STATEMENT OF THE ISSUE

Do G. L. c. 272, §§ 34 and 35 (collectively "the Challenged Laws" or "Massachusetts sodomy laws") violate the Plaintiffs' rights to privacy, equality, free expression and freedom from cruel or unusual punishment guaranteed by the Massachusetts Declaration of Rights?

STATEMENT OF THE CASE

On July 12, 2000, Plaintiffs filed their complaint for declaratory judgment as an original matter in the Supreme Judicial Court for Suffolk County pursuant to G.L. c. 231A, §§ 1 and 2 and M. R. Civ. P. 57. (A. 10).[1] Plaintiffs filed a First Amended Complaint on August 11, 2000; and the Defendants answered that First Amended Complaint on August 23, 2000. (A. 41-50).[2] Thereafter, the Plaintiffs verified the First Amended Complaint.[3]

The parties submitted a Stipulation of Facts filed on March 13, 2001, together with a joint motion to

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[1] Citations are to specific pages in the Appendix, A. __.

[2] The Defendants in their Answer raised ten affirmative defenses. However, because of the procedural posture of this case, none of those defenses has been developed. Plaintiffs expressly reserve the right to respond to defenses, if any, advanced by the Defendants in the opposition and will do so in reply.

[3] Because the Verified First Amended Complaint simply replicated the First Amended Complaint, no answer was ever served and the case was reported on the Verified First Amended Complaint and the Defendants' Answer to the First Amended Complaint.

reserve and report. (A. 51-60). On April 5, 2001, the Single Justice (Greaney, J.) reserved and reported the case without decision for determination by the Supreme Judicial Court for the Commonwealth of Massachusetts on the record including: (1) the Verified First Amended Complaint; (2) the Defendants' Answer; (3) a Stipulation of Facts by the parties; and (4) the Single Justice's Reservation and Report.

STATEMENT OF THE FACTS

The Challenged Laws

Massachusetts -- alone among Northeastern states -- retains its antiquated laws against "the abominable and detestable crime against nature," G. L. c. 272, § 34, ("Section 34") (a 20-year felony) and "unnatural and lascivious acts," G. L. c. 272, § 35, ("Section 35") (a 5-year felony). On their face, these statutes criminalize certain acts of intimacy without exception. Section 34 has been interpreted to apply to "the common law of sodomy and reaches anal penetration." Commonwealth v. Gallant, 373 Mass. 577, 587 (1977). Section 35 has been interpreted to apply to all forms of oral sex but does not include sodomy. See Balthazar v. Superior Court, 428 F. Supp. 425 (D. Mass. 1977), aff'd 573 F.2d 698 (1st Cir. 1978)(fellatio and oral-anal

contact); Commonwealth v. LaBella, 364 Mass. 550 (1974) (cunnilingus); Commonwealth v. Gonzales, 5 Mass. App. Ct. 705, 708 n.3 (1997)(excluding sodomy from Section 35); Commonwealth v. Deschamps, 1 Mass. App. Ct. 1 (1972) (fellatio and cunnilingus). They apply regardless of the sex[4] or marital status of the parties and make no exceptions for conduct that takes place even in a private, consensual, noncommercial, adult setting.[5]

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[4] Although the Challenged Laws on their face outlaw intimate conduct between people of any sex, they are often interpreted and perceived to proscribe only same-sex sexual activity, perhaps because of their origins. See Diana Hassel, The Use of Criminal Sodomy Laws in Civil Litigation, 79 Tex. L. Rev. 813, 822 (2001); Christopher R. Leslie, Creating Criminals: The Injuries Inflicted By "Unenforced" Sodomy Laws, 35 Harv. C.R. – C.L. L. Rev. 103, 111 (2000) ("[A]s interpreted, even gender neutral sodomy laws typically condemn only same-sex sodomy."). Indeed, the Appeals Court has recognized this potential for prejudice against gay people based on the existence of Section 34. See Commonwealth v. Proulx, 34 Mass. App. Ct. 494, 497 (1993) (Section 34 creates "obviously a potential for prejudice").

[5] Plaintiffs recognize that in 1974 this Court was a pioneer in giving voice to the cultural changes that led to community recognition that private, consensual sexual conduct would not constitute "unnatural and lascivious" acts. See Commonwealth v. Balthazar, 366 Mass. 298 (1974). While narrowing the reach of Section 35 in response to the Defendant's vagueness challenge, the Court affirmed the constitutionality of the law as applied to the Defendant who was charged with engaging in nonconsensual acts proscribed by the statute. Id. at 302.

Since Balthazar was decided, jurisprudence under Section 35 has focused on the public/private distinction as an element of the statutory offense. See, e.g., Commonwealth v. Ferguson, 384 Mass. 13, 15-16 (1981). Nonetheless, this Court never directly addressed the privacy issue raised by Balthazar (no state constitutional privacy claim was even raised) and the Court expressly reserved the question. See Balthazar, 366 Mass. at 302. It is on that question which the Plaintiffs seek review in this case. Cf. Commonwealth v. Stowell, 389

Section 34's prohibition against the "crime against nature" pre-dates the Commonwealth's wall erected between church and state, is firmly rooted in ecclesiastical law,[6] and has hardly changed throughout the Commonwealth's history.

Mass. 171, 174 (1983) (again confirming that this Court has yet to pass on whether the right of privacy in the Declaration of Rights extends to protect from regulation, "private consensual noncommercial sexual behavior between adults").

[6] In England, the proscription against sodomy originated with the Roman Catholic Church, which regulated sexual conduct as moral offenses until Henry VIII renounced the Church in 1534. See Don Gorton, The Origins of Anti-Sodomy Laws, The Harvard Gay & Lesbian Review 10 (1998). Henry VIII then imported into secular English law with penalty of death the Church's "detestable and abominable vice of buggery committed with mankind or beast." See Act of 1533, 25 Hen. 8, ch. 6 (Eng.). Under English law of the time, sodomy encompassed anal intercourse either between two men or between a man and a woman, and "buggery" in turn comprised both this conduct and bestiality. See William N. Eskridge, Jr., Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946, 82 Iowa L. Rev. 1007, 1012 (1997). Echoing Leviticus's declaration that man "shalt not lie with mankind, as with womankind; it is abomination," Leviticus 18:22, Sir Edward Coke characterized sodomy under English law as "a detestable and abominable sin." See Sir Edward Coke, The Third Part of the Institutes of the Laws of England 58-59 (London 1644). Similarly Blackstone described sodomy as "the infamous crime against nature [and] against the express law of God." Blackstone, Commentaries on the Laws of England 215 (Jones ed. 1916).

Colonial Massachusetts inherited its proscription against sodomy from English law. Section 34 traces its roots back to the Massachusetts Body of Laws and Liberties of 1641, which quoted directly from Leviticus that, "If any man lyeth with mankind as he lyeth with a woeman, both of them have committed abhomination, they both shall surely be put to death." Mass. Body of Laws & Liberties of 1641 c. 94, § 8. In 1697, the prohibition was recast as the "detestable and abominable sin of buggery with mankind or beast, which is contrary to the very light of nature" with the ultimate punishment of "the pains of death" for all parties involved. Mass. Province Laws, ch. 19 (1697). The General Court re-

Section 35 dates to 1887, when the Massachusetts legislature passed a statute prohibiting "unnatural and lascivious acts." 1887 Mass. Acts c. 436, § 1. The statute was intended to apply to a variety of "sodomitical practices" not covered by the "crime against nature" prohibition of Section 34 and fixed a penalty of up to 5 years in prison. According to one legal historian, this statute was passed to provide a new legal mechanism to ensure that the longstanding prohibitions against sodomy extended to oral sex as well as anal sex. Eskridge, supra, n.6, at 1026. This statute, now codified as G. L. c. 272, § 35, has remained nearly unchanged since its passage. These laws are currently enforced; no judicial order, binding pronouncement, or precedent prevents them from being enforced. (A. 57-59).

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enacted a sodomy statute in 1785 reviving the Levitical formula. Mass. St. 1785, c. 46, § 1. The "crime against nature" language in place today was part of a reenactment passed in 1804. Mass. St. 1804, c. 133. In 1836, the legislature rephrased the statute in nearly the form that stands today in Section 34, a ban on the "abominable and detestable crime against nature." Mass. St. 1836, c. 14.

The Parties

A. Plaintiffs

Plaintiffs are a diverse group of citizens of the Commonwealth who engage in the intimate conduct prohibited by the Challenged Laws. (A. 52–57). Many do so in the context of committed relationships with their intimate partners of many years. (A. 53–57). They engage in this conduct in various places in the Commonwealth including their homes and secluded areas outside of their homes. (A. 52–57). The plaintiffs believe all such areas are private, although they fear such areas could be construed as public. (A. 52–57).

Because they engage in conduct prohibited by the Challenged Laws and intend to continue to do so in the future, (A. 52–57), the plaintiffs fear they are subject to being arrested, charged with and prosecuted under the Challenged Laws. (A. 52–57). They also fear the multiple adverse consequences that are likely to stem from an arrest and prosecution. Certain plaintiffs believe that, if convicted, they face loss of or delay in obtaining professional licensure.[7] (A. 54, 56). One

[7] See In the Matter of Prager, 422 Mass. 86, 91–92 (1996) (stating that a felony conviction is conclusive evidence of lack of good moral character for purposes of admission to bar).

plaintiff fears a loss of rights relating to children of her domestic partner. (A. 55). Others stress their belief that a criminal record relating to sodomy laws has inhibited or will inhibit professional advancement. (A. 53-54, 56). For others, exposure to public humiliation and reprobation related to criminal charges -- particularly sodomy charges -- is an element of their fear. In fact, GLAD brings this challenge on behalf of its donor/members who cannot do so because of the stigma associated with being charged with violating the Challenged Laws. (A. 52).

One plaintiff, Mr. Doe, is an adult male citizen of the Commonwealth of Massachusetts and a resident of Suffolk County. (A. 52). In August 1999, according to the police report, Mr. Doe engaged in consensual sexual conduct with another adult in a secluded area in Middlesex County under the control of the Metropolitan District Commission ("MDC"). (A. 52). Mr. Doe believed the area in question was private. (A. 52). Nevertheless, the MDC police arrested Mr. Doe and charged him with violating Section 34, as well as several other statutes (G. L. c. 272, § 16, § 53, and trespass). (A. 52).

The Middlesex District Attorney's office entered a *nolle prosequi* on the Section 34 charge. (A. 52). The Section 16 charge was dismissed at the request of the complaining police officer with the consent of Mr. Doe. (A. 52-53). Mr. Doe admitted to sufficient facts for a finding of guilt on the § 53 charge, and the matter was continued without a finding. (A. 53). Mr. Doe also admitted to sufficient facts for a finding of guilt on the trespass charge and paid costs of $200 as well as a victim witness assessment of $35. (A. 53). In March 2000, the § 53 and trespass charges were dismissed on recommendation of the probation department. (A. 53).

B. Defendants

Defendant Thomas F. Reilly is the Attorney General and chief law enforcement officer of the Commonwealth of Massachusetts. (A. 15). Defendants Martha Coakley and Ralph Martin are the District Attorneys of Middlesex and Suffolk Counties, respectively. (A. 15). The District Attorneys have prosecuted and continue to prosecute violations of the Challenged Laws and do not have any future plans to refrain from doing so. (A. 57-59). The Office of the Attorney General has not advised any district attorney in the Commonwealth to refrain from

charging and prosecuting violations of the Challenged Laws. (A. 59).

SUMMARY OF THE ARGUMENT

Massachusetts sodomy laws violate rights guaranteed by the Massachusetts Declaration of Rights. Specifically, these laws invade the Plaintiffs' right to privacy (pp. 9–25) and equality (pp. 31–33) and are unsupported by any compelling or even rational governmental interest (pp. 25–30). The Challenged Laws also violate Plaintiffs' rights to free expression (pp. 33–38) and their right to be free from cruel or unusual punishment. (pp. 38–43). Because these laws on their face offend rights guaranteed by the constitution, this Court should strike them down in their entirety. (pp. 43–49).

ARGUMENT

I. MASSACHUSETTS SODOMY LAWS VIOLATE FUNDAMENTAL GUARANTEES OF PRIVACY, DIGNITY, AND AUTONOMY AND CANNOT BE JUSTIFIED BY ANY LEGITIMATE GOVERNMENTAL INTEREST.

The continued existence and enforcement of the Challenged Laws is seriously at odds with the principles of privacy, dignity, and autonomy inherent in the Massachusetts Declaration of Rights. Further, the retention of these laws is contrary to the clear recent trend of judicial decisions and legislative enactments

striking down sodomy laws in most other states and virtually all democratic nations in the world. Reflecting a clear change in the way that society views the permissible scope of governmental intervention into people's private lives, these other states and countries -- many of which have constitutions and declarations of rights nearly identical to, congruent with, or inspired by the Massachusetts Declaration of Rights -- have recognized that biblically-inspired prohibitions against intimate, adult conduct are assaults on human dignity and invasions of protected zones of privacy that have no place in the modern world.

A. The Challenged Laws Violate The Principles Of Privacy, Dignity, And Autonomy Embodied In The Declaration Of Rights.

The purpose of the Declaration of Rights is to announce great and fundamental principles to govern the action of those who make and administer the law. Foster v. Morse, 1882 WL 10952 (Mass. March 2, 1882). This Court applies these precepts in light of contemporary circumstances. District Attorney for the Suffolk District v. Watson, 381 Mass. 648, 661-62 (1980). Among these enduring principles are the guarantees of privacy, dignity, and autonomy which have long been covetously protected as part of the foundational principles of

liberty and equality derived primarily from Articles 1, 10, 12, and 14 of the Declaration of Rights. See Commissioner of Correction v. Myers, 379 Mass. 255, 261 (1979); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 739 (1977).

Article 1 (as amended by art. 106), for example, provides that:

> All people are born free and equal, and have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their Lives and Liberties.

Similarly, Article 14

> was intended by its drafters . . . to protect [individuals] in their beliefs, their thoughts, their emotions and their sensations by conferring, as against the government, the right to be left alone – the most comprehensive of rights and the right most valued by civilized men . . . . It is the right to bring thoughts and emotions forth from the self in company with others doing likewise, the right to be known to others and to know them, and those to be whole as a free member of a free society.

Commonwealth v. Blood, 400 Mass. 61, 69 (1987) (internal quotes omitted) (emphasis added).[8]

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[8] Article 14 reads in relevant part:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places,

The protections of the Declaration of Rights are expansive and often reach beyond the safeguards of the federal constitution, including specifically in the area of privacy. See Moe v. Secretary of Administration and Finance, 382 Mass. 629, 649 (1981); see also Commonwealth v. Rodriquez, 430 Mass. 577, 584 n.7 (2000)(noting that Article 14 provides more protection than the federal constitution); Commonwealth v. Montanez, 410 Mass. 290, 295 n.7 (1991) (similar).[9]; Blood, 400 Mass. at 68 n.9 (1987) (same); Commonwealth v. Upton, 394 Mass. 363, 373 (1985) (same).

In sketching the contours of the constitutional guarantees, this Court has explained that privacy rights protect autonomy and human dignity. In factually distinct but related cases, this Court has explained that privacy rights guard: (1) an individual's interest in making certain kinds of important decisions that fundamentally affect his or her person, see Commonwealth

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> or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

[9] See Henry Clay, Human Freedom and State Constitutional Law: Part One, The Renaissance, 70 Mass. L. Rev. 161, 161 (1985)(identifying "human freedom" which encompasses individual rights, as an area of the law which is particularly suitable for independent state grounds analysis).

v. Stowell, 389 Mass. 171, 173 (1983), or relate to the especially intimate aspects of a person's life, see Opinion of the Justices, 423 Mass. 1201, 1234-5 (1996); (2) "the sanctity of individual free choice and self-determination," see Saikewicz, 373 Mass. at 742; and (3) the freedom from "unwanted infringements" of one's bodily integrity, Matter of Spring, 380 Mass. 629, 634 (1980). Contravening these principles, the Challenged Laws violate basic notions of autonomy and human dignity by invading citizens' private lives. For these reasons, they cannot survive scrutiny.

1. The Challenged Laws violate Plaintiffs' rights to privacy by intruding on intimate decisions that fundamentally affect the Plaintiffs and by invading intimate aspects of their lives.

The Challenged Laws criminalize common acts of sexual intimacy engaged in by the majority of Americans -- and presumably by the majority of the citizens of the Commonwealth.[10] The decision to engage in sexual

[10] In 1994, a major study of sexual behavior in the United States found that 77% of adult males had performed oral sex and 79% had received it. See Edward D. Laumann, et al., The Social Organization of Sexuality: Sexual Practices in the United States 102-104 (1994). The corresponding figures for adult females were 67% and 73%. Id. Though less data is available on the incidence of anal intercourse between men and women, research indicates a significant number of people engage in that conduct as well. Id. at 99. (26% for men, 20% for women). See also Robert T. Michael, et al., Sex in America: A Definitive Survey 140 (Warner Books 1994).

activity clearly constitutes the type of intimate decision falling within the protected zone of privacy. See Moe, 382 Mass. at 649 n.15 (referring to sexual conduct as included within concept of privacy); see also Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) (recognizing that sexual conduct "by definition concerns the most intimate of human activities and relationships"). Further, many of the plaintiffs in this case engage in this conduct as a dimension of their committed relationships with their partners and spouses. (A. 53-57). This conduct is part of an intimate, personal realm into which the government may not intrude. Cf. Commonwealth v. Walter, 388 Mass. 460, 465 (1983)(rejecting privacy claim regarding prohibition of prostitution, contrasting the "impersonal nature" of sex for money transaction with intimate and personal decisions).

Numerous other state courts have held that intimate sexual conduct between adults of the kind prohibited by the Challenged Laws is the paradigmatic example of an area that deserves protection from unwarranted governmental intrusion:

> [I]t is hard to imagine any activity that adults would consider more fundamental, more private and, thus, more deserving of

> protection from governmental interference than non-commercial, consensual adult sexual activity.

Gryczan v. State, 942 P.2d 112, 123 (Mont. 1997).

> We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from government interference than unforced, private, adult sexual activity.

Powell v. State, 510 S.E.2d 18, 24 (Ga. 1998). See also Campbell v. Sundquist, 926 S.W.2d 250, 262 (Tenn. Ct. App. 1996); see also Picado v. Jegley, No. 99-7048, slip. op. at 5 (Cir. Ct. Pulaski Cty., Ark., March 23, 2001) (notice of appeal filed April 23, 2001) (similar).

Thus, the Challenged Laws both invade an individual's interest in making these types of personal decisions and allow the government to intrude into one's private, intimate affairs.

2. The Challenged Laws violate Plaintiffs' rights to privacy by infringing upon their rights of free choice and self-determination.

Intimate sexual conduct between consenting adults of the kind prohibited by Sections 34 and 35 is an expression of personal autonomy profoundly linked with dignity and identity: "[I]ndividuals define themselves in a significant way through their intimate sexual relationships with others . . . and . . . much of the

richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds." Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting).[11]

By limiting free choice and self-determination, sodomy laws diminish the personal autonomy and, ultimately, the dignity of the citizens of the Commonwealth. For many years, this Court has valued and expanded on "[t]he constitutional right to privacy . . . [which] is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life." Saikewicz, 373 Mass. at 742. See also Moe, 382 Mass. at 648 (emphasizing that cases decided under right to privacy involve "principle of personal autonomy"); Myers, 379 Mass. at 261 ("[I]ndividuals have a constitutional right of

[11] The United States Supreme Court's ruling that sodomy laws do not contravene federal privacy protections has been uniformly criticized and, because it was solely based on federal law, is not binding on this Court. See, e.g., Charles Fried, Constitutional Doctrine, 107 Harv. L. Rev. 1140, 1143 n.9 (1994) (Bowers "was wrong and one is entitled to expect nothing else than its eventual overruling"); Laurence Tribe, American Constitutional Law 1521 (2d ed. 1988); Joel D. Joseph, Worst Decisions of the Supreme Court 65-74 (1987); Janet E. Halley, Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick, 79 Va. L. Rev. 1721, 1748-53 (1993); Developments in the Law - Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1523 (1989). Tellingly, subsequent to Bowers, the Georgia Supreme Court invalidated the Georgia sodomy statute on state constitutional grounds. See Powell, 510 S.E.2d at 26.

privacy, arising from a high regard for human dignity and self-determination . . . .").

Indeed, the Constitutional Court of South Africa explained in interpreting its guarantee of dignity, a "cornerstone" of the South African Constitution and a right "closely related" to equality and privacy, "[t]here can be no doubt that the existence of a law which punishes a form of sexual expression . . . degrades and devalues" those who engage in such conduct. See Nat'l Coalition for Gay and Lesbian Equality v. Minister of Justice, 1998 (12) BCLR 1517, 1536-37 (Const. Ct.) (striking down South Africa's sodomy laws); Cf. Attorney General v. Desilets, 418 Mass. 318, 329 (1994) (continued existence on books of statute of "doubtful constitutionality" diminishes claim of disfavored group to be free of discrimination). As the South African Constitutional Court explained, with respect to sodomy laws that prohibited intimate conduct between men, these laws proscribe intimate acts which people engage in as "part of their experience of being human." Nat'l. Coalition for Gay and Lesbian Equality, 1998 (12) BCLR at 1536.

By prohibiting certain forms of intimate expression that relate to an individual's identity, the Challenged

Laws are unwarranted governmental intrusions on the personal autonomy and dignity of these plaintiffs and all the citizens of the Commonwealth in violation of the privacy guarantees of the Declaration of Rights.

3. The Challenged Laws violate Plaintiffs' rights to privacy by infringing upon their bodily integrity.

On their face, the flat prohibitions set forth in the Challenged Laws violate the right to privacy by interfering with an individual's control of his or her body. See Moe, 382 Mass. at 649 n.15 (control of one's body protected by Massachusetts privacy guarantees). As construed by this Court, Massachusetts sodomy laws criminalize common acts of intimacy including nearly all sexual modes of expression apart from vaginal-penile intercourse. By regulating in specific ways the very use people may make of their bodies in the course of sexual intimacy, these statutes invade the constitutional zone of privacy as it pertains to bodily integrity.

B. The Modern Trend In Other Jurisdictions, Both In The United States And Abroad, Has Been To Eliminate Sodomy Laws.

As this Court has consistently explained, the Declaration of Rights is not a static document rooted entirely in the conditions of the time of its framing.

See Watson, 381 Mass. at 661–62 (constitutional provisions to be construed "in light of contemporary circumstances"). While the great and fundamental principles our Constitution embraces remain the same over time, this Court's role is to apply them in a modern society and under conditions of growth and change. See, e.g., Trefry v. Putnam, 227 Mass. 522, 523–24 (1917) (characterizing the Constitution "as an enduring instrument, so comprehensive and general in its terms that a free, intelligent and moral body of citizens might govern themselves under its beneficent provisions through radical changes in social, economic and industrial conditions").

Fortunately, the drafters had sufficient foresight to create a robust instrument upon which our courts have been able to rely in crafting strong protections for liberty. See Margaret H. Marshall, Foreword, 44 Boston B. J. 4 (Feb. 2000) (The "genius" of the Massachusetts Constitution "resides in the applicability of [its] principles to the challenges of an evolving society.") As John Adams, the principal drafter of the Massachusetts Constitution of 1780, recognized,

> The present actors on the stage have been too little prepared by their early views and too much occupied with turbulent scenes, to do

> more than they have done . . . It is for the young to make themselves masters of what their predecessors have been able to comprehend and accomplish but imperfectly.[12]

In recent years, reflecting the global change in societal attitudes and circumstances, other courts have undertaken a privacy analysis similar to that outlined above under their cognate constitutional provisions, many of which derive directly from John Adams's vision embodied in the Declaration of Rights. [13] Such analyses of the applicability of other states' privacy principles to laws similar to the Challenged Laws may inform this Court's interpretation of the privacy principles in the Declaration of Rights.

Specifically, courts in Kentucky, Georgia, Tennessee, Arkansas, and Minnesota have struck down sodomy statutes as violative of those states' privacy

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[12] John Adams, A Defence of the Constitutions of Gov't of the United States of America (1787-1788) in The Selected Writings of John and John Quincy Adams 112 (Adrienne Koch & William Peden, eds. 1946).

[13] See Suzanne L. Abram, Note, Problems of Contemporaneous Construction in State Constitutional Interpretation, 38 Brandeis L.J. 613, 620-25 (2000) (noting that state constitutions borrowed liberally from one another and that the Massachusetts Constitution was often the model); S.B. Benjamin, The Significance of the Massachusetts Constitution of 1780, 70 Temp. L. Rev. 883, 905 (1997) (noting the influence of the Massachusetts Constitution on other states' constitutions).

guarantees based on virtually identical language to that found in the Declaration of Rights. Kentucky's right to privacy, for example, is grounded in constitutional language virtually identical to Article 1 of the Massachusetts Declaration of Rights.[14] See Commonwealth v. Wasson, 842 S.W.2d 487, 493 (Ky. 1992). Like Massachusetts, Georgia recognizes the right to privacy as the "right to be let alone," [15] and has found this right to be grounded, in part, on a constitutional provision nearly identical to Article 14 of the Declaration of Rights.[16] These decisions reflect only the most recent outcomes in a broad trend across this country and throughout the world in eliminating sodomy statutes during the last thirty years.

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[14] Section 1 of the Kentucky Constitution reads: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: First: The right of enjoying and defending their lives and liberties. . . . Third: The right of seeking and pursuing their safety and happiness." Ky. Const. § 1.

[15] Compare Pavesich v. New England Life Ins. Co., 50 S.E. 68, 71 (Ga. 1905) (noting connection between Georgia's "right to be let alone" and the protections afforded by its constitution from unreasonable searches and seizures) with Blood, 400 Mass. at 69 (referring to Massachusetts' "right to be let alone" derived from Article 14's protections against unreasonable searches and seizures).

[16] See also Picado, No. CV-99-7048, slip op. at 8; Doe v. Ventura, No. MC-01-489, 2001 WL 543734, *5-7, *9 (Minn. Cty. Ct. May 15, 2001) (striking sodomy law under a right to privacy based in part on state constitutional provision substantially similar to Article 14); Campbell, 926 S.W.2d at 260 (same, also characterized as right to be let alone).

By the 1930s, sodomy laws existed in all 50 states. This status remained unchanged until 1970 when Illinois, in the process of updating its criminal laws consistent with the American Law Institute's Model Penal Code, omitted any mention of sodomy.[17] Connecticut eliminated sodomy from its code in 1971. See 1969 Conn. Pub. Acts 828, § 214. By 1980, 21 states had invalidated their sodomy laws, primarily through legislative reform. See Nan D. Hunter, et al., The Rights of Lesbians and Gay Men (3d ed. 1992). Since 1992, eleven additional states have either struck (Arkansas, Georgia, Kentucky, Maryland, Minnesota, Montana, Tennessee) or repealed (Arizona, Nevada, New York, Rhode Island) their laws proscribing intimate, adult conduct. See Ellen Ann Anderson, The Stages of Sodomy Reform, 23 T. Marshall L. Rev. 283, 286 (1998).[18]

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[17] Section 213.2 of the Model Code makes a fundamental departure from prior law in excepting from criminal sanctions deviate sexual intercourse between consenting adults. See Model Penal Code and Commentaries, Part II at 362-63 (1980 ed.). As the Commentary to the Code noted, "One need not endorse wholesale repeal of all 'victimless' crimes in order to recognize that legislating penal sanctions solely to maintain widely held concepts of morality and aesthetics is a costly enterprise." Id. at 371-72.

[18] Plaintiffs acknowledge this widespread trend is not without exceptions. See State v. Smith, 766 So.2d 501 (La. 2000); Lawrence v. State, Nos. 14-99-00109-CR, 14-99-00111-CR, 2001 WL 265994 (Tex. App. March 15, 2001). In addition, a Virginia appeals court declined to address a facial challenge to that state's sodomy laws brought by individuals charged with solicitation to engage in public sodomy. DePriest v.

The trend toward eliminating sodomy laws is hardly an American phenomenon. No jurisdiction in Europe criminalizes consensual same-sex relations with the exceptions of Maldovia, Romania, and certain countries of the former Soviet Union. See James D. Wilets, Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts, 27 Colum. Hum. Rts. L. Rev. 33, 34 n.6 (1995). Three decisions of the European Court of Human Rights,[19] which has jurisdiction

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Virginia, 537 S.E.2d 1 (Va. App. 2000). This Court should decline to follow the misguided outcomes in the Texas and Louisiana cases because both relied on principles of constitutional interpretation foreign to this Court's privacy jurisprudence. For example, both view the privacy principles in the respective state constitutions as fixed in time, rather than evolving and accounting for contemporary circumstances. See Smith, 766 So.2d at 511; Lawrence, 2001 WL 265994, at *9. Both hold that the long-standing history of sodomy prohibitions justifies a rejection of privacy challenge today. See Smith, 766 So.2d at 508, 512; Lawrence, 2001 WL 265994, at *9. See also note 24.

[19] The European Court concluded that the total prohibition of sexual activity between men in Northern Ireland could not be justified under Article 8(2) as "necessary in a democratic society" for the protection of "morals" or "the rights and freedoms of others." Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser.A) 149, 160-61 (1981). The Court reached the same conclusions regarding sodomy laws in Modinos v. Cyprus, 259 Eur. Ct. H.R. (ser.A) 485 (1993), and Norris v. Ireland, 142 Eur. Ct. H.R. (ser.A) 186 (1988). The Dudgeon decision had a domino effect in the United Kingdom and dependent territories. Not only was the Sexual Offences Act of 1967, which decriminalized same-sex activity in England and Wales, extended to Scotland and Northern Ireland, but legislation was amended in Jersey (1990), the Isle of Man (1992), Gibraltar, and Bermuda (1994). See James D. Wilets, The Human Rights of Sexual Minorities, 22 Human Rights 22, 24 (1995); Laurence R. Helfer, Note, Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights, 65

over all countries in the Council of Europe, have ruled that the sodomy laws of Northern Ireland, Ireland and Cyprus violated the privacy provisions of the European Convention on Human Rights and Fundamental Freedoms.[20] Canada long ago passed the Criminal Law Amendment Act of 1967-68, which decriminalized all of the types of intimate conduct covered by Massachusetts sodomy laws.[21] See Criminal Law Amendment Act, c. 38, 1968-69 S.C. 847-964 (Can.). None of Japan, Taiwan, South Korea or Hong Kong have sodomy laws. See Wilets, 27 Colum. Hum. Rts. L. Rev. at 34 n.6. Australia's sole remaining sodomy law (in force in Tasmania) was ruled in violation of the privacy (and non-discrimination) guarantees of the

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N.Y.U. L. Rev. 1044, 1061 n.120, 1090 n.341 (1990).

[20] Hungary, the Czech Republic, Slovakia, Poland, Bulgaria, Slovenia, Croatia, and Montenegro had decriminalized same-sex intimate activity even before Dudgeon was decided in 1981. Michael Jose Torra, Gay Rights After the Iron Curtain, 22 Fletcher Forum of World Affairs 73, 76 (1998). Other states, such as Estonia (1992), Latvia (1992) and Lithuania (1993) did so shortly before or after their applications for Council of Europe membership were granted. Recent reforms -- perhaps due to the prospect of membership -- have also occurred in Ukraine (1991), Russia (1993), Serbia (1994), and Albania (1995). See James D. Wilets, Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective, 60 Alb. L. Rev. 989, 1026 (1997).

[21] More recently, the Ontario Court of Appeal invalidated Section 159 of the Canadian constitution which established different ages of consent to anal intercourse than to vaginal or oral intercourse. See R v. M, 30 CRR (2d) 112 (1995).

International Covenant on Civil and Political Rights, a covenant to which the United States is a signatory.[22] See Toonen v. Australia, U.N. Hum. Rts. Comm., No. 488, U.N. Doc. CCPR/c/50/D/488/1992, reprinted in 1 Int'l Hum. Rts. Rep. 97 (1994). Finally, as recently as 1998, the South African Constitutional Court invalidated that country's sodomy laws as violative of guaranteed rights of dignity, privacy and equality. See Nat'l. Coalition for Gay and Lesbian Equality v. Minister of Justice, 1998 (12) BCLR 1517 (Const. Ct.).

The only conclusion that can be drawn from this clear national and international trend is that government regulation of intimate, sexual conduct violates contemporary notions of privacy, dignity, and autonomy.

C. The Commonwealth Can Articulate No Legitimate Or Compelling State Interest To Justify These Intrusive Laws.

When statutes like the Challenged Laws implicate fundamental constitutional values, the Commonwealth has the burden of demonstrating a compelling state interest to justify the intrusion. See Aime v. Commonwealth, 414 Mass. 667, 673 (1993) (statutes implicating fundamental

[22] The Australian government has since passed federal legislation rendering the Tasmanian sodomy law unenforceable. See Wilets, 27 Colum. Hum. Rts. L. Rev. at 34 n.6.

rights upheld only if they "are narrowly tailored to further a legitimate and compelling governmental interest"). Because the right to privacy encompasses "certain matters in which individual autonomy is thought to be especially important and desirable . . . individual choice . . . may be circumscribed by the state only in deference to highly significant public goals." Marcoux v. Attorney General, 375 Mass. 63, 66 (1978). Because the Commonwealth has no legitimate state interest to support these invasive proscriptions, let alone a compelling one, this Court should strike the Challenged Laws.

1. The Challenged Laws cannot be justified as an exercise of police power to preserve a particular moral view.

To the extent the state seeks to justify these intrusive laws by pointing to a legislative power to regulate public morality, the defense must fail. An invocation of morality, without more, is never sufficient justification for the violation of a fundamental personal liberty right. See Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992) (stating the obligation of courts is to "define the liberty of all, not to mandate [a] moral code"). As this Court has stressed, the police power is properly invoked only

where the public welfare is truly implicated. See, e.g., Corning Glass Works v. Ann & Hope, Inc. of Danvers, 363 Mass. 409, 416 (1973). When government attempts to codify a particular moral view simply for the sake of giving legal effect to that view, these efforts are divorced from concerns for the public welfare and, as such, constitute an invalid use of the police power. The Challenged Laws were enacted purely out of social condemnation of particular sexual conduct, conduct which causes no harm to individuals or society. See Model Penal Code § 207.5 – Sodomy & Related Offenses, Comment (Tent. Draft No. 4, 1955) ("No harm to the secular interests of the community is involved in a typical sex practice in private between consenting adult partners.") They are therefore unsupported by any legitimate governmental interest. [23]

In addition, when an alleged interest in public morality is not rationally and demonstrably related to the furtherance of the public welfare, morality often

[23] Examples of legitimate government interests include the preservation of life and the protection of the interests of innocent third parties. See Moe, 382 Mass at 657. No such interests support the Challenged Laws. Neither can any interest, such as the preservation of marriage, be pointed to here in support. Cf. Stowell, 389 Mass. at 175 (a criminal prohibition against consensual intimate conduct resulting in adultery, G. L. c. 272, § 14, withstood federal constitutional scrutiny because of the Commonwealth's interest in strengthening and preserving marriage).

turns out to be a thin guise for private, albeit majoritarian prejudice. See, e.g., Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("[P]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); Loving v. Virginia, 388 U.S. 1, 11 (1967) (recognizing that no "overriding purpose independent of invidious racial discrimination" justified Virginia's miscegenation law). Cf. Romer v. Evans, 517 U.S. 620, 634–35 (1996) (animosity toward gays and lesbians is not legitimate governmental interest); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446–47 (1985) ("[A] bare . . . desire to harm a politically unpopular group [is] not [a] legitimate state interest[]."") (internal citation omitted). See also Peter M. Cicchino, Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?, 87 Geo. L.J. 139, 173 (1998) ("[M]oral interests unrelated to an empirical effect on public welfare are not . . . distinguishable from irrational prejudice and private bias.").

The Declaration of Rights protects certain fundamental rights specifically in order to shield

individual choice from majority sentiment – the functional equivalent of popular prejudice. See Vigeant v. Postal Telegraph Cable Co., 260 Mass. 335, 340 (1927) ("The Constitution was intended, its very purpose was to prevent experimentation with the fundamental rights of the individual."). Cloaking private bias in the language of morality makes it no more palatable as a legitimate governmental interest.[24]

As the Montana Supreme Court emphasized in striking that state's sodomy laws:

> Regardless that majoritarian morality may be expressed in the public-policy pronouncements of the legislature, it remains the obligation

[24] As a Tennessee Appeals Court explained, the police power should be used "to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others."). Campbell, 926 S.W.2d at 265. See also Wasson, 842 S.W. 2d at 496 (immorality which does "'not operate to the detriment of others,' is placed beyond the reach of state action by the guarantees of liberty" of the state constitution); Commonwealth v. Bonadio, 415 A.2d 47, 50 (Pa. 1980) (police power to regulate morality should not be used to "enforce a majority morality on persons whose conduct does not harm others"); Post v. State, 715 P.2d 1105, 1109 (Okla. Crim. App. 1986) (the majority's view of moral repugnance at some sexual acts "does not create a compelling justification for state regulation"); Picado, CV99-7048 (an attempt to rescue homosexuals from an unpopular lifestyle is not a compelling reason or even valid reason for infringement of a fundamental right). Declining to follow this widely accepted rejection of morality as a legitimate governmental interest, two courts have accepted moral views as sufficient justification for sodomy laws, conflating the question of whether the laws were justified with whether the law implicated a protected zone of privacy in the first instance. See Smith, 766 So.2d at 509-10; Lawrence, 2001 WL 265994, at *9 n.39 (citing Smith).

> of the courts . . . to scrupulously support, protect and defend those rights and liberties guaranteed to all persons . . .

Gryczan, 942 P.2d at 125. See also Powell, 510 S.E.2d at 26 (agreeing that even if sodomy laws reflect moral views, this "alone does not create a compelling justification for state regulation").

2. The Challenged Laws cannot be justified by law enforcement interests.

The existence of other laws that criminalize nonconsensual, public, and commercial sexual conduct demonstrates that the Commonwealth has no legitimate law enforcement interest in the Challenged Laws.[25]

Striking down the Challenged Laws does not, in any way, inhibit the Commonwealth from protecting its legitimate interests in criminal matters touching upon sexual conduct. Massachusetts has strong laws prohibiting rape and indecent assault. See G. L. c. 265, §§ 13H, 22, 24 (20 years for rape and up to 5 years

[25] The Defendants' stipulations that they only enforce the Challenged Laws under these circumstances avail them nothing. As long as Massachusetts sodomy laws remain on the books, police officers and district attorneys have the unfettered ability to enforce the laws as written with none of the limitations to which Defendants stipulate. Moreover, the stipulations have no binding authority even on the Defendants themselves, much less on either the Attorneys General or District Attorneys who succeed them. See Fort v. Fort, 12 Mass. App. Ct. 411, 417 (1981) (acknowledging that just because a law has fallen into "comprehensive desuetude" does not mean the law has become invalid or unenforceable).

for indecent assault). These prohibitions also include severe penalties for all forms of child sexual abuse, including rape and indecent assault of children, see G. L. c. 265, §§ 13B, 22A, 23, 24B, and c. 272, §§ 29A, 29B, 29C, 35A, and enticing a child for marriage, prostitution, or sexual intercourse, see G. L. c. 272, §§ 1, 2, 4, 4A. In addition, all forms of commercial (prostitution) and public sexual conduct and exposure are prohibited by other statutes. See G. L. c. 272, §§ 6, 8, 12, 13, 16, 53, 53A.

In light of all of these statutes addressing legitimate law enforcement concerns, there can be no law enforcement purpose for the Challenged Laws. As the Georgia Supreme Court explained:

> The State fulfills its role in preventing sexual assaults and shielding and protecting the public from sexual acts by the enactment of criminal statutes prohibiting such conduct . . . and by the vigorous enforcement of those laws through the arrest and prosecution of offenders.

Powell, 510 S.E.2d at 24. The lack of any legitimate law enforcement concern undergirding the Challenged Laws highlights the absence of any compelling governmental justification for them.

II. THE CHALLENGED LAWS VIOLATE EQUAL PROTECTION GUARANTEES OF THE DECLARATION OF RIGHTS BECAUSE THEY IMPLICATE PLAINTIFFS' FUNDAMENTAL RIGHT TO

PRIVACY AND CREATE A STATUTORY SCHEME THAT IMPOSES UNEQUAL CRIMINAL PENALTIES FOR SUBSTANTIALLY SIMILAR CONDUCT WITH NO JUSTIFICATION.

In addition to violating the Plaintiffs' fundamental right to privacy, the laws also violate the principle of equal protection. Specifically, the laws impose widely disparate penalties for substantially similar conduct in which individuals have a fundamental right to engage.

To illustrate the equal protection problem created by the Challenged Laws, consider three situations involving couples engaged in intimate conduct in some outdoor setting: (1) persons engaged in anal sex violate Section 34 and face penalties up to 20 years in prison; (2) persons engaged in oral sex violate Section 35 and face penalties of up to 5 years in prison; and (3) unmarried persons engaged in penile-vaginal intercourse violate G. L. c. 272, § 18, the fornication statute, and face up to 3 months in prison.[26]

[26] Assuming the Balthazar dicta, see n.5, means private, consensual oral sex is beyond the realm of Section 35, one more scenario this Court should consider for equal protection purposes is the following classification involving three couples engaged in intimate conduct in a private setting: (1) persons engaged in anal sex face penalties up to 20 years in prison; (2) persons engaged in oral sex face no criminal penalties; (3) unmarried persons engaged in penile-vaginal intercourse face penalties up to 3 months in prison.

This scheme of widely disparate penalties for substantially identical conduct is impermissible, because the government cannot create arbitrary classifications devoid of justification. See Murphy v. Dep't. of Corrections, 429 Mass. 736, 742 (1999); Dickerson v. Attorney General, 396 Mass. 740, 743 n.3 (1986). When the classification implicates a fundamental right, it is subject to strict judicial scrutiny. See Commonwealth v. Bruno, 432 Mass. 489, 503 (2000). Even when a statute does not touch upon a fundamental right, it may still be found to be unconstitutional if it is not "rationally related to the furtherance of a legitimate state interest." Murphy, 429 Mass. at 739-740 (1999); Murphy v. Comm'r, 415 Mass 218, 233 (1993) (no rational basis for imposing a filing fee only on litigants proceeding with assistance of counsel). See also Coffee-Rich v. Comm'r of Public Health, 348 Mass. 414, 426 (1965); Sperry & Hutchinson Co. v. Director of Div. of Necessaries of Life, 307 Mass. 408, 421 (1940).

While admittedly the Legislature is entitled to a significant amount of discretion in creating criminal classifications, this discretion is not limitless. Here, the government can advance no legitimate basis to

distinguish among these types of conduct. Its classification is arbitrary and therefore fails the test under either standard of review. See Murphy, 429 Mass. at 742 (arbitrary classification created for DNA testing of prisoners presented a "troubling question under the equal protection clause").[27] The criminal scheme establishing penalties for persons convicted of sex-related crimes -- of which the Massachusetts sodomy laws are a part -- has no rational purpose, much less a compelling one, and therefore violates the constitutional guarantees of equality enshrined in the Massachusetts Declaration of Rights.

III. THE CHALLENGED LAWS VIOLATE THE FREE SPEECH GUARANTEES OF ARTICLE 16 OF THE MASSACHUSETTS DECLARATION OF RIGHTS.

It is well-established that the protections of Article 16 of the Massachusetts Declaration of Rights extend beyond pure oral and written speech to "expressive conduct."[28] Commonwealth v. Oakes, 407 Mass.

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[27] Although this Court construed the statute in Murphy to avoid the constitutional problem, it noted "[o]f course, had this been a criminal rather than a regulatory statute, we would hesitate a long time before so discerning and completing the Legislature's intent." Murphy, 429 Mass. at 743.

[28] Article 16 of the Massachusetts Declaration of Rights states "[t]he right of free speech shall not be abridged." As it has in the area of privacy jurisprudence, this Court has found the free expression rights under Article 16 to be more expansive than those derived from the First Amendment. Compare Commonwealth v. Sees, 374 Mass. 532, 538 (1978)

92, 95–96 (1990); see also Commonwealth v. Sees, 374 Mass. 532, 535–37 (1978)(Article 16 protects "conduct designed to express ideas").

Protected expression can take a variety of forms, including burning the American flag, see Texas v. Johnson, 491 U.S. 397, 406 (1989), wearing black arm bands, see Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 514 (1969), tattooing, see Commonwealth v. Meuse, No. 9877CR2644, 1999 WL 1203793, at *3 (Mass. Super. Nov. 29, 1999), and wearing medallions symbolizing the African National Congress, see Manor v. Rakiey, No. 906357, 1994 WL 879790, at *4 (Mass. Super. Aug. 25, 1994).

Article 16 permits the government to regulate a particular act's non-expressive elements to serve a substantial government interest,[29] provided that the regulation does not unduly restrict the act's expressive

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(finding that Article 16 protects semi-nude dancing in establishment serving alcoholic beverages) with Doran v. Salem Inn, Inc., 422 U.S. 922, 932–33 (1975) (finding that district court did not abuse its discretion by finding that semi-nude dancing in businesses serving liquor likely was not expression protected by First Amendment). See also Batchelder v. Allied Stores Int'l, Inc., 388 Mass. 83, 87 (1983) (Massachusetts may "adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.").

[29] See, e.g., Commonwealth v. Duarte, 2 Mass. App. Ct. 909, 910 (1974) (finding forcible rape of a man not to be expressive).

aspects. See Sees, 374 Mass. at 535 (citing United States v. O'Brien, 391 U.S. 367, 376-77 (1968)).

The Challenged Laws regulate expressive conduct within the scope of Article 16. Because the Commonwealth has no legitimate, and certainly no substantial, interest in regulating the conduct's non-expressive elements, the only purpose for the Challenged Laws must be the suppression of the expressive aspect of the proscribed conduct. Accordingly, the Challenged Laws abridge the free speech guarantee of Article 16.

A. The Conduct Regulated By The Challenged Laws Is Expressive Conduct.

Under Massachusetts law, activities conveying a sexual or erotic message have consistently been regarded as expressive. See T & D Video, Inc. v. City of Revere, 423 Mass. 577, 580 (1996) (selling non-obscene "adult" video-tapes is protected); Cabaret Enters., Inc. v. Alcoholic Beverages Control Comm'n, 393 Mass. 13, 17 (1984) (non-obscene nude dancing on licensed premises is protected). Cf. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991) (nude dancing found expressive and protected by the First Amendment).[30]

[30] Though Justice Scalia disagreed with the conclusion drawn by the other members of the Supreme Court in Barnes, that nude dancing constituted expressive conduct, he defined as "inherently expressive" that conduct which "is normally

The sexual conduct proscribed by the Challenged Laws is quintessentially expressive. Like other intimate sexual conduct, the activities at issue in this case are engaged in by the plaintiffs to convey to their sexual partners a wide range of emotions and a multitude of messages.[31] (A. 53-57). Indeed, such non-verbal physical expression is often a more powerful declaration of emotion and thought than its verbal counterparts.[32] As Professors Cole and Eskridge have explained:

> [t]o say "I love you" is one thing; to hold a lover's hand in public to express one's love can express something quite different; and "to make love" is often a still more profound

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engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else." Barnes, 501 U.S. at 578 n.4 (Scalia, J., concurring in the judgment).

[31] There need not be a uniformity of message in order to find a particular activity expressive. See Meuse, 1999 WL 1203793 (Mass. Super. 1999) (finding tattooing to be expressive despite variety of messages).

[32] The intimate sexual expression proscribed by the Challenged Laws also furthers individual development, another important value fostered by Article 16. By engaging in such conduct, individuals explore and define their identities as sexual beings. The significance accorded such exploration underlies Stanley v. Georgia, 394 U.S. 557 (1969), in which the Supreme Court upheld an individual's right to possess obscene materials in his own home. The freedom to engage in such conduct as a means of defining identity is particularly important to lesbians and gay men for whom this activity is often a primary means of sexual expression. See Philip Blumenstein & Pepper Schwartz, American Couples 194-306 (1983). Individual development, in turn, fosters participation by such persons, as gay men and lesbians, in community life and public debate. See William N. Eskridge, Jr., Gaylaw: Challenging the Apartheid of the Closet 181 (1999).

> expression of what one feels and thinks. Even when no one else is watching, all of these acts are, to use Justice Scalia's terms, "normally engaged in for the purpose of communicating . . . an emotion . . . to someone else."

See David Cole & William N. Eskridge, Jr., From Hand-holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct, 29 Harv. C.R.-C.L. L. Rev. 319, 326-27 (1994).

B. The Challenged Laws Are Invalid Because They Are Aimed At The Expressive Aspect Of The Proscribed Conduct And The Government Has No Substantial Or Even Legitimate Interest In Regulating That Conduct.

The conduct proscribed by the Challenged Laws is so imbued with meaning that "the statute[s'] prohibition[s] . . . target[] speech, not conduct." Benefit v. City of Cambridge, 424 Mass. 918, 923 (1997) (invalidating anti-begging statute where "[c]ommunication is an inherent aspect" of proscribed activity). Indeed, because of the absence of any legitimate law enforcement or other societal interest furthered by the Challenged Laws, see Section I.C., supra, they can only be understood as attempts to regulate the proscribed conduct's expressive content. The Challenged Laws thus go beyond permitted "incidental" restrictions on the communicative aspects of conduct, Sees, 374 Mass. at 535, to the naked

suppression of speech. The Challenged Laws therefore violate Article 16.

IV. THE CHALLENGED LAWS VIOLATE THE MASSACHUSETTS DECLARATION OF RIGHTS' PROHIBITION AGAINST CRUEL OR UNUSUAL PUNISHMENT.

Article 26 of the Declaration of Rights prohibits the infliction of "cruel or unusual punishments" by a magistrate or court of law. Like the privacy and free expression guarantees of the Declaration of Rights, Article 26 has been interpreted to provide greater protection than the cognate provision of the United States Constitution found in the Eighth Amendment. See District Attorney v. Watson, 381 Mass. 648, 667 (1980). Conviction under Section 35 carries a maximum sentence of five years imprisonment, while a conviction under Section 34 subjects a defendant to a maximum penalty of 20 years imprisonment. These punishments, indeed any penalties, for the activities proscribed by the Challenged Laws are cruel and unusual under Article 26 because they are disproportionate, see Commonwealth v. Jackson, 369 Mass. 904, 909 (1976), and contrary to contemporary moral standards. See Watson, 381 Mass. at 661 (constitutional duties of Court "require a re-examination of the death penalty to determine whether it

is unconstitutionally cruel in light of contemporary circumstances").

It has long been recognized that imprisonment for a term of years may be so disproportionate to the offense that it "shocks the conscience and offends fundamental notions of human dignity," thereby constituting cruel and unusual punishment. Opinion of the Justices, 378 Mass. 822, 830 (1979). The test for disproportionality is a tripartite one that examines (1) the nature of the offense and the offender in light of the degree of harm to society, (2) the sentence imposed for the challenged statute compared to punishments meted out for more serious crimes within the Commonwealth, and (3) the sentences imposed for the challenged statute compared to sentences imposed for similar offenses in other jurisdictions. See Cepulonis v. Commonwealth, 384 Mass. 495, 497-98 (1981).

Under the first prong of the analysis, it is clear that the terms of imprisonment imposed for violation of the Challenged Laws are grossly disproportionate to the offense. The "offense" – intimate, non-commercial conduct between consenting adults – results in no harm to the participants or to society.[33] See Section I.C.,

[33] As argued elsewhere in this brief, to the extent that

supra. Thus, under the first prong alone, penalties of five and 20 years imprisonment for Sections 35 and 34 respectively are unconstitutionally disproportionate.

Application of the second prong of the analysis also demonstrates the invalidity of the Challenged Laws. Because the sodomy laws serve no permissible purpose, every criminal law of the Commonwealth ought to be deemed to proscribe conduct "more serious" than that proscribed by the Challenged Laws. Certainly, crimes involving harm to a person or damage to property are "more serious" than sexual conduct between consenting adults. Of such crimes, many have less onerous penalties than the Challenged Laws. Assault and battery upon another person, for example, carries with it a possible sentence of not more than two and one half years. See G. L. c. 265, § 13A. An individual convicted of assault with intent to commit a felony, G. L. c. 265, § 29, is subject to imprisonment up to 10 years, half the possible punishment for violation of Section 34.

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the Challenged Laws are interpreted to apply only to nonconsensual and/or public acts or are enforced only in those circumstances, they are merely duplicative of other criminal statutes in the Commonwealth and are therefore unjustified. See Section I.C.2, supra.

Examples of crimes more serious but receiving the same or lesser punishment than the Challenged Laws are also numerous. Such crimes include manslaughter, G. L. c. 265, § 13, and the burning of a dwelling, G. L. c. 266, § 1, both of which impose the same maximum sentence as a conviction under Section 34. Section 34 imposes twice the maximum penalty for assault and battery with intent to murder, G. L. c. 265, § 15, and assault and battery with a dangerous weapon, G. L. c. 265, § 15A. Violation of Section 35 is punishable by the same maximum penalty as larceny, G. L. c. 266, § 30.

A comparison of the penalties for similar crimes in other jurisdictions--the third prong of the analysis--likewise provides compelling evidence that the Challenged Laws are unconstitutional. Well over half of the fifty states have repealed their "sodomy laws" through legislative action. See http://www.sodomylaws.org. Another nine state statutes have been invalidated by the courts.[34] Of those 15 statutes still on the books, only three have penalties

[34] See Picado, cv. 99-7048 (Cir. Ct. Ark. March 23, 2001); Williams v. State, Case No. 98036031/CC-1059, 1998 Extra LEXIS 260 (Cir. Ct. Md. October 15, 1998); Powell, 510 S.E.2d 18; Gryczan, 942 P.2d 112; Campbell, 926 S.W.2d 250; Wasson, 842 S.W.2d 487; Michigan Org. for Hum. Rts. v. Kelley, No. 88-815820 CZ (Mich. Cir. Ct. Wayne Cty. July 9, 1990); People v. Onofre, 415 N.E.2d 936 (N.Y. 1980); Commonwealth v. Bonadio,

as severe as the twenty years imprisonment mandated by Section 34, see Okla. Stat. tit. 21, § 886 (maximum 20 years imprisonment); Idaho Code § 18-6605 (not less than five years imprisonment); Va. Code Ann. § 18.2-361 (five to 20 years imprisonment), and only two additional states have penalties greater or equal to the five years imposed for a violation of Section 35. See Miss. Code Ann. § 97-29-59 (maximum 10 years imprisonment); S.C. Code Ann. § 16-15-120 (maximum five years imprisonment).

The Supreme Judicial Court has recognized that "article 26 . . . must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Watson, 381 Mass. at 661, 665 (finding "death penalty . . . is impermissibly cruel under Art. 26 when judged by contemporary standards of decency"). The successful challenges to sodomy laws throughout the country and world, see Section I.B., supra, are testaments to the evolution of a standard of decency that includes the freedom of intimate self-expression between consenting adults.

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415 A.2d 47 (Pa. 1980).

V. THE ONLY APPROPRIATE REMEDY IN THIS CASE IS TO STRIKE DOWN THE OFFENDING STATUTES IN THEIR ENTIRETY.

Because the statutes, on their face, offend the Declaration of Rights, they must be struck in their entirety. Insofar as the Challenged Laws set up a scheme for criminalizing intimate conduct that cannot survive under any standard of review (violating equal protection guarantees), criminalize expressive conduct (violating rights of free expression), and provide undue punishment for such conduct (violating guarantee of freedom from cruel or unusual punishment), the statutes simply have no permissible construction and must be struck in their entirety.

To the extent the statutes violate principles of privacy guaranteed by the Declaration of Rights, there is no permissible limiting construction that is consistent with this Court's jurisprudence or that cures the constitutional problems they create. Therefore, once this Court reaches the question of remedy, the only option is the simplest -- declare the offending statutes unenforceable against anyone and in all circumstances.

A. Because the Challenged Laws Are Single, Indivisible Enactments With No Sub-Parts Capable Of Severance, They Should Be Struck in Their Entirety.

The rule consistently applied in facial challenges by this Court is that:

> When a court is compelled to pass upon the constitutionality of a statute and is obliged to declare part of it unconstitutional, the court, as far as possible, will hold the remainder to be constitutional and valid, if the parts are capable of separation and are not so entwined that the Legislature could not have intended that the part otherwise valid should take effect without the invalid part.

Murphy v. Commissioner, 418 Mass. 165, 169 (1994) (citing Massachusetts Wholesalers of Malt Beverages, Inc. v. Commonwealth, 414 Mass. 411, 420 (1993)). As a preliminary matter, this statute has no parts to sever and therefore should be struck in its entirety.

Second, because this Court cannot determine whether the Challenged Laws would have been passed without the offending application, it should strike the entire statute. See Mayor of Boston v. Treasurer & Receiver General, 384 Mass. 718, 725 (1981) (rather than strike a specific funding limitation, court struck the entire funding allocation because it could not discern whether the legislature would have made the funding allocation in the first place without the specific limitation).

Here, to graft, in effect, the words "public," "nonconsensual," or "commercial" onto the Challenged Laws would be entirely inconsistent with the legislative intent of the Challenged Laws and would render them redundant with other criminal laws. See Brennan v. Board of Election Comm'rs of Boston, 310 Mass. 784, 789 (1942) (holding that courts should construe statutes as written). As Professor Eskridge has explained, the motivating purpose of the laws was to criminalize all forms of non-procreative sexual activity. See Eskridge, supra n.6 at 1015. They were not intended to regulate only public expressions of intimacy, commercial conduct, nonconsensual or intergenerational conduct.[35] If this Court were to reframe the statute to prohibit only conduct the state may lawfully regulate, what would remain would bear no relationship to the original legislative purpose. In other words, "the parts are [not] capable of separation," Opinion of the Justices, 330 Mass. 713, 726 (1953), in any manner which results in the remaining provisions bearing any resemblance to the law as originally conceived.

[35] When the legislature intends to focus only on public behavior, for example, it has done so in the statute's plain language. See, e.g., G. L. c. 272, § 16 (prohibiting "open and gross lewdness") (emphasis added).

Other courts have reached the same conclusion. Faced with the question of whether it should create a permissible limiting construction for an unconstitutional sodomy law and applying fundamentally the same test as that applicable in Massachusetts, the South African Constitutional Court declined to do so. [36] As that Court explained, "the sole reason for [the law's] existence was the perceived need to criminalise a particular form of gay sexual expression; motives and objectives which we have found to be flagrantly inconsistent with the Constitution." Nat'l Coalition for Gay and Lesbian Equality v. Minister of Justice, 1998 (12) BCLR 1517, 1550 (Const. Ct.). The fact that the "ambit of the offence was extensive enough" to include rape, for example, "was really coincidental." Id. Once the Court found that the "core of the offense" was objectionable, id., no limiting construction could save it. The same analysis pertains here.[37]

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[36] The actual test applied by that court was "first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?" Stated alternately, "if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute." Nat'l Coalition for Gay and Lesbian Equality v. Minister of Justice, 1998 (12) BCLR 1517, 1549 (Const. Ct.).

[37] Although the South Africa Court had before it a sodomy law that criminalized only gay male sex, the underlying

B. Limiting Constructions of the Challenged Laws Do Not Cure the Constitutional Violations and Do Not Fully Protect Plaintiffs' Interests.

Creating a limiting construction of the Challenged Laws does not cure the constitutional problems the laws create. First, it would simply render the laws duplicative of other criminal statutes. See Benefit v. City of Cambridge, 424 Mass. 918, 927 n.7 (1997) (declining to cure constitutional infirmity by a limiting construction because there was already "ample authority available to the government to deal with beggars who transgress peaceful limits"). In addition, a limiting construction would raise new constitutional questions about why the underlying conduct giving rise to the offense results in a variable sentencing scheme. See Section II, supra (describing variable penalties for statutes prohibiting substantially similar conduct).

Second, even if the elements of proof for the Challenged Laws are changed by a limiting construction

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analysis with respect to remedy should be no different in a gender-neutral law. Either way, where the "sole reason" for the law has nothing to do with public, non-consensual or commercial conduct, a limiting instruction on those grounds is improper. In addition, although the South Africa Court considered only the issue of whether construing the sodomy law to prohibit "male rape," would be permissible, here again, the analysis should be no less true for whether construing a gender neutral law to prohibit only rape or public sex would be a permissible construction.

from this Court, as a practical matter, the Challenged Laws will continue to cause serious constitutional problems. For example, the laws will continue to stigmatize those who engage in such conduct and those whom the public perceives to be engaging in such conduct.[38] As the European Court of Human Rights recognized, "the mere existence of" sodomy laws "may continuously and directly affect a person's private life." A.D.T. v. The United Kingdom, __ Eur. Ct. H.R. (ser. __), No. 35765/97, ¶ 23 (31 July 2000), (striking down England's "gross indecency" law).

Third, even limiting the applicability of the Challenged Laws to public conduct (when other laws exist to cover the same conduct) allows these more punitive laws to continue to wreak havoc in people's lives. As a practical matter, a person facing a 20-year prison sentence for engaging in intimate conduct in an area the arresting officers believed to be public may well be coerced into a plea bargain including stipulating to facts on a lesser charge.[39] This is particularly true

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[38] See supra n.4.

[39] Indeed, having engaged in intimate conduct in a place he believed to be private (A. 52), and finding himself arrested and prosecuted nonetheless, John Doe might have had to defend against his Section 34 charge on the ground that the location was legally private. Despite that some defendants have been successful in defending a criminal charge on this basis, see

given the complexities in the caselaw regarding the distinction between conduct that is legally private and that which is legally public.[40] Accordingly, any remedy short of striking the Challenged Laws in their entirety leaves Plaintiffs in the same vulnerable and compromised position they find themselves in today.

Commonwealth v. Ferguson, 384 Mass. 13, 16–17 (1981) and Commonwealth v. Nicholas, 40 Mass. App. Ct. 255, 258 (1996), ultimately succeeding in this way cannot remedy the harms that come with having been improperly arrested and prosecuted in the first place.

[40] As this Court has explained, "[a] place may be public at some times and under some circumstances, and not public at others." Ferguson, 384 Mass. at 16. In practice, outdoor locations may be private, see Nicholas, 40 Mass. App. Ct. at 258, while indoor locations may be public, see Commonwealth v. Kelley, 25 Mass. App. Ct. 180, 185 (1987). While this public/private distinction is a necessarily complicated one, this Court should not permit it to remain in the context of enforcing the Challenged Laws. Because of the historic association of sodomy laws with gay people and a potential for subjective determinations by police officers about what constitutes a public place, the Challenged Laws invite unnecessary abuse. Cf. Custody of a Minor, 378 Mass. 712, 716–17 (1979) ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.")

CONCLUSION

Wherefore, for all of the above reasons, Plaintiffs respectfully ask this Court to declare the Challenged Laws unconstitutional on their face, enjoin the Defendants from enforcing them, and order any further relief that this Court deems just and proper.

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