advocations as may be most suitable to develop his capacities, and give them their highest enjoyment."

The Austrian Supreme Court held, in 1990, that privacy entails the right to withdraw the design of one's private life and information about it from the public and the state. (*Sammlung des Verfassungsgerichts* 1991/12689, March 14, 1991.) Also note that a strong minority of judges on the European Court of Human Rights (ECHR), in a case in which gypsies were not allowed to camp on public grounds, argued that privacy is at least affected when a state does not affirmatively ensure its use: "Measures which affect the applicant's stationing of her caravans have therefore a wider impact than on the right to respect for home. They also affect her ability to maintain her identity as a gypsy and to lead her private and family life in accordance with that tradition." (*Chapman v. United Kingdom*, Application no. 27238/95, 2001.) The judges on the Court from the East European countries held, by and large, that the right to privacy was not violated. Does the understanding of the reach of rights depend on political traditions? Which interpretation seems convincing?

7. *Dignity in international law.* Several international legal norms provide for the protection of dignity in express terms. For some scholars "the United Nations Universal Declaration of Human Rights of 1948 is the single most important reference point of cross-cultural discussion of human freedom and dignity in the world today." Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 Notre Dame L. Rev. 1153 (1998). The Declaration provides that:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world * * *
>
> Art. 1–All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
>
> Art. 22–Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Human dignity is also explicitly protected in the preamble of the UN Charter, in Art. 10 of the International Covenant on Civil and Political Rights, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force March 23, 1966), in Art. 13 of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), and in Art. 1 of the (nonbinding yet symbolically forceful) European Union's Charter of Fundamental Rights (2000). In these documents dignity is associated with the protection of human life, physical integrity, the prohibition against torture and inhuman and degrading treatment, personal autonomy as well as with rights related to self-realization. For instance, Art. 5(2) of the American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978), provides that "no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

Note that the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, European HR Convention) does not mention dignity per se. Does this mean that the protection of human dignity is beyond its scope? What does the express protection of human dignity add to a scheme of rights protection beyond what would be protected by other provisions mentioned above? Consider the reasoning of the High Court of Singapore in a case concerning corruption that dealt with the question of the admissibility of certain evidence, *Taw Cheng v. Public Prosecutor*, 1998–1 S.L.R. 943 (Karthigesu J.A.):

> 25. * * * [I]n determining the scope of a right or liberty, the importance that the court have regard to the Constitution in its entirety cannot be overstressed. This is necessary in order that the court give equal effect to all the provisions of the Constitution, and not to distort or enhance the interpretation of a particular right to the perversion of the others. * * *
>
> 26. [Thus our] decisions illustrated that no right, even a constitutional one, is absolute. In many cases, the scope of a constitutional right is itself limited by the provisions of the Constitution itself.

Does this mean that no right is absolutely fundamental in the sense of being subject to no limitation? What, then, is fundamental about fundamental rights?

A.2. DEATH PENALTY AND LIFE IMPRISONMENT

This section takes up an issue that has been considered mostly in terms of a constitutional protection of human dignity: punishment, and the death penalty and life imprisonment in particular. Although other considerations are frequently entailed in the constitutional review of criminal sentencing—due process and equality are chief among them—the following cases illustrate the centrality of dignity claims to the determination of the constitutionality of the extreme sentences of death and life imprisonment. These cases raise many of the issues and problems involved in attempting to constitutionalize fundamental questions closely related to morals and beliefs. On criminal justice issues generally, see Chapter 9.

GREGG v. GEORGIA

Supreme Court (United States).
428 U.S. 153 (1976).

[Following the decision in *Furman v. Georgia*, there was a constitutional "moratorium" on the death penalty in the U.S., from 1972 to 1976. By 1976, state legislation changed some of the features of the death penalty that had made it "cruel and unusual punishment." The Supreme Court upheld the constitutionality of the post-Furman Georgia statute, which provides for the death penalty in certain cases.]

Mr. Justice Stewart delivered the opinion of the Court.

The Court, on a number of occasions, has both assumed and asserted the constitutionality of capital punishment. In several cases, that assumption provided a necessary foundation for the decision, as the Court was asked to decide whether a particular method of carrying out a capital sentence would be allowed to stand under the Eighth Amendment. But until *Furman v. Georgia*, 408 U.S. 238 (1972), the Court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual punishment in violation of the Constitution. Although this issue was presented and addressed in *Furman*, it was not resolved by the Court. Four Justices would have held that capital punishment is not unconstitutional per se; two Justices would have reached the opposite conclusion; and three Justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed. We now hold that the punishment of death does not invariably violate the Constitution. * * *

But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." *Trop v. Dulles*, *supra* at 100 (plurality opinion). This means, at least, that the punishment not be "excessive." When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder), rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime), is under consideration, the inquiry into "excessiveness" has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. * * * Second, the punishment must not be grossly out of proportion to the severity of the crime. * * *

Mr. Justice Brennan, dissenting.

The Cruel and Unusual Punishments Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [*Trop v. Dulles*, 356 U.S. 86, 101 (1958)] The opinions of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens today hold that "evolving standards of decency" require focus not on the essence of the death penalty itself but primarily upon the procedures employed by the State to single out persons to suffer the penalty of death. Those opinions hold further that, so viewed, the Clause invalidates the mandatory infliction of the death penalty but not its infliction under sentencing procedures that Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens conclude adequately safeguard against the risk that the death penalty was imposed in an arbitrary and capricious manner.

In *Furman v. Georgia*, 408 U.S. 238, 257, (1972) (concurring opinion), I read "evolving standards of decency" as requiring focus upon the essence of the death penalty itself and not primarily or solely upon the procedures under which the determination to inflict the penalty upon a

particular person was made. I there said: "From the beginning of our Nation, the punishment of death has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, 'the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries.' It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime." *Id.*, at 296 [quoting T. Sellin, *The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute* 15 (1959)].

That continues to be my view. For the Clause forbidding cruel and unusual punishments under our constitutional system of government embodies in unique degree moral principles restraining the punishments at our civilized society may impose on those persons who transgress its laws. Thus, I too say: "For myself, I do not hesitate to assert the proposition that the only way the law has progressed from the days of the rack, the screw and the wheel is the development of moral concepts, or, as stated by the Supreme Court ... the application of 'evolving standards of decency'...." [*Novak v. Beto*, 453 F.2d 661, 672 (C.A.5 1971) (Justice Tuttle, concurring in part and dissenting in part).]

This Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, when individuals condemned to death stand before our Bar, "moral concepts" require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society. My opinion in *Furman v. Georgia* concluded that our civilization and the law had progressed to this point and that therefore the punishment of death, for whatever crime and under all circumstances, is "cruel and unusual" in violation of the Eighth and Fourteenth Amendments of the Constitution. I shall not again canvass the reasons that led to that conclusion. I emphasize only that foremost among the "moral concepts" recognized in our cases and inherent in the Clause is the primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings—a punishment must not be so severe as to be degrading to human dignity. A judicial determination whether the punishment of death comports with human

dignity is therefore not only permitted but compelled by the Clause. 408 U.S., at 270.

I do not understand that the Court disagrees that "[i]n comparison to all other punishments today ... the deliberate extinguishment of human life by the State is uniquely degrading to human dignity." *Id.*, at 291. For three of my Brethren hold today that mandatory infliction of the death penalty constitutes the penalty cruel and unusual punishment. I perceive no principled basis for this limitation. Death for whatever crime and under all circumstances "is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity.... An executed person has indeed 'lost the right to have rights.'" *Id.*, at 290. Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormity, but it serves no penal purpose more effectively than a less severe punishment; therefore the principle inherent in the Clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment. *Id.*, at 279.

The fatal constitutional infirmity in the punishment of death is that it treats "members of the human race as nonhumans, as objects to be toyed with and discarded. (It is) thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity." *Id.*, at 273. As such it is a penalty that "subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the [Clause]" [*Trop v. Dulles*, 356 U.S., at 99 (plurality opinion of Chief Justice Warren)]. I therefore would hold, on that ground alone, that death is today a cruel and unusual punishment prohibited by the Clause. "Justice of this kind is obviously no less shocking than the crime itself, and the new 'official' murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first." (A. Camus, Reflections on the Guillotine 5–6 (Fridtjof–Karla Pub. 1960).

* * * I would set aside the death sentences imposed in those cases as violative of the Eighth and Fourteenth Amendments.

S. v. MAKWANYANE AND ANOTHER

[SOUTH AFRICA DEATH PENALTY CASE]
Constitutional Court (South Africa).
1995 (3) SALR 391 (CC).

[Two men sentenced to death were awaiting execution on death row. No executions had occurred in South Africa since 1989. The new South African government saw the death penalty as a cruel, inhuman, and degrading punishment, and asked the Court to declare it unconstitutional, while the Attorney–General contended that the death penalty was a necessary and acceptable form of punishment. The case addresses the death penalty in terms of the right not to be subjected to "cruel, inhuman or degrading punishment" provided in section 11(2) of the Constitution.]

Chaskalson P.

* * * Capital punishment was the subject of debate before and during the constitution-making process, and it is clear that the failure to deal specifically in the Constitution with this issue was not accidental. * * *

[5] It would no doubt have been better if the framers of the Constitution had stated specifically, either that the death sentence is not a competent penalty, or that it is permissible in circumstances sanctioned by law. This, however, was not done and it has been left to this Court to decide whether the penalty is consistent with the provisions of the Constitution. That is the extent and limit of the Court's power in this case. * * *

[7] * * * It is a transitional constitution but one which itself establishes a new order in South Africa; an order in which human rights and democracy are entrenched * * *

[8] Chapter Three of the Constitution sets out the fundamental rights to which every person is entitled under the Constitution and also contains provisions dealing with the way in which the Chapter is to be interpreted by the Courts. It does not deal specifically with the death penalty, but in *section* 11(2), it prohibits "cruel, inhuman or degrading treatment or punishment." There is no definition of what is to be regarded as "cruel, inhuman or degrading" and we therefore have to give meaning to these words ourselves.

[9] [This Court] gave its approval to an approach which, whilst paying due regard to the language that has been used, is "generous" and "purposive" and gives expression to the underlying values of the Constitution. * * *

[10] * * * I need say no more in this judgment than that *section* 11(2) of the Constitution must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter Three of which it is part. It must also be construed in a way which secures for "individuals the full measure" of its protection. Rights with which *section* 11(2) is associated in Chapter Three of the Constitution, and which are of particular importance to a decision on the constitutionality of the death penalty are included in *section* 9, "every person shall have the right to life", *section* 10, "every person shall have the right to respect for and protection of his or her dignity", and *section* 8, "every person shall have the right to equality before the law and to equal protection of the law." Punishment must meet the requirements of *sections* 8, 9 and 10; and this is so, whether these sections are treated as giving meaning to *section* 11(2) or as prescribing separate and independent standards with which all punishments must comply * * *

[26] Death is the most extreme form of punishment to which a convicted criminal can be subjected. Its execution is final and irrevocable. It puts an end not only to the right of life itself, but to all other personal rights which had vested in the deceased under Chapter Three of

The USSC held that there is a right to consume pornography in private, *Stanley v. Georgia*, 394 U.S. 557 (1969), while others have argued that pornography violates the rights of people, particularly the rights of women and children. See Catharine A. MacKinnon, *Sex Equality* 1532–1626 (2001). The Court stated that "the makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness." Whose happiness counts? Against what other rights should this happiness be balanced? And is pornography about "happiness"? Consider that the SACC, in *Curtis v. The Minister of Safety and Security and others*, 1996 (3) SALR 617 (CC), with reference to the Canadian decision *R. v. Butler*, [1992] 1 S.C.R. 452, argued that pornography should not be viewed from "a public-morality basis that underpins the American approach," but rather judged according to "a standard based explicitly on the harm believed to be engendered by certain kinds of sexually explicit material." The Court, nonetheless, upheld its use in private. Remember that some crimes, particularly those committed against children and women, many of which are sexual in nature, are committed at home. Should this make a difference in considering the inviolability of privacy rights?

4. *"Private parts."* Places that can be considered private, where searches have to be based on law and be justifiable, are clearly not limited to the home and the prison cell. But does the constitutional protection of privacy extend to the body, to one's "private parts"? In the U.S., it was held that, although vaginal searches "give us cause for concern as they implicate and threaten the highest degree of dignity," after balancing all factors, they did not constitute a violation of privacy, since "the search was not unreasonable by its very nature." *Rodriques v. Furtado*, 950 F.2d 805 (1st Cir.1991). Is a right to dignity at stake here as well, or is this a violation of physical integrity? The USSC also held that surgery may constitute a potentially unconstitutional search in *Winston v. Lee*, 470 U.S. 753 (1985). Consider the constitutional requirements necessary to permit such intrusions. If one can consent to surgery, can one consent to a search of one's house or car in a criminal investigation? If a legal system accepts implied consent in medical cases, does it have to accept implied consent to police activities, or is there a difference? How do you know whether someone has "consented" freely to a violation of privacy? Can one voluntarily forfeit one's privacy? Can one consent to the abridgement of a fundamental right?

C. THE RIGHT TO BODILY SELF-DETERMINATION

Cases on dignity, autonomy, and privacy do not deal only with territorial understandings of constitutional protection but also with decisional aspects of personhood. The right to bodily self-determination—the right to dispose of one's body as one chooses—is an integral component of this. The following cases illustrate that the private is not restricted to the literal space of the home but extends to the private body as well. This is supported by a strong philosophical and jurisprudential tradition that understands autonomy in terms of ownership of one's body. Western thinking tends toward the position that human beings have a broad individual right to make decisions on matters with profound consequences for one's body and one's life. Thus we find the right to privacy prominently in the so-called Biomedicine Convention, the "Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine" (Oviedo, 4.IV.1997), a European international treaty that seeks to complement the European HR Convention in an effort to protect the dignity and identity of all human beings without discrimination. See H.D.C. Roscam Abbing, *The Convention on Human Rights and Biomedicine: An Appraisal of the Council of Europe Convention*, European Journal of Health Law 377–87 (1998). But where are the limits of this kind of self-determination? Grand theories often ignore that a right to one's body is bound to social status, race, and gender. In addition, the tradition of self-ownership may, for example, conflict with conceptions of life and the body which stem from theoretical frameworks that view life as a given, either by nature or some metaphysical force, as in certain theological traditions. The long-standing and controversial debates about reproductive rights, at the forefront of which is the right to an abortion, raise these issues in complex ways, which is why we discuss them first. More recently, related questions have arisen around whether, given that one cannot take the life of another person, one has a legal right to take one's own life. Since suicide is not prohibited in most jurisdictions, these cases revolve around the issue of assisted suicide.

C.1. ABORTION

ROE v. WADE

Supreme Court (United States).
410 U.S. 113 (1973).

[A pregnant woman and others challenged the constitutionality of a statute making a crime to "procure an abortion" except "by medical advice for the purpose of saving the life of the mother."]

Justice Blackmun delivered the opinion of the Court.

* * * We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem. * * *

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. * * *

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, * * * [the] Court has recognized that a right of personal privacy, * * * does exist under the Constitution. [Based