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Mandated Choice Policies: When are they preferable?

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Abstract

Under mandated choice policies, people are free to choose whichever option they prefer, but 'choosing not to choose' is penalized. In Australia, voting is mandatory, and abstaining is penalized with a fine. In New Zealand and several American states, it is mandatory for those who want to obtain a driver's license that they decide whether to register as organ donors. If they fail to do so, they will not receive a driver's license. Proponents of such policies stress that they may be the least autonomy-infringing ways of achieving some good and provide society with knowledge about people's preferences and are, partly for these reasons, preferable to employing defaults. This article compares mandated choice in voting and donor registration with respect to the ends served, how a mandated choice policy will serve these ends, the distribution of burdens and the nature of the possible options. It is argued that mandated choice is more attractive in the context of donor registration.

Keywords: mandated choice; organ donation; compulsory voting; Mandatory choice; voting ethics; active choice

Introduction

New Zealand and several U.S. states require applicants for a driver's license to choose whether to register as organ donors: no choice, no driver's license.ⁱ As one of several countries with compulsory voting, Australia fines electors who fail to vote AU\$20:ⁱⁱ no electoral choice, and you are left AU\$20 poorer. When states fine nonvoters or withhold certain goods from those unwilling to choose their donor status, they are pursuing *mandated choice policies*. Though mandated choice policies are coercive, legal obligations to choose differ from conventional legal obligations and raise important questions about when such policies are justified.

The work of Cass Sunstein has been a key contribution to the literature on mandated choice policies. In his 2014 article and subsequent book on the topic (Sunstein 2014; 2015), Sunstein sets out a range of criteria for choosing between mandated choice policies and opt-out policies. Whereas Sunstein focuses on both mandated choice policies introduced by private companies and elected politicians, we focus only on *public* mandated choice policies. More importantly, while Sunstein compares mandated choice policies to prominent alternatives such as opt-out policies, our focus is the justifiability of mandated choice policies and how different mandated choice policies vary in whether they are justified. This paper compares compulsory voting and mandated choice in donor registration to explore the nature of mandated choice as a tool of state regulation and how to evaluate the appropriateness of this tool. These two policies are chosen for comparison because they represent two policy spheres where mandated choice policies are frequently suggested and employed. Furthermore, as both policies have been implemented in various places, there is actual legislation in place which can be discussed. Section I discusses some general features of mandated choice policies. Section II scrutinizes a framework for evaluating mandated choice policies developed by Sunstein and presents an alternative. Section III compares compulsory voting and mandated choice in donor registration using the developed framework.

I. Shared features for mandated choice policies

Compulsory voting and mandated choice in donor registration share defining features of mandated choice policies. Highlighting these contribute to our general understanding of mandated choice policies and how they differ from other policies. It also makes it clear why we think the policies under discussion should be considered mandated choice policies.

First, both policies increase the cost of failing to actively choose an option from a given set (*henceforth*: the required set). Australia imposes an AU\$20 fine on electors who fail to choose an option from a set containing the options available on the ballot plus the option of casting a blank (or otherwise invalid) vote. New Zealand withholds driver's licenses from those who fail to indicate their preference regarding donor registration. Both policies require active choice because they attach costs to failing to choose. The presence of a penalty sets these policies apart from non-interference regarding whether citizens make an active choice concerning voting/donor registration.

Second, both policies attach costs to failing to actively choose, for the purpose of incentivising an active choice among the options. This purpose matters. A policy can make some choices more expensive without being a mandated choice policy. Various taxes, fees, and regulations also increase the costs of some choices, as an unintended side effect. Australia does not fine nonvoters to increase public revenue, nor as an administrative fee to cover the costs of holding an election. They do so to make abstention disadvantageous so that citizens will vote. The purpose of the question about donor registration differs from the other questions on the driver's license application form. Unlike questions about, e.g., the applicant's name or whether they have any medical conditions that affect their ability to drive, an answer to the question "Would you be willing to donate organs in the event of your death?"ⁱⁱⁱ is not needed to determine whether the applicant is fit to drive or ensure the correctness of the personal information displayed on the driver's license. Instead, an answer to the question about

donor registration is demanded to pressure citizens into actively deciding whether to become organ donors. These first two aspects of mandated choice policies make them coercive.

Third, the required sets for both policies contain a number of relevantly different options to choose from. Australian electors are required to attend the polls but can cast their vote for several different parties (or indeed, cast an invalid vote). Similarly, applicants for a New Zealand driver's license must choose whether to register as an organ donor but can obtain a driver's license regardless of what they choose. This makes mandated choice policies different from standard legal obligations, which require us to act in a specific way.

Fourth, neither compulsory voting nor mandated choice in donor registration alters the relative cost of options within the required set. Compulsory voting penalises abstention but does not reward voting in a particular way. Similarly, people who must choose whether to register as donors are not incentivised to register.^{iv} The neutrality between the options makes mandated choice policies different from taxes and fees intended to discourage the choice of particular options without prohibiting them.

These are the four characteristics that compulsory voting, mandated choice in donor registration, and all other mandated choice policies have in common. That the two policies under discussion share these features suggests the plausibility of discussing them as mandated choice policies. The policy regarding donor registration is commonly recognized and discussed as a policy of mandated choice (Cotter 2011; Chouhan and Draper 2003, 158; Herz 1999; MacKay and Robinson 2016, 9; Spellman 2005; Spital 1996; 1995). The New Zealand Ministry of Health also uses the term (New Zealand and Ministry of Health 2017a, 18, 19). It is less common to discuss compulsory voting as a mandated choice policy, though Sunstein does so (Sunstein 2015, 121). Perhaps some will dispute that compulsory voting is a mandated choice policy because citizens are typically still allowed to cast an invalid or blank vote under compulsory voting.^v This, however, is not enough to show that it is not

a mandated choice policy. It is true that the required set for compulsory voting includes the possibility to cast a blank or invalid vote,^{vi} and citizens are thus not forced to choose among the parties running for election. But compulsory voting *does* have a required set that excludes at least one relevant option: namely, not attending the polls, which is penalized under compulsory voting. Thus, compulsory voting is a mandated choice policy.

Finally, we might note some common features of the justificatory burden falling upon proponents of compulsory voting and mandated choice in donor registration. Like any laws or policies, mandated choice policies are justified if, and only if, the normatively relevant considerations in their favor outweigh the normatively relevant countervailing considerations (cf. Feinberg 1984, 7–10; Moore 2014). The relevant considerations in their favor will be the goodness of the end(s) served^{vii} by coercing citizens to choose an option from the required set. The relevant considerations against can be of either an absolute or a comparative kind. Because mandated choice policies coerce citizens to actively choose an option within the required set, their proponents must both argue that coercing citizens to choose from the required set is justified, and that coercing citizens to choose any one specific option from this set is not justified.^{viii} The first element ensures that the policy is justified in an absolute sense, as superior to non-interference. The second element ensures that the policy is justified in a comparative sense, as superior to the alternative of coercing citizens to select a particular option within the required set. The task of justifying mandated choice policies in both the absolute and comparative way described here can be completed in two ways. First, one can show that the considerations in favour of coercing citizens to choose an option from the required set do not apply (with equal force) to coercing citizens to select a particular option from this set. Second, one can show that the considerations against coercing citizens to select a particular option from the required set do not apply (with equal force) to coercing citizens to choose an option from within this set.

II. Assessing mandated choice policies

In this section, we present and critically evaluate Sunstein's criteria for the evaluation of mandated choice policy, and suggest some alternatives. According to Sunstein, mandated choice policies are preferable to defaults when: choosing fosters learning about important subjects; the context of the choice is non-technical or familiar to the chooser; choice architects are likely to be wrong or ill-motivated in designing default rules; people would actually prefer to choose; and there is a large heterogeneity of relevant opinions on the matter (Sunstein 2015, 19).^{ix} Default mechanisms are preferable when these characteristics are not prevalent. There are two shortcomings in Sunstein's approach.

The first shortcoming is that Sunstein's framework evaluates mandated choice policies based on features of the choice situations only, but this wrongly excludes from the equation relevant considerations about what mandated choice policies seek to achieve and how well they achieve it. The desirability of a policy's end, and how effectively the policy serves that end, is of significant relevance to the justifiability of *any* policy. Consider what happens if we employ Sunstein's framework in the context of donor registration: it is plausible that choosing about donor registration will foster learning; the choice is at least somewhat non-technical, and there is a heterogeneity of opinions on the matter. It is, however, also plausible that people would prefer not to choose, and that choice architects could be mistaken or ill-motivated. The extent to which the two last criteria speak against mandated choice, however, is likely to vary. An assessment based on Sunstein's criteria would arguably, under particular assumptions, lead us to favor a mandated choice policy in donor registration over default. But this assessment does not take into account how each policy affects the organ donation rate. This is peculiar, to say the least, especially as donor registration policies are often motivated by their ability to increase donation rates. Furthermore, there will often be more than one possible default, but Sunstein's criteria offer no guidance about *which* default mandated choice policies should be assessed against. Consider the two defaults commonly proposed with respect to

donor registration: opt-in and opt-out. Which of these defaults should mandated choice for donor registration be preferable to in order to be preferable *simpliciter*? Presumably, the best one. But it is difficult to see how we could determine which default is ‘best’ without taking into account how well opt-in and opt-out serve the end of organ donation policy, i.e., increasing donation rates, as well as their normatively relevant costs.

The second shortcoming of Sunstein’s approach is that treating (deliberately designed) default rules as the relevant alternative (Cf. Sunstein 2014, 12) to mandated choice policies is sometimes inappropriate. To see this, let us briefly apply Sunstein’s criteria to voting. Sunstein’s criteria seem to suggest that mandated choice in the form of compulsory voting is preferable: choice in political matters is likely to foster learning;^x people clearly hold heterogeneous political views; while it is less clear that political choice is non-technical, it is not clearly false; even the most public-spirited government could hardly be trusted to design the kind of default rule against which Sunstein, crucially, pits compulsory voting, i.e. ‘default voting’ which distributes the votes of absentee electors based on their past voting choices (Sunstein 2014, 3; 33; 45); and, though we cannot know for sure, citizens would probably prefer active voting to this type of default voting. On this brief analysis, Sunstein’s considerations seem to heavily favour compulsory voting. While default voting is indeed very unattractive, the merits of default voting are largely irrelevant to the justifiability of compulsory voting, because default voting is not the appropriate alternative to compulsory voting. Instead, the ‘default’ in actual systems of voluntary voting is that no one receives the votes of abstainers. This default does not raise similar worries about the heterogeneity of preferences and the motives of choice architects, because it is relevantly neutral with respect to the choice in question, as failing to choose will not affect the electoral outcome on this default. This indicates that Sunstein’s considerations about heterogeneity and the competence and motives of the choice architects are relevant mainly when no relevantly neutral option exists.^{xi}

Consider further the example of mandatory naming laws. The purpose of such a law is that people name their children. What they name them is not important, but it is important that children are named. It is difficult to say whether an analysis based on Sunstein's criteria would favour a mandated choice policy or a default. But the kind of questions we would need to consider in order to do so are headed in a strange direction. Perhaps being forced to choose will foster learning, and it is surely not a technical choice, but it is one that people disagree on. We might also believe that people prefer to choose and that choice architects are likely to set an unhelpful default. All this points to the plausibility of a mandated choice policy. But what if people were, perhaps for strange reasons, very much against being forced to name their child? What if, as a protest against the mandated choice policy, many refused to do so? On one interpretation, Sunstein's framework would yield the same verdict as before, despite the inability of the policy to serve its ends. On another, we can re-interpret people's reactions as a very strong preference for not choosing (though really they prefer not to be coerced). Either solution is unsatisfactory and shows that the framework lacks attention to whether the ends are achieved.

As a reaction to the above, we would like to propose a different set of criteria. We do not necessarily believe that Sunstein would disagree with them but hope that those interested in mandated choice policies will acknowledge their relevance for the continued debate over such policies. Following from the above discussion, we submit that the differences that affect the relative justifiability of mandated choice policies fall along four dimensions: the end they serve; how they serve it; the possible options; and the morally relevant costs of coercing citizens to choose an option from the required set. The first two dimensions concern the normatively relevant considerations in favour of a mandated choice policy, while the latter two dimensions pertain to the normatively relevant costs of mandated choice policies. We will now use those dimensions to analyse the justifiability of compulsory voting and mandated choice in donor registration.

III. The relative justifiability of compulsory voting and mandated choice in donor registration

This section assesses and compares compulsory voting and mandated choice in donor registration. It does so based on the four dimensions just developed while reflecting on the shortcomings in Sunstein's proposed framework.

The end served

Before considering the end served by the two policies, an important distinction should be drawn between *pure* and *impure* mandated choice policies. A mandated choice policy is pure if, and only if, selection of any option within the required set serves the end of that policy. Consider again naming policies. Presumably, the end of this mandated choice policy is that children are named. Since any choice of name will achieve that, compliance with mandated naming always serves its end. A mandated choice policy is impure if, and only if, selecting some options within the required set does not serve the end of that policy. Whereas compliance with a pure mandated choice policy always serves its end, it is possible to comply with an impure mandated choice policy without serving its end. Impure mandated choice policies are typically implemented in the hope that active choosers will tend to choose particular favoured option(s) within a required set that includes non-favoured options as well.

Whether mandated choice policies are pure or impure depends on their justifying end(s), roughly understood as the good reasons for their introduction. Determining a policy's justifying end is challenging, but tentative judgments can be reached based on the stated objectives of relevant legislation, and/or the most prominent arguments in favour of that policy in the literature.^{xii}

The explicit end of New Zealand's mandated choice with respect to donor registration is increasing deceased organ donation (New Zealand and Ministry of Health 2017b). The literature defending mandated choice in donor registration is also clear that its purpose is to increase donation rates to prevent death and serious harm to people needing an organ transplant (Chouhan and Draper 2003, 158; Cotter 2011, 601; Spital 1995; 1996, 67; MacKay and Robinson 2016, 11). Mandatory choice in donor registration is an impure mandated choice policy since its required set contains the option of declining to register as a donor, and choosing this option does not contribute to increasing donation rates.

It is more challenging to determine the justifying end(s) of compulsory voting. The Australian law was partly motivated by the drop in turnout of 11 percentage points from the federal election of 1919 to the election in 1922 (Evans 2006, 5). But while compulsory voting is effective at raising turnout (Birch 2009a, 79–97), turnout is not a valuable end in itself. It is, however, safe to say that whatever end compulsory voting serves, it serves it by increasing electoral turnout. The introduction of compulsory voting has historically been motivated by a number of reasons (Cf. Birch 2009a, 27–38), and many different arguments have been advanced in the literature on compulsory voting (Chapman 2019; Elliott 2017; Engelen 2007; Feeley 1974; Lijphart 1997; Hill 2014). There are thus many possible justifying ends of compulsory voting. Due to space constraints, this article considers only two of the most commonly suggested ends of compulsory voting: the end of protecting political equality and the end of preventing free-riding. We stress that protecting political equality and preventing free-riding are not the only possible ends of compulsory voting. Compulsory voting has also been defended on the grounds that it ensures government legitimacy (Hill 2014, 128ff), promotes social justice (Birch 2009a, 128–33; 2009b, 23–24; Chong and Olivera 2005), and functions as a pre-commitment device (Elliott 2017), to name a few. Our conclusions pertain only to compulsory voting *as a policy that serves the end of protecting political equality or preventing free-riding*. That said, we

argue that such a limited discussion of compulsory voting remains interesting due to the prominence of these ends in the literature.

The argument that compulsory voting protects political equality proceeds roughly as follows. Compulsory voting increases electoral turnout. The higher the general turnout, the smaller the gap in turnout between electors with high socioeconomic status and electors with low socioeconomic status (Lijphart 1997; Hill 2014). Since governments are more attentive to the interests of *voters* than *abstainers*, reducing the socioeconomic bias in *who* votes reduces the degree to which advantaged electors wield more political influence than less well-off citizens. The correlation between compulsory voting and egalitarian political outcomes is often taken as evidence that equalizing turnout makes governments accord more weight to the interests of disadvantaged groups (Lijphart 1997; Hill 2014, 134ff; Chong and Olivera 2005; Engelen 2007; Feeley 1974). Thus, compulsory voting protects political equality because higher turnout tends to be less unequal, and less unequal turnout leads to a less unequal distribution of political influence (Lijphart 1997; Hill 2014, 132–40). The argument that compulsory voting is justified because it protects the value of political equality is arguably the most prominent argument in the literature (Lijphart 1997; Engelen 2007, 24–25; Hill 2014, 132–40; 196; Lacroix 2007, 193–94; Hill 2006, 209; Birch 2009b, 22–23). It is also the argument that opponents of compulsory voting appear to consider to be the strongest (Lever 2010; Brennan 2014, 32–48). Brennan, in particular, refers to this argument both as ‘probably the most popular’ (Brennan 2014, 35) and ‘the strongest existing argument for compulsory voting’ (Brennan 2014, 48). The unequal voting patterns of different social classes also featured prominently in the debates preceding the introduction of compulsory voting in Australia (Brett 2019).

The literature also often mentions the prevention of free-riding as an end of compulsory voting (Blais 2000, 116; Engelen 2007; Lever 2010; Whelan 2018, 161). Moreover, Hill claims that the ambition to prevent free-riding is a core sentiment in the Australian legislation (Hill 2002). Lachlan

Umbers (2018) has recently argued that since governments are more responsive to the interests of voters, the members of a given social group produce a ‘disposition on the part of elected officials to protect and promote the legitimate interests of that group in policymaking’ (Umbers 2018, 4) by voting. Responsiveness to the legitimate interests of a particular social group is a good that benefits all members of that social group benefit, but which only voters from that group contribute to producing. Therefore, abstainers free-ride on voters from the social group, or groups, to which they belong. Umbers further argues that the *unfairness* of free-riding grounds an enforceable duty not to free-ride capable of justifying compulsory voting (Umbers 2018).

Since the required set for compulsory voting contains the option of attending the polls without casting a valid vote (Umbers 2018, 2; Hill 2014, 115–16), compulsory voting is an impure mandated choice policy unless its end is served when electors attend the polls regardless of whether they cast a *valid* vote. Compulsory voting serves the ends of protecting political equality and preventing free-riding because voting makes politicians more responsive to the interests of one’s social group (Umbers 2018, 4; Hill 2014, 132–40). However, attending the polls without casting a valid vote does not make politicians more responsive to the interests of the social group(s) to which one belongs. Since the required set for compulsory voting contains options that promote neither the end of protecting political equality nor the end of preventing free-riding, compulsory voting is an impure mandated choice policy, if introduced in order to serve either of these ends.

Having clarified the ends the two mandated choice policies serve, we can now compare the policies. Mandated choice in donor registration serves the end of increasing donation rates,^{xiii} which in turn prevents death and serious harm (Chouhan and Draper 2003, 160). Few, if any, goods are of equal importance to that of saving lives and preventing suffering. Even though protecting the political equality central to democracy and preventing free-riding are indeed important ends (the former somewhat more obviously so than the latter), it is difficult to escape the conclusion that they are not

as important as increasing donation rates in our current circumstances, in which people die due to the scarcity of organs for available for transplant.

The two policies also differ concerning the *kind of good* they serve. This is important since some genuine goods may not be of a kind that can permissibly be promoted through state coercion (Brennan 2014, 62–64). While nearly everyone agrees that preventing harm to others is among the ends which it is permissible for the state to pursue through coercion, there is more disagreement about the permissibility of using state coercion to prevent harm to oneself (Feinberg 1989) or harmless wrongs (Feinberg 1990). While saving lives and preventing suffering is preventing harm to others, it is thus not equally uncontroversial that state coercion may be employed to prevent free-riding. This is a comparative, rather than absolute, claim about the degree of the permissibility of using state coercion to prevent free-riding. However (un)controversial the use of state coercion to prevent free-riding is in an absolute sense (Cf. Umbers 2018, 7–8), it is surely more controversial than the use of state coercion to prevent harm to others, which is almost certainly the least controversial use of state coercion. In sum, the differences in the nature of the respective goods served by compulsory voting and mandated choice in donor registration are such that the latter is, *ceteris paribus*, easier to defend as superior to *the alternative of non-interference*. However, as we shall see in the next section, the moral weight of the good served by mandated choice in donor registration makes the task of demonstrating that it is preferable to the *alternative of direct coercion* (of citizens to register as donors) more difficult.

How the end is served

The strength of the considerations in favour of a mandated choice policy depends not only on the goodness of its end but also on how the policy serves its end. Since policies require citizens to act in a certain way *for the sake of* some end(s), the conduct they require should be suitably related to this end. Like any policy, the efficiency of mandated choice policies depends on the rate of compliance.

More interestingly, the justifiability of a mandated choice policy decreases with the *morally relevant distance* between the selection of an option from the required set of a mandated choice policy (henceforth: compliance) and contributing to its end. *Distance* refers to the length of the causal chain between compliance with a mandated choice policy and serving its end, but only the presence of further *exercises of free agency* (henceforth: choices) in the causal chain creates *morally relevant distance*. Thus, mandated choice policies are harder to justify if further choices are required in order for compliance with a mandated choice policy to serve its end.

Why should we believe morally relevant distance matters in this way? The state should generally treat adults as autonomous beings. This requires treating them as beings who are generally autonomous in their actions, such that their conduct is neither caused by others nor determined by their own previous actions (Simester and Von Hirsch 2011, 61–62). Since our own or others' previous choices do not normally force autonomous beings to do anything now, we should normally focus on the last choice in the causal chain leading to X when imputing moral (and legal) responsibility for X or designing laws aimed at promoting (or preventing) X. Thus, mandated choice policies are harder to justify if further choices are necessary for compliance to promote their end since this increases the morally relevant distance between compliance with a mandated choice policy and promoting its end.

We can now turn to the discussion of the morally relevant distance between compliance with mandated choice in donor registration and compulsory voting and the promotion of their respective ends. As impure mandated choice policies, the causal chain between compliance and their ends includes at least one further choice: the compliers must choose a favoured option by registering as an organ donor in the case of mandated choice in donor registration and (at minimum) casting a valid vote in the case of compulsory voting. Complying but choosing a non-favoured option from the required set will not serve their ends. This makes impure mandated choice policies harder to justify, all else equal.

In fact, the required set for mandated choice in donor registration and compulsory voting seems to contain not only options that are no more conducive to their ends than noncompliance but options that are even *less* conducive to their ends than noncompliance (insofar as the end of compulsory voting is either protecting political equality or preventing free-riding). The presence of options that are *less* conducive to their ends than noncompliance in the required set poses two distinct challenges to the justifiability of mandated choice policies. First, these policies will predictably coerce some citizens to act in a way contrary to their ends. Second, these policies cause citizens who do not comply, but would otherwise have selected an option more inimical to their end than failing to choose, to be liable for a penalty for the sake of these ends.

Actively registering one's unwillingness to be an organ donor is, in most legal contexts, more inimical to the end of mandated choice in donor registration than making no active choice, since most systems allow families to donate when the deceased has not decided in this regard.

As explained above, the argument that compulsory voting protects political equality and the argument that compulsory voting prevents free-riding both imply that voting serves these ends because voting makes politicians more responsive to the interests of one's social group (Umbers 2018, 4; Hill 2014, 132–40). Compulsory voting is an impure mandated choice policy (if the end is protecting political equality or preventing free-riding) because one can comply in a way that does not promote these ends by attending the polls without casting a valid vote. Attending the polls without voting is not any *less* conducive to the ends of protecting political equality and preventing free-riding than noncompliance. However, the required set for compulsory voting arguably does contain some options that are even *less* conducive to these ends than noncompliance because they make politicians less responsive to the interests of one's social group.

To see this, consider the bases on which politicians believe that some particular policies are in the interest of a particular social group, and others are not. Given that politicians are more responsive

to the interests of voters because the desire for (re)election provides a powerful incentive to *appeal* to voters but not abstainers (Hill 2014, 137; Umbers 2018, 4; Lijphart 1997, 2), such beliefs must (at least partly) be based on the preferences actually expressed by the voting choices of the members of that particular social group. But whether a voter prefers some policy is not a matter of whether that policy is objectively in her interest, but whether that voter *believes* that policy is in her interest. Politicians have an incentive to respond to the interests that voters *believe they have*, and the best indicator of what interests voters believe they have is how they vote.

If group interests are objective, but politicians respond to the interests that voters from that social group express by how they vote, then voting in a way that expresses a preference contrary to the interests of one's group reduces political responsiveness to those interests more than not attending the polls. Working-class people who vote for parties vehemently opposed to redistribution will reduce political responsiveness to the *objective* interests of their social class. If group interests are subjective (in which case they are presumably the interests that most members of the group believe they have in virtue of their group membership), then voting in a way that expresses a preference contrary to the interests that most members of one's group believe they have reduces political responsiveness to the interests of one's social group more than not attending the polls. If the great majority of a social group believes more redistribution to be in their interests, group members who vote for an anti-egalitarian party will reduce political sensitivity to the interests of their social group.^{xiv}

Thus, the required set for compulsory voting contains options that are less conducive to the ends of protecting political equality and preventing free-riding than not attending the polls. Under compulsory voting, some citizens who would otherwise have abstained will vote for parties unable or unwilling to pursue the end compulsory voting policy is supposed to serve. The causal chain between compliance with mandated choice in donor registration and compulsory voting and their respective ends also contains further choices *by other people*. Since the removal of organs suitable

for transplant typically requires consent by the family of the deceased, complying with mandated choice in donor registration *and* selecting the favoured option increases donation rates only if the family chooses not to exercise their veto. This further increases the morally relevant distance between complying with mandated choice in donor registration and increasing the number of organs available for transplant.

Similarly, choosing to vote in a way that increases political responsiveness to the interests of one's social group is not the only further choice needed for compliance with compulsory voting to promote political equality or reduce free-riding. The elected representatives must also respond by choosing to actually pursue policies sensitive to the interests of these social groups. Even though empirical evidence suggests that elected representatives *do* respond this way (Lijphart 1997; Hill 2014, 134ff; Chong and Olivera 2005; Engelen 2007; Feeley 1974), they are free to exercise their agency in ways that do not track the interests of relevant social groups. That such a further choice by elected representatives is required in order for compliance with compulsory voting to serve the end of promoting political equality or reducing free-riding increases the relevant distance. One could respond that elected representatives are morally obligated to (make a reasonable effort to) take the interests of all electors equally into account when making policy. But this response makes things worse because elected representatives would have this obligation under voluntary voting as well, in which case compulsory voting serves its ends because coercing citizens to vote produces a disposition on the part of elected officials *to do what they ought to do in the first place*. It is normally unjust to restrict the liberty of A in order to prevent B from violating her moral duties towards A. Surely, the violation of moral obligations ought to be prevented by restricting the liberty of potential violators rather than potential victims.

This takes us to the question of why impure mandated choice policies should be preferred to direct coercion. Since the required sets for impure mandated choice policies contain options that do

not serve their ends, the considerations in favour of an impure mandated choice policy will apply with stronger force to directly coerce citizens to select the favoured option. Therefore, the only way to show that impure mandated choice is preferable to direct coercion is to show that the considerations against direct coercion do not apply (with equal force) to impure mandated choice. This is easy with respect to compulsory voting. Coercing citizens to vote is not contrary to democracy, but coercing them to vote *in a particular way* clearly is. It is less clear what considerations make the impure mandated choice in donor registration preferable to direct coercion. Some suggest that directly coercing citizens to register as organ donors would violate religious freedom (Chouhan and Draper 2003, 160), but why could direct coercion not allow for religious exemptions, akin to how the United Kingdom exempts Sikhs from wearing motorcycle helmets?^{xv} Another claim is that direct coercion would cause the donation of organs for the wrong reason (Chouhan and Draper 2003, 161). But even if it is morally better to register freely, a transplanted kidney will greatly improve the life of the recipient even if donated for the wrong reason. Chouhan and Draper state that ‘an act that is freely chosen, regardless of whether it is objectively wrong, has greater moral value than an act that may be objectively good but has not been freely chosen’ (Chouhan and Draper 2003, 161). However, if they are right, then moral value is neither the only value nor the most valuable thing about donating organs. A more compelling line of argument is that direct coercion violates individual autonomy and bodily integrity in a way mandated choice does not (Wilkinson 2011).

Both mandated choice in donor registration and compulsory voting are relevantly remote from the ends they serve since the causal chains between compliance and the promotion of their ends contain further choices. This is partly due to the fact that they are both impure mandated choice policies, which coerce citizens to choose in the hope that they will select a specific favoured option. The morally relevant distance between compliance with these policies and the promotion of their ends makes these policies harder to justify, all else equal. The fact that the causal link between voting and

protecting political equality/reducing free-riding depends on further choices by elected representatives that they were morally obligated to make in the first place is particularly problematic. That said, the causal link between compliance with mandated choice in donor registration and increasing donation rates depends on further choices in a way that calls into doubt what makes this policy preferable to direct coercion.

The possible options

We now turn to the third kind of consideration that affects the justifiability of the two mandated choice policies: the options included in the required set. The relevance of the options within the required set follows from four claims. First, mandated choice policies infringe on the negative liberty to choose options outside the required set. Second, how much a mandated choice policy infringes on negative liberty depends on the options within the required set. Third, infringements on negative liberty require justification. Fourth, the justificatory burden is proportional to how much negative liberty is infringed. The main focus of the discussion below is the second claim, especially spelling out exactly *what* it is about the options within the required set that affects the degree to which mandated choice policies infringe on negative liberty, and how this reflects on mandatory choice in donor registration and compulsory voting. Before doing that, however, a few comments about the third and fourth claims. (The uncontroversial first claim was briefly defended in the first section).

The third claim is a core commitment of liberalism (Cf. Feinberg 1984, 7–10; 206ff; Moore 2014; Gaus 2012, 479ff; Blake 2001; Rawls 2001, 44, 112). It affirms that liberty, rather than coercion, is the norm from which deviations are to be justified (Feinberg 1984, 9). Since liberty is the baseline that one must justify deviating from, the infringement of negative liberty is among the normatively relevant reasons *against* a policy that the considerations in its favor must outweigh in order for it to be justified. The strength of this reason is proportional to how much the policy infringes on negative liberty. More weighty considerations are required to justify policies that infringe more

on negative liberty. This does not mean that infringements on negative liberty cannot be justified, nor even that (minor) infringements of negative liberty are particularly demanding to justify. It simply means that some justification is needed. This is hardly controversial. The very fact that scholars bother making a *positive* case for compulsory voting and mandated choice in donor registration at all (as opposed to merely answering objections) shows that they too believe that these policies need justification.

Since mandated choice policies infringe on the negative liberty to choose options outside the required set, the degree to which mandated choice policies infringe on negative liberty depends on what options are included within the required set. Specifically, it depends on the *width* and the *granularity* of the required set. *Width* refers to the logical distance between the two extreme options (on relevant dimensions). *Granularity* refers to the spread of options across the width. Consider two versions of a mandated choice policy in donor registration. A policy that had citizens choose whether to say ‘yes’ or ‘no’ to register as an organ donor would have a lot of width, but little granularity. The granularity would be increased by allowing people to select only some of their organs, or choosing whether to make one’s donation subject to family approval. Mandated choice policies infringe more on negative liberty if the required set is narrow and coarse-grained. A coarse-grained set excludes a greater number of distinct options, whereas a narrow required set limits the range of alternatives. Though the required set for mandated choice policies must, by definition, contain relevantly different options, the required set need not be particularly wide or fine-grained.

The required set of mandated choice in donor registration is typically very wide since it normally includes both the option of registering and not registering as a donor. However, this is not always the case. The form used in New Zealand asking whether one would be willing to donate organs in the event of one’s death specifies that ‘if you answer “yes”, in the event of your death your next-of-kin will be asked for their agreement to donate organs’.^{xvi} Thus, the New Zealand policy excludes

the option of consenting regardless of what one's family thinks, thereby unnecessarily narrowing the required set. The policy is also very coarse-grained, as one cannot consent to donate only some organs in the event of one's death since the only possible answers are 'yes' and 'no'. A maximally fine-grained feasible required set would include the option of consenting, consenting subject to family veto, and not consenting to become a donor with respect to each relevant organ.

The required set for compulsory voting typically contains each voting option (e.g., the parties and/or candidates running in a general election) and attending the polls without casting a valid vote. The width of the required set can be ensured by including the possibility of voting for 'none of the above', since this makes the required set span as much of the logical space as possible. Indeed, proponents of compulsory voting support the inclusion of a 'none of the above' option on the ballot precisely because this makes compulsory voting less coercive (Hill 2014, 141–42). The granularity of the required set is dependent on the parties and candidates available on the ballot. The required set for compulsory voting is more fine-grained in multi-party systems than in two-party systems. However, even at best the required set for compulsory voting will exclude many feasible political platforms if no party is running on them. Though adding the possibility of voting 'none of the above' will ensure width in the required set, it does not solve the problem of granularity. Lumping every position not represented on the ballot together as 'none of the above' causes the options within the required set to be unevenly distributed across the available width, creating a required set which is coarse-grained outside the political mainstream and fine-grained within it.

While the range of parties would not have been more comprehensive under voluntary voting, it shows that states cannot alter the required set for compulsory voting the way they can alter the required set for mandated choice in donor registration. Nor can the ordinary citizen easily start a new political party. It is thus relatively simple to ensure that the required set for mandated choice in donor

registration is sufficiently wide and fine-grained, but the required set for compulsory voting is largely outside the state's control.

The costs and burdens

The costs of mandated choice policies understood as the weight of the morally relevant considerations against these policies, also affect their justifiability. We discussed one of these costs, the infringement on negative liberty, above. However, mandated choice policies also have other costs, such as the costs of compliance and the costs of noncompliance.

Compliance with mandated choice policies has conventional economic costs equivalent to the costs of actively selecting the least costly option within the required set. The conventional costs of complying with a mandated choice in donor registration like that of New Zealand are low (Feinberg 1984, 50). Effectively, they are the costs of answering a further question when applying for a driver's license. The conventional cost of complying with compulsory voting is equivalent to the expenses of showing up at the polling station. Though this cost is typically small, voting is not free. For instance, the cost of voting in Australia is estimated to be AU\$5 (Hill 2014, 124).

Choosing may also have psychological costs. Obviously, the nature and extent of the psychological costs (and benefits) of choosing might differ greatly between individuals, in a way that a legal framework cannot reasonably take into account.^{xvii} However, some psychological costs might be generally felt. Active choosing takes up scarce mental 'bandwidth' in the form of the attention and effort expended to choose. That is why we often rely on habits and defaults. Active choosing can also be burdensome when the choice is complicated (Sunstein 2014, 40). This can happen both when choosers lack information and when they possess more information than can easily be factored into the decision-making process. The choice situation of those asked to decide whether they want to register as organ donors is not particularly complicated. The medical science of organ transplants is

complex, but the rough relationship between registering as a donor and the supply of organs is not. By contrast, the relationship between voting for a particular party or candidate and government policy after the election might be rather complicated.

The unpleasantness of contemplating one's own death is sometimes mentioned as another psychological cost of reflecting on whether to register as an organ donor (MacKay and Robinson 2016, 5). This is no doubt correct. But voting similarly involves a potentially unpleasant reflection on disturbing trends in current politics. The obvious reply is that citizens *ought* to reflect on politics regardless, but it seems equally plausible that they ought to contemplate their own mortality if doing so is part of a process that could save lives. Even if relevant, the distress of contemplating an unpleasant choice situation impacts the justifiability of both policies equally.

The *distribution* of the costs also matters. The costs of compulsory voting are distributed equally among all electors. They may be lower for those living close to a polling station, but this is an inequality that is hard to avoid. By contrast, though low, the cost of complying with the New Zealand version of mandated choice in donor registration is imposed exclusively on those interested in obtaining a driver's license. This presumably has a disparate impact on rural citizens without easy access to public transport. There is little reason to impose this cost only on those interested in obtaining a driver's license. It might seem that the difference in people's exercises of responsibility (about whether to apply for a driver's license and thus answer the relevant question) could justify this inequality,^{xviii} but this is not the case. First, responsibility-sensitive theories of distributive justice imply that difference in choice justifies inequality only if people are, to some extent, in an equal choice situation. But the situation of urban and rural citizens is not equal with respect to choosing whether to apply for a driver's license, which rural citizens typically need more. Furthermore, most responsibility-sensitive theories require either that the consequences people experience from their choices are naturally connected to those or conforms to a further principle justifying the connection

of particular choices and their consequences in this way.^{xix} But refusing to choose whether to become an organ donor is not connected to the inability to obtain a driver's license in either of these ways. Of course, even if the distribution is unjust, it is hardly one of the great injustices of our world. However, requiring a decision about whether to register as an organ donor in connection with tax returns, or something else that involves (nearly) all citizens, rather than the application for a driver's license would be *pro tanto* superior.

The last relevant factor is the costs of noncompliance. Though most Australian turnout is high, it is not universal. Following the 2004 general elections, 52,796 Australian electors paid an AU\$20 penalty for failing to vote (Birch 2009a, 6). Some might want to dispute that the costs imposed on abstainers are relevant to the justifiability of compulsory voting; after all, they could have just voted. But if one concedes that penalizing abstention by, e.g., AU\$2000 or prison would be disproportionately severe, and surely this would be universally conceded, then the costs of noncompliance matter. Although AU\$20 is a small sum,^{xx} this penalty is a real and relevant cost that adds to the case against compulsory voting that must be overcome by the goodness of its end.^{xxi} The cost of noncompliance with New Zealand's mandated choice policy in donor registration is the inability to obtain a driver's license. Imposing this significant disadvantage, typically visited only on serious traffic offenders, on those who refuse to choose whether to register as an organ donor is problematically disproportional. Of course, it is unclear whether a nontrivial number of New Zealanders cannot obtain a driver's license because they refuse to choose whether to register as donors. However, as already argued, the proportionality of the penalty remains relevant for the assessment. In general, the differences in cost of compliance between compulsory voting and mandated choice in donor registration are not large enough to significantly affect their relative justifiability. However, the cost of noncompliance with the New Zealand policy of mandated choice with respect to organ donation is significantly higher. Furthermore, the cost distribution of this policy is unjustly unequal.

IV. Conclusion

While mandated choice policies can seem a solution to situations where we want more people to choose among a required set, not all such policies are equally attractive, even when we can expect them to bring about attractive ends. The ends analysed in this article were increasing donation rates in the case of donor registration and protecting political equality or preventing free-riding in the case of compulsory voting. These policies were discussed in light of the end they serve; how they serve it; the options within their required set; and their morally relevant costs, including how they are distributed. Based on this, we can conclude that when considering those ends, mandated choice is more attractive in the context of donor registration. Having also contrasted our approach to that of Cass Sunstein, we hope to have also shown how mandated choice policies must be evaluated in light of their ends.

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ⁱ For prominent discussions of mandated choice in organ donation see (Cotter 2011; Chouhan and Draper 2003, 158; Herz 1999; MacKay and Robinson 2016, 9; Spellman 2005; Spital 1996).

ⁱⁱ See Australian Commonwealth Electoral Act 1918 [CEA], section 245 (http://www.austlii.edu.au/au/legis/cth/consol_act/cea1918233/). Note that electors can avoid the fine by providing a “valid and sufficient reason for failing to vote” (CEA, section 245(4D)).

ⁱⁱⁱ <https://www.nzta.govt.nz/assets/resources/application-for-driver-licence-dl1/docs/dl1.pdf>

^{iv} As the New Zealand Transport Agency emphasises (<https://nzta.govt.nz/driver-licences/getting-a-licence/organ-and-tissue-donation/>).

^v This leads some to prefer the term mandatory turnout (Cf. Elliott 2017).

^{vi} Note that Australian law actually does in fact strictly require casting a valid vote (Evans 2006), as several court rulings have upheld (Evans 2006; Brett 2019b), but the legal obligation to do more than attend the polls cannot be enforced due to the secret ballot (Hill 2014, 115–16).

^{vii} *End* should be understood broadly, such that ends can be served not only by promoting that which ought to be promoted, but also respecting what ought to be respected, protecting what ought to be protected etc.

^{viii} Compare this with what Chouhan and Draper refer to as ‘the two central objections to mandated choice’ (Chouhan and Draper 2003, 158) which are, respectively, objections that one has failed to convincingly argue each of these things.

^{ix} In earlier formulations the risk of inertia also spoke against defaults (Sunstein 2014, 28–38).

^x For evidence that it does, see (Carreras 2016; Sheppard 2015; Shineman 2018).

^{xi} To be fair, most of the choices Sunstein discusses lack such relevantly neutral options.

^{xii} Cf. (Husak 2008, 133) for some remarks on how to determine *ratio legis*.

^{xiii} Some also stress the value of knowing for certain what people prefer, regardless of whether it increases donation rates (Hansen 2012).

^{xiv} One could define social groups as consisting *exclusively* of persons who consider a particular policy to be in their interest. But such a definition would exclude the collectives we normally have in mind when talking about social groups – those with similar ‘racial, socio-economic, [or] geographic’ (Umbers 2018, 4n) backgrounds – since they are not monolithic in this way.

^{xv} See (Modood 2011, 30).

^{xvi} <https://www.nzta.govt.nz/assets/resources/application-for-driver-licence-dl1/docs/dl1.pdf>

^{xvii} Cf. Feinberg’s remark that ‘criminal statutes, to be effective, must employ general terms without the endless qualifications and refinements that would be needed to accommodate the whole range of idiosyncratic vulnerabilities’ (Feinberg 1984, 51). The mandated choice policies we discuss are not criminal statutes, but there is little reason to think that this point applies only to criminal law.

^{xviii} As claimed by luck egalitarian theories of distributive justice (Arneson 1989; Cohen 1989; Knight 2009; Lippert-Rasmussen 2016).

^{xix} These are often referred to as principles of stakes (Olsaretti 2009; Stemplowska 2013).

^{xx} Note, however, that the penalty will typically be imposed on those least able to pay, as some socio-economic bias in voting remains under compulsory voting (Lijphart 1997, 3; Katz and Levin 2018).

^{xxi} This implies that compulsory voting can be made more justifiable by reducing the penalty. Note, however, that compulsory voting increases turnout only if enforced (Birch 2009a, 79–97).