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INTOXICATED SCOOTERING: RETHINKING ELECTRIC SCOOTER LIABILITY IN WASHINGTON STATE

David Goodwin*

Abstract: The widespread acceptance of electric scooters has transformed the landscape of urban transportation. Yet, the emerging phenomenon of intoxicated scootering poses unanswered questions of liability and accountability. New research indicates that a third of traumatic electric scooter injuries are associated with intoxicated scootering. This statistic is particularly alarming given that there are over fifty million scooter trips per year in the United States.

In Washington State, the State Legislature has not enacted a state-wide policy against intoxicated scootering. Instead, the Legislature delegates the authority to regulate the operation of electric scooters to local governments. Due to the ambiguity of whether electric scooters qualify as “vehicles” for purposes of the DUI statute, intoxicated scooterers either face no liability or full DUI penalties depending on their local jurisdiction’s regulations. The State’s fragmented approach to intoxicated scootering either overcriminalizes or fails to deter intoxicated scootering. This Comment proposes a statutory carve-out for intoxicated scootering, facilitating deterrence by imposing civil penalties on offenders.

INTRODUCTION

The electric scooter has quickly become a staple in modern urban transportation.¹ In 2022, there were over fifty million electric scooter trips in the United States,² 2.7 million of which took place in Seattle,

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1. The micromobility revolution of 2018 was a result of the widespread commercialization of dockless electric devices like bicycles and scooters. See *What Were the First Electric Scooters?* RIDER GUIDE, <https://riderguide.com/blog/the-first-electric-scooters> [https://perma.cc/NA99-HAKN] (recounting the history of electric scooters since the 19th century). Government-collected data on scooter share programs over time in the United States substantiates this event. See *Bikeshare and E-Scooter Systems in the U.S.*, U.S. DEP’T. TRANSP., <https://data.bts.gov/stories/s/Bikeshare-and-e-scooters-in-the-U-S-/fwcs-jprj/> [https://perma.cc/YFC3-GBD2].

2. Mohamed Abouelela, Emmanouil Chaniotakis & Constantinos Antoniou, *Understanding the Landscape of Shared-E-Scooters in North America; Spatiotemporal Analysis and Policy Insights*, 169 TRANSP. RSCH. PART A: POL’Y & PRAC. 1, 1 (2023); *Shared Micromobility in 2022*, NAT’L ASS’N CITY TRANSP. OFFS., <https://nacto.org/publication/shared-micromobility-in-2022/#:~:text=Overall%2C%20riders%20took%20130%20million,million%20were%20taken%20in%20Canada> [https://perma.cc/M2KT-2WY4].

Washington.³ Today, there are 252 electric scooter systems across 156 cities in the United States,⁴ Washington State accounting for eight of these cities.⁵ The global market for electric scooters is worth over thirty-three billion dollars,⁶ which is unsurprising given the device's acclaimed qualities—accessibility, enjoyability, affordability, and environmental sustainability.⁷ However, the device's novelty has spurred an unforeseen issue of liability: intoxicated scootering.⁸

The dangers of intoxicated scootering have only recently become widely documented.⁹ Unsurprisingly, driving an electric scooter while intoxicated significantly decreases an operator's driving performance.¹⁰ Studies spanning from 2019 to 2023 indicate that about a third of

3. *Scooter and Bike Share – Data and Permit Information*, SEATTLE DEP'T. TRANSP., <https://www.seattle.gov/transportation/projects-and-programs/programs/new-mobility-program/scooter-bike-share-data> [<https://perma.cc/3C7R-KREH>].

4. *See Bikeshare and E-Scooter Systems in the U.S.*, *supra* note 1.

5. *See Bikeshare and E-Scooter Systems in the U.S.*, *supra* note 1.

6. *Electric Scooters Market Size & Share Analysis Report*, GRAND VIEW RSCH., <https://www.grandviewresearch.com/industry-analysis/electric-scooters-market> [<https://perma.cc/DQ5G-GANK>].

7. *See* Daniel Foley, *E-Scooter Adoption in the Last 10 Years*, UNAGI SCOOTERS, <https://unagiscooters.com/scooter-articles/e-scooter-adoption-in-the-last-10-years/> [<https://perma.cc/ZE5E-5Q7A>]. Accessibility in this context refers to the abundance of options and availability, though disability accessibility has been a source of positive public discourse for electric scooters. *See* Gus Alexiou, *E-Scooters Often Hired by Disabled Riders to Combat Pain and Fatigue, Survey Shows*, FORBES (Apr. 17, 2023), <https://www.forbes.com/sites/gusalexiou/2023/04/16/e-scooters-often-hired-by-disabled-riders-to-combat-pain-and-fatigue-survey-shows/?sh=6e6f54c04a42> [<https://perma.cc/PCN4-TAWM>].

8. This Comment refers to the operation of an electric scooter as “scootering,” though some refer to the act as “scooting.” *See* Jacques Chouinard, *Scooting Under the Influence: Criminal Liability in the Age of Micro-Transit*, 50 N.M. L. REV. 488, 488–90 (2020).

9. *See, e.g.*, Jordan Greene, *Drunk E-Scootering is the New Drunk Driving*, S.I. NEWHOUSE SCH. OF PUB. COMM'NS, <https://www.thenewshouse.com/off-campus/drunk-escootering-new-impaired-driving-college-campuses/> [<https://perma.cc/GJ9T-TJBH>] (commenting on the increase in intoxicated scootering on college campuses in the United States); Lucy Riley, *Electric Scooter Accident Injuries and the Heightened Risk with Alcohol Consumption*, YOURHUB (Jan. 22, 2024), <https://yourhub.denverpost.com/blog/2024/01/electric-scooter-accident-injuries-and-the-heightened-risk-with-alcohol-consumption/313961/> [<https://perma.cc/JX2P-UMV2>] (commenting on recent discoveries by the Denver Police Department).

10. Katharina Zube, Thomas Daldrup, Michael Lau, Rüdiger Maatz, Anne Tank, Irina Steiner, Holger Schwender & Benno Hartung, *E-Scooter Driving Under the Acute Influence of Alcohol—A Real-Driving Fitness Study*, 136 INT'L. J. LEGAL MED. 1281, 1281 (2022).

hospitalized scooterers¹¹ are intoxicated at the time of accident,¹² and new research reveals that intoxicated scooterers are more likely to experience traumatic injuries.¹³ Additionally, the majority of electric scooter crashes result in injury only to the scooterer rather than pedestrians or property.¹⁴ Though many electric scooter crashes go unreported, from 2017 to 2022, 169,300 electric scooterers visited emergency departments in the United States.¹⁵

Washington State lacks insightful data on electric scooter crashes.¹⁶ The City of Seattle's 2022 E-Scooter Share Pilot Program Evaluation considered only self-reported electric scooter injuries.¹⁷ The City of Spokane commissioned a report to make policy recommendations

11. This Comment refers to electric scooter riders as "scooterers" for clarity and brevity, but the nomenclature for this class of riders is unsettled. See Jonathan Zasloff, *What DO You Call Someone Who Rides A Scooter?*, LEGAL PLANET (Mar. 5, 2019), <https://legal-planet.org/2019/03/05/what-do-you-call-someone-who-rides-a-scooter/> [<https://perma.cc/J47M-JBJJ>].

12. See Lesli M. Kobayashi, Elliot Williams, Carlos V. Brown, Brent J. Emigh, Vishal Bansal, Jayraan Badiee, Kyle D. Checchi, Edward M. Castillo & Jay Doucet, *The E-merging E-pidemic of E-scooters*, 4 TRAUMA SURGERY & ACUTE CARE OPEN 1, 1 (2019) (48%); Biswadev Mitra, Eleanor Heald, Muhuntha Sri-Ganeshan, Eanna Macsuibhne, Elton Edwards & Peter A. Cameron, *Electric Scooter-Related Trauma, Alcohol and Other Drugs*, 35 EMERGENCY MED. AUSTL. 353, 353 (2023) (24%); Arthur James, Anatole Harrois, Paer-Selim Abback, Jean Denis Moyer, Caroline Jeantrelle, Jean-Luc Hanouz, Mathieu Boutonnet, Thomas Geeraerts, Anne Godier, Julien Pottecher, Delphine Garrigue-Huet, Jean Cotte, Jean Pasqueron, Arnaud Foucier, Tobias Gauss & Mathieu Raux, *Comparison of Injuries Associated with Electric Scooters, Motorbikes, and Bicycles in France, 2019-2022*, 6 JAMA NETWORK OPEN 1, 1 (2023) (37%).

13. See Holger Kleinertz, Annabelle Volk, Dimitris Dalos, Rico Rutkowski, Karl-Heinz Frosch & Darius M. Thiesen, *Risk Factors and Injury Patterns of E-Scooter Associated Injuries in Germany*, 13 SCI. REPS. 1, 1 (2023) (finding that intoxicated electric scooterers were 25% more likely to fall on their head or face).

14. See Tarak K. Trivedi, Charles Liu, Anna Liza M. Antonio, Natasha Wheaton, Vanessa Kreger, Anna Yap, David Schriger & Joann G. Elmore, *Injuries Associated with Standing Electric Scooter Use*, 2 JAMA NETWORK OPEN 1, 1 (2019) (finding that falls constituted 80% of injuries, collisions with objects or people constituted 11% of injuries, and collisions with vehicles constituted 9% of injuries); Kleinertz et al., *supra* note 13 at 2, 3 (finding that 94% of electric scooter related trauma patients were riders and 6% were pedestrians that were either hit by riders or tripped over immobile electric scooters).

15. U.S. CONSUMER PROD. SAFETY COMM'N, MICROMOBILITY PRODS.-RELATED DEATHS, INJURIES, AND HAZARD PATTERNS: 2017-2022 4 (2023), <https://www.cpsc.gov/s3fs-public/Micromobility-Products-Related-Deaths-Injuries-and-Hazard-Patterns-2017-2022.pdf?VersionId=BekCvIY03IvMU9nHr2ErziUNXNkPAghJ> [<https://perma.cc/65CK-CRHB>].

16. See Colin Tiernan, *How Safe Are Lime Scooters? Government Agencies Say They Have No Idea*, SPOKESMAN REV. (Aug. 13, 2013), <https://www.spokesman.com/stories/2023/aug/13/how-safe-are-lime-scooters-government-agencies-say/> [<https://perma.cc/MG65-PHVS>] ("Local data on Lime scooter safety is difficult to find, if it exists at all").

17. SEATTLE DEP'T TRANSP., E-SCOOTER SHARE PILOT EVALUATION 38 (2022), https://www.seattle.gov/documents/Departments/SDOT/NewMobilityProgram/ScooterShare_Pilot_Report_Final.pdf [<https://perma.cc/C2EK-B6EZ>].

following Spokane's 2018 pilot program, though the audit concluded that crash information was lacking.¹⁸

In 2019, the Washington State Legislature incorporated electric scooters into the State Code.¹⁹ The Code delegates operational regulation to local governments,²⁰ but it lacks reference to intoxicated scootering. Additionally, statutory ambiguity exists over whether electric scooters qualify as "vehicles" under the State's Driving Under the Influence (DUI) statute.²¹ Thus, intoxicated riders may face full DUI penalties or completely avoid liability depending on the local municipal code. A no penalty system does not facilitate the State's deterrence policy to thwart risks to public safety.²² Alternatively, a DUI penalty system for intoxicated scooters results in illogical and disproportionate sentencing.²³

Washington State's hands-off approach to intoxicated electric scootering is ineffective, but it is not unique.²⁴ Reform to intoxicated scootering laws across the United States is still in its infancy, but there are promising legislative trends. California, the District of Columbia, and New York have recently enacted laws to deter intoxicated scootering.²⁵ The national shift in attitude towards intoxicated scootering, combined with new research, clarifies the act's physical and social risks. Washington State's ill-defined and hands-off policy toward intoxicated scootering is ripe for reform.

Part I of this Comment identifies Washington State's current approach to intoxicated scootering. It considers legislative intent in light of the current statutory provisions for both DUI and electric scooters. Part II of this Comment examines variations in national approaches to intoxicated scootering, including recent national reform. Part III of this Comment

18. See TOOLE DESIGN, SPOKANE SHARED MOBILITY STUDY FINAL RECOMMENDATIONS 41 (2019), <https://static.spokanecity.org/documents/projects/shared-mobility/spokane-shared-mobility-report.pdf> [<https://perma.cc/BEV7-MR4J>]. In an interview with local law enforcement, a Spokane Sergeant noticed an increase in scooter crashes on weekends near the bar scene. Amanda Roley, *Here's Why You Won't Get a DUI On a Lime Bike or Scooter in Spokane*, KREM NEWS (June 14, 2019), <https://www.krem.com/article/news/local/spokane-county/heres-why-you-wont-get-a-dui-on-a-lime-bike-or-scooter-in-spokane/> [<https://perma.cc/K9KQ-H6ZY>].

19. H.B. 1772, 66th Leg., 2019 Regular Sess. (Wash. 2019); see Leah LaCivita, *Scooter Legislation Passes, Sets Stage for Statewide Expansion*, MUN. RSCH. & SERVS. CTR. WASH. (Aug. 19, 2019), <https://mrsc.org/stay-informed/mrsc-insight/august-2019/scooter-legislation-passes-sets-stage-for-statewi> [<https://perma.cc/HT76-3FTL>].

20. WASH. REV. CODE § 46.61.715(1)(d) (2019).

21. See *infra* sections I.B., I.C.

22. See *infra* sections I.A., III.A.

23. See *infra* section III.B.

24. See *infra* section II.A.

25. See *infra* section II.B.

critiques Washington State's bifurcated policy towards intoxicated scooting. Part IV establishes the moral culpability of intoxicated scooting and reconceptualizes penalties for offenders. Ultimately, this Comment concludes that Washington State's current system towards intoxicated scooting does not serve the State's policy goals of deterrence. By enacting a statutory carveout, Washington State can ensure logical and proportionate punishment for intoxicated scooterers and foster public safety.

I. WASHINGTON STATE'S APPROACH TO INTOXICATED SCOOTERING

Intoxicated scooting is a novel issue, but a century of law development helps frame its current status. Section A begins by recounting DUI's legislative history in Washington State. Next, section B examines the State's DUI statute and corresponding "vehicle" definition. After, section C considers the application of the "vehicle" definition to electric scooters in light of *United States v. Dotson*²⁶. Section D introduces the statutory framework for electric scooters in Washington State. Then, section E contemplates the current legal treatment of intoxicated scooters in Washington State. Finally, section F explores the moral culpability of intoxicated scooting in light of State legislation and precedent.

A. *Legislative History of DUI Law*

Washington State's "Driving Under the Influence" (DUI)²⁷ statute has evolved significantly over the last 100 years. The State's 1923 Legislature first cemented the criminalization of DUI by implementing a driver's license revocation penalty, hoping to reduce drunk driving accidents.²⁸ However, the statute's vagueness and reliance on the antiquated Pierce's Code²⁹ did not stand the test of time. Contemporary laws did not clearly denote the crime, resulting in an ill-defined and naive conception of intoxicated driving.³⁰

26. *United States v. Dotson*, 34 F.3d 882 (9th Cir. 1994).

27. While many states distinguish DUI and Driving While Intoxicated (DWI) as unique offenses, Washington State employs the terms interchangeably. See *DUI vs. DWI*, <http://www.duivsdwi.org/> [<https://perma.cc/K5ZV-F6EA>]. This Comment uses "DUI" exclusively for clarity.

28. 1923 Wash. Sess. Laws 328.

29. "Pierce's Code" was a collection of all contemporary laws in Washington State, published by Frank Pierce from the mid-1800s through the mid-1900s. See generally FRANK PIERCE, PIERCE'S CODE: STATE OF WASHINGTON CYCLOPEDIA ARRANGEMENT INCLUDING LAWS 1919 ANNOTATED (1919).

30. See Doug Dahl, *DUI Vs. DWI – A Brief History*, WISE DRIVE (Aug. 6, 2020), <https://www.thewisedrive.com/dui-vs-dwi-a-brief-history/> [<https://perma.cc/HP4T-DQXF>].

In an effort to concretely define intoxicated driving, the Washington State Legislature introduced the state's first comprehensive framework for motor vehicle offenses involving alcohol or other substances in 1979.³¹ Substitute House Bill 665 (SHB-665) established an illegal blood alcohol concentration limit of 0.10 percent and raised penalties including mandatory jail sentencing.³² In the following years, faulty administrative and procedural practices, like varied enforcement and nonuniform sentencing, hindered SHB-665's goal of deterring repeat offenders.³³ Despite high recidivism, reports revealed that DUI accidents dropped twenty-five percent one year after implementation.³⁴ This drop signals that the public was generally deterred from DUI, likely stemming from word-of-mouth reports of increased enforcement.³⁵

In 1998, the Clinton Administration pushed to reduce DUI incidents.³⁶ Congress enacted a series of programs incentivizing states to lower the blood alcohol concentration (BAC) limit to .08 in return for millions in federal funding.³⁷ Two years later, the Department of Transportation's Appropriations Act threatened to withdraw "federal highway construction funds" if states did not adopt a .08 BAC by 2004.³⁸ Following suit, the Washington State Legislature amended the state DUI statute to a .08 BAC level in 1998,³⁹ leading to higher rates of DUI arrests and convictions.⁴⁰

31. H.B. 665, 46th Leg., 1st Extraordinary Sess. (Wash. 1979).

32. *Id.*

33. See U.S. DEP'T JUST., ASSESSMENT OF THE IMPLEMENTATION AND IMPACT OF SHB 665 – THE NEW DRIVING WHILE INTOXICATED LAW 9–10 (1980), <https://www.ojp.gov/pdffiles1/Digitization/75339NCJRS.pdf> [<https://perma.cc/PAT3-X8X4>]; WASH. TRAFFIC SAFETY COMM'N, AN EVALUATION OF WASHINGTON STATE'S 1979 DRIVING WHILE INTOXICATED (DWI) LAWS 3 (1984), <https://rosap.ntl.bts.gov/view/dot/1396> [<https://perma.cc/48XL-WWYN>].

34. WASH. TRAFFIC SAFETY COMM'N, *supra* note 33, at 78.

35. See WASH. TRAFFIC SAFETY COMM'N, *supra* note 33, at 3.

36. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., LEGISLATIVE HISTORY OF .08 PER SE LAWS 1 (2001), <https://rosap.ntl.bts.gov/view/dot/1740> [<https://perma.cc/MN97-XUAG>].

37. WASH. TRAFFIC SAFETY COMM'N, *supra* note 33, at 1–2.

38. WASH. TRAFFIC SAFETY COMM'N, *supra* note 33, at 6.

39. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 36, at 8; see also WASH. STATE INST. PUB. POL'Y, DEFERRED PROSECUTION OF DUI CASES IN WASHINGTON STATE: EVALUATING THE IMPACT OF RECIDIVISM 1 (2007), <https://cdn.lawlytics.com/law-media/uploads/16/1698/original/Deferred-Prosecution-of-DUI-Cases-in-Washington-State.pdf?1351096988> [<https://perma.cc/WS8H-T7A4>] (noting concurrent amendments made to the DUI statutes, including increased penalties).

40. See Jon Fox, *1999 Washington State DUI Law Changes Explained*, FOX L. FIRM (Nov. 26, 2008), <https://www.duidefense.com/1999-washington-state-dui-law-changes-explained/> [<https://perma.cc/VY4S-BWUU>]; see also WASH. STATE INST. PUB. POL'Y, *supra* note 39, at 15.

The 1998 changes to Washington State’s DUI laws remain in effect today,⁴¹ though penalties for DUI in Washington State continue to evolve.⁴² These DUI penalty updates are driven by the same deterrence rhetoric behind Washington State’s first DUI legislation in 1923.⁴³

B. Current Statutory Provisions for DUI and “Vehicle”

Washington State’s DUI statute criminalizes driving a “vehicle” while impaired by drugs or alcohol.⁴⁴ “Vehicle” is statutorily defined as “a device capable of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway.”⁴⁵ Under the definition, there are specific exclusions for “vehicles,” though they apply sporadically to various statutes.⁴⁶ For instance, a golf cart is not a “vehicle” for any statutory purposes other than DUI.⁴⁷ Of particular note, “motorized foot scooters” and “bicycles” are only excluded from the “vehicle” definition under the titling, registration, dealing, and tax statutes.⁴⁸

The Legislature’s silence as to whether bicycles or electric scooters are excluded as “vehicles” for purposes of the DUI statute is not shocking at first glance. For instance, a “bicycle” is not specifically excluded from the DUI statute,⁴⁹ but there is a corresponding statutory carveout that prescribes non-penal procedures for intoxicated bicyclists.⁵⁰ However, such a carveout does not exist for “motorized foot scooters,” creating ambiguity about the legal treatment of intoxicated electric scooter riders. Fortunately, some precedent alleviates the ambiguity of this interpretative gap.

41. See WASH. REV. CODE § 46.61.502 (2022).

42. See *id.*; Vitaliy Kertchen, *Changes in DUI Laws On the Horizon?*, NW SIDEBAR (May 20, 2013), <https://nwsidebar.wsba.org/2013/05/20/dui-law-changes/> [https://perma.cc/29V9-GEDL] (noting over ten amendments to Washington’s DUI statute since 2002, including mandatory ignition interlock installation).

43. See, e.g., S.B. 5032, 68th Legislature, 2023 Regular Sess. (Wash. 2023) (proposing an amendment to lengthen DUI felony statutes to deter recidivism).

44. WASH. REV. CODE § 46.61.502(1) (2022) (“A person is guilty of driving while under the influence . . . if the person drives a vehicle within this state . . . [w]hile the person is under the influence of or affected by intoxicating liquor, cannabis, and any drug.”).

45. WASH. REV. CODE § 46.04.670(1) (2023).

46. See *id.* §§ 46.04.670(1), 46.04.670(2)(a)–(f).

47. *Id.* § 46.04.670(2)(d).

48. *Id.* § 46.04.670(2)(c).

49. *Id.*

50. WASH. REV. CODE § 46.61.790 (2000).

C. *United States v. Dotson and the Meaning of “Vehicles”*

United States v. Dotson a crucial case of first impression involving moped DUI,⁵¹ demonstrates the challenges of defining “vehicle” in Washington State. The Ninth Circuit Court of Appeals reviewed Dotson’s DUI conviction under the 1979 version of the DUI statute and “vehicle” definition.⁵² Appellant Dotson drove his moped while intoxicated on a military base in Washington in 1994, violating the State’s contemporary DUI law.⁵³ Dotson was charged under a federal statute that criminalizes violations of state criminal law while on-base.⁵⁴ Dotson contended that a moped was not a “vehicle” in Washington State because the statutory exclusions omitted reference to the DUI statute.⁵⁵

The court defined “vehicle” using the 1991 statute:

“Vehicle” includes every device capable of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway, including bicycles. The term does not include devices other than bicycles moved by human or animal power or used exclusively upon stationary rails or tracks. mopeds shall be considered vehicles or motor vehicles only for the purposes of chapter 46.12 RCW, but not for the purposes of chapter 46.70 RCW. Bicycles shall not be considered vehicles for the purposes of chapter 46.12, 46.16 or 46.70 RCW.⁵⁶

The court found a common sentiment construed in the first two sentences. The “vehicle” definition typically connotes motorized or self-propelled vehicles but not “devices propelled by human power.”⁵⁷ mopeds qualify as both, resulting in ambiguity.⁵⁸ Furthermore, the exclusions set forth in sentence three, that mopeds must be titled as “vehicles” but are unregulated by licensed vehicle dealers,⁵⁹ left silent whether mopeds qualify for any other unstated statutory purposes.⁶⁰

51. *United States v. Dotson*, 34 F.3d 882, 883 (9th Cir. 1994).

52. *Id.* at 886.

53. *Id.* at 883.

54. *Id.* (explaining that 18 U.S.C. § 13 of the Assimilative Crimes Act “assimilate[s]” state criminal law making DUI on-base a federal crime).

55. *Id.*

56. *Id.* at 883–84.

57. *Id.* at 884.

58. *Id.*

59. See WASH. REV. CODE § 46.12 (regulating titling for “vehicles”); WASH. REV. CODE § 47.70 (regulating the sale of “vehicles”).

60. See *Dotson*, 34 F.3d at 884.

The court framed this silence in light of the prior amendments to the “vehicle” definition in 1961 and 1979.⁶¹ The 1961 version is textually similar but does not mention bicycles or mopeds.⁶² The 1979 version introduced the “moped” exception language to the definition, which accompanied the codification of the device elsewhere in the Code.⁶³ This version had narrower language in the third sentence compared to the 1991 version: “except that mopeds shall be considered vehicles or motor vehicles for the purposes of chapter 46.12 RCW, but not for the purposes of chapter 46.70 RCW.”⁶⁴ Importantly, the language was slightly altered in 1991, modifying the extent of the exception by adding “only” in the third sentence.⁶⁵ Because of this alteration and the newly-added bicycle exceptions under the “vehicle” definition statute, the court found that the Legislature consciously decided against including mopeds in the “vehicle” definition for DUIs.⁶⁶ Dotson’s conviction was reversed.⁶⁷

Dotson illustrates a classic case of statutory construction.⁶⁸ If a statute is textually ambiguous, the court will try to give effect to the legislature’s goal in designing the statute. In this case, ambiguity derived from textual silence indicated a deliberate “no.”

D. *Electric Scooters’ Statutory Scheme in Washington State*

In 2019, Washington State officially introduced a statutory framework for electric scooters that defines and regulates the use of the device.⁶⁹ “Motorized foot scooters” are “device[s] with two or three wheels that [have] handlebars, a floorboard that can be stood upon while riding, and is powered by an internal combustion engine or electric motor that has a maximum speed of no greater than twenty miles per hour on level ground.”⁷⁰ Motorized foot scooters cannot be operated while dark outside without reflectors,⁷¹ generally cannot be ridden on sidewalks,⁷² cannot be

61. *See id.*

62. *Id.*

63. *Id.*

64. *Id.* (emphasis omitted).

65. *Id.* at 883–84; WASH. REV. CODE § 46.04.670 (1991).

66. *Dotson*, 34 F.3d at 886.

67. *Id.*

68. Statutory Construction is “the act or process of interpreting a statute.” *Statutory Construction*, BLACK’S LAW DICTIONARY (12th ed. 2024).

69. *See* H.B. 1772, 66th Leg., 2019 Regular Sess. (Wash. 2019) (amending portions of WASH. REV. CODE § 46.61).

70. WASH. REV. CODE § 46.04.336 (2019).

71. *Id.* § 46.20.500.

72. *Id.* § 46.61.710.

operated on highways,⁷³ and are treated similarly as bicycles for trail operation or parking purposes.⁷⁴ Operators of motorized foot scooters must comply with local helmet laws,⁷⁵ but operators do not need a driver's license to use them.⁷⁶

While this statutory framework seems comprehensive, the legislature delegates significant operational regulation to state agencies, local governments, and municipalities.⁷⁷ Along with the general freedom to regulate the commercial use and distribution of electric scooters,⁷⁸ these entities may “adopt[] and assess[] penalties for moving or parking violations involving shared scooters.”⁷⁹ For instance, there is no state-wide helmet law, nor does King County require riders to wear helmets.⁸⁰ However, several cities within King County have implemented ordinances requiring helmets for riders.⁸¹

There are several reasons why a legislature might choose to delegate operational regulations to local entities. Longstanding tradition holds that cities maintain the right to regulate local nuisances insofar as they pertain to the safety and convenience of other people.⁸² Local governments arguably act more efficiently and more representatively of the local attitude.⁸³ Municipal officials directly contract with popular scooter share

73. *Id.*

74. *See id.*

75. *Id.* § 46.37.530.

76. *Id.* § 46.20.500.

77. *Id.* § 46.61.710.

78. *Id.* §§ 46.61.715(1) (a)–(c).

79. *Id.* § 46.61.715(1)(d).

80. *Bicyclist Laws & Safety*, WASH. STATE DEP'T TRANSP., <https://wsdot.wa.gov/travel/bicycling-walking/bicycling-washington/bicyclist-laws-safety> [<https://perma.cc/DB2M-2J7R>].

81. *See id.*

82. *See* Eugene McQuillin, *Power of Municipality to Declare What Constitutes a Nuisance*, 45 CENT. L.J. 487, 488 (1897) (“It must be conceded that city authorities have the right to regulate the use of private property within the city, so as to prevent its proving pernicious to the health and comfort of the citizens generally or injurious to certain classes of property and business within the city, otherwise we would strike at the very foundation of police regulations.”).

83. *See The Importance of Effective and Efficient Local Governments*, DILIGENT BLOG (Mar. 6, 2019), <https://www.diligent.com/resources/blog/the-importance-of-effective-and-efficient-local-governments> [<https://perma.cc/33ES-XL32>] (comparing the functions and capabilities of state and local governments).

companies⁸⁴ like Lime⁸⁵ or Bird⁸⁶, boosting the local economy while shielding the state from some aspects of insurance liability.⁸⁷

In Washington State, this deference has had varied results for electric scooter regulations. The City of Seattle has regulated motorized foot scooters since 2004.⁸⁸ Supplanting Seattle’s longstanding policies for micromobility⁸⁹ could have been politically destabilizing or socially undesired. However, the new discretion in regulating “electric personal assistive mobility devices” (EPAMDs), including motorized foot scooters, has led to imbalanced enforcement across Washington State. The City of Spokane applies the State DUI statute to intoxicated electric scooter riders,⁹⁰ whereas the Cities of Seattle, Tacoma, and Pullman have only adopted the minimum state requirements.⁹¹ For jurisdictions that enforce penalties against intoxicated scooterers, none have reduced the penalties associated with the DUI statute.

E. Liability for Intoxicated Scootering Under Washington State’s Bifurcated System

Although many speculate about whether electric scooters fit within the “vehicle” definition for purposes of Washington’s DUI statute,⁹² there is

84. WASH. REV. CODE §§ 46.61.715(1)–(2) (2019).

85. LIME, <https://www.li.me/> [<https://perma.cc/S5GK-9YHW>].

86. BIRD, <https://www.bird.co/> [<https://perma.cc/7KS8-X624>].

87. Insurance liability in this context is beyond the scope of this Comment. The Legislature mandates some minimum insurance coverage from “scooter share program” providers. *See* WASH. REV. CODE § 46.61.715(3) (2019). This coverage may vary depending on the permitted rider age. WASH. REV. CODE § 46.61.720(3)(a)(iii) (2019). However, major electric scooter distributing companies have complex insurance coverages built into user agreements. *See Rider Insurance*, LIME, <https://www.li.me/insurance> [<https://perma.cc/GRM5-EBW7>]; *Rider Insurance*, BIRD, <https://www.bird.co/insurance/> [<https://perma.cc/ME7D-EXBG>]. Whether intoxicated riders qualify for insurance coverage is not clear nor public.

88. *See* SEATTLE, WASH., MUN. CODE § 11.46 (2020); SEATTLE, WASH., ORDINANCE 121518 (Jul. 16, 2004).

89. “Micromobility” refers to a wide range of shared urban transportation devices, like electric scooters and bicycles, including docked and dockless models. *See* Karen Johnston, Deirdre A. Oakley, Audra Durham, Claire Bass & Stacie Kershner, *Regulating Micromobility: Examining Transportation Equity and Access*, 4 J. COMPAR. URB. L. & POL’Y 685, 685 (2020).

90. SPOKANE, WASH., MUN. CODE § 16A.62.050 (2009) (applicability); SPOKANE, WASH., MUN. CODE § 16A.62.010 (2019) (definitions).

91. *See* SEATTLE, WASH., MUN. CODE ch. 11.46; TACOMA, WASH., MUN. CODE ch. 11.06; PULLMAN, WASH., CITY CODE ch. 12.11.

92. *See, e.g.,* Steve Karimi, *E-Scooters and DUIs in Washington*, KARIMI L. OFF. (July 23, 2019), <https://www.seattle-lawyer-dui.com/e-scooters-and-dui> [<https://perma.cc/W9ZQ-LS5H>]; *DUI’s and Lime Scooters*, COONEY L. OFFS. (May 17, 2022), <https://www.jcooney.com/2022/05/duis-and-lime-scooters/> [<https://perma.cc/R69D-TD25>].

no clear-cut answer, nor is there any legislative or judicial guidance. What should the average rider expect?

There are two systems in Washington State for intoxicated scootering, dependent on the local jurisdiction's regulations. Riders whose jurisdictions criminalize intoxicated scootering face DUI penalties,⁹³ and these penalties are severe. Figure A depicts various factors and maximum limits employed by courts in sentencing DUIs.

Figure A: Washington State DUI Sentencing Grid⁹⁴

| | First Offense | Second Offense Within Past 7 Years | Two or More Prior Offenses Within Past 7 Years |
|--|--|--------------------------------------|--|
| BAC Less Than 0.15, or No Test Result | | | |
| Jail Time | Mandatory 24 consecutive hours; Maximum 364 days | Mandatory 30 days; Maximum 364 days | Mandatory 90 days; Maximum 364 days |
| Fine | Mandatory \$990.50; Maximum \$5000 | Mandatory \$1,245.50; Maximum \$5000 | Mandatory \$2,095.50; Maximum \$5000 |
| Driver's License | 90 Day Suspension | Two Year Revocation | Two Year Revocation |
| Ignition Interlock Device | Mandatory | Mandatory | Mandatory |
| Alcohol or Drug Education/Treatment | Discretionary | Discretionary | Discretionary |
| BAC at least 0.14 or Greater, or Test Refusal | | | |
| Jail Time | Mandatory 48 consecutive hours; Maximum 364 days | Mandatory 45 days; Maximum 364 days | Mandatory 120 days; Maximum 364 days |

93. See *supra* section I.D.

94. Adapted from WASH. STATE ADMIN. OFF. OF THE CT., COURT DUI SENTENCING GRID (2022). See WASH. REV. CODE §§ 46.61.502(5)–(6) (2022) (DUI statute); WASH. REV. CODE § 46.61.5055 (2020) (penalties); WASH. REV. CODE § 9A.20.021 (2015) (guidelines).

| | | | |
|---|--|---|--|
| Fine | Mandatory \$1,245.50; Maximum \$5,000 | Mandatory \$1,670.50; Maximum \$5000 | Mandatory \$2,945.50; Maximum \$5,000 |
| Driver's License | One year revocation; Two years if refused | 900 day revocation; Three years if refused | Four year revocation |
| Ignition Interlock Device | Mandatory | Mandatory | Mandatory |
| Alcohol or Drug Education/ Treatment | Discretionary | Discretionary | Discretionary |

There are a few perplexing results from this system. First, DUI laws in Washington State mandate a varying license revocation period,⁹⁵ despite riders not needing a license to operate an electric scooter.⁹⁶ Second, Washington mandates installation of ignition interlock devices,⁹⁷ which requires an operator to confirm an acceptable sub .025 BAC breath test before starting their “vehicle,”⁹⁸ but installation on an electric scooter is not feasible. Third, significant fines may be placed only on adult violators,⁹⁹ but the Legislature authorizes operation of scooters by persons of any age.¹⁰⁰

Alternatively, jurisdictions may choose to not enforce DUIs against intoxicated scooterers.¹⁰¹ In these “silent” jurisdictions, scooterers face uncertain legal treatment due to a lack of precedent and legislative guidance.¹⁰² *Dotson* reinforces a no-penalties presumption; the State Legislature deliberately decided against including a statutory exclusion.¹⁰³ Despite this presumption, the lack of precedent or legislative guidance

95. WASH. REV. CODE § 46.61.5055(9) (2020).

96. *Id.* § 46.20.500(5).

97. *Id.* § 46.61.5055(5)(a).

98. *Ignition Interlock Device (IID)*, WASH. STATE DEP'T LICENSING, <https://dol.wa.gov/driver-licenses-and-permits/suspended-license/ignition-interlock-device-iid> [<https://perma.cc/DP6T-P5TM>].

99. WASH. REV. CODE § 46.61.5055(15) (2020).

100. *See id.* § 46.61.715(3)(a)(iii).

101. *See id.* § 46.61.715(1)(d).

102. *See supra* section I.C.

103. *See United States v. Dotson*, 34 F.3d 882, 886 (9th Cir. 1994).

means that electric scooter riders may still be charged for intoxicated scootering.

Consider the case of Lily Romero in Albuquerque, New Mexico.¹⁰⁴ Romero was charged with DUI in 2019 after riding an electric scooter while intoxicated.¹⁰⁵ At the time, there was no concrete statute prescribing DUI penalties for intoxicated electric scooter riders.¹⁰⁶ Romero pled guilty to disorderly conduct,¹⁰⁷ avoiding an uncertain trial based on an ambiguous DUI statute.¹⁰⁸

Romero's decision to plea to a lesser charge reflects a common form of "ambiguity aversion," one's rational avoidance of unknown outcomes.¹⁰⁹ Defendants have many reasons to accept a plea offer. Defendants often cannot afford trial expenses, pretrial detention can be avoided without paying bail, and losing at trial often leads to a worse outcome than the plea offer.¹¹⁰ Most importantly, a plea offer permits the defendant to retain some control over their future, alleviating the psychological stress of an unpredictable trial.¹¹¹ While enticing, plea bargaining under ambiguous statutes induces an imbalanced power dynamic at the defendant's detriment because of the heightened uncertainty.¹¹² Had the New Mexico DUI statute and "vehicle" definition been clearer, would Romero have made the same choice?

Under Washington State's complex framework towards intoxicated scootering, riders may be subject to the same dilemma Romero faced. Scooterers in some jurisdictions face rigid, harsh penalties, whereas scooterers in other jurisdictions must grapple with uncertain legal treatment. Despite sharing identical roots of moral culpability, the State's policy towards intoxicated scootering is bifurcated.

104. Jeannie Nguyen, *Albuquerque Woman Caught Driving Drunk On E-Scooter Dodges DWI Conviction*, KRQE NEWS (Jan. 8, 2020, 10:43 AM), <https://www.krqe.com/news/albuquerque-metro/albuquerque-woman-caught-driving-drunk-on-e-scooter-dodges-dwi-conviction/> [<https://perma.cc/HW9L-FXL8>].

105. *Id.*

106. Nguyen, *supra* note 104.

107. *Id.*

108. *See* N.M. STAT. § 66-1-4.19(B) (2024) ("Vehicle" definition); N.M. STAT. §§ 66-8-102(A)–(B) (2016) (DUI statute).

109. Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495, 1495 (2006).

110. Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 418–19 (2008).

111. Segal & Stein, *supra* note 109, at 1497.

112. *See* O'Hear, *supra* note 110, at 425; Segal & Stein, *supra* note 109, at 1496.

F. *A Moral Gray Area*

An understated area in this discussion is whether intoxicated scooting is morally improper, justifying the enforcement of criminal penalties against offenders. “Overcriminalization” encompasses the practice of “imposing penal sanctions on conduct that should be solely a matter of individual morality.”¹¹³ Scholars contemplate whether laws that criminalize casual social behavior are better left to civil regulatory regimes and civil penalties.¹¹⁴ There are some commonly recognized features of overcriminalization, like “excessive unchecked discretion in enforcement authorities,” “inevitable disparity” in the treatment of similar groups of people, “potential for abuse by enforcement authorities,” and “potential to . . . evade significant procedural protections.”¹¹⁵

Overcriminalized behavior tends to be subtle and unexpected. For instance, federal law criminalizes the removal of factory-installed mattress tags,¹¹⁶ though violating consumers face no penalties.¹¹⁷ But, the mattress tag debacle¹¹⁸ is not an isolated incident. Often, a public outcry for “‘something’ [to] be done” leads to criminalization,¹¹⁹ and Washington State is not immune to such outcry.

In 1974, the Washington State Legislature completely overhauled and centralized the State’s criminal code.¹²⁰ While a crucial legal development for Washington State, the overhaul suffered public criticism of overcriminalization resulting from even minor changes to criminal

113. Sara Sun Beale, Essay, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 748 (2005).

114. *Id.*

115. *Id.* at 749.

116. 16 C.F.R. § 1632.31(b)(5) (2024).

117. See Stuart P. Green, *Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1540, n.7 (1997) (explaining that only manufacturers are barred from tearing the tag off before distribution).

118. The criminal act of removing mattress tags “has become a kind of metaphor for oppressive, trivial, and intrusive government regulation.” *Id.*; see also Mary Whisner, *Mattress Tags and Pillow Cases*, 101 LAW LIBR. J. 235, 235 (2009) (recounting memorable pop culture references to the crime in a joking manner).

119. Arval A. Morris, *Overcriminalization and Washington’s Revised Criminal Code*, 48 WASH. L. REV. 5, 10 (1972).

120. *Id.* at 5.

statutes like public drunkenness,¹²¹ vagrancy and disorderly conduct,¹²² drug usage,¹²³ gambling,¹²⁴ and some sexual offenses.¹²⁵

Today, the ambiguity surrounding the legal treatment of intoxicated riders has sparked rhetoric about overcriminalization.¹²⁶ The underlying premise is that the moral turpitude of the act cannot be equated to that of conventional “vehicle” DUI.¹²⁷ In *City of Montesano v. Wells*,¹²⁸ a Washington State appellate court reversed a DUI conviction in a case involving a drunken cyclist.¹²⁹ The court agreed that drunk bicycling does not infer an equivalent magnitude of risk posed by conventional DUI, stating “[i]mplicit in all DUI statutes is the recognition that driving or being in control of a motor vehicle while intoxicated poses an extreme danger to the driver and to others.”¹³⁰ Specifically, the “weight and the speed at which [motor vehicles] travel” poses an intrinsic and distinguishable danger from bicycles.¹³¹

Applying a lens of “overcriminalization” to intoxicated scootering helps to frame its moral culpability in light of Washington state’s current policy. Electric scooters fit somewhere between a bicycle and a conventional car. Electric scooters cannot cause the “carnage and slaughter” associated with conventional DUI,¹³² but their speed and self-propulsion invokes a greater risk than that of a bicycle.¹³³ Fortunately, recent national reform in this area helps to quantify that risk.¹³⁴

121. *Id.* at 11–16.

122. *Id.* at 16–22.

123. *Id.* at 41–51.

124. *Id.* at 51–53.

125. *Id.* at 23–41.

126. See generally Chouinard, *supra* note 8 (proposing a new statutory carveout in New Mexico for intoxicated scootering with criminal penalties); see also *infra* section II.B.

127. See Chouinard, *supra* note 8, at 499; see also *infra* section II.B.

128. *City of Montesano v. Wells*, 79 Wash. App. 529, 536, 902 P.2d 1266, 1270 (1995). This decision was delivered before the statutory carveout for intoxicated bicycling was enacted by the Legislature in 2000. See WASH. REV. CODE § 46.61.790 (2000).

129. *Wells*, 79 Wash. App. at 536, 902 P.2d at 1270.

130. *Id.*

131. *Id.*

132. *Id.* (quoting *Clingenpeel v. Municipal Court of Antelope*, 166 Cal. Rptr. 573, 578 (Cal. Ct. App. 1980)).

133. See *infra* section III.A.

134. See *infra* section II.B.

II. JURISDICTIONAL VARIANCES TO INTOXICATED SCOOTERING

Given the relatively new emergence of the electric scooter market,¹³⁵ it is unsurprising that little case law exists in this area. While many state legislatures, like Washington, have updated their statutory language to incorporate electric scooters, few states have yet to subject electric scooters to DUI laws. Section A explores the national differences in state codes as it relates to electric scooters and “vehicles.” Section B examines current statutory carveouts for electric scooter DUIs across the United States.

A. Nuances in Statutory Language Across the United States

Across the United States, state DUI statutes use the words “a/any vehicle” or “motor vehicle” to define the scope of the crime.¹³⁶ The federal DUI statute uses the “motor vehicle” language.¹³⁷ Even more complex, each state has its own definition of “vehicle” or “motor vehicle” and corresponding exclusions.¹³⁸

In states with vague statutory language and no binding precedent, the public can only speculate as to whether an electric scooter fits within their state’s definition.¹³⁹ For instance, Washington State’s DUI statute uses “a vehicle.”¹⁴⁰ Due to the ambiguity surrounding the exceptions,¹⁴¹ attorneys theorize that *Dotson* weighs against electric scooter’s inclusion.¹⁴² Alternatively, the broadness of the “any” quantifier implicates electric scooters. For example, Vermont and North Carolina’s DUI statutes use

135. See *As E-Scooter Usage Booms, New Report Identifies Deficiencies Impacting Rider Safety*, GOVERNORS HIGHWAY SAFETY ASS’N (October 6, 2022), <https://www.ghsa.org/resources/news-releases/TRB-Escooter-Safety-Report22> [<https://perma.cc/G7XZ-M55E>].

136. See Neil Shouse, *Can I Get a DUI On A Lime or Bird e-Scooter?*, SHOUSE L. GROUP (Sept. 12, 2021), <https://www.shouselaw.com/ca/blog/dui/can-i-get-a-dui-on-a-lime-or-bird-scooter/> [<https://perma.cc/XB4M-D7PR>].

137. See 36 C.F.R. § 4.23 (2024).

138. See Shouse, *supra* note 136.

139. See, e.g., Shouse, *supra* note 136 (California); *Can You Get a DWI in Texas On An Electric Scooter?*, BLASS L., <https://www.blasslaw.com/blog/can-you-get-a-dwi-in-texas-on-an-electric-scooter/#:~:text=There%20is%20not%20a%20specific,A%20motor%20vehicle> [<https://perma.cc/44TV-47ND>] (Texas); John Hunsucker, *Can You Get a DUI On A Bird or A Lime Scooter?*, NATIONAL COLLEGE FOR DUI DEFENSE (July 04, 2019), <https://www.ncdd.com/top-dui-attorneys-blog/can-you-get-a-dui-on-a-bird-or-lime-scooter> [<https://perma.cc/FX6P-MNTT>] (Oklahoma).

140. WASH. REV. CODE § 49.61.502(1) (2022).

141. *Id.* § 46.04.670(1)(d).

142. COONEY L. OFFS., *supra* note 92.

the “any vehicle” language.¹⁴³ The Vermont Supreme Court inferred plainly that “any vehicle” included an electric scooter.¹⁴⁴ Alternatively, the North Carolina Court of Appeals inferred legislative intent to include electric scooters under the definition because they were not specifically excluded.¹⁴⁵

Even similar language can spur divergent results. For instance, the prevailing precedents in Washington State and North Carolina on this issue share nearly identical reasoning with opposite holdings, differing only in the employment of “vehicle” and “any vehicle.”¹⁴⁶ Without clearer legislative instruction in the form of carveouts or statutory exclusions, courts will inevitably be burdened with applying strict definitions to new technology. Fortunately, some legislatures have provided guidance on what this instruction might look like.

B. *Current Statutory Carveouts for Intoxicated Scootering*

California, New York, and the District of Columbia are the only jurisdictions with statutory schemes specifically designed to deal with intoxicated scootering.¹⁴⁷ California’s Vehicle Code (CVC) states that one cannot drive a “vehicle” while intoxicated,¹⁴⁸ characterizing “vehicle” as any self-propelled device.¹⁴⁹ Additionally, the CVC makes it unlawful for operators of a “motorized scooter” to drive while intoxicated.¹⁵⁰ In 2018, Nicholas Kauffroath became the first person in Los Angeles to be prosecuted for operating a motorized scooter while intoxicated.¹⁵¹ Although California’s electric scooter carveout prescribes only a fine not exceeding \$250,¹⁵² Kauffroath struck a pedestrian and fled the scene.¹⁵³

143. VT. STAT. ANN. tit. 23, § 1201(a) (2022); N.C. GEN. STAT. § 20-138.1 (2006).

144. *See* State v. Colehamer, 308 A.3d 440, 448 (Vt. 2023). The statutory interpretation of “vehicle” was not at issue on this appeal, though the Court proceeded under a similar statute with identical language. *See id.*

145. State v. Crow, 623 S.E.2d 68, 73 (N.C. Ct. App. 2005).

146. *See* United States v. Dotson, 34 F.3d 882, 886 (9th Cir. 1994); *Crow*, 623 S.E.2d at 73.

147. *See infra* section II.B.

148. CAL. VEHICLE CODE §§ 23152(a)–(g) (West 2016).

149. *Id.* § 670.

150. *Id.* § 21221.5.

151. Steve Kiggins, ‘Safer’ Sidewalks: Los Angeles Secures First Motorized Scooter DUI Conviction, USA TODAY (Sept. 28, 2018, 10:18 AM), <https://www.usatoday.com/story/news/2018/09/27/los-angeles-secures-first-motorized-scooter-dui-conviction/1450040002/> [<https://perma.cc/9YEK-Z8CU>].

152. CAL. VEHICLE CODE § 21221.5 (West 2000).

153. Kiggins, *supra* note 151.

The court increased the fines, granted restitution to the victim, mandated probation, and ordered Kauffroath to attend a DUI alcohol program.¹⁵⁴

New York's Vehicle & Traffic Law (VAT) makes it unlawful to drive a "motor vehicle" while intoxicated,¹⁵⁵ defining a "motor vehicle" as a non-human powered device but categorically excepting "electric scooters" from this definition.¹⁵⁶ However, in 2020, the Legislature enacted a carveout which made it unlawful to operate an "electric scooter" while intoxicated.¹⁵⁷ The New York carveout's penalty for first time offenders is a misdemeanor charge with a fine not exceeding \$500 and imprisonment in a county jail not exceeding a year.¹⁵⁸ Subsequent offenses induce felony charges, along with increased fines and/or incarceration.¹⁵⁹ Uniquely, New York legislators wanted to protect riders from pretextual stops¹⁶⁰, permitting DUI testing only if the electric scooterer was involved in a crash.¹⁶¹

The Code of the District of Columbia (CDC) states that it is unlawful to operate "any vehicle" while intoxicated,¹⁶² defining "vehicle" as "any appliance moved over a highway on wheels" but not explicitly excepting electric scooters.¹⁶³ However, in 2020, the District of Columbia Council passed the Shared Fleet Devices Amendment Act (SFDAA), which supplemented the Anti-Drunk Driving Act of 1982.¹⁶⁴ The SFDAA criminalized the operation of "any personal mobility device or electric mobility device" while intoxicated,¹⁶⁵ enforcing fines not exceeding \$150 upon conviction.¹⁶⁶

As pioneers of reform in these areas, California, New York State, and the District of Columbia have decided that the risks of intoxicated

154. Kiggins, *supra* note 151.

155. N.Y. VEHICLE & TRAFFIC LAW § 1192 (McKinney 2009).

156. *Id.* § 125.

157. *Id.* § 1289.

158. *Id.*

159. *Id.*

160. "Pretextual stops" refer to a policing practice whereby an officer's suspicion derives from cognitive biases rather than concrete observations about a suspect's behavior. See Kirk Miller, *Police Stops, Pretext, and Racial Profiling: Explaining Warning and Ticket Stops Using Citizen Self-Reports*, 6 J. ETHNICITY CRIM. JUST., 123, 127 (2008).

161. Michael Gannon, *NYS Budget Legalizes E-Bikes and Scooters*, QUEENS CHRONICLE (Apr. 9, 2020), <https://www.qchron.com/editions/queenswide/nys-budget-legalizes-e-bikes-and-scooters/> [https://perma.cc/US2W-5AQA].

162. D.C. CODE § 50-2206.11 (2013).

163. *Id.* § 50-2201.02(17).

164. Shared Fleet Devices Amendment Act of 2020, 67 D.C. Reg. 13886 (Nov. 27, 2020).

165. D.C. CODE § 50-2206.16a(a) (2021).

166. *Id.* § 50-2206.16a(b).

scooter do not give rise to conventional DUI penalties. This trend in national reform helps to define intoxicated scooting's moral gray area by cementing uniformly reduced consequences.

III. WASHINGTON'S BIFURCATED POLICY TOWARDS INTOXICATED SCOOTING IS INEFFECTIVE

Washington State does not have a statute that prescribes penalties for intoxicated riding.¹⁶⁷ The statutory ambiguity under the "vehicle" definition weighs in favor of a no-penalty presumption.¹⁶⁸ However, the Legislature grants local governments the authority to regulate the operation of electric scooters within their jurisdiction,¹⁶⁹ leading to an imbalanced approach to intoxicated scooting prevention.¹⁷⁰ Thus, the State's bifurcated policy towards intoxicated scooting results in either a no-penalty system or a DUI penalty system depending on local regulations.¹⁷¹

Washington State's policy does not comport with the universal policy goal of DUI: deterrence.¹⁷² Recall the keen dicta in *City of Montesano v. Wells*: "Implicit in all DUI statutes is the recognition that driving or being in control of a motor vehicle while intoxicated poses an extreme danger to the driver and to others."¹⁷³ The public safety risk of conventional DUI is life and death,¹⁷⁴ making it obvious why legislatures prescribe severe and increasing penalties to offenders.

However, the risk to public safety spurred by intoxicated scooting is elusive. Certainly, intoxicated scooting does not pose the same risk as that of driving a car under the influence. Electric scooters are lightweight and capped at moderately low speeds.¹⁷⁵ Furthermore, data suggests that electric scooter accidents result in traumatic injury primarily to the rider.¹⁷⁶ Despite the comparatively reduced risk, new research confirms the seriousness and commonness of injury in intoxicated scooting.¹⁷⁷ An

167. See *supra* sections I.D, E.

168. See *supra* sections I.C, E.

169. WASH. REV. CODE § 46.61.715(1)(d) (2019).

170. See *supra* section I.E.

171. See *supra* section I.E.

172. See *supra* section I.A.

173. *City of Montesano v. Wells*, 79 Wash. App. 529, 536, 902 P.2d 1266, 1270 (1995).

174. *Drunk Driving*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <https://www.nhtsa.gov/risky-driving/drunk-driving> [<https://perma.cc/ZRL4-GREA>].

175. WASH. REV. CODE § 46.04.336 (2019).

176. See Trivedi et al., *supra* note 14.

177. See Zube et al., *supra* note 10; Kobayashi et al., *supra* note 12; Kleinertz et al., *supra* note 13.

effective deterrence policy is vital to thwart the risks to unwitting riders and the general public. But how should the legislature balance the social liability of intoxicated scooting with the public's freedom?

Sections A and B critique both ends of the penalty spectrum in light of the policy goals of deterrence. Section C comments on the drawbacks of a multijurisdictional approach to intrastate DUI enforcement.

A. *No Penalty System*

The majority of jurisdictions in Washington State do not enforce penalties against intoxicated scooterers.¹⁷⁸ *Dotson* characterizes this silence as intentional.¹⁷⁹ But, due to a lack of research, the State Legislature's understanding of intoxicated scooting may have been underdeveloped when the device was incorporated in 2019. If contemporary research of the issue was lacking, the intuitive solution likely was to equate intoxicated scooting with intoxicated bicycling.

In Washington State, bicyclists enjoy complete immunity from intoxicated bicycling insofar as they do not break other traffic laws.¹⁸⁰ At a maximum, officers may only temporarily impound a bicycle if the officer finds "a threat to public safety."¹⁸¹ The Legislature's removal of liability for intoxicated bicycling tips the scale toward prioritizing individual freedom over potential harm to society. For bicycling, this makes sense. Bicycles have existed for centuries,¹⁸² and legislators have real-world experience concerning the risks of bicycling. However, there are three unique and serious differences associated with electric scooting.

First, electric scooterers can effortlessly cruise at speeds nearing twenty miles per hour due to the scooter's self-propelling electric motor.¹⁸³ The lack of rider input in propulsion, compared to bicycling, makes it easier to accumulate risk out of carelessness.¹⁸⁴ This echoes crucial dicta from *Dotson*: the Legislature's statutory characterization of "vehicles"

178. *See supra* section I.D.

179. *See supra* section I.C.

180. *See* WASH. REV. CODE § 46.61.790 (2000).

181. *Id.* Impoundment cannot induce fees. *Id.*

182. The bicycle was invented in 1817 by Karl von Drais. *See* Evan Andrews, *The Bicycle's Bumpy History*, HIST. CHANNEL (Sept. 29, 2023), <https://www.history.com/news/bicycle-history-invention> [<https://perma.cc/7DNL-HGGC>].

183. WASH. REV. CODE § 46.04.336 (2019)

184. *See* *Distracted Driving*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/distracted-driving/about/index.html> [<https://perma.cc/235V-3A44>] (stating that "cognitive" distractions, like "taking your mind off driving," increase the chance of a crash).

intrinsically relies upon the level of driver control in vehicle operation.¹⁸⁵ The ease-of-use of electric scooters is typically a positive factor, but it has detrimental effects when riders are intoxicated.¹⁸⁶

Second, electric scooters are popular, accessible, and cheap.¹⁸⁷ Imagine an individual leaving a bar after a night of drinking. There are several lawful methods to journey home, but to the rider, these options may be expensive, time-consuming, or less exciting. Upon exiting the bar, that person spots an electric scooter on the sidewalk. It takes mere moments and one dollar to activate an electric scooter.¹⁸⁸ The excitement and reliability of electric scooters draws immediate attention, especially from an inebriated pedestrian.

Third, given the novelty of electric scooters,¹⁸⁹ the average electric scooter rider cannot be expected to have equivalent levels of experience as that of a bicyclist. Many people can remember learning how to ride a bicycle, and some may even remember their first bicycle ride. “Procedural memory,” or “muscle memory,” of bicycle riding is common,¹⁹⁰ but the majority of people today likely did not grow up in a culture of electric scooter riding. Whereas a bicyclist can rely upon muscle memory in an inebriated state, an electric scooterer does not possess similar instincts.

The electric scooter’s self-propulsion and availability, combined with the average user’s inexperience with the platform, demands heightened rider protection. Intoxicated riders are especially susceptible to risks given these differences. Although the Legislature might expect some backlash from those who prioritize individual freedom,¹⁹¹ the potential for traumatic injury is too great to permit unregulated, intoxicated electric scootering.¹⁹²

185. See *United States v. Dotson*, 34 F.3d 882, 883 (9th Cir. 1994).

186. See Zube et al., *supra* note 10, at 1288.

187. See Foley, *supra* note 7.

188. See *How to Ride Lime: Tips & Tricks for a Smooth First Ride*, LIME TIMES (July 21, 2023), <https://www.li.me/blog/how-to-ride-lime-tips-tricks-for-a-smooth-first-ride> [<https://perma.cc/KD4V-ZTER>]. The cost of using an electric scooter varies, but typically it costs one dollar to unlock and between fifteen and thirty cents-per-minute to ride. See *Lime Scooter Price – Is It Increasing?*, FLUID FREERIDE, <https://fluidfreeride.com/blogs/news/lime-scooter-price> [<https://perma.cc/DFW7-YYEP>].

189. See *Bikeshare and E-Scooter Systems in the U.S.*, *supra* note 1.

190. Hayley Bennet, *Why You Never Forget How to Ride a Bike, Explained By Neuroscience*, BBC SCI. FOCUS (Apr. 24, 2023), <https://www.sciencefocus.com/science/why-do-we-never-forget-how-to-ride-a-bike> [<https://perma.cc/VB7K-LT5D>].

191. See generally Robert Rivard, *The Bike Helmet Dilemma: Freedom and Choice vs. Safety*, SAN ANTONIO REP. (June 10, 2013), <https://sanantonioreport.org/the-bike-helmet-dilemma-freedom-and-choice-vs-safety> [<https://perma.cc/7BJV-P96B>] (reporting on the bicycle rider protest over helmet laws).

192. See Zube et al., *supra* note 10; Kobayashi et al., *supra* note 12; Kleinertz et al., *supra* note 13.

Applying a no-penalty policy to intoxicated electric scooting is misguided, as it does not foster deterrence and prevent threats to public safety. Still, the social threat of intoxicated scooting should not qualify for conventional DUI penalties. A punishment must fit the crime, and that punishment must be realistic.¹⁹³

B. *DUI Penalty system*

On the other end of the spectrum, jurisdictions may enforce criminal DUI penalties against intoxicated scooterers.¹⁹⁴ These mandated penalties are severe, and deterrence is effectively served when applied to conventional DUI. However, when applied to intoxicated scooting, these penalties are illogical and disproportionate,¹⁹⁵ resulting in detrimental effects to the criminal justice system.

Washington State's sentencing guidelines, mandating ignition interlock installation and license revocation,¹⁹⁶ are at odds with electric scooter operation.¹⁹⁷ A driver does not need a license or a car to operate an electric scooter,¹⁹⁸ making these penalties illogical. Functionally, these penalties do not prevent an offender from committing the same offense post-conviction, which conflicts with the Legislature's goal of deterring recidivism.¹⁹⁹

Formalistically, the mandatory nature of these penalties significantly limits judicial discretion. The reduction of judicial discretion in criminal sentencing is well documented,²⁰⁰ and it is particularly apparent in the case of Washington's DUI sentencing.²⁰¹ Because the Legislature mandates ignition interlock and license revocation, judges cannot lessen a sentence

193. See Michael Davis, *How to Make the Punishment Fit the Crime*, 27 NOMOS: AM. SOC'Y POL. & LEGAL PHIL. 119, 124 (1985).

194. See *supra* section I.E.

195. In this niche area, the logicalness and proportionality of intoxicated scooting penalties is the primary focus of analysis. See Chouinard, *supra* note 8, at 500.

196. See WASH. REV. CODE § 46.61.5055 (2020).

197. See *supra* section I.E.

198. WASH. REV. CODE § 46.20.500 (2019).

199. See *supra* section I.A.

200. See Robert H. Vasoli, *Growth and Consequences of Judicial Discretion in Sentencing*, 40 NOTRE DAME LAW. 404, 404 (1965) ("One of the hallmarks of classical penology was its opposition to arbitrary sentencing powers vested in the judiciary. Accordingly, the appropriate punishment for an offense was to be calculated by legislative bodies . . .").

201. See Interview with Jon Scott Fox, Fox Law Firm (Apr. 29, 2024) ("The [Washington State] Legislature, over the years, has decided to restrict judicial discretion in sentencing by enacting mandatory penalties. For example, ignition interlock used to be judge discretion, but now it is mandatory."). In fact, many now-mandatory penalties used to be optional and were used primarily in aggravating circumstances. See WASH. REV. CODE § 46.61.5055 (2020); *supra* section I.A.

for one who drives an electric scooter under the influence. Unfortunately, the last resort for unwitting defendants is plea bargaining. Because of the disproportionate penalties and statutory ambiguity, prosecutors wield an even more extreme and unjust power imbalance.²⁰²

Along with the functional and formalistic shortcomings of a DUI penalty system, the penalties of DUI are disproportionate relative to the act of intoxicated scootering. Offenders face mandatory jail time and incur increased car insurance costs due to their “high risk” status.²⁰³ Additionally, offenders will have a permanent misdemeanor on record,²⁰⁴ potentially thwarting future employment and insurance opportunities. These penalties increase according to the number of similar offenses,²⁰⁵ spurring devastating consequences to those already convicted of an electric scooter DUI.

Applying a DUI penalty policy to intoxicated electric scootering is misguided as it overcriminalizes the risky social behavior, entrenching unfair sentencing trends. Still, the threat to public safety, even if primarily to the rider, warrants some level of deterrence.

C. *Intrastate Variances in Enforcement*

While legislative deference to local authorities in regulating local law enforcement can result in fair and efficient policing,²⁰⁶ major penalty variations fail to provide notice of criminal behavior to citizens. Unwitting violations of criminal law should be prevented by the State, especially where that law holds offenders liable regardless of their intentionality. The public ought to have notice of the law and its penalties so they may avoid social misconduct. Otherwise, deterrence is impossible.

Social moral expectations might dictate citizens’ lawful behavior. For instance, drunk driving is a widely accursed act that people expect to be criminalized, regardless of jurisdiction. However, because of their novelty, obscure and emerging public safety issues do not always reflect such traditional social expectations. Intoxicated scootering is regulated at the local level in Washington State, creating several different levels of liability for riders depending on jurisdictional boundaries.

202. *See supra* section I.E.

203. *Financial Responsibility (SR-22)*, WASH. STATE DEP’T LICENSING, <https://dol.wa.gov/driver-licenses-and-permits/suspended-license/types-driver-license-suspensions/financial-responsibility-sr-22> [<https://perma.cc/VZD3-EKTY>]; *see* WASH. REV. CODE § 46.30.020 (2019).

204. WASH. REV. CODE § 46.61.502(5) (2022).

205. *Id.* § 46.61.502(6).

206. *See supra* section I.D.

Nonuniform enforcement for intoxicated scooting, like in Washington, assumes that the general public is capable of technical statutory interpretation. Even if so, the ambiguity of Washington's "vehicle" definition²⁰⁷ further reduces the chances for citizens in silent jurisdictions to know if their conduct is criminal. Resultingly, riders may be unwarrantedly deterred from lawful behavior or unknowingly violative of criminal law.

Alternatively, law enforcement in jurisdictions that criminalize intoxicated scooting may fail to understand the State's policy. In a 2019 interview, Spokane Police Sergeant Terry Preuninger took for granted that "scooters just [do not] meet the [S]tate's definition of a motorized vehicle,"²⁰⁸ despite Spokane County's enforcement of DUI against intoxicated scooterers.²⁰⁹ Sergeant Preuninger noticed an increase in electric scooter crashes, especially within the "bar scene."²¹⁰ Even if officers understand the public safety threat posed by intoxicated scooting, the lack of clear legislative guidance circumvents enforcement expectations.

The legislature is responsible for creating a clear intoxicated scooting policy that balances public safety with individual freedom. Considering the emerging public safety risk of intoxicated scooting, the State's nonuniform and ill-defined policy toward intoxicated scooting is inappropriate and unsustainable. The Legislature should make clear whether intoxicated scooting mandates punishment, and such reform ought to serve the State's deterrence goals.

IV. REFORMING WASHINGTON STATE'S POLICY TOWARDS INTOXICATED SCOOTERING

Washington State's bifurcated system against intoxicated scooting is ineffective and misguided. Section A advocates for a statutory carveout exempting intoxicated scooting from DUI penalties. Section B prescribes a middle-ground on the penalty spectrum for intoxicated electric scooting.

207. *See supra* sections I.B, C.

208. Roley, *supra* note 18.

209. SPOKANE, WASH., MUN. CODE § 16A.62.050 (2008).

210. Roley, *supra* note 18.

A. *A Statutory Carveout*

The Legislature has options to change the statutory framework for intoxicated scootering. Washington State's Rules of the Road²¹¹ contains all relevant statutes: traffic violations, intoxicated driving, and electric scooters.²¹² However, these statutes' reliance on the definitions in the broader Motor Vehicles²¹³ Code requires cross-application. Altering the language of one statute necessarily affects how another statute will be interpreted.

The Legislature may add an explicit exclusion for electric scooters from the DUI statute,²¹⁴ a facially simple solution. However, this addition entrenches a no-penalty system and does not foster deterrence. Additionally, this subtly encroaches on local governments' granted authority to regulate electric scooters in their jurisdiction, making that authority ambiguous.²¹⁵

Altering statutory language in this area can lead to uncertain results. For example, in *Dotson*, the court struggled to reconcile a one-word addition to the moped vehicle exclusion, finding textual ambiguity despite the Legislature's attempt to clarify the moped's status.²¹⁶ To effectuate the intent of DUI policy, the Legislature must employ a method of reform that is clear in both text and purpose. A brand-new statute is required.

By enacting a statutory carveout, the Legislature can grant structural priority and preference to the new statute to shield against unforeseen ambiguities. Consider the Intoxicated Bicyclist carveout.²¹⁷ The Legislature dedicated an entire statute to the enforcement of and penalties associated with intoxicated bicycling. Although the two devices are dissimilar in many ways, bicycles and electric scooters receive identical treatment under the State's "vehicle" definition statute.²¹⁸ By introducing a new carveout for intoxicated scootering, the Legislature need not alter the definition of "vehicle." Additionally, the statute delegating regulation of electric scooter operation to local governments does not explicitly

211. "Rules of the Road" refers to the title of Chapter 46.61 of the Revised Code of Washington, Washington State's regulations for highway travel. See WASH. REV. CODE § 46.61 (2024). States also refer to such an area as "the traffic code" or "the vehicle code." See, e.g., OR REV. STAT. § 59.811 (2024) (Oregon's "Rules of the Road for Drivers").

212. WASH. REV. CODE § 46.61 (2024).

213. WASH. REV. CODE § 46 (2024) (Motor Vehicles).

214. See *id.* § 46.04.670(c).

215. *Id.* § 46.61.715.

216. *United States v. Dotson*, 34 F.3d 882, 883–84 (9th Cir. 1994).

217. See WASH. REV. CODE § 46.61.790 (2000).

218. See *id.* § 46.04.670(2) ("Vehicle excludes: . . . (c) A bicycle or a motorized foot scooter, for the purposes of chapter 46.12, 46.16A, or 46.70 RCW, or for RCW 82.12.045.").

mention intoxicated scooting.²¹⁹ A statutory carveout for intoxicated scooting would not otherwise affect local governments' regulation of electric scooters' speed limits, times of operation, sidewalk riding, or pedestrian rights.²²⁰ While local governments would lose the ability to regulate intoxicated scooting, deterring common threats to public safety is the duty of the State Legislature.²²¹

A new carveout clarifies legislative intent and mandates uniform enforcement. California, the District of Columbia, and New York's carveouts serve as positive examples of sweeping intoxicated scooting reform.²²² Additionally, a carveout grants the Legislature an opportunity to wholly clarify sentencing standards and enforcement expectations. However, the components of a new carveout for intoxicated scooting ought to be carefully scrutinized considering the variance in applied penalties.²²³

B. *Components of a Carveout*

A successful solution must identify the middle ground between a no-penalty system and a DUI penalty system, thereby ensuring deterrence while facilitating public safety. There are three overarching considerations in assessing proper penalties for intoxicated scooting: sentencing, enforcement, and proportionality.

1. *Sentencing*

Penalties must be realistic. License revocation and ignition interlock penalties do not deter recidivism for scooting, nor are they enforceable in many imaginable scenarios.²²⁴ The facial shortcomings of DUI penalties cannot be applied to intoxicated scooting, especially where those penalties are not applicable to all riders.

Correspondingly, the judiciary cannot be expected to enforce Washington's mandatory DUI penalties against intoxicated scooterers.

219. *See id.* § 46.61.715(1)(d).

220. *See id.* §§ 46.61.710(11–12). New York has a similar statutory structure whereby the Legislature delegates the authority to regulate electric scooter operation to local governments. N.Y. VEHICLE & TRAFFIC L. § 1281 (McKinney 2020). When the New York Legislature enacted their intoxicated scooting carveout, the right of local governments to regulate other areas of electric scooter operation were unaffected. *See id.*

221. *See generally* OFF. OF FIN. MGMT. OF THE WASH. STATE LEGISLATURE, A GUIDE TO PARTICIPATING IN THE WASHINGTON STATE LEGISLATURE 4 (2023) (positing that the State Legislature is “the policy forming representative of the people”).

222. *See supra* section II.B.

223. *See id.*

224. *See supra* section III.B.

Despite the Legislature's necessary role in setting penalties,²²⁵ the circumstances of intoxicated scootering do not always warrant mandatory, rigid penalties. It is difficult to justify drunk driving in any situation, yet intoxicated scootering does not rise to this level of moral condemnation.²²⁶

The judiciary may benefit from sentencing guidelines that permit findings of aggravating circumstances. For instance, Washington State mandates higher ranges of fines and jail time for DUI sentencing depending on the amount of alcohol in the offender's system.²²⁷ Likewise, the moral culpability of intoxicated scootering may depend on several factors like blood alcohol concentration and simultaneous infractions. Jail time or fines, if enforced, should depend on the factual circumstances of the crime and the offender's financial status.²²⁸

2. *Enforcement*

Whereas an officer may conduct a traffic stop if they reasonably suspect intoxicated driving,²²⁹ intoxicated scootering requires a tailored approach. Police department policy may dictate whether an intoxicated scooterer may even be pursued by law enforcement. However, it is the Legislature that must determine an officer's discretion in enforcing the law.

There are three helpful examples for assessing officer discretion. New York's intoxicated scootering carveout prohibits officer involvement where an intoxicated scooterer was not involved in a crash,²³⁰ limiting officer discretion to reduce pretextual stops.²³¹ The District of Columbia's intoxicated scootering carveout does not restrict officer involvement,²³² but officers cannot administer BAC tests.²³³ Washington State's bicycle carveout encourages officer involvement where an intoxicated bicyclist is unsafe, but the officer cannot penalize the bicyclist.²³⁴

225. *See supra* section III.B.

226. *See supra* section III.B.

227. *See* WASH. REV. CODE § 46.61.5055 (2020).

228. The current "penalty schedule" for DUI permits consideration of offenders' financial statuses. *See id.*

229. *Id.* § 46.20.308(7).

230. N.Y. VEHICLE & TRAFFIC LAW § 1289 (McKinney 2021).

231. *See* Gannon, *supra* note 161.

232. *See* D.C. CODE § 50-2206.16a(a) (2021).

233. *See Driving while Intoxicated (E-Scooter): Arrest-able? Very Much So . . . DC DUI Lawyer*, LAW OFFS. OF DAVID STEIN (Aug. 18, 2018), <https://www.familylawdc.com/driving-while-intoxicated-e-scooter-arrest-able-very-much-so-dc-dui-lawyer/> [<https://perma.cc/TY4D-CZQE>].

234. *See* WASH. REV. CODE § 46.61.790 (2000).

This bicycling carveout is particularly relevant because it reflects an ideological sentiment in Washington State: law enforcement must ensure public safety, but not every moral violation gives rise to punitive action. Drawing from the spirit of the intoxicated bicycling carveout, the police officers should have similar responsibilities to intoxicated scooterers.

An officer should have the discretion to approach a potential offender if they have a reasonable suspicion that the scooterer is intoxicated. However, charging an intoxicated scooterer should be limited to instances where that officer deems the scooterer a threat to themselves or the public. In less concerning cases, officers should have the discretion to release the rider to a competent person, or simply have the scooterer deactivate the electric scooter. Here, the concern over selective enforcement is understandable, especially where the public does not reasonably expect penalties. The level of discretion then must be something more than the current procedures for intoxicated bicyclists.

3. *Proportionality*

Penalties for intoxicated scooting must be proportionate. Thus, the balancing of setting penalties for a novel crime requires synthesis of the crime's morality and other common trends in sentencing.

The commonalities in recent national reform against intoxicated scooting help to frame the major concerns of overcriminalization and failed deterrence.²³⁵ For instance, each state enforces small fines upon offenders,²³⁶ whereas New York's carveout also prescribes a misdemeanor and jail time where the offender crashes.²³⁷ The average maximum civil penalty among these carveouts is just over \$200, which is relatively minor compared to Washington State's minimum \$350 DUI penalty.²³⁸ While some states have harsher penalties than others, the recent reform demonstrates a common understanding: intoxicated scooting, absent aggravating circumstances, should only qualify for civil penalties.

Enforcing penalties associated with DUI results in an overcriminalized approach to electric scooting.²³⁹ Law enforcement and prosecutors wield unchecked, potentially abusive power over those whose offense primarily endangers only themselves.²⁴⁰ Strict sentencing guidelines

235. See *supra* section II.B.

236. See CAL. VEHICLE CODE § 21221.5 (2000) (\$250 maximum); D.C. CODE § 50-2206.16a(b) (2021) (\$150 maximum); N.Y. VEHICLE & TRAFFIC L. § 1289 (2020) (\$300 maximum).

237. N.Y. VEHICLE & TRAFFIC L. § 1289 (2020).

238. See WASH. REV. CODE § 46.61.5055 (2020).

239. See Beale, *supra* note 113, at 748.

240. See *supra* section I.E.

circumvent “significant procedural protections,”²⁴¹ burdening the criminal justice system and removing judicial discretion.

The current trend in reform toward civil penalties claws back the misguided “overgeneralization” of intoxicated scootering with conventional DUI,²⁴² creating space for a sustainable framework in this area of law. Implementing civil penalties like simple fine ranges is the middle-ground solution. Judicial discretion in fining offenders, under uniform and fair legislative guidelines, can result in a just and efficient system of deterrence.²⁴³ Authorizing increasing fines for repeat offenses targets and reduces recidivism.²⁴⁴

Additionally, qualifying intoxicated scootering with civil penalties legitimizes its existence without subjecting offenders to permanent suffering.²⁴⁵ Although some literature prescribes a criminal regulatory approach,²⁴⁶ such an approach mischaracterizes the reality of intoxicated scootering by overlooking relevant crash data. In Washington State, public intoxication²⁴⁷ and negligent driving²⁴⁸ statutes facilitate proper criminal handling of extreme intoxicated scootering cases.²⁴⁹ Tacking on an additional misdemeanor or related criminal penalty to that individual’s record is simply unnecessary where an offender’s moral culpability is sufficiently established.

A statutory carveout that prescribes civil penalties to intoxicated scootering is realistic, enforceable, and proportionate. Traditional criminal penalties do not further the State’s deterrence policy, nor are they feasible in many situations. By establishing a framework that deters intoxicated scootering without overcriminalizing the act, Washington State can ensure that the public is safe from this emerging threat.

241. Beale, *supra* note 113, at 749.

242. *Id.* at 773.

243. See Sally T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST. 49, 74–76 (1990) (stating that fining sentences are most successful when they fit the “offenders’ financial circumstances,” have reliable “collection procedures,” and “do not start with threats of imprisonment”).

244. See *supra* section I.A.

245. See *supra* section III.B.

246. See generally Chouinard, *supra* note 8.

247. WASH. REV. CODE § 66.44.250 (1983).

248. *Id.* § 46.61.526.

249. Interview with Dustin Howie, Assistant Public Defender, Spokane County Public Defenders (Feb. 13, 2024) (explaining that public intoxication and negligent driving laws supplement legal accountability for intoxicated scootering where DUIs are not pursued by prosecutors).

CONCLUSION

The growing popularity of electric scooters increasingly subjects the public to the risks posed by intoxicated scooting. Washington State's current policy is fundamentally flawed in that it simultaneously permits and overcriminalizes intoxicated scooting. The statutory ambiguity concerning electric scooters' qualification as a "vehicle" persists years after the device's incorporation, allowing most intoxicated scooterers to ride with impunity. The Legislature's delegation of regulation to local governments, without uniform guidelines, entrenches the system of imbalanced penalties applied to intoxicated scooterers.

An effective policy of deterrence toward intoxicated scooting requires uniform enforcement and proportional penalties. New research results and reform trends provide some insight into how Washington State might frame the liability of intoxicated scooting in light of its social harm. By adopting penalties that are fair, efficient, and proportionate, Washington State can facilitate a deterrence policy and better provide for public safety against intoxicated scooting. A model carveout that incorporates this Comment's recommendations is included in the appendix.²⁵⁰

250. The attached model carveout mirrors the language and structure of the intoxicated bicycling carveout in the interests of statutory uniformity and clarity. *See* WASH. REV. CODE § 46.61.790 (2000).

APPENDIX: MODEL STATUTE

RCW 46.61.XXX Intoxicated Electric Scooterers.

(1) No person shall operate or be in the physical control of any motorized foot scooter, as defined in RCW 46.04.336, while under the influence of any drug or any combination thereof.

(a) A violation of this section shall be a civil infraction and shall be punishable by a fine not exceeding two hundred dollars. Successive violations of this section shall be punishable by an additional and increasing fine not exceeding one hundred dollars per prior offense of this section.

(b) A violation of this section alone shall not qualify the offender under RCW 46.61.502.

(c) An intoxicated electric scooter rider may qualify for concurrent charges under RCW 46.61 and RCW 66.44.

(2) A law enforcement officer may require an electric scooter rider to turn off or exit their electric scooter. The law enforcement officer may offer to transport an electric scooter rider who appears to be under the influence of alcohol or any drug and who is walking or moving along or within the right-of-way of a public roadway. The law enforcement officer offering to transport an intoxicated electric scooter rider under this section shall:

- (a) Transport the intoxicated electric scooter rider to a safe place; or
- (b) Release the intoxicated electric scooter rider to a competent person.

(3) The law enforcement officer shall not provide the assistance offered if the electric scooter rider refuses to accept it. No suit or action may be commenced or prosecuted against the law enforcement officer, law enforcement agency, the state of Washington, or any political subdivision of the state for any act resulting from the refusal of the electric scooter rider to accept this assistance.

(4) The law enforcement officer may impound the electric scooter operated by an intoxicated electric scooter rider if the officer determines that impoundment is necessary to reduce a threat to public safety, and there are no reasonable alternatives to impoundment. An electric scooterer will be given a written notice of when and where the impounded electric scooter may be reclaimed. The electric scooter may be reclaimed by the electric scooter rider when the electric scooter rider no longer appears to be intoxicated, or by an individual who can establish ownership of the electric scooter. The electric scooter must be returned without payment of a fee. If the electric scooter is not reclaimed within thirty days, it will be subject to sale or disposal consistent with agency procedures.

(5) A law enforcement officer may not impound an electric scooter that operates under a scooter share program as defined in RCW 46.61.715.

(a) The law enforcement officer ordering an electric scooter rider to exit and turn off their electric scooter must grant the electric scooter rider the opportunity to self-terminate their scooter share service.

(b) A law enforcement officer cannot terminate a rideshare service between the electric scooter rider and the scooter share service provider unless consent is provided by the electric scooter rider.

(c) The law enforcement officer must ensure that a terminated shared electric scooter is staged in a manner compliant with RCW 46.61.715(1)(c) or otherwise does not obstruct vehicle or pedestrian traffic.

