9.1 The legal regulation of § 1631d BGB, the "odd law" (Mandla FPR 2013, 244), brings a new constitutional dimension to the legal situation. As long as **the state** had only **omitted** a targeted intervention, making no special legislative act and no attempt to prosecute circumcision as a crime, there was **no** active **governmental intervention in fundamental rights** with which to take issue. However, given the legislative endorsement of circumcision, every instance of circumcision becomes an act of state intervention (aA Germann MedR 2013, 412, 413). Since such an intervention has the potential to undermine fundamental civil rights, it warrants **judicial review** by the Federal Constitutional Court. This active **governmental intervention** is now at issue, not "only" the state's failure to institute protective measures for children who are threatened with the violation of their rights to self-determination and bodily integrity. The legislator has certainly **neglected an open and unbiased inquiry**, and has, moreover, misjudged the situation with its hasty action. In addition, it has misjudged the constitutional benchmark for a judicial review of its ruling through § 1631d BGB and it has tacitly created a dubious (Stumpf DVBl 2013, 141, 145) special privilege for patriarchally minded religious groups, allowing for a lopsided disadvantage for male infants and boys. This point is clearly brought to light when one compares the severe penalties imposed for the genital mutilation of girls. Several laws are violated: Art 1 Par 1 GG, Art 2 Par 2 S 1 GG, Art 3 Par 2 GG and Art 19 Par 4 GG. In addition: § 1631d BGB Art 14 Par 2 KRK, Art 19 KRK and Art 24 Par 3 KRK (Stumpf DVBl 2013, 141, 146, 147; aA Kelle in Heil/Kramer, *Beschneidung*, 115, 124 ff; Yalcin Betrifft, *Justiz* 2012, 380, 385). The method by which one starts with a predetermined result and seeks only an explanation to back it up betrays the standards of the accepted juridical method of working. In reality, there is no way to legitimize an irreversible injury to the male genitalia with neither medical indication nor consent subject. The ultimate solution to the dilemma must come from within religious communities, not from the state. The law must not bend to accommodate the religious requirement to make a sacrifice with the bodies of defenseless children. Rather, the religious communities themselves must consider whether the practice – notwithstanding its long tradition and special religious meaning – can be continued in the context of a secular social order. (For an earlier discussion, see Salomon, *Die Beschneidung*, 1844, 72 ff.) It is irrelevant to suggest that the practice, as a part of an inviolable religious code, is sacrosanct and, thereby to attempt to preemptively render every critique of it moot. It is unhelpful to invoke the persecution of Jews, which naturally only shuts down any reasoned discussion. To declare the injury of others to be a human right (cf Germann in Heil/Kramer *Beschneidung*, 83 ff), is also to avoid the issue (see section 35.3), which needs to be debated in a less emotionalized manner.

9.2 Circumcision – whether it's interpreted as an initiation rite, a mystical action, a religious deed, or a prophylactic/medical operation – is, by German law, **indisputably a bodily injury** for both the purposes of civil liability law and existing criminal laws (Brocke/Weidling StraFo 2012, 450, 452; Czerner ZKJ 2012, 374, 378; Dettmeyer/Parzeller/Laux/Friedl/Zedler/Bratzke ArchKrim 2011, 85, 90; Exner, 30 f; Fateh-Moghadam RW 2010, 115, 121; Giger forumpoenale 2012, 95, 98; Herzberg JZ 2009, 332; Kempf JR 2012, 436; Krebs/Becker JuS 2013, 97, 99; Putzke FS Herzberg 2008, 669, 673 ff; Yalcin Betrifft Justiz 2012, 380, 381), **for which**, notably, **the trifle clause "minima non curat praetor" does not apply** (Herzberg ZIS 2012, 486, 488; Putzke FS Herzberg 2008, 669, 673 ff and MedR 2012, 621, 622; medizinisch Stehr Der

Spiegel 30/2012, 124). Also § 1631d BGB did not change the facts of the case (Mandla FPR 2013, 244, 245). The comparison with the prick from an earlobe piercing as a trifle or a socially acceptable act obviously misses the point. The religious interpretation of circumcision cannot spiritualize away the fact of the amputation of the foreskin (Isensee JZ 2013, 317, 318). Furthermore, the fact that proponents want to understand it as "a trifle" does not make it so. In the case of circumcision, the proverb that the only "small procedure" is one that is performed on someone else rings particularly true (Gollaher, 137).

9.3 In the case of the circumcision of consenting adults, there is, in principle, no injustice, because the right to physical integrity, the right to religious and sexual self-determination, and the independent exercise of these rights to self-determination are not violated by others. In these cases, there is no violation of fundamental rights as far as the state is concerned. The only problem is the determination of **ability to consent**, which cannot be made too early (Jerouscheck FS Dencker 2012, 171, 180). On the other hand, a fixed cut-off age doesn't exist, but rather individual ability to make appropriate decisions prevails (Weilert RW 2012, 292, 299). The significance of lower limits follows from the fact that it cannot stand to reason that, while a child under fourteen years old cannot consent to transient sexual activity that leaves no trace, he is considered capable of consenting to a permanent alteration to his genitalia through an invasive procedure (Giger forumpoenale 2012, 95, 100).

9.4 The numerous cases of circumcision of children who are unable to consent are legally different to assess from the voluntary circumcisions of those who are able to consent. Consent by proxy is simply not possible, even through § 1631d BGB n.F. (see section 35.1 ff), because it is a matter of the sacrosanct (Art 1 Par 1 S 2 GG, Art 79 Par 3 GG). Circumcision of infants and boys is no trifle (Stumpf DVBl 2013, 141, 143). It is medically and psychologically incorrect to describe it as "harmless" (like Brocke/Weidling StraFo 2012, 450, 451; on a non liquet of the encumbrances of the children Hörnle/Huster JZ 2013, 328, 337) or "insignificant" (like Kelle in Heil/Kramer Beschneidung, 115, 125; by contrast compare Hartmann Stellungnahme zur Anhörung im Rechtsausschuss am 26.11.2012, 4 f). From time immemorial, complications and dangers, which occasionally lead to permanent impairment or death, have been well known (Salomon Die Beschneidung 1844, 80 ff). Every objective **doubt about the triviality of the procedure** would, by universally recognized medicolegal standards (except for § 1631d BGB), certainly preclude the validity of the consent (compare BGHSt 16, 309, 313). A legal assessment of the circumcision question without **close consideration of the medical** (Stehr/Schuster/Dietz/Joppich Klinische Pädiatrie 2001, 50, 54) **and psychological significance, consequences and sequelae** of the procedure would be methodologically invalid and dangerous (Czerner ZKJ 2012, 374, 378). In fact, the legislator of the circumcision statute (§ 1631d BGB) was incorrectly advised. The male prepuce is, contrary to the spiritual meaning of the procedure, not a dispensable body part. It has an evolutionarily developed protective function, by which it shields the glans from dehydration, injuries, contamination, infections, and loss of sensitivity, and it has an **important physiological function** as an erogenous zone. The extremely high density of nerve endings on its inner surface allow for intense sexual sensations. Furthermore, the structure allows for a sliding effect that prevents unnecessary friction during sexual intercourse (BT-Drs 17/11430, 7 f; Hartmann Stellungnahme zur Anhörung

im Rechtsausschuss am 26.11.2012; Putzke MedR 2012, 621, 622; Warren/Bigelow The case against circumcision British Journal of sexual Medicine 1994, 6). The amputation of the foreskin prevents this protection of the glans and measurably impairs sexual sensation (Bronselaer/Schober/Meyer-Bahlburg/T'sjoen/Vlietinck/Hoebeke; Male circumcision decreases penile sensitivity as measured in a large cohort BJU Int 2013 Feb 4 doi 10.1111/j.1464-410X.2012.11761.x). The rite of circumcision predates written history and existed before biblical times (Gollaher, 13 ff) not only to prevent smegma buildup, but also to reduce lust by weakening the penis and attenuating sexual pleasure (Salomon Die Beschneidung 1844, 25 f with reference to Maimonides and Philo) in order to maintain fertility and fecundity. Sexual traumatization, which Moses ben Maimon (Maimonides) and his students appreciated (Gollaher, 36), and Freud and his adherents criticized, is nothing less than a goal of the operation.

9.5 Nontherapeutic circumcision comes in **various forms** and is prevalent **in many different cultures** all over the world. It originated prehistorically and was first a mystical practice, then a religious rite, and finally a medicalized activity performed for alleged prophylaxis and sometimes even merely for aesthetic reasons. The mystical operation, which is particularly invasive, involving a urethrotomy stretching all the way along the penis from the meatus to the scrotum, and is practiced by Aboriginal Australians and certain African peoples as an initiation and sacrificial rite (compare Gollaher, 79 ff), is older than the religious rite. The religious circumcision commandment is, in turn, older than the current scientific understanding of the medical, psychological, and sociological significance of the practice. Medicalization has conveniently stripped circumcision of every discernable meaning. The original purpose lies in the darkness of the early days of human history. In the USA in the twentieth century, circumcision was bereaved of meaning and commercialized through sheer habituation to a seemingly medical routine and was preserved due to both phony claims about medical advantages and the placebo effect (Gollaher, 177). The mutilation was at times even transformed into an ideal of beauty. The operation on the sexual organ should, however, from a religious or mystical perspective, be painful and bloody since it is performed as an initiation rite or sacrifice. Operations under anesthesia and sterile conditions eliminate, however, precisely these elements, and thus the purpose as an initiation or sacrifice is lost. A ritual operation to attenuate the sex drive should be traumatizing in order to induce spiritual purity by reducing sexual desire in the spirit. The medical version retains at least some of this meaning. Cleanliness and medical prophylaxis against future infectious diseases are much more convincing justifications in modern industrialized nations than the prevention of smegma accumulation. What remains regardless of the mode of explanation is the alteration of the sex organ as a permanent bodily marking. Since circumcision affects sexual development and self-determination, it falls within the constitutionally delineated **sphere of privacy**, and, thus, is exempt from heterogeneous influence by Art 1 Par 1 GG. This legal position of victims of circumcision doesn’t permit the proxy decisions of parents, religious societies, nor ever the German legislature (Art 79 Par 3 GG). Art 1 Par 1 GG protects the right to sexual self-determination, which is invasively and traumatically violated when the sensitivity of the male sex organ is impaired through the amputation of its most sensitive and densely innervated part. The foreskin is neurologically the most important part of the penis and its excision eliminates at least half of the potential for sensation (McGrath in

www.beschneidung-von-jungen.de/home/beschneidung-und-sexualitaet/neurologie-der-vorhaut-und-des-penis.html), which, as it were, is precisely one of the original goals of the procedure. Thus, what is most commonly overlooked in the current discussion of the legal situation in Germany is that circumcision pertains to the right to sexual self-determination. This right is not to be subject to the disposition of any other person than its bearer. Art 1 Par 1 GG protects the dignity and individuality of the person and his right to dispose himself as he will and to autonomously determine his own fate (BVerfGE 49, 286, 298). The significant impairment of the male sex organ's capacity for sensation through the amputation of the foreskin encroaches on the domain of protection of this right and thereby on the very **core of personal rights**. The constitution, however, places the sexual sphere, as a part of the private sphere, under the protection of Art 2 Par 1 GG iVm Art 1 Par 1 GG (BVerfGE 60, 123, 134), which definitely precludes a proxy decision with consequences for the rest of the subject's life.

9.6 The operation is, at any rate, **not medically indicated** in the vast majority of cases. An adherent foreskin and physiological phimosis does not in itself demonstrate an illness and is not an indication for circumcision. In fact, this normal adherence serves a protective function during childhood and, in most cases it resolves itself during puberty or can be remedied through non-invasive methods (Becker, 51 ff; Dettmeyer/Parzeller/Laux/Friedl/Zedler/Bratzke ArchKrim 2011, 85, 87, 88). Healing through amputation is, baring urgent medical indication, a contradiction in terms. The idea that phimosis is per se a medical indication is appropriated to disguise other ritual, spiritual, or commercial purposes of circumcision outside the realm of medicine. Surgical intervention is only medically necessary when an especially serious condition (such as paraphimosis) is discovered and non-invasive treatments are ineffective (compare BGHSt 19, 201, 205). The Professional Association of Pediatricians (Berufsverband der Kinder- und Jugendärzte) therefore justifiably emphasizes in an informational brochure, "Thus operations in this very intimate region require a medical indication (necessity), should be implemented according to strict medical criteria, and should preferably maintain the foreskin and its natural functions." Only certain exceptional cases of phimosis constitute a true medical indication for circumcision (Stehr/Putzke/Dietz DÄBl 2008, A1778 ff), in which the parents can consent by proxy for the children, because – only in these cases – the circumcision actually represents an improvement to the health of the child. Contrary remarks in the context of patient information for non-pathological cases, even when the assertion of a medical indication is "reinforced" through religious incentive, are false and must nullify the informed consent of the misled parents.

9.7 In any case, **Prophylaxis** (BT-Drs 17/11295, 8; AG Köln BeckRS 2012, 13648; Yalcin Betrifft Justiz 2012, 380, 383; Zypries RuP 2012, 139) for the prevention of future illnesses or prevention of the transfer of pathogens from others is no justification for a circumcision. A medical indication is also lacking in this respect (Becker, 37; Herzberg JZ 2009, 332, 334; Hörnle/Huster JZ 2013, 328, 338; Isensee JZ 2013, 317, 320, 321; Jerouscheck FS Dencker 2012, 171, 178 f). When an operation is medically unnecessary and is being performed merely as a prophylaxis, the consenting party should at the very least be clearly informed of this fact (BGHSt 12, 379, 383); such disclosure is frequently lacking. Moreover, doctors have an ethical right of refusal with respect to non-indicated operations. Above all, in biblical times circumcision was thought to effect **cleanliness** especially through elimination of smegma, which was presumed to harbor disease carriers

(Salomon Die Beschneidung 1844, 21 ff), and also **protection** against venereal disease (Gollaher, 197 ff). Today this no longer a relevant reason for a circumcision, especially not for infants and young children, who are not yet sexually active. Were prophylaxis a legitimate reason for the excision of body parts in the interest of public health, then, as a matter of fact, currently healthy pharyngeal tonsils (RGSt 61, 393 ff), appendixes (BGHSt 12, 379 ff), foreskins, and other potentially inflammation prone body parts would have to be removed; this is, however, not sensible (aA Yalcin Betrifft Justiz 2012, 380, 383). The suggestion that potential cancer risk could justify a circumcision highlights the absurdity of the assertion that allegedly vulnerable body parts should be preventatively removed (Putzke FS Herzberg 2008, 669, 689). Penile cancer, with an incidence rate of .0016 percent, is rarer than cancer of any other body part, but these parts are not preventatively "circumcised." Cancer cannot be stopped through preventative circumcision. Fatalities from **penile cancer** are far rarer than fatalities from side-effects of circumcision (compare Gollaher, 194 ff). The assertion of cancer prophylaxis through circumcision is – according to one's taste in terminology – a myth, a sign of hysteria, or a simple lie. Female **cervical cancer** is not necessarily the consequence of poor sexual hygiene on the part of a male partner (Gollaher, 191 ff); moreover it can be prevented by vaccinations. In any case, it doesn't justify circumcision of infants or sexually immature children. Once again, phony justifications are publicized and far too often believed. Circumcision's importance for the reduction of **HIV transmission in Africa** (Brocke/Weidling StraFo 2012, 450, 456 Fn 75; Zypries RuP 2012, 139, krit Exner, 20 f), which is emphasized as a legitimation for circumcision (Gollaher, 201 ff), manifestly diverts attention from domestic state of affairs. In modern industrialized nations, sexual hygiene, and sufficient teaching, learning, and practice of protection can suffice without requiring an operation that permanently changes the sex organ and violates the child's rights to religious and sexual self-determination though a tangible physical and psychological injury. New studies collectively prove, that, contrary to urban legend, no considerable win for **public health** is attained through routine circumcision and infants and boys. Risks and side-effects are substantially more than is widely known. In any case, they certainly offset any incidental medical advantages. No national medical organization still recommends circumcision without medical indication today (Boyle/Goldman/Svoboda/Fernandez in www.beschneidung-von-jungen.de/home/psychologische-aspekte-der-beschneidung/maennliche-beschneidung-schmerz-trauma-und-psychosexuelle-folgen.html; Hartmann Stellungnahme zur Anhörung im Rechtsausschuss am 26.11.2012, 2; Walter JZ 2012, 1110). German doctors have collectively spoken out against the practice.

9.8 In Germany, circumcision is a "**surgical operation**" (BR-Drs 597/12, 3), which, in principle, requires a doctor. Thus, even in cases where consent is valid, it **cannot be performed by a non-physician** (Regardless of consent, only *trivial* operations can be performed by non-physicians, BGHSt 16, 309, 311 ff). § 1631d Par 2 BGB deviates from this principle out of political consideration for religious groups, thereby endangering the entire system of laws. In every case, it allows for an irreversible intrusion into the sacrosanct legal rights of defenseless children. This can't continue without legal consequences. **Operations always carry a risk**, even when they are performed according to medical standards (Gollaher, 179; Lack ZKJ 2012, 336, 341; Putzke FS Herzberg 2008, 669, 677), and even when the risks seem statistically insignificant. In

actuality, the incidence statistics of postoperative complications are unknown (Gollaher, 180). Psychological or physical impairments are the inevitable consequences of every operation (BGHSt 45, 219, 223). The claim that postoperative consequences are not proven is patently false since even grave instances of complication are certainly seen on occasion. On the other hand, the very loss of the healthy foreskin is a detriment to bodily substance, which, without sufficient reason for concern, cannot be performed by a third party because it breaches the (legally protected) private sphere. A positive interest of the infant or child, who doesn't yet understand the meaning of the painful procedure, nor the permanent effect it has on his body, cannot override his interest in the defense of his bodily integrity. This is why in many parts of the world circumcision is performed on young children or even infants; older people would express dissent out of fear of the painful procedure. Thus, from a legal perspective, there is no question (similar findings in Fischer StGB § 223 Rn 47) that, with the intrusion into the private sphere, the domain of the sacrosanct (Art 1 Par 1 GG, Art 79 Par 3 GG) is breached. This all is rather easy and, constitutionally, barely controvertible. It reduces the discussion of the rights of a group or the parents to free practice of religion through circumcision of infants or children to legal absurdity. The community has no right to demand a bodily sacrifice of infants or children when such a sacrifice violates their sphere of privacy. Therefore, by secular law, the exercise of religion though a practice of violence with irreversible consequences cannot be allowed (Art 1 Par 1, 20 Par 3, 79 Par 3 GG). The civil rights and liberties of the parents and the religious groups by Art 4 Par 1 GG cannot permit a violation of the fundamental rights of other people. This is an "unreasonable" decision, which justifies disposition about which interest is properly to be legally protected (compare BGHSt 11, 111, 113, 114). The religious groups demand, by contrast, that, in the end, the child, who is not yet able to consent, must undergo a **sacrifice of bodily substance** (Borkenhagen/Brähler/Franz Intimmodifikationen 2010, 183, 195) as a permanent marking, thereby making this **the object of the operation** (Czerner ZKJ 2012, 374, 380, 381; Staudinger/Coester BGB § 1666 Rn 126). Thereby, human dignity in the sense of Art 1 Par 1 GG is infringed upon; not primarily by direct action of the state, but certainly with the permission of § 1631d BGB. Social responsibility for children, as bearers of fundamental rights, does not exist as long a sacrifice of bodily substance continues (compare in another context Weilert RW 2012, 292, 320), especially in the sphere of privacy. Circumcision and its governmental condonation through § 1631d BGB thus conflicts with Art 1 Par 1 GG (Czerner ZKJ 2012, 374, 381), and also with Art 3 EMRK (aA Brocke/Weidling StraFo 2012, 450, 457). Therefore, circumcision should not be performed without a medical reason, certainly not **without anesthesia** for the infants or children, and certainly not in accordance with the ritual of Metzitzah B´peh, in which the infant is symbolically anesthetized with alcohol and the Mohel sucks blood from the wound, risking the transmission of infections from his mouth. This and nothing else follows with the requisite legal certainty from § 223 Par 1 StGB as a behavioral norm and from Art 2 Par 2 S 1 GG together with the ethical imperative of doctors to not harm anyone's health. Jewish and Muslim life in Germany must, after all, be protected in accordance with the current legal system. However it doesn't depend on a strict application of German laws, provided that they are in conformity with the constitution.

9.9 Circumcision is performed without medical indication, without anesthesia, and without adherence to other medical standards, including the dissemination of neutral

patient information that doesn't sugarcoat (compare BGHZ 90, 103, 108) **the consequences** to the parents, who make the decision for the child. The medical standards don't allow the omission of information in the interest of not upsetting the parents (compare BGHSt 11, 111, 115). So disclosure must include the **impact** of the painful genital operation (for discussion of the weeklong postoperative pain in adults see Salomon Die Beschneidung 1844, 30) on the infant or child, who, according to Islam, is only accepted into the society as a man when he can bear the pain (Kelek, 118 ff). That the **experience of violence in the genital area** is associated with fear of death and castration anxiety (for pertinent conclusions of a study of Turkish boys before and after circumcision see Gollaher, 99) can also not be omitted. It is thus objectively more serious than most cases of § 176a StGB; in this case it's about a socially accepted abuse (Kelek, 122). The personal development of the circumcised child is broken through a violent lesson that is neither explained nor understood (Kelek, 121; Jaermann Spuren Nr 96 [2010]). The physical effect of the painful operation in the genital region cannot be trivialized (compare Goldman The psychological impact of circumcision 1999). It goes beyond the counterweight of actions as in iSd § 176 StGB or also § 176a StGB, which are indeed illegal because of abstract **dangers for the child's overall development**. By § 226a StGB, this is recognized for female genital mutilation. Also in the case of male circumcision, however, a direct bodily operation in the genital region with irreversible physical consequences is always joined with the concrete danger of psychological consequences. A general permission of such circumcisions can therefore unsettle the criminal law system, as well as the systems of medical law and liability law, in the long term. It's not the responsibility of opponents of circumcision to convey the evidence of the danger (as in the results of Germann MedR 2013, 412, 416). Rather, the burden of proof is on its proponents to prove their claims as to its harmlessness. The opposite is, however, certainly the case both medically and psychologically. The fact that an adequate exploration of infants' experiences is not possible and, thus, the psychopathologic discovery of an adjustment disorder, post-traumatic stress disorder, depression, or personality disorder as a result of the experience of violence is unverifiable or only verifiable with considerable difficulty does not mean that it doesn't exist. The intensity of the experience suffices in any case for bringing about a psychopathological acute stress disorder (§ 20 StGB Rn 50). With boys or men who are circumcised later in life, the psychopathological evidence often is verifiable (Jaermann Spuren Nr 96 [2010]). **Anesthesia** during the operation can admittedly reduce the rate of psychopathogical acute stress disorder, though it cannot eliminate the psychological reaction to a violation in the genital area altogether. Why traumatization is treated differently in § 1631d BGB (the male circumcision law) from the way it is treated in § 226a StGB (the female genital mutilation law) does not seem to be accounted for by biological or religious reasons and remains unclear (compare Duncker psychosozial 115 [2009], 87 ff). The seemingly small cause can have considerable effects.

9.10 It's remarkable that, from long ago (for discussion of Maimonides compare Gollaher, 37) until the most recent past, the **false assertion** that **infants don't have a fully developed experience of pain** (Gollaher, 37, 185) has been disseminated and believed in both the religious (Salomon Die Beschneidung 1844, 17) and medical communities. In particular, people thought that the nerves or the awareness of pain in the brain was not yet sufficiently developed. Even today, proponents of circumcision claim

that pain in infants is “minimal” (Goldberg in www.beschneidung-mohel.de/ablauf_und_heilungsprozess.html*)*. This assertion contradicts observation and medical knowledge as well as one of the many purposes of the patriarchal operation. “The bodily pain inflicted on this body part is the true purpose of circumcision” (Maimonides [1135 – 1204] The Guide for the Perplexed Part III Chapter 49). The assertion that circumcision is a virtually pain-free trifle is in any case incorrect (Jerouscheck FS Dencker 2012, 171, 178; Putzke FS Herzberg 2008, 669, 678). Thus, the supposition that the circumcision of infants is a less complicated and dangerous procedure than the circumcision of older people is (Antomo Jura 2013, 425, 426) medically false. Meanwhile, it is also firmly established that the pain center in the brain is present at least from the twenty-second gestation week and is fully developed in the thirty-fifth through the thirty-seventh week or – with pre-term neonates – in the corresponding development weeks (Czerner ZKJ 2012, 374, 378; Gollaher, 186 ff; Hartmann Stellungnahme zur Anhörung im Rechtsausschuss am 26.11.2012, 4; Zernikow Der Spiegel v 13.8.2012, 133). Infants are at least as sensitive to pain as adults (BT-Drs 17/11295, 8). Technically speaking, their **pain sensitivity is substantially stronger** (Putzke FS Herzberg 2008, 669, 678), since the pain suppression system actually doesn’t develop until later. For pain management in cases of infant circumcision, non-doctors often use ELMA cream, a freely distributed analgesic that is sufficient for mild dermatological procedures such as hair removal, but decidedly insufficient for circumcision (Hartmann Weitere Stellungnahme zur Anhörung im Rechtsausschuss am 26.11.2012, 1; Merkel Stellungnahme zur Anhörung im Rechtsausschuss vom 23.11.2012, 2). A general anesthetic is indicated, but is too risky for infants. Thus it can’t be justified for a medically non-indicated circumcision, while a circumcision without general anesthesia does not conform with the rules of the medical profession (Mandla FPR 2013, 244, 247). The pain problem is thus also not be solved by the legislature of § 1631d BGB. The pain of a circumcision without sufficient pain management changes the biometrical structures of the infant’s medulla spinalis and brain. Brain development can be impaired by the painful experience of violence (Czerner ZKJ 2012, 374, 378; Giger forumpoenale 2012, 95, 96). At the very least, the **sense of basic trust in the mother** (Jaermann Spuren Nr 96 [2010]) is impaired through the perceived betrayal (Borkenhagen/Brähler/Franz Intimmodifikationen 2010, 183, 199; Herzberg JZ 2009, 334). It follows therefrom that the parent-child relationship, and with it the child’s well-being, is injured by allowing circumcision. Since the parents are falsely advised that the procedure is painless, their proxy consent is invalid (compare RGSt 61, 393, 396). Experiences of pain in infancy actually leave behind **deep traces in pain memory**. So operations on newborns without anesthesia can increase future pain sensitivity and increase the risk of developing chronic pain. In general, the question of the pain sensitivity of newborns has considerably changed recently. However practitioners of circumcision have retained an outdated viewpoint. Thus far, with the novelty of the insights into the pain sensitivity of infants, **pediatric anesthesia** is still in the early stages of development; so **infant circumcision is contraindicated**. General anesthesia is more dangerous for infants than for older children and is, therefore, not medically recommended (Becker, 33). In cases of infant circumcision that take place outside the hospital, the required anesthesia generally either doesn’t take place at all or is merely symbolic (Walter JZ 2012, 1110, 1114). The claim of proponents of circumcision that

"We don't harm our children," is untruthful (Putzke RuP 2012, 138). For this reason, even increasing numbers of Jews are deciding to leave their sons intact (Stumpf DVBl 2013, 141, 142). The question of justification for the infliction of pain must at least be posed differently than it is through § 1631d Par 2 BGB. Infants lack only the ability to explain the vociferous manifestation of pain. After witnessing an agonizing circumcision, parents often subsequently become opponents of circumcision (compare Herzberg ZIS 2012, 486, 501 f), provided that unconscious **repression mechanisms** or **cognitive dissonance** – a Milgram situation – are not operative. The trauma is passed from one generation to the next when fathers demand the circumcision of their sons as a renouncement of their own early experience of violence. A person thinks either in the form of language or in images. Language is first learned in childhood. This is why is it is impossible to subsequently verbalize "wordless" memories. Thus experiences are masked; **preverbal traumas** remain **unconscious** (Boyle/Goldman/Svoboda/Fernandez Männliche Beschneidung – Schmerz, Trauma und psychosexuelle Folgen http://www.beschneidung-von-jungen.de/home/psychologische-aspekte-der-beschneidung/maennliche-beschneidung-schmerz-trauma-und-psychosexuelle-folgen.html). Yet they are generally present (Jaermann Spuren Nr 96 [2010]). With the circumcision of boys comes the imprinting of sexual trauma along with its social meaning for paternalism, a distorted perception of women, and the segregation of the sexes, which has still barely been explored in Islam (Borkenhagen/Brähler/Franz Intimmodifikationen 2010, 183, 194, 198). Usually, due to shame, those who are circumcised are unwilling to talk about their experiences (Robertson www.beschneidung-von-jungen.de/home/psychologische-aspekte-der-beschneidung/beschneidung-in-der-kindheit.html). They react – consciously or unconsciously to protect their own parents from reproach – with a defense attitude.

9.11 It's remarkable that the practice of **non-religiously-motivated circumcision of boys** in the English-speaking world, which originated in the context of the Victorian **prudery** of the nineteenth century, was **propagated as a means of reducing the sensitivity of the male sex organ** in order to impede unwanted sexual activities such as masturbation (Walter JZ 2012, 1110 f) and premarital sex (Gollaher, 140 ff; Herzberg ZIS 2012, 486). Circumcision has had an unusual historical development. It started out as a sort of experimental surgery owing to a dilettante "neural reflex theory" that was ignorant about biological and neurological links, later came to be associated with the assertion of cleanliness compared to the filth in which the new immigrants lived, and eventually also with charlatanry and infection hysteria due to newly immerging infectious diseases such as, most recently, AIDS (compare Gollaher, 103 ff). "No matter what the doctors do with regard to circumcision, it was always the patients and the parents who finally decided. In order to get healthy men to submit themselves to a surgical operation on their sex organ, or to get parents to make this decision for their male offspring, the doctors had to convince them that it was a minor operation that was neither dangerous nor particularly painful" (Gollaher, 133). This led to **structurally flawed patient education**. Moreover, special benefits that were consistent with the progress of medical knowledge had to be emphasized. The **import and purpose** of the operative measure is thereby **lost** over the years or replaced by currently fashionable spurious explanations. Over all, a remarkable ignorance has thus far prevailed.

9.12 Over the course of the multifaceted development of **religiously motivated circumcision**, there has been no **plausible explanation** for why the foreskin of all things is the object of the sacred operation. The **divine command** that introduces a **covenant between man and God** in which the **women (who are also in other respects treated unequally)** have only an indirect stake, is **unquestioned**. For believers, it is beyond critique. Thus it has been preserved for thousands of years. It can also be assumed that, among other things, it has historically been used for the **repression of sexual excesses**. As Maimonides is supposed to have said, "I am of the of the opinion that one of the goals of circumcision is the curtailment of sexual intercourse and, as far as possible, the weakening of the generative organ to bring about temperance in men. Some people think that through circumcision a defect in the male body structure is remedied, but thereto one can simply respond: How can works of nature be so flawed that they require external alteration, especially since the value or the foreskin for this organ is so obvious. The bodily harm that is inflicted on this organ is precisely what is desired. This, I think, is the best reason for the commandment to circumcise." If this is at least a concomitant reason for circumcision and, at the same time, a side effect, then it would be the case that what has up until this point only been recognized by German law in the case of female genital mutilation (Hagemeier/Bülte JZ 2010, 406, 409; Wüstenberg ZGMR 2012, 263, 266), specifically the effect on **freedom of sexual self-determination**, is also operative in the case of male circumcision (compare Hörnle/Huster JZ 2013, 328, 328, who draw no consequences from this). The motivation for the early practice of circumcision in America was a weakening of the sexual organ. The fact that circumcised men are still sexually active does not demonstrate that circumcision doesn't entail physiological changes. Those who are circumcised in infancy have no opportunity to compare the sexual sensations with and without the foreskin. The practice of circumcision in North America has, furthermore, developed into a **commercially motivated clinical routine**, which has, through habituation, been accepted as a matter of course, though it has since then been on the decline. The pseudo-rational attempts at justification which led the German legislature to pass § 1631d BGB are successively proving false. Today, the assertions of medical advantages of routine circumcision without indication lack any scientifically acceptable support. Preventative treatment through amputation is medically paradoxical. Even so, non-religiously motivated circumcisions are still performed **in hospitals** by doctors under somewhat acceptable medical conditions This is not so in the case of religiously motivated circumcisions that are performed by non-physicians; sterilization and anesthesia are not satisfactorily ensured. These circumcisions are indeed in some cases performed by physicians, but not always. There's no telling whether experienced **non-physician circumcisers**, who are **highly renowned** in religious societies and attempt to meet medical requirements, do in fact at all points maintain the same medical standard as licensed physicians. The Orthodox Jewish form of circumcision includes the ritual of periah, in which the mohel tears the inner foreskin from the glans with his fingernail and the ritual of metiztzah b'peh, in which the mohel puts the bleeding penis in his mouth and aspirates blood. This is incomparable to the physician's method, which is the only method allowed by the German legistarure under § 1631d BGB. Moreover, **information for the parents that meets the standard of patient information for operations** is routinely not provided in cases of ritual circumcision, because the circumciser is convinced by a religious or other need, and therefore the

impact, risks, and side effects of the operation are trivialized (compare for non religiously motivated, but medically non-indicated circumcision Gollaher, 133). Hereafter, an unbiased decision by the parents, as the proxies of the child, about whether or not to perform the medically non-indicated operation is impossible. The legislative attempt to combine the spiritual necessity, which cannot be verified with a secular-logical rationale, with legally regulated medical standards was a priori moribund. By medicolegal standards, the justification of bodily harm through the consent of the parents clearly falls flat in light of the belief in the divine imperative and the conviction that denial represents blasphemy. At any rate, whether **the religious motivation** of the parents and the circumciser (Mandla FPR 2013, 244, 245, 246) permits a deviation from this standard is decidedly questionable. The assessment of a case in which **medical complications** arise (Bleeding, infection, urethral injuries, necrosis, skin bridges, cysts, etc. compare BT-Drs 17/11430, 8 f; www.beschneidung-von-jungen.de/home/medizinische-aspekte/komplikationen/stanford-university-komplikationen-der-beschneidung.html) must serve as a **control question**, though it was notably absent from the legislative proceedings for § 1631d BGB.

9.13 By and large, these questions are asked in the area of bodily injury law and criminal liability:

- whether social acceptability still precludes the factual finding of bodily injury in the case of religiously motivated male circumcision (to date Exner, 168 ff; Fateh-Moghadam RW 2010, 115, 130 f; Rohe Das islamische Recht 2. Aufl, 342; Zypries RuP 2012, 139; ablehnend Bartsch StV 2012, 604, 605; Brocke/Weidling StraFo 2012, 450, 453; Czerner ZKJ 2012, 374, 382; Dettmeyer/Parzeller/Laux/Friedl/Zedler/Bratzke Archiv für Kriminologie 2010, 85, 90; Fischer StGB § 223 Rn 11; Herzberg JZ 2009, 332 and MedR 2012, 169, 170 f; Hörnle/Huster JZ 2013, 328, 329; Isensee JZ 2013, 317, 320; Jerouscheck NStZ 2008, 313, 317 and FS Dencker 2012, 171, 181; Kempf JR 2012, 436, 437; NK/Paeffgen StGB § 228 Rn 18b; Putzke FS Herzberg 2008, 669, 680 and MedR 2012, 621, 622; Radtke Stellungnahme zur Anhörung im Rechtsausschuss BT vom 23.11.2012, 4; Yalcin Betrifft Justiz 2012, 380, 381),
- whether a teleological reduction determination of bodily harm is to be made (Goerlich/Zabel JZ 2012, 1058, 1059; aA Radtke Stellungnahme zur Anhörung im Rechtsausschuss vom 23.11.2012, 4),
- whether a **proxy consent of both parents**, who would otherwise be accomplices and not only participants of the bodily injury, which is primarily brought about them (aA Brocke/Weidling StraFo 2012, 450, 458), can justify the operation (See 35.1 ff); this would, however, above all presuppose an appropriate representation of the impact and consequences of the operation (compare BGHSt 4, 88, 90; BGHSt 12, 379, 383),
- whether an **extra-legal excuse** by Art 4 Par 1 GG is to be established (Jahn JuS 2012, 850, 852) and
- whether **common law** applies in that, because of alteration of factual knowledge, there has not been public recognition of the fact that the legitimacy of circumcision can no longer be accepted, especially since the intervention of the legislature changed the legal situation. Existence before the (factual-) knowledge of serious physical and psychological dangers for those affected means that a law

of the non-persecution of circumcisions as bodily injury can no longer be upheld by virtue of legal custom, though it previously obtained and was propagated.

9.14 In Sweden in 1997 the supreme court still accepted social acceptability as the local ground for the justification of circumcision (Ring/Olsen-Ring FuR 2012, 522, 523, 528); on this basis, in 2001 a Swedish law was originated that served a model for the German legislature that passed § 1631d BGB. Social acceptability as a reason for the preclusion of criminal status of the act no longer persists by German law, since the renunciatory attitude of the majority of the German people during the ongoing discussion about the legitimacy of circumcision shows that the practice of is no longer generally accepted and can no longer obtain as a socially tolerable medical trifle. § 1631d BGB is therefore finished and cannot normatively restore the waning social acceptability. The German legislature was unprepared, but wanted to take quick action and fixated on solving the circumcision issue through a family-law permission in accordance with parental rights to care for their children without the threat of legal penalty (compare Section 35.1 ff). By the same token, they created new problems for the question of female genital mutilation (§ 226a StGB nF), the illegality of which comprises a biologically and religiously unjustifiably unequal treatment of the sexes.

9.15 As compared with the penal and liability law standards for the assessment of medically-indicated iatric procedures, a legal legitimation of circumcision of male infants and boys is justifiable (if not – as it is here – represented as an intrusion into the sacrosanct) through **concession of a special right** (Isensee JZ 2013, 317, 325; Walter JZ 2012, 1110, 1111), wherefore the legislature was appointed (Krüper ZJS 2012, 547, 551 f). The legislature quickly determined the result and passed a hastily designed act (abl Walter JZ 2012, 1110 ff; krit Isensee JZ 2013, 317 ff). In the final analysis, though, religious circumcision of the male child should conform not only to the law, but also to the **parents' obligation to raise their children** (BT-Drs 17/11295, 12; Brocke/Weidling StraFo 2012, 450, 453). Jewish and Muslim parents who fail to circumcise their male children are failing to fulfill their religious duty. Consequently, those parents who choose not to allow their child to be circumcised despite their religious beliefs **risk the marginalization** of the child (Brocke/Weidling StraFo 2012, 450, 456), and thereby endanger the child's well-being. Consideration of the risk of marginalization is, at least in Islam, not a resounding argument, because Muslims are not strictly organized in a unified religious society (Kloepfer DÖV 2006, 45, 49), and different schools of religious jurisprudence that have different views on the circumcision requirement might arise. It won't be considered compulsory by all Islamic schools. The same holds true more or less for Jews who don't accept the obligation to circumcise, but instead perform a non-bloody *Brit Shalom*. Besides, if the parents were acting under duress in the form of the threat of ostracism from a social group, this would negate the parents' informed consent. In the case of a tangible threat of marginalization, this threat would not be a free decision nor an unbiased consideration for the child's welfare (Stumpf DVBl 2013, 141, 144). It remains to be clarified, whether a law that allows medically non-indicated religious circumcision of boys while the circumcision of girls and women is legally prohibited under threat of penalty (§ 226a StGB) contravenes Art 3 Par 2 GG (aA Sprickhoff FamRZ 2013, 337, 338). Also, if no written religious sources explicitly require the circumcision of girls (Borkenhagen/Brähler/Utz-Billing/Kentenich Intimmodifikationen 2010, 133, 139; Jositsch/Mikolásek AJP 2011, 1281, 1282), while male circumcision – as a substitute for

human sacrifice (Borkenhagen/Brähler/Franz Intimmodifikationen 2010, 183 ff) – is part of the Old Testament story of Abraham and was only abandoned in the New Testament in accordance with Christian understanding, this implies nothing about the general dearth of religious motive for female circumcision. In Islam according to Sunna, circumcision of boys and girls is to some extent equated (Gollaher, 243 ff). German national law also has nothing to decide about the correctness or incorrectness of a religious belief (Schwarz JZ 2008, 1125, 1127). The more or less extensive dissemination of the postulates provides no legal ground for differentiation.

9.16 The question of justification must be judged under consideration of the details, which elements of a criminal offence, which are not modified as such by § 1631d BGB, are satisfied in a particular case. On closer examination, it is a matter of a **qualified bodily injury**, which cannot be in keeping with the best interests of the child. Besides § 223 Par 1 StGB, **§ 224 Abs. 1 Nr. 2 StGB** is also applicable. If the surgical tool which the doctor uses for a successful and de lege artis implemented procedure with a view to the overall improvement of the state of health is, according to the inconsistent case law, not a "dangerous tool" in the sense of § 224 Par 1 Nr 2 StGB, this doesn't preclude the application of qualification standards in the case of an altogether medically non-indicated procedure (§ 224 StGB Rn 28.1; Bartsch StV 2012, 604, 605; Exner, 32 ff; Herzberg JZ 2009, 332; Jerouscheck FS Dencker 2012, 171, 176 f; Kempf JR 2012, 436, 437; Putzke FS Herzberg 2008, 669, 682 and MedR 2012, 621, 622; Stumpf DVBl 2013, 141, 147; differenzierend Giger forumpoenale 2012, 95, 98; aA LG Köln NJW 2012, 2128; Brocke/Weidling StraFo 2012, 450, 452 with inappropriate indication of the lack of a law-averse attitude of circumcisers, which is irrelevant not only to the facts of the case [to bodily "abuse" through a medical procedure RGSt 25, 375, 378] , but also to qualification). It is also not to be assumed that, with measured application of the dangerous tool, only a simply bodily injury would result (for Swiss law Giger forumpoenale 2012, 95, 98). So § 224 Par 1 Nr. 2 StGB is pertinent. In addition, **§ 224 Par 1 Nr 4 StGB** can be applied if the child who is to be circumcised sees himself as put up against a majority as adults, who collectively want to injure his genitals and are willing to use force. Whether the pertinence of § 224 Par 1 Nr 4 StGB with respect to the "group dynamics" of the involvement of several people also applies in the case of the bodily injury of the structurally defenseless infant is unclear, but it stands to reason that it would. If circumcision were to qualify as dangerous bodily injury, then it would be a criminal offence liable to public prosecution. For that, § 230 StGB plays no role. At the latest, **in cases of serious complications**, which can in extreme cases necessitate the amputation of the penis (documented in the case of incorrect placement of the Mogen clamp), **§ 226 Par 1 StGB** comes into play; in rare but documented cases of the death of the child as a consequence of shock (Stehr Der Spiegel 30/2012, 124), impurely treated posteroperative hemorrhage, or inflammation (Fatalities were what occasioned legislation in Norway; compare Lack ZKJ 2012, 336, 342), **§ 227 StGB** also applies. Whether male genital mutilation represents, moreover, a lasting **disfigurement** in the sense of § 226 Par 1 Nr 3 StGB, is not yet been seriously examined (compare also for mutilation according to French law Weiß ZStW 125 [2013], 187, 189). A justification (§ 228 StGB, § 1631d BGB) or excuse (§ 17 StGB, § 35 StGB, Art 4 Par 1 GG) based on the qualification of bodily injury is naturally harder than the one based on the basic elements of the offense in § 223 Par 1 StGB. Consideration of the statistical rarity of severe consequences, which

do, however, occur, obscures the view of the legal matters of detail in an abstract-general legal review. Because of the qualification of bodily injury, deliberations about the exclusion of circumcision from criminal prosecution on grounds of expediency (§ 153 StPO) or the absence of prosecution requirements by § 230 StGB (Löffelmann Rechtspolitik 2012, 35, 38 ff) are stalled.

9.17 It is recognized by all the classifications of the WHO that the circumcision **of girls** or women, which is known as **female genital mutilation**, (criticism of nominal dissimilarity to "male circumcision" Walter JZ 2012, 1110, 1112) is punishable. That which is hard to stipulate through Art 3 Par 2 GG is qualifiedly accounted for in **§ 226a StGB**. Established therein is an aesthetic of mutilation (compare Gollaher, 146), which is cast as positive in the case of male circumcision, but is cast as negative in the case of female circumcision. Yet the difference remains a matter of taste. Female genital mutilation is still required almost exclusively in its countries of origin – owing to a religious motivation of the Shafi'i school of Islam (compare Gollaher, 243 ff) and also Coptic Christians and Ethiopian Jews – where male circumcision is also required (Herzberg ZIS 2012, 486, 493 f; Putzke MedR 2012, 621, 622 f; Zähle AöR 134 [2009], 434, 442). Of course, there are also non-religious rites of initiation. The nineteenth-century quack medical theory of illness due to irritation of the copulative organs recommended cliterodectomies to remedy female "nervousness" just as it prescribed male circumcision as a cure for all kinds of ailments (Gollaher, 114). The exact origin of mythically/religiously motivated female genital cutting, lies, like the origin of male circumcision, in the darkness of prehistory. The two practices are, however, anthropologically complementary (compare Gollaher, 79 ff). For this reason, it does not stand to reason to categorically treat them differently. **Indisputably**, female genital mutilation **cannot be justified**. In the case of people who are able to consent, § 228 StGB precludes the efficacy of the consent (BT-Drs 17/13707, 8). In cases of girls who are unable to consent, justification of the genital mutilation through the proxy consent of the parents is impossible across-the-board; this is legally recognized across Western Europe (EGMR NVwZ 2012, 686, 687; BGH NJW 2005, 572 ff; OLG Karlsruhe NJW 2009, 2521, 3522; Obergericht des Kantons Zürich Rechtsmedizin 22 [2012], 191 ff mAnm Bettmeyer; Hagemeier/Bülte JZ 2010, 406, 407; Borkenhagen/Brähler/Utz-Billing/Kentenich Intimmodifikationen 2010, 133, 145; Hahn ZRP 2010, 37 ff; Herzberg JZ 2009, 332, 337; Isensee JZ 2013, 317, 322; Jositsch/Mikolásek AJP 2011, 1281, 1284; Lack ZKJ 2012, 336; Möller ZRP 2002, 186, 187; NK/Paeffgen StGB § 228 Rn 18; Rosenke Die rechtlichen Probleme im Zusammenhang mit der weiblichen Genitalverstümmelung 2000, 128 ff and ZRP 2001, 377, 378; Wüstenberg ZRP 2010, 131, 132; RuP 2010, 31 ff). Already before the establishment of § 226a StGB, genital mutilation was **dangerous** (Wüstenberg AZR 2008, 65 ff), and, in light of the disfigurement (zweifelnd Hagemeier/Bülte JZ 2010, 406, 407), the excision of an important piece of the body (Wüstenberg AZR 2008, 65 ff), and the impairment of fecundity (Dettmeyer/Laux/Friedl/Zedler/Bratzke/Parzeller ArchKrim 2011, 1, 13) also a (deliberate) **severe bodily injury** in the sense of § 226 StGB, and, for custodians, an **abuse of wards** by § 225 StGB (Hagemeier/Bülte JZ 2010, 406, 407). § 226a StGB nF supervenes unsystematically (for concurrence of laws with § 223 StGB and nominal concurrence of offences with § 224 StGB and § 225 StGB, BT-Drs 17/13707, 8). It constitutes a lex specialis through § 226 StGB, although the legislature

has acted on the assumption of a false systematic understanding of that rule of qualification.

9.18 Infibulation (type III circumcision of girls or women by the WHO's classification scheme; compare Borkenhagen/Brähler/Utz-Billing/Kentenich Intimmodifikationen 2010, 133, 135 ff) is phenomenologically unmatched by the religious or medicalized form of male circumcision, though it is indeed matched by the urethrotomy of Aboriginal Australians and some Central African tribes. In the case of type I (clitoridectomy) and II (excision) or IV (all other harmful procedures to the female genitalia), there exists no essential difference from religiously motivated male circumcision with regard to physiological-psychological pertinence (Karim/Hage in www.beschneidung-von-jungen.de/home/maennliche-und-weibliche-beschneidung/bei-jungen-ist-es-gut-bei-maedchen-nicht.html), nor with regard to legal assessment (Herzberg ZIS 2012, 486, 491; Putzke MedR 2012, 621, 622 f; aA Lack ZKJ 2012, 336; Schwarz JZ 2008, 1125, 1126). The nonprofit *Terre des Femmes e.V.* supposes precisely the opposite: that German legal policy is honored by virtue of the differentiation of § 1631d BGB for male circumcision on the one hand and § 226a StGB for female genital mutilation on the other hand. The purported differences – the religious motivation, the intensity and physical effects of the operation, the medicalization, and the number of cases – are all quantitative rather than legal-qualitative (NK/Paeffgen StGB § 228 Rn 103c). Circumcision of boys and girls traces back to an Egyptian-African custom or an even older initiation rite (Gollaher, 13 ff, 79 ff, 237 ff; Quack in Heil/Kramer Beschneidung, 17 ff). Followers of the Shafi'i School of Islam also treat the two practices roughly as equal (Gollaher, 66 ff; Stumpf DVBl 2013, 141, 145). In this respect, the German legal-political will, which suggests that the one has nothing to do with the other (BT-Drs 17/11295, 13) and that they are indeed notionally (genital mutilation here, circumcision there) distinguishable, appears vulnerable by Art **3 Par 2 GG** (Herzberg ZIS 2012, 486, 491; Mandla FPR 2013, 244, 247; Putzke MedR 2012, 621, 623; Stumpf DVBl 2013, 141, 145; Walter JZ 2012, 1110, 1112; aA Germann MedR 2013, 412, 423). The statutory quality of the procedures on girls and on boys is the same (Isensee JZ 2013, 317, 322). The state doesn't judge the beliefs and motives, but rather only the conduct of the doer and its effects on others by secular standards, even if the behavior is religiously motivated (compare BVerfGE 102, 370, 394; BVerfGE 105, 279, 294).

9.19 The assumption that, in the case of male circumcision, "Drawbacks are not sufficiently extensive and frequent, to be able to speak of a drastic and enduring detriment to health" (Steinbach NVwZ 2013, 550, 551), ultimately lacks sounds medical-psychological substantiation. Upon closer examination, it does not hold. The assumption that the foreskin is unimportant is based on a prescientific view, which is in remarkable contrast even to early scientific knowledge; as early as antiquity, the contrary was known to be true (compare Gollaher, 151 ff). Essentially the **same reasons** that are used to suggest that one should not take drastic measures against the allowance of male circumcision were fielded to advocate for the intensification of penalties for female genital mutilation. In the case of female genital mutilation, the **right of the state to protect children from the acts of their parents** when they encroach on the children's right from Art 2 Par 2 S 1 GG is recognized (Fünfsinn Stellungnahme vom 19.4.2013 für den Rechtsausschuss, 10 ff; Rosenke Die rechtlichen Probleme im Zusammenhang mit der weiblichen Genitalverstümmelung 2000, 130; Wüstenberg RuP 2007, 225, 226). In

the case of male circumcision it is not. The numerousness of instances (BT-Drs 17/11295, 13; Jositsch/Mikolásek AJP 2011, 1281, 1182) and **traditional practice** of genital mutilation should not legitimize female genital mutilation (Hahn ZRP 2010, 37, 38), but the same aspects should indeed legitimize male circumcision. Its demand through a **religious postulate** is also ignored or repudiated as going to far in the one case (compare Salomon Die Beschneidung 1844, 33 ff), while it is accepted in the other case. Victim protection should, in the one case, mandate an **intrusion** of justice **into the family units of foreign ethnic groups** and the repression of **old traditions** (Hahn ZRP 2010, 37, 40), while in the other case it should not. Only one of these positions can be correct (compare NK/Paeffgen StGB § 228 Rn 103c; aA Rixen NJW 2013, 257, 259). In the expert hearing in the judiciary committee for new regulation of female genital mutilation, this problem still only appears in a footnote or shrouded in periphrases. The protection of the bodily integrity of children who are unable to consent must, however, have precedence over culture, tradition, and religion in both cases. This is the legal clarity that can be won from Art 2 Par 2 S 1 GG and § 223 StGB.