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GENDER AND THE SHARING ECONOMY

*Naomi Schoenbaum**

ABSTRACT

While the sharing economy has been celebrated as a flexible alternative to traditional employment for those with family responsibilities, especially women, it presents challenges for gender equality. Many of the services that are “shared” take place in the context of intimacy, which can have substantial consequences for transacting, particularly by enhancing the importance of identity of both the worker and the customer. Expanding on previous research on intimate work—a critical area that exists largely in limbo between the law of the market and the law of the family—this Article explores the significance of intimacy in the sharing economy and the implications for its regulation of the sharing economy and for sex equality. It argues that the intimacy of many sharing economy transactions heightens the salience of sex to these transactions, in tension with sex discrimination law’s goal of reducing the salience of sex in the labor market. But even if existing sex discrimination law extends to these transactions, the intimacy of the transactions again limits the law’s ability to promote gender equality in the same transformative way that it has in the traditional economy. The sharing economy thus raises serious concerns for proponents of sex equality.

* Associate Professor of Law, George Washington University Law School. Thanks very much to the Fordham Urban Law Journal for inviting me to participate in the 2015 Cooper-Walsh Colloquium, to Professor Katharine Bartlett for her generous response to this paper, and to colloquium participants for their helpful comments and questions. For additional feedback, I thank Einat Albin, Arianne Renan Barzilay, Nestor Davidson, David Fontana, David Schleicher, and Kate Silbaugh.

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INTRODUCTION

The sharing economy has been hailed as a job creator and celebrated for offering flexibility that can benefit all workers, but especially women.¹ Much of the language used to describe the possibilities of the sharing economy for workers is that of liberation from the confines of the traditional workaday world and freedom to create one's own productive experience, which might be particularly important to women workers, who have historically been shortchanged when it comes to the rewards of work.² Specifically, the

1. See Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES (Aug. 16, 2014), http://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html?_r=0 [https://perma.cc/K67H-AHHW].

2. *Id.*; see also Paul Merrion, *Making Inroads: Women Cabbies on the Rise*, CRAIN'S CHICAGO BUSINESS (Sept. 27, 2014),

idea that work can be done largely outside of a standard workplace, and often at home (either the worker's or the customer's), and be fit into small parcels of a worker's time, has been seen to be a particularly good fit for workers with significant family care responsibilities, who are overwhelmingly women.³ The sharing economy's merging of home and work harkens back to an earlier era when women were less likely to labor in a formal workplace, and more likely to work from their own or someone else's home.⁴ Even the term "sharing" suggests the traditionally feminine value of cooperation over the traditionally masculine value of competition.⁵ In light of this seeming synergy between women workers and the sharing economy, is the sharing economy in fact a boon to women's equality?⁶

<http://www.chicagobusiness.com/article/20140927/ISSUE01/309279976/making-inroads-women-cabbies-on-the-rise> [<https://perma.cc/3W77-B973>].

3. *Id.*

4. See Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J. LAW & FEMINISM 51, 54 (1997) (describing how at the turn of the nineteenth to twentieth century, "[k]eeping boarders was a lucrative source of income for women," and how women at this time "engaged in industrial home work, doing paid piecework in their homes, such as sewing garments, typing documents, or rolling cigars").

5. Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 71-73, 98-99 (1995) (referencing sources that type competition as a masculine value and cooperation as a feminine value).

6. This is an especially important question for urban areas, where the bulk of sharing economy activity takes place. See Nestor M. Davidson & John J. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL'Y REV. __ (forthcoming 2016) (arguing that the sharing economy "is fundamentally an urban phenomenon" due to the "density, proximity, specialization, and even anonymity that mark city life"); Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Governmental Policy: The Future of Local Regulation of the "Sharing Economy"*, George Mason University Law and Economics Research Paper Series 15-01, at 5, http://www.law.gmu.edu/assets/files/publications/working_papers/1501.pdf [<https://perma.cc/JX67-L6FK>] (highlighting how the density of urban spaces underlies the sharing economy). In this way, this Article contributes to the literature on the relationship between gender and geography. See, e.g., Lisa Pruitt, *Gender, Geography & Rural Justice*, 23 BERKELEY J. GENDER, L. & JUSTICE 338 (2008) (arguing that geography is important for understanding gender equality and focusing specifically on the issues that face rural women); Naomi Schoenbaum, *Mobility Measures*, 2012 BYU L. REV. 1165, 1227-31 (arguing that urban spaces can enhance gender equality by providing greater density of labor market opportunities for both husband and wife, reducing the need for long-distance moves that tend to negatively affect women's workplace equality); Katharine B. Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 FORDHAM L. REV. 1797, 1826 (2007) (arguing that suburban sprawl—the increasing distance between home and work—hinders women's workplace equality due to longer commute times that not only impact the ability to balance work and family but also tend to disproportionately limit women's job opportunities and suggesting that denser urban areas can thus enhance women's equality). This Article helps to highlight the complex relationship between geography and gender equality. On the one hand, by providing a dense labor market that reduces

While the regulation of the sharing economy has received scholarly attention, little attention has been paid to the question of identity in the sharing economy, and especially to gender.⁷ Within this literature, scholars disagree on how much—if at all—the sharing economy changes the regulatory landscape across several areas of law.⁸ Much of the existing scholarship is focused on the descriptive question of whether and to what extent current law governs sharing economy transactions.⁹ But this focus tends to sidestep the critical normative consideration of the consequences of applying existing regulation to this changed context, including whether existing law will achieve its aims when applied in these sometimes quite different circumstances. This Article concerns itself with this consideration in the context of sex discrimination law and sex equality.

Building on prior work on intimate work,¹⁰ this Article explains how the intimate nature of much of the transacting in the sharing economy

the need for long-distance moves and for long commutes, urban spaces alleviate some of the work-family tensions that contribute to women's lack of labor market equality. See Schoenbaum, *Mobility Measures*, *supra*, at 1227-31; Silbaugh, *supra*, at 1826. On the other hand, as this Article explores, if the sharing economy takes hold even more strongly as a source of work in cities, urban spaces may exacerbate the salience of sex at work, undermining women's labor market equality.

7. See, e.g., *id.*; Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85 (2015), https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Rogers_Dialogue.pdf [<https://perma.cc/2322-AKWG>]; Deborah F. Buckman, *Liability and Regulation of Ride-Sharing Services Using Social Media*, 6 A.L.R. 7th Art. 1 (June 2015); Molly Cohen & Corey Zehngbot, *What's Old Becomes New: Regulating the Sharing Economy*, BOSTON B.J. (Spring 2014), <https://bostonbarjournal.com/2014/04/01/whats-old-becomes-new-regulating-the-sharing-economy/> [<https://perma.cc/R7KT-XDAF>]; Catherine Lee Rassman, *Regulating Rideshare Without Stifling Innovation: Examining the Drivers, The Insurance "Gap", and Why Pennsylvania Should Get on Board*, 15 U. PITT. J. TECH. L. & POL'Y 81 (2014).

8. Compare, e.g., Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. _____ (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2570584 [<https://perma.cc/A438-B45Q>] (arguing in the tax context that current law is adequate to regulate the sharing economy), with Abbey Steimer, *Betwix and Between: Regulating the Sharing Economy*, 43 FORDHAM URB. L.J. _____ (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535656 [<https://perma.cc/BC5V-AF47>] (arguing that the sharing economy "does not fit within existing legal frameworks").

9. An important exception includes Sofia Ranchordas, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH 1 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492798 [<https://perma.cc/QXK3-EFUT>].

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

heightens the salience of sex to both buyers and sellers there. This is troubling for the legal sex equality project, whose goal has generally been to make sex *less* salient in the market.¹¹ And, importantly, simply extending existing sex discrimination law to the sharing economy may not alleviate these troubles.

As transactions increasingly occur in a space that blurs the traditional distinctions of home and market, not only is the salience of sex heightened, but also the law's ability to address it is cabined.¹² So even if sex discrimination law applies to the sharing economy, the more intimate nature of these transactions—and the consequences of intimacy for the operation of this law—limits the law's ability to have the transformative effect that it has had in the traditional economy.¹³ While some may celebrate a realm of market transactions with greater freedom to express intimate preferences, this expanded realm of freedom risks undermining the project of sex equality by reifying the salience of sex in the market.

While this Article raises concerns about the impact of the sharing economy for women's equality, it should not be read as a condemnation of the sharing economy in general or even for women. Surely, the sharing economy enhances utility, including women's utility, in a variety of ways. More analysis is required to assess on balance the impact of the sharing economy on women's welfare. This Article is meant only as a first intervention to raise some of the challenges that the sharing economy presents for gender equality.

This Article proceeds in three parts. In Part I, this Article sets forth the case for the heightened significance of identity in the sharing economy based on the intimacy of the transactions that occur there. It begins by explaining how transactions in the sharing economy take on a more intimate cast than transactions in the traditional economy. First, the place of sharing economy transactions confers intimacy. Sharing economy transactions often transcend the boundaries of home and market in that they occur in a seller's or buyer's private space.

11. See generally Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENVER UNIV. L. REV. 995 (2015) (arguing that the success of employment discrimination law in promoting sex equality in the market has been due to reducing the salience of sex by challenging essentialist notions of sex difference); *infra* note 102 and accompanying text.

12. See *infra* Part I.A.1.

13. See Janet Nadler & Kenworthy Bilz, *Law, Psychology, and Morality*, in MORAL COGNITION AND DECISION MAKING: THE PSYCHOLOGY OF LEARNING AND MOTIVATION 101 (D. Medin, et al., eds., 2009); John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LIT. 1603 (1991).

Second, sharing economy firms rely on intimacy as a risk-reducing mechanism that confers trust. This intimacy then magnifies the significance of the identity of buyers and sellers to a transaction. Identity traits serve as powerful signals of the type of services a seller provides or the type of customer the buyer will be, and intimacy intensifies preferences for the types of traits that identity signals. Sharing economy firms' personalization of transactions only heightens the significance of buyers' and sellers' identities, and the private spaces in which much of the transacting occurs allow discriminatory preferences to flourish largely unchecked.

In Part II, this Article turns to focus specifically on the salience of sex in the sharing economy. This Part begins by looking at sex preferences in the sharing economy, and identifies four interests that underlie these preferences: privacy interests; preferences for comfort and even pleasure; the desire for a space free of sexuality; and safety concerns. This Part then catalogs the various manifestations of the salience of sex in the sharing economy. From discrimination to segregation, what is perhaps most notable about these manifestations is how often they take the form of express sex-based preferences or distinctions, rather than the sorts of unconscious biases and subtle discrimination that have dominated much recent scholarship on discrimination.¹⁴ This suggests that our norms do not yet consider sex-based discrimination in market transactions that are marked by intimate or social features to be overly problematic.

In Part III, this Article looks at the consequences of the salience of sex in the sharing economy. The increasing blurring of home and work that the sharing economy creates presents challenges for legal regulation and the goals of sex equality. This Part begins with a normative evaluation of the salience of sex in the sharing economy. It considers both the promise and the threat of this phenomenon to the larger goals of the sex equality project of the market, concluding that the threat outweighs the promise. Part III then assesses the ability of existing law to combat the salience of sex in the sharing economy. It first addresses the uncertainty surrounding the application of existing sex discrimination law to the sharing economy. It then explores how the market has responded in the face of this legal uncertainty and concludes that market responses alone have thus far been inadequate to constrain the salience of sex in the sharing economy, and indeed have often had the opposite effect. Even if current antidiscrimination laws were to apply to the sharing economy, the intimacy and other

14. See sources cited *infra* note 20.

structural features of sharing-economy transactions would sharply limit the promise of such laws to have the transformative effect on sex equality that they have had in the traditional economy. Regardless then of whether current law extends to the sharing economy, the sharing economy should raise serious concern for proponents of sex equality. This Part concludes with a few words on new directions the law might take to address this concern.

I. INTIMACY AND IDENTITY IN THE SHARING ECONOMY

The sharing economy heightens the salience of the identity of both sellers and buyers because of the increased intimacy of the transactions therein. This Part first describes the intimacy of sharing economy transactions, and then explains how intimacy makes identity more salient.

A. Intimacy

The sharing economy tends to encompass more intimate transactions than the traditional economy for two reasons. First, the *place* of the transaction confers intimacy. Sharing economy transactions tend to merge home and market in that they occur in the seller's or buyer's private car or home. Second, sharing economy firms rely on intimacy as a risk-reducing mechanism that confers *trust*. To overcome the riskiness of sharing economy transactions, sharing economy firms rely not on firm reputation or other guarantees by the firm, but rather by making transactions more intimate, that is, by predicating transactions on personal information about buyers and sellers. These mechanisms are discussed in turn.

1. Place

Transactions in the sharing economy are often more intimate than transactions in the traditional economy because of where they take place, outside of the traditional workplace. Perhaps the most defining feature of the sharing economy is that it enables the disaggregation of the sale of one's property (e.g., cars, homes) and labor.¹⁵ When it comes to property, this means that sellers are able to sell segments of their own personal property, such as rooms in their homes or rides in their cars, for short segments of time. When it comes to labor, this means that sellers are able to sell smaller segments of their labor. The sale of disaggregated personal property often entails a seller having

15. See Rauch & Schleicher, *supra* note 6, at 5–6.

someone come into her home (AirBnB) or her car (Uber).¹⁶ The sale of disaggregated personal labor often entails a seller providing labor in the buyer's home (TaskRabbit or Kitchensurfing).¹⁷

The rise of the sharing economy then challenges the traditional sociological division between the “first place,” which is the home, the “second place,” which is the workplace, and the “third place,” which are communal spaces generally open to the public that may or may not be part of the market.¹⁸ Some sharing economy transactions merge the first and second places. For example, TaskRabbit, which allows consumers to hire “taskers” to complete a variety of tasks in their homes, renders the same space—the consumer's home—the second place for the worker and the first place for the consumer.¹⁹ Other sharing economy transactions bring more merging of the first and third places. For example, ride-sharing services render the same space—the seller's car—the first place for workers (albeit in a private car rather than a private home) and the third place for consumers. Finally, some sharing economy transactions merge the first, second, and third places. For example, AirBnB and other home-sharing services render the same space—the seller's home—the first and second places for the owner (who is working in her own home) and the third place for the consumer.²⁰

To be sure, it is not the case that these places are always neatly divided in the traditional economy. Much service work in the traditional economy blurs the second and third places: the same setting, for example, a hair salon, is a second place for the worker and a

16. *About Uber*, UBER, <https://www.uber.com/our-story/> [https://perma.cc/GZ6B-Q8LC]; *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> [https://perma.cc/2KU4-PKBR].

17. See TASKRABBIT <https://www.taskrabbit.com/> [https://perma.cc/7ENH-D4B9]; KITCHENSURFING, <https://www.kitchensurfing.com/> [https://perma.cc/A4ZC-KRYW] (“a professional chef cooks in your kitchen once a week so you can cross dinner off your to do list”); “Uber” *Your Cooking; The Sharing Economy Comes to Your Kitchen*, FORBES (May 13, 2015), <http://www.forbes.com/sites/thehartmangroup/2015/05/13/uber-your-cooking-the-sharing-economy-comes-to-your-kitchen/> [https://perma.cc/XQ49-TMFK].

18. See generally RAY OLDENBURG, *THE GREAT GOOD PLACE: CAFES, COFFEE SHOPS, COMMUNITY CENTERS, BEAUTY PARLORS, GENERAL STORES, BARS, HANGOUTS, AND HOW THEY GET YOU THROUGH THE DAY* (1999) (coining the term “third place,” and distinguishing it from the “first place” and the “second place”); Leo W. Jeffres et al., *The Impact of Third Places on Community Quality of Life*, 4 APPLIED RESEARCH IN QUALITY OF LIFE 333, 334 (2009) (listing as third places, inter alia, community centers, senior centers, coffee shops and cafes, bars and pubs, restaurants, shopping centers, stores, malls, markets, hair salons, barber and beauty shops, recreation centers, YM/WCA, pools, movie theaters).

19. See TASKRABBIT, *supra* note 17.

20. See *About Us*, AIRBNB, *supra* note 16.

third place for the consumer.²¹ And domestic service work blurs the first and second places: the same setting—the consumer’s home—is the second place for the worker and the first place for the consumer.²² The point then is not that this blurring is entirely new or unique to the sharing economy, but that the size of the sharing economy calls these boundaries into question more than ever before, as more production and exchange occurs in private spaces.²³ This shift in the place of productivity to private settings might be viewed as a return to the pre-Industrial Revolution era, when much production was done in the home.²⁴ This shift has significance for legal regulation, to which I return in Part III. Here, my focus is on explaining how this shift makes transactions in the sharing economy more intimate.

Sociologists have defined intimate interactions as those that depend on “particularized knowledge received, and attention provided by, at least one person—knowledge and attention that are not widely available to third parties.”²⁵ The knowledge is not ordinary knowledge, but knowledge of special types of information such as “shared secrets, interpersonal rituals, bodily information, awareness of personal vulnerability, and shared memory of embarrassing situations.”²⁶ Nor is the attention ordinary attention, but attention that encompasses “such elements as terms of endearment, bodily services, private languages, emotional support, and correction of embarrassing defects.”²⁷

The direct interaction between buyer and seller in more personal spaces makes these transactions intimate, giving access to private information that is not typically shared with others. And the placement of these services in personal spaces primes the interactions to take on a more intimate character beyond the information that is revealed simply by virtue of the fact that the interaction takes place there. Without the structure and signals of a third-party firm in an

21. This lends unique dynamics to much of this work. See Schoenbaum, *supra* note 10, at 1194, 1213.

22. See Roberts, *supra* note 4, at 60–61.

23. John Hawsworth & Robert Vaughan, PWC, THE SHARING ECONOMY—SIZING THE REVENUE OPPORTUNITY (2015), <http://www.pwc.co.uk/issues/megatrends/collisions/sharingeconomy/the-sharing-economy-sizing-the-revenue-opportunity.html> [https://perma.cc/Q4HB-83VU] (estimating the potential value of the five main sharing economy sectors to be \$335 billion by 2015).

24. See, e.g., Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499 (1983).

25. VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 14-15 (2005).

26. *Id.* at 15.

27. *Id.*

office setting mediating the transaction, buyers and sellers tend to fall back on the scripts of personal interaction in unregulated spaces like the home.²⁸

Note that not all transactions in the sharing economy are intimate, and of those that are intimate, some are more intimate than others. For example, one might rent out an apartment that one does not live in through AirBnB. Unless the apartment owner chooses to meet the AirBnB renter or to include personal items in the apartment (e.g., photographs or mementos), this transaction would not be intimate. An AirBnB owner who rents out a room in her home with a shared bathroom engages in a more intimate transaction than one who rents out a separate apartment within her home. Likewise, Uber drivers and those who ride with them can, to a large extent, choose how intimate to make their transactions by deciding how much information to reveal in conversation. Some riders have chosen to make their transactions with ride-share drivers far more intimate, by, for example, sharing personal information and even changing in the backseat of the car.²⁹

2. Trust

Transactions are risky. Market transactions present risks for sellers—whether they will be compensated for the goods or services they sell—and for buyers—whether they will get the goods or services they bargained for. In addition to these basic risks of transacting, buyers and sellers may face additional risks, such as the safety risk that arises when the transaction is face-to-face. Searching for appropriate persons with whom to transact and assessing the reliability of market strangers involves significant transaction costs.³⁰ Firms help to mitigate these costs by building trust based on reputation.³¹

28. Marjorie L. De Vault, *Home and Work: Negotiating Boundaries through Everyday Life*, 102 AM. J. OF SOCIOLOGY 1491, 1491 (1997) (book review).

29. See Winnie Hu, *She Rides, a New York Taxi Service Aimed at Women, Finds a Loyal Following*, N.Y. TIMES (Nov. 11, 2014), <http://www.nytimes.com/2014/11/12/nyregion/new-york-taxi-service-aimed-at-women-finds-loyal-following.html> [<https://perma.cc/QQU4-JVVS>].

30. See Rauch & Schleicher, *supra* note 6, at 9; see also *The rise of the sharing economy: On the internet, everything is for hire*, THE ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy> [<https://perma.cc/YGJ6-94RZ>].

31. Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* 3 (Harvard Business School, Working Paper 14-054, 2014), <http://hbswk.hbs.edu/item/digital-discrimination-the-case-of-airbnb-com> [<https://perma.cc/KGY6-8UFC>]; PWC, *The Sharing Economy*, Consumer Intelligence Series 16, <https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf> [<https://perma.cc/VK2V->

In the sharing economy, technology has reduced the firm's role in matching buyers and sellers.³² The term "peer-to-peer" economy, sometimes used to describe the sharing economy, nicely captures this. The sharing economy lowers transactions costs associated with matching consumers and producers, and these lowered transaction costs allow for the disaggregated consumption of goods and services.³³ Although such disaggregated consumption can take place through the use of mediating firms, and they long have (e.g., hotels, car rental companies), technology allows expansion of this model to enable more and more casual disaggregation of consumption. This means that firms are relied on less, and transactions are based more on relationships between the consumer and producer.³⁴ This fact already makes sharing economy transactions more personal.

With these more personal transactions and risks, the resulting need for trust remains. Sharing economy firms like Uber and AirBnB that connect buyers and sellers mediate some risks both by reputation and policy, but much less so than in the traditional economy. This leads to the need for alternative sources of trust necessary for markets to operate.³⁵

One of the primary ways of engendering trust in the sharing economy is by making transactions between producers and consumers more personal: by replacing the trust placed in the firm with trust placed in individual sellers and buyers.³⁶ Sharing economy transactions are often made to turn on the individual's characteristics. For many services, either sellers or buyers or both create profiles that reveal information about themselves, including their names and photographs.³⁷ Both buyers and sellers can rate each other, and these

56XX] (citing that "69% [of consumers surveyed] say they will not trust sharing economy companies until they are recommended by someone they trust"). Of course, in addition to the role of reputation, law also places burdens on firms (and individuals) that reduce risks to sellers and buyers. I return to a discussion of the role of law in Part III.

32. *Id.*

33. See Rauch & Schleicher, *supra* note 6, at 9.

34. See Rogers, *supra* note 7, at 97 (discussing how Uber drivers need to establish "micro-relationships" to earn certain ratings).

35. Rachel Botsman, *The Currency of the New Economy is Trust*, TED Talk (June 2012),

http://www.ted.com/talks/rachel_botsman_the_currency_of_the_new_economy_is_tru_st?language=en ("The currency of the new economy is trust.").

36. See Rauch & Schleicher, *supra* note 6, at 9.

37. See Airbnb Help, *Why do I need to have an Airbnb profile or profile photo?*, AIRBNB, <https://www.airbnb.com/help/article/67/why-do-i-need-to-have-an-airbnb-profile-or-profile-photo> [<https://perma.cc/4MRG-7PZX>]; see Jamiev2014, "Putting the "Pro" in Profile, TASKRABBIT BLOG (Apr. 10, 2013),

ratings feature prominently in online profiles.³⁸ This intensifies the shift of focus of the transaction from one with the sharing economy firm to one between the individual buyer and seller.³⁹

With this focus on the transaction between the buyer and the seller often comes a sense of social or personal connection between the two that sharing economy firms emphasize.⁴⁰ Indeed, some firms market themselves specifically on a model of intimacy. Lyft, a ride-sharing competitor to Uber, has used the tagline: “your friend with a car.”⁴¹ Tripda, a long-distance ride-sharing platform has emphasized the social nature of the service: “Why travel alone? Carpool instead! Sharing a ride is fun & social. We connect you with new and interesting people to share a ride with, while saving on your travel costs!”⁴² AirBnB has also marketed itself as a great way to meet people, including romantic partners.⁴³

<https://blog.taskrabbit.com/2013/04/10/putting-the-pro-in-profile/>
[<https://perma.cc/68QP-Z2XG>].

38. See Rauch & Schleicher, *supra* note 6, at 9; see Uber Help, *How are Ratings Calculated*, UBER, <https://help.uber.com/h/66ce3340-aa1f-4357-b955-027ef50441d3> [https://perma.cc/6RQF-7BT6].

39. See *In the Battle Between Lyft And Uber, The Focus Is On Drivers*, NPR ALL TECH CONSIDERED (Jan. 18, 2016), <http://www.npr.org/sections/alltechconsidered/2016/01/18/463473462/is-uber-good-to-drivers-it-s-relative> [https://perma.cc/8WML-6MXQ]. And as the founder of RelayRides, a car-sharing market-place noted, “You meet great, interesting people. You have great stories.” See Singer, *supra* note 1.

40. One article raised concerns about the sharing economy for those with autism, who tend to want to avoid intimacy. See Lynne Soraya, *Disability and the Sharing Economy*, PSYCHOLOGY TODAY (Aug. 11, 2014), <https://www.psychologytoday.com/blog/aspergers-diary/201408/disability-and-the-sharing-economy> [https://perma.cc/9A7S-3BPH]. For those with anti-intimacy preferences, the personalization of transactions in the sharing economy raises anxiety about the expectations for intimate interaction in such transactions. It is acceptable to sit silently in a taxi, but perhaps not when one uses Uber or Lyft. Given the expectations of intimacy, a passenger’s ratings may be affected by his anti-intimacy preference if she chooses not to engage with her driver. The same concerns on the flip side could be raised for drivers with autism.

41. Jason Tanz, *How AirBnB and Lyft Finally Got Americans to Trust Each Other*, WIRED (Apr. 23, 2014), <http://www.wired.com/2014/04/trust-in-the-share-economy/> [https://perma.cc/V8WV-279N].

42. *How It Works*, SHARING TRIP, <http://sharingtrip.in/how-it-work.html#> [https://perma.cc/C8GH-K5EH]. Tripda ceased operations in February 2016. TRIPDA, <https://tripda.com/> [https://perma.cc/47J4-QXF6].

43. *Host*, AIRBNB, <https://www.airbnb.com/host> [https://perma.cc/5B2V-5XB8] (“Besides the extra income, hosts join a supportive worldwide community”); *When Strangers Meet: An AirbnB Love Story*, AIRBNB BLOG (Feb. 13, 2015), <http://blog.airbnb.com/strangers-to-soul-mates-couples-who-met-through-airbnb/> [https://perma.cc/Z7PU-99MB?type=image] (“This is part of our special series ‘When Strangers Meet’. Have you met someone special through a chance encounter on AirbnB? Friend, husband, wife, long lost soul mate: we want to hear your story. It

The intended level of intimacy of the transaction may vary by the sharing economy firm offering the service. A driver who worked through both Uber and Lyft emphasizes the more personal relationship that Lyft tries to cultivate between its drivers and riders as compared with Uber:

[Uber] recommends that drivers “wear a collared shirt and generally look professional.” They also advise that drivers should open the door and put bags in the trunk.

Lyft, conversely, encourages uniqueness. Drivers are musicians, artists, and entrepreneurs like myself (among many other paths), and their personalities come through via their clothing and their cars. Drivers create goofy concepts, such as the Disco Lyft, the Karaoke Lyft, and the Chalkboard Lyft. Cars are still clean and safe, but rides are treated as an opportunity for an experience . . . Lyft encourages you to be a good friend. Provide a clean car, have fun, and don’t let your pal down. The culture is goofy, fun, unique, and irreverent, just like a true bud. You’re encouraged to be yourself and have fun. Uber wants you to be a chauffeur and to treat the role as a career. It’s run with military precision and professionalism is encouraged from drivers.⁴⁴

B. Identity

As a general matter, whether in the traditional or sharing economy, intimacy tends to breed discrimination. Intimacy enhances the salience of the particular worker and her identity to the consumer.⁴⁵ Intimate workers’ identities can be powerful signals. The intimate worker is in many ways inseparable from her product: the intimate

happens when you let your guard down. When you open up to new adventures. Or, as everyone and their mother says: Finding “the one” happens when you’re not even looking for it. So maybe we shouldn’t be surprised to discover an overwhelming number of couples who met and fell in love through the serendipitous circumstance of an Airbnb. But we still are. Every time. From strangers to soul mates, we’re celebrating Valentine’s Day with the stories of couples who met through one fateful stay in an Airbnb. This is one of them.”); Anh-Minh Le, “*When Strangers Meet*” *Film Contest Winners*, AIRBNB BLOG (Jan 27, 2015), <http://blog.airbnb.com/when-strangers-meet-film-contest-winners/> [https://perma.cc/VJ6A-F9JY] (sponsoring film contest about strangers meeting on AirBnB).

44. Greg Muender, *Uber vs. Lyft: A former driver compares the two services*, PANDO.COM (Dec. 3, 2014), <https://pando.com/2014/12/03/uber-vs-lyft-a-former-driver-compares-the-two-services/> [https://perma.cc/7BHE-L4WE].

45. See, e.g., Harry J. Holzer & Keith R. Ihlanfeldt, *Customer Discrimination and Employment Outcomes for Minority Workers*, 113 Q.J. ECON. 835 (1998) (finding that the racial composition of an establishment’s customers has sizable effects on the race of who gets hired in jobs that involve direct contact with customer and hypothesizing that this is due to customer preferences in relationships).

services she provides.⁴⁶ Thus, the worker's identity characteristics "serve as signifiers . . . that shape expectations about the service they are to receive."⁴⁷ For example, the Filipina childcare worker, for instance, is seen as caring, family-first, and docile.⁴⁸ While the signal may not be reliable, it provides an easy shortcut when information is expensive and biases run deep.⁴⁹

Consumers may then perceive identity to be quite relevant to the provision of intimate services. Identity may be seen to confer expertise: a woman may believe that a female gynecologist is better able to understand her problems.⁵⁰ Identity preferences may also derive from a belief that the consumer will face less discrimination from workers who share the consumer's identity.⁵¹ For example, a woman might believe that a female divorce lawyer would hold fewer biases against her choices in seeking alimony and child support. The sensitive circumstances of intimate services can also lead consumers to be more comfortable with workers of a particular identity.⁵² Intimacy

46. See Robin Leidner, *Emotional Labor in Service Work*, 561 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 83 (1999); Amy S. Wharton, *The Sociology of Emotional Labor*, 35 ANN. REV. SOC. 147, 152 (2009).

47. Wharton, *supra* note 46, at 152 (internal quotation marks omitted).

48. See Cameron Lynne Macdonald & David Merrill, *Intersectionality in the Emotional Proletariat*, SERVICE WORK: CRITICAL PERSPECTIVES 113, 121-22 (Marek Korczynski & Cameron Lynne Macdonald eds., 2009) (explaining that "racial/ethnic groups are preferred by parents [for caregivers] based on their presumed qualities that are rooted in their ethnicity," and quoting a childcare placement agency owner: "people think that Filipinas are from a different planet where everybody cares about children").

49. For the seminal discussion on labor market signals, see Michael A. Spence, *Job Market Signaling*, 87 Q.J. ECON. 355, 356-61 (1973), and for more general discussion on signals, see George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970).

50. See Tamar Lewin, *Women's Health Is No Longer a Man's World*, N.Y. TIMES (Feb. 7, 2001), <http://www.nytimes.com/2001/02/07/us/women-s-health-is-no-longer-a-man-s-world.html> [<https://perma.cc/Y9T4-8H3C>] (discussing how women's preference for female gynecologist is partially rooted in the belief that they will understand women's health better because they are women).

51. This is at least part of the basis for same-race preferences in health care providers. See Jennifer Malat & Mary Ann Hamilton, *Preference for Same-Race Health Care Providers and Perceptions of Interpersonal Discrimination in Health Care*, 47 J. HEALTH & SOC. BEHAV. 173 (2006); Frederick M. Chen et al., *Patients' Beliefs About Racism, Preferences for Physician Race, and Satisfaction With Care*, 3 ANNALS FAM. MED. 138 (2005) (analyzing surveys showing that minorities who perceive racism in the healthcare system are more likely to prefer physicians of the same race).

52. See, e.g., Lewin, *supra* note 50 (in context of gynecologists, noting that "many women find it easier to talk to another woman when the subject is sexuality or menopause or pregnancy").

also strengthens the motivation to discriminate in the other direction—from sellers against buyers.⁵³

In the sharing economy, the shift in focus from an impersonal transaction with a firm to a personal interaction between individuals makes the identity of both the buyer and the seller more salient.⁵⁴ Photographs and even names can reveal identity traits like race and sex.⁵⁵ This personalization of the transaction not only enables discrimination,⁵⁶ but by focusing the basis of trust in the relationship between seller and buyer, it heightens the salience of the identity of the transacting parties, heightening the odds of discrimination.⁵⁷ Indeed, it is precisely “[t]he social nature of the sharing economy [that renders

53. In the traditional economy, the issue of discrimination against consumers has focused on discrimination that arises out of religious and moral preferences of workers, e.g., a wedding vendor who refuses service to gay couples. *See, e.g.,* Washington v. Arlene’s Flowers, No. 13-2-00871-5, https://www.aclu.org/sites/default/files/field_document/2015-02-18—ord_denying_defs_msj_and_granting_pls_and_wa_states_msj.pdf [<https://perma.cc/LU8J-4LJA>] (upholding discrimination challenge to wedding florist’s refusal to serve gay couple against First Amendment defenses); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (upholding discrimination challenge to wedding photographer’s refusal to serve gay couple against First Amendment defenses); Michael Paulson & Fernanda Santos, *Religious Right in Arizona Cheers Bill Allowing Businesses to Refuse to Serve Gays*, N.Y. TIMES (Feb. 21, 2014), <http://www.nytimes.com/2014/02/22/us/religious-right-in-arizona-cheers-bill-allowing-businesses-to-refuse-to-serve-gays.html> [<https://perma.cc/62TZ-HW5S>].

54. *See* Stacy Perman, *Is Uber Dangerous for Women?*, MARIE CLAIRE (May 20, 2015), <http://www.marieclaire.com/culture/news/a14480/uber-rides-dangerous-for-women> [<https://perma.cc/64BD-WDSG>] (quoting David Plouffe, former Obama campaign manager now serving as Uber’s senior vice president of public policy and strategy: “[T]he relationship that is most important to an Uber rider is that relationship with their Uber driver, and it’s one that they really cherish.”).

55. *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991–92 (2004).

56. Edelman & Luca, *supra* note 31, at 9-11 (documenting race discrimination against sellers on AirBnB); Ian Ayres, Mahzarin R. Banaji, & Christine Jolls, *Race Effects on Ebay*, 46 RAND J. ECON. 891 (2015) (documenting race discrimination against sellers of baseball cards on Ebay by varying race of person holding the card). The ratings system may be one mechanism by which discriminatory bias is manifested. *See* Greg Harman, *The sharing economy is not as open as you might think*, THE GUARDIAN (Nov. 12, 2014), <http://www.theguardian.com/sustainable-business/2014/nov/12/algorithms-race-discrimination-uber-lyft-airbnb-peer> [<https://perma.cc/HX2P-YHT2>]; Rogers, *supra* note 7, at 95.

57. *The New Sidecar Has Arrived*, SIDECAR (Feb. 19, 2014), <https://www.sidecar.com/the-new-sidecar-has-arrived/> [<https://perma.cc/YJ92-6S4Q>] (“You can now differentiate yourself by the picture of your car, your profile photo, or your amazing attitude and the service you provide. Sidecar’s new “bumper sticker” gives you the ability to advertise what’s great about your ride and increases your chance of getting chosen by riders.”)

it] more vulnerable [to identity preferences] than the traditional economy.”⁵⁸

Other circumstances related to the intimacy of sharing economy transactions make identity preferences particularly likely to flourish there. The privacy of sharing economy transactions means that these transactions take place in contexts that lack structural features that constrain discrimination. In the traditional economy, transactions are more likely to be entered into in public in the presence of others, rather than in front of a computer in the privacy of one’s own home, or on one’s smartphone.⁵⁹ The publicness of interacting in the traditional economy means that buyers and sellers are more likely to be subject to the pressures of social norms, including the norm of nondiscrimination.⁶⁰ Transacting online in the sharing economy, with no one watching, makes it easier to act on discriminatory preferences, without any sense of the constraint of being monitored.

Moreover, in the traditional economy, institutional antidiscrimination structures may bring benefits that trickle down even to those who are not protected by antidiscrimination law. For example, equal opportunity and sexual harassment trainings for employees in a traditional firm may mean that supervisors and coworkers are less likely to discriminate not only against employees who are protected by antidiscrimination, but also against independent contractors who work in the same place.⁶¹ In the workplace-less sharing economy, such institutional structures are largely absent.

II. THE SALIENCE OF SEX IN THE SHARING ECONOMY

The last Part explained how the more intimate nature of sharing economy transactions heightens the salience of identity in these transactions. This Part focuses specifically on one feature of identity—sex—and discusses how the sex of both buyer and seller plays a substantial role in the sharing economy. This Part first describes how

58. Jenna Wortham, *Ubering While Black*, MEDIUM (Oct. 23, 2014), <https://medium.com/matter/uber-ing-while-black-146db581b9db> [<https://perma.cc/64WE-4TEX>] (quoting Michael Luca).

59. See Rogers, *supra* note 7, at 95.

60. See Lior Jacob Strahilevitz, *‘How’s My Driving?’ for Everyone (and Everything)*, 81 N.Y.U. L. REV. 1699, 1759-65 (2006) (discussing monitoring and norm compliance).

61. See Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005) (discussing the role that firms play in enforcing employment discrimination law); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (same); cf. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003) (documenting firms’ rigorous enforcement of sexual harassment law).

in these intimate settings, sex preferences flourish due to interests related to privacy, comfort, enjoyment, sexuality, and security, which are discussed in turn. This Part then discusses the way that these sex preferences manifest in the sharing economy in the forms of discrimination and segregation.

A. Explanations

1. Privacy

As for privacy interests, these relate to concerns of bodily intimacy, whether through physical touching, visual display, or simply sensitive information about the body. One common preference among female customers is for female gynecologists.⁶² We can see a similar preference being met by the market, which has produced all-female gyms⁶³ and weight-loss centers.⁶⁴ Firms routinely ask customers whether they have a sex preference for services ranging from massage therapy⁶⁵ to hair styling.⁶⁶

A number of sharing-economy transactions raise these privacy concerns. If an AirBnB guest is sharing a dwelling and especially a bathroom with her host, privacy concerns might arise for both guest and host. As the Ninth Circuit discussed in a case holding that the roommate relationship was protected by the right to intimate association, “[a]side from immediate family or a romantic partner, it’s

62. See Lewin, *supra* note 50 (documenting that women now comprise over seventy percent of ob-gyn residents and attributing this to patient demand). In the past fifteen years, the rising demand for female gynecologists and obstetricians has led to a rise in all-female practices. See Kate Stone Lombardi, *A Clinic Where All the Doctors Are Women*, N.Y. TIMES (Dec. 3, 2000), <http://www.nytimes.com/2000/12/03/nyregion/in-business-a-clinic-where-all-the-doctors-are-women.html> [<https://perma.cc/FG8M-PPJ6>]; WOMEN OB/GYN, <http://www.womenobgyn.com> [<https://perma.cc/T234-ZLA6>] (giving the tagline “Women, helping women” and describing “group of five female OB/GYN’s, and three nurse practitioners,” with a photograph of only women providers).

63. EEOC v. Sedita, 816 F. Supp. 1291 (N.D. Ill. 1993) (denying BFOQ for health club instructors).

64. EEOC v. HI 40 Corp., 953 F. Supp. 301 (W.D. Mo. 1996) (denying BFOQ for weight-loss center counselors).

65. See Erika Allen, *The First Issue in Any Massage*, N.Y. TIMES (Sept. 16, 2012), <http://www.nytimes.com/2012/09/16/fashion/massage-first-issue-man-or-woman-therapist.html> [<https://perma.cc/T234-ZLA6>] (explaining that when a customer is booking a massage, a spa’s first question is often, “Do you prefer a male or female massage therapist?”).

66. See *Select Service(s) And Employee(s), Bubbles Hair Salon*, BUBBLES, <https://bubbles.mylocalsalon.com/onlinebooking/v7410/Steps/SelectServices.aspx> [<https://perma.cc/YX6W-BLRW>].

hard to imagine a relationship more intimate than that between roommates, who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms.”⁶⁷ As the court explained: “The home is the center of our private lives. Roommates note our comings and goings, observe whom we bring back at night, hear what songs we sing in the shower, see us in various stages of undress and learn intimate details most of us prefer to keep private. Roommates also have access to our physical belongings and to our person.... Taking on a roommate means giving him full access to the space where we are most vulnerable....”⁶⁸ The court specifically recognized how the intimacy of a shared dwelling can generate sex preferences: “women will often look for female roommates because of modesty... concerns. As roommates often share bathrooms and common areas, a girl may not want to walk around in her towel in front of a boy.”⁶⁹

While home-sharing as offered by sharing-economy firms like AirBnB is typically not as intimate as the roommate relationship because it is short-term, it still raises many of the same concerns even in the limited time period during which the dwelling is shared. Such persons may have “unfettered access to the home,” which “implicates significant privacy... considerations.”⁷⁰ And such bodily privacy concerns are not limited to home-sharing services in the sharing economy. One female ride-sharing passenger shared a story of changing her clothes in the backseat of her ride-share car, and noted that she only felt comfortable doing so because the driver was a woman.⁷¹

2. *Comfort/Pleasure*

Beyond preferences based in bodily intimacy, sex preferences often arise out of increased comfort with those of the same sex in emotionally intimate settings. For example, studies have shown that most women prefer female psychotherapists,⁷² and firms that provide

67. *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1221 (9th Cir. 2012).

68. *Id.*

69. *Id.*

70. *Id.* This short-term, iterative nature of home-sharing guests also distinguishes them from roommates in that hosts will likely have many home-sharing guests, but few roommates.

71. *See Hu, supra* note 29.

72. *See, e.g.,* Cynthia F. Pikus & Christopher L. Heavey, *Client Preferences for Therapist Gender*, 10 J. COLL. STUD. PSYCH. 35 (1996) (finding that women prefer women therapists and that men express little preference); Bernadette M. Lauber & Jean Drevenstedt, *Older Adults' Preferences For Age and Sex of a Therapist*, 14 CLIN.

services addressing emotionally intimate services—from divorce lawyers⁷³ to nannies⁷⁴—advertise on the basis of sex. These sex preferences in emotionally intimate contexts are not simply about comfort, but about pleasure for those who prefer their transactions to be more rather than less intimate in terms of sharing and personal conversation. For those who have such preferences, transacting with a person of the same sex can be seen to facilitate this intimacy. Women often find it easier to discuss personal matters with other women, particularly in the provision and consumption of intimate services.⁷⁵

A driver for a taxi service aimed at women said that she preferred driving women because “[m]en would tell her to drive faster, or talk about sports,” whereas “[w]omen opened up about their lives.”⁷⁶ She explained: “I bet you, if it had been a man, they would have stayed quiet.”⁷⁷ We see these preferences exercised in the sharing economy, too. Several ride-sharing firms advertise the ability to select women drivers or an all-female driving experience as a way to enhance the comfort and enjoyment of the trip.⁷⁸

GERONTOLOGIST 13 (1994) (finding sex preferences for therapists). These sex preferences based on emotional intimacy can be seen in case law. *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133 (3d Cir. 1996) (accepting BFOQ in part based in theory that female counselors could better serve girls with emotional troubles).

73. THE WOMEN’S LAW GROUP, <http://thewomenslawgroup.com> [<https://perma.cc/KSR7-ZDQ3>] (describing a practice of “female attorneys who . . . practice law from a woman’s perspective,” and who “understand that going through a divorce, custody issue, or other family law matter can be one of the most difficult times of your life”); WOMEN’S DIVORCE RIGHTS, <http://www.womensdivorcerights.com/about.php> [<https://perma.cc/2C9B-3QTA>] (“[f]ounded . . . to support, inspire, and encourage women . . . during each stage of their lives”).

74. *See, e.g.*, RENT A MOM INC., <http://www.rentamominc.com> [<https://perma.cc/BDV7-3AYF>] (“The Company with a Heart for Families”); RENT A GRANDMA, <http://rentagrandma.com> [<https://perma.cc/8HSD-VDJK>].

75. *See* Pikus & Heavey, *supra* note 72, at 35 (women prefer female therapists); Lauber & Drevenstedt, *supra* note 72; Debra L. Roter et al., *Physician Gender Effects in Medical Communication: A Meta-analytic Review*, 288 PATIENT-PHYSICIAN RELATIONSHIP 756, 759 (2002) (both men and women prefer female primary care physicians due to communication styles); *see* Klea D. Bertakis et al., *Patient-Centered Communication in Primary Care: Physician and Patient Gender and Gender Concordance*, 18 J. WOMEN’S HEALTH 4, 542-43 (2009) (intersection of female doctor with female patient results in more interactive conversations focused on patient’s illness, experience, and personal factors); Debra Roter et al., *Effects of Obstetrician Gender on Communication and Patient Satisfaction*, 93 OBSTETRICS & GYNECOLOGY 5, 5-6 (1999) (women have a strong preference for female doctors in obstetrics and gynecology).

76. *See* Hu *supra* note 29.

77. *Id.*

78. Hiawatha Bray, *Hitchhiking goes digital with Tripda ride sharing service*, BOSTON GLOBE (Nov. 21, 2014),

Comfort may also generate sex-based preferences that are consistent with stereotypical male and female roles. The placement of many of these services in the home triggers the traditional family roles of men and women even more strongly than when workers act in the market. So when selecting “taskers” for assistance with household chores through a sharing economy firm like TaskRabbit, consumers may feel more comfortable with those that fill stereotypical gender roles: female taskers for cleaning and caring for children, and male taskers for home repairs or to help us move furniture.⁷⁹

3. Sex

Sex is a motivation for gender preferences in intimate spaces. When women want to keep sexuality out of an intimate space, they may seek to do so by preserving an all-female space.⁸⁰ Heteronormative assumptions of course underlie this strategy: that concerns about sex and sexual arousal raised by intimacy can be quelled by providing these services in a same-sex space.⁸¹ Civil and criminal law once did

<https://www.bostonglobe.com/business/2014/11/21/hitchhiking-goes-digital-with-tripda-ride-sharing-service/4JjciQxKybC2FD7HymwxUK/story.html>
[\[https://perma.cc/UE9E-ANXQ\]](https://perma.cc/UE9E-ANXQ) (“Tripda also features a ladies-only option for women who would rather not take a long trip in the company of a male stranger”); Jay Barman, *Sidecar Now Let’s You Choose Women Drivers*, SFIST (Dec. 19, 2014), http://sfist.com/2014/12/19/sidecar_now_lets_you_choose_women_d.php
[\[https://perma.cc/64SM-RG8M\]](https://perma.cc/64SM-RG8M).

The heightened intimacy of the sharing economy may increase demands for emotional labor, which may disproportionately burden women. Arlie Hochschild identified emotional labor as a problem in the traditional workplace. See ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 7 (2d ed. 2003) (providing the seminal study on invisible emotional labor—work we do to create a particular feeling or state of mind in others—and documenting a variety of resulting harms); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1307 (2000) (explaining how invisible work is not rewarded formally or informally). Emotional labor is likely to be even more of a problem in the sharing economy, because there is more direct interaction between buyers and sellers, and ratings-based evaluations mean that sellers need to please buyers, and buyers need to please sellers. This may have a disparate impact on women, because women are judged less favorably than men when they provide support, and more harshly than men when they decline to provide it. See Madeline E. Heilman & Julie J. Chen, *Same Behavior, Different Consequences: Reactions to Men’s and Women’s Altruistic Citizenship Behavior*, 90 J. APP. PSYCH. 431, 434-40 (2005).

79. See TASKRABBIT, *supra* note 37. See *infra* Part I.B for further discussion of how sharing economy firms themselves reinforce these preferences.

80. See, e.g., *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1221 (9th Cir. 2012) (explaining that a woman might prefer a female roommate because “[s]he might also worry about unwanted sexual advances or becoming romantically involved with someone she must count on to pay the rent.”)

81. *Id.*

enforce a norm of no-sex between members of the same sex, constructing same-sex spaces as sex-free zones.⁸² Although recent changes in law undermine these heteronormative assumptions, the strategy persists.⁸³ Given the intimacy of the shared spaces of the sharing economy, both buyers and sellers of ride-sharing and home-sharing services have expressed preferences for all-female spaces to avoid the injection of sexuality there.⁸⁴

Men too have gender preferences that are rooted in sex and sexuality. Men may prefer female service providers in intimate spaces as a way to avoid connotations of homosexuality, as in the case of men's preference for female massage therapists,⁸⁵ or as a way to inject sexuality into the transaction, as in the case of restaurants like Hooter's.⁸⁶ One concern with allowing ride-sharing passengers to select the sex of their drivers is precisely that men would select women drivers to engage in a sexually charged transaction.⁸⁷ In fact, Uber has relied on this preference as a marketing device. In 2014, it offered a promotion in France for rides with "Avions de Chasse" ("hot chick" drivers) with the tagline, "Who said women don't know how to drive?"⁸⁸

82. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986).

83. See *Obergefell v. Hodges*, 576 U.S. —, 135 S. Ct. 2584, 2599 (2015) (finding constitutional right to same-sex marriage); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding anti-sodomy laws unconstitutional).

84. See Winnie Hu, *New Service Offers Taxis Exclusively for Women*, N.Y. TIMES (Sept. 7, 2014), <http://www.nytimes.com/2014/09/08/nyregion/new-service-offers-taxis-exclusively-for-women.html> [https://perma.cc/5PWJ-A4NR] (a driver for a female-only service described the service as akin to the a female-only gym she joined after she "tired of men flirting with her while she was working out").

85. See Allen, *supra* note 65.

86. A final reason for some sex preferences is religion. For example, Hasidic Jewish women will only ride with women drivers. See Hu, *New Service Offers Taxis Exclusively for women*, *supra* note 84.

87. See Barman, *supra* note 78 ("The only downside now, though, comes for female Sidecar drivers, who say they could face further harassment from male passengers who select them on purpose (and, we would guess, when drunk?). Because, yes, the gender preference is available to all users, male and female.").

88. Rebecca Greenfield, *Want More Female Uber Drivers? Here's How to Make It Happen*, FAST COMPANY, <http://www.fastcompany.com/3043622/most-innovative-companies/want-more-female-uber-drivers-heres-how-to-make-it-happen> [https://perma.cc/296J-D3GA]; Schuyler Velasco, *Can Uber Solve its women problem*, THE CHRISTIAN SCI. MON., <http://www.csmonitor.com/Business/2015/0310/Can-Uber-solve-its-women-problem> [https://perma.cc/JGS4-ZCQ2].

4. Safety

Many sharing economy services, precisely because of the intimate nature of where they occur—in a private home or vehicle—raise safety concerns. Because these transactions occur in a private home or vehicle, usually with no one else present besides the buyer and seller, they render both the buyer and the seller vulnerable to physical and sexual security risks. And the close private quarters in which these transactions take place makes it difficult or impossible for a buyer or seller who feels threatened to walk away or otherwise exit.

Safety concerns have been raised frequently in the context of ride-sharing services, and affect both passengers and drivers.⁸⁹ As for passengers, ride-sharing services have faced a slew of assault allegations against their drivers.⁹⁰ Uber, for example, has faced numerous complaints of sexual assault by its drivers in Boston, Chicago, Los Angeles, Philadelphia, San Francisco, Washington, D.C., and other cities.⁹¹ In December 2014, an Uber driver in New Delhi was

89. See *Reported List of Incidents Involving Uber & Lyft*, WHO'S DRIVING YOU?, <http://www.whosdrivingyou.org/rideshare-incidents> [https://perma.cc/NB8B-Q3F4].

90. Perman, *supra* note 54.

91. *Id.* (describing among other incidents one where an Uber driver in Houston was charged with sexually assaulting an intoxicated woman he'd pick up from a bar and driven back to his home); Velasco, *supra* note 88; see also Steve Annear, et al., *Uber Driver Charged with Assault*, BOSTON GLOBE (Feb. 9, 2015), <http://www.bostonglobe.com/metro/2015/02/09/boston-uber-driver-charged-with-indecent-assault-and-battery-boston-police-say/k9eKsX2q95hA9bdM13Iorj/story.html> [https://perma.cc/EDL4-2MX8] (reporting multiple incidents of sexual assaults by Uber drivers against female passengers, including a rape and several indecent assaults); Sarah Gray, *Updated: Uber calls what amounts to a 2-hour kidnapping an "inefficient route"*, SALON (Oct. 14, 2014), http://www.salon.com/2014/10/14/uber_calls_what_amounts_to_a_2_hour_kidnapping_an_inefficient_route/ [https://perma.cc/9V2N-352W]; Perry Stein, *Uber Driver Charged With Sexually Assaulting Passenger in D.C.*, WASHINGTON CITY PAPER (July 28, 2014), <http://www.washingtoncitypaper.com/blogs/citydesk/2014/07/28/uber-driver-charged-with-sexually-assaulting-passenger-in-d-c/> [https://perma.cc/VRR2-UFVU] (reporting on affidavit of passenger accusing Uber driver of molesting her after she passed out in his car).

Uber has other "women problem[s]." Greenfield, *supra* note 88; Velasco, *supra* note 88; Anita Little, *Five Reasons to Delete Your Uber App*, MS. MAGAZING BLOG (Nov. 20, 2014), <http://msmagazine.com/blog/2014/11/20/5-reasons-to-delete-your-uber-app/> [https://perma.cc/X7QN-S57X]. At the corporate level, Uber is known for a "bro-culture." Chloe Angyal, *Uber's Plan to Employ More Female Drivers Won't Empower Women*, THE NEW REPUBLIC (Mar. 23, 2015), <https://newrepublic.com/article/121348/ubers-plan-employ-women-drivers-awful> [https://perma.cc/6GJP-55TG]. In 2014, Uber CEO Kalanick provoked ire for calling his company "Boob-er" in a GQ profile, referring to the role that Uber's success has played in boosting his sex appeal. *Id.* That same year, the company apologized for its French promotion offering attractive women drivers. *Id.* As discussed below, Uber has a lower proportion of female drivers than any of its major competitors, and few female

charged with kidnapping and raping a passenger, prompting a temporary ban in that city.⁹²

Drivers too face safety concerns. While ride-sharing services provide one safety advantage over traditional taxi driving—being cashless—they still present dangers to drivers.⁹³ Female drivers report various forms of sexual harassment by riders, particularly by intoxicated men, including being propositioned for sex, facing other unwanted come-ons, and even physical fondling.⁹⁴ Female drivers also report non-sexual physical assaults.⁹⁵ And female Uber drivers have faced harassment from male passengers who have located them using the service’s “Lost and Found” feature, which allows passengers to get directly in touch with their drivers if they believe they have left behind their belongings.⁹⁶

Other sharing economy services also pose safety concerns. For example, AirBnB hosts and guests face security risks. Guests have been drugged, sexually assaulted, and held hostage by their hosts.⁹⁷ Again, in the context of roommates, the Ninth Circuit emphasized the safety concerns of shared dwellings, explaining that “[w]e are at our most

executives. *Id.* (noting that women comprise 14% of Uber’s drivers as compared with 30% of Lyft’s drivers and 40% of Sidecar’s drivers, and that of Uber’s top fifty employees, only six are women).

92. See Velasco, *supra* note 88.

93. See Greenfield, *supra* note 88.

94. 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> [https://perma.cc/D5K9-38XJ] (reporting among other incidents one in January 2015 in Atlanta when an intoxicated male passenger asked his female driver to take him to a strip club, and if she wanted to “make some extra money” by “danc[ing] for him”; after she refused, the passenger rubbed her thighs and breasts and tried to kiss her).

95. *Id.* (describing incident in Los Angeles where female driver alleged that two male passengers hit her in the face with a thorny rose after she asked them not to slam her car door).

96. See Johana Bhuiyan, *Men Are Using Uber’s Lost-And-Found Feature To Harass Female Drivers*, BUZZFEED (Feb. 10, 2015), <http://www.buzzfeed.com/johanabhuiyan/faced-with-harassment-female-uber-drivers-often-left-to-fend#.ojj9JMAq3> [https://perma.cc/E985-PWD4] (reporting incidents where male passengers have contacted female drivers using the feature and even visited their homes by using a combination of this feature and Apple’s Find My iPhone feature).

97. See, e.g., Scott Stump, *Airbnb Horror Story Reveals Safety Issues For Lodging Site*, TODAY (Aug. 17, 2015), <http://www.today.com/money/airbnb-horror-story-reveals-safety-issues-lodging-site-t39091> [https://perma.cc/5CJF-3Ezs]; Marie Lisa Jose, *First, Listen to My Story of Being Drugged on an Airbnb Stay, Then Learn from It*, MATADOR (Aug. 13, 2013), <http://matadornetwork.com/trips/drugged-and-terrified-an-airbnb-booking-gone-wrong/> [https://perma.cc/5DRA-765Q].

vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings.”⁹⁸

Both female service providers and female consumers in the sharing economy have expressed preferences for transacting with women as a way to mitigate these safety concerns.⁹⁹ The market has followed. Several ride-sharing firms market a feature that allows passengers to select the sex of their driver as a safety measure.¹⁰⁰ One of Uber’s primary responses to the safety concerns has been to pledge to hire more women drivers.¹⁰¹

B. Manifestations

The features of the sharing economy and the sex preferences therein discussed in the last subparts have made gender salient in the sharing economy. One notable feature of the salience of sex in these settings is that sex is salient not simply as a product of unconscious biases or structural features of the market, which of late have been the dominant explanations for continuing inequality in the market.¹⁰² Much of the

98. Fair Housing Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216, 1221 (9th Cir. 2012).

99. See Hu, *supra* note 84; see Barman, *supra* note 78.

100. *7 Ways to Ride Safe this Season*, SIDE CAR BLOG (Dec. 16, 2014), <http://www.side.cr/seven-ways-to-ride-safe-this-season-with-sidecar/> [<https://perma.cc/PM9X-B84L>] (“Sidecar is here with some tips from our female drivers on how to ride snug and safe during the most wonderful (and busiest!) time of the year . . . Seven Ways to Ride Safe this Season (with Sidecar!) Be Choosy: If you prefer to ride in a newer car or with a woman at the wheel, go ahead and choose!”); Bray, *supra* 78.

101. *Meet the Uber Team Driving Our Women Partner Program*, UBER (July 27, 2015), <http://newsroom.uber.com/2015/07/meet-the-uber-team-driving-our-women-partner-program/> [<https://perma.cc/DF8J-ZEWF>] (one million women drivers globally by 2020); Jessica Goldstein, *You Shouldn’t Have to Hire A Female Driver: Uber’s Hiring Pledge Isn’t Enough*, THINKPROGRESS (Mar. 12, 2015), <http://thinkprogress.org/culture/2015/03/12/3633002/shouldnt-female-driver-ubers-hiring-pledge-isnt-enough/> [<https://perma.cc/J96U-BDGT>]. In March 2015, Uber announced a partnership with UN Women in its goal to create a million new driving jobs for women by 2020. Angyal, *supra* note 91. After barely a week, responding to criticism from women’s rights and labor groups, UN Women called off the partnership. *Id.*

102. See, e.g., Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1895–96 (2009); Peggy C. Davis, *Law of Microaggression*, 98 YALE L.J. 1559, 1561–62 (1989); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186–1217 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 317 (1987); Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1808 (2000); Ann C. McGinley, *Viva Law Evolucion!: Recognizing Unconscious Motive in*

sex discrimination and segregation that we see in the sharing economy is based in express discriminatory preferences and even outright segregation.¹⁰³ This Subpart will discuss the manifestations of sex-based preferences in the sharing economy.

As referenced above, one response to sex preferences has been discrimination in the selection of both sellers and buyers.¹⁰⁴ Some ride-sharing companies have allowed riders to select a driver of his or her preferred sex.¹⁰⁵ One long-distance ride-sharing service, Trypda, also allows drivers to choose only female passengers.¹⁰⁶ These options apparently have been quite popular. After Sidecar introduced this option, many of their female drivers reported an increase in ride

Title VII, 9 CORNELL J. L. & PUB. POLY'Y 415, 421–46 (2000); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 902–15 (1993); Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 321–23 (2000); Sturm, *supra* note 61, at 460 (2001). For a critique of this scholarly trend, see generally Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006).

Note that we do also need to be concerned about how both conscious and unconscious biases operate in the sharing economy. Such biases can work their way into both buyers' and sellers' profiles by way of ratings. Abraham Riesman, *We Asked 10 Black-Car Drivers If They Prefer Working for Lyft or Uber—Here's Why Lyft Won By a Landslide*, N.Y. MAG. (Dec. 7, 2014), <http://nymag.com/daily/intelligencer/2014/12/lyft-uber-drivers.html#> [https://perma.cc/B9BD-FBJU] (“Nine out of ten times, it’s the foreigners that aren’t good at speaking English that frustrate a customer. If they’re trying to get somewhere and the language is a barrier, it’s difficult. They don’t mean to give the driver a bad [average] rating. But based on communication skills, they’re giving you the rating on that.”). These ratings are used not only by buyers and sellers to determine with whom to transact, but also by sharing economy firms. For example, Uber will drop drivers if their rating gets too low, *see id.*, and Lyft won’t match a driver with a rider again if either party rated the other party fewer than four stars, *see* Harry Campbell, *My Rating System for Uber and Lyft Passengers*, THE RIDESHARE GUY (Aug. 31, 2015), <http://therideshareguy.com/my-rating-system-for-uber-and-lyft-passengers> [https://perma.cc/GM7Q-ZH5F].

103. This may flow from the fact that the norms against the expression of sex preferences in intimate spaces are far weaker than the norms against, say, race discrimination, as we can see in the ongoing sex segregation of certain intimate spaces, including bathrooms and locker rooms. *See* Mary Anne Case, *All the World’s the Men’s Room*, 74 U. CHI. L. REV. 1655, 1656 (2007) (mentioning her work on “public toilets as gendered spaces”); Mary Anne Case, *Toilet Survey*, <http://webcast-law.uchicago.edu/toiletsurvey/form/> [https://perma.cc/VXZ6-54Q3] (seeking to gather data on sex-segregated toilet facilities); Mary Anne Case, *Changing Room? A Quick Tour of Men’s and Women’s Rooms in U.S. Law over the Last Decade, from the U.S. Constitution to Local Ordinances*, 13 PUBLIC CULTURE 333 (2001) [hereinafter Case, *Changing Room?*] (documenting sex segregation of public toilets); Danielle A. Schmidt, *Bathroom Bias: Making the Case for Trans Rights under Disability Law*, 20 MICH. J. GENDER & L. 155, 161 (2013) (discussing bathroom segregation in the workplace).

104. *See supra* Part I.B.

105. SIDE CAR BLOG, *supra* note 100; Bray, *supra* 78.

106. Bray, *supra* 78.

requests from female passengers.¹⁰⁷ And other sharing economy services that allow consumers to select workers based on a profile complete with name and photograph, such home-sharing services like AirBnB and in-home task services like TaskRabbit, permit easy discrimination on the basis of sex.

Sex segregation is another manifestation of the salience of sex in the sharing economy. Lyft for example began as a ride-sharing service for women only.¹⁰⁸ While Lyft ultimately decided to provide service to both men and women, recent taxi services like SheTaxis, which provides an all-female taxi service by connecting female drivers with female passengers, suggests that a sharing economy version is not far behind.¹⁰⁹ The sharing economy is also marked by significant informal segregation by sex. Sex segregation is particularly marked among drivers for ride-sharing services. Women constitute 14% of Uber's drivers, 30% of Lyft's drivers, and 40% of Sidecar's drivers.¹¹⁰ So while Uber claims to be a job creator, it has been a job creator almost entirely for men.¹¹¹

Safety concerns contribute to the segregation of ride-sharing services not only because women avoid driving due to these concerns, but also because these concerns—and women's attempt to address them—end up making driving less lucrative for women. A combination of market forces and firm policies mean that female

107. Bhuiyan, *supra* note 96; Kaleigh Rogers, *Why Doesn't Uber Let Women Passengers Choose Women Drivers*, MOTHERBOARD (Apr. 6, 2015), <http://motherboard.vice.com/read/why-doesnt-uber-let-women-passengers-choose-women-drivers> [<https://perma.cc/HS2B-MS9E>].

108. Huet, *supra* note 94; *see* Rogers, *Why Doesn't Uber Let Women Passengers Choose Women Drivers*, *supra* note 107.

109. SHETAXIS, <http://shetaxis.com> [<https://perma.cc/8QZV-YAEG>]. SheTaxis is a livery service that does not employ drivers directly, but joins with existing livery companies that employ drivers to provide their female drivers to female passengers seeking female drivers. *See* Hu, *supra* note 84. According to SheTaxis, anyone can use the company's services, but only a party including a woman can request a female driver; a male passenger could be served by a driver of either sex. Because SheTaxis does not employ its drivers, the company avoid the confines of employment discrimination law. Under some cities' laws, it would be illegal for a driver to decline a fare because of gender. *See id.*

110. Angyal, *supra* note 91; Rogers, *Why Doesn't Uber Let Women Passengers Choose Women Drivers*, *supra* note 107. Note that at least some of these firms are doing considerably better than taxi and livery drivers as a whole. Women make up only 14% of all such drivers in the United States. Paul Merrion, *Making Inroads: Women Cabbies on the Rise*, CHICAGO BUSINESS (Sept. 27, 2014), <http://www.chicagobusiness.com/article/20140927/ISSUE01/309279976/making-inroads-women-cabbies-on-the-rise> [<https://perma.cc/TTV3-M792>].

111. Huet, *supra* note 94.

drivers suffer financially when they try to mitigate safety concerns.¹¹² The busiest times of the week for ride-sharing are nights and weekends, when drivers can make more money, both because of traffic and because of bonuses offered by ride-sharing firms at these times.¹¹³ But these are also the times when riders are most likely to be intoxicated. Female drivers who opt not to drive during these times due to heightened safety concerns thus suffer disproportionate financial consequences. And female drivers who reject male passengers who are intoxicated or otherwise pose safety risks likewise suffer disproportionate losses. Some ride-sharing services require a 90% acceptance rate of riders to be eligible for bonuses, and other services count cancellations against drivers in their ratings.¹¹⁴ Uber does not let a driver block a certain passenger and Lyft only declines to match a driver or passenger if either has given the other a sufficiently low rating.¹¹⁵ Neither firm routinely removes passengers with low ratings, though if drivers' ratings fall, they are let go.¹¹⁶

There is one market for ride-sharing services that is overwhelmingly female: driving children.¹¹⁷ Shuddle, which is essentially Uber for children, is comprised of 98% female drivers.¹¹⁸ There are a number of reasons for the gender inversion. First, drivers must have caregiving experience, which is more common among women.¹¹⁹ Second, the circumstances of the driving—during the daytime, without any intoxicated adults—alleviates many of the safety concerns for women drivers, and may be less likely to conflict with their own caregiving

112. See Greenfield, *supra* note 88.

113. Huet, *supra* note 94.

114. Huet, *supra* note 94.

115. *Id.*

116. *Id.*

117. Another gig economy platform dominated by women is Etsy. ETSY, <https://www.etsy.com/> [<https://perma.cc/HT78-DNXZ>]. As compared with the ride-sharing services, Etsy, a micro-entrepreneur platform that allows sellers to peddle their creative wares through the site, is comprised of 88% female sellers. Interestingly, while Etsy sellers report higher levels of education than most Americans, the average/median income for Etsy sellers is \$44,9000, ten percent lower than the national average/median. Although many Etsy sellers use the platform merely to supplement more traditional income sources, it is notable that these sellers nonetheless remain below average in income. See Jennifer Neeley, *Is the Sharing Economy Feminist*, SOCIAL MEDIA TODAY (June 2, 2015), <http://www.socialmediatoday.com/technology-data/jennifer-neeley/2015-06-02/sharing-economy-feminist> [<https://perma.cc/THH2-GV5N>].

118. Mike Isaac, *New Ride Services Forge Own Specialized Paths*, N.Y. TIMES BLOG (June 10, 2015), http://bits.blogs.nytimes.com/2015/06/10/new-ride-services-forge-own-specialized-paths/?_r=0 [<https://perma.cc/Y4RQ-PQ5N>].

119. Greenfield, *supra* note 88.

obligations.¹²⁰ Finally, stereotypical expectations of both workers and consumers strongly type this sort of intimate caregiving service as women's work.¹²¹

III. THE CONSEQUENCES FOR SEX EQUALITY

The merging of first, second, and third places, and the increasing blurring of home and market that comes with the sharing economy present challenges for legal regulation. As legal scholars have long recognized (and critiqued), current law is organized largely around the distinction between the family and market.¹²² Particularly when it comes to discrimination, very different law applies to the home and the market. In the home, sex discrimination has long not only been permitted, but required.¹²³ While required sex discrimination has faded,¹²⁴ discrimination is still permissible.¹²⁵ On the other hand, many forms of sex discrimination are prohibited in the labor market,¹²⁶ in the housing market,¹²⁷ and in public accommodations.¹²⁸

As set forth in the last two Parts, as the sharing economy expands, the nature of the transactions and the context in which they occur make it particularly likely that sex preferences, and discrimination on the basis of such preferences, will flourish. There is perhaps an irony here: as law has become less accepting of discrimination in the

120. *Id.*

121. *See supra* notes 45-53 (discussing how identity signals skills for certain work).

122. *See, e.g.,* Olsen, *supra* note 24, at 1498, 1501.

123. We can see this through anti-sodomy laws, *see* Lawrence v. Texas, 539 U.S. 558, 578-79 (2003) (striking down sodomy ban), and bans on gay marriage, *see* Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584, 2599 (2015) (striking down gay marriage ban).

124. *See Obergefell*, 135 S. Ct. at 2599 (striking down ban on gay marriage); Lawrence v. Texas, 539 U.S. 558, 578-79 (2003) (striking down anti-sodomy law).

125. No law bans private actors from discriminating in the selection of romantic partners or children for adoption, and, indeed, the constitutional right to intimate association guarantees some sphere of liberty for individuals to exercise discriminatory preferences free from government interference in their most intimate interactions. *See* Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307 (2009) (discrimination in romance); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 634 (1980) (intimate association). The lack of legal prohibition even extends outside the family, to certain domestic workers who labor in the home. *See* Schoenbaum, *supra* note 10, at 1231; Katharine Silbaugh, *Turning Labor into Love*, 91 NW. U. L. REV. 1, 72-79 (1996). While Section 1981 bans race discrimination in contracting, other prohibitions against discrimination do not apply against domestic workers. *See id.*

126. *See* 42 U.S.C. § 2000e (1964).

127. *See* 42 U.S.C. §§ 3601-3631 (1968).

128. *See* 42 U.S.C. § 2000a.

home,¹²⁹ the changing shape of the economy is leading to more discrimination in the market. The sharing economy thus may be seen to pose a threat to the sex equality project of the market, that is, the goal of ridding market transactions of the salience of sex by eliminating sex discrimination, sex segregation, and sex stereotyping.¹³⁰ Before going further, it is worth acknowledging that the sex equality project is not monolithic. There are exceptions to the ban on sex discrimination,¹³¹ as well as certain contexts in which sex discrimination law allows for the recognition of sex differences in the market.¹³² And of course not everyone agrees that sex equality is best achieved by making sex less rather than more salient in the market.¹³³ Despite these facets of sex discrimination law, it is nonetheless descriptively accurate to recognize that existing sex discrimination law primarily aims to make sex less salient in the market.

This Part first discusses the threat that the sharing economy poses to the legal sex equality project, and also considers whether the sharing economy poses any promise or reason for reconsidering the equality project. This Part next discusses what role there is for law to intervene. It addresses the unsettled nature of current law, market responses in the face of this uncertainty, and the challenges that the sharing economy poses for the sex equality project *even if* current antidiscrimination law were to be extended to the sharing economy, which calls into question the transformative potential of antidiscrimination law there.

A. Promise or Threat?

As we can see, sex preferences have flourished in the sharing economy. Importantly, these preferences manifest not only in subtle

129. See sources cited *supra* note 126.

130. See Schultz, *supra* note 11, at 996; Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 106–108 (2010).

131. I discuss the intimacy-based exceptions in *infra* Part III.B.3. For an interesting critique of how antidiscrimination law, through its exceptions, operates both to prohibit *and* to approve certain forms of sex discrimination, see Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1 (2000).

132. See *Cal. Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (1987) (holding that Title VII does not preempt a state law that mandates benefits for pregnant workers and not for non-pregnant workers because “Congress intended the [Pregnancy Discrimination Act] to be a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise”).

133. See Schultz, *supra* note 11, at 996 (discussing disagreement among feminists as to whether sex equality is best achieved by the law recognizing sex differences when it comes to pregnancy).

discrimination and unconscious biases, but overt discrimination and segregation. This suggests not only that norms are not strong enough to constrain sex discrimination in these settings, but that norms are sufficiently weak that express sex preferences and even segregation are considered acceptable and perhaps even desirable (at least by substantial numbers of persons).

Some might argue that the sharing economy holds promise in terms of rethinking the sex equality project. As an initial matter, the sharing economy may lead us to question the boundaries around the home and the market as they traditionally have been conceived. This holds the promise of breaking down these boundaries that feminist legal scholars have typically found troubling, as these boundaries have often been used to deny protection to women and women's work.¹³⁴ However, most feminist scholars have been concerned not simply with shifting the boundaries, but with extending the protections of the public sphere to the private sphere.¹³⁵ If the sharing economy prompts recognition of the need to extend more market protections to the home, this would be consistent with the arguments of many sex equality scholars.¹³⁶ If, instead, the sharing economy extends exceptions to antidiscrimination protections for market activity because they are viewed as sufficiently private or intimate, this would present a challenge to the sex equality project as it has primarily been conceived.

This challenge might be supported with a range of arguments. First, what we already see happening in the sharing economy strongly suggests that some people—especially women—want the freedom to exercise sex preferences. Despite the sex equality project, there is still a strong sense that sex preferences in intimate spaces within the market, housing, and public accommodations are acceptable—we can see this both in life¹³⁷ and in law.¹³⁸ Eliminating these options then

134. See Olsen, *supra* note 24, at 1518–20; Schoenbaum, *supra* note 10, at 1174–75; Silbaugh, *Turning Labor into Love*, *supra* note 125, at 22–26.

135. See sources cited *id.*

136. See sources cited *supra* note 136.

137. See Case, *Changing Room?*, *supra* note 103 (bathrooms); Lewin, *supra* note 50; Allen, *supra* note 65 (massage); Barry Gewen, *Sports and Sexual Segregation*, N.Y. TIMES BLOG (June 4, 2008), http://artsbeat.blogs.nytimes.com/2008/06/04/sports-and-sexual-segregation/?_r=01 [<https://perma.cc/8QS7-X9TJ>] (athletics).

138. Title VII's BFOQ exception applies to sex but not race. See *infra*, notes 204–10 and accompanying text for more on the BFOQ exception. Section 1981 bans race but not sex discrimination in contracting. See 42 U.S.C. § 1981 (1991). And of course strict scrutiny applies to race discrimination under the Constitution, while only intermediate scrutiny applies to sex. Compare *City of Richmond v. J.A. Croson*, 488 U.S. 469, 494 (1989) (O'Connor, J., plurality opinion) (applying strict scrutiny to race classifications),

may actually *reduce* women's welfare. And there may be trade-offs between intimacy and equality. As one driver explained, she preferred working for an all-female taxi service because she was able to engage in more intimate transactions with female passengers.¹³⁹ Second, an alternative regime might be justified if the circumstances of certain market transactions are sufficiently different that they justify a different approach to legal regulation. In fact, there might be concern that if we regulate sharing economy activities too much like those of the traditional economy that the law will infringe too much on spaces where we currently enjoy freedom from regulation.¹⁴⁰ Finally, one might argue that allowing alternative regulatory regimes to exist in the market would provide the benefit of affording buyers and sellers the opportunity to opt into the regulatory regime that best matched their own preference.¹⁴¹

We have rejected each of these arguments in the traditional economy.¹⁴² Is there a reason to accept them in the sharing economy? Believers in the sex equality project would argue no.¹⁴³ While a lack of

with Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (applying intermediate scrutiny to sex classifications).

139. See Hu, *supra* note 84.

140. I am not arguing specifically that a constitutional right to intimate association applies in these cases, but rather that as a matter of practice these spaces are currently subject to less regulation.

141. See Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 116 (2015), <https://lawreview.uchicago.edu/page/self-regulation-and-innovation-peer-peer-sharing-economy> [<https://perma.cc/643J-7RAG>] (arguing for different regulatory regimes for the sharing and traditional economies). *But see* Edith Ramirez, Fed. Trade Comm'n, Keynote Remarks at the 42nd Annual Conference on International Antitrust Law and Policy, Fordham Law School (Oct. 2, 2015), https://www.ftc.gov/system/files/documents/public_statements/810851/151002for_dhamremarks.pdf [<https://perma.cc/S87N-M9TX>] (arguing to "avoid creating two distinct regulatory tracks—with one set of rules for the older, incumbents businesses and a different set of rules for the new entrants they now increasingly compete against").

142. With the exception of the intimacy exceptions discussed *infra* Part III.B.3, which, at least in the traditional economy, have been recognized as quite narrow and have been applied only rarely. See 29 C.F.R. § 1604.2(a) (2002) ("The [Equal Employment Opportunity] Commission believes that the bona fide occupational qualification exception as to sex [discrimination] should be interpreted narrowly. "). By contrast, recognizing a similar approach in the sharing economy would so greatly expand the recognition of such exceptions such that the difference would be one in kind, not just degree.

143. Scholars have addressed these arguments in the context of other intimate work situations and have made a persuasive case rejecting them. See Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1259 (2003) (arguing that there is no justification for the privacy-based BFOQ exception grounded in customer sex preferences); Deborah A. Calloway, *Equal Employment and*

regulation would increase choice for some, it would decrease choice for others. We can see this in the context of the traditional economy when it comes to male gynecologists, where the preference for female gynecologists has seriously hindered men's ability to pursue this career path.¹⁴⁴ And of course, these sex preferences are grounded in sex-based stereotypes. Allowing sex-based stereotypes to have a strong hold in the market runs exactly contrary to the sex equality project, which is premised significantly in an anti-stereotyping principle—that is, that we should not classify on the basis of assumptions about how a man or a woman will behave simply because of sex.¹⁴⁵

Under this anti-stereotyping approach, there may be some tension between short-term and long-term utility. The anti-stereotyping approach is premised in the notion that restricting reliance on sex will make sex less salient over time, thereby reducing the need to rely on sex in the future.¹⁴⁶ And there is reason to believe that sex preferences are not fixed but malleable. For example, while women currently prefer female gynecologists, this preference arose only relatively recently.¹⁴⁷ Until just a few decades ago, when gynecology was a male profession, women saw male gynecologists without complaint.¹⁴⁸ This shift in preference for female gynecologists was, of course, prompted largely by Title VII's equal employment opportunity mandate, which opened up the medical profession to women.¹⁴⁹ Thus, there is reason to believe that consumer preferences can be responsive to the force of law.

And there is yet another reason why law should not simply accede to sex preferences in the name of worker and customer autonomy. Sex

Third Party Privacy Interests: An Analytical Framework for Reconciling Competing Rights, 54 FORDHAM L. REV. 327, 329-33 (1985) (questioning arguments supporting the BFOQ grounded in customer sex preferences but stopping short of arguing for the elimination of the BFOQ exception).

144. See Lewin, *supra* note 50 (discussing how women's preference for female gynecologists has limited men's future in the field). The status of the BFOQ exception as it applies to gynecologists is not clear. See *Veleanu v. Beth Isr. Med. Ctr.*, No. 98 Civ. 7455, 2000 U.S. Dist. LEXIS 13948, at *1 (S.D.N.Y. Sept. 25, 2000) (holding that satisfying patient's request for female gynecologist does not constitute unlawful discrimination without answering whether BFOQ applies such that the employer itself would be barred from considering sex); *EEOC v. Mercy Health Ctr.*, No. Civ. 80-1374-W, 1982 WL 3108 (W.D. Okla. Feb. 2, 1982) (applying BFOQ to labor and delivery nurse).

145. See Franklin, *supra* note 130, at 106.

146. *Id.* at 84-85.

147. See Lewin, *supra* note 50.

148. See *id.*

149. See Schultz, *supra* note 11, at 1006-09.

preferences cannot be viewed as entirely exogenous or fully formed before workers and customers enter the market.¹⁵⁰ Rather, sharing economy firms play a role in shaping preferences. Therefore, it is not even clear whether satisfying these preferences can even be seen to further the unmanipulated interests of workers and customers.

Some firms expressly suggest sex discrimination as a way to satisfy preferences of privacy, comfort, and safety.¹⁵¹ Even when such firms do not expressly advocate sex discrimination, they nonetheless may reinforce conscious and unconscious discriminatory preferences. TaskRabbit's homepage, for example, suggests the different tasks for which you can "Hire [a tasker] for a Range of Needs Around Your Home."¹⁵² For the task of "Cleaning" ("We'll make your home sparkle!"), we see an image of a (white) female tasker cleaning a kitchen, with a woman (presumably the client) holding a baby in the background (representing the female labor she is replacing).¹⁵³ For the task of "Moving Help," we see an image of a (black) man moving boxes.¹⁵⁴ These images prime us for the identity of the proper tasker for each task. For the task of "Handyman," ("Taskers can help with handyman tasks around your home."), TaskRabbit goes further, making it explicit that it is men who should complete these tasks.¹⁵⁵ If "Handyman" was not clear enough, we see an image of a (white) man with his tools.¹⁵⁶

As Professor Vicki Schultz has made clear in the case of employees, individuals do not come to the workplace with fully formed preferences about work.¹⁵⁷ Rather, work experiences themselves, which are largely determined by the employer, shape workers' expectations and preferences.¹⁵⁸ This is no less true for consumers, whose expectations and preferences are not exclusively formed before

150. See Allen, *supra* note 65 (noting that one woman believed she had no preference for either a male or female masseuse until realizing that with a female masseuse she was able to relax more).

151. See *supra* Part II.B.

152. See TASKRABBIT, *supra* note 37.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. See Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1815 (1990) ("[W]omen's work preferences are formed, created, and recreated in response to changing work conditions").

158. *Id.* at 1816 (describing the variety of mechanisms employers use to "structure opportunities and incentives and maintain work cultures and relations so as to disempower most women from aspiring to and succeeding in traditionally male jobs").

entering the market for a transaction. Rather, the market can help to shape expectations and preferences for the provision of intimate services.¹⁵⁹ To the extent that firms cultivate and reinforce consumers' discriminatory preferences, this helps to shape preferences by legitimating rather than disrupting such preferences, particularly by creating the environment in which intimate services are delivered.¹⁶⁰ If consumers have their preferences accommodated, this reinforces their preexisting view that this is the only acceptable way these services may be delivered.¹⁶¹

Moreover, when it comes to safety, relying on sex preferences sidesteps the underlying issue, which is a safety problem. The solution then is not to avoid the safety issues with sex segregation (which puts the burden on the potential victim of the danger), but to address the underlying safety concerns (which puts the burden on those who pose the safety risks and the institutions responsible for them).¹⁶² Relying on sex segregation to address safety problems in ride-sharing services is reminiscent of single-sex transit systems such as women-only buses and subway cars in place in other countries, including Egypt, Iran, and Pakistan.¹⁶³ This approach is entirely out of step with the U.S. anti-stereotyping approach to sex discrimination.¹⁶⁴

A final problem with sex-based classifications is that they assume a neat binary when it comes to sex. In an era when Caitlyn Jenner is gracing magazine covers and the public is increasingly coming to

159. See Schoenbaum, *supra* note 10, at 1193-96. Other scholars have recognized the role of the law in shaping even our most intimate preferences. See Emens, *supra* note 125, at 1366-74, for a discussion of the law's role in structuring, as she terms it, "the accidents of sex and love"—the likelihood of dating and marrying people from particular identity groups.

160. See Schoenbaum, *supra* note 10, at 1193-96.

161. See *id.*

162. We can see this recognition by the dissent in the Supreme Court's decision in *Dothard v. Rawlinson*, 433 U.S. 321 (1977). There, the dissent recognized that the real problem in the prison was its "barbaric and inhumane" conditions—"conditions so bad that state officials have conceded they violate the Constitution." *Id.* at 342. The response should have been to improve these conditions rather than to ban women from working in them.

163. See Angyal, *supra* note 91; Holly Kearl, *Actually, No: Women-Only Transportation Won't End Harassment*, TAKEPART, <http://www.takepart.com/article/2015/08/31/women-only-public-transportation> [<https://perma.cc/R3XN-8YT7>] (noting that countries with women-only bus services include Bangladesh, Guatemala, India, Indonesia, Mexico, Pakistan, Thailand, and the United Arab Emirates, and that countries with women-only subway cars or sections of trains include Brazil, Egypt, Iran, Japan, Malaysia, Mexico, Nepal, and Russia).

164. See *supra* text accompanying notes 125-30.

accept transgenderism¹⁶⁵, this is an especially problematic solution. Transgender individuals have already troubled our sex-segregated spaces, such as bathrooms and athletic facilities.¹⁶⁶ A regime premised on sex is likely to raise significant classification problems for transgender individuals and concerns about who is a “real” woman.¹⁶⁷ And substantial reliance on sex-based classifications might pose a challenge to transgenderism, which relies on some notion of fluidity across the sexes.¹⁶⁸

Finally, believers in the sex equality project might be concerned that the sheer size of the sharing economy poses too great of a threat to the sex equality project were it to go unregulated by antidiscrimination law. If antidiscrimination law does not apply to the bulk of sharing economy transactions, this creates a large and expanding segment of market activity that is not subject to the equality norms that typically govern work, housing, and much activity in third spaces. This would affect not only the sharing economy, but could, by affecting the norms of sex equality in the market, undermine the role of antidiscrimination law in transforming gender relations even within the traditional economy.

B. What Role for Law?

This Subpart addresses what role the law can play in addressing the salience of sex in the sharing economy. It is not clear whether current

165. See Buzz Bissinger, *Caitlyn Jenner: The Full Story*, VANITY FAIR (July 2015), <http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz> [<https://perma.cc/5FYH-BMW2>] (cover photo of Jenner done by Annie Leibowitz).

166. See Schmidt, *supra* note 103, at 161-62. For a fascinating discussion of these issues, see Michelle Goldberg, *What Is a Woman?*, NEW YORKER (Aug. 4, 2014), <http://www.newyorker.com/magazine/2014/08/04/woman-2> [<https://perma.cc/5QNC-ZUCR>].

167. Goldberg, *supra* note 166.

168. One could argue that transgenderism actually accepts and reinforces the sex binary. It is premised on the notion that there are two sexes and that a person identifies as either one or the other. If someone identifies with the sex not of her birth, she may need to switch sex. There are other sex and gender identity positions that blur the line far more, such as persons who refuse to identify as either male or female, or even persons who feel no compunction to have their gender performance match their sex. See generally Case, *Disaggregating Gender from Sex and Sexual Orientation*, *supra* note 5 (1995) (discussing the distinction between sex and gender, and the legal implications for those whose gender does not match their sex); Elinor Burkett, *What Makes a Woman?*, N.Y. TIMES (June 7, 2015), http://www.nytimes.com/2015/06/07/opinion/sunday/what-makes-a-woman.html?_r=0 [<https://perma.cc/5QNC-ZUCR>] (highlighting and critiquing that transgender individuals often adopt very stereotypical performances of female gender).

antidiscrimination and other protective law applies to the sharing economy. This Subpart does not seek to answer this question,¹⁶⁹ but briefly sets forth the terms of the uncertainty. The primary aim of this Subpart is to highlight how even if this law does apply, there are reasons to believe that it will not be as effective or transformative as it has been in the traditional economy. The sharing economy thus poses unique challenges for the goals of sex equality. This Subpart begins with a discussion of current law and market responses, then turns to the challenges that the sharing economy presents to antidiscrimination law, and concludes with a few suggestions for new legal approaches to address these challenges.

1. Current Law

The first set of laws that would be relevant to discrimination in the sharing economy is antidiscrimination law in the employment, housing, and public accommodations contexts. These laws ban sex discrimination.¹⁷⁰ But it is not clear whether these laws apply to sharing economy firms.¹⁷¹ As for employment discrimination law, many sharing economy firms have argued that their workers are independent contractors and not employees, and thus that they are not covered under these laws.¹⁷² Litigation is ongoing,¹⁷³ and scholars have disagreed on the correct answer.¹⁷⁴

169. Other scholars have taken on this task. *See, e.g.*, Benjamin Means & Joseph Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 4 (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2663350 [<https://perma.cc/V88C-9JWY>]; Rogers, *The Social Costs of Uber*, *supra* note 7, at 95.

170. *See* 42 U.S.C. § 2000e (1964) (federal employment discrimination law), *et. seq.*; 42 U.S.C. §§ 3601-3631 (1968) (federal housing discrimination law); 42 U.S.C. § 2000a (1964) (federal public accommodations law). Federal public accommodations law does not bar sex discrimination, but most state laws do. *See, e.g.*, Alaska Stat. Ann. § 18.80.200 (West 1964); Ariz. Rev. Stat. Ann. § 41-1442 (West 1965); 2015 Cal. Legis. Serv. Ch. 282 (S.B. 600) (2015); Colo. Rev. Stat. Ann. § 24-34-601 (West 1979); Conn. Gen. Stat. Ann. § 46a-64 (West 1949).

171. *See* Rogers, *The Social Costs of Uber*, *supra* note 7, at 95.

172. *See* Means & Seiner, *supra* note 169, at 2-3; Rogers, *The Social Costs of Uber*, *supra* note 7, at 98-99. Note that 42 U.S.C. § 1981, which bans race discrimination in contracting, should operate to prohibit race discrimination, regardless of worker status.

173. *See, e.g.*, O'Connor v. Uber Technologies, Inc., No. C-13-03826 EMC (N.D. Cal. Mar. 11, 2015); Cotter v. Lyft, Inc., No. 13-cv-04065-VC (N.D. Cal. Mar. 11, 2015).

174. *Compare, e.g.*, Rogers, *supra* note 7, at 98-99 (questioning whether current law would consider sharing economy firms to be employers, but arguing that the law *should* so cover them), *with* Means & Seiner, *supra* note 169, at 4 (arguing that current law is too uncertain to answer the question and arguing for a new standard based on worker flexibility).

As for the application of housing discrimination law and public accommodations law, sharing economy firms have likewise claimed that these laws do not apply to them because they are not entities that are regulated under the law.¹⁷⁵ Their status under current law is not clear.¹⁷⁶ Even if these laws do not cover firms, there is a separate question of whether individuals who open their homes or cars or other spaces to customers are covered. But even if individuals are covered, this would have less of an impact than regulating the firms themselves, as firms rather than individuals are the entities with the incentives and the ability to implement effective policies to address the concerns raised above.¹⁷⁷

The second set of laws that would be relevant here is law related to safety. For safety issues that rise to a serious enough level, criminal law could deter and punish, and tort law could deter and compensate. But because the institutional entity—the firm—rather than the individual has a much greater ability to control and prevent harms and to compensate victims, effective use of these areas of law would turn on institutional liability.¹⁷⁸ Sharing economy firms themselves might be negligent with regard to allowing unsafe users to use their services, but likely only if they knew or should have known of the dangers.¹⁷⁹

175. See ADA and FHA Compliance, AIRBNB, <https://www.airbnb.com/help/article/898/ada-and-fha-compliance> [<https://perma.cc/Y9LZ-ZGAE>] (discussing that it is important for U.S. hosts (and not Airbnb) to understand their responsibilities under the Fair Housing Act).

176. See Rogers, *The Social Costs of Uber*, *supra* note 7, at 95. Compare 42 USC § 2000a(b) (1964) (defining “place of public accommodation” to include, for example, hotels and motels, restaurants, and theaters, but not transportation companies), with 49 CFR § 37.29 (1991) (“Providers of taxi service are subject to the requirements of [the transportation and related provisions of Titles II and III of the ADA].”); DC Code § 2-1401.02(24) (1977) (defining “place of public accommodation” to include “all public conveyances”). Disability-rights organizations have argued that Uber is a taxi service under the Americans with Disabilities Act of 1990, and therefore must make reasonable accommodations for disabled passengers. See Complaint for Violations of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., the California Unruh Civil Rights Act, Cal. Civ. Code §§ 51 & 52, and the California Disabled Persons Act, Cal. Civ. Code §§ 54–54.3, *National Federation of the Blind of California v. Uber Technologies, Inc.*, Case No 3:14-cv-4086, 2014 WL 4628579, at *14–20 (N.D. Cal. Sept. 9, 2014). The Justice Department has sided with the plaintiffs. Statement of Interest of the United States of America, *National Federation of the Blind of California v. Uber Technologies, Inc.*, Case No 3:14-cv-4086, *5 (N.D. Cal. Dec. 23, 2014).

177. Individuals are far less likely to be sued, and thus they will not feel as much pressure to comply with any applicable law. And they do not have the resources or the control to ascertain and implement effective safety and antidiscrimination measures.

178. See Reinier H. Kraakman, *Vicarious and Corporate Civil Liability*, in *TORT LAW AND ECONOMICS* 134, 134–36 (Michael Faure, Ed. 2009)

179. See Kat Greene, *Airbnb Renter Says Hosts Were Spying With Hidden Camera*, LAW360 (Dec. 15, 2015), <http://www.law360.com/articles/737996/airbnb-renter->

For this reason, effective safety policies would be more likely to be forthcoming from sharing economy firms if they faced vicarious liability for the torts of their workers.¹⁸⁰ Vicarious liability will turn on whether these workers are in fact employees, which again is contested.¹⁸¹

Finally, there are regulations aimed at protecting the safety of workers and consumers.¹⁸² But again, sharing economy firms claim that these laws do not apply to them because they are not the type of entities that are covered by such laws.¹⁸³ These issues have yet to be resolved.¹⁸⁴

2. Market Responses

Whether due to market pressure or worker pressure,¹⁸⁵ sharing economy firms have responded to some discrimination and safety concerns in ways that are not required by law. But the responses have been inadequate. Some firms prohibit posting material that “promotes discrimination, bigotry, racism, hatred, harassment or harm,” and will engage in some monitoring to help enforce the policy.¹⁸⁶ But firms do

says-hosts-were-spying-with-hidden-camera [https://perma.cc/Y4M2-XTPS] (arguing that Airbnb doesn’t have a vetting process and bringing a negligence claim against Airbnb).

180. See Talia G. Loucks, *Travelers Beware: Tort Liability in the Sharing Economy*, 10 WASH. J.L. TECH. & ARTS 329, 333 (2015); see also Abbey Stemler, *Between and Between: Regulating the Shared Economy*, 43 FORDHAM URB. L.J. ___ (forthcoming 2016), 8 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535656 [https://perma.cc/CH84-ZMFZ].

181. See *Id.* at 335; see also Andrew Deck, *Are Uber Drivers Employees? The Growing Labor Crisis in the “Sharing Economy,”* BROWN POLITICAL REVIEW (Oct. 14, 2015), <http://www.brownpoliticalreview.org/2015/10/are-uber-drivers-employees-the-growing-labor-crisis-in-the-sharing-economy/> [https://perma.cc/B57J-5TV9].

182. See, e.g., Occupational Safety and Health Act, 29 U.S.C. §§ 651-78; National Labor Relations Act, 29 U.S.C. §§ 141-197, 142(1).

183. See Stemler, *supra* note 180, at 9.

184. See sources cited *supra* note 175. In a decision that applies only to the individual employee claimant, the California Labor Commissioner’s Office concluded that an Uber driver was an employee, not an independent contractor. See *Berwick v. Uber Techs., Inc.*, Case No. 11-46739 EK (June 3, 2015), <http://www.scribd.com/doc/268911290/Uber-vs-Berwick> [https://perma.cc/2MJ8-XATD]. Uber has appealed this decision. See *Uber Techs. v. Berwick*, Case No. CGC-15-546378 (Cal. Sup. Ct. June 16, 2015), <http://www.scribd.com/doc/268911290/Uber-vs-Berwick> [https://perma.cc/2MJ8-XATD].

185. See Rogers, *The Social Costs of Uber*, *supra* note 7, at 96-97, 99 (citing associations of Uber drivers and how work stoppage changed Uber behavior).

186. Harman, *supra* note 56. In one instance, AirBnB removed a listing that banned gay couples. Nick Duffy, *Accommodation website Airbnb removes listing that banned gay couples*, PINKNEWS (Nov. 23, 2014), <http://www.pinknews.co.uk/2014/11/23/accomodation-website-airbnb-removes->

not engage in nearly enough monitoring to ensure that users do not discriminate, not only in the posting of material, but in the remainder of their transactions.¹⁸⁷ And of course at least some of these firms are playing a role in cultivating discrimination, either specifically by relying on sex discriminatory mechanisms, or by activating discriminatory preferences.¹⁸⁸

Sharing economy firms have taken action in response to safety concerns, but these responses too have been inadequate. For example, Uber and other ridesharing services vet their drivers by relying on private firms that conduct criminal background checks.¹⁸⁹ But the firms have been criticized for incomplete background checks after finding drivers with criminal histories.¹⁹⁰ And this falls short of the measures required in many cities to ensure the safety of taxi drivers: finger-printing to check their status on federal databases of violent offenders and drug-testing.¹⁹¹ Uber does not provide an emergency number for passengers who feel threatened by drivers; the only way to contact the firm is by email.¹⁹² Nor has the company removed from its system passengers who have been reported to sexually harass drivers.¹⁹³ In December 2014, Uber updated its safety policy, and began charging a safety surcharge to all rides.¹⁹⁴ But assaults have continued even after the revamp.¹⁹⁵

listing-that-banned-gay-couples/ [https://perma.cc/QK4A-ZY68]. AirBnB just rolled out new measures to combat discrimination, but it is too soon to assess their efficacy. See Katie Benner, *AirBnB Adopts Rules to Fight Discrimination by Its Hosts*, N.Y. TIMES, at A1 (Sept. 9, 2016), <http://www.nytimes.com/2016/09/09/technology/airbnb-anti-discrimination-rules.html> (reporting that the company would require rental hosts to agree to a “community commitment” to comply with a new nondiscrimination policy and would try to reduce reliance on user photographs).

187. Lyft doesn’t track users’ race or gender, but they monitor drivers to make sure they aren’t denying a large number of requests to particular group. If so, this might lead to investigation of driver. Harman, *supra* note 56; Wortham, *supra* note 58. However, most firms do not engage in any sort of comprehensive monitoring and auditing that could help to reduce discrimination.

188. See *supra* notes 104-121 and accompanying text.

189. See Perman, *supra* note 54.

190. See *id.*; Carmel DeAmicis, *Exclusive: Uber driver accused of assault had done prison time for a felony, passed background check anyways*, PANDO (Jan. 6, 2014), <https://pando.com/2014/01/06/exclusive-uber-driver-accused-of-assault-passed-zero-tolerance-background-check-despite-criminal-history/> [https://perma.cc/79B3-MC23].

191. See Perman, *supra* note 54.

192. See *id.*

193. See Rogers, *The Social Costs of Uber*, *supra* note 7.

194. *Uber’s ‘safe ride fee’ becomes ‘booking fee’ after \$25m settlement over rider safety*, THE GUARDIAN (Apr. 7, 2016),

AirBnB has tried to increase consumer and host protections by doing more to verify the personal aspects of the transaction. The firm has added protections to ensure that online profiles match real-life identities.¹⁹⁶ The “Verified ID” function matches users’ online identities (for example, through existing AirBnB reviews or Facebook) and offline documentation, such as scanning official identification, like a driver’s license.¹⁹⁷ But the scheme is not yet obligatory unless booking last minute.¹⁹⁸

Note that market pressures may push at least some firms towards classifying their workers as employees and bringing them within the dictates of employment law. While working with independent contractors allows firms to avoid the minimum wage and other expensive protections that come along with employment status, it comes at a cost. The demise of at least one sharing economy firm, Homejoy, a home cleaning service, has been attributed to the lack of control they exercised over their workers, leading to inferior service and dissatisfied customers.¹⁹⁹ A few sharing economy firms have voluntarily shifted their workers from independent contractors to employees because they deemed control over their workers necessary for the success of their business.²⁰⁰ While this voluntary reclassification is not likely to be adopted by most firms, these

<https://www.theguardian.com/technology/2016/apr/07/uber-driver-background-check-lawsuit-passenger-safety-california> [<https://perma.cc/8RUD-L6NX>]; Perman, *supra* note 54 (explaining that the fee goes toward background checks, vehicle screenings, driver education, and the development of additional safety features).

195. See Velasco, *supra* note 88.

196. Paul Brady, *Six Tips for First-Time Airbnb Renters*, CONDE NAST TRAVELER (Jan. 14, 2014), <http://www.cntraveler.com/stories/2014-01-14/six-tips-for-first-time-airbnb-renters> [<https://perma.cc/5ZBH-WW3N>]. See Strahilevitz, *supra* note 60, at 1705, on how anonymity in the context of driving leads to worse behavior.

197. What is Verified ID?, UBER, <https://www.airbnb.com/help/article/450/what-is-verified-id> [<https://perma.cc/5X7U-ENUS>].

198. Airbnb Help, *I’m a host. What are some safety tips I can follow?*, AIRBNB, <https://www.airbnb.com/help/article/231/i-m-a-host—what-are-some-safety-tips-i-can-follow> [<https://perma.cc/3DXU-HGRB>]; Airbnb Help, *I’m a guest. What are some safety tips I can follow?*, AIRBNB, <https://www.airbnb.com/help/article/241/i-m-a-guest—what-are-some-safety-tips-i-can-follow> [<https://perma.cc/9KQ6-FJG5>].

199. See Ellen Huet, *What Really Killed Homejoy? It Just Couldn’t Hold on to Its Customers*, FORBES (July 23, 2015), <http://www.forbes.com/sites/ellenhuet/2015/07/23/what-really-killed-homejoy-it-couldnt-hold-onto-its-customers> [<https://perma.cc/YWD7-7KKX>].

200. See Ellen Huet, *The Price Of Control: On-Demand Shipping Service Shyp Converts Its Couriers To Employees*, FORBES (July 1, 2015), <http://www.forbes.com/sites/ellenhuet/2015/07/01/on-demand-shipping-service-shyp-converts-its-couriers-to-employees/> [<https://perma.cc/LGK7-XBZV>]. On the general question of the firm’s make/buy decision, see the seminal Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

examples reveal at least some counter-pressure from the market that would limit independent contracting even in the sharing economy.

3. Challenges for Law

Even if antidiscrimination law does apply to the sharing economy, either under current doctrine or by expansion of the law to new types of working relationships, such as “dependent contractors,”²⁰¹ it will still not address all of the manifestations of the salience of sex in the sharing economy. This is for a number of reasons related to the nature of transactions in the sharing economy. First, intimacy exceptions to antidiscrimination law will tend to be more relevant in the sharing economy, as will the lack of protection against customer discrimination.²⁰² Second, and perhaps even more importantly (because these intimacy exceptions could be eliminated, at least in theory), even when antidiscrimination law applies, structural features of the sharing economy make antidiscrimination law less effective and reduce the law’s potential to have the transformative effect that it has had in the traditional economy. These challenges that the sharing economy poses to sex discrimination law are discussed in turn.

First, exceptions to and gaps in antidiscrimination law will be particularly likely to be relevant to sharing economy transactions. Employment discrimination law contains a “bona fide occupational qualification” (BFOQ) exception to certain intimate work circumstances.²⁰³ Employers relying on sex segregation to address safety concerns in settings of intense intimacy is not unheard of in U.S. law. One of the seminal early Title VII sex discrimination cases, *Dothard v. Rawlinson*, was decided precisely on this ground.²⁰⁴ In that

201. See Lauren Weber, *What if There Were a New Type of Worker? Dependent Contractor*, WALL ST. J. (Jan. 18, 2015), <http://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831> [<https://perma.cc/HFD9-8ZR3>].

202. Some of the inadequacy of law here would apply equally to the traditional economy. Occupational segregation has proven quite resistant to legal challenge. See *EEOC v. Sears*, 839 F.2d 302, 320-21 (1988) (crediting the lack of interest defense to reject Title VII sex discrimination claim based in occupational segregation); Schultz, *supra* note 11, at 1048-1066, 1109 (critiquing the lack of interest defense). Even though some sharing economy firm policies (e.g., bonuses for driving at night or for acceptance rates) might be subject to disparate impact challenges, these are notoriously difficult to win. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 735, 738-40 (2006) (documenting low success rates of disparate impact claims).

203. See 42 U.S.C. § 2000-2(e)(1) (1964); Schoenbaum, *The Law of Intimate Work*, *supra* note 10, at 1190.

204. 433 U.S. 321 (1977).

case, the Court held that an employer could rely on sex as a qualification for the position of correctional officer because the dangers that women made them unfit for the job.²⁰⁵ *Dothard* may be distinguished, as prisons are already premised on the sex segregation of prisoners.²⁰⁶ And a later decision by the Court rejected a BFOQ defense that turned on the argument that sex discrimination was necessary to protect women workers.²⁰⁷ But the possibility for exceptions based on intimacy remains, not only due to safety concerns, but also due to interests in privacy²⁰⁸ and sexual titillation.²⁰⁹

Intimacy exceptions also exist under fair housing law. First, federal housing law contains a so-called “Mrs. Murphy” exception, which exempts from antidiscrimination mandates dwellings intended to be occupied by four or fewer families if the owner lives in one of the units.²¹⁰ Note, however, that even a Mrs. Murphy landlord must still comply with fair housing law’s ban on posting discriminatory advertisements.²¹¹ Second, as discussed above, at least one federal

205. *Id.* at 335 (“A woman’s relative ability to maintain order in a male, maximum security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood. There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women.”).

206. See David S Cohen, *Keeping Men “Men” and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 25 HARV. J.L. & GENDER 509, 514 (2010) (citing state statutes).

207. See *United Auto Workers v. Johnson Controls*, 499 U.S. 187 (1991) (rejecting BFOQ defense in case where employer banned fertile female employees from working with chemicals that presented safety risks to fetuses).

208. At their most substantial, these privacy interests arise in contexts where female customers express preferences for female workers so as to avoid genital exposure to male workers. Title VII has drawn the line in interpreting the BFOQ exception to sex discrimination based in customer privacy preferences here. Compare *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410 (N.D. Ill. 1984) (attendants responsible for cleaning bathrooms); *Brooks v. ACF Indus. Inc.*, 537 F. Supp. 1122 (S.D. W. Va. 1982) (janitor responsible for cleaning bathrooms); *EEOC v. Mercy Health Ctr.*, No. Civ. 80–1374–W, 1982 WL 3108 (W.D. Okla. Feb. 2, 1982) (labor and delivery nurse); *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982) (same), with *Olsen v. Marriott Int’l, Inc.*, 75 F. Supp. 2d 1052 (D. Ariz. 1999) (denying BFOQ for massage therapist); *EEOC v. Sedita*, 816 F. Supp. 1291 (N.D. Ill. 1993) (denying BFOQ for health club instructors); *EEOC v. HI 40 Corp.*, 953 F. Supp. 301 (W.D. Mo. 1996) (denying BFOQ for weight-loss center counselors).

209. See *Wilson v. Southwest Airlines*, 517 F. Supp. 292 (N.D. Tex. 1981); see generally Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147 (discussing and explaining the more lenient approach to privacy preferences than titillation preferences).

210. 42 U.S.C. § 3603(b)(2) (1968).

211. See *id.* At § 3603(c).

appellate court has held that the right to intimate association protects roommate relationships such that antidiscrimination law cannot intervene in these decisions.²¹²

Antidiscrimination law also lacks protection against customer discrimination,²¹³ which is particularly likely to arise in the sharing economy given that it is service oriented, and that the intimacy of the transactions tends to stoke discriminatory preferences. Not only does antidiscrimination law contain no ban on customer discrimination per se, but it also does little to stand in the way of employers cultivating and reinforcing discriminatory preferences in customers.²¹⁴

Second, structural features of the sharing economy will tend to make antidiscrimination law less effective there. One of the primary benefits for which employment discrimination law has been justly celebrated is providing a place of integration.²¹⁵ Professor Cynthia Estlund has argued that the application of antidiscrimination mandates in the workplace has created a space where coworkers can come together in a more integrated setting than they would otherwise find in their neighborhoods, schools, or other third places of public accommodation.²¹⁶ Relying on the contact hypothesis, Estlund argues that this means that employment discrimination law plays a critical role in improving race relations and race equality norms.²¹⁷

While Estlund's focus is on race, we can expand her argument to gender. One might think that men and women already have plenty of contact in the home and in a variety of third places such as bars. But what the workplace setting and employment discrimination law bring are an opportunity for men and women to interact as coworkers in settings where norms of equality prevail, allowing the interaction to change the nature of gender relations in a way that does not occur in

212. *See supra*, notes 97-98 and accompanying text. As discussed above, it is not clear whether this decision would apply to shared dwellings in the sharing economy context because those relationships are not as intimate due to their shorter duration.

213. *See* Schoenbaum, *The Law of Intimate Work*, *supra* note 10, at 1189-91; Bartlett & Gulati, *Discrimination by Customers* (Nov. 13, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2540334 [<https://perma.cc/SCS6-53N9>]. Because 42 U.S.C. § 1981 bans race discrimination in contracting, it would apply to customer discrimination, but it has never been deployed this way. *See* Bartlett & Gulati, *supra*, at 4 n.8; IAN AYRES, PERVERSIVE PREJUDICE: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 127-36 (2001) (discussing how § 1981 could apply to customer discrimination).

214. *See supra*, text accompany notes 159-60.

215. *See* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 8 (2000).

216. *Id.*

217. *Id.* at 19.

other settings. We can see the role that law has played in changing norms of male-female interaction quite clearly in the context of sexual harassment.²¹⁸

Critically, however, employment discrimination law's role in changing these norms turns not only on the law itself, but also on the structural features of the workplace in which the law operates. Part of the mechanism by which antidiscrimination law changes norms is through the presence of coworkers and the contact that they have with each other.²¹⁹ Building relationships in a context of equality helps to improve race and gender relations. But in the sharing economy, even if the law applies, there is no workplace and no coworkers. What is left is the relationship between the seller and the buyer. There is reason to believe that the application of antidiscrimination law in this type of setting will not have so beneficial an effect on norms. In such settings, interactions between buyers and sellers take place in a context of hierarchy, and are not as regular as those of the daily interactions between coworkers.²²⁰

The lack of coworkers may also undermine the enforcement of antidiscrimination law.²²¹ As an initial matter, given the reliance on comparators as the primary mechanism for proving discrimination,²²² it is unclear how discrimination would even be established in many cases in the sharing economy. Moreover, because antidiscrimination law turns largely on private rights of enforcement, workers' legal consciousness must be raised for a legal violation to be recognized and a claim to be made in the first instance.²²³ With this understanding of the enforcement of employment discrimination law, coworkers become a critical part of the enforcement mechanism.

218. See Nadler & Bilz, *supra* note 13, at 101.

219. See Estlund, *Working Together*, *supra* note 215, at 19.

220. See *id.* at 25 (describing the conditions in which the contact hypothesis is likely to hold true, including conditions of regular interaction and non-hierarchy).

221. See Naomi Schoenbaum, *Coworkers in Law* (unpublished manuscript arguing that coworkers are essential to work law and work life, including through aiding in the enforcement of work law).

Note that one sector of the sharing economy—the co-working firm—would provide workers with something like coworkers, even when workers are self-employed or labor for different firms. See Davidson & Infranca, *supra* note 6, at 15-16 (discussing the phenomena of co-working firms).

222. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 750 (2011).

223. See Amy Blackstone, et al., *Legal Consciousness and Responses to Sexual Harassment*, 43 L. & SOC'Y REV. 631 (2009) (discussing the importance of legal consciousness to rights claiming).

First, the support that coworkers provide raises legal consciousness. “[T]he presence of close work friends . . . is a strong and consistent predictor of [legal] mobilization.”²²⁴ Because coworkers have often undergone similar experiences, they are thus well placed to confirm a worker’s sense of a violation, a necessary precondition to exercising voice.²²⁵ And talking to coworkers who have already complained to the employer can lead a worker to see that she too “can speak up if something like this happens.”²²⁶ Coworkers’ experience also allows them to provide informed guidance about possible rights’ violations.²²⁷ Obtaining such information is essential before complaining of discrimination because retaliation protection attaches only once the employee reasonably believes there has been a violation.²²⁸

Second, mutually supportive behavior that arises from coworker bonds sets the stage for collective action that helps to enforce antidiscrimination law.²²⁹ This is especially important given the role that the fear of retaliation plays in deterring workers from challenging discrimination.²³⁰ When a group of employees complain, it is harder for the employer to pin the blame on any individual worker, and the employer may be unwilling to terminate or otherwise retaliate against a large swath of workers.

Third, strong coworker relationships obviate the need for complaint by preventing violations from occurring in the first place. Supportive work cultures with high coworker solidarity have been linked with lower incidences of sexual harassment.²³¹

The structural features that make many sharing economy transactions more intimate will also limit the effectiveness of antidiscrimination law. The lack of norms against the exercise of sex

224. *Id.* at 646 (collecting studies); *see also* Abhijeet K. Verdara, et al., *Making Sense of Whistle-Blowing’s Antecedents: Learning from Research on Identity and Ethics Programs*, 19 *BUS. ETHICS. Q.* 553 (2009) (workplace culture with higher incidence of coworker friendship is linked with a greater incidence of whistleblowing).

225. Blackstone, *supra* note 223, at 655–57 (explaining how relationships shape perceptions of having been wronged); Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 *J. OCC. HEALTH PSYCH.* 247, 249 (2003).

226. *Id.* (quoting research subject).

227. *See* Schoenbaum, *supra* note 225, at 14–20.

228. *See supra* notes 223–225.

229. *See supra* Part I.B.1.

230. *See* Deborah Brake, *Retaliation*, 90 *MINN. L. REV.* 18, 20, 37 n.58 (2005) (compiling studies showing that “[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination”).

231. *See* Blackstone, *supra* note 223, at 635 (collecting studies finding that the presence of coworker bonds is associated with lower incidence of discrimination).

preferences in intimate settings will make any law that bans these preferences less likely to be enforced. Because antidiscrimination law is largely enforced through private rights of action, the violation of norms will often be a necessary predicate to raising legal consciousness and taking legal action.²³² And the fact that sharing economy transactions take place in a private setting with little monitoring not only makes the operation of antidiscrimination norms less effective, but also makes the operation of antidiscrimination law less effective.²³³ The decreased likelihood of detection lowers the expected cost of non-compliance, making non-compliance more likely.²³⁴ Scholars have posited that employers themselves can and do play a significant role in implementing antidiscrimination law.²³⁵ But firms will have a much harder time doing this in the case of disaggregated and private transactions of the sharing economy that take place without any workplace.

4. *New Directions*

While this Article does not take on the task of prescribing new approaches that could cure the legal shortcomings just discussed,²³⁶ a few words addressing possible future directions for law are in order. First, regulating the information on which buyers and sellers can rely could successfully reduce discrimination while potentially better fulfilling preferences of buyers and sellers. In the employment context, for example, limiting employers' access to information about a prospective employee's membership in a protected class is a key strategy the law relies on to reduce discrimination at the hiring stage.²³⁷

One way to restrict discrimination in the sharing economy is to bar buyers and sellers from learning the sex of prospective transacting parties. Banning access to such information may in fact lead to *better*

232. See Blackstone, *supra* note 223, at 633-34.

233. See Strahilevitz, *supra* note 60, at 1759-65.

234. *Id.*

235. See Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005); Sturm, *supra* note 61, at 460.

236. Future work will explore identity preferences and discrimination in the sharing economy and will have more to say on this.

237. See generally Naomi Schoenbaum, *It's Time That You Know: The Shortcomings of Ignorance as Fairness in Employment Law and the Need for an "Information-Shifting" Model*, 30 HARV. J.L. & GENDER 99 (2007). Federal employment discrimination law regards employers' preemployment inquiries regarding prospective employees' protected trait status as evidence of discrimination, and some state law prohibits such inquiries. *Id.* at 137.

fulfillment of the preferences of transacting parties, as they can no longer rely on sex as a proxy for the traits they seek, and must rely on other information that may prove to be more highly correlated with the traits they are seeking. For example, if a buyer or seller is looking for a transacting party who will provide a more intimate transaction by sharing personal information, it will likely be more effective to seek a person with this trait rather than to rely on female sex as a proxy for this trait. Self-disclosure or reviews by other users could reveal information about such traits.²³⁸ Prohibiting access to information about gender might be enough to spur sharing economy firms to make available other information on which transacting parties could rely to satisfy their preferences. If not, the law might come up with incentives for firms to do so.

Another approach to addressing discrimination in the sharing economy would place a legal obligation on firms not to cultivate or reinforce discriminatory preferences of transacting parties. Scholars have begun to explore proposals to this effect in other contexts in the traditional economy,²³⁹ and one could imagine that this type of proposal could be extended to the sharing economy. In fact, the technology on which sharing economy firms rely would mitigate the burden of complying with such a mandate. The fact that users select and review transacting parties online makes it easy for firms to monitor the behavior of their users through algorithms that would track whether users were disproportionately acting on sex (e.g., by rejecting or negatively reviewing transacting parties of one sex or the other).²⁴⁰ Although the tracking of user conduct by sharing economy firms might raise privacy concerns,²⁴¹ there does not seem to be a

238. See Strahilevitz, *supra* note 60, at 1755-58, 1762, 1764-65 (proposing review system with commentary as a way to provide meaningful feedback in the context of driving, suggesting criteria for extension to other contexts, and giving the behavior of hotel guests as well as a number of online communities as examples). These reviews themselves may be infected with bias, although the algorithm suggested below, *see infra* note 240 and accompanying text, could help to ameliorate this problem.

239. See Schoenbaum, *Intimate Work*, *supra* note 10, at 1238-39 (arguing in the context of intimate work that “[e]mployers should be held responsible for the affirmative acts they take that cultivate and reinforce discriminatory preferences” of workers and customers); Bartlett & Gulati, *supra* note 213, at 36 (proposing the following law that would address customer discrimination: “any individual or entity with a legal obligation not to discriminate on the basis of race or gender in its employment or public accommodation practices also has an obligation not to facilitate discrimination by its customers of which it is, or should be, aware, nor to discriminate when it acts as a customer”).

240. See *id.* at 1733-34 (proposing use of algorithms to weed out malicious feedback in “How’s My Driving” system).

241. See Davidson & Infranca, *supra* note 6, at 18 n.109.

strong privacy interest in this non-intimate information,²⁴² and the interest in rooting out discrimination would likely trump any interest in privacy.

CONCLUSION

New technologies can bring with them hope about transformative possibilities for the future. And while innovations may contribute to significant progress of all sorts, including for gender equality we should be skeptical that technological progress inevitably leads to progress of other sorts.²⁴³ But note that the sharing economy may also give us reason to be optimistic. The pervasiveness of intimacy across the sharing economy could provide the motivation that spurs innovative regulatory responses to the challenge of combatting discrimination in intimate spaces, which would be beneficial not only in the sharing economy, but across all intimate transactions in the economy.

242. See Strahilevitz, *supra* note 60, at 1743 n.188 (noting that information related to intimate conduct present the strongest case for privacy protection).

243. See Silbaugh, *Turning Labor into Love*, *supra* note 125, at 10 n.20 (explaining that market innovations—"an increase in the purchases of housework replacement services or goods, such as carry-out food and laundry services"—rather than technological innovations reduced women's domestic workload).