1. [The most important practical meaning…]

a) Consent.
Consent has the most important practical meaning. About its foundations and limitations BGH (Federal Supreme Court) NStZ ("New Periodical for Criminal Law") **00**, 87, there in detail Niedermair, as well as 29n before §§ 32 and the remarks on § 228. Specifically on the consent to medical treatment and 37n. On the exclusion of the elements of an offense and unlawfulness in the realm of sport cf. § 228 RN 14; on the consent to "dares" in the context of initiation rituals of youth gangs cf § 228 RN 18; on the consent to sado-masochist injuries cf. BGH **49** 166, May, Criminal Law and Sado-Masochism, 1997 as well as § 228 RN 5 and 8.

b) Circumcision.
aa) Point of departure.

In the context of circumcisions that cause physical injuries one has to distinguish in regards to the limits of parental power of representation - the minor's authority to consent has to be determined from case to case (Dettmeyer ArchKrim 127, 967; cf. also Putzke NJW ("New Judicial Weekly") 08, 1569n [critical on Frankfurt NJW **07,** 3580], in the same place Schramm [literature and 16] 225: usually between the 16th and 18th year of age; divergent Zähle AöR ("Archive for Public Law") 134, 450: majority): In regards to a mutilating circumcision of female sex organs the parents principally lack the power of representation: Fischer 51; cf. iZm (?) § 1666 BGB (German Civil Code) BGH(Z) NJW **05,** 673, München(Z) NJW **09,** 3522; cf. also Bumke NVwZ ("New Periodical for Administrative Law") 02, 426; for the classification as grievous bodily harm: BT-Drs. ("printed matter of the Bundestag") 16/12 910, 17/4759 as well as § 226a. In contrast, the parental custodianship in regards to medically not indicated circumcisions, performed especially for ritual reasons, was debatable: According to the predominant legal opinion (cf. epilogue in edition 41 before § 32; lately decidedly as well as accurate Fischer 44–50a, Paeffgen NK ("Nomos commentary") § 228 RN 103a n.), the district court of Cologne classified (NJW **12,** 2128; appr. Kempf JR 12, 436, Kreß MedR 12, 682, Krüper ZJS 12, 547, Putzke MedR 12, 621; rej. Bartsch StV 12, 604, Beulke/Dießner ZIS 12, 338, Lack ZKJ 12, 336, Muckel JA 12, 636, Rox JZ 12, 806, Satzger BLJ 12, 90, Wiater, NVwZ 12, 1379 u. auch AG Köln BeckRS **12,** 13648) circumcisions that are not aimed at the child's well-being based on a lack of medical indication as criminal assault, which could not even be legalized by way of the construct of socially adequate behavior (concerning this gen. 107a before § 32) (Brocke/Weidling StraFo ("Criminal Attorney Forum", periodical) 12, 453, Herzberg JZ ("Jurist's Newspaper") 09, 338, ZIS ("Periodical for International Criminal Law Dogmatics") 10, 475, MedR ("Medical Law", periodical) 12, 171 f., Hörnle/Huster JZ 13, 329, Isensee JZ 13, 320, Jerouschek Dencker-FS 181, Rox JZ 12, 807, Valerius in the same place [literature § 211] 151; of other opinion Exner in the same place 188, Zähle AöR 134, 453 as well as iE Goerlich/Zabel JZ 12, 1059 referencing Art. 140 GG, Art. 137 III 1 WRV (the constitution of the Weimar Republic) [with response Rox ibid. 1061]). This verdict initiated an irritatingly fast (critical Antomo Jura 13, 436, Eschelbach Beck-OK 9.9, Hassemer ZRP ("Periodical for Legal Policy") 12, 180 f., Herzberg ZIS 12, 504,

Walter JZ 12, 115) executed legislative procedure (BT/Drs. 17/10 331 v. 19.7.12 [BT-Resolution], BT-Drs. 17/11 295 from 11.5.12 [RegE] (legislative draft), BT/Drs. 11/17 814 [report of the legal committee] of 12.11.12; s. a. BT-Drs. 17/11 430, 17/11 815, 17/11 816, 17/11 835), which, from the outset, aimed at establishing the legality of circumcisions, and which found its preliminary end by the cessation of § 1631 d BGB (BGBl. I S. 2749) on 12.28.12. The option to ensure a criminalization of those involved in the procedure in the case of religiously motivated circumcisions by the way of the exclusion of circumcisions from the elements of the offense of § 223 (Kempf JR 12, 439, Walter JZ 12, 1117) or by explicitly laying down a reason for exemption of penalty (cf. Jahn JuS 12, 852 with reference to BVerfG **32** 98: more-than-positive lawful excuse of the unacceptability of normative behavior) - in both cases the unlawfulness of circumcision outside of criminal law would have remained untouched, though - has not been pursued. The decisive motive for the change of the BGB, i.e. the enabling of assaulting *ritual* practices, did not find expression in the legal text (unlike in the initiating BT-resolution as well as in the explanatory memorandum, cf. BT-Drs. 17/10 331 p. 1 resp. 17/11 295 p. 6 n.; but also cf. p. 16), by the way.

bb) Legislative content of § 1631 BGB

§ 1631 BGB, which is by the principle of the unity of the legal order also relevant for criminal law (27 before § 32: that which is permissible according to civil law cannot be found punishable), grants the authority to the custodians to consent to the medically not indicated circumcision of their male child, who is not able to reason or to consent, if it shall be executed according to the rules of medical practice (paragraph 1 (1)), unless the procedure would risk the child’s well-being even under consideration of its purpose (paragraph 1 (2)). Furthermore the parents may also consent to a circumcision not exercised by a physician, if it is performed within the first six months after birth (concerning this crit. Hahn MedR 13, 220) by a person designated by a religious community, who received a special education to do so and is equally qualified to perform the circumcision (paragraph 2).

cc) Concerns.

A few constitutional concerns that can’t be denied are being raised against § 1631 d BGB, namely under the aspect of Art. 2 II GG (possible risk of complications and significant longterm consequences of an irreversible mutilation, which can’t be weighed-up with a sufficiently proven meaningfulness; contentiously, cf. Herzberg ZIS 12, 488 and 504, Jerouschek Dencker-FS 177 n., Merkel German Ethics Council plenary session of August 23rd, 2012 [presentation p. 10 cf.], Putzke MedR 12, 623, Putzke/Stehr/Dietz Monthly Periodical for Pediatrics 08, 786 on the one hand, Deusel in Heil/Kramer in the same place 183 n., Fateh-Moghadam ibid. 152 n., RW 10, 134 n. on the other hand), but also from the perspective of Art. 3 II GG (unequal treatment in relation to respective amputation on girls, which are penalized - rightfully so - even in their weakest form of intrusion) as well as Art 4 I GG (negative religious freedom of the

child), although all of this has to be regarded in front of the background of the limits of governmental control of unsoundness – criteria therefor in Hörnle/Huster JZ 13, 332 n. – of the determination of the child's well-being, which lies primarily in the hands of its parents (Art. 6 GG); for unconstitutionality Alatovic/Helmken NKrimP 13, 132 n. (concerning circumcisions without parental interest particularly worthy of protection in the case of § 1661d paragraph 1 BGB as well as the lack of necessity of physician-directed assistance in cases of paragraph 2), Czerner ZKJ 12, 378 n., Eschelbach Beck-OK 9.3 n., 35.2 n., Herzberg ZIS 12, 488 n., Scheinfeld HRRS 13, 268 n., Walter JZ 12, 1111 n.; aA Brocke/Weidling StraFo 454 n., Germann G. Fischer-FS 53 n., MedR 13, 424, BeckOK-GG Art. 6 Rn. 50, Höfling German Ethics Council plenary session of August 23rd, 2012 (Report p. 7 n.), Rixen NJW 13, 258 n., Valerius in the same place 157 and as a result also Schramm in the same place (literature and 16) 229; finally, despite grave concerns affirmative of the regulation Isensee, JZ 13, 327 (prevention of a culture war [concerning this critically Scheinfeld HRRS 13, 273]). Hörnle/Huster JZ 13, 337 n. stress that in the face of still unclear data on the procedure's risks and longterm effects a diametrically opposite decision by the legislative would have been constitutionally permissible as well. Also, the regulation could conflict with the BRD's (Federal Republic of Germany's) commitment (Art. 24 III) to abolish traditions that are adverse to the child's health, which had been adopted in the context of the UN Convention on the Rights of the Child (BGBl II 1992 p. 121): Czerner ZKJ 12, 434, Dettmeyer ArchKrim 227, 95, Herzberg ZIS 12, 490, Putzke Herzberg-FS 704; of contrary opinion Brocke/Weidling StraFo 12, 457, Kelle in: Heil/Kramer in the same place p. 125 n., Lack ZKJ 12, 342, Rixen NJW 13, 259 [following BT-Drs. 17/11 295 p. 15]).

dd) Problems of application.

Next to norm-immanent questions (e.g. dissent or different motivations of the guardians), the application of $ 1631 d BGB raises a series of problems because they can't be reconciled seamlessly with general regulations according to medical law.

ee) Sufficient treatment of pain.

While in the case of a circumcision executed on the basis of § 1631d I BGB, i.e. according to the rules of medical practice, sufficient anesthesia of the child is demanded in regards to the rules of medical practice (BT-Drs. 17/11 295 p. 17; cf. also Höfling German Ethics Council plenary session of August 23rd, 2012 [Report p. 8], Rixen NJW 13, 256), a circumcision executed by non-physicians (§ 1631d II BGB) lacks this regulation. The insofar obvious unconstitutionality of this so called mohel-clause (critical of this "reservation of religious tradition" Isensee JZ 13, 326), which can be deduced from a violation of Art. 1 I, 2 II GG, will only be possible to avoid by constitutionally conform interpretations if they demand a medically sufficient anesthesia of the absolutely pain-sensitive (Czerner ZKJ 12, 378, Eschelbach Beck-OK 9.5, Putzke

Herzberg-FS 08, 678) toddlers (according to Jewish tradition the circumcision has to be carried out on the 8th day after birth), who moreover can't know of the pain's impermanence (likewise Alatovic/Helmken NKrimP ("New Criminal Politics", periodical) 13, 132, Fateh-Mogdaham RW 10, 135, Hörnle/Huster JZ 13, 339, Merkel German Ethics Council plenary session of August 23rd, 2012 [presentation p. 19], FAZ ("Frankfurt General Newspaper", daily trans-regional newspaper) from 11.26.12 p. 8, Walter JZ 12, 114; critical of the differentiation in regards to muslim circumcisers Eschelbach Beck-OK 35.7). On the relationship to § 1 I HPG (Non-Medical Practitioners Act) - the injection required for sufficient pain treatment is a medical act (cf. Hess VGH (Administrative Court) NJW **00,** 2760 [piercing-anesthesia]) cf. Hahn, MedR 13, 215 n.

ff) Constraints according to § 1631 d I 2 BGB

According to the intent of the legislator (but not according to the wording of the regulation [hereto critically Alatovic/Helmken NKrimP 13, 129]) not religiously motivated circumcisions can violate the child's well-being and thus can be illegal according to § 1631 d I 2 BGB (BT-Drs. 17/11 295 p. 18: purely aesthetically reasons or complication of masturbation). But, because one should not rely solely on the ill intentions of a disfavorable motivation in the context of the guardians' authority to consent, which is, according to legislator's decision, objectively given (Fischer 50 b, Merkel FAZ from 11.26.12 S. 8; critically also Fateh-Mogdaham in Heil/Kramer in the same place 158), one has to limit the application of § 1631 d I 2 BGB's constraint in the context of criminal law to objective risks to the child's well-being (for example an extraordinarily high health risks [hemostasis-disorder] or insufficient pain treatment) (in general Rixen NJW 13, 256 n.; in contrast Hörnle/Huster JZ 13, 338, Isensee JZ 13, 321 consider a circumcision for prophylactic reasons impermissible; zw.).

gg) Veto power

The veto power of the child who is unable to consent, and who is about to be circumcised, as demanded by the German Ethic's Council (cf. BT/Drs. 17/11 295 p. 18; also Höfling Ethics Council plenary session of August 23rd, 2012 [report p. 8]), does not find expression in the legal text; merely in its reasoning (BT-Drs. 17/11 295 p. 18) a - in most cases inconsequential (Eschelbach Beck-OK 35.5, Herzberg ZIS 12, 495, Merkel FAZ from 11.26.12 p. 8) - "examination" of the seriously and explicitly expressed adverse will of their child (who is unable to consent) by the parents is demanded and a threat to the child's well-being in the sense of § 1631d I 2 BGB at least thought possible (ibid. p. 18). But one has to grant the soon-to-be-circumcised de lege lata the legal position (and thus a treatment veto) (equally also Fateh-Mogdaham RW 10, 127, Germann MedR 13, 424, Isensee JZ 13, 325, Hörnle/Huster JZ 13, 338; derivingly Rixen NJW 13, 260; skeptically Herzberg ZIS 10, 475), which the judicature (BGH[Z] NJW **07,** 217) generally grants to minors (as patients) with sufficient ability to reason in the context of a medically relatively indicated procedure with the possibility of significant

consequences for their future lifestyle (Nw. u. 38a); in the context of a ritual circumcision this should, in the face of § 5 I 2 KErzG ("Religious Child-Education Act"), be assumable for a 12-year old at the latest, while the natural defensive reaction of an infant would not be an obstacle (equally also Hörnle/Huster JZ 13, 338).

hh) Sufficient education

Furthermore, general principles of medical law (cf. BT-Drs. 17/11 295 p. 17 n.) demand that the parents of the to-be-circumcised are comprehensively educated about the gravity of the procedure, its irreversible physical consequences and possible complications (including the rather rare ones) (cf. also Eschelbach Beck-OK 35.4, 9.6). This, by the way, is an equivalent legal situation to other not insignificant physical procedures that are medically not indicated (such as plastic surgery: 41 c). The fact that the guardians cannot only appeal to their parental right (Art. 6 I GG) as a responsibility-right referring to the child's well-being, however, (cf. BVerfG **103** 107 [basic right in the interest of the child]; Uhle in Epping/Hillgruber GG Art. 6 RN 46 [fiduciary right]), but also to their freedom of religion, which can, for the child's protection, also be limited, does not change a thing about the procedural condition of justification, which lies specifically in the child's well-being.

ii) Consequences of ineffective consent/precedents

If there is no effective consent by the guardians according to the criteria of above 12 e–h at hand, § 226 I No. 1 (and according to the predominant opinion despite the procedure's lack of deadly danger [cf. § 227 Rn. 3] maybe also § 227) comes into consideration (cf. Eschelbach Beck-OK 9.11) in the case of complications. If not medically indicated circumcisions executed before the amendment of the BGB had been classified as illegal (previous edition 41 before § 32 with further prove), from now on circumcisions executed before Dec 28th 2012 also have to be regarded in the light of the regulation of § 1631d BGB, which is external to criminal law, and thus a milder law in the sense of § 2 III (indirect accessoriness; on this in general Dannecker in the same place [literature § 2] 467, 488 n. cf. 26 before § 32), because this change of law external to criminal law is based on an explicitly legal policy consideration by the legislator (BT-Drs. 17/11 295 p. 6: abolishment of legal uncertainty); thus, it does not come down to a (usually unavoidable) mistake of law (cf. LG Köln NJW **12,** 2129; cf. also Putzke Herzberg-FS 708).