

### 3. Nudging in Donation Policies

#### Registration and Decision-Making

---

*Douglas MacKay & Katherine Saylor*

#### 1. Introduction

Suppose you are a policymaker responsible for addressing the shortage of donated organs in your jurisdiction. What types of policies might you implement to increase the number of organs available for transplantation? You might first consider coercive measures, for example, requiring all competent adults to register as organ donors, or simply laying claim to the organs of deceased citizens, regardless of their objections or the objections of their family members. You could also introduce incentives, permitting people to sell their kidneys while alive, and perhaps also permitting the buying and selling of the organs of the deceased. Finally, you could mount an information campaign, informing people of the benefits to others of organ donation with the aim of persuading them to register as donors.

Unfortunately, each of these strategies faces significant problems. Coercive policies would limit people's liberty, preventing them from deciding not to donate their organs, for example for religious reasons or because they are skeptical of the concept of brain death. A system of incentives threatens to commodify people's bodies and exacerbate inequality between the rich and the poor. Finally, while there are no ethical objections to information campaigns, they are unlikely to move the needle on the problem at hand. If only there were a type of intervention that was more effective than an information campaign but also avoided the ethical objections to policies that employ coercion and incentives.<sup>1</sup>

Nudges would seem to fit the bill, promising to influence people's actions in predictable directions without limiting their choices – i.e. employing coercion – or significantly changing their incentives (Thaler/Sunstein 2008: 6). It is thus not surprising that scholars have strongly advocated the use of nudges to increase the number of organs available for transplantation, and that policymakers have listened, for example by implementing opt-out donor registration systems. Nudges are not without their critics though. Although nudges are respectful of people's liberty, some argue that

---

1 We recognize of course that these are not the only policy options on the table. Policymakers can no doubt increase the number of organs available for donation by reforming the processes by which potential donors are identified and assessed by organ procurement organizations.

they are not respectful of people's autonomy, instead influencing people's choices through nonrational means.

In this chapter, we provide an overview of the ethical considerations relevant to the use of nudges in organ donation policy. We do not defend a position on the permissibility of nudging in this context. Instead, we aim to clearly outline the most prominent arguments on the different sides of this issue that have been presented in the English-language scholarly bioethics literature. We also highlight the questions that are in need of further investigation.

In part 1, we briefly discuss nudging before considering proposals to use nudges to increase the number of registered organ donors, including opt-out donor registration systems and the use of 'nudge statements'. In part 2, we discuss the use of nudges to influence the decision-making of family members in circumstances where they have a veto over the donation of their loved one's organs.

## 2. Nudges and Organ Donor Registration Policy

Nudges would not be possible if people were "Econs," that is, agents with full information, unlimited cognitive abilities, a complete and consistent set of preferences, and perfect self-control (Thaler/Sunstein 2008: 6–7). But people are Humans, not Econs, and while Humans are like Econs in some respects, they are unlike them in important ways. Humans approach the world with two cognitive systems. System 1 is the Automatic System: the system of gut reactions. It is intuitive, fast, effortless, associative, unconscious, and skilled (ibid.). System 2 is the Reflective System: the system of conscious thought. It is the system Humans share with Econs and is deliberate, controlled, effortful, deductive, slow, self-aware, and rule-following (Thaler/Sunstein 2008: 20). We use System 2 to solve a math or logic problem; we use System 1 to make a snap judgment.

Since nudges influence us to act in predictable ways, they would also not be possible if System 1 were unstructured. However, System 1 biases our decision-making in consistent ways. As Dan Ariely puts it, "we are not only irrational, but *predictably irrational* [...] our irrationality happens the same way, again and again" (2008: xx). Choice architects – those who design the environments within which people make choices – can thus significantly influence the choices people make. As such, choice architects can nudge people, influencing their choices in predictable ways without limiting their options through coercion or making certain options costlier than others (Thaler/Sunstein 2008: 3).

System 1 has a number of features that are directly relevant to the registration of organ donors. In this part of the chapter, we consider two nudges in the context of organ donor registration policy: 'opt-out' registration policies and 'nudge statements'. In exploring the ethics of nudges in this context, we accept an assumption made by scholars working on this question – namely, that people have a moral right to determine what happens to their organs after they die.<sup>2</sup> People therefore have a right to decide whether they wish to register as an organ donor, and their decisions and preferences regarding the donation of their organs should be given great weight by deci-

2 Wilkinson (2011: 11–62) offers what we take to be the strongest defense of this claim.

sion-makers. The central ethical question in this context concerns the permissibility of using nudges to influence people's registration choices, a question that is ethically challenging only if these choices are deserving of respect.

## 2.1 Opt-Out Donor Registration Systems

Humans exhibit status quo bias, a tendency to stick with the current state of affairs (Thaler/Sunstein 2008: 34). Humans are thus more likely to choose the option that choice architects have presented as the default – that is, the option choosers are left with if they take no positive action (*ibid.*: 35). With respect to the design of organ donor registration policy, a number of commentators argue that policymakers should nudge people to register as organ donors by making donor registration the default option (*ibid.*: 177–179; Rippon 2012; Whyte et al. 2012; Saunders 2012). Such policies are typically referred to as 'opt-out' policies since they register all citizens as donors, putting the onus on individuals to opt out of this status if they so choose. Proponents argue that because people exhibit status quo bias, such a policy will increase the number of registered donors and so lead to a greater number of donated organs. Because people have the option to easily opt-out of being registered, proponents argue, such systems do not coercively limit people's choices and so adequately respect their liberty.<sup>3</sup>

Opt-out systems raise a number of interesting questions that we cannot fully address here. First, will such systems actually lead to an increase in the number of donated organs? A good deal of the evidence regarding the importance of defaults in this context has been provided by lab experiments (Johnson/Goldstein 2003; van Dalen/Henkens 2014). Furthermore, some scholars are skeptical that transitioning to an opt-out system alone will significantly raise the number of donated organs in a jurisdiction, for example because of the role played by families in deciding whether or not to authorize donation, and the crucial importance of an effective procurement system (Wilkinson 2011: 94–95; Willis/Quigley 2014). Second, do opt-out systems adequately secure people's consent to donation? Some scholars defend the claim that such systems do so, where this consent is understood as presumed (Cohen 1992), normative (Saunders 2010), or implicit (Saunders 2012). Others, by contrast, are skeptical of such claims (Veatch 2000: 167–174; Kluge 2000; den Hartogh 2011a; den Hartogh 2011b; MacKay 2015). Still others argue that consent is not necessary for the ethical removal

3 Whyte et al. (2012: 33–34) also suggest that mandated active choice policies would nudge people to register as organ donors. Such policies do not present one with a default, but instead ask them whether they would like to be registered as an organ donor or not and require them to answer the question or face a sanction, for example not receiving their driver's license or identification card (Thaler/Sunstein 2008: 180). We suggest however that mandated active choice policies are not best characterized as nudges. The justification for these policies is that they do not present people with a default option and so do not influence their choices by engaging their status quo bias (MacKay/Robinson 2016: 6 fn 2). It's possible that mandated active choice policies play upon other features of System 1 – e.g. a desire to conform to the beliefs of others (Thaler/Sunstein 2008: 53–55) – but we are aware of no empirical research that establishes this effect in this context. Also, even if mandated active choice policies do nudge potential donors in this way, the nudge is likely to be far less effective than the nudge employed by opt-out policies. Mandated active choice policies, unlike opt-out policies, employ no default, which we know has a strong effect on people's decision-making in the context of organ donor registration (MacKay/Robinson 2016: 7–8).

of people's organs (Gill 2004; Zambrano 2018). Our focus here, however, is whether it is permissible for policymakers to nudge people to register as organ donors by taking advantage of their status quo bias.<sup>4</sup>

A common objection to the use of nudges is that they are disrespectful of people's autonomy (Bovens 2008; Hausman/Welch 2010; Wilkinson 2013; White 2013; Guldberg/Jespersen 2013; Rebonato 2014). While nudges do not change people's incentives or limit their choices, critics argue that they do interfere with people's decision-making, namely the exercise of their rational capacities. Douglas MacKay and Alexandra Robinson (2016) raise this objection against the use of nudges in the context of organ donor registration policy. Following Jennifer Blumenthal-Barby (2012), they argue that opt-out systems are a form of *reason-bypassing nonargumentative influence* – that is, influence that bypasses or works around people's rational capacities, often without their knowledge (MacKay/Robinson 2016: 4). Opt-out systems employ this form of influence since they use a default rule to influence people to register as donors.

MacKay and Robinson further argue that the use of a default rule in opt-out systems is disrespectful of people's autonomy (2016: 6). People are autonomous if they have the capacity to govern their lives on the basis of reasons; and people exercise their autonomy by “deciding what to do with their bodies and minds on the basis of their values and preferences, and the reasons they take to be binding on them” (ibid.). The use of a default rule is disrespectful of people's autonomy, MacKay and Robinson claim, since it involves working around rather than engaging with people's rational capacities. To respect people's autonomy, they write, agents must recognize the value of people governing their lives based on their values and preferences. This involves “engaging people's rational capacities through rational persuasion, not (1) restricting their options or (2) corrupting the deliberative processes by which they make decisions” (ibid.).

MacKay and Robinson do not conclude from this that it is wrong on balance for policymakers to employ default rules to register donors, only that it is *pro tanto* wrong. They also provide a framework for evaluating the degree of *pro tanto* wrongness of opt-out systems and their principal alternatives: opt-in, mandated active choice (MAC), and voluntary active choice (VAC) (ibid.: 10–11). MacKay (2017) refines this framework in a later paper (see Table 1):

---

4 If opt-out systems cannot be said to secure people's consent, one might argue that it is a mistake to speak of organ ‘donation’ in the context of such systems. This is a good point; however, we will continue to use the term ‘donation’ throughout this chapter since it is common practice to do so within the existing literature, and the most plausible replacement term – ‘procurement’ – may confuse some readers.

	Coercion?	Reason-bypassing nonargumentative influence?	Pro tanto wrong?	Value of Choice	Degree of influence	Degree of Wrongness
Opt-in	No	Yes	Yes	High	Very low - moderate	Low - high
Opt-out	No	Yes	Yes	High	Very low - moderate	Low - high
MAC	Yes	No	Yes	Very low	High	Low
VAC	No	Yes	Yes	High	Very low - low	Low - mo- derate

Table 1: Evaluating Pro Tanto Wrongness

Each option's degree of pro tanto wrongness, MacKay claims, is a function of the value of the choice that is the target of the policy, and the degree to which the policy influences this choice. In cases where an opt-out system is expected to significantly influence this choice, MAC may be less pro tanto wrong since although it employs coercion, it targets a very low-value choice – namely, people's choice to state their preference regarding the donation of their organs. More generally, MacKay and Robinson (2016) conclude that the question of which system is, on balance, morally preferable depends on each system's degree of pro tanto wrongness, whether it secures people's valid consent to donation, and the number of donated organs it is likely to yield.

A number of scholars dispute MacKay and Robinson's claim that opt-out systems of organ donor registration are pro tanto wrong because they employ a default rule. Responding directly to MacKay and Robinson, Cass R. Sunstein argues that opt-out systems might infringe people's autonomy because they do not secure people's explicit consent, but not because default rules “bypass people's rational capacities” (2016: 1). Instead, Sunstein argues, “default rules, taken as such, do not intrude on autonomy even if they influence people without persuading them” (ibid.). Because human beings have limited cognitive bandwidth to make choices, default rules, when they are carefully designed, promote people's “freedom to focus on their most pressing concerns” and improve their wellbeing (ibid.). Sunstein grants that it is wrong to use default rules in cases where “what is necessary is an explicit indication of people's values, wishes, and tastes,” (2016: 2) not because default rules are a form of reason-bypassing nonargumentative influence but rather because in these cases we need people's explicit consent. In response, MacKay (2017) grants that default rules may *promote* people's autonomy in the way Sunstein suggests, but he argues that this does not entail that the use of such rules is *respectful* of people's autonomy – i.e. doesn't bypass or corrupt their deliberative processes.

Daniel Kelly and Nicolae Morar (2016) raise a different objection against MacKay and Robinson's analysis, arguing that it depends on a conception of autonomy and rationality that is too individualistic. Once we understand autonomy and rationality as social and embedded, they suggest, we will cease to see the use of defaults in opt-out systems as a corruption of people's autonomous decision-making.

Andreas T. Schmidt (2019) develops this argument in a more systematic fashion, arguing that not only is nudging compatible with treating people as rational agents,

it also facilitates rational decision-making.<sup>5</sup> Schmidt first argues that objections to nudging such as MacKay and Robinson's, which focus on how nudges disrespect people as autonomous and rational agents, presuppose what he calls "heroic rationality" (ibid.: 518). According to this view, people make rational decisions by employing System 2 – i.e. considering all of the relevant information, performing correct probabilistic judgments, working through the various considerations in support of each option, and choosing the option for which one has the strongest reasons (Schmidt 2019: 519–520).

Second, Schmidt argues that heroic rationality, as a normative ideal, is implausible, and defends an alternative theory of rationality: "ecological rationality" (ibid.: 520). Following Jennifer Morton (2011), Schmidt argues that "a person's decision is procedurally rational in an environment to the extent that, given her particular psychological make-up, the decision-making procedures she uses allow her to reliably achieve her ends in this type of environment" (2019: 521). While heroic rationality locates rationality in System 2, ecological rationality counts certain System 1 decision-making procedures as rational when they reliably further an agent's ends (ibid.: 522–523).

Third, Schmidt argues that even though nudges act on System 1, their use by policymakers does not necessarily treat people as irrational because System 1 processes might count as rational in certain environments (ibid.: 526–527). Schmidt argues further that nudges may even support rational decision-making since governments can adjust people's choice environments to better fit both the decision-making procedures they use as well as their psychological make-up, thus improving their procedural rationality (ibid.: 528). For example, given people's status quo bias, Schmidt argues, governments can improve people's procedural rationality by setting defaults that better align with their ends (ibid.: 529–530). In a jurisdiction where people prefer to be organ donors, governments can improve people's abilities to satisfy this preference by implementing an opt-out system.

To summarize, MacKay and Robinson argue that opt-out systems are *pro tanto* wrong because they nudge people to register to donate and therefore engage in reason-bypassing nonargumentative influence. By contrast, Sunstein and Schmidt hold that policymakers' use of defaults in the context of organ donor registration can in fact support people's rational decision-making. Future work is necessary to resolve this conflict. In particular, one interesting question requiring further exploration is whether, following Schmidt, policies that aim to minimize the effect of cognitive biases on people's decision-making – e.g. active choice frames – are more respectful of people's autonomy than policies that employ nudges that improve people's ability to realize their ends. Implementing an opt-out system may improve people's procedural rationality – compared to an opt-in system – in jurisdictions where most people prefer to be organ donors. But is it correct to say that an opt-out system is more respectful of people's autonomy than an active choice system which aims to minimize the effect of status quo bias on people's decisions?

5 Bart Engelen (2019), Neil Levy (2019), and Timothy Houk (2019) have similarly argued that nudges should not be understood as bypassing people's rational capacities.

## 2.2 Organ Donor Registration and Nudge Statements

There are other features of System 1 that are important for the design of organ donor registration policy. First, people tend to be loss averse, meaning that they are more likely to value a good they possess than one they do not. In other words, people attach greater weight to losses than to equivalent gains (Thaler/Sunstein 2008: 33–34). Second, people are more likely to respond to appeals or warnings that engage their emotions – a central feature of System 1. Finally, although no Econ would feel obliged to reciprocate or give back upon receiving a gift, Humans do. People can therefore be nudged to act in pro-social ways – e.g. giving to charity – if they are provided with a small gift (Behavioral Insights Team 2013a).

In two recent experiments, scholars found that people can be nudged to register as organ donors if exposed to statements that play upon these features of System 1. The U.K. Government's Behavioral Insights Team (2013b) conducted a randomized controlled trial in which they evaluated the effect on donor registration rates of including different messages on a high traffic government webpage that encourages people to join the National Health Service Organ Donor Register. The most successful messages were those that employed a loss frame and that appealed to people's sense of reciprocity (*ibid.*: 7).<sup>6</sup> The Ontario Ministry of Health and Long Term Care and its partners conducted a similar randomized controlled trial evaluating the effectiveness of placing different 'nudge statements' at the top of the organ donor registration form (Government of Ontario 2019). Investigators found that the use of nudge statements respectively appealing to reciprocity and to people's emotions each increased the likelihood of people registering by 2.1 times (*ibid.*).

To our knowledge, no one has directly addressed the ethical issues regarding the use of these nudge statements to increase organ donor registration. However, scholars have addressed the ethics of such statements in other contexts.

Consider the use of a 'loss frame' to nudge people to register as donors. Because people tend to be loss averse, they may be more responsive to 'loss frames' compared to 'gain frames' that provide people with exactly the same information. To take the above example, it may be that people provided with the statement, 'three people die every day because there are not enough organ donors,' would be more likely to register as organ donors than people provided with the statement, 'three lives could be saved if

---

6 To explain the effectiveness of the loss frame, the U.K. Behavioral Insights Team (2013b: 5) appeals to loss aversion. However, the study's authors do not cite any evidence showing that people are loss averse not only with respect to their own wellbeing but also the wellbeing of others. It's possible therefore that loss aversion is not the driver of the effectiveness of the loss frame. An alternative explanation is that loss frames may better highlight gaps between people's intentions and actions because there is evidence that people can be spurred to action if differences between their intentions and actions are identified (Freijy/Kothe 2013). In addition, there is also good evidence showing that loss-framed messages in the context of organ donor registration can increase psychological reactance and so decrease people's intent to register (Reinhart et al. 2007). More research is therefore needed to determine whether loss frames can indeed be relied upon to increase donor registration rates, and if so, which psychological mechanism is responsible for this effect. Thanks to an anonymous reviewer for a helpful discussion of this issue.



there were enough organ donors.<sup>7</sup> Supposing this is true, is there anything wrong with using the former frame?<sup>8</sup>

Consider first that MacKay and Robinson's objection to the use of defaults is relevant here. Employing a loss frame rather than a gain frame is also a form of reason-bypassing nonargumentative influence and is therefore arguably disrespectful of people's autonomy. However, scholars have argued that the use of framing effects to nudge people's choices is not problematic in similar contexts. For example, with respect to the clinical context, Gorin et al. (2017: 34–35), Cohen (2013), and Blumenthal-Barby et al. (2013) argue that nudges are permissible when (1) they are unavoidable, and (2) their direction is justifiable – for example, if they help patients to satisfy their deeply-held preferences or, where such preferences are lacking, to realize their best interests. In the context of registering organ donors, this position would imply that policymakers should employ the loss frame since (1) the information must be framed in some way, and (2) more people wish to register as organ donors than not.

In response to this line of argument, Søren Holm argues that while nudging may be inevitable – e.g. it is necessary to frame information in some way – it may be possible in certain contexts to minimize the impact of such nudges, either by designing choice situations to trigger System 2 or by designing “choice situations so that the nudges present in them cancel each other out” (Holm 2017: 39; cp. Miller/Gelinas 2013; cp. Chwang 2016; cp. Gelfand 2016; cp. Wilkinson 2017). Just as MacKay and Robinson argue that the use of an active choice policy rather than an opt-out policy is a way to avoid taking advantage of people's status quo bias, so too there may be ways for policymakers to provide people with information that minimizes the effect of nudges.

What about nudge statements that appeal to people's emotions or sense of reciprocity?

“If you need a transplant, would you have one? If so, please help save lives and register today.”

“How would you feel if you or someone you love needed a transplant and couldn't get one? Please help save lives and register today” (Government of Ontario 2019).

Consider the latter nudge statement. Using Blumenthal-Barby's (2012) terminology, this statement would seem to employ reason-countering nonargumentative influence since it plays upon people's emotions. One might argue therefore that is objectionable. However, as Joshua Hobbs (2017: 41) argues regarding the use of similar types of nudge statements to facilitate charitable giving, emotion plays an important role in moral deliberation. Therefore, such nudge statements should not necessarily be understood as forms of reason-countering nonargumentative influence. Indeed, it seems reason-

7 Note that this is not what the U.K. study did. The various ‘nudge statements’ were compared against each other and a control of no statement (Behavioral Insights Team 2013b).

8 One additional potential problem with the phrasing of this statement – separate from the question of framing – is that it implies that three people die every day because of the actions of potential donors, not (primarily) because of illness. One might argue that this phrasing is somewhat manipulative. Thanks to an anonymous reviewer for identifying this potential problem.



able to think that the above statement need not be understood as a nudge at all but rather as a moral argument – presented in brief – with the following structure:

1. If you or a loved one needed an organ, you would want others to register as organ donors.
2. You should treat others as you would want them to treat you.
3. So, you should register as an organ donor.<sup>9</sup>

Once we reconstruct the statement in this way, it need not be understood as a nudge but rather as an act of rational persuasion, thus raising no problems regarding respect for autonomy. Indeed, we can also run the same analysis on the above statement in terms of its appeal to people's sense of reciprocity. In our view, more work is necessary to draw a boundary between moral argumentation and nudging. The latter, after all, certainly makes use of System 1 processes such as people's emotions and sense of reciprocity.

To sum up our discussion thus far, some scholars argue that the use of nudges to influence people to register as organ donors is pro tanto wrong when these nudges fail to engage people's rational capacities. The principal examples of such nudges include opt-out donor registration systems and the use of nudge statements that employ loss frames. With respect to opt-out donor registration systems, some respond that such systems promote people's autonomy by giving them the freedom to focus on their most pressing concerns, or that people's reliance on status quo bias is in fact rational, provided rationality is understood as ecological rationality. With respect to the use of loss frames in nudge statements, some respond that framing is inevitable and justifiable provided it leads people to make choices that align with their preferences. We have also seen that not all 'nudge statements' are normatively problematic. Some such statements can be reconstructed as moral arguments in brief, and so it is not clear that they are best understood as nudges in the first place.

Finally, it is important to note that even if the critics of nudges are right that it is pro tanto wrong to employ nudges to increase organ donor registration, this does not mean that policymakers should not use them. There may be competing considerations that render the use of nudges on balance permissible, even if it is the case that people have a moral right to determine what happens to their organs after they die. First, some scholars argue that people have a *duty* to register as organ donors, appealing either to notions of fairness (Steinberg 2004) or to the duty to easy rescue (Hester 2006; Fabre 2006: 72–97; Snyder 2009; Saunders 2010). If this view is right,<sup>10</sup> one might argue that although nudges are pro tanto wrong, they prevent people from committing a second wrong, namely failing to register as an organ donor, and so may be on balance justifiable for that reason (Blumenthal-Barby/Opel 2018).

Second, as MacKay and Robinson (2016) and Gelinias (2016) argue, if the use of nudges is expected to significantly increase the number of donated organs available for transplantation, the gains to people's wellbeing may be great enough to outweigh the pro tanto wrong in question. Importantly, these two competing considerations may work together to justify the use of nudges if (1) people have a duty to register

9 Steinberg (2004) offers a more systematic development of this argument.

10 For responses to these arguments, see Ben Almási (2014).

as organ donors, and (2) such registration will significantly increase the number of donated organs (Navin 2017).

3. Nudging and Next-of-Kin Clinical Decisions

In the effort to increase organ donation, next-of-kin decision-making at the end of life is another potential target for nudges. Many jurisdictions offer family members a de facto or de jure veto over organ donation. In the U.S., despite first-person authorization laws, a recent survey of all 58 organ procurement organizations found that 20 per cent would not proceed without the consent of the family (Chon et al. 2014). Limited international data show that an estimated 34–38 per cent of families refuse donation under both opt-in and opt-out systems (Rosenblum et al. 2012). Family members can thus pose an obstacle to donation, and, in some cases, may choose to frustrate the prior preferences of the decedent.

Organ donation requestors may wish to nudge family members to make one decision rather than another, relying on many features of System 1, including status quo bias and loss aversion. This type of case is different from that of registering organ donors, since the target of the nudge is not the potential donor but rather the potential donor’s family members. For example, Sheldon Zink and Stacey Wertlieb suggest that rather than adopting a “value-neutral approach” (2006: 130) in which families are provided with information regarding donation in an unbiased manner, requestors should adopt a “presumptive approach” (ibid.) by presenting donation as the default option. With respect to the request for authorization in particular, Zink and Wertlieb (2006: 135) contrast the standard and presumptive approaches in the following way:

	Standard	Presumptive
The request	Would you like me to give you some time before you make your final decision?	If you do not have any more questions, I will now guide you through this process.

Table 2: *Securing Familial Authorization (adapted from Zink and Wertlieb 2006)*

Scholars disagree both about whether it is permissible to nudge family members and about what the goal of the nudge ought to be. First, Sharif and Moorlock (2018) argue that it is permissible to nudge family members in order to bring their decisions in alignment with the decedent’s prior wishes. Accepting the premises that (1) people have a duty to donate their organs, and (2) people have a right to determine what happens to their organs after they die, Sharif and Moorlock present the following argument in support of the use of nudges:

“a) If a person wants, or would want, to do the right thing, and (b) it is important to respect that person’s wishes in a given context, (c) it is prima facie ethically permissible to remove barriers to that person doing the right thing in the given context. (d) Donating organs is the morally right thing to do, so (e) it is therefore prima facie ethically permissible to remove barriers to organ donation.” (2018: 157)

They therefore conclude that it is permissible to use nudges to remove barriers to donation, including the objections of family members.

Sharif and Moorlock (2018) recognize that nudging is a form of nonrational influence and so disrespectful of people's autonomy, but they argue that it is justifiable because it both benefits potential recipients and fulfills the decedent's prior preference to donate. Importantly, recognizing that people have a right to determine what happens to their organs after they die, Sharif and Moorlock (2018) argue that family members should not be nudged to authorize donation in cases where donation would compromise the decedent's prior wishes.

Other scholars reject Sharif and Moorlock's position, suggesting that family members should be nudged to authorize donation with the goal of benefiting recipients. Zink and Wertlieb (2006: 130) argue that requestors should adopt a presumptive approach to all families on the grounds that requestors have a responsibility to be advocates of donation, and that organ donation is the morally right thing to do. In contrast to Sharif and Moorlock, Zink and Wertlieb (2006) hold that the goal of the nudge is not to fulfill the preferences of the decedent but rather to benefit potential recipients.

A number of scholars are critical of this position, however. Some reject it on the grounds that people have a right to determine what happens to their organs after they die and therefore their preferences should take priority over benefits to recipients (Sharif/Moorlock 2018). Others argue that the presumptive approach is potentially manipulative and so may lead family members to make decisions that are not fully autonomous or in the best interests of family members and patients (Rippon 2012; Troug 2012). Nevertheless, if nudging family members is expected to significantly increase the supply of donated organs, one might argue that societal benefits outweigh the pro tanto wrongness of nudging family members (MacKay/Robinson 2016). Therefore, it may be justifiable to use pro-donation nudges even when the explicit motivation is societal benefit rather than aligning outcomes with decedent's preferences.

A third possibility, which is deserving of future research, is whether it is permissible to use nudges to help family members make the 'best' decision for both the family and patient, where this may involve donation under some circumstances and no donation under others. Thaler and Sunstein (2008) understand nudges as a way to help decision-makers make good decisions under sub-optimal conditions. Given that more family members regret refusals than authorizations, interventions that increase donation authorization may promote the realization of stable, considered preferences for many family members (Rodrigue et al. 2008). There may be some set of nudges requestors could use to aid family members in making the best decision for themselves and the patient under challenging end-of-life circumstances.

## 4. Conclusion

Our aim in this chapter has been to provide an overview of the ethical dimensions of the use of nudges in organ donation policy. We first explored the use of nudges to increase organ donor registration before turning to the use of nudges to influence the decision-making of family members in cases where they are asked to authorize the use of their loved one's organs.

We conclude by highlighting a number of ethical questions regarding the use of nudges in donation policy that require further research. First, regarding the use of opt-out systems of donor registration, more work is needed to determine if such systems should be understood as fully respectful of people's autonomy, following Schmidt's conception of ecological rationality, or whether systems that employ active choice frames – e.g. mandated active choice – are superior in this respect because they aim to minimize the effect of bias on people's decision-making. Second, should statements that can be understood to offer moral arguments in brief be considered nudges, even though they appeal to aspects of System 1? Third, nudges frequently support better choices for people who hold majority views but not those who hold minority views. Additional consideration is needed regarding how nudges can both reduce mistakes for the majority while also respecting the autonomy of people whose stable, considered preferences are minority views – i.e. those who prefer not to donate their organs.

Finally, even if it is in principle permissible to nudge potential donors and/or family members to increase donation rates, there are a number of further ethical issues policymakers must consider before implementing such a system. A number of scholars have argued that because, as Luc Bovens puts it, the features of System 1 exploited by nudges “work better in the dark,” (2009: 209) policies that employ nudges must be implemented with transparency and accountability (Thaler/Sunstein 2008: 244–245; Bovens 2009; Farrell 2015). In addition, even if governments and organ procurement organizations implement nudges in a transparent way, there is always the difficult question of whether the use of nudges may undermine public trust in the organ transplantation and broader health care system. Although there is widespread scholarly agreement on the need for transparency and the potential detriment to public trust, further work is necessary to determine exactly how the principles of transparency and accountability should be understood in this context.

## References

- Almassi, Ben (2014): “Trust and the Duty of Organ Donation.” In: *Bioethics* 28/6, pp. 275–283.
- Ariely, Dan (2008): *Predictably Irrational: The Hidden Forces That Shape Our Decisions*, New York: Harper Collins.
- Behavioral Insights Team (2013a): *Applying Behavioral Insights to Charitable Giving*, Cabinet Office.
- Behavioral Insights Team (2013b): *Applying Behavioral Insights to Organ Donation: Preliminary Results from a Randomised Controlled Trial*, Cabinet Office.
- Blumenthal-Barby, Jennifer S. (2012): “Between Reason and Coercion: Ethically Permissible Influence in Health Care and Health Policy Contexts.” In: *Kennedy Institute of Ethics Journal* 22/4, pp. 345–366.
- Blumenthal-Barby, Jennifer S./Cantor, Scott B./Russell, Heidi Voelker/ Naik, Aanand D./Volk, Robert J. (2013): “Decision Aids: When ‘Nudging’ Patients to Make A Particular Choice is More Ethical Than Balanced, Nondirective Content.” In: *Health Affairs* 32/2, pp. 303–310.

- Blumenthal-Barby, Jennifer S./Opel, Douglas J. (2018): "Nudge or Grudge? Choice Architecture and Parental Decision-Making." In: Hastings Center Report 48/2, pp. 33–39.
- Bovens, Luc (2008): "The Ethics of Nudge." In: Mats J. Hansson/Till Grüne-Yanoff (eds.), *Preference Change: Approaches from Philosophy, Economics and Psychology*, Berlin: Springer, pp. 207–220.
- Chon, W. J./Josephson, M. A./Gordon, E. J./Becker, Y. T./Witkowski, P./Arwindekar, D. J./ Naik, A./Thistlethwaite Jr., J. R./Liao, C./Ross, L. F. (2014): "When the Living and the Deceased Cannot Agree on Organ Donation: A Survey of US Organ Procurement Organizations (OPOs)." In: American Journal of Transplantation 14/1, pp. 172–177.
- Chwang, Eric (2016): "Consent's Been Framed: When Framing Effects Invalidate Consent and How to Validate It Again." In: Journal of Applied Philosophy 33/3, pp. 270–285.
- Cohen, Carl (1992): "The Case for Presumed Consent, to Transplant Human Organs after Death." In: Transplantation Proceedings 24/5, pp. 2168–2172.
- Cohen, Shlomo (2013): "Nudging and Informed Consent." In: The American Journal of Bioethics 13/6, pp. 3–11.
- Den Hartogh, Govert (2011a): "Can Consent be Presumed?" In: Journal of Applied Philosophy 28/3, pp. 295–307.
- Den Hartogh, Govert (2011b): "Tacitly Consenting to Donate One's Organs." In: Journal of Medical Ethics 37/6, pp. 344–347.
- Engelen, Bart (2019): "Nudging and Rationality: What is There to Worry?" In: Rationality and Society 31/2, pp. 204–232.
- Fabre, Cécile (2006): *Whose Body is it Anyway? Justice and the Integrity of the Person*, New York: Oxford University Press.
- Farrell, Anne-Maree (2015): "Addressing Organ Shortage: Are Nudges the Way Forward." In: Law, Innovation and Technology 7/2, pp. 253–282.
- Freijy, Tanya/Kothe, Emily J. (2013): "Dissonance-based Interventions for Health Behavior Change: A Systematic Review." In: British Journal of Health Psychology 18/2, pp. 310–337.
- Gelfand, Scott D. (2016): "The Meta-Nudge – A Response to the Claim that the Use of Nudges During the Informed Consent Process is Unavoidable." In: Bioethics 30/8, 601–608.
- Gill, Michael B. (2004): "Presumed Consent, Autonomy, and Organ Donation." In: Journal of Medicine and Philosophy 29/1, pp. 37–59.
- Gorin, Moti/Joffe, Steven/Dickert, Neal/Halpern, Scott (2017): "Justifying Clinical Nudges." In: Hastings Center Report 47/2, 34–35.
- Gelinas, Luke (2016): "Rights, Nudging, and the Good of Others." In: The American Journal of Bioethics 16/11, 18–19.
- Government of Ontario: "Behavioural Insights Pilot Project – Organ Donor Registration", April 30, 2019 (<https://www.ontario.ca/page/behavioural-insights-pilot-project-organ-donor-registration>).
- Guldborg, Pelle/Jespersen, Andreas Maaløe (2013): "Nudge and the Manipulation of Choice: A Framework for the Responsible Use of the Nudge Approach to Behavior Change in Public Policy." In: European Journal of Risk Regulation 4/1, pp. 3–28.

- Hausman, Daniel M./Welch, Brynn (2010): "To Nudge or Not to Nudge," *Journal of Political Philosophy* 18/1, pp. 123–136.
- Hester, D. Micah (2006): "Why We Must Leave Our Organs to Others." In: *The American Journal of Bioethics* 6/4, pp. W23–W28.
- Hobbs, Joshua (2017): "Nudging Charitable Giving: The Ethics of Nudge in International Poverty Reduction." In: *Ethics & Global Politics* 10/1, pp. 37–57.
- Holm, Søren (2017): "Authenticity, Best Interest, and Clinical Nudging." In: *Hastings Center Report* 47/2, pp. 38–40.
- Houk, Timothy (2019): "On Nudging's Supposed Threat to Rational Decision-Making." In: *The Journal of Medicine and Philosophy* 44/4, pp. 403–422.
- Johnson, Eric J./Goldstein, Daniel (2003): "Do Defaults Save Lives?" In: *Science* 302, pp. 1338–1339.
- Kelly, Daniel/Morar, Nicolae (2016): "Nudging and the Ecological and Social Roots of Human Agency." In: *The American Journal of Bioethics* 16/11, pp. 15–17.
- Kluge, Eike-Henner W. (2000): "Improving Organ Retrieval Rates: Various Proposals and Their Ethical Validity." In: *Health Care Analysis* 8/3, pp. 285–287.
- Levy, Neil (2019): "Nudge, Nudge, Wink, Wink: Nudging is Giving Reasons." In: *Ergo* 6/10, pp. 281–302.
- MacKay, Douglas/Robinson, Alexandra (2016): "The Ethics of Organ Donor Registration Policies: Nudges and Respect for Autonomy." In: *The American Journal of Bioethics* 16/11, pp. 3–12.
- MacKay, Douglas (2015): "Opt-out and Consent." In: *Journal of Medical Ethics* 41/10, pp. 832–835.
- MacKay, Douglas (2017): "Nudges, Autonomy, and Organ Donor Registration Policies: Response to Critics." In: *The American Journal of Bioethics* 17/2, pp. W6–W8.
- Miller, Franklin G./Gelinas, Luke (2013): "Nudging, Autonomy, and Valid Consent: Context Matters." In: *The American Journal of Bioethics* 13/6, pp. 12–13.
- Morton, Jennifer (2011): "Toward an Ecological Theory of the Norms of Practical Deliberation," In: *European Journal of Philosophy* 19/4, pp. 561–584.
- Navin, Mark (2017): "The Ethics of Vaccination Nudges in Pediatric Practice." In: *HEC Forum* 29/1, pp. 43–57.
- Rebonato, Riccardo (2014): "A Critical Assessment of Libertarian Paternalism." In: *Journal of Consumer Policy* 37/3, pp. 357–396.
- Reinhart, Amber Marie/Marshall, Heather M./Feeley, Thomas Hugh/Tutzauer, Frank (2007): "The Persuasive Effects of Message Framing in Organ Donation: The Mediating Role of Psychological Reactance." In: *Communication Monographs* 74/2, pp. 229–255.
- Rippon, Simon (2012): "How to Reverse the Organ Shortage." In: *Journal of Applied Philosophy* 29/4, pp. 344–358.
- Rodrigue, James/Cornell, Danielle/Howard, Richard (2008): "The Instability of Organ Donation Decisions by Next-of-kin and Factors that Predict it." In: *American Journal of Transplantation* 8/12, pp. 2661–2667.
- Rosenblum, Amanda/Horvat, Lucy/Siminoff, Laura/Prakash, Versha/Beitel, Janice/Garg, Amit (2012): "The Authority of Next-of-kin in Explicit and Presumed Consent Systems for Deceased Organ Donation: an Analysis of 54 Nations." In: *Nephrology Dialysis Transplantation* 27/6, pp. 2533–2546.

- Saunders, Ben (2010): "Normative Consent and Opt-out Organ Donation." In: *Journal of Medical Ethics* 36/2, pp. 84–87.
- Saunders, Ben (2012): "Opt-out Organ Donation without Presumptions." In: *Journal of Medical Ethics* 38/2, pp. 69–72.
- Schmidt, Andreas T. (2019): "Getting Real on Rationality – Behavioral Science, Nudging and Public Policy," In: *Ethics* 129/4, pp. 511–543.
- Sharif, Adnan/Moorlock, Greg (2018): "Influencing Relatives to Respect Donor Autonomy: Should we Nudge Families to Consent to Organ Donation?" In: *Bioethics* 32/3, pp. 155–163.
- Snyder, Jeremy (2009): "Easy Rescues and Organ Transplantation." In: *HEC Forum* 21/1, 27–53.
- Steinberg, David (2004), "An 'Opting In' Paradigm for Kidney Transplantation." *The American Journal of Bioethics* 4/4, pp. 4–14.
- Sunstein, Cass R. (2015): "The Ethics of Nudging." In: *Yale Journal of Regulation* 32/2, pp. 413–450.
- Sunstein, Cass R. (2016): "Autonomy by Default." In: *The American Journal of Bioethics* 16/11, pp. 1–2.
- Thaler, Richard H./Sunstein, Cass R. (2008): *Nudge: Improving Decisions About Health, Wealth, and Happiness*, New Haven: Yale University Press.
- Taylor, James Stacey (2012): *Death Posthumous Harm, and Bioethics*, New York: Routledge.
- Troug, Robert (2012): "When Does a Nudge Become a Shove in Seeking Consent for Organ Donation?" In: *The American Journal of Bioethics* 12/2, pp. 42–44.
- Van Dalen, Hendrik P./Henkens, Kène (2014): "Comparing the Effects of Defaults in Organ Donation Systems" In: *Social Science & Medicine* 106/April, pp. 137–142.
- Veatch, Robert M. (2000): *Transplantation Ethics*, Washington: Georgetown University Press.
- White, Mark D. (2013): *The Manipulation of Choice: Ethics and Libertarian Paternalism*, New York: Palgrave Macmillan.
- Whyte, Kyle Powys/Selinger, Evan/Caplan, Arthur L./Sadowski, Jathan (2012): "Nudge, Nudge or Shove, Shove – The Right Way for Nudges to Increase the Supply of Donated Cadaver Organs." In: *The American Journal of Bioethics* 12/2, pp. 32–39.
- Wilkinson, T. M. (2011): *Ethics and the Acquisition of Organs*, New York: Oxford University Press.
- Wilkinson, T. M. (2013): "Nudging and Manipulation" In: *Political Studies* 61/2, pp. 341–355.
- Wilkinson, T. M. (2017): "Counter-Manipulation and Health Promotion." In: *Public Health Ethics* 10/3, pp. 257–266.
- Willis, Brian H./Quigley, Muireann (2014): "Opt-out Organ Donation: On Evidence and Public Policy." In: *Journal of the Royal Society of Medicine* 107/2, pp. 56–60.
- Zambrano, Alexander (2018): "Should Consent be Required for Organ Donation?" In: *Bioethics* 32/7, pp. 421–429.
- Zink, Sheldon/Wertlieb, Stacey (2006): "A Study of the Presumptive Approach to Consent for Organ Donation: A New Solution to an Old Problem" In: *Critical Care Nurse* 26/2, pp. 129–136.



