

**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 have changed the landscape of transportation services. These companies allow individuals to request a ride anywhere in a given area from a vetted driver by using an app and facilitating payment 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, but may be unsafe for women.² It has been accused of grossly underreporting the incidence of sexual assault complaints lodged by its customers.³

A competitor now plans to offer ridesharing by and for women only. Its goal is to provide a safer ride for both drivers and customers. Its business model, however, may 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.

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 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 hiring and legislative approach to serving 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.⁴

¹ See, e.g., UBER, <https://www.uber.com> (last visited May 13, 2016); LYFT, <https://www.lyft.com> (last visited May 13, 2016).

² Jack Nicas, *Alphabet Unveils Program for Carpooling Via App Waze, Fraying Ties With Uber*, WALL ST. J. (May 17, 2016, 6:36 am), <http://www.wsj.com/articles/alphabet-unveils-program-for-carpooling-via-app-fraying-ties-with-uber-1463428668>.

³ Charlie Warzel and Johana Bhuiyan, *Internal Data Offers Glimpse At Uber Sex Assault Complaints*, BUZZFEED (Mar. 6, 2016, 1:34 p.m.), https://www.buzzfeed.com/charliewarzel/internal-data-offers-glimpse-at-uber-sex-assault-complaints?utm_term=.uDjND303#.muNJ5LQWQ.

⁴ While sexual assault happens to both men and women, the majority of sexual assault victims are women. *Who Are the Victims?*, RAINN, <https://rainn.org/get-information/statistics/sexual-assault-victims> (last visited May 13, 2016). This appears to be so in transportation services as well. For example, of 70 media reports of sexual assault and harassment, only one story describes an allegation of sexual assault on a man (by a male driver). WHO'S DRIVING YOU, <http://www.whosdrivingyou.org/rideshare-incidents> (last visited May 13, 2016). For this reason, the Article focuses on the safety concerns of women rather than of men. While men have been victims of non-sexual assault by Uber and Lyft drivers (*Who Are the Victims?*, RAINN, <https://rainn.org/get-information/statistics/sexual->

SafeHer's proposed business model raises at least two potential legal issues. The first is whether Title VII of the Civil Rights Act's prohibition on gender discrimination in employment prevents SafeHer from refusing to employ men as drivers. If its employment practices were challenged as a violation of that law, would SafeHer be able to argue successfully that being a woman is a Bona Fide Occupational Qualification? Could SafeHer 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 SafeHer's refusal to allow men to ride 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. Resolving only one of these legal issues may moot the argument for the single-sex rideshare model as a whole.

This Article explores the legal challenges of both hiring and serving only women in the ridesharing context, proposes that the state's interest in promoting public safety outweighs its interest in gender equality in this context, and examines potential resolutions of this tension. It proceeds in five 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 federal 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 Bona Fide Occupational Qualification (BFOQ) defense, and argues for a public safety 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 reviews and provides a cost-benefit analysis of an alternative, contractual approach to providing single-sex ridesharing. Part V provides an overview of single-sex ridesharing practices in other countries to provide a comparative basis for the issues and remedies described in this Article.

I. Ridesharing Services Exacerbate a Public Safety Problem for Women.

Many women 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. This fear is not unreasonable. Media attention has focused on the growing threat to women in this context. There have been high-profile reports of assault by Uber and Lyft drivers in cities across the country, including Boston, New York, Washington DC, Los Angeles and Orlando.⁵

While there are no federal government records of the incidence of violence involving taxi and rideshare drivers, some private organizations are collecting and publicizing examples of such

assault-victims (last visited May 13, 2016)), companies like SafeHer do not attempt to solve that problem and therefore it is beyond the scope of this Article.

⁵ Adrienne LaFrance and Rose Eveleth, *Are Taxis Safer than Uber?* THE ATLANTIC, <http://www.theatlantic.com/technology/archive/2015/03/are-taxis-safer-than-uber/386207/> (Mar. 3, 2015).

violence. One source maintains an online list of deaths, assaults, sexual assaults, kidnappings, felonies, DUI incidents and other dangers involving ridesharing companies.⁶ In May 2016, the website contained links to 70 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 since 2013.⁷

The incidence of sexual assault in taxis is reportedly rising as well. In New York City, the number of reported rapes by taxi drivers of passengers increased 40% between 2014 and 2015, compared with an overall 6% rise in the number of rapes reported in general during those years.⁸ It is impossible to know whether ridesharing services are safer than taxis in this regard, since police departments do not generally distinguish between them in terms of recordkeeping.⁹

To complicate matters, the frequency and severity of sexual assaults in rideshare services may be underreported by the services themselves. In March 2016, BuzzFeed reported that Uber may have grossly understated its sexual assault complaints.¹⁰ While Uber had admitted to receiving five claims of rape and “fewer than” 170 claims of sexual assault between December 2012 and August 2015, screen shots of Uber’s internal reporting system suggested that in fact it had received thousands of such complaints.¹¹ 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.¹² Searches for “assaulted” and “sexually assaulted” returned hundreds of other hits.¹³ Uber’s response to these reports provide little comfort to potential customers. It first rebutted the BuzzFeed report and then retracted its rebuttal, apologizing to its customer service vendor for using a “flawed (and fictitious)” example to explain the inaccuracy of the search results.¹⁴

While ridesharing companies might improve the safety of their service, for example, by adopting more stringent screening procedures for their drivers, Uber has resisted adopting more thorough screening measures. More troublingly, it has also been accused of lying about the strength of its

⁶ WHO’S DRIVING YOU, <http://www.whosdrivingyou.org/rideshare-incidents> (last visited May 13, 2016). 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 (TLPA), an association representing, among others, drivers whose livelihood is presumably threatened by the growth of ridesharing companies. WHO’S DRIVING YOU, <http://www.whosdrivingyou.org/about>, (last visited May 13, 2016).

⁷ WHO’S DRIVING YOU, <http://www.whosdrivingyou.org/rideshare-incidents> (last visited May 13, 2016).

⁸ Thomas MacMillan and Pervaiz Shallwani, *Rise in Sexual Assaults Reported by Taxi Passengers*, WALL ST. J. (Jan. 10, 2016, 8:48 p.m.), <http://www.wsj.com/articles/rise-in-sexual-assaults-reported-by-taxi-passengers-1452476904>.

⁹ Adrienne LaFrance and Rose Eveleth, *Are Taxis Safer than Uber?* THE ATLANTIC, <http://www.theatlantic.com/technology/archive/2015/03/are-taxis-safer-than-uber/386207/> (Mar. 3, 2015).

¹⁰ Charlie Warzel and Johana Bhuiyan, *Internal Data Offers Glimpse At Uber Sex Assault Complaints*, BUZZFEED (Mar. 6, 2016, 1:34 p.m.), https://www.buzzfeed.com/charliwarzel/internal-data-offers-glimpse-at-uber-sex-assault-complaints?utm_term=.uDjND303#.muNJ5LQWQ.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Charlie Warzel, *Uber Apologizes For “Imperfect (And Fictitious)” Rebuttal Of A BuzzFeed News Claim*, BUZZFEED (Mar. 7, 2016, 4:50 p.m.), https://www.buzzfeed.com/charliwarzel/uber-apologies-for-imperfect-and-fictitious-rebuttal-of-a-bu?utm_term=.uDjND303#.kfrzm3GpG.

safety checks as well as lying about the frequency of reported sexual assaults by their drivers.¹⁵ Uber's resistance to improving its screening measures and the allegations of fraud surrounding its driver and customer safety records all 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.

The safety of the drivers themselves is no less a concern. Women drivers face unique safety risks, dissuading them from working in this field. Only 1 percent of New York City taxi drivers and 5 percent of New York City livery car and limousine drivers are women.¹⁶ Only 14% of Uber drivers and 30% of Lyft drivers are women.¹⁷ According to SafeHer founder Michael Pelletz, many women fear driving for taxi and ridesharing companies because of the threat they face from customers.¹⁸ 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.¹⁹ Customers have used Uber's "lost and found" feature to harass or stalk female drivers after their rides.²⁰ The app Uber drivers use does not allow them to block specific passengers, so drivers cannot avoid passengers who make them uncomfortable.²¹ 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 four out of five stars are often fired.²²

A. **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 safety concerns.²³ Several competitors have emerged, buoyed by these concerns, with varying degrees of success.²⁴ One competing ridesharing company, for women only, has gained national

¹⁵ Reuters, *Uber To Pay \$25 Million to Settle Accusations It Mislaid Customers*, FORTUNE (April 7, 2016, 8:51 pm), <http://fortune.com/2016/04/07/uber-settlement-lawsuit-mislead-customers>.

¹⁶ Winnie Hu, *New Service Offers Taxis Exclusively for Women*, N.Y. TIMES, Sep. 8, 2014 at A15.

¹⁷ Ellen Huet, *Why Aren't There More Female Uber And Lyft Drivers?* FORBES (Apr. 9, 2015, 11:00 am), <http://www.forbes.com/sites/ellenhuet/2015/04/09/female-uber-lyft-drivers/#7e6bf7085298>.

¹⁸ Telephone interview with Michael Pelletz, Founder, SafeHer (May 11, 2016).

¹⁹ Ellen Huet, *Why Aren't There More Female Uber And Lyft Drivers?* FORBES (Apr. 9, 2015, 11:00 am), <http://www.forbes.com/sites/ellenhuet/2015/04/09/female-uber-lyft-drivers/#7e6bf7085298>.

²⁰ Johana Bhuiyan, *Men Are Using Uber's Lost-And-Found Feature To Harass Female Drivers*, BUZZFEED (Feb. 10, 2015, 2:47 pm) https://www.buzzfeed.com/johanabhuiyan/faced-with-harassment-female-uber-drivers-often-left-to-fend?utm_term=.cx391agOg#.gaX6JagNg.

²¹ Ellen Huet, *Why Aren't There More Female Uber And Lyft Drivers?* FORBES (Apr. 9, 2015, 11:00 am), <http://www.forbes.com/sites/ellenhuet/2015/04/09/female-uber-lyft-drivers/#7e6bf7085298>.

²² Ellen Huet, *How Uber's Shady Firing Policy Could Backfire On The Company*, FORBES (Oct. 30, 2014, 10:00 am), <http://www.forbes.com/sites/ellenhuet/2014/10/30/uber-driver-firing-policy/#52790e588ef7>.

²³ Stacy Perman, *Is Uber Unsafe for Women? Many say yes*, MARIE CLAIRE <http://www.marieclaire.com/culture/news/a14480/uber-rides-dangerous-for-women/> (May 20, 2015)

²⁴ 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>. Other "Uber for kids" companies such as HopSkipDrive and Zemcar remain in business. HOPSKIPDRIVE, <http://www.hopskipdrive.com/> (last visited May 19, 2016); ZEMCAR, <http://www.zemcar.com/> (last visited May 19, 2016).

attention.²⁵ SafeHer²⁶ is a new ridesharing company that uses only women drivers and picks up only women passengers and children under 13. The company, formerly known as Chariot for Women, plans to launch its service in several locations across the country in the fall of 2016. SafeHer 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 SafeHer ride. Drivers, after having passed a series of safety screenings, can respond to customer requests and provide rides. Although it initially announced an April 19, 2016 launch in Massachusetts, the company delayed and broadened the geographic scope of its launch to better meet customer demand.²⁷

SafeHer's business model addresses the safety risks that women face as both customers and drivers of rideshare companies. According to its founder, Michael Pelletz, SafeHer's goals include empowering women and ensuring their safety.²⁸ It 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 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.

SafeHer is not the first company to propose a gendered ridesharing model, nor is it the first to raise concerns about the legality of that model. 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.²⁹ When it announced its opening in 2014, critics noted that it was likely to violate federal and local anti-discrimination laws.³⁰ 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. Federal Law Should Not Prohibit Hiring Only Women as Rideshare Drivers.

SafeHer's plan to hire only women as drivers appears to violate a narrow reading of federal law, in that it amounts to sex-based discrimination in employment. Employment discrimination based on sex violates Title VII of the Civil Rights Act of 1964.³¹ If a man applied to drive with SafeHer

²⁵ See, e.g., Curt Woodward, *Uber, but for women? Probably illegal, experts say*, BOSTON GLOBE (Mar. 28, 2016), <https://www.bostonglobe.com/business/2016/03/28/uber-but-for-women-probably-illegal-experts-say/QP5fYbQfvXUnKcEs0BqhEP/story.html>; Kristen Hall-Geisler, *Chariot for Women is a new ridesharing service for women only*, TECHCRUNCH (Apr. 8, 2016), <http://techcrunch.com/2016/04/08/chariot-for-women-is-a-new-ride-sharing-service-for-women-only/>; Trisha Thadani, *Ex-Uber driver creates ride-sharing service for women*, USA TODAY (Apr. 4, 2016, 4:48 pm), <http://www.usatoday.com/story/news/nation/2016/04/02/ex-uber-driver-creates-ride-sharing-service-women/82557796/>.

²⁶ SAFEHER, <http://www.safeher.com> (last visited May 20, 2016).

²⁷ Telephone interview with Michael Pelletz, Founder, SafeHer (May 11, 2016).

²⁸ Susan Zalkind, *Confessions of a female Uber driver: women-only rideshare has many pluses*, THE GUARDIAN (April 21, 2016, 8:00 am), <https://www.theguardian.com/technology/2016/apr/21/chariot-for-women-female-only-rideshare-uber>.

²⁹ SHETAXIS, <http://shetaxis.com> (last visited May 16, 2016).

³⁰ See, e.g., Jacob Gershman, *New Car Service App for Women Raises Legal Questions, Experts Say*, WALL ST. J.: LAW BLOG (Sep. 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>; Vivian Giang, *Can This Women-Only Taxi Service Overcome Legal Hurdles?*, FAST CO.: STRONG FEMALE LEAD (Oct. 3, 104 5:21 am) <http://www.fastcompany.com/3036570/strong-female-lead/can-this-women-only-taxi-service-overcome-legal-hurdles>.

³¹ 42 U.S. Code § 2000e-2 (a)(1) (2015).

and was rejected because of his gender, he could therefore make out a prima facie claim of discrimination. Whether SafeHer could rebut that presumption of discrimination would depend on whether it could assert a defense. The most likely defense in this instance would be that being female is a BFOQ for driving for SafeHer.³²

The BFOQ defense allows employers to make hiring decisions based on sex, which otherwise would violate Title VII, if such decisions are necessary to the nature of the defendants' business.³³ This test, introduced by the Fifth Circuit in *Diaz v. Pan American World Airways, Inc.*³⁴ and adopted by the Supreme Court in *Dothard v. Rawlinson*,³⁵ has been referred to as the "essence of the business" test.³⁶ Under this test, if an employee of either sex can perform the particular job, the defense will fail.³⁷

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."³⁸ 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.³⁹ As described further below, courts have accepted the BFOQ defense where the defendant can demonstrate a legitimate need to do discriminate based on gender in order to promote safety and privacy.

A. The BFOQ Defense Presents a Challenge to Ridesharing.

The fact that SafeHer's female customers may prefer a woman driver does not constitute an easy BFOQ defense without further analysis.⁴⁰ Customer preference has long been held insufficient to support a BFOQ defense.⁴¹ 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 ability to perform certain kinds of work. In the ridesharing context, however, women riders arguably prefer women drivers for safety reasons rather than because they view women drivers as more competent.⁴²

³² See 42 U.S.C. § 2000e-2(e)(1) (2015) ("[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...").

³³ See, e.g., *Torres v. Wisc. Dept. of Health and Soc. Svcs.*, 859 F.2d 1523, 1528 (7th Cir. 1988).

³⁴ 442 F.2d 385, 388 (5th Cir. 1971).

³⁵ 433 US 321, 333 (1977).

³⁶ See Rachel L. Cantor, *Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 1999 U.CHI. LEGAL F. 493 for an extensive discussion of this test.

³⁷ *Johnson Controls*, 499 US 187, 201 (1991) ("By modifying 'qualification' with 'occupational,' Congress narrowed the term to qualifications that affect an employee's ability to do the job.").

³⁸ Interpretive Memorandum of Title VII of HR 7152, Senators Joseph S. Clark and Clifford P. Case, Floor Managers, in 110 Cong Rec § 7212, § 7213 (Apr 8, 1964).

³⁹ *Id.*

⁴⁰ Whether SafeHer can accommodate only female customers is discussed further in Section III.

⁴¹ 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 employer cannot deny a man a position as flight attendant based on customer preference to be served by women).

⁴² Women may, in fact, be better drivers. According to a New York Times report, 80% of all crashes in a five year period that seriously injured or killed pedestrian involved male drivers. "The imbalance is far too great to be

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 Auto 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.”⁴³ 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.”⁴⁴

Although sex in this context is often equated with sexuality or sex appeal⁴⁵, 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 SafeHer. Promoting women's safety by restricting the business to women drivers and riders is central to the mission of the company.⁴⁶ Hiring only women as drivers arguably protects riders from sexual assault by drivers. Conversely, picking up only women passengers arguably protects drivers from sexual assault by riders. SafeHer'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.

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

Societal concerns and strong government interests play a vital role in the application of the BFOQ defense. Courts have upheld the BFOQ defense, for example, when the defendant can demonstrate sex-linked concerns about privacy.⁴⁷

Courts have recognized a government interest in 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.”⁴⁸ Justice Breyer's dissent in *D.C. v. Heller* noted that “the [Supreme] Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify

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. 18, 2010 at A19.

⁴³ 499 US 187, 203 (1991), quoting *Western Air Lines, Inc v Criswell*, 472 US 400, 413 (1985).

⁴⁴ Rachel L. Cantor, *Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 1999 U.CHI. LEGAL F. 493, 501 (1999).

⁴⁵ Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. OF GENDER L. & POLICY 169, 184 (2009).

⁴⁶ SAFEHER, <http://safeher.com/about-us.php> (last visited May 20, 2016) (“The app is built for safety... Safety is THE priority.”)

⁴⁷ See, e.g., *Backus v. Baptist Medical Ctr.*, 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated on other grounds*, *Backus v. Baptist Medical Center*, 671 F.2d 1100 (8th Cir. 1982) (upholding BFOQ preference for hiring female obstetric nurses out of concern for patient privacy in delivery rooms); *Brooks v. ACF Industries, 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); *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).

⁴⁸ 457 US 305, 315 (1982), citing *Ingraham v. Wright*, 430 US 651, 673 (1977).

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)).⁴⁹

Other courts have recognized the importance of personal safety as well. In a case concerning the unauthorized disclosure of personal information, the Sixth Circuit Court of Appeals 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.”⁵⁰ In *Flowers v. City of Minneapolis, Minnesota*, a case concerning a claim of police brutality, the Eighth Circuit Court of Appeals acknowledged in passing the plaintiff’s “fundamental right to personal safety.”⁵¹ The Second Circuit Court of Appeals noted that New York has “substantial, indeed compelling, governmental interests in public safety,” a proposition to which both parties agreed.⁵²

The “substantial, indeed compelling governmental interest[] in public safety” is 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 outweigh the right to be free from gender discrimination provided by Title VII.

Courts have upheld the BFOQ defense on the basis of safety concerns in other contexts. For example, in *Dothard*, the Supreme Court allowed the Alabama Board of Corrections to discriminate against a female applicant for a prison guard position on the basis of her sex because having a female prison guard would create security problems.⁵³ The Court expressed as much concern about the physical danger to the plaintiff as a potential assault victim as it did about the overall security of the prison itself.⁵⁴ 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.⁵⁵ In analyzing the state’s “thorough, thoughtful approach” to sex-based staffing, the appellate court affirmed that preventing sexual assault of the prisoners is a legitimate objective.⁵⁶

Based on this jurisprudence, there are strong arguments in favor of single-sex ridesharing. There are also serious concerns about the extent to which allowing gender discrimination reinforces old stereotypes of women as the weaker sex, as well as other concerns, outlined in the following

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

⁵⁰ *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998), citing *Union Pac. Ry. V. Botsford*, 141 US 250, 251 (1891).

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

⁵² *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96 (2d Cir.2012).

⁵³ *Dothard v. Rawlinson*, 433 US 321 (1977).

⁵⁴ “The 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. The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility.” *Id.* at 336.

⁵⁵ *Teamsters Local Union v. Wash. Dept. of Corr.*, 789 F. 3d 979 (9th Cir. 2015)

⁵⁶ *Id.* at 988, 990.

section. The question is how to protect women from the safety risks apparent in more ubiquitous ridesharing services without devolving into the kind of protectionist schemes that have in effect denied women's equality for most of the United States' history.

C. Potential Objections to Title VII Exceptions Focus on Equity and Necessity.

There are several counter-arguments to this 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) single-sex ridesharing is an incomplete solution to violence against drivers; (4) sexual harassment law already provides a civil remedy and (5) criminal law is the more appropriate basis for resolution of safety issues.

First, as a matter of theory, legal scholars disagree as to whether these BFOQ defenses are beneficial overall. Many academic feminists would argue that any form of gender discrimination is intolerable. Indeed, the debate among feminists as to the wisdom and desirability of gender separatism goes back to the 19th century.⁵⁷ Some have advocated for the elimination of the BFOQ defense in the context of same-sex preferences on the basis of privacy.⁵⁸ One concern is that these privacy-based BFOQs reiterate hetero-normative standards that further marginalize the LGBTQ community. There is potential harm in any sanctioned gender discrimination, even if it is justified by greater concerns (as I argue it is in this context). Here, however, the proposed gender restriction operates to increase women's freedom (to travel, to work, to have a social life) rather than to lessen it. In so doing, it will help to level the playing field rather than perpetuating inequality.

Another potential obstacle to the development of this exception is a lack of evidence that women drivers are actually safer driving for single-sex ridesharing companies than they are for taxis and companies like Uber. Arguably, the fact that women feel more comfortable with other women should not justify disparate treatment in hiring any more than men's comparatively greater comfort in working with other men. Perceived safety is not the same as proven safety. As companies like SafeHer begin operation, it may be helpful to develop this kind of data with a view toward potential future legal challenges.

In response, however, proponents of single-sex ridesharing may argue that women's fear of physical harm is not the same as the casual discomfort of men with women. 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.⁵⁹ The impact of this

⁵⁷ See, e.g., Deborah L. Rhode, *Association and Assimilation*, 81 NW. U.L. REV. 106 (1986)

⁵⁸ 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 the goal of Title VII to promote equal employment opportunity and change the status quo with regard to identity-based exclusions from employment); Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257 (2003) at 1261-62 (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).

⁵⁹ HOW TO EASE WOMEN'S FEAR OF TRANSPORTATION ENVIRONMENTS: CASE STUDIES AND BEST PRACTICES 3 (Mineta Transportation Institute, 2009).

disruption may be particularly severe for low-income and minority women, who tend to have fewer transportation options than more affluent and white women.⁶⁰

Another concern about gender discrimination in hiring ridesharing drivers is that it does little to protect women drivers from nonsexual violence by women customers. While women are more likely to suffer from sexual assault by men, there is no comparable presumption about assault in general. Indeed, one could argue that a single-sex ridesharing company is more likely to attract predatory riders because those riders may assume that women drivers are smaller and weaker than the male majority of Uber and Lyft drivers. The fact that this is not a complete remedy to the problem of drivers' safety should not undermine the value and, I propose, legality of this practice.

Next, one might argue that the remedies presented here are inappropriate because sexual harassment laws already provide a remedy for assault by third parties in an employment context. Those laws, however, have limited effectiveness in ridesharing because of the nature of the work. Sexual harassment law only protects women drivers when the conduct rises to the level of a hostile work environment. Harassment by customers, who ride sporadically, may not be as pervasive as the current standard requires.⁶¹ It may not protect drivers at all if the ridesharing company can prove that the workers are not employees in the first place, but rather are independent contractors. Uber and Lyft have been making this argument repeatedly in cases across the country. 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.

Another potential objection is that public safety is more properly the focus of criminal law than of civil law. Indeed, strengthening criminal law is essential to the prevention of 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. For example, the founder of SafeHer related an anecdote about a female Uber driver who was attacked by two passengers. When the police asked Uber to provide the names of the passengers, Uber refused to do so on the grounds that such disclosures would violate the privacy rights of the passengers.⁶² A second limitation of criminal law to fully address sexual assault lies in the low reporting rate of sexual assault. According to RAINN, the nation's largest anti-sexual assault organization, 68% of sexual

⁶⁰ Id.

⁶¹ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986) (racially or sexually hostile work environment arises only when the conduct is "sufficiently severe or pervasive 'to alter the conditions of employment and create an abusive working environment'" (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982))).

⁶² Telephone interview with Michael Pelletz, Founder, SafeHer (May 11, 2016). A Google search of "female Uber driver attacked" does not return any documentation of men attacking a female Uber driver. It does, however, return many results regarding an incident of a female passenger verbally and physically attacking a male Uber driver. After video footage of the incident emerged, the passenger, a Miami doctor, was suspended from her job. Lindsey Bever, *'She's getting violent': Miami doctor suspended after attack on Uber driver*, WASHINGTON POST (Jan. 22, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/01/22/shes-getting-violent-miami-doctor-suspended-after-attack-on-uber-driver/>.

assaults are unreported, making sexual assault one of the most underreported crimes.⁶³ Prosecutors cannot pursue cases that victims do not report.⁶⁴

Each of these important concerns deserves more discussion than this Article provides, and my hope is that other scholars will continue the discussion. Overall, my belief is that while there are potential societal costs to restricting men from women's ridesharing services, these would be outweighed by the benefit of increased safety for women drivers.

D. Courts Should Recognize a Safety-Based Exception to Anti-Discrimination Laws for Hiring Only Women as Single-Sex Rideshare Drivers.

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 safety, courts should recognize an exception to Title VII for gender discrimination in this context. Cases like *Dothard* which 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, 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.

While most claims of gender discrimination will likely be brought under Title VII, this exception should also be made to state law anti-discrimination claims. 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."⁶⁵ This kind of legislative safe harbor could be interpreted to allow women's ridesharing companies to hire only women drivers if it can persuade lawmakers that its practice ultimately promotes equal employment opportunities for women.

III. State Public Accommodation Laws Should Not Prohibit Accommodating Only Women Passengers.

A second legal problem with single-sex ridesharing lies in its proposal to accept only female customers.⁶⁶ While Title VII prohibits discrimination in public accommodations based on race, color, religion or national origin, it does not bar such discrimination based on gender.⁶⁷ Instead, most states have a law prohibiting gender discrimination in public accommodations. These laws make it illegal to discriminate based on gender in the provision of public accommodations, a category which usually includes transportation services. For example, Massachusetts' public

⁶³ *Reporting Rates*, RAINN, <https://rainn.org/get-information/statistics/reporting-rates> (last visited May 23, 2016).

⁶⁴ Prosecutorial discretion, and the reluctance of many prosecutors to pursue sexual assault cases, compounds this problem.

⁶⁵ R.C.W. 49.60.180 (2011).

⁶⁶ SafeHer, for example, proposes to restrict its customers to women and boys under the age of 13. SAFEHER, <http://safeher.com/about-us.php> (last visited May 20, 2016).

⁶⁷ 42 U.S. Code § 2000a(a) (2015).

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.⁶⁸ 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.”⁶⁹ The other categories of public accommodations include hotels, retail stores, restaurants, theaters, hospitals, and places of “public amusement.”⁷⁰

In light of these laws, there are at least two arguments for allowing single-sex ridesharing companies to drive only women. The first is that 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. A second argument is based on the recognition that public safety is a fundamental government interest that outweighs the importance of equal access in the context of rideshare driving.

A. State Public Accommodation Laws Should Not Apply to Ridesharing.

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. Denying men access to a private car is not the same as denying men access to an entire railway train or bus.⁷¹ It is unlike denying men access to a store or any other truly public space.

Ridesharing is a unique form of public accommodation because of its intimacy. Using a ridesharing service is not like riding a train or a bus. In a rideshare, a small number of passengers, most often a single rider, share a car with a lone driver. Providing a ride means inviting a customer into the driver’s own car. These cars rarely have the kind of structural dividers 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 on one side or the other of 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.⁷² Ridesharing lacks that common feature. Ridesharing is more like private accommodation than public accommodation because of the intimate nature of the service.

Because it differs fundamentally from other kinds of public accommodations, ridesharing should not be treated in the same way as a matter of jurisprudence. The differential treatment of rideshare services as a form of intimate transportation has precedent in both existing law and in legal theory.

⁶⁸ M.G.L. Ch. 272 § 98 (2012).

⁶⁹ M.G.L. Ch. 272 § 92A (2012).

⁷⁰ *Id.*

⁷¹ 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).

⁷² *See, e.g.,* M.G.L. Ch. 272 § 92A (2012).

Courts recognize the value of intimacy in several contexts. The law protects intimacy in the family, allowing people to discriminate in who they marry.⁷³

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 either its right to freedom of association outweighs the plaintiff's right to equal access.⁷⁴ 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.⁷⁵ The salient "factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics[.]"⁷⁶ 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."⁷⁷

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.⁷⁸ *Rotary Club of Duarte* suggests that organizations may segregate themselves by gender 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, 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' rights to acceptance.⁷⁹ Similarly, the fact that ridesharing services occur in individually owned, or family, cars similarly 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."⁸⁰ Recently, Naomi Schoenbaum argued for a unified legal approach to intimate work, which she defines as "intimate services provided by paid workers to a range of customers,"

⁷³ As one scholar puts it, "family 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, n.95 (2015).

⁷⁴ *Roberts v. United States Jaycees*, 468 U.S. 609, 618-620 (1984).

⁷⁵ *Id.* at 618.

⁷⁶ *Id.* at 620.

⁷⁷ *Id.*

⁷⁸ *Board of Dirs. Of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 547-49 (1987).

⁷⁹ *Id.* at 547.

⁸⁰ See Katharine Silbaugh, *Turning Labor into Love*, 91 NW. U. L. REV. 1, 72-79 (1996) (discussing work law exceptions for domestic care workers); Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 156 (2004) (discussing the bona fide occupational qualification to antidiscrimination law as applied to some intimate work).

including daycare work, divorce law, nursing, and hairstyling.⁸¹ 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.⁸² An additional benefit of recognizing “intimate transportation” or a ridesharing exception to public accommodation laws is its potential to further gender equality indirectly by valuing relational work.⁸³

A strong counter-argument to the proposal that ridesharing be treated 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 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.”⁸⁴ The fact that ridesharing companies provide service to the public in general – or at least the female half of the public – may weigh against considering them to be anything other than a public accommodation.⁸⁵ 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.

B. State Laws Should Allow Public Safety Exceptions to Anti-Discrimination Public Accommodation Laws.

A second argument in favor of single-sex ridesharing 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. It could be argued that courts and/or legislators 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.

The debate over the legality of single-sex health clubs has been discussed extensively in the academic literature.⁸⁶ 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.⁸⁷

⁸¹ Naomi Schoenbaum, *The Law of Intimate Work*, 90 WASH. L. REV. 1167, 1167 (2015).

⁸² *Id.* at 1176.

⁸³ *Id.* at 1221.

⁸⁴ M.G.L. c. 272, § 92A (2012).

⁸⁵ *Thomas v. County of Camden*, 386 N.J. Super. 582, 902 A.2d 327 (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).

⁸⁶ 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); Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257 (2003).

⁸⁷ *Id.*

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 Massachusetts, a legislative exception followed a lawsuit in which a man successfully argued that the state's public accommodation laws prevented a woman-only health club from denying him membership based on his sex.⁸⁸ 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 accommodations law.⁸⁹

In Pennsylvania, the court took a different approach to this issue. As in the Massachusetts case, the court faced a challenge to a woman-only health club, but determined that the club could continue to operate pursuant to a privacy-based exemption to Pennsylvania's public accommodation laws.⁹⁰

Miriam Cherry describes five different approaches states take to the issue of single-sex health clubs.⁹¹ The most common approach is effectively to bar them, since in more than half of the states, the plain meaning of the state's public accommodation laws would prohibit their operation.⁹² 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.⁹³ Third, some states including Massachusetts prohibit gender discrimination in public accommodations but specifically exempt health clubs, allowing single-sex health clubs for men and women.⁹⁴ Fourth, in ten states, there are no general prohibitions on discrimination in public accommodations based on gender.⁹⁵ A fifth approach is Pennsylvania's judicial reading of a privacy-based exemption into a public accommodations law that barred them, as do the laws of the first group.⁹⁶

The diverse approaches states take to incorporating gender as a protected class in public accommodation laws suggests that any legislative solution may have limited potential effectiveness. Complicating this fragmentation is that many states have rulings by civil rights commission interpreting their statutes in the context of single-sex health clubs.⁹⁷ These commission rulings, while suggestive, are not dispositive in terms of 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 accommodations laws makes that solution infeasible. The development of a model public accommodations law that provides exceptions for ridesharing services to anti-discrimination provisions would provide a platform for encouraging legislative reform on this issue.

⁸⁸ *Foster v. Back Bay Spas, Inc.*, No. 96-7060, 1997 WL 634354, at *1 (Mass. Super. Oct. 1, 1997).

⁸⁹ An Act Relative to the Membership of Fitness and Wellness Facilities in the Commonwealth, Ch. 19, 1998 Mass. Legis. Serv. 12 (West) (codified in M.G.L., Ch. 272, § 92A (2012)).

⁹⁰ *LivingWell (North), Inc. v. Pennsylvania Human Relations Comm'n*, 606 A.2d 1287, 1291 (Pa. Commw. Ct. 1992).

⁹¹ Miriam Cherry, *Exercising the Right to Public Accommodations: The Debate Over Single-Sex Health Clubs*, 52 ME. L. REV. 97, 118-121 (2000).

⁹² *Id.* at 119.

⁹³ *Id.* at 119-120.

⁹⁴ *Id.* at 118-119.

⁹⁵ *Id.* at 118.

⁹⁶ *Id.* at 120.

⁹⁷ *Id.*

Now, however, may be an exceptionally good time to create new 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 already are 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 California⁹⁸, New York⁹⁹, Illinois¹⁰⁰ and Massachusetts.¹⁰¹ Uber and Lyft are promoting the creation of new laws to support their business models in 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' decision to classify drivers as independent contractors rather than employees, effectively denying them the legal protections and financial benefits associated with employment.

Legal theorists are proposing new ways to accommodate these more flexible forms of employment.¹⁰² They may also be receptive to creating new and more effective ways of protecting women and children from sexual assault in ridesharing.

IV. A Contractual Business Model Provides an Alternative Yet Imperfect Solution.

The preceding discussion of gender discrimination laws may not be directly relevant to a potential lawsuit against single-sex ridesharing companies – at least, not immediately. These companies 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 may download to connect with potential riders, and one that riders may 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 13 years old before using sites like Facebook, as required by the Children's Online Privacy Protection Act of 1998.¹⁰³ If a plaintiff claimed that he was the victim of gender discrimination, the defendant could then respond that the plaintiff was not entitled to any remedy because he had violated the contract.

⁹⁸ Carolyn Said, *Uber, Lyft May Face New Rules in California*, SAN FRANCISCO CHRONICLE (Apr. 5, 2016) <http://www.sfchronicle.com/business/article/Uber-Lyft-may-face-new-rules-in-California-7230320.php>.

⁹⁹ 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?_r=0

¹⁰⁰ Jim Dalke, *Regulations on Uber and Lyft Get Ironed Out As Illinois Lawmakers Approve Ridesharing Bill*, CHICAGOINNO (Dec. 4, 2014, 1:24 p.m.) <http://chicago.inno.streetwise.co/2014/12/04/uber-lyft-see-ridesharing-regulations-with-illinois-bill>.

¹⁰¹ 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.

¹⁰² 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>.

¹⁰³ FACEBOOK: TERMS OF SERVICE, <https://www.facebook.com/terms.php> (last accessed May 19, 2016); Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501–6506 (1998).

Another benefit of this approach 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. An app user who is denied benefits because of his gender may have a claim for violation of the covenant of good faith and fair dealing.¹⁰⁴ 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 men has an illegal purpose.¹⁰⁵

V. Women-Only Transportation Has Had Mixed Success Worldwide.

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.¹⁰⁶ Women tend to be more fearful in public settings because they perceive a higher risk than men.¹⁰⁷ This risk is exacerbated in enclosed spaces with few exits and deserted spaces such as transit stops and empty streets.¹⁰⁸ Although women's security in public transportation is a global issue, the United States has not kept up with other countries in addressing that issue. 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."¹⁰⁹

If single-sex ridesharing is fully legalized 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.¹¹⁰ 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, women's safety.¹¹¹ One result was the Safer

¹⁰⁴ *Anthony's Pier Four, Inc. v. HBC Associates*, 411 Mass. 451, 473, 583 N.E.2d 806 (1991) (Exercise of a discretionary right under a contract to deprive a plaintiff of privileges and benefits of membership because of gender would violate the covenant of good faith and fair dealing).

¹⁰⁵ *Illegal Bargains*, Corbin on Contracts, Ch. 89 § 1513, pt. 8 (1962)..

¹⁰⁶ *Why Public Transport Needs to Work for Women Too*, SUSTAINABLE CITIES COLL.(Feb. 11, 2015), <http://www.sustainablecitiescollective.com/embarq/1044816/why-public-transport-needs-work-women-too>.

¹⁰⁷ *HOW TO EASE WOMEN'S FEAR OF TRANSPORTATION ENVIRONMENTS: CASE STUDIES AND BEST PRACTICES 10* (Mineta Transportation Institute, 2009).

¹⁰⁸ *Id.*

¹⁰⁹ *HOW TO EASE WOMEN'S FEAR OF TRANSPORTATION ENVIRONMENTS: CASE STUDIES AND BEST PRACTICES 32* (Mineta Transportation Institute, 2009).

¹¹⁰ *Id.*

¹¹¹ *Technology Innovation Portal*, TRANSPORT FOR LONDON, <https://tfl.gov.uk/info-for/business-and-commercial/innovation-portal> (last visited May 20, 2016).

Travel at Night initiative, which was designed to highlight the dangers of taking “illegal minicabs” home after a night out.¹¹²

While there is precedent in other countries for legalizing single-sex ridesharing, it has not been universally successful when proposed or adopted. Women-only transportation options have met with mixed success around the world. Many have become quite popular. In India, a women-only train called the “Ladies Special” has been running on the Mumbai Suburban Railway since 1982.¹¹³ 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.”¹¹⁴ Women-only train cars have become popular in Tokyo and Osaka, where they were introduced in an effort to combat groping and other forms of sexual assault.¹¹⁵ In Egypt, where 99% of women and girls interviewed for a UN survey in 2013 reported having been sexually harassed, there are women-only train cars on Cairo’s Metro.¹¹⁶

Not all such programs have been successful. 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.¹¹⁷ Most recently, a proposal to re-introduce women-only train cars in London, which British Rail had operated from 1874 to 1977, failed spectacularly.¹¹⁸ In August 2015, the Leader of the Labour Party’s proposal to reinstate women-only train cars to reduce harassment was met with significant backlash from his female colleagues.¹¹⁹ The Deputy Mayor of London later rejected the idea of women-only train cars and the London Assembly voted unanimously against them.¹²⁰ 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

¹¹² *Share a #HomeSafeSelfie – Safer Travel at Night*, TRANSPORT FOR LONDON (Sep. 25, 2014), <https://tfl.gov.uk/info-for/media/press-releases/2014/september/share-a-homes>.

¹¹² *Id.*

¹¹³ *Ladies Special: Celebrating 23rd anniversary of first ever all women local train*, FIRST POST: F.INDIA (May 6, 2015), <http://www.firstpost.com/india/mumbai-local-celebrating-the-23rd-anniversary-of-the-ladies-special-train-2231052.html>.

¹¹⁴ *DF to implement “Pink taxi” program for women*, JUSTICE IN MEXICO (August 10, 2010), <https://justiceinmexico.org/df-to-implement-pink-taxi-program-for-women>.

¹¹⁵ Colin Joyce, *Persistent gropers force Japan to introduce women-only carriages*, THE TELEGRAPH (May 15, 2005, 12:01 BST), <http://www.telegraph.co.uk/news/worldnews/asia/japan/1490059/Persistent-groppers-force-Japan-to-introduce-women-only-carriages.html>.

¹¹⁶ Dina Demrdash, *Cairo’s women-only metro carriages reveal Egypt tensions*, BBC (Mar 12, 2015), <http://www.bbc.com/news/world-middle-east-31773567>

¹¹⁷ Natasha Wynczyk, *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>.

¹¹⁸ Louis Dore, *Women-only train carriages are not happening in London. Here’s why*, THE INDEPENDENT: INDY100 (Sep. 9, 2015), http://indy100.independent.co.uk/article/womenonly-train-carriages-are-not-happening-in-london-heres-why--b1_yKhLRSg.

¹¹⁹ Rowena Mason, *Jeremy Corbyn raises possibility of women-only train carriages*, THE GUARDIAN (Aug. 26, 2015 2:37 EDT), <http://www.theguardian.com/politics/2015/aug/26/women-only-train-carriages-a-possibility-under-jeremy-corbyn>; Andrew Sparrow, *Jeremy Corbyn faces backlash over women-only train carriages idea*, THE GUARDIAN (Aug. 26, 2015, 9:12 EDT), <http://www.theguardian.com/politics/2015/aug/26/jeremy-corbyn-backlash-women-only-train-carriages-cooper-kendall>.

¹²⁰ Louis Dore, *Women-only train carriages are not happening in London. Here’s why*, THE INDEPENDENT: INDY100 (Sep. 9, 2015), http://indy100.independent.co.uk/article/womenonly-train-carriages-are-not-happening-in-london-heres-why--b1_yKhLRSg.

answer.”¹²¹ 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.¹²²

The idea that the government should focus on preventing harassment rather than segregating potential victims is important, but has limited relevance in the context of single-sex ridesharing. Unlike the public transportation initiatives described above, companies like SafeHer 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 its creation.

Conclusion

This Article suggests that single-sex ridesharing businesses like SafeHer should be allowed to operate without the kind of legal constraint that may arise from a broad reading of anti-discrimination laws in employment, at the federal level, and in public accommodation at the state level, at least until women are as safe as men in using all forms of transportation. In doing so, it acknowledges several of the counter-arguments to each element of the proposal and provides an overview 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 interests 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 of 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 apply formal equality principles to the arena of driving for ridesharing companies. The greater threat of sexual assault that putative women drivers face from customers inhibits the participation of women in this field. If companies like SafeHer can reduce the safety risk women drivers face by effectively removing the threat of assault, perhaps its business model 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 of the danger of sexual assault

¹²¹ Id.

¹²² Jessica Valenti, *Is segregation the only answer to sexual harassment?* THE GUARDIAN (Aug. 3, 2007 9:17 EDT), <http://www.theguardian.com/lifeandstyle/2007/aug/03/healthandwellbeing.gender>.

for women by the legal system. 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 necessitates 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.

That said, the recommendations presented in this Article should not be read to suggest that any public sector institutions or nonprofits should divert attention from combating the problem of assault on women. Single-sex ridesharing companies like SafeHer 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 and federal and state gender discrimination in employment 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 rideshare companies should be permitted to engage in otherwise impermissible gender discrimination when they can demonstrate that the purpose and effect of such discrimination is to improve public safety.