

Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*

MELISSA MURRAY**

ABSTRACT

The last sixty years have ushered in a tectonic shift in American sexual culture, from the sexual revolution—with its liberal attitudes toward sex and sexuality—to a growing recognition of rape culture and sexual harassment. The responses to these changes in sexual culture have varied. Conservatives, for their part, bemoan the liberalization of sexual mores and the rise of a culture where “anything goes.” And while progressives may cheer the liberalization of attitudes toward sex and sexuality and the growing recognition of sexual harassment and sexual assault, they lament the inadequacy of state efforts to combat sexual violence. Although these responses are substantively different, both evince a sense of the state’s failure. For conservatives, the changes wrought by the decriminalization of “deviant” sexual behavior, the shift to no-fault divorce regimes, and the recognition of constitutional protections for sex and sexuality suggest that the state has abdicated its historic role

* Originally published in the *Northwestern University Law Review*. This piece has been reproduced as originally published. With the exception of this attribution note, the *Dukeminier Awards Journal* editorial board has not edited this piece in any way, including reviewing citations for accuracy or otherwise ensuring that they conform to any particular style of citation.

** Melissa Murray is a Professor of Law at New York University School of Law. For their generous engagement with this Article, I am indebted to Michelle Adams, Deborah Archer, Sahar Aziz, Rick Brooks, Martha Chamallas, Guy Charles, Jessica Clarke, Amy Cohen, Charlton Copeland, Anne Dailey, Katherine Franke, David Garland, Meredith Harbach, Jill Hasday, Clare Huntington, David Kamin, Suzanne Kim, Andy Koppelman, Corinna Lain, Serena Mayeri, Doug NeJaime, Jide Nzelibe, Alice Ristroph, Adam Samaha, Peter Shane, Marc Spindelman, Emily Stolzenberg, Eric Talley, Deborah Tuerkheimer, and Jeremy Waldron. This Article benefitted from helpful comments and suggestions I received at the Harvard Public Law Workshop and the University of Chicago Legal Forum’s annual symposium, as well as faculty workshops at Cardozo, Columbia, Fordham, Ohio State, Northwestern, NYU, the University of Richmond, the University of Pennsylvania, and the University of Connecticut. Caitlin Millat and Jeremy Brinster furnished outstanding research assistance. I am especially grateful to Kendra Doty, Noor Tarabishy, and the staff of the *Northwestern University Law Review* for their editorial work and assistance. All errors are my own.

© 2020 Melissa Murray. All rights reserved.

in imposing consequences on those who do not comply with traditional sexual mores. For progressives (and especially feminists), state efforts to properly regulate rape, sexual assault, and sexual harassment are, at best, anemic and, at worst, utterly ineffectual. As they see it, the state has failed to impose consequences for harassment, assault, and other offensive sexual conduct.

But it is not just that these two constituencies believe that the state has failed to properly regulate sex and sexuality; they have also responded in uncannily similar ways to these lapses. Specifically, in response to the state's failure to regulate, private actors on both sides of the ideological spectrum have stepped into the regulatory void, challenging extant sexual norms and articulating new visions of appropriate sex and sexuality. These private regulatory efforts are evident in the rise and proliferation of conscience objections or exemptions, as exemplified in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, as well as in the emergence of the #MeToo movement. As this Article maintains, conscience objections allow private actors to reject the extant normative regime and instead articulate and enforce their own views of appropriate sex and sexuality through the denial of goods and services. The #MeToo movement has similarly sought to advance an alternative vision of appropriate sex and sexuality through private action. Using social media and the press, the #MeToo movement has identified recidivist harassers and workplaces where sexual harassment and sexual assault are rife, advocated for increased workplace harassment training, and, ultimately, called for the expulsion from the workplace of many high-profile men who, for years, engaged in objectionable conduct.

As this Article explains, the fact that private actors are stepping in to regulate in the state's stead is not necessarily novel. Private actors have often played a regulatory role—particularly in contexts where norms are in flux or contested. Nevertheless, the private regulation seen in *Masterpiece Cakeshop* and #MeToo evinces a new turn in the regulation of sex and sexuality. In the absence of appropriate state regulation of sex and sexuality, private actors are coming to the fore to take on a more visible role in regulating sex and sexuality, and in doing so, have claimed and recast parts of the public sphere as private space suitable for the imposition of their own norms and values.

TABLE OF CONTENTS

INTRODUCTION	215
I. THEORIES OF REGULATION.....	223
II. CONTEXTUALIZING PRIVATE SEXUAL REGULATION.....	229
A. <i>Private Actors Supporting the State</i>	229
B. <i>Private Actors Cultivating the State</i>	230

C. <i>Private Actors Challenging the State</i>	233
III. THE CHANGING LANDSCAPE OF SEXUAL REGULATION— THEN AND NOW.....	237
A. <i>Then</i>	237
B. <i>Now</i>	239
C. <i>Responding to the Changing Landscape of Sexual Regulation</i>	244
IV. PRIVATE ACTORS AS SEXUAL REGULATORS: <i>MASTERPIECE CAKESHOP</i> AND #MeToo	247
A. <i>Masterpiece Cakeshop</i>	248
B. <i>The #MeToo Movement</i>	254
C. <i>#MeToo and Masterpiece Cakeshop as Private Sexual Regulation</i>	258
V. THE IMPLICATIONS OF #MeToo AND <i>MASTERPIECE CAKESHOP</i> 'S PRIVATE SEXUAL REGULATION.....	260
A. <i>#MeToo: Engaging the State</i>	261
B. <i>Masterpiece Cakeshop: Displacing the State</i>	264
CONCLUSION	270

INTRODUCTION

Over the last sixty years, there has been a tectonic shift in American sexual culture. The combination of decriminalization, shifting social mores, and the recognition of constitutional privacy protections has given rise to what some have termed a “sexual revolution.”¹ Whether one agrees that what has taken place is in fact revolutionary, it is undeniable that over this time, there has been a profound liberalization of the attitudes and laws governing sex and sexuality. Sex is no longer confined to marriage. Indeed, most individuals routinely engage in sex without the benefit of a marriage license,² frequently cohabiting with partners regardless of marital status. On many college campuses, “hook up” culture flourishes, allowing individuals opportunities for sexual experimentation.³ Courts have recognized constitutional rights to contraception⁴ and

1. Michael Compitello, *Parental Rights and Family Integrity: Forgotten Victims in the Battle Against Child Abuse*, 18 PACE L. REV. 135, 159 (1997) (discussing the connection between the “sexual revolution” and the rise of privacy protections).

2. Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954–2003*, 122 PUB. HEALTH REP. 73, 73–78 (2007) (discussing survey findings from 2002 revealing that, by age twenty, 75 percent of Americans had had premarital sex).

3. For a cogent discussion of “hook up” culture and its effects, see generally KATHLEEN A. BOGLE, *HOOKING UP: SEX, DATING, AND RELATIONSHIPS ON CAMPUS* (2008); see also Mary D. Fan, *Sex, Privacy, and Public Health in a Casual Encounters Culture*, 45 U.C. DAVIS L. REV. 531, 538–43 (2011) (noting how shifting social mores regarding sexuality dramatically impact young individuals, like college students, because they tend to be the most sexually active).

4. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending the right to

abortion,⁵ providing women greater reproductive autonomy. And perhaps most profoundly, LGBTQ individuals are no longer consigned by law to the shadows of the closet. They are legally free to express their sexual orientation and, more recently, are entitled to have their relationships recognized by the state in civil marriage.⁶

But the changes in sexual culture are not limited to the liberalization impulses of the “sexual revolution.” We have also witnessed profound changes in the way we conceive of and address rape, sexual assault, and sexual harassment. In many jurisdictions, the marital rape exemption, which ruled out the prospect of rape within the course of an intact marriage, has been jettisoned.⁷ Rape shield laws attempt to facilitate the prosecution and enforcement of rape laws by prohibiting the publication of a rape complainant’s identity and by limiting a defendant’s ability to introduce evidence of, or cross-examine rape complainants about, their past sexual behavior.⁸ Likewise, policies and regulations prohibiting sexual harassment have been introduced in public and private workplaces,⁹ complementing statutory prohibitions on the same conduct at both the state and federal levels.¹⁰

These various changes have produced a range of responses. For many, the liberalization of adult consensual sex has been well-received—a

contraception to all individuals, whether married or single); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (striking state law prohibiting contraception even to married couples on the grounds of the marital right to privacy).

5. *Roe v. Wade*, 410 U.S. 113, 164 (1973) (striking as unconstitutional state law outlawing abortion).

6. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (finding state law prohibiting same-sex marriage unconstitutional).

7. *But see* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1375 (2000) (noting that, despite reforms, many states retained the exemption in some form or created procedural hurdles for marital rape prosecutions).

8. FED. R. EVID. 412; *id.* 413. Efforts to improve the enforcement of rape laws and protect victims culminated in the enactment of Federal Rule of Evidence 412, which declared evidence of a victim’s past sexual behavior generally inadmissible in criminal or civil proceedings, and its companion, Federal Rule of Evidence 413, which allows the government to admit evidence at trial of the defendant’s history of sexual assault. For further discussion of the passage of Rules 412 and 413, see I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 843–46 (2013).

9. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 462–63 (2001) (discussing how multiple players, including private, public, and nongovernmental actors, have developed or redesigned mechanisms to address sexual harassment and other equity concerns).

10. For a discussion of the development of federal statutory protections against sexual harassment under Title VII of the Civil Rights Act of 1964, see Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 816–26 (1991). For a discussion of how federal civil rights law compares to more progressive statutory prohibitions on harassment at the state level, see Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J.F. 121, 126–28 (2018).

welcome shift toward greater autonomy and liberty in intimate life.¹¹ For others, however, the sexual revolution has heralded a steady slide into sexual libertinism and, indeed, an embrace of a culture of “sex without consequences.”¹² As these dissenters see it, the legalization of abortion and contraception has diminished “the sacredness of sexual intercourse, and its intrinsic connection with the procreating of new, vulnerable, human life.”¹³ At the same time, the emergence and proliferation of no-fault divorce regimes have, it is claimed, diminished the importance of marriage and ushered in an era of “divorce on demand.”¹⁴ Whereas the state, often—though not exclusively—through the operation of criminal law, once imposed harsh consequences for exploring sex and sexuality outside of the narrow confines of heterosexual marriage,¹⁵ these voices argue that there is no one imposing such consequences in today’s liberalized sexual society.¹⁶

11. See Jean M. Twenge et al., *Changes in American Adults’ Sexual Behavior and Attitudes, 1972–2012*, 44 ARCHIVES SEXUAL BEHAV. 2273, 2277 (2015) (finding that “[b]etween the 1970s and the 2010s, American adults became more accepting of premarital sex, adolescent sex, and same-sex sexual activity, but less accepting of extramarital sex”); see also Melissa Murray, Griswold’s *Criminal Law*, 47 CONN. L. REV. 1045, 1072 (2015) (“Griswold is credited with helping to transform society from one in which the state demanded compliance with majoritarian sexual norms to one in which the state respected some degree of sexual autonomy.”).

12. See Jonathan Pokluda, *America’s Greatest “Right”: Sex Without Consequences*, PORCH (Apr. 6, 2015), <http://www.theporch.live/blogs/sex-without-consequences> [<https://perma.cc/3AWT-MDY5>] (arguing that those who attempt to hinder or limit these emerging sexual rights are often publicly vilified for expressing those views). Importantly, the notion of consequence-free sex was also articulated by feminists in support of increased reproductive rights. See, e.g., CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 98 (1987) (“[T]he [reproductive] equality issue has been framed as a struggle for women to have sex with men on the same terms as men: ‘without consequences.’”).

13. Helen M. Alvaré, *No Compelling Interest: The “Birth Control” Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 435 (2013).

14. See J. Herbie DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519, 521 (1994) (arguing that no-fault divorce “yielded divorce on demand, with little heed to the inequities of property division and child and spousal support”); see also Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 45–46 (2012) (“The possibility of ‘divorce on demand’ created the potential for the widespread instrumental use of marriage as a vehicle for opting into particular benefits of marriage and then opting out before the burdens became oppressive.”).

15. Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573, 578–79 (2016).

16. See, e.g., Alvaré, *supra* note 13, at 409 (lamenting “the widespread legalization and availability of both contraception and abortion” that has led to a more permissive sexual culture); Ross Douthat, *More Imperfect Unions*, N.Y. TIMES (Jan. 25, 2014), <https://www.nytimes.com/2014/01/26/opinion/sunday/douthat-more-imperfect-unions.html> [<https://perma.cc/AP5B-LSF2>] (arguing that liberalization of divorce and abortion laws has led to a less accountable culture, exacerbating family instability); Mary Eberstadt, *A Time of Reckoning*, WKLY. STANDARD (June 15, 2018, 4:51 AM), <https://www.weeklystandard.com/mary-eberstadt/>

The changes in the law's response to rape, sexual assault, and sexual harassment have also prompted divergent views. Although many have applauded these changes as an important step forward in securing gender equality, others argue that the changes are inadequate and ineffective. Many progressive critics maintain that incidents of rape and sexual assault are underenforced by the state and underreported because of victim-blaming and the persistence of state-sanctioned gender norms.¹⁷ They also maintain that the state has failed to properly oversee incidents of workplace sexual harassment and impose consequences on employers in workplaces where harassment is rife.¹⁸

Obviously, both groups—and the critiques that they have lodged—are very different. One group bemoans the secularization of sexual culture, while the other laments the inadequacy of efforts to combat harassment and sexual violence. But despite these core differences, present in both critiques is a sense of the state's failure. For social conservatives, the changes wrought by decriminalization of “deviant” sexual behavior, the shift to no-fault divorce regimes, and the recognition of constitutional protections for sex and sexuality suggest that the state has abdicated its historic role in imposing limits on sex.¹⁹ On the other hand, for progressives (and especially feminists), the changes in the law's response to sexual harassment and sexual assault have not gone far enough. As they explain, state efforts to properly regulate rape, sexual assault, and sexual harassment are, at best, anemic and, at worst, utterly ineffectual.²⁰ Indeed, their conclusions about the state of sexual regu-

five-reasons-the-sexual-revolution-has-been-a-disaster?_amp=true [https://perma.cc/SE82-N7CR] (tracing an increase in “broken families” back to “the destigmatization and mass adoption of artificial contraception . . . followed by widespread legalization of abortion”).

17. See, e.g., Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 232 (2015) (discussing how, despite reforms in rape and sexual assault law, the number of rape reports leading to arrest has declined and conviction rates of rape have not increased).

18. See Estrich, *supra* note 10, at 833–34.

19. See, e.g., Donald Devine, *Same-Sex Marriage Isn't About Freedom*, AM. CONSERVATIVE (June 27, 2013), <http://www.theamericanconservative.com/articles/same-sex-marriage-isnt-about-freedom> [https://perma.cc/J8ZT-PFME] (arguing that “the lack of . . . limits in contemporary America portends the end of Western culture and represents its final ‘deconversion’ from Christianity”).

20. See SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* 32–40 (2017) (discussing how courts have created frameworks that enable them to limit or skirt enforcement of sexual harassment claims); Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 6 (2011) (“The thirty-year period from 1977 to 2007 in the United States saw much innovation in sex crime law, . . . [but] these changes have done little to eliminate the fundamental myths about blame attribution that permeate many aspects of criminal and civil rape law.”); Deborah Tuerkheimer, *The Sexual Assault Survivors' Rights Act Is Not Enough*, TIME (June 9, 2016), <http://time.com/4361989/sexual-assault-survivors-rights-act> [https://perma.

lation in these areas mirror conservative views about the regulation of adult, consensual sex. As these progressives see it, the state does not regulate in this area as robustly as it should, levying few consequences on those who commit sexual harassment and sexual assault and leaving victims with meager remedies and limited avenues for redress.²¹

But it is not just that these two groups have a shared sense that the state has failed to properly regulate sex and sexuality; it is that they have responded in uncannily similar ways to the state's lapses. As both groups recognize, the state's failure to properly regulate sex and sexuality has yielded a space in which private actors on both sides of the ideological spectrum may play a critical role in both challenging extant sexual norms and articulating new visions of appropriate sex and sexuality. The efforts of these two constituencies is evident in the rise and proliferation of religious refusals and conscience exemptions,²² as exemplified in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,²³ and in the emergence of the #MeToo movement.²⁴ Let me take each of these in turn.

cc/4MAA-WAXK] (contending that rape law reform proposals have been “woefully inadequate” because they fail to address issues of gender bias).

21. See, e.g., Julie Goldscheid, *Is Sexual Harassment a Civil Rights Violation? It Should Be*, ACLU: SPEAK FREELY (Jan. 26, 2018, 1:15 PM), <https://www.aclu.org/blog/womens-rights/sexual-harassment-civil-rights-violation-it-should-be> [https://perma.cc/SSL5-Z6QC] (contending that the state needs to enact “more meaningful measures of accountability,” including federal and state civil rights remedies).

22. See Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2518–19 (2015) (discussing conscience exemptions in the same-sex marriage context); see also Melissa Murray, *Overlooking Equality on the Road to Griswold*, 124 YALE L.J.F. 324, 330 (2015) (noting that conscience exemptions “recall earlier criminal prohibitions on contraception” because they “cultivate social meanings about contraception and contraceptive use”).

23. 138 S. Ct. 1719 (2018).

24. The #MeToo movement was founded over ten years ago by activist Tarana Burke to build a support network primarily aimed at young women of color who had been victims of sexual violence. Abby Ohlheiser, *The Woman Behind ‘Me Too’ Knew the Power of the Phrase When She Created It—10 Years Ago*, WASH. POST (Oct. 19, 2017), <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago> [https://perma.cc/4X8T-EYR8]. The movement gained widespread national exposure in 2017 in the form of a hashtag, #MeToo, in the days after sexual harassment allegations against Harvey Weinstein surfaced, when actress Alyssa Milano tweeted: “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.” Samantha Schmidt, *#MeToo: Harvey Weinstein Case Moves Thousands to Tell Their Own Stories of Abuse, Break Silence*, WASH. POST (Oct. 16, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive> [https://perma.cc/93TL-VB8B]; Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976 [https://perma.cc/BNP8-H8NJ]. Despite this history, it may be difficult to speak concretely of the goals and aims of the #MeToo movement vis-à-vis the state, as the movement includes various strands and subgroups. For purposes of this Article, I have focused on those strands of the

In recent years, in the face of generally applicable laws that would require them to, *inter alia*, provide contraception and abortion services and provide goods and services on a nondiscriminatory basis, religious conservatives have sought conscience exemptions and accommodations from these laws.²⁵ As they explain, requiring believers to provide contraception or abortion services, or goods and services for a same-sex wedding, would make them “complicit” in conduct their faiths deem “sinful.”²⁶ In this regard, religious conservatives view themselves as minorities in an increasingly secular culture²⁷ and, as such, seek space and accommodation from the state to be able to conduct themselves in accordance with the tenets of their faiths.

While those asserting conscience objections may insist that the issue is simply about securing space for religious exercise and observance in an increasingly secular culture,²⁸ we might understand their claims differently. Viewed through the lens of sexual regulation, these conscience objections are at once an effort to avoid the ambit of generally applicable laws *and* a bid to occupy the regulatory void in order to reassert and enforce traditional sexual mores that the state no longer enforces. On this account, social conservatives do not simply seek a “carve-out” for religious observance—they are also clearly communicating their objections to the current status quo in which individuals enjoy the right to use contraception, obtain abortions, and marry a person of the same sex. Put differently, conscience objections enable these private actors to eschew the status quo and enact their own brand of sexual regulation in the state’s stead—and indeed, in the face of the state’s apparent embrace

movement that have articulated particular policy goals and interests under the label #MeToo. I am grateful to Deborah Tuerkheimer for helpful conversations on this point.

25. See Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1418–29 (2012) (discussing religious conservatives’ attempts to use conscience exemptions to opt out of the contraceptive and abortion care requirements imposed by the Affordable Care Act of 2010).

26. NeJaime & Siegel, *supra* note 22, at 2518–19.

27. See *id.* at 2553; see also Douglas Laycock, *Religious Liberty for Political Active Minority Groups: A Response to NeJaime and Siegel*, 125 YALE L.J.F. 369, 370 (2016) (“Religious conservatives make the individual-rights arguments of a minority group because they *are* a minority group.” (emphasis added)).

28. Many of the amicus briefs submitted to the Court in *Masterpiece Cakeshop* raised this point. See, e.g., Brief of Agudath Israel of America as Amicus Curiae in Support of Petitioners at 6, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (arguing that, although one’s religious values may be “out of sync with those of 2017 America,” conscience objections are necessary to allow individuals to live according to their personal religious codes); Brief of Christian Business Owners Supporting Religious Freedom as Amicus Curiae in Support of Petitioners at 6, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (arguing that “[p]etitioners’ religious objection is, and always has been, based solely on religious grounds, and not on any animosity toward Respondents or their sexual orientation”).

of more liberal sexual values. In this “carved-out” space, religious conservatives are free to articulate their own views of appropriate sex and sexuality and, through the denial of goods and services (and the expression of judgment that accompanies such denials), levy consequences on those who do not comport with this vision.²⁹

But it is not just social conservatives who are assuming the state’s role in regulating a particular vision of appropriate sex and sexuality. Progressive voices have also stepped in to fill what they perceive as a regulatory void, taking steps to privately regulate sexual harassment and sexual assault. The emergence of the #MeToo movement illustrates this development. #MeToo and its efforts respond directly to the view that the state has failed to impose appropriate consequences on those who commit sexual harassment and sexual assault.³⁰ No longer willing to accept a culture where these behaviors are tacitly condoned and victims’ injuries go unremedied, the #MeToo movement enlists private entities as agents of reform to both challenge—and ultimately replace—extant norms of sexual conduct. Using social media and the press, the #MeToo movement has identified recidivist harassers and workplaces where sexual harassment and sexual assault are rife,³¹ advocated for increased workplace harassment training,³² and, ultimately, called for the expulsion from the workplace of several high-profile men who, for years, engaged in objectionable conduct with impunity.³³ In this regard, like conservatives who register religious-based objections to same-sex marriage, abortion, and contraception, the #MeToo movement, in circumventing extant legal remedies and pursuing redress and reform through private means, calls

29. NeJaime & Siegel, *supra* note 22, at 2566–78 (outlining what they term the third-party “material” and “dignitary” harms associated with conscience exemptions).

30. The related #TimesUp movement, started by women in the entertainment industry, has also publicly appealed to private actors, including corporations and the media, to combat sexual harassment and discrimination in the workplace. *Our Letter of Solidarity*, TIME’S UP (Jan. 1, 2018), <https://www.timesupnow.com/home> [<https://perma.cc/FMA6-ZENX?type=image>].

31. See, e.g., Dan Corey, *A Growing List of Men Accused of Sexual Misconduct Since Weinstein*, NBC NEWS (published Nov. 8, 2017, 3:50 PM; updated Jan. 10, 2018, 3:34 PM), <https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546> [<https://perma.cc/LAU3-YQM3>]; Julia Horowitz, *Workplace Sexual Harassment Claims Have Spiked in the #MeToo Era*, CNN BUS. (Oct. 5, 2018, updated 8:41 AM), <https://www.cnn.com/2018/10/04/business/eeoc-sexual-harassment-reports/index.html> [<https://perma.cc/7FK3-XG5L>].

32. See Jodi Kantor, *#MeToo Called for an Overhaul. Are Workplaces Really Changing?*, N.Y. TIMES (Mar. 23, 2018), <https://www.nytimes.com/2018/03/23/us/sexual-harassment-workplace-response.html> [<https://perma.cc/A3FG-7JDG>].

33. Sarah Almukhtar et al., *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html> [<https://perma.cc/F2ZX-AW7A>].

on private actors—not the state—to mete out proper consequences for sexual harassment and sexual assault.

The comparison between *Masterpiece Cakeshop* and #MeToo may strike some as odd—indeed, deeply discordant. To be clear, in comparing the two, I do not mean to suggest that they are exact analogues. They are not. There are several important points of distinction, which this Article later elaborates. But despite these differences, both movements share surprising features, and viewing them in tandem provides a helpful framework for analyzing this intriguing regulatory development. Indeed, setting aside their substantively different aims, *Masterpiece Cakeshop* and #MeToo may both be seen as attempts by private actors to regulate sexual conduct. Private actors regulating is not, by itself, novel; private actors have exerted regulatory influence, often echoing the state’s regulatory agenda. What distinguishes these acts of private regulation is that, in both *Masterpiece Cakeshop* and #MeToo, private actors are not bound by the state’s vision of appropriate sex and sexuality.³⁴ When these private actors regulate, they are doing so for the express purpose of advancing their particular vision of appropriate sex and sexuality. For conservatives seeking religious exemptions, it is a return to the traditional sexual mores that held sway a generation ago. For the #MeToo movement, it is a vision of sex and sexuality that takes seriously the harms of sexual misconduct and advances more rigorous norms of consent.

This Article proceeds in five Parts. Part I begins by defining the term “regulation” and briefly outlining various theories of regulation. Part II considers the role that private actors have played in reinforcing—and challenging—the state’s regulatory agenda. As it explains, private actors have often played a regulatory role—particularly in contexts where norms are in flux or contested. Part III then considers the changes in the state’s regulation of sex and sexuality that have unfolded over the last sixty years. As this Part explains, constituencies on both ends of the political spectrum have viewed these changes with skepticism. For conservatives, the liberalization of sexual norms signals the state’s abdication of the project of enforcing traditional sexual mores. For progressives, the state’s efforts to reform the legal regime governing sexual harassment and sexual assault have been ineffectual, allowing harassers to go unpunished and depriving victims of remedies and redress. On both accounts, the state has failed to properly regulate sex and sexuality. Using *Masterpiece Cakeshop* and the #MeToo movement as exemplars, Part IV focuses on the responses to the state’s perceived regulatory lapses. As it explains, both constituencies have responded to the state’s perceived failures by shifting to and leveraging forms of private regulation. In this regard, the private regulation seen in *Masterpiece Cakeshop* and #MeToo is noteworthy because it evinces a novel turn in the regulation of sex and

34. See *infra* Part IV.

sexuality. In the absence of appropriate state regulation of sex and sexuality, private actors are attempting to fill the regulatory void by taking on a more visible role in regulating sex and sexuality. More importantly, in doing so, these private actors are engaging in a kind of geographic transmutation. That is, they are recasting parts of the public sphere as *private space* suitable for the imposition of their own private norms. Part V considers the implications of these developments. The Article then briefly concludes.

I. THEORIES OF REGULATION

At the outset, let me say a word about regulation and suggest how we might sketch the contours of what constitutes regulatory action. There is ample literature on the topic of regulation. Indeed, there exists a robust debate among scholars regarding the definition of regulatory activity and when one actor may be said to have regulated another.³⁵ For the purposes of this Article, I define “regulation” as an action that shapes, guides, restricts, or punishes behavior through the imposition of consequences, whether legal or extralegal.³⁶ To this end, regulation need not be an exclusive project of the state—although, as this Article argues, the state historically has served as the most visible source of regulatory power, particularly in the area of sexual regulation. This Part discusses various regulatory forms, including public regulation, private regulation, and regulatory forms that share public and private attributes.

In its most explicit iteration, the state directly regulates through the enactment of legislation, or lawmaking. Historically, the most forceful (and violent) form of this regulation, especially in the context of the regulation of sex and sexuality, has been criminal law.³⁷ But equally as important, state regulation of sex has also included civil law, as well as regulations promulgated by government agencies.³⁸ This type of public

35. For approaches to defining and theorizing “regulation,” see ANTHONY I. OGUS, *REGULATION: LEGAL FORM AND ECONOMIC THEORY* 1–3 (Peter Cane et al. eds., 1994); Robert Baldwin et al., *Introduction: Regulation—The Field and the Developing Agenda*, in *THE OXFORD HANDBOOK OF REGULATION* 5–6 (Baldwin et al. eds., 2010); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 31–86 (1998); Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662–64 (1998); Patrick Luff, *Risk Regulation and Regulatory Litigation*, 64 RUTGERS L. REV. 73, 89–95 (2011); Thomas B. Nachbar, *The Antitrust Constitution*, 99 IOWA L. REV. 57, 70–73 (2013); and Barak Orbach, *What Is Regulation?*, 30 YALE J. REG. ONLINE 1, 4–6 (2012).

36. Black’s Law Dictionary defines regulation as “[c]ontrol over something by rule or restriction.” *Regulation*, BLACK’S LAW DICTIONARY (10th ed. 2014).

37. See Murray, *supra* note 15, at 607.

38. For a discussion of civil regimes in the context of the regulation of sex and sexuality after *Lawrence v. Texas*, see generally *id.* at 584–95, where the Court describes how public employers used professional codes of conduct, workplace fraternization policies, and concerns about institutional reputation to regulate employees’ consensual, nonmarital sex.

regulation is not just enacted but is also enforced by the state: the state creates the law, locates and labels offenders, and imposes consequences. Although private actors may to varying degrees play a role in shaping the norms that are ultimately codified into law, formal control rests with the state.³⁹

At the other end of the spectrum, there exists wholly *private* regulation, purportedly outside of the state's reach. These private regulatory forms include, for example, contract law, a system of privately created arrangements.⁴⁰ This type of regulation may also include what some call private ordering, in which private actors step in voluntarily and independently to fill what they perceive as gaps in state regulation.⁴¹ Although these forms of regulation are nominally private, it would be a mistake to assume that they are entirely outside of the state's ambit. When private individuals seek to regulate their own conduct via contract, they often turn to the public sphere and, specifically, the courts to enforce contractual terms when disputes arise. They must similarly do so to bring private tort actions.⁴² By the same token, private organizational entities may also engage in interplay with the state. For example, the Leadership in Energy and Environmental Design (LEED) standards are organized and awarded by the U.S. Green Building Council (the Council). Although the Council is a private entity, its efforts to shape environmental policies often influence and are influenced by public regulation.⁴³

While the distinction between public and private regulation may appear semantic on its face, it has seismic constitutional implications. Critically, if a regulation is deemed "public," it is subject to constitutional limitations, such as due process, antidiscrimination principles, or restrictions on speech.⁴⁴ Private actors are not subject to the same restric-

39. *But see* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551 (2000) (discussing how private actors often remain "deeply involved in regulation," whether acting in an advisory capacity or with explicit decisionmaking authority).

40. *But see id.* at 588–90 (discussing how, even in purportedly private arrangements, the government has often imposed rudimentary due process requirements on parties).

41. *See* Emily S. Bremer, *Private Complements to Public Governance*, 81 Mo. L. REV. 1115, 1120 (2016) (noting how, in private ordering, private actors attempt to "achieve traditionally public ends in spaces where no governmental regulation presently exists"). Bremer provides the example here of private environmental governance, which has produced a system of collective standards even as no public law requires compliance with them. *Id.*

42. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 886 (1987) (discussing how state officials are, on a daily basis, involved in the enforcement of private law).

43. Bremer, *supra* note 41, at 1120; Philip J. Weiser, *Entrepreneurial Administration*, 97 B.U. L. REV. 2011, 2012–13 (2017).

44. Sheila S. Kennedy, *When Is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON. U. C.R.L.J. 203, 208–09

tions, unless their actions are governed by legislation or state oversight in some capacity.⁴⁵

Notably, there has been significant scholarly criticism of the notion that any state regulation may be classified as purely public or private or that public and private spaces exist in silos. Some argue that the public-private divide has effectively collapsed because virtually all private action can be traced back to a public action, inaction, or grant of power.⁴⁶ Indeed, critics argue that modern private arrangements, such as tort, property, and contract law, are at their inception carved out by state actors, as well as enforced in the courts.⁴⁷ To this end, any time a “private” action occurs, it does so against a backdrop of state regulation permitting, narrowing, or circumscribing its execution.⁴⁸

The notion of a blurred public-private regulatory line is further complicated by privatization. As an initial matter, the term privatization has multiple meanings and interpretations.⁴⁹ Broadly, privatization typically describes circumstances where certain government functions,

(2001).

45. *Id.* at 209. Such legislation includes, for example, the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990.

46. Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 334 (1993) (discussing the “regime of state prohibitions and either explicit or implicit state permissions” underlying private action). Kay identifies the notionally private sphere of domestic life as an example, observing that “it is impossible to deal with the rights and wrongs of family behavior without considering the dense complex of marriage law, custody law, property law, education law and other legal relations against which every private action takes place.” *Id.* at 335. While I would disagree with the notion that domestic relations are wholly consigned to the private sphere, I take seriously the point that all conduct in the “private” sphere takes place against the backdrop of public law, whether through the prospect of adjudication and enforcement or through legal defaults that shape private conduct.

47. See Sunstein, *supra* note 42, at 886.

48. As Kay writes, even “the characterization as private is itself a public matter.” Kay, *supra* note 46, at 337. This has posed a problem for legal concepts such as the state action doctrine, which mandates that the Constitution is only applicable to public action. Because of the difficulty of differentiating between public and private space, many scholars note that the doctrine has developed into a confused, incoherent regime that has produced inconsistent legal outcomes. See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1411 (2003) (contending the Court’s application of the state action inquiry has been “beset by inconsistency and disagreement”); Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENT. 379, 391 (1993) (noting the “confusing and contradictory” fact that, while the Court at once found judicial enforcement of racist covenants in *Shelley v. Kraemer* to be sufficient state action, it has never held the same for the enforcement of wills or the ejection of individuals from the home); William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 5 (1961) (discussing how the Court’s state action jurisprudence “has resulted in a variety of state action doctrines jutting out like the several unrelated heads of a hydra”).

49. Metzger, *supra* note 48, at 1377.

services, or responsibilities are transferred to the private sector, often to for-profit corporations.⁵⁰ Most commonly, privatization takes one of several forms, including “contracting out,” which enables the use of private actors to execute governmental programs or provide state services, creating shared authority between the public and private spaces.⁵¹ The state has heavily relied on privatization in many social welfare contexts, including public education (charter schools), law enforcement (private prisons), healthcare (Medicare- and Medicaid-funded private providers), and welfare programs (shelters run by private entities).⁵²

Other forms of shared regulatory responsibility within the privatization framework include what may be termed public-private partnerships. In this mode, private organizations—both for-profit and nonprofit—perform traditionally “public” responsibilities or address public needs.⁵³ In most cases, the state maintains control over these partnerships through joint financial ventures or total financial support.⁵⁴ Some may call this the virtual “deputization” of a private regulator, characterized by a formal connection between government and the private agent.⁵⁵

More recent scholarship has also considered the notion of “harnessing,” a form of privatization in which the state leverages the strength of the private sector to achieve public aims.⁵⁶ As scholars note, the private sector’s competitive advantage in regulation rests in its ability to act more efficiently and quickly than the state and to reflect market interests.⁵⁷ In civil rights law, for example, many statutes authorize attorney’s fees to incentivize private actors to bring lawsuits that are in the public interest.⁵⁸ These “private attorneys general” effectively complement—

50. *Id.* at 1370–71, 1377–78.

51. *Id.* at 1371, 1378 n.17.

52. *Id.* at 1380–94.

53. Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1230 (2003).

54. *See id.* at 1240–41.

55. Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 168–69, 171 (1989).

56. *See, e.g.*, David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1246–56 (2012) (discussing the role of private enforcers in recouping money from perpetrators of fraud against the government under the False Claims Act); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1414–24 (2000) (proposing a federal statute under which the Department of Justice could deputize private litigants to bring suit against local police departments for constitutional violations); Lesley K. McAllister, *Harnessing Private Regulation*, 3 MICH. J. ENVTL. & ADMIN. L. 291, 324–26 (2014) (discussing private regulation in the context of federal agencies relying on third-party verification programs).

57. *See* McAllister, *supra* note 56, at 294.

58. Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (noting that “[v]irtually all modern civil rights statutes rely heavily on private attorneys general”).

and in some instances, exceed—the state’s efforts to enforce the terms of civil rights statutes.⁵⁹ Some cast this as a form of deputization, as private actors become responsible for executing state aims.⁶⁰ Indeed, as Myriam Gilles explains, these provisions position the “archetypal citizen as an intermediary for achieving public goals.”⁶¹

Critically, all of these traditional privatization regimes, especially in the context of education, criminal justice, and other areas where the state has a historic monopoly on regulation, function as a kind of deputization whereby the state, of its own *accord*, enters into an arrangement with the private actors to assist in executing state aims. Whether this occurs through formation of a contract, or an engagement in a consulting or educational relationship with private actors, or the deliberate harnessing of private efficiencies to maximize public function, the state itself has historically drafted and dictated the contours of the relationship.⁶² To put it simply, the state has almost always taken the lead, while private actors have followed—indeed, echoed—the state’s agenda.

Beyond privatization and formal public-private partnerships, the state may also regulate in tandem with the private sphere through the creation and management of social norms.⁶³ On this account, the state regulates by pulling levers that influence social behaviors, strategically deploying a variety of tools outside of lawmaking to guide what is cast as private choice. For example, the state may utilize strategic economic instruments (i.e., taxes or subsidies) or time, place, or manner restrictions (avoiding an absolute regulatory ban on conduct but burdening it nonetheless, as in prohibiting smoking in public spaces) to incentivize what the state deems positive behavior and to discourage negative behavior.⁶⁴ The state may, by the same token, disseminate information and educate citizens as a form of indirect regulation, reinforcing the state’s preferred

59. Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1346–50 (2012); see also Engstrom, *supra* note 56, at 1253 (describing the state’s role in encouraging an optimal level of private enforcement).

60. See, e.g., Gilles, *supra* note 56, at 1388.

61. *Id.* at 1426.

62. See Metzger, *supra* note 48, at 1394–95 (“In many instances of privatization, the overall context remains one of significant government endeavor; . . . the government provides the funds, sets programmatic goals and requirements, or enacts the regulatory scheme into which private decisionmaking is incorporated.”).

63. See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 907 (1996). But see Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507 (1999) (noting that, although norms may be considered regulatory, “[n]orms are enforced . . . by a community, not by a government”).

64. Sunstein, *supra* note 63, at 948–52; see also Clare Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103, 1112–14 (2010) (contending that these incentives are a type of indirect regulation as part of the “spectrum of state roles” in decisionmaking).

norms.⁶⁵ It may also strategically introduce or frame choices available to the individual,⁶⁶ similarly, the state may deliberately package a series of choices in ways designed to channel individuals into a preferred institution.⁶⁷ Accordingly, while the private sphere has, as this Article discusses, played an important role in the creation and cultivation of norms, it has also historically reinforced and echoed the state's normative agenda.⁶⁸

The modern regulatory landscape, then, may be cast as a spectrum in which public and private actors both play a role in regulation. But despite the participation of both public and private actors, regulatory efforts are most visibly guided and shaped by the state.⁶⁹ Nevertheless, as the following Part makes clear, even outside of traditional private law contexts like tort and contract, private actors have played an important role in reinforcing, and in some cases, challenging the state's regulatory agenda.

65. See Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809, 864 (2010) (discussing the state's use of heteronormative, marriage-focused sex education); Sunstein, *supra* note 63, at 948–49.

66. Huntington, *supra* note 64, at 1114. For example, one spouse may feel more comfortable investing in family while the other invests in a career because the state-enforced default rule of equitable distribution of property upon dissolution of marriage “ensures that the individual with less earning potential still has a claim to marital assets.” *Id.*

67. For example, the state might encourage individuals to confine their sexual relationships to marriage. See, e.g., Susan Frelich Appleton, Obergefell's *Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 933 (2016) (explaining that, by reserving certain benefits for married couples, “the state incentivizes individuals to choose this official format for their sexual and intimate relationships”); Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 503 (1992) (describing how the law once worked to channel individuals into marriage by criminalizing same-sex intimacy and nonmarital sex). This “channelling” effect persists, even in a world where there are many alternatives to marriage. As Bill Eskridge notes, various relationship forms—or “menus” of legal defaults and benefits—have emerged to encourage adults to enter into stable, marriage-like relationships. William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1887–1902 (2012).

Likewise, the state routinely uses tax policy to shape individual behavior. See, e.g., JOINT COMM. ON TAXATION, JCX-40-11, PRESENT LAW AND BACKGROUND RELATING TO TAX TREATMENT OF HOUSEHOLD DEBT 40 (2011), <https://www.jct.gov/publications.html?func=startdown&id=3802> [<https://perma.cc/P5YR-5SXA>] (“Because the Federal income tax allows taxpayers to deduct mortgage interest from their taxable income, but does not allow them to deduct rental payments, there is a financial incentive to buy rather than rent a home.”); David Adam Friedman, *Public Health Regulation and the Limits of Paternalism*, 46 CONN. L. REV. 1687, 1706 & nn.90–91 (2014) (noting that state attempts to discourage soda, cigarette, and alcohol consumption through taxation may not enhance public welfare); see also Lee Anne Fennell, *Willpower Taxes*, 99 GEO. L.J. 1371, 1410 (2011) (“[S]ome taxes (and subsidies) intentionally reprice behavior in the hope of aligning it more closely with the social optimum.”).

68. See *infra* Subpart IV.A (outlining how private actors have historically worked to support state aims).

69. But see *infra* Part IV (describing the role of private actors in shaping and challenging public regulation).

II. CONTEXTUALIZING PRIVATE SEXUAL REGULATION

Historically, the state was the primary driver of sexual regulation, shaping behavior by imposing consequences on those who did not comply with the normative understanding of marriage and appropriate sex and sexuality. To be clear, in saying that the state was the primary driver of sexual regulation, I do not mean to say that the state was the *only* actor involved in the regulation of sex and sexuality, or even that the state was the most important regulatory actor. Instead, I mean only that state regulation of sex was often the *most visible* form of sexual regulation. Laws criminalizing adultery, fornication, and a range of other sexual conduct provided a clear—and, indeed, hypervisible—understanding of sexual mores and expectations.

But while the state may have visibly articulated extant sexual norms, it was not the only actor involved in policing and enforcing those norms. Private actors have often played a role, alongside the state, in regulating sexual conduct. This Part explores this claim. As it makes clear, private actors engaging in establishing and contesting norms is hardly novel. Indeed, private actors have often been engaged with—and against—the state in policing and enforcing social norms. The Subparts that follow briefly sketch some of the forms this interaction between the private sphere and the state traditionally have taken.

A. *Private Actors Supporting the State*

Once norms are codified into law, private actors often played a role in supporting the state by using private action to cultivate compliance with the law. For example, community norms regarding sex and sexuality often reinforced laws and legal rules. Thus, not only did law specifically confine sex and sexuality to marriage by criminalizing out-of-wedlock sex and attaching significant legal impediments for those deemed illegitimate, private actors reinforced—in ways both subtle and overt—this normative regime through their own actions.⁷⁰ In many communities, young women who dared to engage in sex outside of marriage faced considerable social ostracism and stigmatization.⁷¹ Similarly, today,

70. See Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 367 (2011) (discussing how laws discriminating against children born out of wedlock facilitated societal discrimination and provided a private “invitation” to discriminate); see also Janet Hopkins Dickson, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 926–27 (1991) (detailing the ways in which unmarried women were ostracized, including being forced to sit in the town square as a shaming technique).

71. Even today, although sex outside of marriage is relatively commonplace, overt expressions of female sexuality remain disfavored in many communities, prompting “slut-shaming” and other efforts to compel women to comply with gendered norms around sex and sexuality. See Wendy N. Hess, *Slut-Shaming in the Workplace: Sexual Rumors & Hostile Environment Claims*, 40 N.Y.U. REV. L. & SOC. CHANGE 581, 597–99 (2016) (discussing research confirming, for example, that both men and

although abortion is no longer criminally proscribed, women who receive abortions confront considerable civil restrictions on the procedure, and meaningfully, these civil restrictions are often complemented by private actions that make clear the continued disapprobation of abortion care. For example, women who receive abortions face considerable stigma and disapproval of their decision—so much so that they often choose to keep their abortion experiences a secret.⁷² Likewise, even after legalization, abortion providers face a web of state civil regulations, as well as stigma or private shaming from local community members intent on retrenching pro-life norms, at times resulting in threats to providers' safety.⁷³ In this regard, private actors often have complemented the state's regulatory efforts by imposing private consequences on those who fail to comport with a particular vision of appropriate sex and sexuality.

B. *Private Actors Cultivating the State*

Private actors have not always assumed a posture that endorsed or reinforced the state's regulatory agenda. Indeed, in some circumstances, private actors have chosen to articulate new norms in the hope of prompting the state to eventually adopt those norms as part of a state-sanctioned normative regime. Take, for example, the debate over same-sex marriage. For years, as legislators and courts debated the question of whether same-sex couples should be eligible for the status, privileges, and benefits associated with state-recognized civil marriage, many corporations (both publicly and privately held) signaled support for same-sex couples and their families (and the prospect of civil recognition through marriage) by offering domestic partner benefits for their employees. As Douglas NeJaime notes, corporate domestic partner policies were a key part of LGBTQ activists' efforts to push state and local governments to extend rights and benefits to same-sex couples.⁷⁴

women tended to view women who accepted an offer for casual sex as less competent and intelligent than a man who had accepted).

72. Paula Abrams, *Abortion Stigma: The Legacy of Casey*, 35 *WOMEN'S RTS. L. REP.* 299, 306 (2014).

73. In *Planned Parenthood Southeast, Inc. v. Strange*, 33 F. Supp. 3d 1330 (M.D. Ala. 2014), in striking down a state law that required every doctor performing abortions in Alabama to have "staff privileges" at a local hospital and that imposed criminal liability on those who performed abortions without such privileges, an Alabama federal district court specifically recounted the stigma that abortion providers faced in their communities. As the court documented, Alabama abortion providers reported that they were often singled out and ostracized from their communities for providing abortion services, risking their standing within the community and their ability to maintain a private practice. *Id.* at 1349–51.

74. See Douglas NeJaime, *Before Marriage: The Unexplored History of Non-marital Recognition and Its Relationship to Marriage*, 102 *CALIF. L. REV.* 87, 146–49 (2014) (noting that activists hoped "the interaction between legal recognition and employer-sponsored healthcare coverage [would] create[] a mutually constitutive relationship between public and private norms").

That is, even as activists were encouraging corporations to adopt domestic partnership policies, they were also challenging municipalities to do so as well—with those very corporations acting as allies in the effort to prompt government action.⁷⁵ Under these employment policies, companies like Coca-Cola, Amazon, Google, Mattel, Nike, and Whole Foods provided LGBTQ employees with some of the benefits of marriage, even as same-sex relationships were ineligible for state marital recognition.⁷⁶ Indeed, some maintain that the proliferation of these private employer policies, over time, contributed to greater acceptance of these once nontraditional unions, paving the way for the eventual legalization of same-sex marriage.⁷⁷

A similar case can be made for the role of corporations in advancing paid family leave policies in recent years. Beginning in 2015 and 2016, a slate of influential businesses, including American Express, Ikea, Amazon, Twitter, and Netflix, announced expanded paid family leave plans for their employees, offering, in many cases, several months of paid leave to new parents.⁷⁸ Importantly, the United States is the only developed country in the world that does not provide paid maternity leave at the federal level,⁷⁹ and only a handful of states have laws requiring paid family leave.⁸⁰ In stark contrast, all twenty of the biggest companies

75. See *id.* at 148 (describing how employers boosted the efforts of activists by adopting policies which “suggested that marriage and domestic partnership shared central features grounded in mutual support and commitment”).

76. HUMAN RIGHTS CAMPAIGN FOUNDATION, *THE STATE OF THE WORKPLACE FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER AMERICANS 2006–2007*, at 35–50 (2007).

77. Emily Cadei, *How Corporate America Propelled Same-Sex Marriage*, NEWSWEEK (June 30, 2015, 6:16 AM), <http://www.newsweek.com/2015/07/10/shift-corporate-america-social-issues-become-good-business-348458.html> [<https://perma.cc/LV9P-TBVS>]; see Jena McGregor, *Corporate America’s Embrace of Gay Rights Has Reached a Stunning Tipping Point*, WASH. POST (Apr. 5, 2016), <https://www.washingtonpost.com/news/on-leadership/wp/2016/04/05/corporate-americas-embrace-of-gay-rights-has-reached-a-stunning-tipping-point> [<https://perma.cc/LV9P-TBVS>]; Richard Socarides, *Corporate America’s Evolution on L.G.B.T. Rights*, NEW YORKER (Apr. 27, 2015), <https://www.newyorker.com/business/currency/corporate-americas-evolution-on-l-g-b-t-rights> [<https://perma.cc/2X4Z-DKK6>].

78. Clare O’Connor, *These Companies All Boosted Paid Parental Leave in 2016*, FORBES (Dec. 30, 2016, 3:51 PM), <https://www.forbes.com/sites/clareoconnor/2016/12/30/these-companies-all-boosted-paid-parental-leave-in-2016> [<https://perma.cc/28BT-NPQS>].

79. Dayna M. Kurtz, *We Have a Child-Care Crisis in This Country. We Had the Solution 78 Years Ago*, WASH. POST (July 23, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2018/07/23/we-have-a-childcare-crisis-in-this-country-we-had-the-solution-78-years-ago> [<https://perma.cc/S9HL-CDGQ>]; Gretchen Livingston, *Among 41 Nations, U.S. Is the Outlier When It Comes to Paid Parental Leave*, PEW RES. CTR. (Sept. 26, 2016), <http://www.pewresearch.org/fact-tank/2016/09/26/u-s-lacks-mandated-paid-parental-leave> [<https://perma.cc/7PA6-RZQK>].

80. According to the National Conference of State Legislatures, as of January 2018, only four states—California, New York, New Jersey, and Rhode Island—provide paid family leave. *Paid Family Leave Resources*, NAT’L CONF. OF ST. LEGISLATURES (Jan.

in the United States currently offer paid maternity leave policies.⁸¹ As with the decision to offer benefits to same-sex couples, corporate leave policies were not animated solely by a desire to influence public policy; indeed, many companies viewed the family leave policies as an effective tool for recruiting and retaining talent.⁸²

Despite the “business case” for paid leave, these private decisions did have an influence on public-sector policies. The business sector’s embrace of paid leave policies put pressure on federal and state governments to follow suit.⁸³ As corporations have increasingly offered paid leave plans, public support for paid leave has surged, as has bipartisan interest in paid leave policies.⁸⁴ In 2016, as corporations expanded their paid leave initiatives, virtually every Democratic presidential candidate—and many Republican candidates—discussed parental leave reform on the campaign trail, expressing a desire to pass paid leave legislation.⁸⁵ Recently, the White House announced its support for the enactment of a paid leave law,⁸⁶ and proposals have been floated across the aisle.⁸⁷ Twen-

10, 2018), <http://www.ncsl.org/research/labor-and-employment/paid-family-leave-resources.aspx> [https://perma.cc/7EEG-PH6N]. The District of Columbia and Washington State have each passed paid family leave laws and benefits that will go into effect in the coming years. *Id.*

81. Barbara Frankel & Audrey Goodson Kingo, *A Record Number of Companies Are Increasing Paid Family Leave in 2018*, WORKING MOTHER (updated June 29, 2018), <https://www.workingmother.com/2018-might-see-record-number-companies-increasing-paid-parental-leave> [https://perma.cc/C9YL-3RPM].

82. Rebecca Greenfield, *More Companies Than Ever Offer Paid Parental Leave*, BLOOMBERG (June 28, 2018, 4:00 AM), <https://www.bloomberg.com/news/articles/2018-06-28-more-companies-than-ever-offer-paid-parental-leave>. According to YouTube CEO Susan Wojcicki, paid leave benefits would help the “bottom line” by “avoid[ing] costly turnover” of working mothers at the company. Julie Kashen, *Tech Companies Are Leading the Way on Paid Family Leave*, CENTURY FOUND. (Nov. 10, 2015), <https://tcf.org/content/report/tech-companies-paid-leave>.

83. See Stephen Miller, *Trump’s Paid-Parental-Learn Plan Plays Catch-Up to State and Corporate Programs*, SHRM (May 24, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/trump-paid-parental-learn-plan.aspx> [https://perma.cc/MMY9-DFMN].

84. Kathryn Vasel, *Calls for Paid Family Leave Are Getting Louder*, CNN MONEY (Feb. 13, 2018, 5:06 PM), <https://money.cnn.com/2018/02/13/pf/trump-budget-proposal-paid-family-leave/index.html> [https://perma.cc/WN2S-TZCG].

85. Kristin Rowe-Finkbeiner, *Why America Needs a Paid Family Leave Act for All*, TIME (Feb. 26, 2018), <http://time.com/5172814/paid-family-leave-policy> [https://perma.cc/S8U2-FMRN].

86. Ivanka Trump, *Paid Family Leave Is an Investment in America’s Families—It Deserves Bipartisan Support*, FOX NEWS (July 11, 2018), <http://www.foxnews.com/opinion/2018/07/11/ivanka-trump-paid-family-leave-is-investment-in-americas-families-it-deserves-bipartisan-support.html> [https://perma.cc/GH89-V2WB]; see also Seung Min Kim, *Ivanka, Rubio Find a New Project: Paid Family Leave*, POLITICO (Feb. 4, 2018, 6:54 AM), <https://www.politico.com/story/2018/02/04/rubio-ivanka-trump-family-leave-385050> [https://perma.cc/AF8A-LWTQ].

87. Kashen, *supra* note 82, at 12.

ty-one states, for their part, have legislation pending on paid family leave, and several other states have enacted paid leave laws since 2016.⁸⁸ As in the case of same-sex marriage, even though corporations did not squarely aim to spur state actors to regulate, corporate expansion of family leave benefits undoubtedly built public momentum around paid leave reform.

C. *Private Actors Challenging the State*

As the foregoing examples suggest, private actors can be effective players in the regulation of sex and sexuality.⁸⁹ Their actions can reinforce the state's regulatory vision, and in other circumstances, they provide a useful counterpoint to the state—one that may be particularly effective in cultivating state support for a new set of norms, as in the case of corporate support for domestic partnership benefits and paid family leave.

That private action might play a role in circumstances where norms are contested and contestable is perhaps unsurprising. After all, circumstances in which norms are being evaluated—and reevaluated—are often places where private action can be deployed to shape substantive outcomes, even outside the realm of sex and sexuality.⁹⁰ In these contexts, however, private actors frequently assume different postures vis-à-vis the state. In the case of domestic partnership benefits, corporations posited an alternative vision of limited recognition for same-sex couples, providing the state with a template for integrating LGBTQ persons into a system of public and private benefits.

But private actors can also assume a more antagonistic posture vis-à-vis the state, stepping forward to challenge the state's articulation of sociolegal norms. The history of the Civil Rights Movement is instructive on this point. In the wake of *Brown v. Board of Education*,⁹¹ many Southern jurisdictions balked at the Supreme Court's command to desegregate public schools.⁹² Resistance to the Court's mandate took

88. Rebecca Gale, *The National Fight for Paid Leave Has Moved to Statehouses*, SLATE (May 2, 2018, 11:42 AM), <https://slate.com/human-interest/2018/05/the-national-fight-for-paid-leave-has-moved-into-statehouses.html> [<https://perma.cc/C6YH-4AUD>].

89. Indeed, as Vicki Schultz has argued for years, workplace sexual harassment policies have functioned to regulate sex and sexuality since their inception. See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2090 (2003).

90. See, e.g., Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 909 (1998) (suggesting, in the context of international political norms, that norm entrepreneurs may be more successful when the global community is "search[ing] for new ideas"); Louise Marie Hurel & Luisa Cruz Lobato, *Unpacking Cyber Norms: Private Companies as Norm Entrepreneurs*, 3 J. CYBER POL'Y 61, 72 (2018) (discussing Microsoft's success in shaping cybersecurity norms after the failure of public institutions to do so).

91. 347 U.S. 483 (1954).

92. *Brown at 60: The Southern Manifesto and "Massive Resistance" to Brown*, NAACP LDF, <http://www.naacpldf.org/brown-at-60-southern-manifesto-and-massive-resistance-brown> [<https://perma.cc/YCF9-VSMY>].

many forms. Some school boards dragged their feet in terms of integrating public schools, while some grudgingly integrated but actively worked to suppress African American enrollment in integrated schools.⁹³ Private actors often complemented these public acts with their own efforts to resist the imposition of new norms. For example, in many Southern cities and towns, resistance to *Brown* was expressed in the creation of “segregation academies”—private schools that were intended to provide white parents with a segregated alternative to the public schools.⁹⁴

Similar impulses have been documented in the housing context. In 1917, the Supreme Court decided *Buchanan v. Warley*, unanimously invalidating a municipal ordinance that prohibited the sale of real property to blacks in white-majority neighborhoods or buildings and vice versa on the ground that the ordinance violated the Fourteenth Amendment’s protections for freedom of contract.⁹⁵ The decision, however, did not lead to residential integration, as some might have hoped. In response to the Supreme Court’s rebuke of state-ordered residential segregation, private actors relied on restrictive covenants—deed restrictions that specified that property could not be sold to African Americans and other minority groups—to maintain racially segregated neighborhoods.⁹⁶ In 1948’s *Shelley v. Kraemer*, the Supreme Court concluded that, although racially restrictive covenants were permissible, *judicial enforcement* of such covenants constituted unconstitutional state action.⁹⁷ The ruling in *Shelley* was an important step forward, but it did not end residential segregation entirely. At the local level, banking and real estate practices—private actions—continued to facilitate neighborhood segregation.⁹⁸

It was not until the enactment of the Fair Housing Act of 1968 (FHA) that racial, religious, and sex discrimination in real estate transactions were prohibited.⁹⁹ But even this landmark measure offered an outlet for private actors to contest the new norm of housing integration. The “Mrs. Murphy’s” exemption—so named for the hypothetical elderly widow who has converted a portion of her home into a rental apartment

93. *See id.*

94. *Id.* Critically, these decisions had a lasting impact—some of these schools continue to operate in the South today, further exacerbating issues of segregation. Sarah Carr, *In Southern Towns, ‘Segregation Academies’ Are Still Going Strong*, ATLANTIC (Dec. 13, 2012), <https://www.theatlantic.com/national/archive/2012/12/in-southern-towns-segregation-academies-are-still-going-strong/266207> [<https://perma.cc/GXA8-ZLAG>].

95. 245 U.S. 60, 60, 82 (1917).

96. Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1977–78 (2015).

97. 334 U.S. 1, 13–14 (1948).

98. Rose Cuisson Villazor, *Residential Segregation and Interracial Marriages*, 86 FORDHAM L. REV. 2717, 2725 (2018).

99. 42 U.S.C. §§ 3601–3619 (2012). The FHA, which prohibits discrimination in the context of housing, was an analogue to Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations.

to supplement her limited income—provides that if a dwelling has four or fewer rental units and the owner lives in one of those units, the home is exempt from the FHA.¹⁰⁰ The exemption permits private actors in this narrow context to avoid compliance with the FHA and vindicate their own preferences and biases.¹⁰¹

While these examples from the Civil Rights Movement make clear the degree to which private actors may challenge the state and contest the state's normative agenda, they also evince the state's defense of its normative position, and indeed, its regulatory authority. Even as Southerners sought to resist integration, the federal government did not yield in its insistence on integration as its norm. Federal troops were deployed to enforce integration in public schools,¹⁰² while private institutions that defied the integration mandate were rendered ineligible for federal subsidies and tax exemptions.¹⁰³ As importantly, the federal government made its commitment to the new public norm of integration clear in the enactment of antidiscrimination legislation¹⁰⁴—and strict limits on exemptions

100. The “Mrs. Murphy” exemption first arose in connection with the Civil Rights Act of 1964, when Republican Senator George D. Aiken of Vermont urged Congress to “integrate the Waldorf and other large hotels, but permit the ‘Mrs. Murphys,’ who run small rooming houses all over the country, to rent their rooms to those they choose.” ROBERT D. LOEY, *TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964*, at 51 (1990). The exemption does not apply to rental advertising. Mrs. Murphy could not, for example, place an advertisement for the apartment that specified that certain groups were unwelcome to rent the available apartment or room. See Lee Anne Fennell, *Searching for Fair Housing*, 97 B.U. L. REV. 349, 383 (2017).

101. See Fennell, *supra* note 100, at 383–85.

102. See Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 114 (1994) (discussing President Dwight D. Eisenhower's deployment of federal troops to Little Rock, Arkansas, after Governor Orval Faubus “called out the National Guard to prevent the admission of black students to Little Rock High School”); Peniel E. Joseph, *Kennedy's Finest Moment*, N.Y. TIMES (June 10, 2013), <https://www.nytimes.com/2013/06/11/opinion/kennedys-civil-rights-triumph.html> [<https://perma.cc/SCD2-TS5M>] (discussing President John F. Kennedy's 1963 speech condemning Alabama Governor George Wallace's efforts to physically bar African American students from matriculating at the University of Alabama and characterizing the civil rights struggle as a “moral issue”).

103. For example, Title VI of the Civil Rights Act of 1964 prohibits federal financial assistance for private institutions that discriminate on the basis of race. 42 U.S.C. § 2000d (2012); see also Note, *Federal Tax Benefits to Segregated Private Schools*, 68 COLUM. L. REV. 922, 947 n.128 (1968) (describing how the U.S. Commission on Civil Rights interpreted Title VI to bar tax subsidies for segregated institutions). In announcing support for the provisions of Title VI, President Kennedy impressed upon the nation that “[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.” H.R. Doc. No. 88-124, at 12 (1963).

104. See, e.g., Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012) (prohibiting racial discrimination in public accommodations and employment, in addition to federally financed programs); Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2012) (prohibiting racial discrimination in housing).

and accommodations.¹⁰⁵ Indeed, we might understand the enactment of antidiscrimination legislation as an effort to forestall private regulation—discrimination—that is at odds with the norms that have been officially adopted in the public sphere.

* * *

All of these examples suggest the many ways in which private actors historically have both complemented and challenged the state's regulatory efforts. Importantly, however, these examples illustrate that, while private actors have, to some extent, been able to assert alternatives to the state's preferred norms, these efforts have primarily existed on one of two planes. As in the case of corporate policies regarding same-sex partner benefits, private action can engage the state in a dialogue about contested norms. In this regard, private action can at once signal opposition or resistance to state-sanctioned norms while also seeking the state's engagement in the creation of a new mutually agreeable normative scheme.¹⁰⁶ By contrast, as the examples of school desegregation and residential integration make clear, private action can take on a more antagonistic cast, challenging the state's efforts to embed new norms through the advancement of an alternative normative agenda.

This is all to say that private actors have often been engaged with—and against—the state in policing and enforcing social norms. And indeed, these private actions can be as forceful—and in some cases, more forceful—as state regulation in enforcing particular norms at the local level. In sketching the contours of these interactions between private actors and the state, I do not mean to suggest that these archetypes are *exhaustive*. Again, they provide a rough taxonomy that provides some structure for understanding #MeToo and the rise of religious exemption claims like those at issue in *Masterpiece Cakeshop* as efforts to privately regulate sex and sexuality.

105. For example, Title VII of the Civil Rights Act of 1964 allows employers to justify some disparate treatment on the basis of a worker's religion, sex, or national origin if they can point to a "bona fide occupational qualification" that makes such treatment reasonably necessary. 42 U.S.C. § 2000e-2(e). However, no such bona fide occupational qualification exemption exists to justify differential treatment based on race. See *id.*; see also William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 332 (2017). The Fair Housing Act offers only limited exemptions from its prohibition against discrimination in housing. The Act's accommodations for religious organizations do not apply where "membership in such religion is restricted on account of race." 42 U.S.C. § 3607(a). Moreover, while the Fair Housing Act might allow "Mrs. Murphy's" to discriminate in choosing their tenants, they cannot place advertisements that express preferences for certain racial groups. See *supra* note 100.

106. See Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2568–69 (1994).

With this caveat in mind, the following Parts consider *Masterpiece Cakeshop* and the #MeToo movement as new iterations of this impulse toward private sexual regulation. As the following Parts explain, because the state's role in regulating sex and sexuality is in flux, the dynamic between the state and private actors in regulation of sex and sexuality is also in flux. Part III documents these changes in state regulation of sex and sexuality. As it explains, the landscape of sexual regulation is evolving, with the state abdicating its predominant role in the regulation of sexual conduct. As Part IV explains, with the state receding from its traditional role in regulating sex and sexuality, private actors have moved to the fore to more clearly articulate their presence as sexual regulators. In this new dynamic, the state no longer takes the lead in dictating the pace and scope of regulation. Instead, private actors assume the state's regulatory role and dictate their own vision of appropriate sex and sexuality. These regulatory developments, Part V explains, have important consequences for individual rights and the dynamic between the public and private spheres.

III. THE CHANGING LANDSCAPE OF SEXUAL REGULATION—THEN AND NOW

To contextualize the changes in sexual regulation on which this Article is focused, this Part begins by sketching the arc of sexual regulation. It then examines the public's response to the changes in sexual regulation. As it explains, the state has historically functioned as the principal engine of sexual regulation. In recent years, however, decriminalization,¹⁰⁷ the constitutionalization of privacy,¹⁰⁸ and changes in the legal understanding of marriage and divorce have radically altered the regulatory landscape, limiting the state's regulatory reach.

A. *Then*

Since at least the Founding, the state has engaged in the legal regulation of sex and sexuality.¹⁰⁹ Traditionally, state regulation of sex and

107. As I have previously written, in the realm of sex and sexuality, this decriminalization effort is best represented by *Griswold v. Connecticut*, 381 U.S. 479 (1965), where the Court decriminalized contraceptive use for married individuals, and *Lawrence v. Texas*, 539 U.S. 558 (2003), where the Court decriminalized sodomy. Murray, *supra* note 15, at 579–80, 619.

108. For further discussion on *Lawrence* as a highwater mark for the decriminalization movement and the constitutionalization of privacy, see Murray, *supra* note 15, at 578–84, 619.

109. See JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 15–32 (3d ed. 2012) (describing colonial statutes that prohibited acts such as premarital sex, sodomy, and adultery); LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 127–32 (1993) (detailing state regulation—beginning in the colonial era—prohibiting fornication, adultery, and public indecency).

sexuality has occurred primarily, though not exclusively, through the use of the criminal law. Federal, state, and local governments routinely criminalized sexual conduct (and those engaged in it) deemed nonnormative.¹¹⁰ From criminal laws prohibiting fornication (sex outside of marriage) and adultery to laws criminalizing sodomy and contraceptive use, criminal law played a decisive role in marking, punishing, and regulating sexual conduct.¹¹¹

This criminal regulation of sex and sexuality was often supplemented and complemented by a civil regime that reinforced traditional sexual mores.¹¹² At the heart of this civil regime was marriage, which served as the licensed locus for sex and the normative model for adult sexuality.¹¹³ Marriage and its demands for sex and sexuality, in turn, were reinforced by a fault-based divorce regime that penalized spouses who engaged in adultery and other conduct deemed inimical to marriage.¹¹⁴ In addition to the laws of marriage and divorce, a range of other civil laws—from professional codes of conduct and amatory tort actions to rules governing the distribution of intestate property—channeled individuals into marriage, where sex and sexuality could be controlled and made socially productive.¹¹⁵

110. Murray, *supra* note 11, at 1049 (discussing the historical criminalization of acts such as fornication, adultery, and sodomy); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1268 (2009) [hereinafter Murray, *Strange Bedfellows*] (“Family law says what marriage is, and criminal law underscores this normative understanding by criminalizing behavior, and actors, ineligible for marriage.”); see also Brief of Petitioners at 1, *Lawrence*, 539 U.S. 558 (No. 02-102) (arguing that Texas’s criminal sodomy law “brand[ed] gay men and lesbians as lawbreakers and fuel[ed] a whole range of further discrimination”).

111. Murray, *Strange Bedfellows*, *supra* note 110, at 1267–71 (discussing the ways in which criminal law historically worked in tandem with family law to reinforce sexual and familial norms).

112. See Murray, *supra* note 15, at 607–08 (noting that, although civil penalties do not fit the categorical view of punishment associated with criminal sanctions, civil consequences are nonetheless punitive because they impose significant consequences); see also *id.* at 614 (“[C]riminal law’s expressive power to mark and label non-normative sex and sexuality as deviant has left a powerful impression on the law—and on the system of civil regulation that functioned by its side.”).

113. For a discussion of the state’s use of marriage regulation in conjunction with criminal law to channel individuals into what the state deemed to be legitimate sexual behavior (marital sex), see generally Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012).

114. Abrams, *supra* note 14, at 44–45 (discussing grounds for fault-based divorce and arguing that stringent fault-based divorce regimes paired with the state’s granting of federal marital benefits acted in concert to funnel spouses into—and keep them in—the marital institution).

115. See Murray, *supra* note 15, at 578 n.15 (noting that, while marriage acted as the primary civil site of sexual regulation, other forms of civil law similarly played a role in regulating sex and sexuality).

Under these civil and criminal regimes, the state was the most visible driver of regulatory activity, shaping behavior by imposing consequences on those who did not comply with the normative understanding of marriage and appropriate sex and sexuality. In this landscape, private actors played a crucial role, often reinforcing and amplifying the state's normative agenda in the private sphere through extralegal means.¹¹⁶ But even as private actors played a role in regulating sex and sexuality, their actions were less visible than those of the state, which took the lead in articulating the regulatory agenda and a vision of appropriate sex and sexuality. But as the following Subparts document, the state's role in sexual regulation has changed, with the state's presence receding in the regulation of sex and sexuality. This change in the state's posture has prompted important regulatory responses. As Subpart III.C explains, as the state's role in regulating sex and sexuality has shifted, private actors have come to the fore to assert a more visible role in the regulation of sex and sexuality.

B. Now

Over the last sixty years, however, much of the regulatory landscape has changed—and has done so dramatically. As an initial matter, criminal law's once central role in regulating sex and sexuality has been transformed. Insofar as it concerns sex between two consenting adults, criminal law today lacks the powerful regulatory punch it once wielded.¹¹⁷

In the face of shifting norms regarding sex and sexuality, legislatures repealed many laws criminalizing consensual adult sex, including laws criminalizing fornication, adultery, and sodomy.¹¹⁸ Those laws that remain languish in a state of desuetude, on the books but unenforced.¹¹⁹

116. See JoAnne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 *LOY. U. CHI. L.J.* 127, 133–34 (2014) (recounting the “double jeopardy” individuals convicted of sexual offenses in colonial times experienced when, after receiving criminal sanctions in the courts, they received “spiritual sanctions” by being publicly shamed in the church).

117. Murray, *supra* note 11, at 1069.

118. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 *CALIF. L. REV.* 881, 888 (2016) (discussing how, “[b]y late twentieth century, criminal laws against adultery, sodomy, and fornication were rarely enforced or altogether repealed”); see also Deborah L. Rhode, *Adultery: An Agenda for Legal Reform*, 11 *STAN. J.C.R. & C.L.* 179, 181–85 (2015) (discussing adultery laws that remain on the books and the declining impact of those laws); Sweeny, *supra* note 116, at 155 (noting that “only a few states” still criminally sanction fornication and adultery).

119. The Supreme Court stated this explicitly in *Lawrence v. Texas* with regard to sodomy statutes, noting that “these prohibitions often were being ignored . . . Georgia, for instance, had not sought to enforce its law for decades.” 539 U.S. 558, 572 (2003); see also MODEL PENAL CODE § 213.6 note on adultery and fornication, at 435 (AM. LAW INST., Official Draft and Revised Comments 1980) (noting that laws against fornication and adultery were “dead-letter statutes”); Sweeny, *supra* note 116, at 150 (discussing how, by the 1980s, fornication and adultery prosecutions had virtually disappeared).

These changes can be attributed, in part, to increasingly progressive social mores around sex and sexuality. Indeed, in the 1950s and 1960s, a range of individuals and institutions—from sexologist Alfred Kinsey to the American Law Institute—acknowledged the disjunction between the criminal regulation of sex and the quotidian lives of most Americans.¹²⁰ But changing sexual mores alone cannot explain the radical shifts in the regulatory landscape. These shifts were complemented—and indeed, made more robust—by the contemporaneous judicial recognition of constitutional privacy protections for intimate life, which imposed sharp limits on the state’s ability to use the criminal law to regulate private, consensual adult sex. In quick succession, the United States Supreme Court, relying on constitutional protections for individual privacy in each instance, invalidated criminal laws prohibiting contraception¹²¹ and abortion.¹²²

The shift in the state’s use of criminal law to regulate sex and sexuality also prompted a reappraisal of the civil regime governing sex. While marriage persists as the normative ideal for adult intimate life, a sexual life outside of marriage is no longer strictly verboten.¹²³ Civil laws imposing legal impediments on children of illegitimate birth have been subjected to constitutional scrutiny and often were invalidated—a shift that appeared to make greater space for nonmarital sex and families.¹²⁴ Additionally, the system of fault-based divorce, which demanded that spouses establish the wrongdoing of one spouse before a divorce could be obtained, slowly crumbled amidst claims that it fostered collusion and fraud and diminished the legitimacy of the legal system.¹²⁵ In its

120. In *Lawrence*, the Supreme Court cited the American Law Institute’s (ALI) 1955 draft of the Model Penal Code, which specified that it did not recommend or provide for criminal penalties associated with private sexual conduct. 539 U.S. at 572. As the Court noted, the ALI justified this omission on three grounds, one of which was that “[t]he prohibitions undermined respect for the law by penalizing conduct many people engaged in.” *Id.* For a cogent discussion of the ALI’s midcentury proposals, as well as Alfred Kinsey’s studies of sexual behavior, which found that most Americans “routinely engaged in sexual acts and practices that violated the criminal laws of most jurisdictions,” see Murray, *supra* note 11, at 1049–52.

121. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

122. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

123. As recently as 1960, however, the majority of states imposed criminal sanctions for fornication and adultery, although these laws largely lingered in a state of desuetude. Sweeny, *supra* note 116, at 149.

124. See, e.g., *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (striking a provision of Louisiana’s wrongful death law, which excluded illegitimate children from seeking relief as survivors); see also *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619, 621 (1973) (striking a state welfare law denying benefits to children born out of wedlock). For further discussion of the evolution in the Court’s illegitimacy-based jurisprudence and its extension to the rights of unmarried fathers, see Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & L. 387, 391–412 (2012).

125. See Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1499 (2000) (arguing that the fault system was

place, a “no-fault” system emerged, requiring only the initiative of one spouse—and no allegations of wrongdoing—in order to dissolve a marriage.¹²⁶ As some critics argue, the transformation from fault-based to no-fault divorce ushered in a regime of “divorce on demand,” stripping divorce of its normative power.¹²⁷ Some argue further that this development has significantly crippled marriage as an institution.¹²⁸

While the introduction of no-fault divorce altered the landscape of civil marriage, the introduction of civil rights for gay men and lesbians rendered a sea change in the normative understanding of marriage. In a breathtakingly brief period of time, the understanding of civil marriage has been transformed from an institution that was utterly antithetical to homosexuality to one that may comfortably accommodate LGBTQ persons.¹²⁹

These legal changes did not occur in a vacuum. Indeed, they responded to, or occurred in tandem with, profound changes within society—the constitutionalization of privacy rights, the Civil Rights Movement, the women’s rights movement, the LGBTQ rights movement, and the racial and gender integration of most workplaces and institutions.¹³⁰ Nor were they the only changes in the legal regulation of sex and

unpopular and many consistently called for its reform); see also Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 826–27 (1998) (noting that fraud and collusion were prevalent in fault-based regimes).

126. For a concise discussion of the rise of no-fault regimes in the 1970s, see Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1196 (2016).

127. DiFonzo, *supra* note 14, at 519 (“The elimination of grounds transformed mutual consent divorce, the operating milieu for most of the twentieth century, into divorce on demand. . . . [This] has resulted in a significant loss for women.”); see also Dirk Johnson, *Attacking No-Fault Notion, Conservatives Try to Put Blame Back in Divorce*, N.Y. TIMES (Feb. 12, 1996), <http://www.nytimes.com/1996/02/12/us/attacking-no-fault-notion-conservatives-try-to-put-blame-back-indivorce.html> [<https://perma.cc/J2VT-PKM6>]. For a conservative critique of no-fault regimes, see MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* 148–52 (1996), which details that the relative ease with which divorces can be obtained under no-fault law “encourages the urge to flee,” causing marriages to “suddenly ‘irretrievably break down.’” However, some have argued that no-fault divorce regimes are no less contentious, bitter, or efficient than their fault-based predecessors. Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 463–68 (2008).

128. Judge Robert Bork, for one, has argued that no-fault divorce does “enormous damage to the marriage.” Peter Robinson, *Robert’s Rules of Order: A Conversation with Robert Bork*, HOOVER INSTITUTION: UNCOMMON KNOWLEDGE (July 16, 2003), <https://www.hoover.org/research/roberts-rules-order-conversation-robert-bork> [<https://perma.cc/RJJ3-QS9A>].

129. Chris Cillizza, *How Unbelievably Quickly Public Opinion Changed on Gay Marriage*, in *5 Charts*, WASH. POST (June 26, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/06/26/how-unbelievably-quickly-public-opinion-changed-on-gay-marriage-in-6-charts> [<https://perma.cc/HX8U-VH4A>].

130. See Jack M. Balkin, *How Social Movements Change (or Fail to Change) the*

sexuality. Even as the laws governing “normative” sex and sexuality were being relaxed, laws governing forms of sexual conduct deemed harmful and problematic were also being reconsidered.¹³¹ In the 1970s and 1980s, at the urging of feminist reformers and women’s rights advocates, many jurisdictions began to focus on the legal regulation of rape and sexual assault.¹³² Courts and legislatures slowly began to eliminate the resistance requirement that, historically, had defined the crime of rape, and critically, had complicated efforts to successfully prosecute claims.¹³³ In an effort to narrow the influence of the complainant’s precipitating or past sexual conduct, reformers also sought to redefine rape in terms of the absence of affirmative consent, placing the burden of soliciting and securing consent squarely on the person desiring sex.¹³⁴

Constitution: The Case of the New Departure, 39 SUFFOLK U. L. REV. 27, 32–34 (2005) (outlining how the Court’s decisions in *Griswold* and *Roe* reflected shifting social norms of the sexual revolution); Jackie Gardina, *The Tipping Point: Legal Epidemics, Constitutional Doctrine, and the Defense of Marriage Act*, 34 VT. L. REV. 291, 294 (2009) (discussing how these movements occurred alongside the Court’s decisions to strike antiscegenation laws and laws prohibiting access to contraception, among others); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 99–100 (2014) (tracing how the spread of no-fault regimes coincided with both rising rates of nonmarital cohabitation as well as Supreme Court decisions striking distinctions based on illegitimate birth); Edward Stein, *Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism*, 28 LAW & INEQ. 345, 347 (2010) (discussing the connections between the LGBT rights movement, the women’s rights movement, and the Civil Rights Movement).

131. That the loosening of legal and social norms surrounding sex would prompt a reappraisal of law’s treatment of rape and sexual assault is perhaps unsurprising. After all, the legal regulation of rape and sexual assault was part and parcel of the state’s efforts to police sex and sexuality and enforce sexual norms of chastity and marital sexuality. See Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 6 (1998) (contending that rape law served as a defense for women who had engaged in nonconsensual sex outside of marriage and, as such, was always part of the state’s effort to limit sexual autonomy and confine sex and sexuality to marriage); Murray, *Strange Bedfellows*, *supra* note 110, at 1269–70 (noting how criminal law’s “refus[al] to characterize spousal violence as assault and unwanted conjugal sex as rape . . . underscored that marriage was a status relationship with attendant obligations and prerogatives that could not be redefined or renegotiated by the parties”).

132. Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 973–74 (noting that reformers of that period aimed to eliminate many of the perceived injustices of rape law, including the utmost resistance requirement, prompt complaint rule, and marital rape exception).

133. *Id.* at 962–68 (tracing the “movement from the common law’s utmost resistance requirement to today’s general absence of a formal resistance requirement”).

134. SUSAN ESTRICH, *REAL RAPE* 102 (1987) (“[I]t does not seem so much to ask men, and the law, to respect the courage of the woman who does say no and to take her at her word.”); STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 271 (1998) (arguing that “[t]he person who wants to have intercourse must be sure he has a clear indication of the other person’s consent”); Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 429–30 (2016);

Alongside these changes to the legal definition of rape, reformers also agitated for rape shield laws that would prevent the defense from introducing evidence of complainants' past sexual conduct or evidence of "precipitating" factors, like dress.¹³⁵ These evidentiary reforms, it was argued, would reduce the barriers that victims faced in bringing charges, while also limiting the role that sexism and gendered stereotypes might play in juror factfinding and decisionmaking.¹³⁶

Critically, feminist reformers were not exclusively concerned with the issue of rape and sexual assault. The proliferation of gender-integrated workplaces also brought the issue of sexual harassment to the fore in the late 1980s and 1990s.¹³⁷ Arguing that sexual harassment subverted gender integration and equality in the workplace, feminists successfully expanded Title VII's prohibition on sex discrimination and other forms of discrimination in employment to include sexual harassment.¹³⁸ As the legal landscape was transformed to condemn sexual harassment as a form of employment discrimination, individual workplaces responded by developing internal policies and procedures for reporting, addressing, and redressing workplace harassment claims.¹³⁹

Rebecca Beitsch, *#MeToo Movement Has Lawmakers Talking About Consent*, PEW: STATELINE (Jan. 23, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/23/metoo-movement-has-lawmakers-talking-about-consent> [<https://perma.cc/A2SV-EXDL>]; Katie Mettler, 'No Means No' to 'Yes Means Yes': How Our Language Around Sexual Consent Has Changed, WASH. POST: SOLO-ISH (Feb. 15, 2018), <https://www.washingtonpost.com/news/soloish/wp/2018/02/15/no-means-no-to-yes-means-yes-how-our-language-around-sexual-consent-has-changed> [<https://perma.cc/4BKH-7DM4>].

135. See Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 600 n.96 (2009) (surveying various federal and state laws excluding precipitating evidence).

136. Aya Gruber, *Rape Law Revisited*, 13 OHIO ST. J. CRIM. L. 279, 285–86 (2016) (outlining the "second-wave feminist" ideas behind the enactment of rape shield laws).

137. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1685 (1998) ("Over the past twenty years, feminists have succeeded in naming 'sexual harassment' and defining it as a social problem.").

138. The Supreme Court unanimously recognized a Title VII sex discrimination claim in 1986, holding that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986). For a discussion of how feminists successfully constructed the argument that sexual harassment was in itself a form of sex discrimination, see Reva B. Siegel, *A Short History of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 1, 8–18 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

139. Some scholars argue that these structural reforms have incentivized employers to control and regulate even low-level sexual behavior in the workplace, creating an overly policed, "sanitized" work environment that may actually undercut goals of gender equality. See, e.g., Schultz, *supra* note 89, at 2131–36.

C. *Responding to the Changing Landscape of Sexual Regulation*

The changes in the landscape of sexual regulation have prompted a range of reactions. For progressives, the liberalization of sexual attitudes and the diminished legal regulation of normative sex have been especially welcome.¹⁴⁰ Others, however, take a dimmer view. For social conservatives, these changes signal a break with traditional sexual mores. They portend a new, liberal culture in which sex routinely occurs outside of marriage, abortion and contraception are freely available, and same-sex sexuality is accepted (and even embraced)—a culture where, when it comes to sex, “anything goes.”¹⁴¹

On this account, the diminution of criminal law’s role in regulating sex and sexuality alongside the emergence of no-fault divorce seems especially significant. After all, divorce and criminal law were once especially forceful in meting out consequences to those who failed to comport with traditional sexual norms and mores that confined sex to heterosexual marriage and made marriage the normative ideal of adult intimate life. Through the criminal law, the state retained the ability to mark certain sexual conduct as *bad*—and just as importantly, to mark certain actors as sexually deviant.¹⁴² Likewise, fault-based divorce regimes demanded that one spouse be identified as a wrongdoer in order to dissolve the marriage.¹⁴³ The divorce regime imposed penalties on the wrongful spouse—adulterers could lose primary custody of their children or be subject to a less advantageous financial settlement upon divorce.¹⁴⁴ In

140. See Catherine Powell, *Up From Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality*, 84 *FORDHAM L. REV.* 69, 78 (2015) (discussing how *Obergefell* is “undoubtedly a victory deserving of celebration for the ways it moves freedom, autonomy, and equality forward”); David H. Gans, *How Gay Marriage’s Triumph Could Protect Abortion Rights*, *NEW REPUBLIC* (Jan. 6, 2016), <https://newrepublic.com/article/127098/gay-marriages-triumph-protect-abortion-rights> [<https://perma.cc/ZEG4-72LF>].

141. Peter Berkowitz, *Conservative Survival in a Progressive Age*, *WALL ST. J.* (Dec. 12, 2012, 6:39 PM), <https://www.wsj.com/articles/SB10001424127887324469304578144882157377760> [<https://perma.cc/Y4AM-VBBV>]; Kristen Hatten, *Abortion Doesn’t Exist in a Vacuum*, *LIVE ACTION* (Feb. 22, 2010, 5:41 PM), <https://www.liveaction.org/news/abortion-doesnt-exist-in-a-vacuum> [<https://perma.cc/NA8D-RJLQ>].

142. See Murray, *supra* note 15, at 607 (discussing criminal law’s historic twin aims with regard to the regulation of sex and sexuality: to punish those who deviated from the norm of marital sex and to express disapproval of nonmarital sex).

143. Typical fault-based divorce statutes allowed the dissolution of marriage on several grounds, including, most commonly, persistent physical or emotional abuse, abandonment, or adultery. See, e.g., N.Y. DOM. REL. LAW § 170(1)–(4) (McKinney 2010).

144. Eskridge, *supra* note 67, at 1920 (discussing the many penalties the at-fault spouse historically faced in a divorce under a fault-based regime, including limitations on alimony, restrictions on property ownership, custody, and inheritance); Suzanne A. Kim, *The Neutered Parent*, 24 *YALE J.L. & FEMINISM* 1, 10–11 (2012) (noting that judges under fault-based regimes often denied custody to the spouse at fault, particularly in cases of adultery, preferring to grant custody to the innocent partner).

these “good old days,” one’s failure to observe traditional sexual mores incurred severe legal consequences.

With this context in mind, it is unsurprising that many conservatives observe the changes that have taken place as effectively *deregulating* sex.¹⁴⁵ As they see it, the state is no longer interested in regulating and enforcing compliance with traditional sexual mores, a regulatory project that it once vigorously pursued. In this regard, what has occurred is not merely a sexual revolution but rather a kind of sexual anarchy in which the state has abdicated its traditional role of imposing consequences on those who did not comply with traditional sexual mores. On this telling, what has emerged from the debris of the sexual revolution is a culture of “sex without consequences.”¹⁴⁶

But critically, it is not just conservatives who are disappointed with the current state of sexual regulation and who view the current landscape as one in which there are no consequences for offensive sexual conduct. For progressives, the liberalization of sexual mores complements the changes in the regulation of rape, sexual assault, and sexual harassment because both are viewed as promoting greater autonomy and equality in society.¹⁴⁷ But despite this increased focus on rape, sexual assault, and sexual harassment, many progressives feel that the state’s efforts to regulate are inadequate and anemic.¹⁴⁸ As these dissenters see it, although there has been serious legal reform, it is mere window dressing because the state continues to neglect enforcement.¹⁴⁹ Despite these reform efforts, they reason, rape and sexual assault continue to be

145. Through a variety of civil regimes—child custody determinations, professional codes of conduct, administrative regulations, and the expansion of civil marriage to new constituencies—the state continued to regulate private, consensual adult sex and sexuality quite robustly, even as the criminal law receded. See Murray, *supra* note 15, at 591–99, 614–15. However, this regulation may feel less thick and robust than the forms of regulation that once predominated. See Murray, *supra* note 113, at 53.

146. See Pokluda, *supra* note 12; see also Evan Lenow, *More Than Women’s Health: Responsibility and Consequences in the Abortion Debate*, COUNCIL ON BIBLICAL MANHOOD AND WOMANHOOD (July 11, 2013), <https://cbmw.org/topics/culture/more-than-womens-health-responsibility-and-consequences-in-the-abortion-debate> [<https://perma.cc/Z2TB-W9JS>].

147. Indeed, Aya Gruber argues that today, many associate “feminism” more with the punitive turn attending rape and sexual assault laws than they do with calls for access to abortion and reproductive rights. On this account, “[t]he zealous, well-groomed female prosecutor who throws the book at ‘sicko’ sex offenders has replaced the 1970s bra-burner as the icon of women’s empowerment.” Gruber, *supra* note 135, at 583.

148. See *supra* note 20.

149. See Baker, *supra* note 17, at 231–32 (“Despite all the reform, the criminal law does not appear to be actively punishing vast amounts of nonconsensual sex.”).

underreported,¹⁵⁰ or often go unprosecuted¹⁵¹ because of concerns about the victim's credibility or other barriers to prosecution and enforcement.¹⁵² Moreover, despite the changes in the law that have occurred, gendered norms around sex and sexuality have stubbornly persisted, making it difficult for these greater legal measures to gain traction.¹⁵³

Likewise, although many workplaces have created infrastructures for reporting and addressing sexual harassment, concerns about retaliation, victim-blaming, and “gray area” conduct that is offensive, though not necessarily prohibited,¹⁵⁴ prevent many victims from filing complaints.¹⁵⁵ Those who do lodge successful complaints may find that the offenses—and the offenders—continue to be shielded from public scrutiny through legal settlements and nondisclosure agreements.¹⁵⁶ As progressive dis-

150. See MICHAEL PLANTY ET AL., U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994–2010, at 6 (2016), <https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf> [<https://perma.cc/W9L2-DRQ7>] (finding that only 32 percent of sexual assaults against females were reported to the police in 2010); PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 33 (2006), <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf> [<https://perma.cc/PB62-2YM6>] (“Only 19.1 percent of the women and 12.9 percent of the men who were raped since their 18th birthday said their rape was reported to the police.”); Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1155–57 (2018) (reviewing JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017)) (discussing the underreporting of sexual assault).

151. Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2156 (1995).

152. See Baker, *supra* note 17, at 235–45 (discussing the many hurdles rape victims face at trial). Critically, and perhaps unsurprisingly, the sexual assault “enforcement gap” is widest in cases pertaining to women of color, women in poverty, and LGBTQ victims, among others. Tuerkheimer, *supra* note 150, at 1155.

153. See Baker, *supra* note 17, at 247 (contending that rape reformers knew they had to fight against “entrenched norms in gendered scripts” governing public perceptions of sexual interactions between men and women); see also Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 432–33 (2016) (highlighting the “gender roles and stereotypes of masculine and feminine sexuality [and] . . . the hierarchically gendered social meanings and consequences of sexual victimization and perpetration” underlying rape and sexual assault).

154. See Conor Friedersdorf, *How #MeToo Can Probe Gray Areas with Less Backlash*, ATLANTIC (Jan. 18, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/how-metoo-can-probe-gray-areas-with-less-backlash/550559> [<https://perma.cc/M8ZZ-F9PD>] (discussing gray area conduct); Kathleen Kelley Reardon, *It's Not Always Clear What Constitutes Sexual Harassment. Use This Tool to Navigate the Gray Areas*, HARV. BUS. REV. (June 19, 2018), <https://hbr.org/2018/06/its-not-always-clear-what-constitutes-sexual-harassment-use-this-tool-to-navigate-the-gray-areas> [<https://perma.cc/W6TD-SFHZ>] (same).

155. See Estrich, *supra* note 10, at 833–34 (“Empirical studies suggest that possibly actionable harassment is widespread, even endemic, but the number of lawsuits, not surprisingly, does not bear out this possibility.”).

156. Hiba Hafiz, *How Legal Agreements Can Silence Victims of Workplace Sexual Assault*, ATLANTIC (Oct. 18, 2017), <https://www.theatlantic.com/business/>

senters see it, the law makes it challenging for victims to seek and achieve remedies for their injuries because it fails to provide adequate protection and redress.¹⁵⁷ On this account, the state has not gone far enough to address sexual harassment and sexual assault—indeed, it may seem as though there are few consequences for those who engage in this kind of offensive sexual conduct.¹⁵⁸

Although they are associated with divergent political perspectives and differ in both approach and longterm strategy, both the conservative and the progressive positions reflect a shared sense that the state has failed to articulate and enforce norms of appropriate sexual conduct. That is, these changes in the regulatory landscape have left the impression, at least for some, that the state has abdicated its regulatory role to articulate and enforce the bounds of sexual propriety and that this failure results in certain problematic sexual behaviors going unpunished.

These two groups also recognize that the state's departure has left the field open to new regulatory interventions. And these groups have come to the fore to fill the void. In doing so, these groups might be understood as engaging in the sort of private regulation that has always occurred but that has been overshadowed by the state's more visible efforts to regulate sex and sexuality. Today, in view of the diminution in the state's efforts to regulate sex and sexuality, these private regulatory actions are more visible than they have ever been—and, as the following Parts suggest, more consequential. Part IV considers private actors' responses to these perceived state lapses, using *Masterpiece Cakeshop* and #MeToo as examples to illustrate the evolving regulatory phenomenon of private sexual regulation. Part V reflects on the implications of these more visible iterations of private sexual regulation.

IV. PRIVATE ACTORS AS SEXUAL REGULATORS: *MASTERPIECE CAKESHOP* AND #METOO

For both conservatives and progressives, the current landscape of sexual regulation is shaped by the state's failure to properly regulate and enforce what each group perceives as appropriate sexual norms. With this in mind, this Part considers how conservatives and progressives alike have responded to the state's perceived failures. To do so, this Part focuses

archive/2017/10/legal-agreements-sexual-assault-ndas/543252 [https://perma.cc/Y53A-G8TS].

157. See Lenora M. Lapidus, *If Sexual Harassment Is Illegal, Why Is It So Rampant?*, ACLU: SPEAK FREELY (Jan. 18, 2018, 3:30 PM), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/if-sexual-harassment-illegal-why-it-so-rampant> [https://perma.cc/ZET2-W3YS].

158. *Id.* (arguing that, although sexual harassment has been legally prohibited for over two decades, it proliferates because women fear losing their jobs or going to trial, or cannot bring claims due to nondisclosure agreements or mandatory arbitration clauses).

on two distinct developments—religious refusals and conscience exemption claims of the sort sought in *Masterpiece Cakeshop* and the #MeToo movement’s efforts to surface and address sexual harassment and sexual assault in the workplace. To be clear, in juxtaposing these two responses, I do not mean to gloss over or minimize the very real differences in their approaches, animating principles, and goals. Nevertheless, as this Article argues, viewing in tandem these two efforts by private actors to articulate and enforce particular norms of sexual propriety provides a useful framework from which to consider the broader implications of this emergent form of sexual regulation.

Subpart A provides an overview of *Masterpiece Cakeshop*, taking care to locate the request for religious refusals and conscience exemptions in the conservative response to sexual liberalization. Subpart B then turns to the #MeToo movement. This Subpart provides an overview of the #MeToo movement and its aims, and more importantly, contextualizes this development as a progressive response to the perceived failure of the state to properly regulate sexual harassment and sexual assault.

A. Masterpiece Cakeshop

In July 2012, Charlie Craig and David Mullins visited the Masterpiece Cakeshop in Lakewood, Colorado, to order a cake that would be served at a reception celebrating their marriage.¹⁵⁹ However, when Jack Phillips, the owner of Masterpiece Cakeshop, learned that the requested cake was intended for a party celebrating the couple’s Massachusetts wedding, he refused the couple’s business.¹⁶⁰ As Phillips explained to Craig and Mullins, it would defy his religious convictions—which specified that marriage was a union between a man and a woman—to provide a cake for the purpose of celebrating a same-sex marriage.¹⁶¹

On September 5, 2012, Craig and Mullins filed suit against Masterpiece Cakeshop with the Colorado Civil Rights Commission, charging Phillips and Masterpiece Cakeshop with sexual orientation discrimination.¹⁶² Phillips countered the charges by arguing that he had not engaged in sexual orientation discrimination, as he was happy to serve gays and lesbians by providing cakes for other (nonmarital) occasions, such as birthdays and baby showers.¹⁶³ Over the course of four years, the dispute made its way through the Colorado administrative and state court systems,

159. Brief in Opposition at 2, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111). Because same-sex couples were ineligible for civil marriage in Colorado, the couple planned to travel to Massachusetts to marry. *Masterpiece Cakeshop*, 138 S. Ct. at 1724. The cake was intended for a reception that they would host for friends and family in Denver upon their return. *Id.*

160. Brief in Opposition, *supra* note 159, at 2–3.

161. *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

162. Joint Appendix at *47–53, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4232758.

163. *Id.* at *152.

where Craig and Mullins prevailed.¹⁶⁴ Phillips appealed the decision to the United States Supreme Court.¹⁶⁵ At the Court, Phillips repackaged his claims and the attendant arguments. Rather than focusing squarely on the Colorado Anti-Discrimination Act's (CADA) nondiscrimination requirement as an imposition on his religious beliefs, he argued that the compliance with the Colorado antidiscrimination law constituted compelled speech.¹⁶⁶ In a seven-to-two decision, a majority of the Court ruled on narrow grounds that the Civil Rights Commission did not employ religious neutrality in its evaluation of Phillips's claims, thus violating Jack Phillips's free exercise rights, and reversed the Commission's decision.¹⁶⁷ Phillips is currently involved in another suit, *Masterpiece Cakeshop, Inc. v. Elenis*, after refusing to bake a blue and pink cake to celebrate an individual's gender transition.¹⁶⁸ After the refusal, the Colorado Civil Rights Division found that Phillips's decision violated the CADA, and Phillips was ordered to participate in mandatory mediation.¹⁶⁹ Phillips again brought suit against the Colorado Civil Rights Division, arguing, as he had with Craig and Mullins's cake, that the custom gender transition cake "would have expressed messages" he felt he could not express due to his religious beliefs.¹⁷⁰ The case is pending in Colorado district court.

Although the Court did not rule on the broader question of the intersection of antidiscrimination laws, free exercise of religion, and freedom of speech,¹⁷¹ *Masterpiece Cakeshop* (and other religious exemption claims like the one it surfaces) has almost uniformly been characterized

164. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015), *rev'd sub nom. Masterpiece Cakeshop*, 138 S. Ct. 1719. The Colorado Supreme Court subsequently declined to hear the case. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

165. The Court heard oral arguments in the case on December 5, 2017. Transcript of Oral Argument at 1, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

166. *Id.* at 4–10.

167. *Masterpiece Cakeshop*, 138 S. Ct. at 1729–32, 1748.

168. Complaint at 4, *Masterpiece Cakeshop, Inc. v. Elenis*, No. 1:18-cv-02074, 2018 WL 3870105 (D. Colo. Aug. 14, 2018).

169. *Id.* at 29.

170. *Id.* at 27.

171. *Id.* at 3. Despite the Court's limited ruling, some conservatives nonetheless cast the decision as a win for religious liberty and free speech. Press Release, Concerned Women for America, Conservative Women Celebrate Freedom as the U.S. Supreme Court Decides *Masterpiece Cakeshop* (June 4, 2018), <https://concernedwomen.org/conservative-women-celebrate-freedom-as-the-u-s-supreme-court-decides-masterpiece-cakeshop> [<https://perma.cc/Y676-AQ66>]; Rod Dreher, *Religious Liberty Wins Small*, AM. CONSERVATIVE (June 4, 2018, 11:36 AM), <http://www.theamerican-conservative.com/dreher/religious-liberty-wins-small-masterpiece-cakeshop> [<https://perma.cc/8TVR-GX33>]. Conversely, many progressive organizations argued that the decision should be favorably read as continued protection for the rights of LGBTQ individuals because the Court did not provide businesses a right to discriminate. *See, e.g., Masterpiece Cakeshop v. Colorado Civil Rights Commission—FAQ*, ACLU, <https://www.aclu.org/fact-sheet/masterpiece-cakeshop-v-colorado-civil-rights-commission-faq> [<https://perma.cc/47TW-S4K2>].

as a collision between First Amendment values on the one hand and LGBTQ rights on the other—the classic juxtaposition of liberty and equality.¹⁷² This impulse is entirely understandable—on its face, the case surfaced the tensions between Jack Phillips’s religious convictions and free speech rights and Colorado’s commitment to antidiscrimination principles.

But we might also view *Masterpiece Cakeshop* through the lens of sexual regulation—or more particularly, as a response to the state’s failure to enforce the sexual mores to which Phillips subscribed. At the heart of Phillips’s claim for an exemption from the CADA is the view that, by requiring him to sell a cake for use at a same-sex wedding reception, Colorado required Phillips to embrace something that contradicts his religious beliefs and, as he asserted at the Supreme Court, compelled him to reiterate Colorado’s pro-LGBTQ rights message.¹⁷³ On this account, Phillips’s request for accommodation is a request to carve out a space of seclusion within the public sphere where he, and other believers, may dissent from the state’s embrace of same-sex marriage and other issues of LGBTQ equality.¹⁷⁴

As Phillips originally articulated his claim, the requested space of seclusion was space that the state, through an accommodation, would carve out—indeed, *create*—from the existing expanse of the public sphere. But one might argue that such a space need not be created at all because, in fact, it already exists as part of the regulatory landscape in which the state once clearly prescribed and enforced more traditional sexual mores.¹⁷⁵ The space that Phillips sought to occupy was not a new space created in order to accommodate dissenting viewpoints. Rather, it is the very terrain on which the state once proscribed and punished—indeed, regulated—same-sex sexuality.

Through this lens, we might view Phillips’s claim as not merely a request for an accommodation or carveout but rather as a bid to return

172. Michael C. Dorf, *Liberty and Equality Sometimes Require Tragic Choices, Just Not in Masterpiece Cakeshop*, JUSTIA: VERDICT (Dec. 12, 2017), <https://verdict.justia.com/2017/12/12/liberty-equality-sometimes-require-tragic-choices-just-not-masterpiece-cakeshop> [<https://perma.cc/3B33-JGVC>]; Garrett Epps, *Using ‘Free Speech’ to Trump Civil Rights*, ATLANTIC (Nov. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/11/whats-new-about-sessions-defense-of-discrimination/547043> [<https://perma.cc/T2WL-64F9>]; Adam Liptak, *Justices Sharply Divided in Gay Rights Case*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/us/politics/supreme-court-same-sex-marriage-cake.html> [<https://perma.cc/GE3N-W294>].

173. Transcript of Oral Argument, *supra* note 165, at 4.

174. Phillips’s opening brief to the Supreme Court expressed fears that laws like CADA would “crush those who hold unpopular views, pushing them from the public square.” Brief for Petitioners at 3, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111).

175. See NeJaime & Siegel, *supra* note 22, at 2542–43 (discussing how religious objections are frequently made in connection with, and with encouragement from, political parties seeking a return to traditional sexual mores).

to a time when antipathy for same-sex sexuality was clearly articulated and enforced.¹⁷⁶ And while the state, because of antidiscrimination laws and other developments, is no longer in a position to articulate and enforce this vision of appropriate (heterosexual) sexual conduct, private actors, like Phillips, may, through accommodations and carveouts, assume this role. Accordingly, Phillips's bid for accommodation might rightly be viewed as a bid to *assume* the regulatory space—and role—that the state once occupied and now has ostensibly abandoned.¹⁷⁷ In this regard, Phillips's request for accommodation is not simply about seeking space to dissent from the prevailing secular culture. Rather, we might understand it as an effort to reconstitute and reinvigorate—albeit on a smaller scale—a regulatory culture in which homosexuality and same-sex marriage are less accepted and acceptable.

At first blush, Phillips's refusal to provide a wedding cake hardly seems regulatory. If anything, we might characterize it as an omission—a failure to provide the desired cake. But if one takes seriously the humiliation and injury that Craig and Mullins experienced upon being refused service, the regulatory posture of Phillips's refusal becomes clear.¹⁷⁸

Historically, the state criminalized same-sex sexuality under sodomy prohibitions and made same-sex partners ineligible for marital recognition.¹⁷⁹ But, as discussed, the state no longer criminalizes consensual same-sex sodomy, same-sex marriage has been legalized across the country, and a number of states and localities have laws that protect

176. *Id.*

177. See Melissa Murray, *Loving's Legacy: Decriminalization and the Regulation of Sex and Sexuality*, 86 *FORDHAM L. REV.* 2671, 2698–99 (2018) (contending that accommodations enable private actors to “express the kind of disapprobation and discrimination that the state itself is now unable to express”).

178. On this point, many briefs in support of Craig and Mullins cited or quoted Justice Arthur Goldberg's concurrence in the landmark civil rights decision *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). As Justice Goldberg wrote, “Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.” *Id.* at 292 (Goldberg, J., concurring) (quoting S. REP. NO. 88-872, at 2370 (1964)); see, e.g., Brief of 211 Members of Congress as Amici Curiae in Support of Respondents at 19, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (quoting Justice Goldberg's concurrence); Brief of the National Women's Law Center and Other Groups as Amici Curiae in Support of Respondents at 6–7, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (same); Brief of Tanenbaum Center for Interreligious Understanding as Amicus Curiae in Support of Respondents at 7, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (same).

179. William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 *N.Y.U. L. REV.* 1327, 1339–43, 1347 (2000) (discussing the state's use of criminal sodomy statutes in the twentieth century as a way to police homosexuals, who were painted as predatory or sexually deviant).

against sexual orientation discrimination.¹⁸⁰ These changes have profoundly altered the regulatory landscape insofar as homosexuality is concerned. Not only does the state no longer criminally punish same-sex intimacy, it has welcomed same-sex couples into the bosom of civic life.¹⁸¹ A group that the state once cast out as criminals and sexual deviants is now welcomed as part of the sexual mainstream.¹⁸²

With this context in mind, Phillips's refusal and his request for an exemption from the CADA take on a more regulatory cast. In the face of the state's embrace of gay couples, Phillips has drawn a line in the sand. By refusing to furnish a cake—and indeed, making clear that he is refusing because he does not wish to be complicit in something he views as *sinful* and *wrong*—Phillips is articulating his own vision of appropriate sexual conduct (one that does not brook homosexuality), and imposing consequences on the couple for their refusal to comply with these traditional heterosexual mores. Critically, the consequence is not merely the withholding of a cake; it is the withholding of the cake *and* the judgment that accompanies the refusal.¹⁸³ If the state no longer punishes or penalizes same-sex sexuality, Jack Phillips will do so, making clear that he finds this conduct objectionable, even if the state does not.

One could argue that the consequences Jack Phillips imposes on gay couples are minimal. He is one person. If he refuses to serve a gay couple, the couple can simply go to the next bakery, and the next, and so on.¹⁸⁴ While this is certainly true, it is worth noting that Phillips is

180. Twenty-one states, as well as the District of Columbia, prohibit discrimination based on sexual orientation and gender identity for both public and private employees. *State Maps of Laws & Policies*, HUM. RTS. CAMPAIGN (June 11, 2018), <https://www.hrc.org/state-maps/employment> [<https://perma.cc/M66X-2XE2>].

181. Indeed, after *Obergefell*, President Barack Obama celebrated the ruling for ending the “patchwork system” of regulation on same-sex marriage and called the decision a “victory for America” that “affirm[ed] what millions of Americans already believe in their hearts.” *Transcript: Obama’s Remarks on Supreme Court Ruling on Same-Sex Marriage*, WASH. POST (June 26, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/06/26/transcript-obamas-remarks-on-supreme-court-ruling-on-same-sex-marriage> [<https://perma.cc/A2RD-NN53>].

182. In the context of the Court’s decision in *Loving v. Virginia*, 388 U.S. 1 (1967), striking Virginia’s antimiscegenation ban and thus permitting interracial marriage, *Loving* transformed interracial couples from “outlaws to in-laws,” formally sanctioning what had once been deviant—indeed, criminal—behavior. Murray, *supra* note 15, at 580.

183. NeJaime and Siegel write that these harms may be classified as both material (the withholding of the cake) and dignitary (the judgment attending the refusal). NeJaime & Siegel, *supra* note 22, at 2566–78.

184. Phillips himself raised this point to the Court, asking it to reject the “slippery-slope” argument raised by Craig and Mullins that granting Phillips an exemption would “open the floodgates to other people of faith seeking similar freedom.” Brief for Petitioners, *supra* note 174, at 60; *see also* Brief of Christian Legal Society et al. as Amici Curiae in Support of Petitioners at 32, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111) (arguing that couples denied

not alone in refusing goods and services and seeking religious exemptions from the operation of antidiscrimination laws. In fact, claims of this sort have proliferated in recent years among those who furnish goods and services for weddings,¹⁸⁵ as well as those who provide other services (or are in a position to provide such services), like dispensing contraception or performing abortions.¹⁸⁶ And critically, although private actors like Phillips request religious accommodations as individuals, these requests are in fact part of a coordinated effort by religious liberty groups to test the limits of free exercise rights and, in the process, construct a network of accommodation structures that extend to all aspects of civil society—from the provision of wedding cakes to filling prescriptions for contraception.¹⁸⁷ In short, we might understand these claims not as bespoke, individualized claims of religious liberty but rather as a coordinated effort to deploy principles of religious freedom for the purpose of recreating, accommodation by accommodation, an earlier epoch where sex was confined to heterosexual marriage and homosexuality was condemned.¹⁸⁸

In this vein, as a matter of sexual regulation, *Masterpiece Cakeshop* is not simply about Jack Phillips and his bakery. Instead, it is about the prospect of a thousand Jack Phillipses, armed with accommodation carveouts and the authority to refuse goods and services to avoid being complicit in “sin,” as well as the capacity to construct a broader network of refusals that functions collectively as an alternative regime of sexual regulation.¹⁸⁹

Viewing *Masterpiece Cakeshop*—and religious objections more generally—through the lens of sexual regulation not only helps contextualize

goods or services via religious exemptions can seek remedies by simply choosing another provider, while a provider forced to provide goods or services in violation of their religious beliefs must “repeatedly violate his conscience”).

185. Various wedding providers have brought religious exemption claims in an attempt to avoid servicing same-sex couples. See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (photographer); see also *Washington v. Arlene’s Flowers, Inc.*, 389 P.3d 543 (Wash. 2017) (florist), *cert. granted, judgment vacated*, 138 S. Ct. 2671 (2018) (mem.).

186. See NeJaime & Siegel, *supra* note 22, at 2535, 2576–78 (discussing instances of conscience-based refusals by purveyors of contraception, abortion, and wedding-related services).

187. See Sarah Posner, *The Christian Legal Army Behind ‘Masterpiece Cakeshop,’* NATION (Nov. 28, 2017), <https://www.thenation.com/article/the-christian-legal-army-behind-masterpiece-cakeshop> [<https://perma.cc/58TM-A2N6>].

188. See NeJaime & Siegel, *supra* note 22, at 2556 (“[C]onscience provisions allow advocates to rework a traditional norm that was once enforced through the criminal law into a norm that is now enforced through a web of exemptions in the civil law.”).

189. See Brief of 211 Members of Congress as Amici Curiae in Support of Respondents, *supra* note 178, at 16 (arguing that “discrimination under CADA would affect far more than cakeshops in Colorado” and “[e]xamples of how this exemption could operate to circumvent the Civil Rights Act of 1964 abound”).

the conservative response to the new regulatory landscape, it may also render legible the responses of those with different political commitments. The efforts of the #MeToo movement are instructive on this point.

B. *The #MeToo Movement*

In October 2017, in the wake of public revelations of sexual harassment and sexual assault allegations against Harvey Weinstein and other high-profile men,¹⁹⁰ the hashtag #MeToo spread virally across various social media platforms in an effort to demonstrate the widespread prevalence of these offenses, especially in the workplace.¹⁹¹ Initially intended as a means of cultivating empathy among young women for other victims of sexual harassment and sexual assault,¹⁹² the movement and its representative hashtag have come to represent the ubiquity of the offenses—and a society and legal culture that seem to condone the conduct.¹⁹³

190. Jodi Kantor, Megan Twohey, and Ronan Farrow were widely credited for breaking stories detailing allegations of over two decades of sexual harassment and sexual assault committed by Weinstein. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, *NEW YORKER* (Oct. 10, 2017, 10:47 AM), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/7F5Q-RVZH>]; Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, *N.Y. TIMES* (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/PC64-YPMW>]. More than eighty women have since come forward against Weinstein. Janice Williams, *Harvey Weinstein Accusers: Over 80 Women Now Claim Producer Sexually Assaulted or Harassed Them*, *NEWSWEEK* (Oct. 30, 2017, 1:32 PM), <http://www.newsweek.com/harvey-weinstein-accusers-sexual-assault-harassment-696485> [<https://perma.cc/MY24-YAYT>]. In the months after the allegations against Weinstein emerged, many other high-profile men were also publicly fired or forced to resign after facing accusations of sexual harassment or assault. Almukhtar et al., *supra* note 33.

191. For a timeline tracing how #MeToo “went viral,” see Kara Fox & Jan Diehm, *#MeToo's Global Moment: The Anatomy of a Viral Campaign*, *CNN* (Nov. 9, 2017, 1:35 PM), <https://www.cnn.com/2017/11/09/world/metoo-hashtag-global-movement/index.html> [<https://perma.cc/HS7Z-VHDM>].

192. *About, ME TOO*, <https://metoomvmt.org/about> [<https://perma.cc/E8BK-6PKQ>].

193. Mizrahi, *supra* note 10, at 133–37 (describing the failure of the law to protect against sexual harassment in the workplace); Nadia Khomami, *#MeToo: How a Hashtag Became a Rallying Cry Against Sexual Harassment*, *GUARDIAN* (Oct. 20, 2017, 1:13 PM), <https://www.theguardian.com/world/2017/oct/20/women-world-wide-use-hashtag-metoo-against-sexual-harassment> [<https://perma.cc/3ZD2-Y64G>] (highlighting the prevalence of sexual harassment and the resonance of the #MeToo movement); Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, *N.Y. TIMES* (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> [<https://perma.cc/94FM-NG6Z>] (discussing how structural inequality, misogyny, and racism have “long paralyzed effective legal recourse for sexual harassment”); see also *supra* notes 150, 155–157 and accompanying text (noting that sexual assault is chronically underreported and rape laws are underenforced).

Critically, #MeToo's goals go beyond simply highlighting the prevalence of these offenses; its stated purpose is to provide survivors with "pathways" for healing, while simultaneously "disrupt[ing] the systems that allow for the global proliferation of sexual violence."¹⁹⁴ #MeToo has spawned similar social justice-oriented organizations, including Time's Up, a "solution-based, action-oriented next step in the [#MeToo] movement"¹⁹⁵ that focuses on passing legislation and changing policies to address the systemic sources of inequality—lack of representation, gendered pay disparities, and the unequal distribution of power—that cultivate the conditions in which sexual harassment and violence may occur.¹⁹⁶

To date, most commentary about #MeToo has focused on the movement's grassroots origins and its use of social media as a platform for disseminating its messages.¹⁹⁷ On this account, #MeToo's obvious comparators are other social justice-oriented, progressive movements.¹⁹⁸ But if we step back, we might glimpse surprising commonalities between #MeToo activists and conservatives claiming religious exemptions to antidiscrimination laws. Indeed, we might understand #MeToo as lodging a similar (though not identical) critique of the state and its failings and mounting a similar response.

While much has been done to address longstanding blind spots in the law's approach to sexual harassment and sexual assault, like the removal of the marital rape exemption¹⁹⁹ and the revision of evidentiary rules related to the victim's past sexual conduct,²⁰⁰ many progressives

194. *About, supra* note 192.

195. Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements—And How They're Alike*, TIME (published Mar. 8, 2018; updated Mar. 22, 2018, 5:21 PM), <http://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements> [<https://perma.cc/D4UW-D8DH>].

196. *Id.* In a recent article, Vicki Schultz makes the point more concretely. As she argues, sex segregation in the workplace is a key factor in cultivating environments in which sexual harassment exists. See Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 49 (2018).

197. See, e.g., Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979> [<https://perma.cc/3GDH-PTSG>]; Ohlheiser, *supra* note 24.

198. The Black Lives Matter movement, for one, has benefitted tremendously from the use of social media platforms, as on-the-ground activists have used Facebook, Twitter, YouTube, and other digital avenues to report on protests, mobilize support, and encourage public dialogue on police brutality. See Bijan Stephen, *Social Media Helps Black Lives Matter Fight the Power*, WIRED (Nov. 2015), <https://www.wired.com/2015/10/how-black-lives-matter-uses-social-media-to-fight-the-power> [<https://perma.cc/9S57-B738>]. The Occupy Wall Street movement also highlighted the power of social media to turn what began as a small protest into a large-scale initiative. See Jonathan Moyer, *Political Activism on Social Media Has Grown Some Teeth*, PAC. STANDARD (May 8, 2017), <https://psmag.com/social-justice/social-media-activism> [<https://perma.cc/R5YU-VX78>].

199. Murray, *Strange Bedfellows, supra* note 110, at 1260–64.

200. Capers, *supra* note 8, at 843–47.

believe that there has been too little progress in the effort to respond to and remedy the two offenses. The state's inadequate efforts to properly enforce existing laws concerning these offenses has cultivated the conditions under which these—and other—expressions of gender inequality may take root and flourish.²⁰¹

In this regard, #MeToo activists, like religious conservatives, have assessed the current landscape of sexual regulation and determined that the state's anemic response to sexual harassment and sexual assault has given rise to a culture in which such conduct is endemic and condoned.²⁰² Put differently, these progressives view the state as having abdicated its role in articulating and enforcing norms of appropriate sex and sexuality. And in response to the state's failure, the #MeToo movement has attempted to correct these lapses. In so doing, they, like conservatives, have stepped into the regulatory void to advance an alternative set of sexual norms that sharply condemn and denounce harassment and assault and, more particularly, to impose consequences on those who do not comply with this vision of appropriate sex and sexuality.

For example, deeply concerned that the mechanisms of legal settlements have allowed employers to “cover up” the past misdeeds of habitual offenders and to facilitate—even enable—a broader workplace culture of harassment and assault, #MeToo activists have used social media and crowdsourcing to create online “offender” registries.²⁰³ These

201. Donna Lenhoff, one of the architects of the Family and Medical Leave Act and a former civil rights adviser to President Obama, argues that current Title VII guidelines against workplace discrimination are “woefully inadequate” in addressing sexual harassment in the workplace and require significant reform, including abolishing forced arbitration and caps on damages. Donna Lenhoff, *The #MeToo Movement Will Be in Vain if We Don't Make These Changes*, WASH. POST (Jan. 25, 2018), https://www.washingtonpost.com/opinions/the-metoo-movement-will-be-in-vain-if-we-dont-make-these-changes/2018/01/25/5add95a8-0090-11e8-8acf-ad2991367d9d_story.html [<https://perma.cc/UN84-DBZJ>]. Julie Goldscheid similarly argues that, although civil rights remedies are available to sexual assault victims, these remedies are insufficient because they do not extend to private individuals and often only reach employers, not those who actually committed the act of harassment or assault. Goldscheid, *supra* note 21.

202. Kantor, *supra* note 32 (“Harassment has flourished in part because structures intended to address it are broken: weak laws that fail to protect women, corporate policies that are narrowly drawn and secret settlements that silence women about abuses.”).

203. These registries include what was titled the “Shitty Media Men” list, a Google spreadsheet published by writer Moira Donegan one week after the accusations against Weinstein were made public. The list, which circulated rapidly through the media industry, was billed by its author as “a collection of misconduct rumors and allegations” and allowed readers to edit the list anonymously. Jaclyn Peiser, *How a Crowdsourced List Set Off Months of #MeToo Debate*, N.Y. TIMES (Feb. 3, 2018), <https://www.nytimes.com/2018/02/03/business/media/media-men-list.html> [<https://perma.cc/WHA5-7WT2>]. Other crowdsourced lists have been published detailing sexual harassment incidents in academia, see Karen Kelsky, *A Crowdsourced Survey*

crowdsourced documents allow individuals to anonymously identify those who have engaged in harassment and assault—often with particular attention paid to individuals who have been identified multiple times or have been accused of violent offenses.²⁰⁴ Critically, these registries serve multiple purposes. They allow victims an opportunity to name offenders without having to undertake the challenges—and indignities—of filing a complaint with their employer or the authorities.²⁰⁵ Further, by publicizing the identities of alleged harassers and workplaces that shelter them, the registries hope to improve transparency and information-sharing across various industries, ending the so-called “open secrets” or “whisper networks” that previously sought to alert employees to potential harassers.²⁰⁶ And in publicizing the identities of alleged harassers and their workplaces, activists hope to prod workplace management to take appropriate actions to cultivate a safer and more productive workplace culture.²⁰⁷

As many commentators have noted, efforts like these crowdsourced registries pose their own problems. Some argue that the registries, which are often unvetted and allow users to anonymously add information, pose a range of due process concerns.²⁰⁸ Others argue that these efforts constitute a type of sexual “vigilantism” that may, if unchecked, have severe consequences.²⁰⁹

of Sexual Harassment in the Academy, THE PROFESSOR IS IN (Dec. 1, 2017), <https://theprofessorisin.com/2017/12/01/a-crowdsourced-survey-of-sexual-harassment-in-the-academy> [<https://perma.cc/6X7D-N8CV>], as well as naming student offenders on university campuses, see Molly Walsh, #HerToo: Middlebury Student in Trouble over List of Accused Sexual Transgressors, SEVEN DAYS (Jan. 24, 2018), <https://www.sevendaysvt.com/vermont/hertoo-student-in-trouble-over-list-of-accused-sexual-transgressors/Content?oid=12090461> [<https://perma.cc/2GBL-SE29>].

204. The “Shitty Media Men” list included the names of men accused of “physical sexual violence by multiple women,” highlighted in red. See Peiser, *supra* note 203.

205. See Moira Donegan, *I Started the Media Men List: My Name is Moira Donegan*, N.Y. MAG.: THE CUT (Jan. 10, 2018), <https://www.thecut.com/2018/01/moira-donegan-i-started-the-media-men-list.html> [<https://perma.cc/CBX7-KAUK>] (noting that the list was intended to provide “an alternate avenue” to report behavior and warn others without fear of retaliation).

206. See *id.*

207. Kelsky, *supra* note 203 (“My goal is for the academy as a whole to begin to grasp the true scope and scale of this problem in academic settings . . . , paving the way for more frank conversations and more effective interventions.”).

208. See Christina Cauterucci, *Why It's Reasonable to Feel a Queasy Mix of Emotions About the “Shitty Media Men” Spreadsheet*, SLATE (Oct. 12, 2017, 5:28 PM), http://www.slate.com/blogs/xx_factor/2017/10/12/why_it_s_reasonable_to_feel_a_queasy_mix_of_emotions_about_the_shitty_media.html [<https://perma.cc/2BJD-U52K>]; Vidhi Doshi, *After #MeToo, a Facebook List Names South Asian Academics. Some Say It's a Step Too Far*, WASH. POST (Oct. 31, 2017), <https://www.washingtonpost.com/news/worldviews/wp/2017/10/31/after-metoo-a-facebook-list-names-south-asian-academics-some-say-its-a-step-too-far> [<https://perma.cc/DK2R-Y9VL>].

209. See Wendy Kaminer, *Beware Vigilante Feminism*, BOS. GLOBE (Oct. 27, 2017), <https://www.bostonglobe.com/opinion/2017/10/27/beware-vigilante-feminism/>

These critiques are certainly valid. But the focus on these aspects of the #MeToo movement's response to sexual harassment and sexual assault overlooks the regulatory posture of these efforts. Critically, these initiatives go beyond simply providing victims with an opportunity and forum to articulate their injuries and name the perpetrators. They allow individual private actors to assume an aspect of the regulatory role that the state has failed to undertake. Frustrated with the state's efforts (or lack thereof) to deal with harassment and assault, individual actors are taking it upon themselves to launch private "prosecutions" via social media, traditional media, and other extralegal channels that seek to provide the victim with justice and redress by expelling the harasser from the workplace or community. In this regard, the #MeToo movement's responses might be understood as part of a broader effort to occupy the regulatory space that the state has left vacant in order to articulate alternative norms of sexual propriety and to impose consequences on those who violate these norms.

C. *#MeToo and Masterpiece Cakeshop as Private Sexual Regulation*

Regulation, as I have defined it and it is often used, refers to efforts aimed at shaping and influencing behavior, whether through incentives like tax breaks and benefits or more coercive measures like legal prohibitions and punishment.²¹⁰ While we typically associate regulatory power with the state, in fact, a wide range of entities, including private actors, might perform regulatory functions. As discussed in Part I, when private actors explicitly assume regulatory roles, they typically do so by virtue of a delegation of authority from a state actor. The notion of private actors independently regulating, without an explicit or implicit delegation of regulatory authority from the state, is rare (though not necessarily unprecedented).²¹¹ Still, as Part II makes clear, private actors may, through their own actions, assert a less visible regulatory role in order to complement—or in cases, challenge—the state's regulatory agenda.

I raise these points for two purposes. First, I raise them as a response to the impulse to deny the regulatory character of these two movements and their actions. There may be few precedents for #MeToo and

Qix5RT3jJjoVIAzh9Zt9aM/story.html [https://perma.cc/V3YF-DD2P].

210. See *supra* Part I (discussing scholarly attempts to define and theorize regulation).

211. See *supra* Part I (detailing the traditional privatization structure, in which private actors are deputized by the state to achieve state goals); see also Joel Bakan, *The Invisible Hand of Law: Private Regulation and the Rule of Law*, 48 CORNELL INT'L L.J. 279, 281 (2015) (discussing examples of independent private regulation, including corporate social responsibility programs and cross-industry standards set by expert bodies like the International Organization for Standardization); Freeman, *supra* note 39, at 553 & nn.22–23 (noting that some trade associations and professional organizations have developed industry-wide self-regulatory regimes that parallel "traditional command-and-control regulation").

Masterpiece Cakeshop, but make no mistake about it: both movements aim to vindicate their own view of appropriate sex and sexuality—and shape conduct to align with this view—by imposing consequences on those who deviate from these norms. In this regard, both movements are engaging in sexual regulation.

Second, I wish to draw a distinction between privatization on the one hand and the notion of private sexual regulation on the other.²¹² Having rehearsed the standard definition of privatization in Part I, one might be inclined to observe that this arrangement does not exactly map the contours of religious exemptions and the efforts of the #MeToo movement. The standard account of privatization involves the state deputizing a private actor—usually a corporation or some other collective enterprise—to assume traditional state functions. And as importantly, when the private entity assumes those functions, it is not only at the state's behest but rather with the state's guidance as to how the functions can and should be performed.²¹³ In this regard, privatization, despite the centrality of the private actor, is by its nature organized around the state's normative agenda.

By contrast, the efforts to privately regulate glimpsed in #MeToo and *Masterpiece Cakeshop* do not proceed from an obvious delegation of authority from the state.²¹⁴ Nor do they involve an arrangement in which the state sets the tone for regulation by specifying the regulatory aims to be achieved, while the private actor complements and supports the state's regulatory agenda through private action, as described in Subpart II.A. Rather than being state-centered, *Masterpiece Cakeshop* and the #MeToo movement involve private actors taking the lead in regulating and, indeed, in regulating in furtherance of their own normative agendas.

In assuming the role of sexual regulators—and imposing consequences on those who violate particular norms—these private actors do not take their marching orders from the state, as in the traditional model of privatization.²¹⁵ Instead, they regulate in pursuit of a set of sexual norms that they themselves have articulated and hope to advance. And indeed, these norms are often in conflict with the sexual norms that the state has endorsed through law. Moreover, in regulating privately, the goal is not to simply effect the state's regulatory agenda, but rather, to

212. By “private sexual regulation,” I mean to indicate the regulation of sex and sexuality, including normative and nonnormative sex, by private actors.

213. See *supra* Part I (noting that in a traditional privatization model, the state sets the terms for the privatization arrangement).

214. However, some might argue that, in granting a religious accommodation or failing to check religious healthcare refusals, the state implicitly “delegates” authority to religious actors to discriminate in ways that the state is prohibited from doing. Likewise, some might argue that, in allowing the #MeToo movement to disregard norms of procedural fairness, the state tacitly condones these efforts in what might be understood as a public-private partnership.

215. See *supra* Part I (outlining traditional modes of privatization).

advance an entirely different normative vision—one that might rival the state’s for supremacy.

In this regard, *Masterpiece Cakeshop* and #MeToo suggest a distinct and highly visible form of private sexual regulation. The #MeToo movement is demanding a profound sea change in sexual culture, with private actors—rather than the state—leading the charge.²¹⁶ *Masterpiece Cakeshop*, for its part, is forging a similar path, attempting to utilize private actors to reinstate traditional norms of sex and sexuality that have since been displaced in favor of a more liberalized regime.²¹⁷

V. THE IMPLICATIONS OF #METOO AND *MASTERPIECE CAKESHOP*’S PRIVATE SEXUAL REGULATION

As Part II explains, the fact of private regulation is not necessarily novel. Indeed, private actors have long played a role in regulation, whether as complements to the state’s regulatory efforts or through more limited regulatory interventions aimed at spurring the state to broader action in the public sphere. More critically, private actors may function as antagonists to the state—rejecting the state’s normative agenda. This context is important, as it renders legible the distinct regulatory interventions of the #MeToo movement and religious conservatives seeking accommodations.

Both the #MeToo movement and *Masterpiece Cakeshop* are instances of private actors challenging the state’s normative regime for the regulation of sex and sexuality. However, these two efforts differ meaningfully from the ways that private actors previously have sought to challenge the state’s regulatory agenda. The Subparts that follow attempt to parse these differences while considering the implications of these new iterations of private regulation.

216. #MeToo has already seen success on this front, as more than 100 state bills related to workplace harassment have been announced during the 2018 legislative session. Amber Phillips, *While Congress Stalls, States Are Actually Doing Something About Sexual Harassment*, WASH. POST: FIX (Apr. 6, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/04/06/while-congress-stalls-states-are-actually-doing-something-about-sexual-harassment> [<https://perma.cc/5KMM-ESWU>].

217. The Alliance Defending Freedom (ADF), the Christian advocacy organization that represented Phillips in *Masterpiece Cakeshop* and many other organizations in conscience-exemption claims, has stated that its longterm goal is to “change the culture” to “reverse[] the corrosive tide of censorship against Christians” resulting from the enforcement of antidiscrimination laws against religious actors. *Who We Are*, ADF, <https://www.adflegal.org/about-us/who-we-are> [<https://perma.cc/6UHU-YPR6>]; see also ADF, *WHAT DOES RELIGIOUS FREEDOM MEAN TO YOU?* 6, 8 (2016), https://adflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/resources/about-us-resources/who-we-are/adf_signaturebrochure.pdf [<https://perma.cc/CE7Z-YPSK>].

A. #MeToo: Engaging the State

In the year since it first emerged as a vehicle of private sexual regulation, the #MeToo movement has been heralded for its innovative use of social media, particularly in light of the inadequacy of traditional methods of legal enforcement and redress.²¹⁸ But despite these innovative aspects, the #MeToo movement is, in fact, actually quite traditional in its approach to regulation and its relationship to the state—even more so than *Masterpiece Cakeshop*, as I note below.

Like the religious objectors in *Masterpiece Cakeshop*, the progressive activists of the #MeToo movement have stepped in to privately regulate in the state's stead. But even as it takes on the project of privately regulating sexual harassment and sexual assault in the workplace, #MeToo has positioned itself in a way that at once challenges the state *and* seeks to engage with the state in order to yield substantive reforms. Put more directly, it simultaneously rejects the state's attempts to remedy sexual harassment and sexual assault as ineffective while working to spur the state to action to correct—and strengthen—these initiatives.

In this regard, the #MeToo movement may in part sound in the register of the corporations who provided same-sex domestic partnership benefits in the period before marriage equality, and who currently provide paid leave policies absent government regulation requiring them to do so. But the private actions of the #MeToo movement go beyond the cultivation model glimpsed in the same-sex marriage debate. Rather than simply providing a template for action that the state might adopt going forward and passively avoiding direct engagement with the state, activists associated with the #MeToo movement have explicitly stated that the movement's goals involve *engaging* the state in a broader conversation about appropriate conduct in the workplace and the state's role in ensuring safe spaces for women and other vulnerable groups.²¹⁹ On this account, the #MeToo movement's actions are not simply about usurping the state's regulatory role and imposing consequences on those who have failed to comply with the movement's understanding of appropriate sexual conduct. Instead, the larger goal is to persuade the state to adopt this vision of appropriate sex and sexuality and use it to undergird more progressive and egalitarian laws and policies.²²⁰

218. See Abby Ohlheiser, *How #MeToo Really Was Different, According to Data*, WASH. POST (Jan. 22, 2018), <https://www.washingtonpost.com/news/the-intersect/wp/2018/01/22/how-metoo-really-was-different-according-to-data> [<https://perma.cc/8YWW-LPPP>].

219. See *About Time's Up*, TIME'S UP, https://www.timesupnow.com/about_times_up [<https://perma.cc/Z4ES-HU69>] (stating the initiative's goals are to “partner with leading advocates for equality and safety to improve laws, employment agreements and corporate policies . . . and enable more women and men to access our legal system to hold wrongdoers accountable”).

220. *About, supra* note 192 (noting that some of the movement's aims are to

Accordingly, the #MeToo movement's posture vis-à-vis the state is somewhat different from that of corporations that began offering domestic partnership benefits or paid leave programs. Armed with considerable social and financial capital, the corporations were in a position to offer employees some measure of workplace equity and, in so doing, to facilitate an ongoing conversation about LGBTQ equality and same-sex marriage or the importance of providing employees leave to care for newborn children.²²¹ But these corporations did not set out with the intention of engaging or persuading the state to legalize same-sex marriage or enact public leave policies.²²² Their own relative market power allowed them to be able to shape workplace norms within the private sphere. Over time, their actions, in tandem with public efforts to expand public domestic partnership registries and benefits at the state and municipal levels, eventually helped tip the balance in favor of same-sex marriage.²²³

By contrast, while the #MeToo movement has harnessed the power and potential of social media and public opinion, it lacks the market power and capital that these corporations were able to bring to bear on the issue of LGBTQ equality. That is, unlike the corporations, which could continue to cultivate pockets of LGBTQ equality within their private workplaces, the #MeToo movement likely cannot achieve the broader impact it seeks independently.²²⁴ While it has been effective at rooting

“disrupt the systems that allow for the global proliferation of sexual violence” as well as to “reframe and expand the global conversation around sexual violence to speak to the needs of a broader spectrum of survivors”).

221. See Cadei, *supra* note 77 (discussing how corporations' moves to act on social issues have “ma[de] the business community the sort of ‘big tent’ political force that neither major political party can claim to be”).

222. See Phil Wahba, *From Walmart to J.C. Penney, Retail Reflect Shifting U.S. Views on Gay Rights*, FORTUNE (June 26, 2015), <http://fortune.com/2015/06/26/retailers-gay-rights-supreme-court> [<https://perma.cc/D9GK-KBRE>] (arguing that, even if businesses did not sincerely want to support the gay rights effort, there was sufficient financial incentive to support them, including wooing millennial consumers and attracting talent).

223. See Katie Lobosco, *How Businesses Rallied for Same-Sex Marriage*, CNN MONEY (June 26, 2015, 6:56 PM), <https://money.cnn.com/2015/06/26/news/companies/same-sex-marriage-business/index.html> [<https://perma.cc/C2MH-NSVK>]; Socarides, *supra* note 77.

224. See Marci A. Hamilton, *Seven Changes That Would Empower the #MeToo Movement*, NEWSWEEK (Nov. 25, 2017, 9:31 AM), <https://www.newsweek.com/seven-changes-would-empower-metoo-movement-722283> [<https://perma.cc/V5SP-4Z2J>] (arguing that, while publicly shaming offenders is an effective short-term mechanism, longterm change cannot be achieved without disrupting the power structure in place that enabled offenders through legal reform); Rafia Zakaria, *The Legal System Needs to Catch Up with the #MeToo Movement*, NATION (Apr. 18, 2018), <https://www.thenation.com/article/the-legal-system-needs-to-catch-up-with-the-metoo-movement> [<https://perma.cc/MD2R-VF69>] (contending that #MeToo can only go beyond affecting powerful perpetrators to reach the “ordinary harasser and the ordinary harassed” if it spurs legislative action).

out offenders, #MeToo has been unwieldy and subject to myriad criticism even from within its ranks.²²⁵ And indeed, at some point, the criticisms of #MeToo—concerns about due process and vigilantism—may make this kind of extralegal regulation unsustainable in the long term. Unlike a corporation armed with the market power and clout to create and maintain a zone of private regulation as long as it wishes, #MeToo cannot maintain indefinitely the private regulatory zone it has created through its assumption of the state’s regulatory role and its use of social media platforms.²²⁶ To advance its vision of appropriate sex and sexuality and to achieve meaningful change, #MeToo must engage the state. And indeed, those who have led the movement and its related initiatives have from the beginning been upfront about the need—and desire—to engage the state in a broader program of reform.²²⁷ Thus, while #MeToo is not the

225. See, e.g., Elizabeth Bartholet, *#MeToo Excesses*, HARV. CRIMSON (Jan. 16, 2018), <http://www.thecrimson.com/article/2018/1/16/bartholet-metoo-excesses> [<https://perma.cc/BYG8-4AR4>]; Masha Gessen, *When Does a Watershed Become a Sex Panic?*, NEW YORKER (Nov. 14, 2017), <https://www.newyorker.com/news/our-columnists/when-does-a-watershed-become-a-sex-panic> [<https://perma.cc/6ZWL-NSMS>]; Daphne Merkin, *Publicly, We Say #MeToo. Privately, We Have Misgivings*, N.Y. TIMES (Jan. 5, 2018), <https://www.nytimes.com/2018/01/05/opinion/golden-globes-metoo.html> [<https://perma.cc/UKD6-CHLN>]; Valeriya Safronova, *Catherine Deneuve and Others Denounce the #MeToo Movement*, N.Y. TIMES (Jan. 9, 2018), <https://www.nytimes.com/2018/01/09/movies/catherine-deneuve-and-others-denounce-the-metoo-movement.html> [<https://perma.cc/2BAY-G7QN>]; Andrew Sullivan, *It’s Time to Resist the Excesses of #MeToo*, N.Y. MAG.: INTELLIGENCER (Jan. 12, 2018), <http://nymag.com/daily/intelligencer/2018/01/andrew-sullivan-time-to-resist-excesses-of-metoo.html> [<https://perma.cc/2XFY-NNKE>]; Emily Yoffe, *Why the #MeToo Movement Should Be Ready for a Backlash*, POLITICO (Dec. 10, 2017), <https://www.politico.com/magazine/story/2017/12/10/yoffe-sexual-harassment-college-franken-216057> [<https://perma.cc/7U9M-AMM2>].

226. See Joan C. Williams & Suzanne Lebsack, *Now What?*, HARV. BUS. REV. (Feb. 9, 2018), <https://hbr.org/cover-story/2018/01/now-what> [<https://perma.cc/6EUX-WGKY>] (“Translating outrage into action, however, requires moving beyond hashtags toward new norms of workplace conduct.”).

227. During a discussion about the future of the #MeToo movement, founder Tarana Burke told National Women’s Law Center President and CEO Fatima Goss Graves, “We need laws and policies [W]e need people who are thinking about that all the time.” National Women’s Law Center, FACEBOOK (Dec. 4, 2017), <https://www.facebook.com/nwlc/videos/10155948672379313> [<https://perma.cc/B9RS-6CY7>]; see also Charlotte Alter, *‘Every Woman Has a Story.’ How Women Are Turning Their Rage into Political Action*, TIME (Oct. 29, 2017), <http://time.com/5001824/me-too-womens-convention> [<https://perma.cc/2KF2-GWYQ>] (positing that anger over the pervasive sexual harassment and sexual assault exposed by the #MeToo movement was “propelling women into civic engagement in unprecedented numbers”); Ashley Lisenby, *#MeToo Founder Talks the Future of the Movement at Webster University Lecture*, ST. LOUIS PUB. RADIO (Feb. 20, 2018), <http://news.stpublicradio.org/post/metoo-founder-talks-future-movement-webster-university-lecture> [<https://perma.cc/7HP2-7LS8>] (noting that Tarana Burke saw legislation and policy change as goals of the #MeToo movement); Chris Snyder & Linette Lopez, *Tarana Burke on Why She Created the #MeToo Movement—And Where It’s Headed*, BUS. INSIDER (Dec. 13,

first iteration of private actors seeking to regulate in furtherance of a new normative agenda, it is perhaps distinct in its desire—and *need*—to engage the state in an ongoing dialogue about regulating appropriate sexual conduct.

This insight not only distinguishes #MeToo from other efforts to cultivate new sexual norms, it also illuminates a striking difference between #MeToo and *Masterpiece Cakeshop*. For although these two movements are similar in their efforts to privately regulate in furtherance of their own vision of appropriate sex and sexuality, they differ substantially in the ways in which they engage with the state. The Subpart that follows takes up this thread in its discussion of *Masterpiece Cakeshop*.

B. *Masterpiece Cakeshop: Displacing the State*

While the #MeToo movement has been explicit about its desire to engage the state, *Masterpiece Cakeshop* and the conservatives who seek religious accommodations appear less interested in fostering a dialogue with the state about appropriate sexual norms.²²⁸

This indifference to the state is perhaps unsurprising. The liberalization of sexual culture makes clear that conservatives have lost ground in terms of their ability to vindicate their vision of traditional sexuality through majoritarian politics.²²⁹ Instead, the majority hews to a more secular vision and, accordingly, has refashioned the state's regulatory efforts in favor of a more liberalized sexual culture.²³⁰

2017 10:16 AM), <https://www.businessinsider.com/how-the-metoo-movement-started-where-its-headed-tarana-burke-time-person-of-year-women-2017-12> [<https://perma.cc/VB9L-DCUL>] (“The #MeToo Congress bill gets rid of the forced, 90-day cooling-off period that people who work on Capitol Hill have to have before they can file a sexual harassment claim. When that’s passed, that will set a precedent, hopefully, for the country.”).

228. Indeed, both Phillips himself and the ADF have publicly positioned Phillips as a target of state persecution. See Maureen Collins, *3 Myths About the Masterpiece Cakeshop Ruling Debunked*, ADF (June 15, 2018), <http://www.adflegal.org/detail-spaces/blog-details/allianceedge/2018/06/15/3-myths-about-the-masterpiece-cakeshop-ruling-debunked> [<https://perma.cc/Z2YL-JPGN>] (“This time the government has gone too far; we will not stand idly by while people of faith are targeted by the very government that is supposed to be protecting their freedoms.”); see also Brief for Petitioners, *supra* note 174, at 3 (arguing that “the Commission punished [Phillips], demeaned his beliefs, and marginalized his place in the community”).

229. Laura Turner, *What Happens When the ‘Moral Majority’ Becomes a Minority?*, ATLANTIC (Sept. 27, 2015), <https://www.theatlantic.com/politics/archive/2015/09/end-of-moral-majority/407359> [<https://perma.cc/N8TE-KXWP>].

230. See Frank Newport, *Americans Continue to Shift Left on Key Moral Issues*, GALLUP (May 26, 2015), <https://news.gallup.com/poll/183413/americans-continue-shift-left-key-moral-issues.aspx> [<https://perma.cc/3UYU-43LB>] (noting the current surging and in some cases record-high moral approval among Americans of many types of progressive sexual conduct, including same-sex relationships, divorce, and sex between unmarried partners). We might understand the events of the last sixty years not simply as an issue of the state abdicating its traditional role in regulating sex and

This shift helps contextualize conservatives' posture toward the state and the approach that they use in seeking religious accommodations.²³¹ As Douglas NeJaime and Reva Siegel explain, religious actors like *Masterpiece Cakeshop's* Jack Phillips have two options for challenging the cultural and social shifts to which they object. On the one hand, Phillips and other "[r]eligious actors can evangelize by advocating for laws on abortion or marriage that conform to traditional and religious values."²³² That is, using the democratic process, they can try to cobble together a majority to reinstate their more traditional view of sex and sexuality. Of course, it may be increasingly difficult for religious conservatives to harness the majority needed to roll back the cultural changes that have unfolded over the last sixty years.

According to NeJaime and Siegel, recognizing that they will likely be unsuccessful—at least in the short term—in pressing for a legislative return to a more traditional sexual culture, religious conservatives have instead pursued a different path—to “evangelize by seeking religious exemptions from laws of general application that they believe contravene traditional and religious values.”²³³ Put differently, “[w]ithout change in numbers or belief, religious actors can shift from *speaking as a majority* seeking to enforce traditional morality to *speaking as a minority* seeking exemptions from laws that offend traditional morality.”²³⁴

With this in mind, religious conservatives have no incentive to dialogue with the state. The state's normative agenda reflects a new majority of which they are not a part. And because the state does not support their preferred normative agenda, religious conservatives have instead framed their request to the state in more minimal terms. Unlikely to see the state enforce its preferred regulatory agenda, these conservatives simply ask that the state carve out space for them to exercise their religious beliefs in a limited (private) context.²³⁵

But recall that the space that these conservatives seek is not *new* space. Indeed, it is part of the existing terrain that the state once regulated in the context of sex and sexuality—that is, a piece of the public sphere. Reconceptualized in this way, conservatives' request for an accommodation is a request for the state to cede a portion of the public sphere to these private actors who may subsequently recharacterize that

sexuality but rather regulating in furtherance of a different normative agenda, one that favors sexual privacy (and a more limited role for the state) and LGBTQ equality.

231. See Turner, *supra* note 229.

232. NeJaime & Siegel, *supra* note 22, at 2552.

233. *Id.* at 2552–53.

234. *Id.* at 2553.

235. Brief for Petitioners, *supra* note 174, at 3 (arguing that the case centered on “Phillips's freedom to part ways with the current majority view on marriage and to create his wedding cakes consistently with his ‘decent and honorable’ religious beliefs”).

space as a private zone suitable for imposing and enforcing their own regulatory agendas.

In this regard, the request for religious accommodation sounds in the register of the responses to *Buchanan v. Warley* and *Brown v. Board of Education*, where white Southerners resisted the mandate to integrate by appealing to the private sphere—restrictive covenants that prevented property from being sold to minorities and the creation of private “segregation academies” intended as refuges for white students fleeing integrated public schools.²³⁶ And as with restrictive covenants and “segregation academies,” where Southerners’ resistance to integration engaged the state only passively—through judicial enforcement of restrictive covenants and subsidization of segregation academies as tax exempt nonprofits²³⁷—religious conservatives do not require the state’s active engagement in the effort to reentrench traditional sexual mores. All that they require to reinstate their favored vision of traditional sexual mores is the state’s “accommodation.”²³⁸

When viewed through this historical lens, the implications of religious accommodations seem more obvious—and more troubling. The grant of an accommodation is essentially the recharacterization of public space, where the state and its laws hold sway, into private space, where private actors may regulate their own vision of appropriate sex

236. See *supra* Subpart IV.C (discussing how private actors have historically challenged the state). The fact that the request for religious accommodation sounds in the register of past resistance to residential and school integration suggests the degree to which private regulation is often deployed to resist civil rights progress. I do not wish to minimize these commonalities, as I think they are vitally important for understanding the changing dynamics of sexual regulation. Indeed, in calling attention to this common response across distinct issue areas, I hope to make clear that issues of sex and sexuality are part of the ongoing struggle for civil rights—and should be understood as such—even if these issues are often viewed as distinct from more traditional civil rights fare.

237. See *id.*; see also William N. Eskridge, Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 675–77 (2011) (discussing the ways religious fundamentalists attempted to persuade the government to give segregation academies tax-exempt status); Helen Hershkoff & Adam S. Cohen, *School Choice and the Lessons of Choctaw County*, 10 YALE L. & POL’Y REV. 1, 6–8 (1992) (discussing various ways the state supported segregation academies).

238. See Brief for Petitioners, *supra* note 174, at 14 (framing the issue as “[Phillips] seek[ing] to live his life, pursue his profession, and craft his art consistently with his religious identity” away from governmental compulsion to act counter to his beliefs). Prominent religious organizations have also taken pains to frame these accommodations as minor intrusions on public life. See, e.g., Mark David Hall, *Religious Accommodations and the Common Good*, HERITAGE FOUND. (Oct. 26, 2015), <https://www.heritage.org/civil-society/report/religious-accommodations-and-the-common-good> [<https://perma.cc/Y9ZC-2D7N>] (“[T]here is little evidence that . . . accommodations have harmed other individuals or kept either the states or the nation from meeting significant policy objectives.”).

and sexuality. It is this transmutation of the public sphere into private space that allows the private actor's vision of appropriate sexuality to be vindicated—even over the majority's preference for more liberalized sexual norms.²³⁹

And meaningfully, in the contemporary context of *Masterpiece Cakeshop*, it remains to be seen whether the state will resist these efforts to expand the private sphere, as the federal government did during the Civil Rights Movement.²⁴⁰ With the state's role uncertain, this recasting of public space into private space portends the reclamation of the public sphere by private actors. As noted earlier, the threat that lies at the heart of *Masterpiece Cakeshop* is the threat of aggregation.²⁴¹ By himself, Jack Phillips is merely one baker who refuses to bake cakes for same-sex weddings. For some, Phillips's refusal is discomfiting but not necessarily alarming in the way of some more egregious and overt act of discrimination—say, for example, the burning of a cross in an African American's front yard.²⁴² However, the danger is not in Jack Phillips's individual refusal taken alone. A thousand Jack Phillipses armed with religious accommodations have the potential to create a network of refusals that would make it virtually impossible for LGBTQ persons to plan a wedding or, indeed, to participate in many quotidian aspects of public life.²⁴³

Of course, some might argue that this kind of aggregation is less alarming because these accommodations are sought by individuals, and

239. Newport, *supra* note 230; see Turner, *supra* note 229.

240. As discussed in Subpart II.C, *supra*, during the Civil Rights Movement, the federal government rebuked efforts to expand the private sphere for private discrimination in defiance of state-endorsed norms of equality. Through the imposition—and defense—of antidiscrimination statutes and a refusal to enforce racially restrictive covenants, the federal government resisted efforts to undermine the new public norms of integration and equality.

241. See *supra* Subpart III.A (discussing how religious exemptions may work in concert to create a network of refusals).

242. In *Virginia v. Black*, members of the Ku Klux Klan, who had burned a cross in the yard of a black neighbor, challenged Virginia's cross-burning statute on First Amendment grounds. 538 U.S. 343 (2003). The Court found that, while statutes banning cross burning may be permissible under the First Amendment, the Virginia statute was facially unconstitutional because it presumed that burning a cross in public view was *prima facie* evidence of an intent to intimidate. *Id.* at 367.

243. See Brief for the Central Conference of American Rabbis et al. as Amici Curiae in Support of Respondents at 31, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111) (arguing that if “something as attenuated from actual religious observance as a cake sold by a bakery open to the public may trigger an exemption from neutral enforcement of a public accommodation law, surely florists, caterers, venue owners, and invitation printers . . . will assert their own right to a constitutional exemption”); see also Brief of Lambda Legal Defense and Education Fund, Inc. et al. as Amici Curiae in Support of Respondents at 8–9, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (identifying over a thousand instances in which LGBTQ individuals had experienced discrimination in public accommodations).

in this regard, they each may have a bespoke quality that defies the threats that aggregation poses.²⁴⁴ While this might be true in the abstract, in practice, these requests for accommodation are not individual in the strictest sense but rather are part of a coordinated social movement aimed at securing space for the faithful to object to a range of widely accepted sexual practices from contraception to abortion to same-sex marriage.²⁴⁵ The aggregative effect of religious accommodation is to *shrink* the public sphere—and the domain of state-endorsed laws and norms—while *expanding* the private sphere and the authority of private actors who operate outside of the state’s reach.²⁴⁶

244. See Brief of Concerned Women for America as Amici Curiae in Support of Petitioners at 2–5, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (arguing that market forces, including overwhelming public support for LGBTQ rights, would prevent religious exemptions from having aggregate anti-LGBTQ effect); Brief of Law and Economics Scholars as Amici Curiae in Support of Petitioners at 22, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (same); Brief of Mark Regnerus et al. as Amici Curiae in Support of Petitioners at 6, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (contending that individual conscience exemptions would not “open[] the door to widespread discriminatory acts”).

245. NeJaime & Siegel, *supra* note 22, at 2548–52.

246. Some scholars view the interplay between religious accommodations and the public/private divide in ways that are distinct, but nonetheless related, to the view I offer here. As Joseph Singer argues, litigation of the sort seen in *Masterpiece Cakeshop* is an attempt to unsettle—and contest—the public understanding of markets that emerged in the wake of the Civil Rights Act of 1964. See Joseph William Singer, *We Don’t Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 930–32 (2015) (noting that the arguments used by segregationists to exclude customers before the passage of the Civil Rights Act of 1964 have “been revived by businesses seeking to deny services to LGBT customers”); see also Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. REV. 1283, 1293 (1996) (“In 1964, it was still plausible to argue that businesses had a right to exclude African-American customers simply because the businesses were property owners and because one of the rights associated with property was the right to exclude. Today in 1996, this argument is no longer acceptable. . . .”). Likewise, NeJaime and Siegel argue that *Masterpiece Cakeshop* represents an effort to reinvigorate and reintegrate religion in the public sphere. See Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 YALE L.J.F. 201, 213 & n.52–53 (2018). These views are not inconsistent with my view that *Masterpiece Cakeshop*—and religious accommodations more generally—are an attempt to recast portions of the public sphere as private space. All three understandings underscore the tension between private property, markets, and public accommodations law. See, e.g., Freeman, *supra* note 39, at 564 & n.81 (“Critical legal scholars, building on legal realism, successfully exposed the incoherence of the public/private divide, revealing that a purely private realm exists only as a legal construct.”); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN L. REV. 1, 13 (1991) (“The familiarity of the public-private distinction obscures the contingent and political character of the initial designation, and subsequent challenges to the subordinating effects of such a ‘neutral’ distinction are then criticized as ‘political.’”); Kay, *supra* note 46, at 334 (“The overwhelming weight of published academic opinion has rejected the premise that legal doctrine can rest on a supposed distinction between public and private actions. Even in conduct in which no state official participates, it is

In this regard, *Masterpiece Cakeshop* presents a very different approach to engaging the state than does #MeToo. To the extent the #MeToo movement has usurped the state's regulatory role—and the space in which that role is exercised—its colonization is understood as temporary and finite. In time, #MeToo explicitly contemplates returning its regulatory authority and terrain to the state, which will again take the lead in regulating sexual harassment and sexual assault, ideally with a normative agenda that bears #MeToo's imprimatur.

By contrast, religious conservatives appear less concerned with relinquishing regulatory authority and terrain back to the state, or at least, they appear less publicly concerned about the state taking the lead in such a handover. This is not to say that religious conservatives are not interested in effecting normative changes in the public sphere. Indeed, they have made clear in the context of abortion that religious accommodations are part of a multipronged effort to roll back *Roe v. Wade*—and to return to the pre-1973 status quo where abortion was criminally proscribed throughout the United States.²⁴⁷ With this in mind, religious accommodations aimed at same-sex marriages and LGBTQ rights might well be part of a broader effort to undermine *Obergefell v. Hodges* and *Lawrence v. Texas*, the two Supreme Court decisions that legalized same-sex marriage and decriminalized same-sex sexual conduct, respectively.²⁴⁸

Rather, when I suggest that religious conservatives appear less concerned with relinquishing regulatory authority and terrain back to the state, I mean only that, unless and until overturning *Obergefell* and *Lawrence* seems both possible and imminent, private regulation can effectively provide conservatives with the substantive outcome that they seek—a diminished public sphere and the opportunity to impose their vision of appropriate sex and sexuality on others in a more expansive private sphere.²⁴⁹ By facilitating private sexual regulation, state-granted

possible to discern some decision of the state.”).

247. NeJaime & Siegel, *supra* note 22, at 2535–39; *see also Refusing to Provide Health Services*, GUTTMACHER INST.: STATE LAWS & POL'YS, [HTTPS://WWW.GUTTMACHER.ORG/STATE-POLICY/EXPLORE/REFUSING-PROVIDE-HEALTH-SERVICES](https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services) [<https://perma.cc/F2GA-WJUL>] (highlighting the “patchwork of federal laws” that explicitly allow health care providers to refuse to provide abortion-related care to patients).

248. *See* Louise Melling, *Will Obergefell Be the New Roe?*, SLATE (June 5, 2018, 1:41 PM), <https://slate.com/news-and-politics/2018/06/the-masterpiece-cakeshop-decision-will-not-deter-opponents-of-lgbt-equality.html> [<https://perma.cc/5SCN-FQZA>]; *supra* note 107; *see also* RYAN T. ANDERSON ET AL., *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* 112–13 (2017) (arguing that “the law after *Obergefell* should treat those who believe that marriage unites man and woman . . . as it has treated prolife hospitals, doctors, and others in the wake of *Roe v. Wade*”).

249. Indeed, prominent Christian conservatives have said that a direct challenge to *Obergefell* is likely several years away, while a facial challenge to abortion rights under *Roe* may come sooner. *See* Liam Stack & Elizabeth Dias, *Why the Supreme Court Opening Could Affect Gay Marriage As Well As Abortion*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/us/politics/gay-marriage-supreme-court>.

religious accommodations have the potential to undermine not only antidiscrimination laws but also an entire public apparatus structured to vindicate public values of liberty and equality.

This is all to say that while #MeToo and *Masterpiece Cakeshop* both illustrate the power of private sexual regulation, they do so in strikingly different ways. #MeToo sees the state as a necessary, if recalcitrant, partner in its efforts to combat sexual harassment and sexual assault and to cultivate a more progressive sexual culture. Its usurpation of the state's regulatory role and ambit is in furtherance of this dialogical mission. *Masterpiece Cakeshop*, by contrast, does not explicitly seek a partnership with the state. But in providing accommodations—and in so doing, facilitating the diminution of the public sphere and the expansion of the private sphere—the state is functioning, however unwittingly, as a crucial partner in the effort to reinstate the traditional sexual mores that held sway a generation ago.

CONCLUSION

Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons perceived that when society is itself the tyrant—society collectively, over the separate individuals who compose it—its means of tyrannizing are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression. . . .

—John Stuart Mill, *On Liberty*²⁵⁰

In his 1859 book *On Liberty*, John Stuart Mill warned of the “tyranny of the majority.”²⁵¹ As Mill explained, democracy’s inherent weakness was the capacity of the majority to impose its will and, in the process, subjugate minority voices.²⁵² Critically, Mill’s understanding of the tyranny of the majority was not limited to the will of people expressed through state action. Mill recognized that, in addition to the acts done by “the hands of its political functionaries,” individuals were well equipped to “execute [their] own mandates.”²⁵³

Though Mill spoke collectively of the “majority,” his warning contemplated individual private actors—“the separate individuals who

html [<https://perma.cc/U7CA-SBB9>] (quoting Mathew Staver, chairman of the conservative Liberty Counsel).

250. JOHN STUART MILL, *ON LIBERTY* 13 (2d ed. 1859).

251. *Id.*

252. *Id.*

253. *Id.*

compose [society]”²⁵⁴—and the dangers of private action—“despotism of custom”²⁵⁵—aimed at regulating the conduct of others. As Mill observed, in acting independently to pursue their own mandates, individuals might engage in a kind of regulatory activity “more formidable” than anything the state might devise.²⁵⁶ For Mill, the threat of private action lay in its subtlety and invidiousness. Unlike the actions of the state, private action could be difficult to avoid and, indeed, “penetrat[ed] much more deeply into the details of life, enslaving the soul itself.”²⁵⁷

In many ways, Mill’s observations are prescient. We live in a time where private actors exercise significant regulatory power. Technological innovations, like the development of social media, a proliferating meme culture, and the widespread availability of the Internet, have allowed individuals and organizations alike to quickly galvanize support and advocate for new normative agendas.²⁵⁸

254. *Id.*

255. *Id.* at 126.

256. *Id.* at 13.

257. *Id.*

258. For a discussion on the role of social media and technology in modern social movements, see generally Stacey B. Steinberg, *#Advocacy: Social Media Activism’s Power to Transform Law*, 105 Ky. L.J. 413 (2016). The response to the Marjory Stoneman Douglas High School shootings in Parkland, Florida, is exemplary of this trend. In February 2018, a former student at Marjory Stoneman Douglas High School shot and killed seventeen people at the school with an assault rifle. Patricia Mazzei, *Parkland Gunman Carried Out Rampage Without Entering a Single Classroom*, N.Y. TIMES (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/us/parkland-shooting-reconstruction.html> [<https://perma.cc/R48J-6XH6>]. In the aftermath of the shooting, Parkland students and parents began organizing for more rigorous gun control laws—indeed to “rewrite the entire national dialogue about school shootings.” Kelli Kennedy, *Parkland Siblings Detail #NeverAgain Inception in New Book*, SEATTLE TIMES (published June 19, 2018, 3:28 PM; updated June 20, 2018, 8:09 AM), <https://www.seattletimes.com/nation-world/apxparkland-siblings-detail-neveragain-inception-in-new-book> [<https://perma.cc/VUM2-3GD2>]; NEVER AGAIN, <https://neveragain.org> [<https://perma.cc/AV48-EDJU>]; see also Emily Witt, *How the Survivors of Parkland Began the Never Again Movement*, NEW YORKER (Feb. 19, 2018), <https://www.newyorker.com/news/news-desk/how-the-survivors-of-parkland-began-the-never-again-movement> [<https://perma.cc/7LBA-2RFH>]. This included social media campaigns aimed at engaging the state in enacting stricter gun control policies, while also pressuring private actors, like retail outlets, to subscribe to their gun-control agenda. Their efforts also included largescale initiatives like the March for Our Lives, a gun-control demonstration organized by the students through social media that drew a crowd of 800,000 attendees. Katie Reilly, *Here’s the Size of the March for Our Lives Crowd in Washington*, TIME (Mar. 24, 2018), <http://time.com/5214405/march-for-our-lives-attendance-crowd-size> [<https://perma.cc/U7GE-ZLP8>]. When Laura Ingraham, a conservative television host, disparaged the group, its aims, and one of its leaders on-air, the leader quickly mobilized social media to successfully petition advertisers to rescind advertising support for Ingraham’s show. See David Hogg (@davidhogg111), TWITTER (Apr. 17, 2018, 1:08 PM), <https://twitter.com/davidhogg111/status/986335537568116737> [<https://perma.cc/7MT3-UEDN>] (calling for a boycott of Vanguard Group and BlackRock); see also Adam Gabbatt, *NoRA: Activists and Stars Launch Gun Control Campaign*

Despite the rise of private actors wielding considerable authority in shaping behavior and norms—regulating—there has been very little effort to map and theorize these developments and consider their consequences. This Article is an effort to not only acknowledge and grapple with the fact of private regulation but to contemplate the prospect of private regulation in an arena where it is likely to be quite powerful—the regulation of sex and sexuality. The very fact that much of sex and intimate life is considered *private* and individualized and viewed as appropriately beyond the state’s purview makes it especially susceptible to regulatory entreaties from private actors.

As this Article suggests, private sexual regulation may take a variety of forms—some that seek to engage the state and others that enlist the state as a partner, however passively, in its regulatory efforts. Regardless of the form that this kind of regulation takes—and whether the substantive outcomes sought are normatively appealing to various audiences—the fact of these regulatory efforts demands greater attention and study. This Article is an invitation to do both.

to *Battle NRA*, GUARDIAN (Apr. 21, 2018, 9:00 AM), <https://www.theguardian.com/us-news/2018/apr/21/resistance-now-nra-nora-gun-control-activism> [<https://perma.cc/8WMX-58N9>] (discussing the development of the No Rifle Association Initiative, which included both celebrities and Parkland students as part of an NRA boycott).