35.1 In particular, **religiously motivated, medically non-indicated circumcision of boys who are unable to consent** has only recently gained attention because of tabooing (See section 9 ff), although it has for a long time straddled a contested borderline. Circumcision as an alleged prophylaxis, which is based wholly on a myth, has also been called into question in the wake of the discussion about religiously motivated circumcision; in this case, the efficacy of the consent fails in light of the objectively false (on the basis of new medical knowledge) assertions of medical importance and harmlessness that have been disseminated in patient information. § 1631d Par 1 S 1 BGB explains that care for the person of the child also encompasses the right to consent to a medically unnecessary circumcision of a child who lacks the capacity for understanding and discretion as long as it is performed according to medical standards. Accordingly, it doesn't depend on the goal of the procedure. The legislative margin of evaluation ends at the latest at the borderline of caprice; indeed its adherence here appears questionable. The combination of a medically non-indicated operation with the requirement that it be implemented according to the rules of the medical profession contains a contradiction, because, by medico-ethical standards, a non-indicated operation is fundamentally out of keeping with the rules of the medical profession, specifically with the imperative "neminem laede." The purposeless operation without medical indication and with irreversible consequences is hence impossible to legitimize; this pertains above all to the circumcisions that are performed for alleged prophylaxis. Taken for itself, a religious or otherwise plausible purpose does not justify the assumption that the well-being of the child will not be endangered since the operation isn't totally free of risk and has non-trivial consequences. The legislature holds that the bodily **well-being of the child** can be balanced against the **purpose of the circumcision**; this appears, however, "rabulistic" (Löffelmann Rechtspolitik 2012, 35, 37). Only in particular cases when, allowing for the purpose of the circumcision, the well-being of the child is endangered, the parental right to consent to the circumcision would be excluded (§ 1631d Par 1 S 2 BGB). Thereby factors that cannot be offset, videlicet, the right of the child to sexual and religious self-determination as well as his right to bodily integrity and physical health on the one side and the religiously motivated right of the parents (to heteronomy) on the other side, are set against one another. That is – aside from a purely political act of volition – no longer comprehendible. It remains unclear how, in particular cases, a painful foreskin amputation that can cause post-traumatic stress disorder is supposed to be compensated for by a future mental sensation of well-being at the knowledge of one's acceptance into a religious community through its laws. Thus, the civil law provision admits no plausible penal law verification and, thereby, new legal uncertainly is introduced. If the provision is to function as a penal law justification, it lacks the necessary precision. Apart from that, it's hardly feasible because many ambiguities remain.

35.2 So, in view of penal law, which, from the ostensibly clarified provision of § 1631d BGB, is obscured in civil law, the **factual attributes** of the (qualified) bodily injury of circumcision always **indicate** its illegality, which can only be vindicated by an exemption (with different emphasis Lack ZKJ 2012, 336, 338 f). The understanding of § 1631d Par 1 BGB as a penal-law **exemption**, however, does not match the provision structure of the meaning that is transposed into civil law,

whereby the right of the parents to consent should be the rule and putting the child's well-being in danger should be the exception. Only **in the case of a child who is unable to assent or exercise judgment** does the proxy consent of the parents come into question as a possible ground for justification (supported by Yalcin Betrifft Justiz 2012, 380, 381). If a child of around thirteen years old, who is thus capable of discretion and judgment, is to be circumcised, § 1631d Par 1 BGB is **inapplicable**. Then only the consent of the affected boy himself is effective. The ambiguity of the time at which one attains the ability to exercise judgment (Hamdan jurisPK-BGB § 1631d Rn 10) leaves the rule's scope of application unclear in cases of Islamic circumcision (Antomo Jura 2013, 425, 436). That the inability to consent should be judged by the (biased) parents (Hamdan jurisPK-BGB § 1631d Rn 11) complicates the situation. Infants are the only demographic who are distinctly and definitely unable to exercise their own judgment. Even within the scope of application of the rule, it is questionable whether the operation is of such a nature that it can be consented to. Furthermore, the efficacy of the joint **consent of the parents**, which appears particularly dubious in cases of mixed-faith marriages (compare OLG Frankfurt a. M. NJW 2007, 3580), or the efficacy of the unilateral consent of one parent (compare Mandla FPR 2013, 244, 246) is unclear. Whether the existence of a **power of disposition of the explanation** with respect to the compatibility of the operation with the – relatively imprecisely defined – boni mores is relevant to iSd § 228 StGB (so etwa Lack ZKJ 2012, 336, 337), appears to be of secondary importance. Attention should be paid, however, to the fact that the question of adherence to boni mores with respect to the standards of bodily integrity to judge danger to a **legally protected interest** is to be examined (BGH NJW 2013, 1379, 1380), so that an irreversible bodily injury in the genital region cannot be compensated for through factors that that concern religious salvation. § 228 StGB is, however, not even equipped for the proxy consent of parents (Jerouscheck FS Dencker 2012, 171, 177; Radtke Stellungnahme zur Anhörung im Rechtsausschuss vom 23.11.2012, 5). The parents' or community's right to practice religion as their own civil right provides, however, no grounds for justification of an invasion into the bodily integrity of the child as an autonomous juristic person (Czerner ZKJ 2012, 374, 380; Isensee JZ 2013, 317, 319; NK/Paeffgen StGB § 223 Rn 103c; Schönke/Schröder/Sternberg-Lieben StGB Vorbem zu §§ 32 ff Rn 41). Other than emergency laws (§ 32 StGB, § 34 StGB), the **civil rights** of the parents or religious communities, as individual bearers of fundamental rights, provide **no warrant to invade the bodily integrity of another person** (Dettmeyer/Parzeller/Laux/Friedl/Zedler/Bratzke ArchKrim 2011, 85, 92 ff; Giger forumpoenale 2012, 95, 100 [für das vergleichbare schweizerische Recht]; Herzberg ZIS 2012, 486, 490; Isensee JZ 2013, 317, 322, 323; Putzke MedR 2012, 621, 624 and RuP 2012, 138; overlooked by Germann in Heil/Kramer Beschneidung, 83, 87). The subject of protection of Art 6 Par 2 S 1 GG is, moreover, not the **desire and will** (to self actualization) **of the parents,** which these (and other discussants, compare Fateh-Moghadam in Heil/Kramer Beschneidung, 146, 154) frequently misjudge, but rather only the fiduciary **well-being on the child** as apprehended by the parents (Stumpf DVBl 2013, 141, 142). Since it's a matter of the sacrosanct in the genital area, cost-benefit questions play no role (contrary to the legal myth that, ignoring

the circumstances of presentation, a consequential injury in the genital region with irreversible consequences will be maintained). The assumption that the ban on circumcision constitutes a violation of the freedom to practice religion, which in turn needs legitimation, changes the circumstances and evaluation of the procedure without legal justification. Not only bodily integrity is violated, but also the freedom of religious and sexual self-determination of the circumcised infants or boys; this has nothing to do with the civil rights of the parents and the religious communities. That the affected child could one day have consented to the genital operation for himself, so that, in the sense of § 1631d BGB, a consideration of his conflicting will can be relevant only in particular cases, is a fiction. Early childhood circumcision is challenged precisely because of the defenselessness of the subject (and the fact that infants were formerly thought to lack fully developed sensitivity to pain); adolescents or adults would not consent to a genital operation without anesthesia without resistance or reluctance; they would then be compelled to acquiesce to the operation though direct coercion or severe peer pressure. Moreover, the infant or small child does not practice **religion** himself when he undergoes an operation, not even by his representation in the informed consent of the parents (Czerner ZKJ 2012, 374, 376; aA Beulke/Dießner ZIS 2012, 338, 344). A hospital operation – in place of a circumcision in a synagogue, mosque, prayer room, or private residence – is no longer interpretable as a religious-cultural act. So the former is not a practice of religion, while the latter option of operating outside of sterilized rooms does not accord with the rules of the medical profession. In conclusion, the religious communities are not allowed by constitutional law to require a bloody sacrifice for acceptance into their circle, since violence and force do not appear to be compatible with freedom of religion (Art 140 GG iVm Art 136 WRV, see 35.6).

35.3 The **scope of protection of the freedom to practice religion** is fundamentally wide (Czerner ZKJ 2012, 374, 376 f); it includes not only the right to have a belief, but also the freedom the live and act **by** one's **own religious beliefs**, and, in particular, the freedom to participate in cultural activities and to honor religious symbols (BVerfGE 93, 1, 15). The scope of protection of the freedom of religion of one must, however, end where the scope of fundamental rights of another begins (Fischer StGB § 223 Rn 48) and where he has **no opportunity to avoid** the expressions of belief, **cultural activities, and religious symbols** (BVerfGE 93, 1, 16; perhaps overlooked by Schwarz in Heil/Kramer Beschneidung, 98, 104). Circumcision cannot be designated as "religiously indicated" (as Schramm in Heil/Kramer Beschneidung, 134, 140). The frequent equation of the religious freedom of the parents with their authority to consent to the circumcision of the child disregards the distinction between the fundamental rights of the parents and those of the child. Also the **prohibition of violence** in the context of religious freedom and the prohibition of the exercise of force (compare Art 136 WRV iVm Art 140 GG) set conspicuous boundaries to the protection of the freedom of religion (Zähle AöR 134 [2009], 434, 439) that are crossed by the forced circumcision of a defenseless infant or child. Even the scope of protection of Art 4 GG is not without boundaries (Isensee JZ 2013, 317, 319, 320, 322; Zähle AöR 134 [2009], 434, 436). The primacy of the parents in the fiduciary exercise of the rights of the child is based not on their desire and will, but rather on the **presumed will of the child**. This

resembles the handling of the presumed or hypothetical consent in the context of § 228 StGB. The presumed or hypothetical will of the child cannot entail having an irreversible bodily imprint already in place by the time he reaches the age of religious majority and the ability to exercise sexual self-determination (misjudged by Germann in Heil/Kramer Beschneidung, 83, 90 f). Besides, a rite that bypasses the fundamental rights of the child must go against the standard of the **ordre public** (Art 6 EGBGB; Art 20 Par 3 GG iVm Art 1 Par 1, 2 Par 1 and Par 2 S 1, 3 Par 2, 4 Par 1 GG; Czerner ZKJ 2012, 374, 383; Zähle AöR 134 [2009], 434, 437 f), which must deny approval of the ritual operation because of violations of fundamental rights to the detriment of the child; the odre public essentially corresponds with the boni mores as bounds of consent in the sense of § 228 StGB. Thus, no **"intrusion into the fundamental rights of the parents"** subsists (Hörnle/Huster JZ 2013, 328, 329; Wiater NVwZ 2012, 1379, 1380), but rather only an intrusion into the fundamental right of the child to bodily integrity, future sexual self-determination, and autonomous exercise of the positive and negative freedom of religion, which includes freedom to distance oneself from cults and symbols (BVerfGE 108, 292, 301) and certainly freedom from permanent bodily imprinting of a religious symbol (aA Hörnle/Huster JZ 2013, 328, 329). While the symbolic meaning of circumcision is invoked for the argument for the religious freedom of the parents and religious communities, it is unjustly unnoted in the treatment of the negative freedom of religion of the child (Czerner ZKJ 2012, 374, 381). Likewise, the invasion into the right to unimpeded sexual development and non-interference in the sphere of privacy remains unconsidered. These are, however, sacrosanct legal positions. So it's certainly not a cost-benefit question. (Krüper ZJS 2012, 547 ff; Lack ZKJ 2012, 336, 338; Muckel JA 2012, 636 ff; Wiater NVwZ 2012, 1379, 1380; Herzberg ZIS 2012, 486, 492). Even if a trade-off were taken to be possible and requisite (compare Steinbach NVwZ 2013, 550, 551), it would have to turn out in favor of the bodily integrity of the child since the freedom to exercise religion can wait until the child reaches the age of consent (Czerner ZKJ 2012, 374, 380; Jerouscheck FS Dencker 2012, 171, 177; Kempf JR 2012, 436, 438; Pfahl-Traughber Vorgänge 2012 Nr 3, 124 ff; Putzke FS Herzberg 2008, 669, 706). Art **4 GG grants only to the individual "forum internum" absolute protection** (Zähle AöR 134 [2009], 434, 438). Anything that affects the rights and interests of other bearers of legal protection or the community would, though, always be left in the sphere of forum externum. Here, it's a question of the bodily integrity and future religious and sexual self-determination of the children, who are permanently affected by circumcision. Overall, these legal positions offset everything else in the case of an – alleged – conflict of fundamental rights (Czerner ZKJ 2012, 374, 376). Even if one doesn't count them as absolute considerations (that is, considerations to which comparison is simply unintelligible), they would still clearly be of greater importance than the religious freedom of the parents or religious communities. The fact that they outnumber the child also doesn't offset his fundamental rights such that he can be obliged to acquiesce to the forced circumcision. Circumcision takes place as early as possible precisely because hardly anyone would consent to the painful procedure if they were old enough to articulate their will (compare Stumpf DVBl 2013, 141, 142); early circumcision allows the autonomous will of the person concerned to be

circumvented. This also results from the legal policy of Art 136 WRV. Besides, a principle of majority rule is irrelevant to the assessment of religious freedom by Art 1 Par 1 GG (BVerfGE 93, 1, 24). The parents' and religious communities' freedom to practice religion is thus irrelevant to the justification of circumcision of infants or children. § 1631d Par 1 doesn't, however, take the religious motivation into account (Herzberg ZIS 2012, 486). Yet the positive law does not otherwise permit the invasion of the bodily and intimate spheres for the purposes of parenting, wherefore § 1631d BGB is alien to the system. In fact, the law speaks out against encroachments in the bodily sphere without medical indication as a matter of principle in Art 2 Par 2 S 1 GG, § 223 StGB, and § 1631 Par 2 BGB (Czerner ZKJ 2012, 374, 379). By Art 1 Par 1 GG, a medically baseless procedure in the private sphere is never allowed. Hence, the evidence objectively indicates an injustice, because § 1631d BGB is unconstitutional and is, moreover, generally unacceptable because it endangers the well-being of children.

35.4 The proxy **consent of the parents** (which, because of the mutual entitlement to care, is only possible through a joint decision, and is therefore highly problematic in interdenominational marriages and in cases of disagreement between the parents; Antomo Jura 2013, 425, 435; Mandla FPR 2013, 244, 246), which is granted on the basis of the right to the **care of the person of the child** (§ 1631d BGB; BT-Drs 17/11295, 16) is, for purposes of religious affiliation, only effective **until age 14** (§ 5 RelKErzG); consequently, no permanent marking of the child is permitted (BT-Drs 17/11430, 10; Czerner ZKJ 2012, 374, 382; Dettmeyer/Parzeller/Laux/Friedl/Zedler/Bratzke ArchKrim 2011, 85, 93 f). § 1631d BGB diverges from this. Those affected should be able to make their own decision on the basis of the positive and negative freedom of religion; but this right is denied them though through an irreversible bodily imprint (BT-Drs 17/11430, 11; Dettmeyer/Parzeller/Laux/Friedl/Zedler/Bratzke Archiv für Kriminologie 2010, 85, 94; Fischer StGB § 223 Rn 45a; Herzberg ZIS 2010, 471 ff and ZIS 2012, 486, 505; Jerouscheck NStZ 2008, 313 ff; Giger forumpoenale 2012, 95, 101; Putzke NJW 2008, 1568 ff and MedR 2012, 621, 624; aA Brocke/Weidling StraFo 2012, 450, 456). For Muslims this is particularly relevant, because Islam **forbids change of religion** as a matter of principle (Kloepfer DÖV 2006, 45, 46 Fn 9), which contradicts freedom of religion in the sense of Art 4 Par 1 GG. An irreversible bodily procedure that is undertaken to affect a religiously grounded bodily marking, and which trespasses in the core area of the sphere of privacy by involving the primary sex organ, is, moreover, generally not advisable without medical indication, not even in view of a supposed will of the child (compare BGHSt 45, 219, 222). The **parents' religious freedom** from Art 6 Par 2 S 1 GG (Lack ZKJ 2012, 336, 338) gives them **no authority to encroach on the rights of the child** to unimpeded sexual and overall development and bodily integrity from Art 2 Par 2 S 1 GG (Stumpf DVBl 2013, 141, 143; Zähle AöR 134 [2009], 434, 440). They also can not judge, as the child's proxy, which demands the child himself will later make about the intactness of his genital organs (Hartmann Stellungnahme zur Anhörung im Rechtsausschuss am 26.11.2012, 3). According to constitutional law (Germann MedR 2013, 412, 416; Schramm in Heil/Kramer Beschneidung, 134, 138; Yalcin Betrifft Justiz 2012, 380, 384; Wiater NVwZ 2012, 1379, 1381) as well as (a fortiori) criminal law and liability

law, it doesn't depend at all on the **religious motivation** of the parents and the circumcisers (Merkel Stellungnahme zur Anhörung im Rechtsausschuss vom 23.11.2012, 4 f) even if § 1631d Par 1 S 2 BGB cautiously implies something else (Hamdan jurisPK-BGB § 1631d Rn 12). This also holds because the mere motivation in criminal law leaves the otherwise fulfilled objective and subjective elements of the crime basically intact and, taken for itself, does not serve as a legal ground of justification or excuse. Besides, § 1631d BGB doesn't mention the motivation with good reason. Every form of violence against children, including that which consistently takes place without anesthesia because of false assertions about painlessness in newborns, is prohibited in the course of care and upbringing (Czerner ZKJ 2012, 374, 379; MünchKommStGB/Schlehofer StGB Vor §§ 32 ff Rn 143). An operation – particularly one in the "core area" of the right to bodily integrity in the **private sphere** (Lack ZKJ 2012, 336, 338) that has a considerable impact on the overall development of the child – is certainly not an instrument of upbringing, because upbringing manifests itself in the insemination of knowledge, behavioral codes, and beliefs (BVerfGE 93, 1, 17), but not in the violation of the body. § 1631d BGB is therefore out of place in the system of regulation of personal custody, all the more so in criminal law, medical law, and liability law. On closer examination, it doesn't come down to the question of whether the specifications of the prohibition against the use of violence in upbringing are applicable by § 1632 Par 2 BGB (negating BT-Drs 17/11295, 16; Brocke/Weidling StraFo 2012, 450, 455; Lack ZKJ 2012, 336, 339). On the contrary, the protection of the core area of personality in the private sphere imposes a special obligation on the state (Art 1 Par 1 S 2 GG). Therefore, even a **provision for tradition** (Isensee JZ 2013, 317, 324), which § 1631d Par 2 BGB tacitly aims at, cannot be recognized. The interest of securing human dignity demands the absolute protection of the child from irreversible procedures in his sphere of privacy. Art 1 Par 1 GG offers, namely, the protection of the personal sphere of life, which includes people's sexual **self-determination** (BVerfGE 121, 175, 190). Thus, the operation is also not to be justified through the parents' freedom of religious practice. The proxy consent of the parents is only permitted – in cases of medical indication – in the interest of caring for the child's health, not in the interest of upbringing. That consent to a medically non-indicated operation should be allowed under another title is legally unintelligible (Czerner ZKJ 2012, 374, 379) and is based on a religious precept, by which no secular evaluation is governed. The parents' freedom to practice religion appears not to provide effective legitimation, even by the presently popular combination of basic liberties (Art 6 Par 1 GG iVm Art 4 Par 1 GG), which admittedly bring about an extension of the scope of protection, but not an additive reinforcement of the protection (Herzberg JZ 2009, 332, 336; as well as Lack ZKJ 2012, 336, 338; aA Yalcin Betrifft Justiz 2012, 380, 384 f).

35.5 **Consent** to a bodily injury is, as a general rule, **null in cases of misconceptions about legal interests** (compare in a different context BGHSt 16, 309, 310, 315; BGH NJW 2013, 1379, 1380), **and in cases of violation of the rules of the medical profession** (LG Frankenthal MedR 2005, 243 ff). Stricktly speaking, a medically non-indicated invasive procedure with irreversible physical consequences cannot be consented to (legal comparison with French law Weiß

ZStW 125 [2013], 187, 194). The common assertion of false data about the impact, consequences, risks (OLG Oldenburg NJW-RR 1991, 1376), and side effects of circumcision (see above 9.1 ff) voids the consent of the parents. The same holds true for the **collusively inappropriate assertion of a medical indication** in order to mask the religious motivation (for "medical disguise" in France Weiß ZStW 125 [2013], 187, 196). False assertions prevail most notably with regard to the alleged biological inessentiality of the foreskin, its irrelevance to male aesthesia (in particular during sexual activity), the alleged medical-prophylactic relevance of the excision of the foreskin to prevention of future illnesses in the patient and contagiousness to others, the alleged painlessness of the operation (particularly for infants), the impossibility or dispensability of anesthesia, the equivalence between procedures in the hospital and procedures by a circumciser who isn't a physician and doesn't abide by clinical requirements, the supposed lack of complications after the procedure, and the consistent absence of traumatic effects following the procedure. In every particular, **untrue factual assertions** are to be found. In light of this incorrect information, there can hardly ever be an effective consent, provided that in the individual case there is no thorough, accurate, and neutral medical information present (compare OLG Oldenburg NJW-RR 1991, 1376) before the medically non-indicated operation (also compare BT-Drs 17/11295, 17 f; BT-Drs 17/11430, 17). The consent of the parents in thus void from the perspective of criminal law and liability law, especially considering that the procedure is not necessary (Giger forumpoenale 2012, 95, 101; Putzke FS Herzberg 2008, 669, 707), that it isn't **carried out with compliance to the rules of medical profession** that stipulate that neutral **information** and a **medical anamnesis** for the clarification of particular risks be provided before the procedure (BGHSt 12, 379, 384), and finally because, in the exceptional case of serious postoperative sequelae, there are criminal and liability consequences. Furthermore, it is inappropriate to interference in a child's sexual development through the targeted impairment of the copulative organ. If the impact and risks of the procedure are trivialized in the case of a religiously motivated operation, the patient information is flawed and the consent of the parents is void, despite the fact that § 1631d BGB suggests something else. If the parents refuse further information or don't want to believe that a medical indication is lacking, they are acting contrary to duty (aA BT-Drs 17/11295, 16).

35.6 The **will of the child who is unable to consent** should be **considered** by the parents when they decide whether to consent; how this is to happen, however, remains unclear (Hamdan jurisPK-BGB § 1631d Rn 12; Mandla FPR 2013, 244, 246). The provision is vague. No child who knows exactly what the procedure entails would seriously consent to the amputation of his foreskin. As far as the circumcision of adolescents goes, the boy typically has no veto power; often he is seduced to acquiescence with gifts or lied to about the operation ("now something nice will happen"); and not infrequently he is compelled with more or less gentle force to suffer the procedure (Kelek Die verlorenen Söhne 2006). Also, a nonspecific anxiety reaction like the crying of the infant would be considered a veto according to the constitution (compare in a different context Weilert RW 2012, 292, 320). Physical coercion to acquiescence to an operative invasion of the one's physical integrity is, as an act of violence and considerable humiliation (Hörnle/Huster JZ 2013, 328,

338), neither allowed to be performed by the parents, nor can it be delegated to a third party (compare RGSt 61, 393, 394). It is, after all, a matter of an intrusion into the private sphere when the child – in the traditional form of the rite coram public – has his genitals cut. Why this shouldn't be considered degrading treatment (for law aA Czerner ZKJ 2012, 374, 379), is, at any rate, difficult to establish, which is why a search for justification has been avoided for the most part. The religious motivation changes nothing about the impressive impact on the affected child especially when he doesn't understand the purpose of the practice, wherefore it ultimately cannot be consented to. The expectation of disregarding the veto right pertains above all in the case of neonatal circumcisions, in which the protests and loud cries of the infant can be interpreted only one way (Herzberg ZIS 2012, 486, 495). Coercion to acquiesce to circumcision is incompatible with Art **136 WRV** ("Nobody can be compelled to an ecclesiastical act or ceremony or to participate in a religious practice or to use a religious form of oath"), which demands observance of Art 140 GG (also by Swiss law Giger forumpoenale 2012, 95, 101), so that, against statements to the contrary (Bartsch StV 2012, 604, 607), one cannot appeal to the child's freedom to practice religion as represented by the parents. Nothing else can apply to Art 12 Par 1 KRK. By the legislative conception of § 1631d BGB the veto right of the child should be considered in the decision of the parents, by "grappling" with it (BT-Drs 17/11295, 18). Hence it conveniently has no further impact (Merkel Stellungnahme zur Anhörung im Rechtsausschuss vom 23.11.2012, 3 f), especially if the parents for their part succumb to the peer pressure of their religious community. The children's rights will in turn evince only a "symbolic reference, but no more" (Isensee JZ 2013, 317, 326).

35.7 The legislator has, after the Swedish example (Lack ZKJ 2012, 336, 342), categorically permitted parental consent to circumcision without medical indication as long as it is **performed in accordance with the rules of the medical profession**, through the sanction (Isensee JZ 2013, 317, 325) of § 1631d Par 1 S 1 BGB. It appears, however, impracticable, because doctors must, for medico-ethical reasons, refuse to operate in the absence of medical indication, with the result that they also refuse to accept the lex artis of the measure as long as no medical indication exists (Mandla FPR 2013, 244, 247). **Endangerment to the well-being of the child** (§ 1666 BGB; when "the bodily, mental, or psychological well-being of the child or his fortune [is] endangered") should only be **exempted** from the possibility of consent in individual cases (BT-Drs 17/11295, 18). If the practice of religion, however, is not per se neutral for the child's well-being (Stumpf DVBl 2013, 141, 143), and if religion and bodily integrity in the genital region are incommensurable, then an endangerment of the well-being of infants and boys through circumcision is hardy disputable (this is overlooked by Germann MedR 2013, 412, 413 ff). Lastly, it appears in any case to be incongruous from the perspective of criminal law, because, in the case of significant encroachments into the private sphere (compare § 176a StGB), a considerable impairment to the child's sexual and overall development is invariably anticipated. The child's well-being is thus tangibly endangered by every medically non-indicated circumcision, above all in cases of circumcision without sufficient anesthesia (Isensee JZ 2013, 317, 325). With respect to the **requirement of certainty** from Art 103 Par 2 GG, § 1631d BGB leaves the domain of

permissibility unspecified, especially since the well-being of the child is a "dynamic concept" (Lack ZKJ 2012, 336, 339), which appears to be highly indeterminate in criminal law (Mandla FPR 2013, 244, 248; Weilert RW 2012, 292, 308). In particular, it remains unclear in § 1631d BGB, out of which perspective and with regard to which point in time an endangerment to the well-being of the child should be considered. The motivation for the action of the parents, which remains largely unverifiable, is irrelevant for the legal assessment of the child's well-being, since the wellbeing of the child is to be judged exclusively from the viewpoint of the child (Walter JZ 2012, 1110, 1113). Moreover, it appears uncertain from the perspective of the legislature, whether an endangerment of the well-being of the child is to be retrospectively assumed when the circumcision is not performed de lege artis or the consent of the parents is granted after insufficient patient information about the impact and consequences of the procedure, algesia, risks, and side effects is provided. Most notably, causes for conflict can arise if complications subsequently arise and the parents no longer want to stand by their consent. As a result, it is to be supposed that a medically non-indicated circumcision in the genital area endangers the well-being of the child as a matter of principle (Czerner ZKJ 2012, 374, 378; Fischer StGB § 223 Rn 48; Giger forumpoenale 2012, 95, 101; NK/Paeffgen StGB § 223 Rn 103c; see also in another context [bone marrow donation by minors] Weilert RW 2012, 292, 307), especially considering that social marginalization, the hindrance of which is the only comprehensible "use" of circumcision, is not a tangible threat in Germany when circumcision is omitted (Britz ZRP 2012, 252; Walter JZ 2012, 1110, 1114). The threat of marginalization would, apart from that, still not be recognized by the law as a coercive necessitation, but rather as something to be opposed on the grounds of the state's responsibility to provide protection under Art 1 Par 1 S 2 GG. The social integration of the parents into a religious community is not a sufficient ground for the legitimation of the circumcision of their son (Wiater NVwZ 2012, 1379, 1381). Marginalization of the child endangers his well-being; it must be prevented though other means than a dangerous bodily injury to the child (Kempf JR 2012, 436, 438), because otherwise the law (on bodily integrity and sexual self-determination) must abate the injustice (of marginalization of the child as an endangerment to his well-being).

35.8 The special permission to undertake the procedure by a **religious circumciser**, who is **not a licensed physician** (§ 1631d Par 2 BGB), is limited to the first six months of the life of the child, whereby the Jewish practice of circumcision by a Mohel, which is supposed to take place on the eighth day after birth, is accommodated, but much of the Muslim practice of circumcision by a sünnetçi, which is (still) performed on children or adolescents is not. The legal ground of the differentiation is in the text of the law, which does not mention its motive, which is by no means obvious. Furthermore, it is not feasible (Walter JZ 2012, 1110, 1114). With regard to § 1631d Par 2 BGB, there is first and foremost a case against a legislative démenti, against a **special law for religious communities** (Mandla FPR 2013, 244, 247), which, as such, must cause constitutional misgivings (Isensee JZ 2013, 317, 326; Wiater NVwZ 2012, 1379, 1382). It's not a matter of the protection of minorities (aA Yalcin Betrifft Justiz 2012, 380, 387), but rather of the issuance of an otherwise impossible permission to minorities, thus a matter of minority

privilege. The orthodox version of infant circumcision called *Metzitzah B´peh* (for this traditional form see Salomon Die Beschneidung 1844, 44 ff; for the problem of its secular-legal prohibition through permission of non-religious clinical circumcision see Mandla FPR 2013, 244, 247), which is no longer endorsed by the *Central Council of Jews in Germany* but is still practiced by a small group of Jewish circumcisers, is not consistent with the rules of the medical profession and thus is not legitimated by § 1631d Par 2 BGB.

35.9 An inevitable legal mistake by **§ 17 S 1 StGB** (Putzke FS Herzberg 2008, 669, 708), which has become ubiquitous through the formulation of a "correct legal concept" by the federal government (see section 9), provides an occasion – besides § 1631d BGB – to debate the impunity of the circumcisers and the parents. The system-averse adoption of an **extraordinary basis for exculpation** by Art 4 Par 1 GG (Jahn JuS 2012, 850, 852; aA Fateh-Moghadam RW 2010, 115, 139) must, however, raise the same concerns as the special law, videlicet, § 1631d BGB. "Practical concordance" is here barely contrivable (Czerner ZKJ 2012, 433 ff), as long as a one-sided encroachment into a sacrosanct legal position of infants and boys is at issue.