policies have recently been attacked for failing to respect the autonomy of potential donors. In this paper, we respond that while opt-out is indeed not innocuous from the perspective of autonomy, it is still justifiable. It is so on samaritan grounds: deceased organ donation is plausibly a case of easy rescue with low costs to the rescuing agent and large benefits at stake for others. As Wellman's plausible samaritan argument for political obligations suggests, we should accept that our liberty is restricted in certain ways if this is necessary for fulfilling our duties of beneficence towards others. Curtailing our autonomy as opt-out does is justifiable on similar grounds. That is, relative to available alternative schemes, opt-out generates considerable benefits to those who need an organ, and it does so at reasonable costs to donors.

References

- Ahmad, M. Usman, Afif Hanna, Ahmed-Zayn Mohamed, Alex Schlindwein, Caitlin Pley, Ingrid Bahner, Rahul Mhaskar, Gavin J. Pettigrew, and Tambi Jarmi. 2019. "A Systematic Review of Opt-out Versus Opt-in Consent on Deceased Organ Donation and Transplantation (2006–2016)." *World Journal of Surgery* 43 (12): 3161–71. <https://doi.org/10.1007/s00268-019-05118-4>.
- Albertsen, Andreas. 2018. "Deemed Consent: Assessing the New Opt-out Approach to Organ Procurement in Wales." *Journal of Medical Ethics* 44 (5): 314–18. <https://doi.org/10.1136/medethics-2017-104475>.
- . 2020. "Against the Family Veto in Organ Procurement: Why the Wishes of the Dead Should Prevail When the Living and the Deceased Disagree on Organ Donation." *Bioethics* 34 (3): 272–80. <https://doi.org/10.1111/bioe.12661>.
- Almassi, Ben. 2014. "Trust and the Duty of Organ Donation: Trust and the Duty of Organ Donation." *Bioethics* 28 (6): 275–83. <https://doi.org/10.1111/bioe.12096>.
- Anderson, Elizabeth S. 1999. "What Is the Point of Equality?" *Ethics* 109 (2): 287–337.
- Arneson, Richard. 2013. "Paternalism and the Principle of Fairness." *Paternalism*, 134–56.
- Arshad, Adam, Benjamin Anderson, and Adnan Sharif. 2019. "Comparison of Organ Donation and Transplantation Rates between Opt-out and Opt-in Systems." *Kidney International* 95 (6): 1453–60.
- Begon, Jessica. 2016. "Paternalism." *Analysis* 76 (3): 355–73.
- Beraldo, Sergio, and Jurgis Karpus. 2021. "Nudging to Donate Organs: Do What You like or like What We Do?" *Medicine, Health Care and Philosophy*, 1–12.
- Blumenthal-Barby, Jennifer S. 2012. "Between Reason and Coercion: Ethically Permissible Influence in Health Care and Health Policy Contexts." *Kennedy Institute of Ethics Journal* 22 (4): 345–66.
- . 2013. "Choice Architecture: Improving Choice While Preserving Liberty?"
- Camerer, Colin, Samuel Issacharoff, George Loewenstein, Ted O'donoghue, and Matthew Rabin. 2003. "Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"." *University of Pennsylvania Law Review* 151 (3): 1211–54.
- cbs.nl. 2020. "Nearly Half of Dutch Population Included in Donor Register." Webpagina. Statistics Netherlands. 2020. <https://www.cbs.nl/en-gb/news/2020/25/nearly-half-of-dutch-population-included-in-donor-register>.
- Chouhan, P, and H Draper. 2003. "Modified Mandated Choice for Organ Procurement." *Journal of Medical Ethics* 29 (3): 157–62. <https://doi.org/10.1136/jme.29.3.157>.
- Cohen, G. A. 2000. *Karl Marx's Theory of History: A Defence*. Oxford; New York: Clarendon Press ; Oxford University Press.
- . 2008. *Rescuing Justice and Equality*. Cambridge Mass.: Harvard University Press.
- Conly, Sarah. 2014. *Against Autonomy: Justifying Coercive Paternalism*. Cambridge, MA: Cambridge University Press.
- Cullity, Garrett. 2004. *The Moral Demands of Affluence*. Clarendon Press.
- De Wispelaere, Jurgen. 2012. "Tacitly Opting out of Organ Donation: Too Presumptuous after All?" *Journal of Medical Ethics* 38 (2): 73–74. <https://doi.org/10.1136/medethics-2011-100252>.
- Den Hartogh, Govert. 2011. "Can Consent Be Presumed?" *Journal of Applied Philosophy* 28 (3): 295–307. <https://doi.org/10.1111/j.1468-5930.2011.00524.x>.
- Douglas, James F., and Antonia J. Cronin. 2015. "The Human Transplantation (Wales) Act 2013: An Act of Encouragement, Not Enforcement: The Human Transplantation (Wales) Act 2013." *The Modern Law Review* 78 (2): 324–48. <https://doi.org/10.1111/1468-2230.12117>.
- Dworkin, Gerald. 1982. "Is More Choice Better than Less?" *Midwest Studies in Philosophy* 7 (1): 47–61.
- EDQM/Council of Europe. 2018. "Newsletter Transplant." Edited by Beatriz Dominguez-Gil and Rafael Matesanz. *Newsletter Transplant* 23 (1). <http://www.ont.es/publicaciones/Documents/NEWSLETTER%202016%20NIPO.pdf>.
- Fabre, Cécile. 2008. *Whose Body Is It Anyway?: Justice and the Integrity of the Person*. Oxford: Oxford University Press.

- Glod, William. 2015. "How Nudges Often Fail to Treat People According to Their Own Preferences." *Social Theory and Practice* 41 (4): 599–617.
- Hanna, Jason. 2015. "Libertarian Paternalism, Manipulation, and the Shaping of Preferences." *Social Theory and Practice*, 618–43.
- Hansen, Pelle Guldborg. 2012. "Should We Be 'Nudging' for Cadaveric Organ Donations?" *The American Journal of Bioethics* 12 (2): 46–48. <https://doi.org/10.1080/15265161.2011.634950>.
- Hart, Herbert Lionel Adolphus. 1955. "Are There Any Natural Rights?" *The Philosophical Review* 64 (2): 175–91.
- Hausman, Daniel M., and Brynn Welch. 2010. "Debate: To Nudge or Not to Nudge*." *Journal of Political Philosophy* 18 (1): 123–36. <https://doi.org/10.1111/j.1467-9760.2009.00351.x>.
- Herz, Susan E. 1999. "Two Steps to Three Choices: A New Approach to Mandated Choice." *Cambridge Quarterly of Healthcare Ethics* 8 (03): 340–47. <https://doi.org/10.1017/S0963180199803090>.
- Hester, D. Micah. 2006. "Why We Must Leave Our Organs to Others." *The American Journal of Bioethics* 6 (4): W23–28. <https://doi.org/10.1080/15265160600755839>.
- Klosko, George. 2008. *Political Obligations*. 1. publ. in paperback. Oxford: Oxford Univ. Press.
- Kovacs, A. Z., M. Z. Molnar, L. Szeifert, C. Ambrus, M. Molnar-Varga, A. Szentkiralyi, I. Muksi, and M. Novak. 2011. "Sleep Disorders, Depressive Symptoms and Health-Related Quality of Life--a Cross-Sectional Comparison between Kidney Transplant Recipients and Waitlisted Patients on Maintenance Dialysis." *Nephrology Dialysis Transplantation* 26 (3): 1058–65. <https://doi.org/10.1093/ndt/gfq476>.
- MacKay, Douglas, and Alexandra Robinson. 2016. "The Ethics of Organ Donor Registration Policies: Nudges and Respect for Autonomy." *The American Journal of Bioethics* 16 (11): 3–12. <https://doi.org/10.1080/15265161.2016.1222007>.
- Midtgaard, Søren Flinch. 2016. "Paternalism." In *Oxford Research Encyclopedia of Politics*. Oxford University Press.
- NHS Blood and Transplant. 2018. "Organ Donation and Transplantation Activity Report 2017/18." NHS Blood and Transplant. <https://nhsbt.dbe.blob.core.windows.net/umbraco-assets/1848/transplant-activity-report-2017-2018.pdf>.
- Quong, Jonathan. 2011. *Liberalism without Perfection*. Oxford University Press.
- Raz, Joseph. 1986. *The Morality of Freedom*. Clarendon Press.
- Rebonato, Riccardo. 2012. *Taking Liberties: A Critical Examination of Libertarian Paternalism*. Palgrave Macmillan.
- Rithalia, Amber, Catriona McDaid, Sara Suekarran, Lindsey Myers, and Amanda Sowden. 2009. "Impact of Presumed Consent for Organ Donation on Donation Rates: A Systematic Review." *Bmj* 338: a3162.
- Saunders, B. 2011. "Opt-out Donation and Tacit Consent: A Reply to Wilkinson and De Wispelaere." *Journal of Medical Ethics* 38 (2): 75–76. <https://doi.org/10.1136/medethics-2011-100349>.
- Saunders, Ben. 2012. "Opt-out Organ Donation without Presumptions." *Journal of Medical Ethics* 38 (2): 69–72.
- Schmidt, Andreas T. 2017. "The Power to Nudge." *American Political Science Review* 111 (2): 404–17.
- Scoccia, Danny. 2019. "Paternalisms and Nudges." *Economics & Philosophy* 35 (1): 79–102.
- Shaw, David, Denie Georgieva, Bernadette Haase, Dale Gardiner, Penney Lewis, Nichon Jansen, Tineke Wind, Undine Samuel, Maryon McDonald, and Rutger Ploeg. 2017. "Family Over Rules? An Ethical Analysis of Allowing Families to Overrule Donation Intentions." *Transplantation* 101 (3): 482–87. <https://doi.org/10.1097/TP.0000000000001536>.
- Shaw, David M. 2016. "The Consequences of Vagueness in Consent to Organ Donation: The Consequences of Vagueness in Consent to Organ Donation." *Bioethics*, December. <https://doi.org/10.1111/bioe.12335>.
- Shepherd, Lee, Ronan E O'Carroll, and Eamonn Ferguson. 2014. "An International Comparison of Deceased and Living Organ Donation/Transplant Rates in Opt-in and Opt-out Systems: A Panel Study." *BMC Medicine* 12 (1): 1–14. <https://doi.org/10.1186/s12916-014-0131-4>.
- Shiffrin, Seana Valentine. 2000. "Paternalism, Unconscionability Doctrine, and Accommodation." *Philosophy and Public Affairs* 29 (3): 205–50. <https://doi.org/10.1111/j.1088-4963.2000.00205.x>.
- Singer, Peter. 1972. "Famine, Affluence, and Morality." *Philosophy & Public Affairs*, 229–43.

- . 2004. “Outsiders: Our Obligations to Those beyond Our Borders.” *The Ethics of Assistance*, 11–32.
- . 2009. *The Life You Can Save: Acting Now to End World Poverty*. 1st ed. New York: Random House.
- Snyder, Jeremy. 2009. “Easy Rescues and Organ Transplantation.” *HEC Forum* 21 (1): 27–53. <https://doi.org/10.1007/s10730-009-9086-9>.
- Steffel, Mary, Elanor F Williams, and David Tannenbaum. 2019. “Does Changing Defaults Save Lives? Effects of Presumed Consent Organ Donation Policies.” *Behavioral Science & Policy* 5 (1): 68–88.
- Sunstein, Cass R. 2014. “Choosing Not to Choose.” *Duke LJ* 64: 1–52.
- Sunstein, Cass R. 2015. *Choosing Not to Choose: Understanding the Value of Choice*. New York, NY: Oxford University Press.
- . 2016a. “Autonomy by Default.” *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.2853750>.
- Sunstein, Cass R. 2016b. *The Ethics of Influence: Government in the Age of Behavioral Science*. Cambridge University Press.
- Sunstein, Cass R, and Richard H Thaler. 2003. “Libertarian Paternalism Is Not an Oxymoron.” *The University of Chicago Law Review*, 1159–1202.
- Thaysen, Jens Damgaard, and Andreas Albertsen. 2020. “Mandated Choice Policies: When Are They Preferable?” *Political Research Quarterly*, July, 106591292093636. <https://doi.org/10.1177/1065912920936361>.
- Tonelli, M, N Wiebe, G Knoll, A Bello, S Browne, D Jadhav, S Klarenbach, and J Gill. 2011. “Systematic Review: Kidney Transplantation Compared with Dialysis in Clinically Relevant Outcomes.” *American Journal of Transplantation* 11 (10): 2093–2109.
- Tsai, George. 2014. “Rational Persuasion as Paternalism.” *Philosophy & Public Affairs* 42 (1): 78–112.
- Veatch, Robert M., and Lainie Friedman Ross. 2015. *Transplantation Ethics*. Second edition. Washington, D.C.: Georgetown University Press.
- Wellman, Christopher Heath. 1996. “Liberalism, Samaritanism, and Political Legitimacy.” *Philosophy & Public Affairs* 25 (3): 211–37.
- . 2001. “Toward a Liberal Theory of Political Obligation.” *Ethics* 111 (4): 735–59.
- . 2004. “Political Obligation and the Particularity Requirement.” *Legal Theory* 10 (2): 97–115.
- Wellman, Christopher Heath, and John Simmons. 2005. *Is There a Duty to Obey the Law?* Cambridge University Press.
- Whyte, Kyle Powys, Evan Selinger, Arthur L. Caplan, and Jathan Sadowski. 2012. “Nudge, Nudge or Shove, Shove—The Right Way for Nudges to Increase the Supply of Donated Cadaver Organs.” *The American Journal of Bioethics* 12 (2): 32–39. <https://doi.org/10.1080/15265161.2011.634484>.
- Wilkinson, Martin, and Stephen Wilkinson. 2016. “The Donation of Human Organs.” In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Winter 2016 Edition. <https://plato.stanford.edu/archives/win2016/entries/organ-donation>.
- Wilkinson, T. M. 2005. “Individual and Family Consent to Organ and Tissue Donation: Is the Current Position Coherent?” *Journal of Medical Ethics* 31 (10): 587–90.
- . 2007. “Individual and Family Decisions About Organ Donation.” *Journal of Applied Philosophy* 24 (1): 26–40. <https://doi.org/10.1111/j.1468-5930.2007.00339.x>.
- . 2011. “Opt-out Organ Procurement and Tacit Consent.” *Journal of Medical Ethics* 38 (2): 74–75. <https://doi.org/10.1136/medethics-2011-100225>.
- Wolfe, Robert A., Valarie B. Ashby, Edgar L. Milford, Akinlolu O. Ojo, Robert E. Ettenger, Lawrence Y.C. Agodoa, Philip J. Held, and Friedrich K. Port. 1999. “Comparison of Mortality in All Patients on Dialysis, Patients on Dialysis Awaiting Transplantation, and Recipients of a First Cadaveric Transplant.” *New England Journal of Medicine* 341 (23): 1725–30. <https://doi.org/10.1056/NEJM199912023412303>.
- Zambrano, Alexander. 2017. “Patient Autonomy and the Family Veto Problem in Organ Procurement.” *Social Theory and Practice* 43 (1): 180–200.