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Fare Trade: Reconciling Public Safety and Gender Discrimination in Single-Sex Ridesharing

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INTRODUCTION

The expansive growth of ridesharing companies like Uber and Lyft has changed the landscape of transportation services. These companies allow individuals to request a ride almost anywhere from a vetted driver by using a mobile app and paying for that ride online.¹ The industry leaders are Uber and Lyft, whose modes of service differ only slightly from each other. Uber is the world's most valuable company backed solely by private venture capital and dominates the ridesharing industry in the United States.² But based on a number of allegations, customer experiences, and reports, the service might be unsafe for women.³ Uber has also been accused of grossly underreporting the incidence of sexual assault complaints lodged by its customers.⁴

New competitors now plan to offer ridesharing by and for women only, as a kind of "Uber for women." Their goal is to provide a safer ride for both drivers and customers. Yet their business model might be illegal under state and federal law. This Article argues that legislative and judicial exceptions should be made for women-only transportation services, allowing sex-based distinctions in both hiring drivers and accommodating riders, because the social value of public safety outweighs the interest of gender equality in this unique context. Single-sex rideshare companies should be permitted to engage in gender discrimination when they can demonstrate that the purpose and effect of such discrimination is to improve public safety.

See Jane Go, based in Orange County, California, is one of the new single-sex ridesharing companies.⁵ Its proposed business model raises at least two potential legal issues, one relating to drivers and the other relating to riders. The first is whether Title VII of the Civil Rights Act's prohibition on gender discrim-

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1. See LYFT, <http://www.lyft.com> [<http://perma.cc/F8CJ-DFVL>]; UBER, <http://www.uber.com> [<http://perma.cc/VL9N-NYGC>].
2. Jack Nicas, *Alphabet Unveils Program for Carpooling via App Waze, Fraying Ties with Uber*, WALL ST. J. (May 17, 2016), <http://www.wsj.com/articles/alphabet-unveils-program-for-carpooling-via-app-fraying-ties-with-uber-1463428668> [<http://perma.cc/RN2H-XMBR>].
3. See discussion *infra* Section I.A.
4. Charlie Warzel & Johana Bhuiyan, *Internal Data Offers Glimpse at Uber Sex Assault Complaints*, BUZZFEED (Mar. 6, 2016, 1:34 PM), http://www.buzzfeed.com/CharlieWarzel/internal-data-offers-glimpse-at-uber-sex-assault-complaints?utm_term=.udjND303#.muNJ5LQWQ [<http://perma.cc/LP62-HN3D>].
5. *About Jane*, SEE JANE GO, <http://seejanego.co/#about> [<http://perma.cc/QC25-XLYG>].

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ination in employment prevents See Jane Go from refusing to employ men as drivers. If its employment practices were challenged as a violation of that law, would See Jane Go be able to argue successfully that being a woman is a bona fide occupational qualification (BFOQ)? Could See Jane Go avoid liability by demonstrating that Title VII's employment restrictions are irrelevant because its drivers are independent contractors rather than employees? The second question is whether See Jane Go's refusal to allow men to hail rides in its cars amounts to gender discrimination in public accommodation, in violation of most states' civil rights laws. While these are separate legal issues, the success of a single-sex rideshare company depends on their concurrent resolution. Meeting the goal of increased safety, at least in terms of protection from sexual assault, for women drivers depends in large part on the ability to limit ridership to women. Women riders, in turn, are far more likely to feel and arguably be safer with only women drivers. Unfavorable resolution of only one of these legal issues may moot the argument for the single-sex rideshare model as a whole.

This Article provides an overview of the basic legal challenges presented by single-sex ridesharing and proposes solutions in order to develop a more robust academic dialogue about the best approach to this emerging field. It suggests that the likely legal prohibitions on both the hiring and service aspects of a women-only ridesharing service do more harm than good. Rather than promoting gender equality, these prohibitions perpetuate a dangerous work environment for women drivers and a safety risk for women riders. Adopting a more nuanced judicial approach to reviewing cases of allegedly discriminatory hiring and a more sophisticated legislative approach to accommodating ridesharing customers, allowing in both cases for the exclusion of men, promotes the interests of women by increasing their public safety, a critical social interest. The minimal costs of removing legal barriers to a women-only ridesharing service would be outweighed by the social benefit of reducing assaults on women in both the front and back seats.⁶

This Article proceeds in four parts. Part I describes the public safety problems posed by rideshare services for both female drivers and female customers and the ways in which the industry leaders' response to those problems exacerbates them. Part II examines the legal restrictions on sex-based selectivity in hiring drivers and the rationales for exceptions to those restrictions set out in leading case law, including the BFOQ defense, and argues for a public safety

6. While sexual assault happens to both men and women, the majority of sexual assault victims are women. *Victims of Sexual Violence: Statistics*, RAINN, <http://www.rainn.org/statistics/victims-sexual-violence> [<http://perma.cc/W62J-QP4Y>]. This appears to be so in transportation services as well. For example, of over one hundred media reports of sexual assault and harassment, only two stories describe an allegation of sexual assault on males (both by male drivers). *'Ridesharing' Incidents: Reported List of Incidents Involving Uber and Lyft*, WHO'S DRIVING YOU, <http://www.whosdrivingyou.org/rideshare-incidents> [<http://perma.cc/6EL3-CDGR>]. For this reason, this Article focuses on the safety concerns of women rather than of men.

exception to the prohibition on gender discrimination in employment in the narrow context of women's ridesharing companies. Part III explores the legal prohibitions on gender discrimination in public accommodation and its application to ridesharing companies and proposes judicial and legislative solutions. Part IV suggests areas for further research, including the collection of additional data and the study of single-sex ridesharing practices in other countries, before the issues analyzed in this Article can be conclusively resolved.

I. SAFETY DIFFERS BY GENDER IN GROUND TRANSPORTATION

Media attention has focused on the growing threat to women in the ridesharing context. There have been high-profile reports of assault by Uber and Lyft drivers in cities across the country, including Boston, New York, Washington D.C., Los Angeles, and Orlando.⁷ While there are no federal government records of the incidence of violence involving taxi and rideshare drivers, other studies suggest that taxi and rideshare violence is on the rise.⁸ It is therefore reasonable for women to feel unsafe when accepting rides from male strangers, even those presumably vetted as drivers by a ridesharing company, because they are afraid of being sexually assaulted.

A. *Ground Transportation Is More Dangerous for Women Passengers*

Much of the violence reported in ridesharing and taxis, especially rapes, attempted rapes, sexual assaults, and sexual harassment, affects women more than men.⁹ Some private organizations are collecting and publicizing examples

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7. See, e.g., Adrienne LaFrance & Rose Eveleth, *Are Taxis Safer Than Uber?*, ATLANTIC (Mar. 3, 2015), <http://www.theatlantic.com/technology/archive/2015/03/are-taxis-safer-than-uber/386207/> [<http://perma.cc/Z6LX-5YZT>]; Eric Moskowitz, *Uber Driver Charged with Rape of Everett Teen*, BOS. GLOBE (Aug. 11, 2016), <http://www.bostonglobe.com/metro/2016/08/11/uber-driver-charged-with-rape-everett-police/mUvbLnjznEMoZ7tfcBEoej/story.html> [<http://perma.cc/6JDU-RR92>]; *Uber Driver Faces Charges of Sex Assault on Woman in Orlando*, WFTV (Jun. 29, 2016, 2:50 PM), <http://www.wftv.com/news/local/uber-driver-faces-charges-of-sex-assault-on-woman-in-orlando/370348086?> [<http://perma.cc/6CWX-422R>].
 8. See *infra* text accompanying notes 12 and 13.
 9. See *Victims of Sexual Violence: Statistics*, *supra* note 6 (noting that ninety percent of adult rape victims are female and that “[f]emales ages 16–19 are 4 times more likely than the general population to be victims of rape, attempted rape, or sexual assault”). According to the CDC, nearly twenty percent of women have been raped and nearly forty-four percent of women have experienced other forms of sexual assault in their lifetimes. *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011*, CTRS. FOR DISEASE CONTROL & PREVENTION, (Sept. 5, 2014), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm?_cid=ss6308a1_e [<http://perma.cc/V79Z-BDGP>].

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of such violence in ridesharing. One source maintains an online list of deaths, assaults, sexual assaults, kidnappings, felonies, driving under the influence incidents, and other dangers involving ridesharing companies.¹⁰ In September 2016, the website contained links to over one hundred different news stories, primarily from the United States, describing allegations, arrests, and indictments of Uber and Lyft drivers for sexual assault and harassment of their customers, the vast majority of whom were female, since 2013.¹¹

The incidence of sexual assault in taxis is reportedly rising at the same time. In New York City, the number of reported rapes by taxi drivers of passengers increased forty percent between 2014 and 2015, compared with an overall six percent rise in the number of rapes reported in general during those years.¹² Another source noted that instances of stranger rape increased dramatically in New York City between 2014 and 2015, including an increase in what the Police Commissioner described as “for-hire vehicles.”¹³

It is impossible to know whether ridesharing services are safer for women passengers than taxis, because police departments generally do not distinguish between them in terms of recordkeeping.¹⁴ When police departments in Boston, San Francisco, Chicago, New York, and Washington, D.C. were asked for data on assaults against passengers of taxis or Uber cars, they responded that they did not track violent crimes at that level.¹⁵

The frequency and severity of sexual assaults in rideshare services may be underreported by the services themselves, when they provide such data at all. Uber’s failure to provide reliable internal safety data illustrates that fact. In March 2016, BuzzFeed reported that Uber may have grossly understated its sexual assault complaints.¹⁶ While Uber had admitted to receiving five claims of rape and “fewer than” 170 claims of sexual assault between December 2012 and

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10. *Reported List of Incidents Involving Uber and Lyft*, *supra* note 6. The organizers of this site have a professional interest in the ridesharing industry. “Who’s Driving You?” is an initiative of the Taxicab, Limousine and Paratransit Association, an association representing, among others, drivers whose livelihood is presumably threatened by the growth of ridesharing companies. *About Our Campaign*, WHO’S DRIVING YOU?, <http://www.whosdrivingyou.org/about> [<http://perma.cc/T35F-8J7D>].
 11. *Reported List of Incidents Involving Uber and Lyft*, *supra* note 6.
 12. Thomas MacMillan & Pervaiz Shallwani, *Rise in Sexual Assaults Reported by Taxi Passengers*, WALL ST. J. (Jan. 10, 2016), <http://www.wsj.com/articles/rise-in-sexual-assaults-reported-by-taxi-passengers-1452476904> [<http://perma.cc/29WZ-9QPS>].
 13. Ginia Bellafante, *Rape by Strangers*, N.Y. TIMES (Jan. 22, 2016), <http://www.nytimes.com/2016/01/24/nyregion/rape-by-strangers-new-york-city.html> [<http://perma.cc/L9TT-AJFF>].
 14. LaFrance & Eveleth, *supra* note 7.
 15. *Id.*
 16. Warzel & Bhuiyan, *supra* note 4.

August 2015, screenshots of Uber's internal reporting system suggested that in fact it had received thousands of such complaints.¹⁷ One screenshot of a search for "rape" in customer support tickets returned 5,827 tickets, while another screenshot of a search for "sexual assault" returned 6,160 tickets.¹⁸ Searches for "assaulted" and "sexually assaulted" returned hundreds of other hits.¹⁹ Uber's response to these reports provided little comfort to potential customers. It first rebutted the BuzzFeed report and then admitted that BuzzFeed was right, apologizing to its customer service vendor for using an "imperfect (and fictitious)" example to explain the inaccuracy of the search results.²⁰

B. Unsafe Travel for Women Can Cause Socioeconomic Damage

Fear of travel has substantial consequences for women's lives, causing them to disrupt their working and social lives in order to avoid certain transit options that they consider to be unsafe.²¹ The impact of this disruption may be particularly severe for low-income and minority women, who tend to have fewer transportation options than more affluent and white women.²²

The impact of limited options on the lives of working women has been the focus of recent scholarship in this area. Professor Tristin Green has argued, for example, that legal scholars should pay closer attention to the practical impact of Title VII on the working lives of families.²³ In doing so, she draws attention to the socioeconomic realities that limit the options of lower-income communities and examines the interplay of those realities with what she calls "sexist work environments."²⁴ She notes that "employer-controlled variable schedules," in which the employer often varies the start and end times, are more often tied to poorly paid hourly jobs than salaried jobs.²⁵ She also points out that low-wage workers are "more likely to experience variation in ability to work within their

17. *Id.*

18. *Id.*

19. *Id.*

20. Charlie Warzel, *Uber Apologizes for "Imperfect (and Fictitious)" Rebuttal of a BuzzFeed News Claim*, BUZZFEED (Mar. 7, 2016, 4:50 PM), http://www.buzzfeed.com/charliwarzel/uber-apologies-for-imperfect-and-fictitious-rebuttal-of-a-bu?utm_term=.vckNowbeO#.gqonrgyJ9 [<http://perma.cc/7PXH-NzLF>].

21. *How To Ease Women's Fear of Transportation Environments: Case Studies and Best Practices*, MINETA TRANSP. INST. 3 (2009), <http://transweb.sjsu.edu/MTIportal/research/publications/documents/2611-women-transportation.pdf> [<http://perma.cc/TT89-TNFT>].

22. *Id.*

23. Tristin K. Green, *Civil Rights Lemonade: Title VII, Gender, and Working Options for Working Families*, 10 STAN. J. C.R. & C.L. 191, 192 (2014).

24. *Id.* at 193.

25. *Id.* at 208.

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families.”²⁶ These forms of variability make it more important, she argues, to have “all working options on the table.”²⁷

Sarah Schindler has made comparable arguments focusing on the ways in which architectural choices, including the location of public transportation networks, have exclusionary impacts in that they restrict where individuals from poorer areas may travel.²⁸ She describes, for example, Atlanta’s wealthier suburban residents’ opposition to efforts to expand Atlanta’s subway system into their neighborhoods for fear that doing so would give people of color easier access to the suburbs.²⁹ The lack of public transit expansion limits job opportunities in those suburban areas for lower-income Atlanta residents who do not have their own cars. As Schindler points out, courts have not yet recognized infrastructure barriers such as the lack of public transit options as discriminatory, despite their exclusionary effect.³⁰ She notes that the siting of bus stops and subway stations has a “dramatic impact on the mobility of individuals through, and the accessibility of, different areas of the community.”³¹ She urges lawmakers to analyze the discriminatory impact of what she calls “architectural exclusion” and provide legislative remedies.³²

If the siting and extent of public transportation have an impact on the people it excludes, then ridesharing can make that exclusion less severe by providing an alternative option if that option is safe and feasible. Limited public transportation options underscore the need for safe, affordable alternatives in order to increase economic opportunities for lower-income women in particular. In order for a poor woman to take a job in an area that is underserved by public transportation, she must have a safe means of traveling to and from that job. Ridesharing may provide that alternative if it is both safe and legal.

Securing single-sex ridesharing may play an important role in expanding options for working women and their families. By providing a transportation option that is safe, geographically flexible, and available at all hours, a single-sex ridesharing option would increase job opportunities. A woman who works a variable shift at a Wal-Mart, for example, would have greater personal and economic security if she had a transportation option that fit her variable schedule and in which she felt safe from sexual assault. Single-sex ridesharing may improve the economic lives of working families by effectively expanding the range of practical job options open to them.

26. *Id.*

27. *Id.* at 209.

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

29. *Id.* at 1937–38.

30. *Id.* at 1939.

31. *Id.* at 1960.

32. *Id.* at 2020–21.

C. *Ground Transportation Is More Dangerous for Women Drivers*

The safety of the drivers themselves is no less a concern than the safety of the riders. Taxi driving is a more dangerous profession than being a police officer or a security guard, as the homicide rate for taxi drivers is thirty times higher than the average for all workers.³³ In fact, taxi drivers suffer the highest homicide rate of any occupation, at 17.9 per 100,000 employees.³⁴ For comparison, police officers have the second highest homicide rate, at 4.4 per 100,000 employees.³⁵ In New York City, 180 taxi drivers have been killed since 1990, resulting in an average of two drivers murdered every month since 1990.³⁶ In Chicago, 58.7% of cab drivers reported being “threatened, attacked and subjected to hostile racial comments,” and the most common weapons used in those attacks were guns and knives.³⁷

Driving for a rideshare company may be even more dangerous than driving a taxi. In the Occupational Safety and Health Administration (OSHA)’s most recent policy statement on improving the safety of taxi drivers, it recommended the adoption of several specific controls to reduce the likelihood of violence.³⁸ These included physical controls, such as bullet-resistant glass between drivers and passengers, security cameras, and silent alarms.³⁹ None of these recommendations are feasible in ridesharing companies that rely on “civilian” cars, which generally lack the kind of safety features that OSHA recommends and that are increasingly common in taxis.

While rideshare driving shares many of the dangers of taxi driving, with fewer potential safety measures, it is also less subject to governmental attention and oversight than taxi driving. OSHA has neither published statistical information on rideshare safety nor issued comparable policy statements on improving the safety of rideshare driving. While the lack of federal policy recommendations may follow from the lack of federal safety statistics, that is not the only logical conclusion. Another possibility is that because OSHA has not updated

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33. Abbey Q. Keister, *The Safety of Taxi and Rideshare Drivers - Part 1: Heightened Concerns*, ONLABOR (May 31, 2016), <http://onlabor.org/2016/05/31/the-safety-of-taxi-and-rideshare-drivers-part-1-heightened-concerns> [http://perma.cc/E8L8-END5].
34. Justin Bregman, *Are Uber and Lyft Safer Than Taxis?*, QUOTED (July 6, 2015), <http://www.thezebra.com/insurance-news/1682/are-uber-and-lyft-safer-than-taxis/> [http://perma.cc/B3KJ-843D].
35. *Id.*
36. Keister, *supra* note 33.
37. *Id.* (describing the results of a 2008 survey).
38. Occupational Health & Safety Admin., *OSHA Fact Sheet: Preventing Violence Against Taxi and For-Hire Drivers*, U.S. DEP’T LAB. (2010), <http://www.osha.gov/Publications/taxi-driver-violence-factsheet.pdf> [http://perma.cc/8ZRN-9PH6].
39. *Id.* at 1.

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its taxi driver safety recommendations since 2010,⁴⁰ predating the emergence of Uber and Lyft as ubiquitous alternatives to taxis, it has not had the opportunity to issue a policy statement on these relatively recent issues.⁴¹

Women rideshare drivers also face unique safety risks, dissuading them from working in this field. Only 1% of New York City taxi drivers and 5% of New York City livery car and limousine drivers are women.⁴² Only 14% of Uber drivers and 30% of Lyft drivers are women.⁴³ According to the founder of another ridesharing company, many women fear driving for taxi and ridesharing companies because of the threat they face from customers.⁴⁴ A 2015 Forbes investigation revealed that this is a common fear among the female Uber drivers the magazine interviewed, who recounted stories of being assaulted and sexually assaulted by customers.⁴⁵ Customers have used Uber's "lost and found" feature to harass or stalk female drivers after their rides.⁴⁶ The app Uber drivers use does not allow them to block specific passengers, so drivers cannot avoid passengers who make them uncomfortable.⁴⁷ Resisting or rejecting customer advances may result in lower ratings for a driver, increasing the risk of job loss since drivers whose ratings drop to 4.5 or 4.6 out of five stars may be fired.⁴⁸

40. *Id.*

41. Although Uber began providing town car service in 2009, it did not launch in its current iteration as a taxi alternative until June 2010. Nathan McAlone, *Here's How Uber Got Its Start and Grew To Be the Most Valuable Startup in the World*, BUS. INSIDER (Sept. 13, 2015, 8:00 AM), <http://www.businessinsider.com/history-of-uber-and-its-rise-to-become-the-most-valuable-startup-in-the-world-2015-9/> [http://perma.cc/M673-FP5Z].

42. Winnie Hu, *New Service Offers Taxis Exclusively for Women*, N.Y. TIMES (Sept. 8, 2014), <http://www.nytimes.com/2014/09/08/nyregion/new-service-offers-taxis-exclusively-for-women.html>? [http://perma.cc/KA94-4H2Q].

43. Jill Filipovic, *The Ride-Sharing Battle for Female Passengers*, COSMOPOLITAN (June 29, 2015), <http://www.cosmopolitan.com/politics/news/a42650/uber-lyft-ride-sharing-battle-for-female-passengers> [http://perma.cc/CR4N-WXZZ]; Ellen Huet, *Why Aren't There More Female Uber and Lyft Drivers?*, FORBES (Apr. 9, 2015), <http://www.forbes.com/sites/ellenhuet/2015/04/09/female-uber-lyft-drivers/#7e6bf7085298> [http://perma.cc/ZWH5-YRZ8].

44. Telephone Interview with Michael Pelletz, Founder, Safr (May 11, 2016).

45. Huet, *supra* note 43.

46. Johana Bhuiyan, *Men Are Using Uber's Lost-and-Found Feature To Harass Female Drivers*, BUZZFEED (Feb. 10, 2015, 2:47 PM), <http://www.buzzfeed.com/johanabhuiyan/faced-with-harassment-female-uber-drivers-often-left-to-fend> [http://perma.cc/4U2Z-3AGT].

47. Huet, *supra* note 43.

48. Ellen Huet, *How Uber's Shady Firing Policy Could Backfire on the Company*, FORBES (Oct. 30, 2014), <http://www.forbes.com/sites/ellenhuet/2014/10/30/uber-driver-firing-policy/#52790e588ef7> [http://perma.cc/64NF-VFWK].

D. Single-Sex Ridesharing Addresses Some Safety Concerns for Women

While Uber dominates the U.S. ridesharing market, many women hesitate to use it because of the safety concerns described above.⁴⁹ Buoyed by these concerns, single-sex competitors have emerged with varying degrees of success.⁵⁰ One competing ridesharing company, for women only, has gained national attention.⁵¹ See Jane Go is a new ridesharing company that uses only women drivers and allows only women to hail their cars.⁵² See Jane Go plans to operate primarily through the provision of apps that match drivers and riders. Customers will download an app that allows them to call for a ride. Drivers, after having passed a series of screenings, can respond to customer requests and provide rides. The company provides services in Long Beach and Orange County, California, having launched in September 2016.⁵³

See Jane Go's business model addresses the safety risks that women face as both customers and drivers of rideshare companies. According to its website, the company's values include recognition of the importance of safe working conditions and the right to safety "while recognizing that some safety needs and accommodations can vary among genders."⁵⁴ See Jane Go seeks to accomplish these goals in two ways. The first is by providing a safer work environment for women drivers than they currently have either in driving traditional taxis or in

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49. Stacy Perman, *Is Uber Unsafe for Women?: Many Say Yes*, MARIE CLAIRE (May 20, 2015), <http://www.marieclaire.com/culture/news/a14480/uber-rides-dangerous-for-women> [<http://perma.cc/LZ52-DX65>].
50. Shuddle, for example, described itself as "Uber for kids," but closed after two years due to a lack of funding. Billy Steele, *Shuddle Shuts Down Its 'Uber for Kids' Transportation Service*, ENGADGET (Apr. 15, 2016), <http://www.engadget.com/2016/04/15/shuddle-ride-sharing-service-shuts-down> [<http://perma.cc/9VK8-A2A3>]. Other "Uber for kids" companies, such as HopSkipDrive and Zemcar, remain in business. HOPSKIPDRIVE, <http://www.hopskipdrive.com/> [<http://perma.cc/LA3S-FB9E>]; ZEMCAR, <http://www.zemcar.com> [<http://perma.cc/QF2-4F6V>].
51. See Andrew Bender, *See Jane Go: New Ride-Share Service Exclusively for Women Aims To Ease Passengers' Fears*, FORBES (Sept. 13, 2016), <http://www.forbes.com/sites/andrewbender/2016/09/13/see-jane-go-new-ride-share-service-exclusively-for-women-aims-to-ease-passengers-fears/#6ed625477d14> [<http://perma.cc/TR2X-Q2D6>]; Dara Kerr, *See Jane Go Takes Men Out of the Ride Hailing Equation*, CNET (Sept. 13, 2016, 9:13 AM), <http://www.cnet.com/news/see-jane-go-takes-men-out-of-the-ride-hailing-equation/> [<http://perma.cc/3KNJ-EXD7>].
52. *About: Ask Jane*, SEE JANE GO, <http://seejanego.co/ask-jane/#faq1> [<http://perma.cc/L74G-53P3>].
53. Izza Sofia, *See Jane Go, Uber's Newest Competitor, Is a Game Changer for Women*, DESIGN TAXI (Mar. 17, 2017), <http://designtaxi.com/news/391684/See-Jane-Go-Uber-s-Newest-Competitor-Is-A-Game-Changer-For-Women/> [<http://perma.cc/BKD9-6C8M>].
54. *Jane's Values*, SEE JANE GO, <http://seejanego.co/values/> [<http://perma.cc/K88E-63SS>].

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driving for other ridesharing services like Uber and Lyft. The second is by providing a safer transportation option for women passengers in the wake of complaints of sexual assault by Uber drivers.

See Jane Go is not the only company to propose a gendered ridesharing model, nor is it the first to raise concerns about the legality of that model. Safr, formerly known first as Chariot for Women and then as SafeHer, initially offered ridesharing services only by and for women but subsequently changed its model to one that now allows men to drive and ride as well.⁵⁵ In New York, a car service called SheTaxis (or SheRides in New York City) allows women riders to request a female driver through the use of an app.⁵⁶ When it announced its opening in 2014, critics noted that it was likely to violate federal and local anti-discrimination laws.⁵⁷ To date, however, it apparently has not been sued on this basis. There is therefore no case law directly on point as to whether this model is legal.

II. EMPLOYMENT DISCRIMINATION LAWS SHOULD NOT PREVENT HIRING ONLY WOMEN AS RIDESHARE DRIVERS

See Jane Go's plan to hire only women as drivers risks violating Title VII of the Civil Rights Act of 1964's prohibition against sex-based discrimination in employment,⁵⁸ as well as various state laws prohibiting gender discrimination.⁵⁹ In general, a man who is rejected from a job can make out a claim of sex-based discrimination in violation of Title VII if he is rejected because of his sex be-

55. SAFEHER, [http://web.archive.org/web/20160906030219/http://www.safeher.com/\[http://perma.cc/4TC4-26GM\]](http://web.archive.org/web/20160906030219/http://www.safeher.com/[http://perma.cc/4TC4-26GM]) (archived Sept. 6, 2016); *Safr Driver FAQs*, SAFR, <http://www.gosafr.com/terms/driver-faqs.html> [<http://perma.cc/57HN-X2SU>] (“Can men join Safr as a driver? Safr’s primary focus is on the safety and empowerment of all women in the ridesharing economy and we welcome everyone to our team who believes in and supports that mission. Safr does not discriminate on the basis of gender or any other characteristic protected by law. . . . Safr does not deny service on the basis of gender.”).

56. SHETAXIS, <http://shetaxis.com> [<http://perma.cc/LR69-MRDM>].

57. See Jacob Gershman, *New Car Service App for Women Raises Legal Questions, Experts Say*, WALL ST. J.: L. BLOG (Sept. 8, 2014, 5:41 PM), <http://blogs.wsj.com/law/2014/09/08/new-car-service-app-for-women-raises-legal-questions-say-experts/#:GvwHsGDDy2CBVA> [<http://perma.cc/DTH9-C9JG>]; Vivian Giang, *Can This Women-Only Taxi Service Overcome Legal Hurdles?*, FAST COMPANY: STRONG FEMALE LEAD (Oct. 3, 2014, 5:21 AM), <http://www.fastcompany.com/3036570/strong-female-lead/can-this-women-only-taxi-service-overcome-legal-hurdles> [<http://perma.cc/B3PJ-GXFL>].

58. 42 U.S.C. § 2000e-2(a)(1) (2012).

59. See *infra* note 104.

cause it is one of the classes protected by Title VII.⁶⁰ The employer may then raise a defense, such as the BFOQ exception, to escape liability.⁶¹

In the context of ridesharing, then, if a man applied to drive with See Jane Go and See Jane Go did not hire him because of his sex, he could claim sex-based discrimination in violation of Title VII. Whether See Jane Go could overcome that claim of discrimination would depend on whether it could assert a valid defense. The most viable defense in this instance would be that being female is a BFOQ for driving for See Jane Go.⁶² While the following discussion focuses on federal law, similar arguments could be made under state law equivalents as well.⁶³

As explained below, current judicial interpretations of Title VII most likely do not permit a single-sex rideshare company to hire only women drivers. As other legal scholars have noted, when the U.S. Supreme Court has been given the choice of a broad reading or a narrow reading of potential exceptions to Title VII, it has often chosen the narrow reading that limits the application of the

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60. See 42 U.S.C. § 2000e-2(a)(1)–(2) (“It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, *sex*, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, *sex*, or national origin.” (emphasis added)).
61. See *infra* text accompanying notes 65–69.
62. See 42 U.S.C. § 2000e-2(e)(1) (“[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, *sex*, or national origin in those certain instances where religion, *sex*, or national origin is a bona fide occupational qualification . . .”).
63. See, e.g., CONN. GEN. STAT. § 46a-60 (2017) (Connecticut’s anti-discrimination law) (“It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer’s agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual’s race, color, religious creed, age, *sex*, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability or physical disability, including, but not limited to, blindness . . .” (emphasis added)); MASS. GEN. LAWS. ch. 151B, § 4 (2017) (Massachusetts’s anti-discrimination law) (“It shall be an unlawful practice: (1) For an employer, by himself or his agent, because of the race, color, religious creed, national origin, *sex*, gender identity, sexual orientation . . . to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.”).

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BFOQ defense.⁶⁴ Such a reading may not support the practice of refusing to hire male rideshare drivers because of their gender. Strong arguments support a more expansive reading of the BFOQ exception to Title VII in this context, however, and these should be considered when legal challenges to this practice are brought.

A. *The BFOQ Defense Presents a Challenge to Ridesharing*

The BFOQ defense allows employers to make hiring decisions based on sex, which otherwise would violate Title VII, if such decisions are closely related to the nature of the defendants' business.⁶⁵ This test, introduced by the Fifth Circuit in *Diaz v. Pan American World Airways, Inc.*⁶⁶ and adopted by the Supreme Court in *Dothard v. Rawlinson*,⁶⁷ has been referred to as the "essence of the business" test.⁶⁸ Under this test, if an employee of either sex can perform the particular job, the defense will fail.⁶⁹

There is little legislative history to inform a discussion of the original intent of the BFOQ exception. The Interpretive Memorandum of Title VII, one of the few documents courts rely on for this purpose, provided that the BFOQ was intended to provide employers with "a limited right to discriminate."⁷⁰ Examples of potentially acceptable discrimination in the Interpretive Memorandum include an ethnic restaurant's preference to hire a cook of the same ethnicity and the preference of an elderly woman to have a female nurse.⁷¹ As described below, courts have accepted the BFOQ defense where the defendant can demonstrate a legitimate need to discriminate based on gender in order to promote safety and privacy.

The fact that a single sex ridesharing company's female customers may prefer a woman driver does not constitute an easy BFOQ defense without further

64. See, e.g., Henry L. Chambers, *Panel II: Classifications and Categories in the 1964 Act and in Subsequent Civil Rights Laws: Reading Amendments and Expansions of Title VII Narrowly*, 95 B.U. L. REV. 781, 802 (2015).

65. *Torres v. Wisc. Dept. of Health & Soc. Servs.*, 859 F.2d 1523, 1528 (7th Cir. 1988).

66. 442 F.2d 385, 388 (5th Cir. 1971).

67. 433 U.S. 321, 333 (1977).

68. See generally Rachel L. Cantor, *Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 1999 U. CHI. LEGAL F. 493 (discussing the "essence of the business" test).

69. *United Auto Workers v. Johnson Controls*, 499 U.S. 187, 201 (1991) ("By modifying 'qualification' with 'occupational,' Congress narrowed the term to qualifications that affect an employee's ability to do the job.").

70. 110 CONG. REC. 7212, 7213 (1964) ("Interpretative Memorandum of Title VII of H.R. 7152 submitted jointly by Senator Joseph S. Clark and Senator Clifford P. Case, Floor Managers").

71. *Id.*

analysis.⁷² As other scholars have noted, the Supreme Court has read the BFOQ exception narrowly.⁷³ Customer preference has long been held insufficient to support a BFOQ defense.⁷⁴ This is as it should be in situations where customer preference is derived from or reinforced by stereotypical notions about women's or men's comparative abilities to perform certain kinds of work.

Narrow, however, does not mean nonexistent. In *Dothard*, the Supreme Court recognized that a BFOQ might exist while acknowledging that “the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.”⁷⁵ The possible BFOQ in *Dothard* was based on safety concerns, specifically the risk of sexual assault in a prison “where a substantial portion of the inmate population is composed of sex offenders.”⁷⁶ In remanding the case for further consideration, the Court observed that “[t]he likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel.”⁷⁷ The risk of sexual assault in that case may have been sufficient grounds for a BFOQ.⁷⁸

Courts have upheld the BFOQ defense based on safety concerns in other cases. More recently, the Ninth Circuit Court of Appeals ruled that Washington's Department of Corrections could assign female correction officers to guard female inmates and male correction officers to guard male inmates.⁷⁹ In analyzing the state's “thorough, thoughtful approach” to sex-based staffing, the appellate court affirmed that preventing sexual assault of the prisoners was a

72. Whether such companies may accommodate only female customers is discussed further in Part III.

73. See Peter Brandon Bayer, *Title VII at 50: Debunking Unequal Burdens, Trivial Violations, Harmless Stereotypes and Similar Judicial Myths: The Convergence of Title VII Literalism, Congressional Intent and Kantian Dignity Theory*, 89 ST. JOHN'S L. REV. 401, 438 (2015); Benjamin O. Hoerner, *The Role-Modeling BFOQ: Court Confusion and Educational Promise*, 16 U. PA. J. BUS. L. 1211, 1219–22 (2014).

74. See *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (holding that an employer cannot deny a woman an executive position in an international division based on foreign customer preference to work with men); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971) (holding that an employer cannot deny a man a position as flight attendant based on customer preference to be served by women).

75. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

76. *Id.* at 336.

77. *Id.*

78. See *id.*

79. *Teamsters Local Union No. 117 v. Wash. Dep't of Corr.*, 789 F.3d 979 (9th Cir. 2015).

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legitimate objective.⁸⁰ Similarly, the Sixth Circuit ruled that a correction facility's plan to assign female employees to guard female prisoners was logical and would "significantly enhance security at the [prison's] female facilities."⁸¹

Narrow readings of the BFOQ defense have not deterred suggestions that it be expanded in certain circumstances that are comparable in ways to same-sex ridesharing. Benjamin Hoerner, for example, argues that courts should be more accepting of a same-sex BFOQ in the educational context, especially when privacy and physical safety interests are "lurking in the factual background of the case."⁸² Physical safety and, to a lesser extent, privacy are important concerns in the ridesharing context as well.

In this context, women riders arguably feel more secure with women drivers for safety reasons rather than because they view women drivers as more competent.⁸³ Many women believe that they will be safer in a car driven by another woman than they will be in a car driven by a man because the woman driver is less likely to rape them.⁸⁴ Put differently, women riders may prefer women drivers because they would "prefer" not to be assaulted. That type of consumer preference is fundamentally different from the kind of bigotry and sexism that narrow BFOQ interpretations guard against.⁸⁵

There is a compelling analogy in another case of alleged discrimination in the transportation industry: the Supreme Court's ruling in *Western Air Lines v. Criswell*.⁸⁶ In that case, the Court reviewed a challenge to an airline's requirement that its flight engineers retire at age sixty.⁸⁷ At the time, the Federal Avia-

80. *Id.* at 988, 990.

81. *Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, 754 (6th Cir. 2004).

82. Hoerner, *supra* note 73, at 1248.

83. Women may, in fact, be better drivers. According to a New York Times report, eighty percent of all crashes in a five-year period that seriously injured or killed pedestrians involved male drivers. "The imbalance is far too great to be explained away by the predominance of men among bus, livery, taxi and delivery drivers, said . . . a spokesman for the city's Transportation Department." Anemona Hartocollis, *For Women Who Drive, the Stereotypes Die Hard*, N.Y. TIMES (Aug. 17, 2010), <http://www.nytimes.com/2010/08/18/nyregion/18drivers.html> [http://perma.cc/DHV9-G7HM].

84. Ninety-nine percent of the people arrested for "forcible rape" in the United States in 2010 were men. Howard N. Snyder, *Arrests in the United States, 1990–2010*, U.S. DEP'T JUST. 2 (2012), <http://www.bjs.gov/content/pub/pdf/aus9010.pdf> [http://perma.cc/DYD3-XBQZ].

85. *See Bayer, supra* note 73, at 438–39 (noting that BFOQs do not concern profitability because "[w]ere it otherwise, Title VII's first principle would be devoured by the BFOQ defense for employers commonly can demonstrate that blatant discrimination enhances profits by catering to customers' bigoted preferences").

86. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985).

87. *Id.* at 403–05.

tion Administration had not mandated a retirement age for flight engineers, although it required pilots and first officers on commercial flights to retire at age sixty.⁸⁸ The employer airline argued that its retirement provision was grounded in a concern for its passengers' physical safety because the risk of heart attacks is greater in older flight engineers.⁸⁹ On appeal, the airline challenged a jury instruction providing that the "BFOQ defense is available only if it is reasonably necessary to the normal operation or essence of defendant's business."⁹⁰ The trial court had told the jury that "the essence of Western's business is the safe transportation of their passengers."⁹¹ The jury instruction also provided that

Western may establish a BFOQ [by proving that] . . . it was highly impractical for Western to deal with each second officer over age [sixty] on an individualized basis to determine his particular ability to perform his job safely; and . . . [that] some second officers over age [sixty] possess traits of a physiological, psychological or other nature which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age.⁹²

The Supreme Court approved the jury instruction.⁹³ In doing so, it affirmed the airline's practice of restricting employment by age as "reasonably necessary" in order to preserve the "safe transportation of passengers."⁹⁴

Although the *Criswell* Court considered the BFOQ exception in the context of the Age Discrimination in Employment Act of 1967 (ADEA), the ADEA's BFOQ defense language mirrors that of the BFOQ provision in Title VII.⁹⁵ A single-sex ridesharing company might therefore argue, based on the holding in *Criswell*, that restricting employment by gender is "reasonably necessary" to the essence of its business, which is to preserve the "safe transportation" of its women passengers. In doing so, the ridesharing company would have to establish that it is as "highly impractical" to deal with each individual male applicant to determine his potential safety as a driver as it was for Western Air Lines to deal with each individual flight engineer for the same purpose.

In analyzing the BFOQ defense, the Supreme Court has emphasized the connection not only between the qualification and the particular job, but also between the qualification and the overall mission of the business. In *United Au-*

88. *Id.* at 404.

89. *Id.* at 406.

90. *Id.* at 407.

91. *Id.*

92. *Id.* at 407–08.

93. *Id.* at 416–17.

94. *Id.* at 407.

95. 29 U.S.C. § 623(f)(1) (2012); 42 U.S.C. § 2000-e(2)(e) (2012).

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to *Workers v. Johnson Controls*, it stated that a BFOQ must be related to the essence of an employee's job or to the "central mission of the employer's business."⁹⁶ In fact, one scholar has reconciled various tests courts use to evaluate BFOQ defenses by focusing on the nature of the business: "The BFOQ exception of Title VII allows employers to make hiring decisions based on sex so long as sex defines, at least in part, the product market of the business in question."⁹⁷

Although sex in this context is often equated with sexuality or sex appeal,⁹⁸ there is no inherent reason for such a limitation. There is a strong argument that sex defines the product market of single-sex ridesharing companies like See Jane Go, in that promoting women's safety by restricting the business to women drivers and riders is central to the mission of the company. Safr underscored the centrality of safety to its business model on an earlier version of the home page of its website, when the company was named SafeHer, noting: "From background checks to proprietary technologies, SafeHer ensures the door-to-door security of our drivers and passengers. At SafeHer, your safety is our priority."⁹⁹ Hiring only women as drivers arguably protects female riders from sexual assault by drivers. Conversely, picking up only female passengers arguably protects drivers from sexual assault by riders. See Jane Go's emphasis on safety as a core business mission supports the argument for condoning gender discrimination in employment in those rare instances when it is necessary to preserve public safety.

Whether sex can "define, at least in part, the product market" of a transportation company is debatable. Kimberly Yuracko notes that there is a continuum of sexual titillation-based BFOQ cases.¹⁰⁰ Although many other businesses use sex to market food, goods, or services (e.g., Hooters, Abercrombie & Fitch), Yuracko differentiates these from businesses that charge for and derive receipts from selling sexual services, such as phone sex lines and strip clubs.¹⁰¹ It is only in these latter organizations that courts will recognize a gendered BFOQ.¹⁰² Ridesharing would fall, if at all, into the former category under Yuracko's analysis. Because customers are not paying for sexual services, a court is unlikely to rule that sex defines the rideshare company's business.

In light of the importance of hiring only women drivers to the single-sex rideshare business model, and that business model's likely impact on public

96. 499 U.S. 187, 203 (1991) (quoting *Western Air Lines v. Criswell*, 472 U.S. 400, 413 (1985)).

97. Cantor, *supra* note 68, at 501.

98. Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169, 184 (2009).

99. SAFEHER, <http://www.safeher.com> [<http://perma.cc/AAS5-MC5B>].

100. Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 157 (2004).

101. *Id.* at 157–59.

102. *Id.*

safety, courts should recognize an exception to Title VII for gender discrimination in this context.¹⁰³ This would represent an expansion of the current jurisprudence on the BFOQ defense. Cases like *Dothard* that recognize a BFOQ based on the personal safety of the employee when faced with a greater than average risk of sexual assault suggest a comparable exception for single-sex rideshare drivers. If it is permissible to discriminate based on gender in prison guard employment when there is a substantial safety risk to the employee and/or the prisoner, it should be permissible to discriminate based on gender in ridesharing when there is a substantial safety risk to the driver and/or the rider.¹⁰⁴

B. Potential Objections to Title VII Exceptions Focus on Equity

There are several counter-arguments to the proposed expansion of a safety-based exception to Title VII's bar to gender discrimination in hiring. These include the arguments that (1) promoting equality requires a narrowing of the BFOQ defense rather than its expansion; (2) the safety concerns are based on anecdotal rather than statistical evidence; (3) sexual harassment law and criminal law already provide more appropriate bases for resolution of safety issues; and (4) the practice of doing business with women only might be resolved through contract law instead. As discussed in more detail below, each of these objections merits further discussion. However, none leads to the definitive conclusion that single-sex ridesharing should be prohibited by Title VII.

1. The BFOQ Defense May Not Increase Gender Equality Overall

First, as a matter of theory, legal scholars disagree as to whether these BFOQ defenses are beneficial overall. Some note that judicial interpretations of Title VII have failed to produce workplace equality for women.¹⁰⁵ Fifty years af-

103. See discussion of driver safety *supra* Section I.B.

104. While most claims of gender discrimination will likely be brought under Title VII, this exception should also be made for claims brought under state anti-discrimination laws. Some state anti-discrimination laws already provide bases for gender discrimination where the end result is likely to increase gender equality. In Washington, for example, the state employment discrimination law provides that "it shall not be an unfair practice for an employer to . . . base other terms and conditions of employment on the sex of employees where the [equal opportunity] commission . . . has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes." WASH. REV. CODE § 49.60.180 (2017). This kind of legislative safe harbor could be interpreted to allow women's ridesharing companies to hire only women drivers if they can persuade lawmakers that their practice ultimately promotes equal employment opportunities for women.

105. See, e.g., Catharine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More Than Ever*, 37 HARV. J.L. & GENDER 569 (2014); Laura A. Rosenbury, *Work Wives*, 36 HARV. J.L. & GENDER 345, 384 (2013); see also DEBORAH L. RHODE,

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ter its enactment, legal scholars have suggested that the interpretation of Title VII exemplified by cases such as *Ledbetter*,¹⁰⁶ *Ricci*,¹⁰⁷ and *Wal-Mart*¹⁰⁸ has “choked off”¹⁰⁹ strong commitments to gender equity in the context of employment discrimination.¹¹⁰ Others have argued that any form of gender discrimination is intolerable and counterproductive.¹¹¹ One scholar, noting that subconscious gender bias is pernicious and nearly impossible to overcome through litigation, proposes federal legislation that would remove all gender markers from application materials.¹¹² This would effectively eliminate the BFOQ defense.

Indeed, the debate among feminists as to the wisdom and desirability of gender separatism goes back to the nineteenth century.¹¹³ In the early twentieth century, Social Feminists and ERA feminists disagreed over the wisdom of adopting protective labor laws for women.¹¹⁴ Some have advocated for the elim-

WHAT WOMEN WANT: AN AGENDA FOR THE WOMEN’S MOVEMENT 7, 25–38 (2014) (describing a persistent gap in leadership). *But cf.* PEW RESEARCH CTR., ON PAY GAP, MILLENNIAL WOMEN NEAR PARITY—FOR NOW (Dec. 11, 2013), http://www.pewsocialtrends.org/files/2013/12/gender-and-work_final.pdf [<http://perma.cc/8FND-SDNC>] (noting that younger women are making progress in reducing the wage gap and starting near men’s earnings).

106. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 635 (2007) (ruling that the later effects of past discrimination do not restart the clock for timely filing of an EEOC charge).
107. *Ricci v. DeStefano*, 557 U.S. 557, 584 (2009) (emphasizing the importance of the business necessity defense to disparate impact liability); *see also* Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197 (2010); Charles A. Sullivan, *Ricci v. DeStefano: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U. L. REV. COLLOQUY 201 (2009).
108. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 353–56 (2011) (raising the bar for systemic discrimination claims); *see also* Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395 (2011); Michael J. Zimmer, *Wal-Mart v. Dukes, Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409 (2012).
109. Noah D. Zatz, *Putting Intent in Its Place: A New Direction for Title VII*, 28 CAL. LAB. & EMP. L. REV. 8, 8 (2014).
110. *See* Arianne Renan Barzilay, *Parenting Title VII: Rethinking the History of the Sex Discrimination Prohibition*, 28 YALE J.L. & FEMINISM 55, 63–66 (2016).
111. Christy Krawietz, *An Overture to Equality: Preventing Subconscious Sex and Gender Biases from Influencing Hiring Decisions*, 39 SEATTLE U. L. REV. 1051 (2016).
112. *Id.* at 1073.
113. *See, e.g.*, Deborah L. Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106 (1986).
114. *See* Barzilay, *supra* note 110, at 75–80 (discussing the post-suffrage feud over protective labor laws for women).

ination of the BFOQ defense in the context of same-sex preferences on the basis of privacy.¹¹⁵ One concern is that these privacy-based BFOQs reiterate heteronormative standards that further marginalize the LGBTQ community. There is potential harm in any sanctioned gender discrimination, even if it is justified by greater concerns.

Another potential danger of encouraging the differential treatment of men and women is that it may tend to reinforce gender stereotypes. As a legal matter, gender stereotyping generally cannot be used to justify discrimination, even if there is truth in the stereotype. Even if more sexual violence is committed by men than women, that statistic does not necessarily establish a BFOQ for women in the single-sex ridesharing context. Empirically true stereotypes are still stereotypes, and cannot be used to justify an employer's decision to treat each member of the protected class as though he shared that characteristic.¹¹⁶ As the Supreme Court has noted,

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."¹¹⁷

In limiting the permissible use of stereotypes in employment, the Supreme Court limited the harm of gender discrimination, at least in theory. This makes sense from a policy perspective as well, to a degree, since one could argue that the assumption that women riders and drivers are less dangerous than male riders perpetuates gender stereotypes that women are more docile and men are more aggressive.

Legal scholars have pointed out, however, that courts continue to sustain gender stereotyping over Title VII challenges in the form of sex-based appear-

115. See Deborah A. Calloway, *Equal Employment and Third Party Privacy Interests: An Analytical Framework for Reconciling Competing Rights*, 54 *FORDHAM L. REV.* 327 (1985) (arguing for the demise of the BFOQ based in customer privacy concerns because it contradicts Title VII's goal of promoting equal employment opportunity and changing the status quo with regard to identity-based exclusions from employment); Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 *YALE L.J.* 1257, 1261–62 (2003) (arguing for the demise of the BFOQ based in customer privacy concerns because such concerns cannot be meaningfully distinguished from other customer preferences that the law does not tolerate).

116. See *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1084 (1983); *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978).

117. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) (quoting *Manhart*, 435 U.S. at 707 n.13).

ance and grooming codes.¹¹⁸ For example, courts have upheld grooming requirements that prohibit men but not women from having ponytails¹¹⁹ or wearing earrings¹²⁰ and “appearance policies” that require women but not men to wear makeup.¹²¹ In the latter case, the Court of Appeals for the Ninth Circuit observed that gender-linked differences in appearance standards did not necessarily burden one gender more than another, and absent that greater burden, the difference did not constitute gender discrimination: “While [the appearance policy’s] individual requirements differ according to gender, none on its face places a greater burden on one gender than the other. Grooming standards that appropriately differentiate between the genders are not facially discriminatory.”¹²² In this analysis, the court’s focus is on ensuring that gender-based differences do not disproportionately burden or limit one gender compared with another.

In the context of ridesharing, the proposed gender restriction operates to lessen the existing burden on women’s freedom (to travel, to work, to have a social life) rather than to exacerbate whatever comparable burden there might be on men.¹²³ In that regard, such gender stereotyping should be permissible in the ridesharing context at least to the extent that gender-differentiated grooming codes have been upheld, especially since the harm of failing to do so is much more severe in the ridesharing context. In the Ninth Circuit’s terms, single-sex ridesharing would “appropriately differentiate between the genders” and therefore not be facially discriminatory.¹²⁴ In so doing, single-sex ridesharing will help to level the playing field rather than perpetuate inequality.

2. There Is Insufficient Data on the Safety of Single-Sex Ridesharing

Another potential obstacle to the development of this exception is a lack of evidence that women are actually safer with single-sex ridesharing companies than they are with taxis and companies like Uber.¹²⁵ Arguably, the fact that women feel more comfortable with other women should not in itself justify disparate treatment in hiring any more than men’s greater comfort working with

118. See Bayer, *supra* note 73, at 418.

119. *Dodd v. SEPTA*, No. 06-4213, 2007 WL 1866754, at *6 (E.D. Pa. June 28, 2007).

120. *Kleinsorge v. Eyeland Corp.*, No. 99-5025, 2000 WL 124559, at *2 (E.D. Pa. Jan. 31, 2000).

121. *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1106 (9th Cir. 2006) (en banc).

122. *Id.* at 1109–10.

123. See *supra* Section I.B (discussing economic disempowerment). There is no credible evidence that cisgender men are burdened due to their gender in the realm of public transportation.

124. *Jespersen*, 444 F.3d at 1110.

125. See *supra* Section I.A.

other men. Perceived safety is not the same as proven safety. As companies like See Jane Go begin operation, it may be helpful to collect this kind of data with a view toward potential future legal challenges.

The lack of reliable recordkeeping on the relative safety of taxis and rideshare services has at least three consequences. First, it underscores the need for advocates of single-sex ridesharing to collect data on the reported incidents of assault in those services, at least for comparison with existing data on taxi safety. Second, it increases the importance of journalistic and other media reports of assaults in ridesharing vehicles, in the absence of more objective and systematic data collection. Third, it heightens the need for leading rideshare services like Uber to maintain and report their own safety data, either independently or in response to government regulation.¹²⁶

3. Employment Law and Criminal Law Provide Sufficient Redress

One might also argue that the proposed defense of single-sex ridesharing in response to a Title VII claim is inappropriate because sexual harassment laws already provide a remedy for assault by third parties in an employment context. Those laws, however, have limited effect in ridesharing because of the nature of the industry. Sexual harassment law only protects employees when the harassment is pervasive enough to create a hostile work environment. Harassment by customers, who ride sporadically, may not be as pervasive as the current standard requires.¹²⁷

Rideshare drivers' independent contractor status also limits the effectiveness of sexual harassment law, which may not protect drivers at all if the ridesharing company can prove that the workers are independent contractors rather than employees.¹²⁸ Uber and Lyft have been making this argument repeatedly in

126. *But see* Hannah A. Posen, Note, *Ridesharing in the Sharing Economy: Should Regulators Impose Uber Regulations on Uber?*, 101 IOWA L. REV. 405 (2015) (arguing against application of taxi regulations to Uber).

127. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65–67 (1986) (holding that a racially or sexually hostile work environment arises only when the conduct is “sufficiently severe or pervasive ‘to alter the conditions of the victim’s employment and create an abusive working environment’” (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982))). The EEOC notes, however, that a “non-employee” can be the source of sexual harassment. *Harassment*, EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/types/harassment.cfm> [<http://perma.cc/D2YD-4FM9>]; *see also* *Freeman v. Dal-Tile Corp.*, 750 F.3d 413 (4th Cir. 2014) (holding an employer liable for a hostile work environment when it failed to take remedial action to stop a customer’s harassment of an employee).

128. The dichotomy between employees and independent contractors may oversimplify the matter of how to classify rideshare drivers. *See generally* Jessica L. Hubley, *Online Consent and the On-Demand Economy: An Approach for the Millennial Circumstance*, 8 HASTINGS SCI. & TECH. L.J. 1 (2016) (discussing the proper worker classification of Uber drivers and other “gigglancers”); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL’Y REV. 479

cases across the country, but no precedential judgments have issued yet.¹²⁹ If they persuade courts that their drivers are independent contractors, the drivers will also have more limited rights of redress against the companies for torts like negligent infliction of emotional distress.

Even if the drivers are considered employees, workers' compensation would probably be unavailable as a remedy for assault or sexual assault. As Adrienne Davis points out with regard to sex workers, stereotypically "female" injuries are more likely to be excluded from workers' compensation than other injuries.¹³⁰ Courts have found that workplace rapes may be covered by workers' compensation coverage if they "arise from the employment."¹³¹ Victims of sexual assault may experience more emotional suffering and trauma, which are generally excluded from workers' compensation benefits, than the kind of long-term physical harm to which workers' compensation benefits generally apply.¹³²

Alternatively, one could argue that public safety is more properly the focus of criminal law than of civil law. Indeed, strengthening criminal law is essential to deterring sexual assault, but it is not in itself a comprehensive solution. No private business remedy can or should undermine the importance of policing and prosecuting violence against women. The private nature of ridesharing, however, limits the effectiveness of criminal law enforcement. Companies like

(2016) (discussing the proper employment classification status for Uber drivers and concluding that they should be categorized as employees).

129. In April 2016, Uber settled class action lawsuits in California and Massachusetts brought by Uber drivers who claimed that they were misclassified as independent contractors rather than employees, although the California Uber settlement was later rejected by the court. Mike Isaac, *Judge Overturns Uber's Settlement With Drivers*, N.Y. TIMES (Aug. 18, 2016), <http://www.nytimes.com/2016/08/19/technology/uber-settlement-california-drivers.html> [<http://perma.cc/53RH-9F44>]. Lyft settled a similar lawsuit in 2016 in California. Tracey Lien, *Judge Approves Lyft's \$27-Million Class-Action Settlement with Drivers*, L.A. TIMES (June 23, 2016), <http://www.latimes.com/business/technology/la-fi-tn-lyft-settlement-approval-20160623-snap-story.html> [<http://perma.cc/TE9V-WEYT>]. In June 2015, a deputy labor commissioner in California issued an opinion that Uber's drivers are employees, but as an administrative ruling it has limited precedential value. Mike Isaac & Natasha Singer, *California Says Uber Driver Is Employee, Not a Contractor*, N.Y. TIMES (June 17, 2015), <http://www.nytimes.com/2015/06/18/business/uber-contests-california-labor-ruling-that-says-drivers-should-be-employees.html> [<http://perma.cc/E5VJ-LHEB>].
130. Adrienne D. Davis, *Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor*, 103 CALIF. L. REV. 1195, 1230 (2015).
131. Robert S. Goldberg, Comment, *Victims of Criminal Violence in the Workplace: An Assessment of Remedies in the United States and Great Britain*, 18 COMP. LAB. L.J. 397, 407 (1997); see also *Dawson v. Wal-Mart Stores*, 751 S.E.2d 426 (Ga. Ct. App. 2013) (barring employee's negligence claims against employer because workers' compensation provided an exclusive remedy).
132. See Davis, *supra* note 130.

Uber and Lyft must respond to subpoenas, but are otherwise under no obligation to comply with investigators' requests for information. A second way criminal law fails to fully address sexual assault lies in the low reporting rate of sexual assault victims to law enforcement. According to Rape, Abuse & Incest National Network (RAINN), the nation's largest anti-sexual assault organization, approximately two thirds of sexual assaults are unreported.¹³³ Prosecutors cannot pursue cases that victims do not report.¹³⁴

4. Contract Law Provides a Potential Alternative Resolution

A final objection may be that employment discrimination laws need not be stretched to accommodate single-sex ridesharing if potential disputes can be resolved through contract law instead. A company may be able to circumvent some potential claims, or at least delay the resolution of these issues, by adopting a contractual approach to engaging drivers and riders. It could style itself as a SAAS (software as a service) technology company rather than a common carrier. In this business model, its products would be two apps: one that drivers could download to connect with potential riders, and one that riders could use to get and pay for rides. The terms and conditions of downloading these apps might contain self-enforcing restrictions on gender, compelling users to certify that they are female. Such a provision would be similar to terms and conditions that compel users to certify that they are over thirteen years old before using sites like Facebook,¹³⁵ as required by the Children's Online Privacy Protection Act of 1998.¹³⁶ If a male plaintiff claimed that he was the victim of gender discrimination, the defendant could respond that the plaintiff was not entitled to any remedy because he had violated the contract.

One benefit of this approach, if only to the company, is to distance the rideshare company from the driver in terms of a putative employment relationship. A contractual, app-based relationship is likely to weigh in favor of a determination that the would-be driver should be viewed as an independent contractor rather than an employee. This would make the proper interpretation of Title VII's anti-discrimination provisions irrelevant, as there would be no "employment" within the meaning of that law.

Such a strategy, however, would have its drawbacks. A male app user who is denied benefits because of his gender may have a claim for violation of the cov-

133. *The Criminal Justice System: Statistics*, RAINN, <http://www.rainn.org/statistics/criminal-justice-system> [<http://perma.cc/SP3R-YCGL>].

134. Prosecutorial discretion, and the reluctance of many prosecutors to pursue sexual assault cases, likely compounds the problem of underreporting.

135. *Terms of Service*, FACEBOOK, <http://www.facebook.com/terms> [<http://perma.cc/ES3L-P2M4>].

136. Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501–6506 (2012).

enant of good faith and fair dealing.¹³⁷ Additionally, a plaintiff met with a counterclaim for contract violation might raise the defense of contract unenforceability on the grounds that a contract designed to discriminate against men has an illegal purpose.¹³⁸ These drawbacks are relatively minor, however, especially since neither the good faith defense nor the illegality requirement are clear cut, and both are likely to be complicated by a myriad of specific factors requiring more discovery and debate than many individual plaintiffs will likely choose to sustain. The contract strategy is likely to have the desired effect of minimizing claims against the company, although it does little to resolve the legal question of whether the practice is discriminatory or not.

* * *

Each of the preceding concerns and alternatives deserves more discussion beyond this Article, and each provides an opportunity for continued debate. None, however, conclusively establishes that the BFOQ defense should not be expanded in the ridesharing context as I suggest, and none provides as effective a means of addressing the safety concerns of women drivers and riders. In sum, while there are potential practical and doctrinal concerns about excluding men from women's ridesharing services, these concerns would likely be outweighed by the benefit of increased safety for women drivers.

C. *The Government's Interest in Public Safety Justifies an Alternative Exception to Title VII's Anti-Discrimination Provision for Single-Sex Ridesharing Companies*

Even if the BFOQ defense is not specifically accepted, public policy concerns about women's safety justify an alternative defense. Societal concerns and strong government interests play a vital role in the interpretation of Title VII. Courts have upheld the BFOQ defense, for example, when the defendant can demonstrate sex-linked concerns about privacy.¹³⁹ Privacy is comparable in many ways to genuine policy concerns about women's safety as both riders and drivers in the emerging field of ridesharing.

137. *Borne v. Haverhill Golf Country Club, Inc.*, 791 N.E.2d 903, 914 (Mass. App. Ct. 2003) (upholding award of damages for, *inter alia*, breach of an implied covenant of good faith and fair dealing in gender discrimination case involving golf club membership).

138. See 89 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1513 (1962).

139. See *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128 (3d Cir. 1996) (upholding a psychiatric hospital's gender-based staffing policy as necessary to meet the "therapeutic needs and privacy concerns" of patients); *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122 (S.D. W. Va. 1982) (upholding male gender as a BFOQ for janitors in male bathhouses because of privacy concerns); *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated on other grounds*, 671 F.2d 1100 (8th Cir. 1982) (upholding BFOQ preference for hiring female obstetric nurses out of concern for patient privacy in delivery rooms).

Courts have recognized a government interest in guaranteeing public safety across a wide range of contexts. For example, the Supreme Court noted in *Youngberg v. Romeo* that “the right to personal security constitutes a ‘historic liberty interest’ protected substantively by the Due Process Clause.”¹⁴⁰ Justice Breyer’s dissent in *D.C. v. Heller* noted that

the Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties, *see, e.g.,* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (First Amendment free speech rights); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (First Amendment religious rights); *Brigham City v. Stuart*, 547 U.S. 398, 403–404 (2006) (Fourth Amendment protection of the home); *New York v. Quarles*, 467 U.S. 649, 655 (1984) (Fifth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436 (1966)).¹⁴¹

Other courts have recognized the importance of personal safety as well. In a case concerning the unauthorized disclosure of personal information, the Court of Appeals for the Sixth Circuit observed that “as far back as 1891, the Supreme Court recognized that ‘no right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.’”¹⁴² In *Flowers v. City of Minneapolis*, a case concerning a claim of police brutality, the Court of Appeals for the Eighth Circuit acknowledged in passing the plaintiff’s “fundamental right to personal safety.”¹⁴³ The Court of Appeals for the Second Circuit noted that “New York has substantial, indeed compelling, governmental interests in public safety.”¹⁴⁴ While these cases were decided in contexts different from ridesharing, the general principles they espouse, that personal autonomy and safety are essential rights, are important precepts in determining how to regulate single-sex ridesharing. Because personal safety and bodily autonomy are fundamental rights, there is a strong public interest in promoting that safety in all contexts, including the newly ubiquitous practice of ridesharing.

The “substantial, indeed compelling, governmental interests in public safety” are no less a concern in the context of women’s safety from sexual assaults. If a single-sex ridesharing company can demonstrate that its hiring practices promote public safety, the strong governmental interest in that safety should

140. 457 U.S. 307, 315 (1982) (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

141. 554 U.S. 570, 689 (2008) (Breyer, J., dissenting).

142. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998) (quoting *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891)).

143. 478 F.3d. 869, 873 (8th Cir. 2007).

144. *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012).

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outweigh the right to be free from gender discrimination provided by Title VII.¹⁴⁵

Leading ridesharing companies' resistance to improving safety for women bolsters this argument. While ridesharing companies might improve the safety of their service, for example, by adopting more stringent screening procedures for their drivers, it is not clear that they have done so voluntarily. More troublingly, they have also been accused of lying about the strength of internal safety checks as well as the frequency of reported sexual assaults by their drivers.¹⁴⁶ Uber appears to have made only minimal, piecemeal efforts to mitigate the risk of assaults on drivers, including asking drivers in Charlotte, North Carolina to leave toys in the backseat to distract drunken passengers and asking some Seattle drivers to install passenger-facing mirrors in the back seat to make it more likely that passengers will self-moderate their behavior.¹⁴⁷ Uber's resistance to improving its screening measures and the allegations of fraud surrounding its driver and customer safety records underscore both the inadequacy of existing private incentives to mitigate the risk of sexual assault in ridesharing and the need for a creative new approach to doing so.

There are strong arguments in favor of single-sex ridesharing despite the current jurisprudence generally favoring a narrow reading of the BFOQ exception. It is, however, an uphill climb. There are also serious concerns about the extent to which allowing gender discrimination reinforces old stereotypes of women as the weaker sex, or men as naturally aggressive, as well as other concerns, outlined in the following Part. The question is how to protect women from the safety risks apparent in more ubiquitous ridesharing services without devolving into the paternalistic schemes that have effectively denied women equality for most of the United States' history.

III. PUBLIC ACCOMMODATION LAWS SHOULD NOT PROHIBIT ACCEPTING ONLY WOMEN PASSENGERS

Title VII and comparable state laws present a challenge on the driver side of single-sex ridesharing. On the passenger side, different laws come into play.¹⁴⁸

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145. My analysis herein is limited to discrimination based on gender and does not extend to any other protected class.
146. See, e.g., *Uber To Pay \$25 Million To Settle Accusations It Mislead [sic] Customers*, FORTUNE (Apr. 7, 2016), <http://fortune.com/2016/04/07/uber-settlement-lawsuit-mislead-customers> [<http://perma.cc/MEJ3-FJPT>].
147. Abbey Q. Keister, *The Safety of Taxi and Rideshare Drivers—Part 2: OSHA's Response*, ONLABOR (June 2, 2016), <http://onlabor.org/2016/06/02/the-safety-of-taxi-and-rideshare-drivers-part-2-oshas-response/> [<http://perma.cc/9Y53-RT5U>].
148. See Jane Go, for example, restricts its customers to women: it describes itself as a “women-driving-women service. Only women drive for Jane, and only women can hail a ride with Jane.” *About: Ask Jane*, SEE JANE GO, <http://seejanego.co/ask-jane/> [<http://perma.cc/T8TG-2QFH>].

While Title II of the Civil Rights Act prohibits discrimination in public accommodations based on race, color, religion, or national origin, it does not bar such discrimination based on gender.¹⁴⁹ Instead, laws in all states prohibit gender discrimination in the provision of public accommodations, a category which usually includes transportation services.¹⁵⁰ For example, Massachusetts' public accommodations law penalizes anyone who makes "any distinction, discrimination or restriction on account of race, color, religious creed, national origin, sex, sexual orientation . . . or any physical or mental disability" in public accommodations.¹⁵¹ These accommodations include, among many other types, "a carrier, conveyance or elevator for the transportation of persons, whether operated on land, water or in the air, and the stations, terminals and facilities appurtenant thereto."¹⁵² The other categories of public accommodations include hotels, retail stores, restaurants, theaters, hospitals, and places of "public amusement."¹⁵³

In spite of these laws, single-sex ridesharing companies should be allowed to drive only women for two reasons. First, public accommodation laws should not apply to ridesharing, as they do to common carriers, because of the private or intimate nature of the ridesharing experience. Second, public safety is a fundamental government interest that outweighs the importance of equal access in the context of rideshare driving.

A. *Ridesharing Is Less Public Than Most Public Accommodations*

Both taxis and ridesharing should be considered forms of public accommodation. Although Title II does not specifically list taxis and other common carriers as examples of public accommodations, it is logical to consider them as such in light of the historical background of the Civil Rights Act.¹⁵⁴ The definition of "public accommodations" in the Americans with Disabilities Act is more detailed, and prohibits discrimination in "specified public transportation," meaning transportation "by bus, rail, or any other conveyance . . . that provides the general public with general or special service . . . on a regular and continu-

149. 42 U.S.C. § 2000a(a) (2012).

150. The National Conference of State Legislatures maintains a chart of state public accommodation laws indicating the bases on which each state's laws prohibit discrimination. See *State Public Accommodation Laws*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> [<http://perma.cc/D8XB-4EN7>].

151. MASS. GEN. LAWS ch. 272, § 98 (2017).

152. *Id.* § 92A(2).

153. *Id.*

154. For a detailed analysis of this issue and the history of prohibitions on race discrimination in common carriers, see Danita L. Davis, *Taxi! Why Hailing a New Idea About Public Accommodation Laws May Be Easier Than Hailing a Taxi*, 37 VAL. U. L. REV. 929 (2003).

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ing basis.”¹⁵⁵ Both taxis and ridesharing are forms of transportation that “provide[] the general public with general or special service . . . on a regular and continuing basis,” in that they are open to the public as a general matter. Because ridesharing meets this definition of public accommodation, it is likely to be subject to public accommodation laws at the state level.

One justification for exempting single-sex ridesharing from state public accommodation laws rests on the premise that these laws should not apply equally to all forms of transportation. The phrase “public accommodation” in transportation invokes two senses of “public.” The first is that the accommodation is open to the public at large, in that anyone may ride. The second is that those members of the public ride in a relatively public space, such as a bus, train, or airplane. Ridesharing involves only the first kind of public, in that anyone can sign up to ride.¹⁵⁶

The second connotation of “public” does not apply to ridesharing. Ridesharing is a unique form of public accommodation because, unlike riding a train or bus, it involves inviting a customer into the driver’s own car. In a rideshare, a small number of passengers, most often a single rider, share a car with a lone driver. Ridesharing is even more private than a taxi. The privately owned cars rarely have the kind of structural dividers between the front and back seats, intercoms, or diverting video screens usually found in taxis. Because the ride is private, there are no onlookers who might inhibit or prevent an attack on either the rider or the driver. There are no potential witnesses to any form of assault, as there is nobody in the car who is not a party to the transaction.

Most other forms of public accommodation, including restaurants, retail stores, hotels, and theaters are characterized by the presence, or potential presence, of many people at once.¹⁵⁷ Ridesharing lacks that common feature. Denying men access to a car is not the same as denying men access to an entire railway train or bus.¹⁵⁸ It is unlike denying men access to a store or any other truly public space. Ridesharing is more like private accommodation than public accommodation because of the intimate nature of the service.

155. 42 U.S.C. § 12181(10) (2012) (discussing the definition of specified places of public transportation).

156. Ridesharing drivers may choose not to pick up certain riders based on their ratings by previous drivers, and ridesharing companies may ban riders who violate their terms of service. See, e.g., *Safety Behind the Wheel*, UBER, <http://www.uber.com/drive/safety/> [<http://perma.cc/AF6D-T3CQ>]. This selectivity effectively limits the extent to which ridesharing is truly public in the first sense.

157. See MASS. GEN. LAWS ch. 272, § 92A (2017).

158. In Japan, however, there is a decades-old tradition of reserving certain train cars for the exclusive use of women. These “flower trains” are perceived as a means of protecting women from, among other things, groping by male riders. ALISA FREEDMAN, *TOKYO IN TRANSIT: JAPANESE CULTURE ON THE RAILS AND ROAD* 56 (2011).

Because it differs fundamentally from other public accommodations, ridesharing should receive distinct treatment as a matter of jurisprudence. The differential treatment of rideshare services as a form of “intimate transportation” has precedent in both existing law and legal theory. The law currently protects intimacy in the context of family law, allowing people to discriminate in whom they marry.¹⁵⁹ Though ridesharing involves a different kind of intimacy, one that is spatial or physical rather than emotional or familial, the notion of closeness, and the judicial recognition of its unique qualities, applies as well in ridesharing as it does in other contexts.

Intimacy also plays a role in the case law concerning gender-based challenges to state public accommodation laws in the context of private clubs. Although no single-sex ridesharing company styles itself as a private club, this case law may still be instructive because of the courts’ emphasis on intimacy and scale. The intimacy of ridesharing services is similar to the intimacy of private clubs.

A private club or association can avoid liability under most public accommodation statutes by showing that its right to freedom of association outweighs the plaintiff’s right to equal access.¹⁶⁰ In *Roberts v. United States Jaycees*, the Supreme Court articulated a framework for analyzing the conflict between a private club’s asserted rights of free association and state public accommodations laws.¹⁶¹ The salient “factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics . . .”¹⁶² Of particular importance, however, was intimacy. The Court rooted the right to freedom of association in a similarity to family relations, which are “distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.”¹⁶³

In *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Supreme Court relied on *Roberts* in ruling that the laws of Rotary International excluding women from membership were illegal.¹⁶⁴ *Rotary International* suggests that organizations may segregate themselves by gender only if they are “intimate associations” rather than larger, less selective, and more public institutions. The fact that the Rotary Clubs were inclusive, rather than exclusive,

159. As one scholar puts it, “[f]amily law creates barriers to entry that encourage selectiveness in entering intimate relationships and makes relationships sticky with waiting periods and formal legal process requirements for dissolution of these relationships.” Naomi Schoenbaum, *The Law of Intimate Work*, 90 WASH. L. REV. 1167, 1186 n.95 (2015).

160. *Roberts v. United States Jaycees*, 468 U.S. 609, 618–20 (1984).

161. *Id.* at 618.

162. *Id.* at 620.

163. *Id.* at 619–20.

164. *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 547–49 (1987).

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weighed in favor of the Court's determination that their members were not entitled to a degree of freedom of association that would outweigh putative female members' right to acceptance.¹⁶⁵ By contrast, the fact that ridesharing services occur in individually or family-owned cars weighs in favor of viewing them more like private arrangements than like public accommodations.

Scholars are also starting to articulate theoretical grounds for a unique treatment of "intimate work."¹⁶⁶ Naomi Schoenbaum argues for a unified legal approach to intimate work, which she defines as "intimate services provided by paid workers to a range of consumers," including daycare work, divorce law, nursing, and hairstyling.¹⁶⁷ Her article proposes a scheme to harmonize various fragmented approaches to this work under existing laws. While neither driving for nor riding in a rideshare service falls neatly into any of the four general categories of intimate work that Professor Schoenbaum articulates (body work, care work, confidence work, or erotic work), they do share the common features of close proximity to other people and the presence of a paid transaction that her intimate work categories possess.¹⁶⁸ An additional benefit of recognizing "intimate transportation" or a ridesharing exception to public accommodation laws is its potential to indirectly further gender equality by valuing relational work.¹⁶⁹

Allowing same-sex drivers also addresses the privacy concerns of riders. Adrienne Davis observes that courts have upheld gender as a valid hiring criterion in cases involving restroom attendants, nursing home aides, and obstetric nurses.¹⁷⁰ She describes the principle in these cases as one of "spatial privacy."¹⁷¹ "For women," she notes, "spatial privacy is often articulated in the language of vulnerability—that they feel physically and/or sexually threatened by men working in women's prisons, restrooms, or locker rooms, or that they feel exposed, literally and figuratively, during childbirth and find comfort in same-sex nurses."¹⁷²

Single-sex ridesharing companies could argue that their clients similarly feel vulnerable in the context of ridesharing, in that they feel sexually threatened by male drivers. While their bodies are not as exposed to these drivers as they would be to nurses and aides, they are more physically vulnerable to male driv-

165. *Id.* at 547.

166. See Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 72–79 (1996) (discussing work law exceptions for domestic workers); see also Yuracko, *supra* note 100, at 156 (discussing the bona fide occupational qualification exception in anti-discrimination law as applied to some forms of intimate work).

167. Schoenbaum, *supra* note 159, at 1167.

168. *Id.* at 1176.

169. *Id.* at 1221.

170. Davis, *supra* note 130, at 1237.

171. *Id.*

172. *Id.*

ers in the private, enclosed space of cars than they are in more exposed spaces. If single-sex rideshare companies succeed, it will be due in large part to the fact that women “find comfort” in same-sex drivers. This privacy-based argument is different from general customer preference, which courts have resisted using as a basis for a BFOQ defense,¹⁷³ in that it focuses on the customer’s right to privacy and personal security rather than a more arbitrary general preference for one gender over another in the commercial context.

An objection to treating ridesharing more like intimate transportation than public accommodation is that public accommodation is defined by the potential audience (public vs. private) rather than the nature of the accommodation itself; in other words, the objection focuses on the first connotation of “public” described above. In Massachusetts, for example, state law defines a “place of public accommodations, resort or amusement” to include “any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public and includes a place of public amusement, recreation, sport, exercise or entertainment.”¹⁷⁴ The fact that ridesharing companies provide service to the public in general, or at least the female half of the public, may weigh against treating them as anything other than a public accommodation.¹⁷⁵ In other words, the fact that a store may be tiny does not disqualify it as public accommodation because the nature of its business is to serve the public. Although single-sex ridesharing would be open to half of the public, its “public” aspects are outweighed by its intimate nature, isolation, and the necessary proximity of driver to rider.

B. Public Policy Demands Exceptions to Public Accommodation Laws

A second argument in favor of exempting single-sex ridesharing from public accommodation laws focuses on the public safety imperative. Courts have already exempted certain kinds of businesses from public accommodation laws in the interest of protecting the right to privacy, most commonly in the context of health clubs. Courts and legislatures should make a similar exception here in the interest of safety. Public safety is as important as privacy, and single-sex ridesharing companies meet important public safety needs.

173. See *Diaz v. Pan Am Airways*, 442 F.2d 385, 389 (5th Cir. 1971) (“[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company’s inability to perform the primary function or service it offers.”).

174. MASS. GEN. LAWS ch. 272, § 92A (2017).

175. *Thomas v. Cty. of Camden*, 902 A.2d 327 (N.J. Super. Ct. App. Div. 2006) (holding that the existence of broad public solicitation is a principal characteristic of public accommodations, for purposes of the legal prohibition of discrimination in relation to public accommodation).

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The debate over the legality of single-sex health clubs has been discussed extensively in the academic literature.¹⁷⁶ Scholars have debated the extent to which various legal approaches to single-sex health clubs, including the legislative exception to Massachusetts' public accommodation law and Pennsylvania's privacy-based judicial exemption, benefit women.¹⁷⁷

Across the country, legislatures and courts have struggled with the idea of allowing exceptions to public accommodation laws for single-sex health clubs. For example, in a Massachusetts lawsuit, a man successfully argued that the state's public accommodation laws prevented a women-only health club from denying him membership based on his sex.¹⁷⁸ Within six months of that decision, the state legislature had passed a law providing that women-only health clubs could exclude men without violating Massachusetts' public accommodation law.¹⁷⁹

A Pennsylvania court took a different approach to this issue. As in the Massachusetts case, the court faced a challenge to a women-only health club, but determined that the club could continue to operate pursuant to a privacy-based exemption to Pennsylvania's public accommodation laws.¹⁸⁰ The court there determined that there was an implicit "customer gender privacy" defense in the context of women's health clubs that "legitimizes certain gender-based discrimination."¹⁸¹

Miriam Cherry describes five different approaches that states take to the issue of single-sex health clubs.¹⁸² The most common approach is to effectively bar them, since in more than half of the states, the plain meaning of the state's public accommodation laws would prohibit their operation.¹⁸³ A second approach, taken by another six states, is the adoption of more ambiguous public accommodation laws that may or may not prohibit single-sex health clubs.¹⁸⁴ Third, some states, including Massachusetts, prohibit gender discrimination in

176. See, e.g., Miriam Cherry, *Exercising the Right to Public Accommodations: The Debate over Single-Sex Health Clubs*, 52 ME. L. REV. 97 (2000); Michael R. Evans, *The Case for All-Female Health Clubs: Creating a Compensatory Purpose Exception to State Public Accommodation Laws*, 11 YALE J.L. & FEMINISM 307 (1999).

177. See, e.g., Kapczynski, *supra* note 115, at 1275–78.

178. *Foster v. Back Bay Spas, Inc.*, No. 96-7060, 1997 WL 634354, at *1 (Mass. Super. Oct. 1, 1997).

179. An Act Relative to the Membership of Fitness and Wellness Facilities in the Commonwealth, ch. 19, 1998 Mass. Legis. Serv. 12 (West) (codified as MASS. GEN. LAWS ch. 272, § 92A (2017)).

180. *LivingWell (North), Inc. v. Pa. Human Relations Comm'n*, 606 A.2d 1287, 1291 (Pa. Commw. 1992).

181. *Id.* at 1290.

182. Cherry, *supra* note 176, at 118–21.

183. *Id.* at 119.

184. *Id.*

public accommodations but specifically exempt health clubs, allowing single-sex health clubs for men and women.¹⁸⁵ Fourth, in ten states, there are no general prohibitions on discrimination in public accommodations based on gender.¹⁸⁶ A fifth approach is Pennsylvania's judicial reading of a privacy-based exemption into a public accommodation law that barred single-sex health clubs.¹⁸⁷

The diverse approaches that states take to incorporating gender as a protected class in public accommodation laws suggest that any legislative solution may be of limited effect. Complicating this lack of unity, many states have rulings by civil rights commissions interpreting their statutes in the context of single-sex health clubs.¹⁸⁸ These commission rulings, while suggestive, do not control any future judicial resolution of a legal challenge. While a uniform federal legislative solution to this issue would be more efficient than a state-by-state approach, the relatively decentralized nature of gender-based public accommodation laws makes that solution infeasible. The development of a model public accommodation law for state-by-state adoption that provides exceptions for ridesharing services would provide a platform for encouraging legislative reform on this issue.

Now, however, may be an exceptionally good time to create new state legislation toward this end. A legislative solution may be especially practical in light of the current wave of new ridesharing legislation being enacted across the country. Ridesharing companies are already working with legislators to create exemptions to existing regulations and to develop new laws to accommodate their business models. Such legislation is in place or in process in many states, including California,¹⁸⁹ New York,¹⁹⁰ Illinois,¹⁹¹ and Massachusetts.¹⁹² Uber and Lyft are promoting the creation of new laws to support their business models in

185. *Id.* at 118–19.

186. *Id.* at 118.

187. *Id.* at 120.

188. *Id.*

189. Carolyn Said, *Uber, Lyft May Face New Rules in California*, S.F. CHRON. (Apr. 5, 2016), <http://www.sfchronicle.com/business/article/Uber-Lyft-may-face-new-rules-in-California-7230320.php> [<http://perma.cc/AEF4-KGEU>].

190. Emma G. Fitzsimmons, *City's Delayed Traffic Study To Guide Regulation of Uber Vehicles*, N.Y. TIMES (Jan. 14, 2016), <http://www.nytimes.com/2016/01/15/nyregion/citys-delayed-traffic-study-to-guide-regulation-of-uber-vehicles.html> [<http://perma.cc/WP8D-D4UC>].

191. Jim Dallke, *Regulations on Uber and Lyft Get Ironed Out as Illinois Lawmakers Approve Ridesharing Bill*, CHICAGOINNO (Dec. 4, 2014, 1:24 PM), <http://chicago.inno.streetwise.co/2014/12/04/uber-lyft-see-ridesharing-regulations-with-illinois-bill> [<http://perma.cc/M7U6-6A45>].

192. Shira Schroenberg, *Massachusetts House Passes Regulations for Uber and Lyft*, MASSLIVE (Mar. 9, 2016, 6:22 PM), http://www.masslive.com/politics/index.ssf/2016/03/massachusetts_house_passes_reg.html [<http://perma.cc/G652-CQMB>].

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many of the states and cities where they operate. Some of these laws are voluntary initiatives by the ridesharing companies. Others have arisen in response to class-action lawsuits challenging ridesharing companies' decisions to classify drivers as independent contractors rather than employees, effectively denying them the legal protections and financial benefits associated with employment.

Legal commentators are proposing new ways to accommodate these more flexible forms of employment.¹⁹³ They may also be receptive to creating new and more effective ways of protecting women and children from sexual assault in ridesharing.

IV. MORE RESEARCH IS NEEDED PRIOR TO SIGNIFICANT CHANGE IN THE LAW

While there are strong arguments in favor of allowing ridesharing companies to hire only women drivers and accept only women passengers, certain issues relevant to the conclusive resolution of this issue should be studied in more detail. These include the specific frequency of violence in ridesharing, including but not limited to violence against women, as well as what can be learned from the general failure of women-only ridesharing experiments in other parts of the world.

A. *More Data Should Be Collected on Ridesharing Safety*

As noted above, a principal objection to the argument that public safety concerns justify differential treatment for single-sex ridesharing companies centers on the lack of hard data comparing ridesharing to taxis (or, for that matter, to any other form of transportation).¹⁹⁴ That data does not exist in part because ridesharing companies have not been required systematically to provide it. More data should be collected on, *inter alia*:

1. The incidence of assault in ridesharing companies on men and women passengers;
2. The incidence of assault in ridesharing companies on men and women drivers;
3. The incidence of rape and sexual assault in ridesharing companies on men and women passengers;
4. The incidence of rape and sexual assault in ridesharing companies on men and women drivers;
5. The criminal justice system's response rates for, and effectiveness in resolving, allegations of violence in ridesharing.

193. Vin Gurrieri, *Uber Cases Could Spur New Employee Classification*, LAW360 (May 6, 2016, 8:50 PM), <http://www.law360.com/articles/793584/uber-cases-could-spur-new-employee-classification> [<http://perma.cc/R95Q-HCFM>].

194. See *supra* Section II.B.2.

From such data, analysts could determine the relative safety of ridesharing compared with taxis and other forms of transportation, for which more extensive data is collected.

B. The Mixed Success of Women-Only Transportation in Other Countries Should Be Studied

Other countries' experiences, which almost always take the form of some women-only transportation options (although not specifically in the form of single-sex ridesharing), are also instructive. The personal and physical risks women take in using rideshare services are part of the global issue of improving women's safety in using public transportation.¹⁹⁵ Women tend to be more fearful in public settings because they perceive a higher risk than men.¹⁹⁶ This risk is exacerbated in enclosed spaces with few exits and deserted spaces such as transit stops and empty streets.¹⁹⁷ Although women's security in public transportation is a global issue, the United States has not kept up with other countries in addressing it. As a large-scale survey of U.S. transit operators reported, "we have to sadly conclude that the United States is considerably behind other countries on the issue of transit safety for women."¹⁹⁸

If single-sex ridesharing is upheld as legal through judicial interpretation of existing laws or the creation of new laws, the United States would not be alone in creating safer forms of transportation for women. Other countries, including Canada, the United Kingdom, Australia, Germany, Sweden, Mexico, India, Indonesia, Egypt, and Japan, have developed a variety of measures to provide women with safer forms of public transportation.¹⁹⁹ For example, London's public transportation operator, Transport for London, uses a Technology Innovation Portal to collect innovative technological ideas to improve, among other things, safety.²⁰⁰ One result was the Safer Travel at Night initiative, which was designed to highlight the dangers of taking "illegal minicabs" home after a night out.²⁰¹

195. See *Why Public Transport Needs To Work for Women, Too*, SMART CITIES DIVE (Feb. 11, 2015), <http://www.sustainablecitiescollective.com/embarq/1044816/why-public-transport-needs-work-women-too> [<http://perma.cc/L8ML-T9P5>].

196. MINETA TRANSP. INST., *supra* note 21, at 10.

197. *Id.*

198. *Id.* at 32.

199. *Id.*

200. *Innovation Portal: Challenges*, TRANSPORT FOR LONDON, <http://tfl.gov.uk/info-for/business-and-commercial/challenges#on-this-page-5> [<http://perma.cc/KZ2Z-EK3D>].

201. *Share a #HomeSafeSelfie - Safer Travel at Night*, TRANSPORT FOR LONDON (Sept. 25, 2014), <http://tfl.gov.uk/info-for/media/press-releases/2014/september/share-a-homesafeselfie-safer-travel-at-night> [<http://perma.cc/N4K7-NG3X>].

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While other countries have proposed or adopted single-sex transportation, it has not been universally successful. Many women-only transportation options have become quite popular. In India, a women-only train called the “Ladies Special” has been running on the Mumbai Suburban Railway since 1982.²⁰² In Mexico, following the success of the government-subsidized Atenea women-only bus system, the Mexico City government announced the introduction of “pink taxis” that “would be driven only by women and would stop only for women.”²⁰³ Women-only train cars have become popular in Tokyo, where they were introduced in an effort to combat groping and other forms of sexual assault.²⁰⁴ In Egypt, where ninety-nine percent of women and girls interviewed for a United Nations survey in 2013 reported having been sexually harassed, there are women-only train cars on Cairo’s Metro.²⁰⁵

The failures, however, may prove instructive for U.S. scholars. Indonesia’s women-only train cars were converted back to mixed use in May 2013, seven months after their introduction, because they were not being used to capacity.²⁰⁶ Most recently, a proposal to re-introduce women-only train cars in London, which British Rail had operated from 1874 to 1977, failed spectacularly.²⁰⁷ In August 2015, Labour Party leader Jeremy Corbyn’s proposal to reinstate women-only train cars to reduce harassment was met with significant backlash from his female colleagues.²⁰⁸ The Deputy Mayor of London later rejected the

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202. *Ladies Special: Celebrating 23rd Anniversary of First Ever All Women Local Train*, FIRST POST (May 6, 2015), <http://www.firstpost.com/india/mumbai-local-celebrating-the-23rd-anniversary-of-the-ladies-special-train-2231052.html> [http://perma.cc/E7QQ-WF69].
203. *DF To Implement “Pink Taxi” Program for Women*, JUST. MEX. (Aug. 10, 2010), <http://justiceinmexico.org/df-to-implement-pink-taxi-program-for-women> [http://perma.cc/4REW-6G2S].
204. Colin Joyce, *Persistent Gropers Force Japan To Introduce Women-Only Carriages*, TELEGRAPH (May 15, 2005, 12:01 AM), <http://www.telegraph.co.uk/news/world-news/asia/japan/1490059/Persistent-gropers-force-japan-to-introduce-women-only-carriages.html> [http://perma.cc/5]NH-NS6H].
205. Dina Demrdash, *Cairo’s Women-Only Metro Carriages Reveal Egypt Tensions*, BBC (Mar. 12, 2015), <http://www.bbc.com/news/world-middle-east-31773567> [http://perma.cc/PTP7-VGA8].
206. Natasha Wynarczyk, *Indonesian Women-Only Trains Are Scrapped*, MARIE CLAIRE (May 14, 2013, 3:27 PM), <http://www.marieclaire.co.uk/news/world/542689/indonesian-women-only-trains-are-scrapped.html> [http://perma.cc/KA7F-VFHG].
207. Louis Doré, *Women-Only Train Carriages Are Not Happening in London. Here’s Why*, INDEPENDENT: INDY100 (Sept. 9, 2015), http://indy100.independent.co.uk/article/womenonly-train-carriages-are-not-happening-in-london-heres-why--b1_yKhLRSg [http://perma.cc/FG6R-MHZ7].
208. Rowena Mason, *Jeremy Corbyn Raises Possibility of Women-Only Train Carriages*, GUARDIAN (Aug. 26, 2015), <http://www.theguardian.com/politics/2015/aug/26/women-only-train-carriages-a-possibility-under-jeremy-corbyn> [http://perma.cc/

idea of women-only train cars and the London Assembly voted unanimously against them.²⁰⁹ Her proposal to dismiss the idea stated that it “amounts to nothing more than gender segregation and does nothing to address any of the issues of sexual harassment. Everyone should feel safe on [London] trains— isolating women and treating them as the problem is not the answer.”²¹⁰ One editorial echoed the concern that creating women-only transportation improperly diverts attention away from the harassers:

While the idea of a safe space is compelling, this international trend—which often comes couched in paternalistic rhetoric about “protecting” women—raises questions of just how equal the sexes are if women’s safety relies on us being separated. After all, shouldn’t we be targeting the gropers and harassers? The onus should be on men to stop harassing women, not on women to escape them.²¹¹

The idea that the government should focus on preventing harassment rather than segregating potential victims is important, but it has limited relevance in the context of single-sex ridesharing in this country. Unlike the public transportation initiatives described above, companies like See Jane Go represent a privately financed effort to meet the needs of women drivers and passengers. There is no question of how best to allocate limited public resources in this context, since no public resources are being used for their creation.

The history of single-sex transportation around the world should be studied more closely before adopting definitive principles regarding it under U.S. state and federal law. There will be significant differences, in part due to differences in cultures, legal systems, and criminal justice procedures, but there may be important similarities to study as well. The problem of women’s vulnerability in public places is all too global. So too are the potential physical, personal, and socioeconomic consequences for women and their families, as well as the impossibility of genuine gender equality and diversity unless women can take part freely and fully in public life. Wherever women feel unsafe in public, public resources should at least be considered as an option for improving their safety.

JWQ7-W3EN]; Andrew Sparrow, *Jeremy Corbyn Faces Backlash over Women-Only Train Carriages Idea*, GUARDIAN (Aug. 26, 2015), <http://www.theguardian.com/politics/2015/aug/26/jeremy-corbyn-backlash-women-only-train-carriages-cooper-kendall> [<http://perma.cc/M3SU-KMBQ>].

209. Doré, *supra* note 207.

210. *Id.*

211. Jessica Valenti, *Is Segregation the Only Answer to Sexual Harassment?*, GUARDIAN (Aug. 3, 2007), <http://www.theguardian.com/lifeandstyle/2007/aug/03/healthandwellbeing.gender> [<http://perma.cc/9EY5-3TGX>].

CONCLUSION

A broad reading of laws prohibiting gender discrimination both in employment and in public accommodations would constrain the operation of single-sex ridesharing companies. This Article suggests that one way to alleviate the danger women face in ridesharing is to allow those companies to operate by reading anti-discrimination laws more narrowly and recognizing a slightly expanded BFOQ defense in this context. Doing so will promote public safety and further broader social interests. The Article anticipates some of the more significant counterarguments and proposes areas for additional research, including a more rigorous and thorough documentation of the incidence of assault in ridesharing and a comparative study of how single-sex transportation options have fared in other countries.

There is no simple solution to the question of how best to advance the national interest in public safety, especially the safety of women from sexual assault, while simultaneously working towards a more equitable society overall. These arguments and counterarguments are necessary for a fuller debate about the emerging rideshare industry and the safety implications for women drivers and riders.

This suggested approach is rooted in substantive equality principles. Applying formal equality principles in the context of ridesharing services does little to advance the status of women overall because it perpetuates many of the public dangers that inhibit women from full participation in public and social life. Women do not have truly equal opportunities when we only apply formal equality principles to the arena of driving for ridesharing companies. The greater threat of sexual assault that women drivers face from customers inhibits the participation of women in this field. If single-sex ridesharing companies can reduce the safety risk women drivers face by effectively removing the threat of assault, perhaps their business models should be seen as a form of substantive equality.

Applying a substantive equality approach to the regulation of ridesharing services could have a significant positive effect on the safety of women, especially the younger and more urban women who are most likely to use these services. A secondary effect of the judicial and legislative solutions proposed here may be a greater overall acknowledgment by the legal system of the danger of sexual assault for women. This, in turn, may have beneficial ripple effects for victims of sexual violence in other circumstances as well.

While public safety is often considered a matter of criminal law rather than civil law, the increasing use of private transportation services and the dramatic incidence of assault that has been reported in connection with these companies necessitate a nontraditional response. Existing civil and criminal laws, however, are insufficient to protect women from physical danger in this context. They have not done enough to deter assault on women using private transportation services.

The recommendations presented here should not be read to suggest that any public sector institutions or nonprofits should divert attention from com-

bating the problem of assault on women. Single-sex ridesharing companies present a market-based partial remedy to the issue of women's safety in transportation. Because they do not use government funds, they should supplement and bolster, rather than weaken, government, nonprofit, and NGO efforts to improve public safety.

Despite the importance of restricting gender discrimination in most employment contexts, exceptions should be made in the context of ridesharing in order to improve public safety. Rideshare services that cater only to women and use exclusively women drivers should be permitted, despite the general prohibitions on such practices by state public accommodation laws and federal and state employment discrimination laws. The vulnerability of women to sexual assault in these contexts justifies judicial and legislative recognition of a public safety exception. To that end, single-sex ridesharing companies should be permitted to engage in otherwise impermissible gender discrimination so long as they can demonstrate that the purpose and effect of such discrimination is to improve public safety.