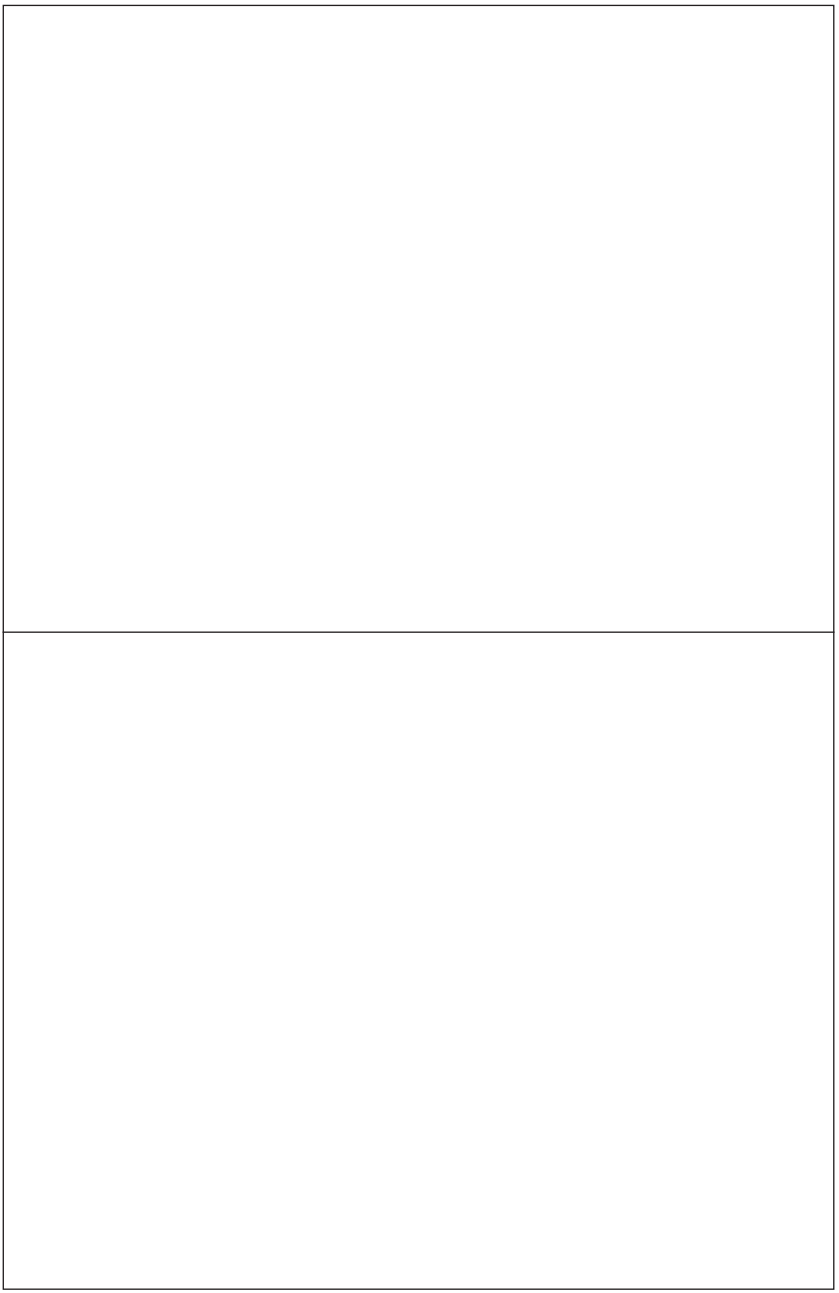
Christoph Krönke

Governmental Paternalism

Nomos



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Preface

This book is the result of my work as an Early Career Scholar of the international and interdisciplinary *Enhancing Life Project* (ELP), launched by the University of Chicago in collaboration with the Ruhr University Bochum, and supported by a grant from the John Templeton Foundation. The ELP enabled me to conduct independent research on my individual project from October 2015 to December 2016.

The overall aim of the ELP was to comprehensively explore the rich but widely unexamined aspirations of human beings that move persons and communities into the future.[1] 35 scholars from diverse academic backgrounds (Christian theology, religious studies, anthropology, communications and media studies, history, law, medicine, philosophy, political science, social work, and sociology) and from different countries and cultural contexts (including Germany, Iraq, Israel, Taiwan, the United Kingdom, and the United States) were supported.[2] During three joint seminars in Banff, Canada (2015), Berlin, Germany (2016) and Chicago, United States (2017), I had the opportunity to exchange and collaborate with my fellow scholars and focus on our shared concern, i.e. developing the academic field of *Enhancing Life Studies* (ELS).

With my individual project on *Governmental Paternalism* I tried to find an answer to the big question "What is enhancing life?" by asking another question: *Who* should decide what an enhanced life actually is? Is it the government or is it the individual? For a (radical) libertarian, the answer would be simple. The individual gets to decide. If he or she wants to drink, smoke, gamble, it's up to him or her to do so. But if you are a liberal or hold moderate political views, you would probably say that the government has certain responsibilities with respect to the wellbeing of its citizens.

I would like to thank my mentor *Martin Burgi*, who advised me to apply for the ELP in the first place, and – of course – the entire ELP team, including its Principal Investigators, *Günter Thomas* and *William Schwei-*

1 See http://enhancinglife.uchicago.edu/about/introduction-the-big-questions for a detailed project description.

2 Cf. http://enhancinglife.uchicago.edu/about.

ker, as well as *Sara Bigger* (Project Director), *Markus Höfner* (Project Co-ordinator), *Heike Springhart* (Project Consultant) and all my fellow scholars for making everything happen. The ELP has truly enhanced my personal and academic life.

Christoph Krönke Munich, June 2017

Governmental Paternalism: Anachronism or Future Model of Enhancing Life?

Paternalism? Seriously? Why would anyone in our assumingly liberal Western societies appreciate a government that patronizes its citizens, be it for their own good? In the 21st century, indeed, writing a book on "Governmental Paternalism", a term with strongly pejorative (even sexist?) overtones, does call for some explanation – at least if governmental paternalism is put in context with the enhancement of human life.

For quite a long time, the idea of a "father" (or "mother") State that takes care of his (or her) citizens and provides protection, regardless of and even against their actual will, was not much appreciated. *Immanuel Kant* drastically wrote in 1793 that a "fatherly government (*imperium paternale*)" renders its citizens as "underage children" who were "not able to distinguish what is truly good or bad for them"; hence, *Kant* argued, governmental paternalism was "the greatest possible despotism".[3] Accordingly, the first paternalism debate, for instance, in German legal scholarship, culminating in the 1990s, was a very critical one and focused on the question of whether protecting human beings from themselves was permissible in light of their fundamental human rights.[4] Most legal scholars agreed that governmental paternalism had to be limited to exceptional cases, such as protecting people from gross self-harming conduct (e.g. from gambling or "walking and texting") or the protection of minors (e.g. from skin cancer, by way of indoor UV tanning restrictions) and of mentally disordered people who do not have the ability to fully understand and

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3 *Kant*, Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis (1793), in: Riedel (ed.), Immanuel Kant, Schriften zur Geschichtsphilosophie, 2001, page 118 (137) (translated by the author).

4 See *von Münch*, Grundrechtsschutz gegen sich selbst, in: FS Ipsen, 1977, pages 113-128; *Doehring*, Die Gesunderhaltung des Menschen im Spannungsverhältnis zwischen Staatsfürsorge und Individualentscheidung, in: FS Zeidler II, 1987, pages 1553-1565; *Hillgruber*, Der Schutz des Menschen vor sich selbst, 1992; *Littwin*, Grundrechtsschutz gegen sich selbst, 1993; *Fischer*, Die Zulässigkeit aufgedrängten staatlichen Schutzes vor Selbstschädigung, 1997; *Schwabe*, Der Schutz des Menschen vor sich selbst, JZ 1998, pages 66 *et seq.*; *Möller*, Paternalismus und Persönlichkeitsrecht, 2005.

evaluate the consequences of their actions. In general, however, the notion of governmental paternalism had a rather negative connotation.

It was not until recently that more and more scholars recognized the truly positive aspects of governmental paternalism, particularly in Anglo-Saxon jurisprudence. The proponents of so-called "libertarian paternalism"[5] make arguments on the basis of behavioural economics research, which reveals that people systematically tend to make "bad decisions" due to the structural lack of attention, information, cognitive abilities and self-control. They argue that governments should be allowed to smoothly move ("nudge") and guide its citizens "in a direction that will make their lives better" by way of a self-conscious governmental "choice architecture".[6] In their famous book on "nudging", *Richard Thaler* and *Cass Sunstein* argued that influencing people's behaviour by a well-designed choice architecture does not burden people who want to exercise their freedom of

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5 For a historical reconstruction of the term see *Thaler*, Misbehaving: The Making of Behavioral Economics, 2015, pages 322 *et seq*.

6 Cf. *Thaler/Sunstein*, Nudge – Improving Decisions About Health, Wealth and Happiness, 2008, pages 5-6. The theories developed in this book received remarkable attention among legal scholars. For the discussion in German see *Eidenmüller*, Effizienz als Rechtsprinzip – Möglichkeiten und Grenzen der ökonomischen Analyse des Rechts, 1995, pages 358 *et seq.*; *id.*, Liberaler Paternalismus, JZ 2011, pages 814 *et seq.*; *van Aaken*, „Rational Choice" in der Rechtswissenschaft – Zum Stellenwert der ökonomischen Theorie im Recht, 2003, pages 71 *et seq.*; *id.*, Begrenzte Rationalität und Paternalismusgefahr: Das Prinzip des schonendsten Paternalismus, in: Anderheiden/Bürkli/Heinig/Kirste/Seelmann (ed.), Paternalismus und Recht, 2006, pages 109 *et seq.*; *Englerth*, Vom Wert des Rauchens und der Rückkehr des Idioten – Paternalismus als Antwort auf beschränkte Rationalität?, in: Engel/Englerth/Lüdemann/Spiecker gen. Döhmann (ed.), Recht und Verhalten – Beiträge zu Behavioral Law and Economics, 2007, pages 231 *et seq.*; *Schuppert*, Zwischen Freiheit und Bevormundung, in: FS Schmidt-Jortzig, 2011, pages 291 *et seq.*; *Smeddinck*, Regulieren durch „Anstoßen". Nachhaltiger Konsum durch gemeinwohlverträgliche Gestaltung von Entscheidungssituationen?, Die Verwaltung 44 (2011), pages 375 *et seq.*; *id.*, Der Nudge-Ansatz – eine Möglichkeit, wirksam zu regieren?, ZRP 2014, pages 245 *et seq.*; *Kirchhof*, Contra: Nudging – schwierige Fragen nach Recht, Freiheit und Gesellschaft, RuP 2015, pages 85 *et seq.*; *id.*, Nudging – zu den rechtlichen Grenzen informalen Verwaltens, ZRP 2015, pages 136 *et seq.*; *Wolff*, Eine Annäherung an das Nudge-Konzept nach Richard H. Thaler und Cass R. Sunstein aus rechtswissenschaftlicher Sicht, Rechtswissenschaft 2015, pages 194 *et seq*. Moreover, several German scholars who publish regularly on the well-known *Verfassungsblog* organized a major conference on "Choice Architecture in Democracy" in January 2015, the contributions to which are available on http://verfassungsblog.de/category/focus/choice-architecture-nudging-en/.